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January 28, 2013

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Notice of Ex Parte Presentations*
American PrePaid Phonecall Association
Payphone Compensation (WC Docket No. 11-141)

Dear Ms. Dortch:

This is to provide notice pursuant to the Commission's ex parte rules that the American PrePaid Phonecall Association ("APPPA") met with Commission staff on January 25, 2013, to discuss the Commission's review of the Wireline Competition Bureau's order in the above-reference docket.[1] In the meetings, APPPA was represented by its Executive Director, Gene Retske, and its Board member Ray Valmé, CEO of Dial World Communications (both by phone) and by undersigned counsel (in person). We met in separate meetings with Patricia Argeris of the Office of Commissioner Rosenworcel; Nicholas Degani of the Office of Commissioner Ajit Pai; and Lisa Gelb, William Dever, Denise Coca, and Angela Bouliakis of the Wireline Competition Bureau ("Bureau") and Marcus Maher of the Office of the General Counsel. In addition, I had a telephone conversation on January 24 with Angela Kronenberg of the Office of Commissioner Clyburn.

In all of these meetings, APPPA's presentation followed the attached talking points, which were distributed to the meeting attendees. For all of the reasons discussed there, the Commission should reverse the Bureau's decision but, if the Commission upholds the Bureau's decision, it should decline to give the ruling retroactive effect. APPPA also would like to take the opportunity of this ex parte filing to further flesh out why retroactive effect of this ruling would cause "manifest injustice."

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[1] *Petition of GCB Communications, Inc. d/b/a Pacific Communications and Lake Country Communications, Inc. for Declaratory Ruling*, WC Docket No. 11-141, Declaratory Ruling, 27 FCC Rcd 7361 (WCB 2012) ("*Bureau Order*").

As a declaratory ruling – an adjudicatory decision – the *Bureau Order* and any Commission decision upholding it would ordinarily have retroactive effect.[2] The Commission may provide that an adjudicatory ruling will not have retroactive effect, however, when retroactivity "would work a 'manifest injustice.'"[3] Under relevant court precedent, "manifest injustice" analysis "'boil[s] down to a question of concerns grounded in notions of equity and fairness.'"[4] The analysis may extend beyond just "the common situation that pits one group of carriers against another" and include considerations involving the affected carriers "*and their customers*."[5]

If PSPs are allowed to file *retroactive* claims for payphone compensation for prepaid calls where the Completing Carrier received no payphone-specific coding digits, and thus had no notice that the call was payphone-originated, customers of prepaid calling providers and payphone service providers ("PSPs") will be harmed. Prepaid card providers decrement value for calls in real time, and have no ability to recover charges after a call is completed. Because of this, prepaid calling providers will be forced to *prospectively* increase the payphone surcharges on their products in order to recover for this retroactive liability. As described in more detail in the attached APPPA Press Release, this is likely to increase payphone surcharges on prepaid calling products from current $0.99 levels to $1.30 - $1.50, further undermining the value that consumers receive for prepaid calling products. Moreover, these higher surcharges will be paid – *not* by the customers that placed the payphone calls that triggered the liability – but by *future* prepaid customers that use payphones to place their calls. As the Commission has held, it is manifestly unjust to require today's consumers "to subsidize charges that should have been paid by consumers in [the past]."[6] This type of harm is particularly detrimental to consumers who place prepaid calls from payphones, who are typically the most economically vulnerable.

Retroactive application of the liability rule in this case also would be manifestly unjust because it would undermine the Commission's statutory duty to "promote the widespread deployment of payphone services to the benefit of the general public."[7] As the Commission observed in *Arya*, in determining whether to give retroactive effect to a declaratory ruling, a relevant factor is whether retroactivity would undermine its other statutory mandates.[8] The

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[2] *See, e.g., Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) ("*Qwest*").

[3] *Id. See also Petition for Reconsideration of the Fifth Circuit Remand Order of Arya Communications International Corporation*, CC Docket Nos. 96-45 *et al*., Order on Reconsideration, 23 FCC Rcd 6221, 6226 ¶ 14 (2008) ("*Arya*").

