Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Federal-State Joint Board on Universal Service	CC Docket No. 96-45
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	CC Docket No. 98-171
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	CC Docket No. 90-571
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	CC Docket No. 92-237 NSD File No. L-00-72
Number Resource Optimization	CC Docket No. 99-200
Telephone Number Portability	CC Docket No. 99-200
Truth-in-Billing and Billing Format	CC Docket No. 95-116
American Public Communications Counsel Petition for Reconsideration	CC Docket No. 98-170

OPPOSITION OF VERIZON[1]

INTRODUCTION

The Central Atlantic Payphone Association ("CAPA") asks the Commission to order Verizon and other local exchange carriers ("LECs") to pay refunds of Universal Service Fund ("USF" or "the fund") surcharges to payphone service providers as a result of the Commission's

[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

recent order changing its rules to exclude payphone lines from the *Centrex Waiver Order*.[2] The *Centrex Waiver Order* allows LECs to recover a portion of USF contributions due on Centrex revenues from all multi-line business customers. The *CAPA Petition*[3] must be denied because: (1) the *2008 Order* changing the rule established in the *Centrex Waiver Order* applies on a prospective basis only; (2) the Commission may not impose a retroactive requirement now because it would be unlawful; and (3) even aside from the fact that the Commission could not order refunds, doing so would make no policy sense because there has been no windfall to LECs nor penalty to payphone service providers; rather, the Commission made a policy judgment in the *2008 Order* to change its previous rule in order to give payphone service providers a benefit going forward.

I. THERE IS NOTHING TO CLARIFY IN THE COMMISSION'S *2008 ORDER* BECAUSE THAT ORDER UNAMBIGUOUSLY APPLIES ON A PROSPECTIVE BASIS ONLY.

The Commission's *2008 Order* clearly changed the rule established in the *Centrex Waiver Order*. In the *2008 Order* the Commission even went so far as to provide for specific time frames for the affected parties to comply with the newly changed rule. *2008 Order* ¶ 9. Because the 2008 Order changed a previously established rule, it necessarily applies on a prospective basis only.

In the *Centrex Waiver Order* the Commission granted a waiver of the universal service "no mark-up rule," 47 C.F.R. § 54.712, to allow LECs to continue to recover a portion of

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[2] *American Public Communications Council Petition for Reconsideration*, Order on Reconsideration, 23 FCC Rcd 2567 (2008) ("*2008 Order*"), modifying *Federal-State Joint Board on Universal Service*, Order and Second Order on Reconsideration, 18 FCC Rcd 4818 (2003) ("*Centrex Waiver Order*").

[3] Central Atlantic Pennsylvania Payphone Association, *Petition for Clarification or in the Alternative for Reconsideration*, CC Docket No. 96-45, *et al*. (filed March 14, 2008) ("*CAPA Petition*").

required USF contributions on Centrex revenues on a per-line basis from all multi-line business customers, including payphone service providers. *Centrex Waiver Order* ¶¶ 3-9.

> [L]ocal exchange carriers that utilize the PICC equivalency ratios when recovering contribution costs from Centrex customers will be permitted to recover a share of their contributions associated with the subscriber line charge for a specific Centrex line from their multi-line business customers in a given state. *Id*. ¶ 3.

The Commission has previously confirmed that payphone service providers are "multi-line business customers" of their underlying LECs,[4] and the *Centrex Waiver Order* makes no distinction between payphone service providers and other multi-line business customers. Indeed, in seeking to modify the *Centrex Waiver Order*, the American Public Communications Council ("APCC") filed a petition for reconsideration, acknowledging that "LECs can now, under the current waiver, include in the universal service line item" on payphone lines USF contribution costs associated with Centrex revenues.[5] It was the APCC petition for reconsideration that resulted in the *2008 Order*.

The Commission itself also observed in the *2008 Order* that "absent our decision in the *Centrex Waiver Order*, PSPs would pay less in the USF contribution pass-through charges." *2008 Order* ¶ 6, and noted that the *Centrex Waiver Order* "applied to independent payphone service providers …" *Id*. ¶ 1.

In instructing parties on compliance with the new rule, the Commission further confirmed that the *2008 Order* was to have prospective effect only by allowing for a grace period before the new rule went into effect. "In order to give effect to our decision in this order, PSPs should

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[4] *Access Charge Reform, Price Cap Performance for Local Exchange Carriers*, Order on Reconsideration, 18 FCC Rcd 12626, ¶¶ 10, 12 (2003).

[5] American Public Communications Council, *Petition for Reconsideration*, CC Docket No. 96-45, *et al*. at 2 (filed April 30, 2003).

identify themselves within 30 calendar days to their respective underlying LEC so the LEC can ensure its compliance with this order." *2008 Order* ¶ 9. The Commission also provided "LECs with 90 days after the effective date of this order to ensure their compliance with the decision contained herein." *Id.* Had the Commission done anything other than announce a new rule in the *2008 Order* these provisions would make no sense.

There is therefore nothing to clarify in the *2008 Order*; it clearly applies on a prospective basis only.

II. THE PROHIBITION AGAINST RETROACTIVE RULEMAKING PREVENTS THE COMMISSION FROM APPLYING ITS *2008 ORDER* ON A RETROACTIVE BASIS AND ORDERING REFUNDS.

