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Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association, Petition for Declaratory Ruling

Dear Ms. Dortch:

On behalf of the American Public Communications Council, Inc. ("APCC"), this *ex parte* letter replies to the November 22, 2006 *ex parte* filed by AT&T, BellSouth, and Verizon (the "Bell Companies")[1] in response to the "subdelegation" argument in APCC's *ex parte* of October 25, 2006.[2]

In its October 25 *ex parte*, APCC contended that the Commission must correct the state commissions' failure to provide an effective remedy for the Bell Companies' non-compliance with the new services test ("NST") and the resulting violations of Section 276 of the Communications Act ("the Act"). Otherwise, the Commission's reliance on state commissions to review payphone line rates is an unsupervised and thus illegal subdelegation of the Commission's Section 276 authority.[3]

In a three-page response that skates over the surface of the subdelegation issue, the Bell Companies argue that there can be no unlawful subdelegation because Section 276 leaves it entirely to the states to determine the remedy, if any, for the Bell Companies' violations of federal law. In the alternative, the Bell Companies argue that it is too late for payphone service

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1 *See* Letter to Martha Dortch from Aaron Panner, November 22, 2006 ("*Bell Companies' Subdelegation Ex Parte*").

2 *See* Letter to Martha Dortch from Albert H. Kramer and Robert F. Aldrich, October 25, 2006, attaching a paper entitled "Section 276 of the Act Requires Refunds of Payphone Line Charges in Excess of NST-Compliant Rates" ("*APCC Section 276 Ex Parte*").

3 *See APCC Section 276 Ex Parte* at 8-14, *discussing United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir.), *cert. denied. sub nom. Nat'l Ass'n of Regulatory Utility Comm'rs v. United States Telecom Ass'n*, 543 U.S. 925 (2004) ("*USTA II*").

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providers ("PSPs") to complain about an unlawful subdelegation to the states. Neither of these arguments has even superficial appeal, and neither stands up to scrutiny.

I. SECTION 276 ESTABLISHED A FEDERAL SCHEME OF PAYPHONE REGULATION AND ASSIGNED RESPONSIBILITY TO THE COMMISSION FOR ENFORCING THE SCHEME

The Bell Companies argue that there can be no unlawful subdelegation of Section 276 enforcement responsibility because the Commission has no enforcement responsibility in the first place. According to the Bell Companies, Congress left it to the states to decide the appropriate remedy, if any, for noncompliance with Section 276. Noting that the only explicit command to the Commission in Section 276 "is to adopt regulations to implement the Act," the Bell Companies contend that, once it adopted regulations addressing payphone line rates, the Commission's job was done. *Bell Companies' Subdelegation Ex Parte* at 2. It was then entirely up to the states to decide how to implement and enforce the regulations because "[t]he states have always had responsibility for regulating intrastate payphone line rates." *Id.*

This argument overlooks the fundamental point that Section 276 is a *federal* law imposing a *federal* regulatory scheme on interstate *and intrastate* payphone services -- *in spite of* the prior tradition of state regulation. As the Supreme Court has pointed out regarding the 1996 Act as a whole, the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the states," and as a result, "has removed a significant area from the States' exclusive control."[4] Nowhere is this displacement of the traditional state role more emphatic than in Section 276, which imposed a comprehensive scheme of federal regulation without diluting the federal role at all or requiring any deference to the states. Thus, while Congress recognized that "the Commission's regulations implementing [the] commands [of Section 276] would tread on ground traditionally occupied by the states," it did not view that tradition as a reason to limit the Commission's Section 276 authority over payphone line rates.[5] To the contrary, Congress deliberately inserted a sweeping preemption clause to strengthen the Commission's hand. *Id., citing* 47 U.S.C. § 276(c). Rather, Congress consciously broke with that tradition, "unambiguously and straightforwardly authoriz[ing] the Commission to regulate the BOCs' intrastate payphone line rates." *Id.*

The absence of express language indicating who should enforce the Commission's Section 276 regulations does *not* mean that Congress wanted to leave enforcement to the *states*;

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4 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721, 730 n. 6, 731 n. 8 (1999).

5 *New England Public Communications Council v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) ("*NEPCC*") (rejecting the Bell Companies' challenge to the Commission's jurisdiction to require their intrastate payphone line rates to conform to the federal NST pricing standard).

rather, it simply means that Congress did not intend to relieve *the Commission* of its statutory obligation to implement the requirements of the Act.[6] As Section 1 of the Act provides:

> . . . there is created a commission to be known as the "Federal Communications Commission", which . . . shall execute *and enforce* the provisions of this chapter.

