

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
FSH Communications, LLC, )
Complainant, )
v. ) File No. EB-09-MD-003
AT&T Corporation, )
and Global Tel\*Link Corporation, )
Defendants. )

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2012

Released: December 21, 2012

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order denies a formal complaint<sup>1</sup> filed by FSH Communications, LLC ("FSH") against Defendants AT&T Corporation ("AT&T") and Global Tel\*Link Corporation ("GTL") under section 208 of the Communications Act of 1934, as amended ("Act").<sup>2</sup> FSH alleges that Defendants are obligated, pursuant to the Commission's payphone compensation orders released between 1996 and 2000,<sup>3</sup> to compensate FSH for 0+ calls<sup>4</sup> placed from FSH's payphones at the "default" rate applying under those orders when there is no compensation agreement. FSH asserts that Defendants' failure to pay FSH this 0+ call default compensation violates sections 201(b) and 276(b) of the Act.<sup>5</sup> As explained below, we find that FSH's reliance on the 1996 to 2000 Payphone Orders is misplaced. The calls at issue were made between January 1, 2005 and December 31, 2008, and are

<sup>1</sup> Formal Complaint, File No. EB-09-MD-003 (filed Mar. 13, 2009) ("Complaint").

<sup>2</sup> 47 U.S.C. § 208.

<sup>3</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 20541 (1996) ("1996 Payphone Order"); Order on Reconsideration, 11 FCC Rcd 21233 (1996) ("Reconsideration Order"); Second Report and Order, 13 FCC Rcd 1778 (1997) ("1997 Payphone Order"); Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) (subsequent history omitted) ("1999 Payphone Order") (collectively referred to as the "1996 to 2000 Payphone Orders").

<sup>4</sup> "A 0+ call occurs when the dialer dials '0' and then the desired telephone number. 0+ calls include credit card, collect, and third-number billing calls." 1999 Payphone Order, 14 FCC Rcd at 2569, ¶ 53 n.90 (citations omitted).

<sup>5</sup> 47 U.S.C. §§ 201(b), 276(b). See, e.g., Complaint at 2-3, ¶¶ 1-2 & n.3, 5-6, ¶¶ 13-15, 14-15, ¶¶ 38-45, 23-24, ¶ 71; Reply of FSH Communications, LLC, File No. EB-09-MD-003 (filed Aug. 26, 2009) ("Reply") at 2-3 & n.4.

governed by the Commission's payphone compensation rules in effect at that time.<sup>6</sup> We find that the pertinent rules do not obligate carriers to pay default compensation for 0+ calls. Accordingly, we further find that Defendants' failure to pay 0+ default compensation does not violate sections 201(b) or 276(b) of the Act.

## II. BACKGROUND

### A. Factual Background

2. FSH is a payphone service provider ("PSP"). In August, 2004, FSH purchased from another PSP payphones located in various correctional facilities for use by inmates.<sup>7</sup> AT&T served as the presubscribed interexchange carrier ("PIC") for these prison phones from January 1, 2005 to June 1, 2005, and GTL served as the PIC for the phones for the remaining period at issue in the Complaint (June 1, 2005 through December 31, 2008).<sup>8</sup>

3. Most of the calls placed from FSH's prison phones were collect 0+ calls.<sup>9</sup> Because 0+ payphone calls are routed to the payphone's PIC,<sup>10</sup> the 0+ calls placed from these prison phones during the Complaint period were routed to AT&T or GTL.<sup>11</sup> At the time it purchased the prison phones, certain of the phones were subject to contracts that did not compensate the PSP for 0+ calls (the "Prison Payphones").<sup>12</sup> In its Complaint, FSH seeks default compensation for the 0+ calls placed from these Inmate Phones ("Inmate Calls").<sup>13</sup> FSH admits that it has a contractual right to compensation for 0+ calls placed from the remaining prison phones, and does not seek default compensation for those calls.<sup>14</sup>

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<sup>6</sup> The Commission released a series of payphone compensation orders after the *1996 to 2000 Payphone Orders*, which amended the Commission's payphone compensation rules. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 FCC Rcd 8098 (2001) (subsequent history omitted) ("*2001 Payphone Order*"); Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020 (2002) ("*2002 Payphone Order*"); Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 6347 (2002); Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002); Report and Order, 18 FCC Rcd 19975 (2003) ("*2003 Payphone Order*"); Order on Reconsideration, 19 FCC Rcd 21457 (2004) (subsequent history omitted) (collectively, with the *1996 to 2000 Payphone Orders*, referred to as the "*Payphone Orders*").

