

December 31, 2009

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Hon. Julius Genachowski  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Ex Parte via ECFS

Re: CC Docket No. 96-128, Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and For an Order of Preemption and related cases (“NST refund cases”)

Dear Chairman Genachowski

Florida Public Telecommunications Association, Inc. (“FPTA”) hereby sets forth its reply to the March 23, 2009 filing by AT&T Corp. and Verizon (the “BOCs”) entitled “No Federal Rule Preempts State Procedural Rules Governing the Availability of Refunds for State Payphone Line Rates” (“BOCs Preemption Comments”).

FPTA’s petition, and those of the other independent payphone providers, are occasioned by the historic failure of the BOCs to comply with the tariff requirements for payphone access line (“PAL”) charges under the Commission’s implementation of section 276 of the Telecommunications Act of 1996 (the “Act”), 47 U.S.C. § 276 (2000), as interpreted and intended to be implemented by several Commission orders and judicial review thereof.

Four key propositions, none of which were recognized in the BOCs Preemption Comments, bear on the Section 276 mandate that the Commission reform the U.S. pay telephone industry by promoting fair competition and widespread deployment of public pay telephone services across the nation. . These propositions are:

- *Federal preemption.* Legal authority to regulate and set rates for inter- and intrastate payphone services, and the interconnection thereof to the public switched telephone network, rests exclusively with the Commission; moreover, under the supremacy clause of the U.S. Constitution and well

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established principles of federal preemption *the states have no independent legal authority*, beyond what may be expressly delegated to them by the Commission, provided that the Commission's delegation may not be inconsistent with federal law;

- *Uniformity of national policy.* The Commission is required to implement a *uniform national policy* for the regulation of payphones and the Commission may not establish or allow to be established an arbitrary patchwork of state or regional regimes;
- *Self-effectuating statute.* The market-opening mandate enacted by Congress in section 276 or its implementation by the Commission never was intended to depend, in whole or in part, on *the doing of any thing or the taking of any action* by any PSP. By contrast, the Commission placed affirmative duties on the BOCs to ensure the filing of sufficient cost studies to permit the state authorities to evaluate the new services test ("NST")-compliance of intrastate PAL tariffs; and,
- *BOC unclean hands, evident NST non-compliance, and collection of dial-around compensation.* From 1997 to 2004 the BOC Coalition vigorously challenged the Commission's authority to regulate intrastate PAL charges and to require NST-compliant PAL tariffs. Moreover, throughout these seven years of BOC-inspired litigation (and generally until the denial by the U.S. Supreme Court of the BOCs' petition for review of the adverse decision of the D.C. Circuit court in 2003), the BOCs not only charged and collected PAL tariffs that clearly exceeded NST-compliant rates, but, in exchange for the Commission's permission to collect tens of millions of dollars in dial-around compensation, the BOCs agreed not only to *comply* with the very NST requirements they were challenging but also to give refunds for any excess PAL charges occasioned by their failure to comply. Thus, having put themselves on actual notice of a possible future rate change for non-compliant PAL tariffs, the BOCs now come before the Commission with unclean hands by disclaiming responsibility for a regulatory failure for which they themselves are responsible.

Accordingly, FPTA believes that the only fair, reasonable, and not plainly erroneous resolution to the pending PSP refund petitions is a Commission order, which:

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- *fully endorses federal regulatory policy favoring reparations* for any departure of historical PAL rates from NST-compliant PAL rates *nunc pro tunc* to April 15, 1997;
- directly responds to all pending matters in a manner that *harmonizes national payphone regulation* consistent with federal statutes and case law;
- declares that claim preclusion, procedural or substantive, estoppel by time, laches, limitations, or the apparent finality of any state judgment or decision based on state law *does not impede the fulsome and uniform implementation of national payphone regulation*, including the award of reparations to PSPs;
- declares that section 276 rate regulation *requires refunds* where BOC PAL tariffs have clearly departed from the requirements of NST-compliance subsequent to April 15, 1997, and orders the payment of such refunds.

Thank you for your consideration of our position. We urge the Commission to act promptly to resolve the long-standing failure of the BOCs to comply with the conditions laid down by the Commission more than a decade ago.

Sincerely,

/s/

PATTON BOGGS LLP

By: Jonathan Rubin

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