

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	
Reclassification and Compensation Provisions	)	CC Docket 96-128
of the Telecommunications Act of 1996	)	
	)	
Florida Public Telecommunications Association	)	
Inc. Petition for Declaratory Ruling and Order of	)	
Preemption	)	

**REPLY COMMENTS OF THE  
ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION  
TO THE FLORIDA PUBLIC TELECOMMUNICATIONS ASSOCIATION  
PETITION FOR DECLARATORY RULING**

The Florida Public Telecommunications Association (“FPTA”) has petitioned for a declaratory ruling regarding refunds for excessive network charges to payphone providers. This is the fourth such petition seeking the Commission to clarify whether incumbent local exchange carriers are actually required to comply with the Commission’s directive that rates for local telephone services provided to payphone providers must be cost based in compliance with the Commission’s new services test no later than April 15, 1997. From these petitions and comments a clear pattern evolves: (1) payphone providers are repeatedly seeking the Commission to enforce the express federal regime laid out in the Commission’s *Payphone Orders*,<sup>1</sup> while the Bell Operating Companies (“BOCs”) repeatedly seek excuses on how the Commission’s *Payphone Orders* may be avoided; (2) equity requires implementation of the

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<sup>1</sup> *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) (“*First Payphone Order*”), and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 (“*Payphone Reconsideration Order*”) *aff’d in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com’n. v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) (“*Bureau Waiver Order*”); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) (“*Bureau Clarification Order*”) (collectively “*Payphone Orders*”).

Commission's federal regime that, in exchange for reducing rates for network services to payphone providers by tens of millions of dollars, the incumbent local exchange carriers receive hundreds of millions of dollars in federal dial around compensation; (3) the states are clearly divided as to how to implement the Commission's *Payphone Orders*, between those granting refunds for the excessive charges and those others denying refunds for the same violations; and (4) time is running out as payphone providers exhaust the state procedures, after nine years of extensive litigation pursued to enforce the explicit requirements of the Commission's *Payphone Orders*.

The Commission was *emphatic* as to the requirement for cost-based rates and its precondition for incumbent carriers' eligibility to receive dial around compensation. The regime established by the Commission was explicitly laid out. Yet, after nine years of obstructions and resistance to the implementation of the Commission's orders, the incumbent local exchange carriers have absconded with their dial around compensation while refusing to refund charges in excess of the cost-based rates they were required to charge. Unless the Commission acts now, to clarify the situation and to declare its intent to actually enforce its explicit orders, the payphone providers' federal rights will be lost, the Commission's process will be trampled, and the statutory goal of the promotion of deployment of payphone services will be undermined.

The Illinois Public Telecommunications Association ("IPTA") has previously cited and quoted from the Commission's own language its frequent admonishments that rates for network services provided to payphone providers must be cost based in compliance with the Commission's new services test *no later than* April 15, 1997. These orders repeatedly emphasized that the incumbent local exchange carriers would not be eligible to receive dial around compensation until they were in *actual* compliance with the cost-based rate requirement.

See IPTA Comments at 2. Never in any of the comments filed in any of the four petitions for declaratory ruling has any BOC denied, or could it deny, this express language in the Commission's *Payphone Orders*. Yet, through the BOCs' false self-certifications of compliance with the Commission's requirements, they have collected hundreds of millions of dollars in dial around compensation, for which they were not eligible, while charging payphone service providers excessive rates, that did not comply with the new services test. In the face of such un rebutted violations of the Commission's orders, the BOCs continue to argue ways that the Commission's orders may be avoided. This posturing is unconscionable and unsupported by law or equity.

If the Commission brought the payphone providers and the BOCs together today, and proposed nothing more than what the Commission explicitly found in the *Payphone Orders* in 1996 and 1997, there would be no debate as to whether the BOCs would agree to the receipt of hundreds of millions of dollars in dial around compensation in exchange for the reduction of tens of millions of dollars in rates that exceeded their cost basis. It is only because the BOCs have thus far succeeded in collecting dial around compensation without complying with the Commission's requirements that this issue even exists. This should not be a difficult proposition for the Commission to resolve. However, should the Commission fail to act in enforcement of its payphone orders as originally designed, numerous payphone providers will be deprived of the critical revenues needed to maintain their payphone operations. The BOCs' manipulation of the Commission's processes can not be condoned, directly or indirectly, by failing to act in this matter.