[4] *Arya*, 23 FCC Rcd at 6227 n.49, *quoting Cassell v. FCC*, 154 F.3d 478, 486 (D. C. Cir. 1998).

[5] *Arya*, 23 FCC Rcd at 6227 ¶ 15 (emphasis in original).

[6] *Arya*, 23 FCC Rcd at 6227 ¶ 16.

[7] 47 U.S.C. § 276(b)(1).

[8] *Arya*, 23 FCC Rcd at 6227 ¶¶ 15-16 (finding that manifest injustice analysis must "necessarily consider … the potential effect of [retroactivity] on our statutory obligations" and denying retroactivity in part

record in this proceeding demonstrates that PSPs and Completing Carriers will need to work together going forward to find a solution to the current problems with the reliability of the transmission of payphone-specific coding digits. The burden of retroactive charges skews the respective sides' bargaining positions too far in the PSPs' favor, however, such that the parties are unlikely to work together on a solution. Absent a solution to the signaling problem, prepaid providers are even more likely to block payphone-originated calls, which will remove a significant revenue source for PSPs. This will undermine the widespread deployment of payphone services to the benefit of the general public, in contravention of the Commission's statutory obligation. Again, this disadvantages disproportionately the most vulnerable consumers of prepaid calling products. This too constitutes a manifest injustice that supports a decision not to give this order retroactive effect.

This case is profoundly different from the situation where the D.C. Circuit overturned a Commission decision to deny retroactivity in the *Qwest* menu-driven card case.[9] First, in *Qwest*, no circumstances involving manifest injustice to customers were cited by the Commission or considered by the court. Here, as discussed above, retroactivity would cause substantial manifest injustice to customers of prepaid providers and PSPs. Second, retroactive application of the rule in *Qwest* did not undermine a statutory obligation of the Commission, as would be the case here. Moreover, this case is factually different. AT&T's reliance on its interpretation of the law was not "reasonable" because the legal issue clearly was an open question.[10] Here, however, Completing Carriers' right to rely on delivery of payphone-specific coding digits had never been questioned until shortly before the PSPs filed their declaratory ruling petition. In *Qwest*, the court criticized the Commission for not considering the "equal and opposite" impact of no retroactivity on the carriers that would thereby be denied access charges. Here, however, the Commission should weigh the impact and note that prepaid providers bill their customers in real time, and thus lack any ability to recover for retroactive liability from the customers who made the calls. All of these factors distinguish this case from *Qwest*.

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because it would be "fundamentally at odds with our Section 254 mandate to preserve and advance universal service.").

[9] *See Qwest, supra.*

[10] *Qwest*, 509 F.3d at 540.

The *Bureau Order* is incorrect from a legal perspective and harmful from a policy perspective. If it applies retroactively, however, that harm will be multiplied such that clear manifest injustice will occur. The Commission should not uphold the *Bureau Order* but, if it does, it must provide that its order will not have retroactive effect.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

/S/

L. Charles Keller

Attachments

cc (email): Angela Kronenberg
Priscilla Argeris
Nicholas Degani
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Marcus Maher
William Dever
Denise Coca
Angela Bouliakis

