BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the telecommunications Act of 1996 Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption Concerning the Refund of Payphone Line Rate Charges	Case No. CC Docket No. 96-128 COMMENTS OF NPCC AND MIPA IN SUPPORT OF PETITION OF FPTA FOR DECLARATORY RULING

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I. INTRODUCTION

The Northwest Public Communications Council ("NPCC") and Minnesota Independent Payphone Association ("MIPA") are trade associations representing the interests of payphone service providers ("PSPs") in Oregon, Washington, Idaho, and Montana (NPCC) and Minnesota (MIPA). The NPCC and MIPA file these comments on the Petition of the Florida Public Telecommunications Association ("FPTA") For A Declaratory Ruling And For An Order Of Preemption ("Petition") pursuant to the Commission's Public Notice dated February 8, 2006. As the Commission is aware, similar petitions were filed by the Illinois Public Telecommunications Association ("IPTA"), the Independent Payphone Association of New York ("IPANY"), and the Southern Public Communications Association ("SPCA") on various dates in 2004. Collectively all four petitions will be referred to as the "Petitions."

NPCC and MIPA filed formal comments in this docket in support of several of the Petitions on August 26, 2004, and January 18, 2005. NPCC and MIPA hereby incorporate those prior comments herein by this reference. As NPCC and MIPA noted in their January, 2005 comments, the four states involved in the Petitions are not alone. Actions involving refunds or damages for RBOCs' violations of Section 276 are pending involving almost two dozen states. The NPCC and MIPA urge this Commission to issue an order on the Petitions that would provide guidance for the other states. In so doing, the NPCC and MIPA urge the Commission to provide broad policy guidance to ensure proper implementation of the non-discrimination requirements of Section 276. Procedurally, however, NPCC and MIPA urge the Commission to keep its decision narrow and address only the precise procedural issues raised by the pending Petitions.

II. OTHER STATES ARE SEEKING OR WOULD BENEFIT FROM FCC GUIDANCE

The FPTA Petition merely serves once again to highlight the pressing need for FCC guidance to the states. The Commission has a significant interest in ensuring that Section 276 of the Telecommunications Act of 1996 is interpreted and applied consistently among the states and consistent with Congress' and the Commission's intent. As the Commission noted in

In the Matter of Wisconsin Public Service Commission, 17 F.C.C.R. 2051, 2064 ¶ 2 and Note 10 (2002) (''*Wisconsin Order*''), state commissions were inconsistent in applying the FCC's New Services Test ("NST")to payphone access services. Likewise, state commissions have been inconsistent in ordering refunds for overcharges for payphone access services even where RBOCs admittedly or demonstrably failed to comply with the FCC's New Services Test by April 15, 1997, or the extended deadline of May 19, 1997.

A. OREGON

The Commission should grant the Petitions and, as it did in *Wisconsin*, provide guidance for states, some of which are actively seeking prompt guidance from the Commission. One of the states that is actively seeking the Commission's guidance regarding proper application of federal law on refunds is Oregon. The need for FCC guidance has become even greater in Oregon since the NPCC and MIPA filed their comments in January 2005. Although NPCC was actively pursuing Qwest's refund obligations before the Oregon Public Utilities Commission ("PUC" or "OPUC"), the PUC decided to suspend action on NPCC's refund complaint pending FCC action on the Petitions in this docket. Attached are two orders of the Oregon PUC: Ruling, Disposition: Proceeding held in abeyance, *The Northwest Public Comm's Council v. Qwest Corp.* (Dkt. DR 26/UC 600, March 23, 2005) (Attachment 1); and Order, Disposition: ALJ Ruling Affirmed, *The Northwest Public Comm's Council v. Qwest Corp.,* Order No. 05-208 (Dkt. DR 26/UC 600, May 3, 2005) (Attachment 2).

In Order No. 05-208, the Oregon PUC affirmed the ALJ Ruling holding the NPCC's refund complaint case in abeyance pending the outcome of the FCC's rulings on the Petitions to, "provide the FCC an opportunity to fashion a comprehensive solution to the issues in a manner consistent with the requirements set forth in its *payphone orders*." *Id*. at 3.

1. <u>Background of Oregon Case</u>

NPCC's case in Oregon, which NPCC and MIPA outlined in comments filed on January 18, 2005 in this docket, is similar to each of the Petitions in some respects. For example, like Bell South in Florida, Qwest continued to discriminate against its payphone competitors in

violation of Section 276(a) by failing to comply with like the NST for many years after April 15, 1997.[1] Also, like the IPTA, NPCC was in continuous litigation with Qwest from the time Qwest was to have complied with the new services test for pricing its payphone access lines in early 1997. Qwest ultimately lost that litigation in November 2004, when the Oregon Court of Appeals found that Qwest's filings with the OPUC in early 1997 did not comply with the FCC's *Payphone Orders*. *See Northwest Public Comm's Council v. PUC,* 100 P3d 776 (Or. App. 2004).