The BOCs allege that there was no obligation established by the Commission in its payphone orders to require a refund of charges in excess of those required by the new services

test.<sup>2</sup> This BOC position alone supports the granting of the declaratory ruling requested in the various petitions. The *Payphone Orders* were expressly clear that cost-based rates in compliance with the new services test must be in effect no later than April 15, 1997.<sup>3</sup> They were equally clear that the incumbent local exchange carriers were not eligible to receive dial around compensation in any state unless they were in actual compliance with the requirement for cost-based rates.<sup>4</sup> Those explicit holdings of the Commission do not need clarification. However, enforcement for violation of these express requirements are definitely in need of the Commission's clarification.

As noted by the APCC, the states are equally divided regarding enforcement or non-enforcement of the Commission's directives.<sup>5</sup> Although, the BOCs claim that the Florida Public Service Commission found that there was no FCC requirement that a BOC need to voluntarily change its rates,<sup>6</sup> in contrast, there was a clear FCC requirement that cost-based rates must be actually in effect no later than April 15, 1997. Whether that FCC requirement will be enforced is definitely in need of clarification, contrary to the comments of the BOCs.

Other excuses employed by the BOCs argue that this should be govern by state procedural rules, and subject to the particular facts and circumstances of each case.<sup>7</sup> What is in issue here is the substantive provisions of the federal regime and the emphatic orders of the Commission. Whether the Commission's orders are going to be implemented and enforced is not an optional matter of state procedure. The enforcement of Commission orders against the

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<sup>2</sup> Comments of AT&T Inc., BellSouth Telecommunications, Inc., and the Verizon Telephone Companies on Florida Public Telecommunications Association's Petition for a Declaratory Ruling ("BOCs Comments") at 2.

<sup>3</sup> *First Payphone Order*, ¶ 147; *Payphone Reconsideration Order*, ¶ 163. See also *Wisconsin Order*, ¶¶ 15, 42, 49-51.

<sup>4</sup> *Payphone Reconsideration Order*, ¶¶ 130-131, 163; *Bureau Waiver Order*, ¶¶ 30-31, 33; *Bureau Clarification Order*, ¶ 10.

<sup>5</sup> Comments of the American Public Communications Council on the Florida Public Telecommunications Association's Petition for a Declaratory Ruling at 3-4.

<sup>6</sup> BOCs Comments at 11.

<sup>7</sup> BOCs Comments at 10-11.

direct violations by the incumbent carriers is a general principle of federal law directed to the Commission's intentions on implementing Section 276 and the Commission's rules and regulations.

The Commission expressly designed the incumbent local exchange carrier's eligibility for dial around compensation to be preconditioned on the actual implementation of cost-based rates for network services provided to payphone service providers. This precondition for dial around compensation was expressly based upon the Commission's concern that the incumbent local exchange carriers had a natural incentive to charge competing payphone providers excessive rates. The express purpose of the precondition is to enforce the payphone providers' rights to cost-based rates.<sup>8</sup> Yet, the BOCs avoid all of the Commission's language to allege that the payphone providers have no legally cognizable interest in enforcing this requirement.<sup>9</sup> Implicitly underlying the BOCs' argument is that somehow it was the long distance carriers whose rights were violated when payphone service providers did not receive cost-based rates. But, the Commission thought that the enormous carrot of dial around compensation would be sufficient inducement for any reasonable company to comply with the new services test requirement. A small reduction in rates, of tens of millions of dollars, in exchange for receipt of hundreds of millions of dollars in additional revenues, should have been sufficient. But the BOCs want it both ways, even after the numerous concessions granted by the Commission to accommodate the BOCs.