47 U.S.C. § 151 (emphasis added).

Because Section 276 does not provide for *any* implementing role for the states, the Bell Companies have no explanation for how the Commission could have "fulfilled its mandate under Section 276" by merely "adopting a federal pricing standard and leaving responsibility for application of that standard to the states." *Bell Companies' Subdelegation Ex Parte* at 2. In their filings in this proceeding, therefore, the Bell Companies have vacillated as to how the states managed to acquire their implementing function, *i.e.*, whether they were "given" the job by the Commission[7] or whether they just somehow slipped into that role because they "have always had responsibility for regulating intrastate payphone line rates." While the earlier "given" formulation must be abandoned because, absent FCC oversight, it is an unlawful subdelegation, the alternative "always had responsibility" formulation is equally unsatisfactory. As explained above, it is contradicted by the statute itself, which explicitly gives the FCC sole responsibility for implementing the provisions of Section 276.

Unlike the Bell Companies, the Commission itself has been clear from the start that it alone has the statutory responsibility to enforce Section 276 and its implementing regulations, including the NST requirement. That is why the Commission initially determined that payphone

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6 In this regard, there is an important difference between the payphone provisions and the local competition provisions of the Act. The local service competition provisions explicitly *limit* the Commission's regulatory role. Regarding the pricing of unbundled network elements ("UNEs"), Section 252 largely confines the Commission to the adoption of pricing standards and explicitly assigns responsibility to the *states* for applying and enforcing those standards. 47 U.S.C. § 252. By contrast, Section 276 confers *plenary* authority and responsibility on the Commission for both intrastate and interstate regulation of payphone services and does not assign *any* responsibility to the states for regulating *any* aspect of payphone competition, including the regulation of payphone line rates.

7 *See* Reply Comments of BellSouth Telecommunications, Inc., SBC Communications, Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association's Petition for a Declaratory Ruling at 3 (September 7, 2004) (Section Heading I: "The Commission Has Given States Responsibility for Enforcing Federal Standards Applicable to Payphone Line Rates"); Comments of AT&T Inc., BellSouth Telecommunications, Inc., and the Verizon Telephone Companies on Florida Public Telecommunications Association's Petition for a Declaratory Ruling at 2 (February 28, 2006) ("The Commission established a system . . . giving state commissions primary responsibility for administering the Commission's pricing rules").

lines should be federally tariffed.[8] As the Commission stated, "Federal tariffing enables the Commission to directly ensure that payphone services comply with Section 276." *First Payphone Reconsideration Order* at 21308 ¶ 162.

APCC does not contend, however, that it was illegal *per se* for the Commission to change course on reconsideration and "rely on the states to ensure that the payphone line is tariffed by the LECs in accordance with the requirements of Section 276."[9] Under *USTA II*, it is reasonable to use other governmental or private agencies as "short-cuts" to achieve compliance with federal regulations, provided that the agencies' processes are "superintended by the [Commission] in every respect" to ensure that they conform to federal requirements.[10] By allowing state commissions to take on the task of determining whether the Bell Companies' payphone line rates were priced in accordance with the NST, the Commission did not automatically commit an unlawful subdelegation. The subdelegation prohibition is breached only if the Commission fails to effectively oversee the states' performance of their assigned tasks.[11]

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8 *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541, 20614 ¶ 146 (1996) ("*First Payphone Order*"), *recon.* 11 FCC Rcd 21233, 21306 ¶ 147 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part*, *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied*, *Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998) (collectively "*Payphone Orders*").

9 *Id.* ¶ 163. The Bell Companies misstate APCC's position in this regard. *Bell Companies' Subdelegation Ex Parte* at 1.

10 *USTA II*, 359 F.3d at 567 (*quoting Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 708 n. 5 (D.C. Cir. 1977)).