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- The Bureau erred in finding that Completing Carriers may not rely on the transmission of Flex/ANI to fulfill their obligations to track and compensate for payphone-originated calls.
  - The Bureau fails to explain why the Commission ordered LECs to deploy Flex/ANI, at great expense, if no one would be permitted to rely on it.
    - There was therefore no need to impose a "duty" on payphone providers to transmit Flex/ANI (they presumably were motivated to do so, as they wanted to get paid).
  - The Bureau relies on FCC statements (e.g., Flex/ANI was "never a *sine qua non* for the payment of payphone compensation") that date from *before* Flex/ANI had been deployed, thus using this language out of context.
  - The audit and certification language only supports imposing liability on Completing Carriers to the extent they fail to comply with its obligations. Counting payphone-originated calls based on Flex/ANI was part of the structure that Completing Carriers were required to use in audits and certifications.
- The Bureau Order is inconsistent with the Commission's duty promote payphone deployment to benefit the public, and will harm the most vulnerable consumers.
  - Prepaid providers must have the ability to bill their customers *in real time* for payphone calls or they will not be able to recover the compensation amount.
  - Prepaid providers operate on razor-thin margins and cannot absorb even a small amount of post-hoc compensation claims from payphone providers.
  - Bureau order has spawned a cottage industry of payphone providers filing strike suits for post-hoc compensation.
  - Order leaves prepaid providers with little choice but to block payphone-originated calls (which is specifically allowed by FCC rule).
  - Blocking leaves customers that must rely on payphones unable to obtain the best rates for international calls, which are only available from prepaid providers.
- If the Commission nonetheless upholds the Bureau's legal conclusion, its ruling should be prospective-only, because retroactive application would work a "manifest injustice."
  - Finding that Completing Carriers cannot rely on Flex/ANI leaves parties to negotiate an alternative mechanism. But the threat of large retroactive claims tilts the playing field excessively in favor of payphone operators.
  - Retroactive compensation claims are unusually damaging to prepaid providers because they bill their customers in real-time; they cannot recover after the fact. (That is, the burden of retroactivity does not fall in an "equal and opposite" way on prepaid providers.)
  - If prepaid providers are required to pay large retroactive compensation claims, they will have to recover these costs through increased payphone surcharges on prepaid cards going forward. These charges are already $0.99, and the most popular cards in the market are at the $5 price point. Any increase to recover past liability will further erode the value that the most vulnerable consumers receive for prepaid cards. This is "manifestly unjust" to these consumers.
  - Large retroactive claims also will further encourage prepaid card providers to block payphones, which will harm consumers and undermine the FCC's statutory duty to promote payphone deployment.

FOR IMMEDIATE RELEASE:

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FCC Set to Act on Payphone Charges
APPPA Concerned Over Consumer Impact

Washington D.C. [January 23, 2013] – The American PrePaid Phonecall Association, APPPA, is concerned over the impact on consumers of a ruling by the Wireline Competition Bureau (Bureau) regarding pay phone charges to prepaid service providers. The full Commission is considering whether to uphold the Bureau ruling giving pay phone providers the right to bill prepaid service providers for calls made from their phones, even if required identification information was not passed to the prepaid provider. Of most concern is that this ruling could apply retroactively, even if the required signals were not received from the pay phone.

"If this ruling is affirmed by the full Commission, the impact will be the greatest on those who can afford it the least," said Gene Retske, Executive Director of APPPA. "Prepaid providers will have to pay for calls long after their ability to appropriately charge the customer who made the call."

Retske also said that, while the issue is mired in technical and legal language, if affirmed, the ruling will have the net effect of limiting access to payphones by the least affluent consumers. "This ruling will disproportionately impact the very consumer who needs access to discounted, high value international long distance services," added Retske.

The owner of one prepaid calling company, Ray Valmé, of Dial World Communications said that the average payphone charge is about $0.99 per call when using a prepaid phone card. He said that carriers would then have to budget an additional amount for retroactive payphone charges and build them into their ongoing payphone fee.

"Because prepaid phone service is sold through merchants, today's $0.99 payphone fee could increase to as much as $1.39 on a $5 calling card that affects 28% of the value, on a $3 calling card. That is 46% of the value," said Valmè.

APPPA is continuing to work with the FCC to resolve this issue in favor of the industry and its consumers.

About APPPA

The group of industry leaders represents the majority of the prepaid calling market in the U.S. and created an association to protect the industry's interests, good name and public trust by providing best practices, and to speak with one voice

for the industry and its consumers. Prepaid phone call providers who want more information about joining **APPPA** should contact Gene Retske, Executive Director, at (202) 370-7600 or by email, execdir@apppa.us