The Commission repeatedly facilitated the incumbent carriers' ability to reach this enormous pool of additional revenues. In the *Payphone Reconsideration Order*, the Commission permitted the incumbent carriers to be eligible for dial around compensation earlier

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<sup>8</sup> *Payphone Reconsideration Order*, ¶¶ 130-131, 163.

<sup>9</sup> BOCs Comments at 16.

than originally proposed. However, this was expressly conditioned on the basis that they fully implemented all of the payphone requirements, including the requirement for cost-based rates.<sup>10</sup> When the BOCs again petitioned the Commission that the incumbent carriers could not meet this requirement on time for them to begin receipt of the dial around motherload on April 15, 1997, the Commission again accommodated the incumbent carriers, enabling them to meet the cost-based rate requirement later than April 15, 1997, but still enjoy collection of dial around compensation back to that date, provided they refunded any excessive charges.<sup>11</sup> Yet, again, when the long distance carriers *correctly* stated that the incumbent carriers had not complied with the cost-based rate precondition, thereby causing the long distance carriers to withhold dial around compensation, the Commission again facilitated the incumbent carriers' ability to begin collection of dial around revenues. In *Bell Atlantic v. Frontier Communications Services*, the Commission held that once the incumbent carrier self-certified that it was in compliance with the cost-based rate requirement, and other requirements, the incumbent carrier could begin receiving the dial around revenues. But the Commission emphasized that, despite the self-certification, only *actual* compliance would suffice to make the carrier eligible. However, it was the Commission or the state commissions that would enforce this requirement, not the long distance carriers.<sup>12</sup>

Now, as the payphone providers have gone to state commissions and to this Commission to enforce that order for actual compliance, the BOCs argue to pay no attention to any of these previous Commission orders, or to the rights of the payphone providers they established. Instead, the BOCs seek the Commission to find a way to ignore all that has gone before and to simply deny enforcement of any of the expressed requirements previously made. As noted in the

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<sup>10</sup> *Payphone Reconsideration Order, supra.*

<sup>11</sup> *Bureau Clarification Order*, ¶¶ 18-23.

<sup>12</sup> *Bell-Atlantic v. Frontier Communications Services*, DA 99-1971, ¶ 28 (Com. Car. Bur. Released September 24, 1999).

comments of the Independent Payphone Association of New York, the very integrity of this Commission's regulatory process is in issue.<sup>13</sup> The BOCs' actions, and their posturing in these proceedings, seek to severely undermine the integrity and credibility of the Commission's regulatory process through bad faith and gross manipulation. They should not be permitted to mock the efforts and the orders put forth by the Commission in its extensive attempts to implement both the intent and the requirements of Section 276.

The BOCs claim that the state processes have been exhausted and therefore it is too late to seek Commission action. This only supports what was noted by the IPTA in its opening comments on the FPTA Petition. The BOCs seek to delay and manipulate the Commission's process while state proceedings run their course, without guidance or consistent application of the Commission's orders. Time is running out for all payphone providers. State proceedings are being exhausted and payphone providers ultimately will have no further avenues of relief. The Commission must come forward and speak out as to its intent that the Commission's *Payphone Orders* are to be enforced according to the requirements clearly laid out therein. The incumbent local exchange carriers were not to charge rates to payphone providers in excess of cost-based rates on or after April 15, 1997. Nor were the incumbent carriers eligible to collect dial around compensation until they were in actual compliance of the cost-based rate requirements. This federal regime was clearly laid out by the Commission. Failure to enforce those orders would have a devastating effect on the payphone industry, violate any sense of equity and justice, and undermine the entire federal process. The IPTA, and other state payphone providers, spent nine years following the Commission's directives and only seek to enforce those orders as issued.

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<sup>13</sup> Comments of the Independent Payphone Association of New York, Inc. at 3-6, 9-13.

WHEREFORE, for the above reasons, and those previously stated in comments to this petition and to the other petitions for declaratory rulings, the Illinois Public Telecommunications Association respectfully requests that the Commission grant the various petitions for declaratory rulings.

Respectfully submitted,

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