11 While AT&T, Verizon, and BellSouth -- the authors of the *Bell Companies' Subdelegation Ex Parte* -- contend that there can be no unlawful subdelegation because the Commission had no implementation authority to subdelegate, Qwest goes to the opposite extreme, and, in effect, takes the same position that the Bell Companies wrongly ascribe to APCC -- that a subdelegation of the kind that *USTA II* defines as unlawful has already occurred and cannot be mitigated. Qwest admits that the Commission had authority to review payphone line rates itself and that the Commission "delegated" that authority to the states. *See* Letter to Marlene H. Dortch from Robert B. McKenna at 12-13 (September 5, 2006) ("Qwest Ex Parte"). Qwest contends, however, that the Commission cannot now assert any oversight over the states unless it first officially revokes the delegation to the states. *Id.* at 13 ("The Commission clearly had the right to assume control over any part of the process by revoking delegation to a state and requiring federal tariffs, but barring such revocation, the ultimate authority for determining . . . whether refunds were due and owing if a tariff was found to be unreasonable, was left to the state regulators"). In other words, according to Qwest, the Commission has already made a subdelegation that is inevitably unlawful because "FCC oversight [is] neither timely nor assured." *USTA II*, 359 F.3d at 567. As explained below, Qwest overstates the case. The Commission provided several mechanisms for overseeing the states and should use those mechanisms now to avoid an unlawful subdelegation.

In short, contrary to the Bell Companies' argument, the responsibility to ensure that payphone line rates comply with Section 276 belongs clearly and solely to the Commission. Although the Commission could and did assign certain implementation functions to state commissions, the Commission could not and did not simply hand over its statutory oversight and enforcement responsibilities. Just as the Commission had to ensure that state commissions correctly interpreted the federal NST requirement in their review of payphone line rates, the Commission must also ensure that the state commissions apply an effective federal remedy for the Bell Companies' clear violations of the NST requirement. To prevent the state commission "shortcut" from turning into an unlawful subdelegation for lack of effective oversight, the Commission must act now to "superintend" state processes (*id.*) and ensure, at long last, an effective remedy for the Bell Companies' longstanding NST violations.

II. ANY PRIOR MISTAKES DO NOT EXCUSE THE COMMISSION FROM TAKING STEPS NOW TO ENSURE AN EFFECTIVE REMEDY FOR THE BELL COMPANIES' VIOLATIONS OF SECTION 276

In the alternative, the Bell Companies argue that, if the Commission did subdelegate its responsibilities to the states, it is too late for PSPs to complain. This argument rests on theerroneous assumption that unlawful subdelegation necessarily occurs at the rulemaking stage rather than in the process of rule implementation.[12] Certainly, if the Commission in the *Payphone Orders* rulemaking had turned over its review responsibilities entirely to the states, or if the Commission had determined that it would not exercise any oversight of the states' review of payphone line rates, it would have been appropriate for PSPs in 1996 to petition for review of such a decision.[13]

The Commission, however, did not turn over all its review responsibilities to the states. Rather, it stated repeatedly that it *would* exercise effective oversight. First, the Commission made Bell Companies' compliance with Section 276 safeguards, including the NST requirement,

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12 As noted above, the Bell Companies misstate APCC's position as being that, in and of themselves, "the Commission's regulations governing intrastate payphone line rates . . . constitute an unlawful 'subdelegation' of the Commission's authority." *Bell Companies' Subdelegation Ex Parte* at 1. APCC clearly stated its position that any unlawful subdelegation will result, not from the regulations *per se*, which merely allow the states to conduct review of payphone line rates under federal guidelines, but from a failure by the Commission to exercise effective oversight over the states' implementation of their review function.

13 Even if the Commission's 1996 decisions had been an unlawful subdelegation *per se*, that still would not preclude the Commission from acting now, *e.g.*, by exercising its preemption authority, to cure the effects of such unlawful subdelegation, including ensuring that PSPs receive refunds of line charges in excess of NST-compliant rates. Moreover, APCC's failure to challenge the subdelegation in 1996 would not preclude APCC from challenging a Commission refusal to exercise preemption authority now.

a prerequisite for collecting dial-around compensation.[14] Second, the Commission specifically reserved the right to review Bell compliance with Section 276. In the *First Payphone Reconsideration Order*, the Commission "delegate[d] authority to the [Bureau] to make any necessary determination as to whether a LEC has complied" with Section 276 requirements. Thus, the Commission retained jurisdiction "to ensure that all [*Payphone Orders*] requirements . . . have been met." *Waiver Order*, 12 FCC Rcd at 21379 ¶ 19, n.60; *North Carolina Utilities Commission,* Order, 13 FCC Rcd 5313, 5314 ¶ 2 (CCB 1998). Third, the Commission retained authority under the Act to preempt any state decisions that are inconsistent with its regulations. 47 U.S.C. § 276(c). Here, unlike in *USTA II*, the unlawful subdelegation results not from the regulations themselves, but from the way the Bell Companies seek to have them enforced – *i.e.*, solely at a state's discretion.[15]