Qwest's Oregon payphone access line rates, which were over $34 per month in early 1997, dropped to under $10 when Qwest finally complied with the NST. Qwest was, in effect, charging its competitors more than three times as much as it was charging its own payphone division for network services. However—in spite of a final and unappealable order holding that Qwest's 1997 rates did not comply with the NST or Section 276(a) of the Communications Act for many years after 1997—Qwest has refused to refund its unlawful overcharges.

NPCC filed a complaint against Qwest with the OPUC seeking refund. However, the OPUC has not acted on that complaint because it is awaiting guidance and clarification from the FCC. However, the OPUC indicated it would not wait indefinitely for this Commission's guidance:

> In reaching this decision, we note that the ALJ's decision does not postpone this matter indefinitely. The ruling allows the parties to move to reopen the proceeding if circumstances arise warranting such action. To ensure there is no undue delay, the parties may ask the Commission to revisit this matter <u>if the FCC has not acted by the end of this year</u>.

Order No. 05-208 at 3 (emphasis added).

2. <u>Current Status of Oregon Case</u>

The OPUC has become somewhat more proactive since its orders merely holding NPCC's refund claim in abeyance. Attached is the November 23, 2005, letter from the Oregon

[1] While the cases arise from similar facts, procedurally NPCC's case is different from that of FPTA (as well as IPTA, IPANY and SPCA) because there is no final state decision in Oregon on refunds.

Public Utility Commission ("OPUC") addressed to Chairman Martin (Attachment 3) regarding CC Docket No. 96-128. The OPUC requested prompt action by the Commission on petitions for declaratory ruling in the Payphone Docket to serve as guidance for a similar docket pending at the OPUC. Although they were not explicitly identified by the OPUC, the letter clearly referred to the petitions filed by IPTA, IPANY, and the SPCA.

Because the OPUC was reversed in 2004 on its interpretation of the FCC's application of the NST to PAL rates (in an Order issued before FCC Order No. 02-25 in the Wisconsin case), the OPUC sensibly seeks guidance from the Commission before issuing a ruling on NPCC's refund claim. Some of Qwest's defenses to the OPUC action raise the same issues that are involved in the Petitions. A ruling by the Commission on the points discussed below would enable the OPUC to properly interpret and apply federal law to the claim against Qwest.

The Commission should also be aware that the OPUC may not have the luxury of awaiting Commission guidance indefinitely. The PUC case is on remand from the Marion County, Oregon Circuit Court, which retains jurisdiction. The Circuit Court has required periodic status reports on the OPUC's action on the remand of NPCC's refund claims. The case was remanded to the PUC on March 1, 2004. Thus, the court has been awaiting PUC action for two years. At the most recent status conference, the court required the parties to report the status to the court on August 21, 2006. At that time the court may order the OPUC to rule notwithstanding the lack of FCC guidance.

B. COLORADO, IDAHO, IOWA, MINNESOTA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, UTAH, WASHINGTON, AND WYOMING

Fifty one payphone service providers (PSPs), including a number of members of the NPCC and MIPA, brought suit against Qwest in the U.S. District Court for the Western District of Washington in 2003 (*Davel Communications, Inc. et al. v. Qwest Corp.* Case No. 03-3680P ("*Davel*")). The complaint alleged that Qwest had violated Commission orders and Section 276(a) of the Communications Act, damaging the PSPs by discriminating against them

by charging them double or triple was Qwest had charged itself from 1997 to 2002 for access line service. The District court dismissed the case in the erroneous belief that the filed tariff doctrine barred plaintiffs' claims. The case is now pending before the Ninth Circuit Court of Appeals.

Oral argument in the *Davel* case was heard by the Ninth Circuit on December 8, 2005. A decision is expected in the middle of 2006. In light of the Supreme Court's decision in *Brand X*,[2] the Ninth Circuit would likely give *Chevron*[3] deference to the Commission, if the Commission rules before the Ninth Circuit does. If the Commission does not rule before the Ninth Circuit, then that increases the chances that Section 276(a) will be interpreted in multiple and inconsistent ways.

