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December 6, 2007

Ex Parte Filing

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128

Dear Ms. Dortch:

On December 6, 2007, on behalf of AT&T and Verizon, Mark Montano and Ann Berkowitz of Verizon, Davida Grant of AT&T, and I met with Ian Dillner of Chairman Martin's office to discuss the petitions for declaratory ruling and preemption filed in the above-captioned docket. The attached document reflects the substance of our discussions.

One original and two copies of this letter are being submitted to you in compliance with 47 C.F.R. § 1.1206(a)(2) to be included in the record of these proceedings. If you have any questions concerning this matter, please contact me at (202) 326-7921.

Sincerely,

/s/ Aaron Panner
Aaron M. Panner

Enclosure

The Commission Should Deny the Petitions

- Independent payphone providers have brought petitions challenging state commission decisions denying refunds of amounts paid under valid state tariffs.

- The Commission has determined that states are responsible for regulating basic payphone line rates in accordance with federal pricing standards, indicating that the availability of refunds depends on state law, including state procedural rules.

- Whether a particular state determination is correct under the particular facts of the case is not an appropriate topic for a declaratory ruling.

- Contrary to the independent payphone providers, LECs never promised to provide refunds voluntarily; LECs' sole commitment was to make specific filings – that is, those made pursuant to a Bureau waiver order – effective 34 days prior to their actual filing.

- These petitions constitute improper collateral challenges to state commission determinations and, in most cases, state court judgments. They are barred by *res judicata*.

Regulatory Background – the 1996 Payphone Orders

- In the *First Report and Order*, the Commission held that "tariffs for payphone services must be filed with the Commission as part of the LECs' access services to ensure that the services are reasonably priced and do not include subsidies." 11 FCC Rcd at 20615, ¶ 147.

- In the *Order on Reconsideration*, however, the Commission – over independent payphone providers' objections – eliminated the requirement that LECs file federal tariffs for "basic payphone line[s]." 11 FCC Rcd at 21308, ¶ 163.

- Instead, the Commission held that it would "*rely on the states* to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Id.* (emphasis added).

- The Commission did not require all BOCs to file new tariffs for basic payphone line services. Instead, the Commission noted that "[w]here LECs have already filed intrastate tariffs for these services, states may," after considering federal requirements, "conclude: (1) that existing tariffs are consistent with the requirements of the [*Payphone Orders*]; and (2) that in such case no further filings are required." *Order on Reconsideration*, 11 FCC Rcd at 21308, ¶ 163.

Procedural Background – Payphone Refund Petitions

- In several states, payphone providers have challenged LECs' existing payphone line rates as inconsistent with pricing rules adopted in the *Payphone Orders* and subsequently clarified in the *Wisconsin Order*.

- In some states, LECs have filed new rates that have been approved by state commissions; in other states, state commissions have ordered new rates.

- Payphone providers – in a variety of proceedings, including some initiated years after the fact – have sought refunds of amounts paid under prior tariffs, dating back to April 15, 1997.

- Some state commissions have ordered refunds. While LECs have sought judicial review of those refund determinations, LECs have not asked the Commission to review any state commission decisions ordering refunds.

- Some state commissions have denied refunds. Independent payphone providers have generally sought judicial review in state court. In several cases, after the state courts had adjudicated and rejected their claims, payphone providers have filed petitions at the Commission seeking to mount a collateral attack on the state determinations.

The Petitions Are Contrary to the Commission's Allocation to the States of Responsibility for Administration of Rules Governing Basic Payphone Line Rates

- In determining that state tariffs would continue to govern basic payphone line rates, the Commission made clear that state procedures and remedies would apply.

- The Commission will not take over that state commission role unless state commissions are "unable" to carry it out. *Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 16.

- It would have been evident to the Commission that disputes about state tariffs' compliance with federal requirements might arise, either immediately or at a later date. By "rely[ing] on the states," the Commission ensured that any proceedings for enforcement of these requirements would take place before state commissions with judicial review as provided under state statute.

- Nothing in the *Payphone Orders* supports any suggestion that the Commission intended to require automatic refunds (or equivalent relief) in the event that a state eventually determined that a BOC's payphone line rates should be reduced in light of the New Services Test.

The Facts of Specific Cases Are Not an Appropriate Topic for a Declaratory Ruling

- Each of the state commission decisions at issue is largely based on the specific procedural posture of individual cases.

- This Commission is well aware that the procedural choices of individual litigants may have a profound effect on the relief available. *See, e.g.*, *Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004).

- Whether a state commission applied the law correctly to the facts of a particular case is a question for the reviewing court, not for the FCC.

LECs Never Agreed to Voluntary Refunds

- To qualify for per-call compensation in 1997, LECs had to certify that existing rates were compliant with FCC pricing rules or file new, compliant rates.

- When uncertainty over the scope of requirements delayed filing of certain rates, LECs sought an extension until May 19, 1997, promising to hold payphone providers harmless by giving those specific filings retroactive effect to April 15, 1997.

- The LECs honored that commitment.

- The argument that LECs made a blanket commitment to waive all procedural objections to subsequent refund claims is absurd.

Where States Have Rendered Final Judgments, *Res Judicata* Bars Collateral Challenge

- "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979)

- All the requirements for estoppel are met here: same parties, same claim, state tribunal with jurisdiction, and final judgment.

- Commission cannot, acting in an adjudicatory capacity, disregard judgment of state tribunal. *Town of Deerfield v. FCC*, 992 F.2d at 420 (2d Cir. 1993); *Wabash Valley Power Ass'n, Inc. v. Rural Electrification Admin.*, 903 F.2d 445 (7th Cir. 1990).