The Commission cannot make its newly modified waiver retroactive. Under the Supreme Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. … By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms" (internal citations omitted). *See also National Mining Ass'n v. Department of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002). In this context, a rule or waiver is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Id.* (internal quotation marks and citations omitted). In sum, "a retroactive rule forbidden by the [Administrative Procedure Act] is one which 'alters the past legal consequences of past actions.'" *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)); *see also id.* (citing *Bergerco Canada v. U.S.*

Treasury Department, 129 F.3d 189, 192-93 (D.C. Cir. 1997) (treating Justice Scalia's concurring opinion as "substantially authoritative")).

Because the Commission's *2008 Order* changed the rule established in *Centrex Waiver Order*, that change must be given prospective application only. To do otherwise would be a clear violation of the rule against retroactive rulemaking that "generally prohibits the promulgation of so-called 'legislative' rules retroactively." *Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1124 (D.C. Cir. 1994) (citing *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987), *aff'd*, 488 U.S. 204 (1988)). And in changing the *Centrex Waiver Order*, the Commission indeed was acting in a quasi-legislative, not quasi-adjudicatory, capacity. The *2008 Order* was neither an adjudication between interested parties nor an enforcement proceeding initiated by the Commission. Rather, in the order the Commission evaluated its existing policy judgment articulated the *Centrex Waiver Order* and decided to change the rule as applied to payphone service providers on the grounds that a changed approach was preferable given the "pro-competitive statutory aims of section 276." *2008 Order* ¶ 7. The change in policy was applicable to all payphone service providers and required all LECs to make changes going forward.

Applying the Commission's *2008 Order* to prior conduct would violate the rule against retroactive rulemaking because it would impermissibly "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). But this is precisely the result that CAPA seeks. The Commission's *Centrex Waiver Order* gave LECs the right to continue to recover through USF surcharges to <u>all</u> multi-line business customers certain contribution costs associated with Centrex revenues. *Centrex Waiver Order* ¶

3. CAPA is seeking to change that right by now requesting refunds of certain USF surcharges on payphone lines that were billed and paid before the Commission issued the *2008 Order* changing the *Centrex Waiver Order*. This is unambiguously prohibited by well-established precedent.

Further, this is not a case where there is any presumption of retroactivity. As the D.C. Circuit recently explained, the presumption of retroactivity only applies to "agency adjudications" where there are merely "'new applications of existing law, clarifications, and additions.'" *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (internal citations omitted). The presumption does not apply to "agency decisions that 'substitut[e] . . . new law for old law that was reasonably clear." *Id*. *See also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *et al*., Order on Reconsideration, ¶ 14 (rel. April 11, 2008) ("[i]n considering whether to give retroactive application to a new rule, the courts have held that when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given solely prospective effect in order to 'protect the settled expectations of those who had relied on the preexisting rule'").

Here, there can be no retroactivity because the Commission was not adjudicating a complaint based on existing law, but rather was promulgating a new rule that substituted for an old rule that was reasonably clear. The *Centrex Waiver Order* by its terms applied to all multi-line business customers including payphone service providers. The Commission's *2008 Order* modified that aspect of the *Centrex Waiver Order* and expressly excluded payphone service providers. *2008 Order* ¶ 1. Accordingly, the Commission's *2008 Order* substituted new law for old law that was reasonably clear and therefore is not subject to any presumption of retroactivity

Even aside from the fact that the Commission could not set retroactive USF surcharge rates applicable to payphone service providers, section 204(a)(3) of the Act prohibits application

of any such rates to "deemed lawful" tariffed charges that Verizon and other LECs frequently obtain for USF surcharges. Section 214 provides that any charge "shall be deemed lawful and shall be effective" 15 days (for rate increases) or 7 days (for rate reductions) after the date on which it is filed with the Commission, unless the Commission suspends or investigates the charge. 47 U.S.C. § 204(a)(3). It is well-settled that deemed lawful tariffs that take effect without suspension or investigation are not subject to any refunds. *ACS of Anchorage v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002).

III. IN ADDITION TO THE LEGAL PROHIBITIONS, THERE ARE COMPELLING POLICY REASONS WHY THE COMMISION SHOULD NOT ORDER REFUNDS OF USF SURCHARGES.

As explained above, the Commission does not have the authority to order refunds of USF surcharges collected from payphone service providers during the last five years. Even aside from this basic fact, there are also compelling reasons why the Commission should not order such refunds.

All parties in this instance acted in accordance with the Commission's unambiguous rules existing at the time when USF surcharges were billed to and paid by payphone service providers. LECs appropriately collected USF contributions associated with Centrex revenues from multi-line business customers, including payphone service providers. There was no wrongdoing, and payphone service providers did not suffer a penalty because they had no right to a lower USF surcharge until the Commission changed its *Centrex Waiver Order* policy and exempted payphone service providers in the *2008 Order*.

Moreover, collection of USF surcharges from payphone service providers did not result in any windfall to the LECs. These charges simply reimbursed LECs for their contributions to the USF. Any refund of the surcharges now would leave LECs with a shortfall that they could

not recoup from other multi-line business customers. It would be impossible to identify and locate all of the multi-line business customers served during the last five years in order to bill them for additional USF contributions. And even if these customers could be identified and located, it is doubtful that they would actually pay any supplemental bill for stale USF contributions.

Accordingly, any refund ordered by the Commission would effectively result in a penalty to LECs and a windfall to payphone service providers who had the opportunity to recover the cost of USF surcharges billed to them from their own end-user customers over the last five years. Such a result would be manifestly unfair because in paying their USF contributions and recovering those contributions through surcharges as allowed by the *Centrex Waiver Order* LECs were simply following the Commission's unambiguous rules.

CONCLUSION

For the foregoing reasons, the *CAPA Petition* must be denied.

Respectfully submitted,

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