III. THE COMMISSION CAN PROVIDE BENEFICIAL GUIDANCE WITHOUT HAVING TO ADDRESS EVERY POTENTIAL PROCEDURAL ISSUE

The NPCC and MIPA recognize that each of the four Petitions may have certain unique aspects. Nevertheless, they also raise broad issues that are common to the Petitions as well as to the cases against Qwest in two forums covering 12 states. The Commission can issue an order on the Petitions that will provide guidance to the OPUC and the Ninth Circuit, which will help ensure that the Commission's orders are applied uniformly and consistent with their purpose to implement Section 276(a). The Commission's orders in this docket were all intended to properly implement Congress' directive that, effective on April 15, 1997, "any Bell operating company . . . shall not prefer or discriminate in favor of its payphone service." *Id.*

The Commission should issue the broadest possible policy declaration on the substance of the Petitions. Specifically, the Commission should do everything it can to make it clear to state commissions and courts that the intent of Congress and the Commission's orders was to eliminate any and all RBOC discrimination **effective on April 15, 1997**, not years later as

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[2] *National Cable & Telecom. Assn. v. Brand X Internet Services*, 545 U.S. ___, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

[3] *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Qwest did. Any RBOC that had failed to comply timely with the FCC's New Services Test on that date was violating Section 276(a) by continuing to discriminate after the deadline for the end of such discrimination. Accordingly, any and all available procedural avenues to remedy the discrimination retroactive to April 15, 1997, should be favored as a matter of policy in order to implement Congress' directive.

While the Commission's substantive declaration should be broad, its procedural analysis should be crafted narrowly, addressing only the four Petitions that are before it today. The Commission should take care to avoid potential prejudice to the claims and defenses of other parties by making it clear that any procedural determinations are limited to the Petitions and should not be applied to cases that are not before the Commission. As NPCC and MIPA have noted in these and prior comments, NPCC's own experience in Oregon reflects a procedural background that is distinct from that in the pending Petitions. Likewise, the action pending in the Ninth Circuit involving 11 other Qwest states is unique. If not carefully crafted, a Commission ruling on procedural aspects of one of the Petitions could be misconstrued by state commissions and courts as applying to claims that are procedurally distinct from all of the Petitions.

The Commission can and should deal with several generic issues raised by the Petitions. In particular:

1. The Commission should declare that the "filed tariff" doctrine has no impact on the refund obligation or any damage claims under federal law where claimants prove RBOC violation of Section 276(a). Section 276 and the orders in the Payphone Docket expressly adopted ***federal*** regulations. The Waiver Order (DA 97-805, Apr. 15, 1997, a/k/a "Refund Order") imposed ***federal*** conditions for waiver of a ***federal*** requirement, and the RBOCs expressly waived any filed rate doctrine claims. The filed tariff doctrine that the RBOCs are asserting is founded on ***state*** law, because the rates were filed with ***state*** commissions, not a

federal agency. Thus under the Supremacy Clause of the U.S. Constitution, the filed tariff doctrine cannot block refund or damage claims based on federal law.[4]

2. The Commission should interpret the Refund Order broadly to require refunds by RBOCs regardless of whether they made voluntary rate filings within the 45 days following the Refund Order. Such an interpretation is necessary because:

(a) Failure to require refunds undermines Section 276(a). It would have the effect of allowing unlawful discrimination, in some cases (such as Oregon) for many years after the RBOCs were required to have stopped discriminating. Even absent the Refund Order, PSPs should have a right to refunds as damages for RBOCs' discrimination (e.g. under 47 U.S.C. Sec. 207) for charges that exceeded what the NST permitted going back as far as the longest applicable statute of limitations will allow.

(b) Without a federal ruling that refunds are required, the states will continue to inconsistently interpret and apply the Commission's rules and orders. For example, in one state, an RBOC that made a good faith effort to fully and timely comply with the Commission 's order may be held liable for refunds, while in another state, an RBOC that did not seriously attempt to comply may be held exempt from refunds.

(c) The 45 day limitation in the Refund Order should be construed as a limitation on the RBOCs' right to collect dial around compensation, not on the obligation to pay refunds. The intent of the 45 days was to ensure prompt action. Interpreting the 45 days as a limitation on refunds rewards delay, which is the exact opposite of the order's intent in setting the 45 day limit.

IV. CONCLUSION

The NPCC and MIPA support the FPTA Petition and all the Petitions. Whether they are granted in whole or in part, however, the Commission should act promptly to provide guidance for the Oregon PUC and other states and courts that are faced with deciding similar

[4] There are other reasons that the filed tariff doctrine should not bar refund claims. However, federal pre-emption is the most salient.

issues. Prompt Commission action will help ensure consistent application of the Commission's orders and proper implementation of the non-discrimination requirements of Section 276(a).

DATED this 28th day of February, 2006.

Respectfully submitted,

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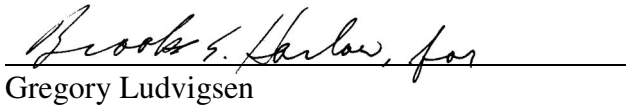

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Dated this 28th day of February, 2006.

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