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[14] As it turned out, the Bell Companies almost universally *failed* to bring their rates into compliance with the NST by the April 15, 1997, compliance deadline. The Commission, however, temporarily waived the deadline to allow the Bell Companies more time to come into compliance without losing their eligibility to collect dial-around compensation. As APCC has argued, the Bureau's *Waiver Order* mitigated any harm to PSPs from the Bell Companies' failure to comply by requiring Bell Companies to provide refunds back to April 15, 1997, for any excess over NST-compliant rates. Under APCC's interpretation, "the *Waiver Order* thus constitutes an effective check on the states NST review processes, precluding any finding of unlawful subdelegation." See Letter to Marlene H. Dortch from Albert H. Kramer and Robert F. Aldrich at 3 (October 26, 2006). Under the Bell Companies' interpretation of the order, however, the *Waiver Order* – which effectively precluded the Commission from using the threat of ineligibility for compensation as an effective oversight tool -- becomes an obstacle to effective oversight that threatens to render the entire delegation of ratemaking authority unlawful. The Commission, however, can prevent this result by using the other tools available to it to ensure that refunds are provided.

[15] The Bell Companies suggest that state commissions need not award refunds for the Bell Companies' violations of Section 276 because "APCC identifies no basis in federal law" for the refund (*i.e.*, reparations) remedy. (*Bell Companies' Subdelegation Ex Parte* at 1). Reparations/refunds *are*, however, the statutory remedy for carrier violations of the Act. *See, e.g., MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995) (a finding that a rate is unreasonable, based on the carrier's earning more than the prescribed rate of return, is by itself sufficient to require an award of reparations); *AT&T v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001) (Commission has authority to determine retroactively that a competitive LEC's access rates were unreasonable and to specify the reasonable rate for purposes of awarding reparations); *Halprin, Temple, Goodman, & Sugrue v. MCI Telecomms. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568 ¶ (1998) (even though non-dominant carriers' rates are presumed reasonable that presumption may be rebutted and reparations awarded); *ACC Long Distance Corp. v. New York Tel. Co.*, Memorandum Opinion and Order, 9 FCC Rcd 1659, 1661-62 ¶ 11 (1994) (Commission rejects argument that it cannot order refunds of overearnings); *MCI Telecomms. Corp. v. Pacific Northwest Bell Tel. Co., et al., Memorandum Opinion and Order*, 5 FCC Rcd 216, 221-22 ¶ 48 (1993) (Commission rejects argument that it cannot order refunds of

To satisfy *USTA II*, the Commission must fully exercise its retained authority to "superintend [the NST review process] in every respect," – including the determination of the appropriate remedy for the Bell Companies' statutory violations. *USTA II,* 359 F.3d at 567. In the *Wisconsin Public Service Commission* proceeding, after the states allowed the Bell Companies to maintain their noncompliant rates for five years, the Commission did ultimately exercise its retained jurisdiction to beneficial effect, by issuing rulings that clarified the NST and guided state commissions' efforts to "ensure compliance with the *Payphone Orders* and Congress' directives in section 276."[16] With respect to remedies, the Commission must similarly exercise effective oversight and correct the states' failure to provide reparations for unlawful payphone line rates.

In summary, neither the Commission's decision to let the states review payphone line rates nor any past failures to adequately "superintend" that review precludes the Commission from now taking the necessary steps to exercise effective oversight, avoid unlawful subdelegation, and ensure an effective remedy for the Bell Companies' extended noncompliance with the Act.

Sincerely,

Albert H. Kramer
Robert F. Aldrich

cc: Daniel Gonzalez
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a legally tariffed rate); *Cruces Cable Co., Inc., v. American Television Relay, Inc.*, 35 FCC 2d 707, 709 (1972) (Where rate was filed on one day's notice, and customer challenged the rate as unlawfully discriminatory and requested interim rate relief, Commission denied interim relief because the customer "is entitled to recover damages for any violation of the Act which may be found either upon complaint to this Commission or upon suit in federal court"). *See generally* 47 U.S.C. §§ 206-08. APCC pointed this out in the *APCC Section 276 Ex Parte* (at 6). Further, as explained in that ex parte, neither the filed rate doctrine nor the retroactive ratemaking doctrine pose a barrier to the award of reparations to PSPs.

16 *Wisconsin Public Service Commission, Memorandum Opinion and Order,* 17 FCC Rcd 2051, 2052 ¶ 2, *aff'd, NEPCC.*

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