<sup>7</sup> See, e.g., Joint Statement of FSH Communications, LLC, AT&T Corporation, and Global Tel\*Link Corporation, File No. EB-09-MD-003 (filed Nov. 18, 2009) ("Joint Statement") at 7, ¶ 1; Complaint at 7, ¶ 19.

<sup>8</sup> See, e.g., Joint Statement at 7-8, ¶¶ 3-4; Complaint at 7-9, ¶¶ 20-24.

<sup>9</sup> See Joint Statement at 8 ¶ 6; Complaint Ex. 4 (McGuane Dec'n) at 2, ¶ 2.

<sup>10</sup> See *2002 Payphone Order*, 17 FCC Rcd at 2028, ¶ 21.

<sup>11</sup> See Joint Statement at 8, ¶ 6.

<sup>12</sup> See Joint Statement at 8, ¶ 9 ("at some point AT&T ceased making [payphone compensation] payments to FSH"); *id.* at 10, ¶ 17 (GTL did not pay per-call compensation to FSH for [Inmate Calls] ..."). An inmate PSP does not necessarily choose and contract directly with an inmate payphone's PIC, and is not necessarily compensated on a per-call basis. The governmental entity in charge of the correctional facility in which inmate payphones are located usually controls the phones and awards a contract to provide inmate payphone service to a prime contractor, which may be a PSP, a platform service provider, an IXC, or other entity. Compensation of the various parties involved in providing the inmate payphone service may take any number of forms, including per-call compensation or monthly commissions. See Reply of FSH Communications, LLC, File No. EB-09-MD-003 (filed Aug. 26, 2009), Dubay Dec'n at 2-3, ¶¶ 3- 5.

<sup>13</sup> See, e.g., Joint Statement at 9-10, ¶¶ 15-16; Joint Statement, Disputed Facts to be Proven by FSH, at 11, ¶ 2; Complaint at 8-9, ¶¶ 22-23, 10, ¶ 26; Reply at 6-9.

<sup>14</sup> See Joint Statement at 9-10, ¶¶ 14-16; Complaint at 10, ¶ 26; Reply at 6-9, 13. AT&T alleges that, pursuant to a master contract between AT&T and FSH, AT&T paid commissions to FSH compensating FSH for 0+ calls placed

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## B. Regulatory Background

4. Section 276(b)(1)(A) of the Act directs the Commission to “establish a per call compensation plan to ensure that all [PSPs] are fairly compensated for each and every completed . . . call using their payphone . . . .”<sup>15</sup> Section 276(d) of the Act defines “payphone” to include inmate payphones for the purposes of section 276.<sup>16</sup>

5. The Commission first addressed a section 276 payphone compensation plan in the *1996 Payphone Order*. In that order, the Commission determined that “once competitive market conditions exist, the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones.”<sup>17</sup> The Commission further decided that it would “take affirmative steps to ensure fair compensation” only “where the market does not or cannot function properly.”<sup>18</sup> Consequently, the Commission required carriers to compensate PSPs for completed calls “at a rate agreed upon by the parties by contract,” but also established a “default” compensation rate to be paid by carriers for certain kinds of completed calls “in the absence of an agreement.”<sup>19</sup>

6. In addressing a payphone compensation plan for 0+ calls, the Commission in the *1996 Payphone Order* focused on completed 0+ calls placed from Bell Operating Company (“BOC”) payphones, because the BOCs were subject to contracts, entered into prior to passage of the 1996 Act, that did not compensate them for 0+ calls (“Pre-existing contracts”). The Commission specifically found it necessary to provide 0+ default compensation to BOC PSPs because, in the absence of a contract providing for such compensation, BOCs might not otherwise receive fair compensation for 0+ calls. The Commission did not make such a finding with regard to non-BOC PSPs because these PSPs were able to contract with their payphone’s PIC for 0+ call compensation.<sup>20</sup> The Commission anticipated, however, that default compensation for BOC 0+ calls would not be indefinite because the Pre-existing contracts would eventually lapse and be replaced with negotiated compensation arrangements.<sup>21</sup>

7. The payphone compensation rules promulgated by the *1996 Payphone Order* state in relevant part as follows:

[E]very carrier to whom a *completed call* from a payphone is routed shall compensate the [PSP] for the call at a rate agreed upon by the parties by

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from at least some of the Prison Payphones as to which FSH’s Complaint seeks 0+ compensation. *See Answer of AT&T*, File No. EB-09-MD-003 (filed June 29, 2009) at 23-24, 34, ¶ 7 (“AT&T Answer”). FSH disagrees, arguing that, pursuant to the master contract, the commissions were paid to the site owner, not FSH. Reply at 6-9, 32-33.

<sup>15</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>16</sup> 47 U.S.C. § 276(d).

<sup>17</sup> *1996 Payphone Order*, 11 FCC Rcd at 20567, ¶ 49.

<sup>18</sup> *Id.*

<sup>19</sup> *See 1996 Payphone Order*, 11 FCC Rcd at 20722 (Appendix E), § 64.1300(a), (c).

<sup>20</sup> *1996 Payphone Order*, 11 FCC Rcd at 20569, ¶ 53.

<sup>21</sup> *See 1996 Payphone Order*, 11 FCC Rcd at 29547, ¶ 11; *Reconsideration Order*, 11 FCC Rcd at 21259, ¶ 51 n.209 (“[T]hese [pre-]existing contracts will lapse in the years ahead and will be replaced with contracts under which the BOCs [w]ill receive whatever compensation arrangement they negotiated with the respective location providers.”) The Commission also determined in the *1996 Payphone Order* that 0+ calls placed from inmate payphones would be treated in the same manner as 0+ calls placed from other payphones for the purposes of its payphone compensation plan. *1996 Payphone Order*, 11 FCC Rcd at 20579, ¶ 74. *Accord Reconsideration Order*, 11 FCC Rcd at 21259-60, ¶ 52, 21269, ¶ 72; *1997 Payphone Order*, 13 FCC Rcd at 1780, ¶ 2.

contract.... In the absence of an agreement..., the carrier is obligated to compensate the [PSP] at a per-call rate [established by the Commission].<sup>22</sup>

The 2001 *Payphone Order* amended the rule as follows:

[T]he first facilities-based interexchange carrier to which a *completed coinless access code or subscriber toll-free payphone call* is delivered by the local exchange carrier shall compensate the [PSP] for the call at a rate agreed upon by the parties by contract.... In the absence of an agreement..., the carrier is obligated to compensate the [PSP] at a per-call rate [established by the Commission].<sup>23</sup>

The 2003 *Payphone Order* further amended the rule, in language that remains in effect to date, as follows:

[A] Completing Carrier that *completes a coinless access code or subscriber toll-free payphone call* from a switch that the Completing Carrier either owns or leases shall compensate the [PSP] for that call at a rate agreed upon by the parties by contract.... In the absence of an agreement..., the carrier is obligated to compensate the [PSP] at a per-call rate [established by the Commission].<sup>24</sup>

### III. DISCUSSION

8. In its Complaint, FSH alleges that Defendants are obligated to pay FSH default compensation for the Inmate Calls pursuant to the *1996 to 2000 Payphone Orders*, and that Defendants' failure to do so violates the Act.<sup>25</sup> We find, however, that the Inmate Calls, which were all placed between January 2005 and December 2008, are governed by the rules that were in effect at the time the calls were placed, *i.e.*, the rules promulgated by the *2003 Payphone Order*, not the rules promulgated by the *1996 to 2000 Payphone Orders* cited by FSH. The relevant rules require carriers to pay default compensation solely for coinless access code and subscriber toll-free payphone calls, but not for 0+ calls.<sup>26</sup> Thus, the applicable rules, by their terms, do not obligate Defendants to pay FSH default compensation for the Inmate Calls.

9. In seeking to have the Commission apply to this case rules and requirements imposed in the *1996 to 2000 Payphone Orders*, FSH argues that the *2001* and *2003 Payphone Orders* only address compensation for access code and subscriber toll-free payphone calls, and that the Commission did not intend to alter the obligation to pay default compensation for 0+ calls imposed in the *1996 to 2000*

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<sup>22</sup> *1996 Payphone Order*, 11 FCC Rcd at 20722 (App. E), § 64.1300(a), (c); 47 C.F.R. § 64.1300(a), (c) (1996) (emphasis added).

<sup>23</sup> *2001 Payphone Order*, 16 FCC Rcd at 8111 (App. B), § 64.1300(a); 47 C.F.R. § 64.1300(a), (c) (2001) (emphasis added). The *2001 Payphone Order* was vacated for failure to provide proper notice and opportunity for comment. See *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003). The Circuit Court stayed its vacatur and mandate, however, through September 30, 2003. See *Sprint v. FCC*, 2003 WL 1877308 (D.C. Cir. 2003). The Commission addressed the Circuit Court's remand in the *2003 Payphone Order*. See *2003 Payphone Order*, 18 FCC Rcd at 19976.

<sup>24</sup> *2003 Payphone Order*, 18 FCC Rcd at 20018 (App. C), § 64.1300(b); 47 C.F.R. § 64.1300(b), (c) (2003 *et seq.*) (emphasis added).

<sup>25</sup> See Complaint at 2-3, ¶¶ 1-2 & n. 3, 14-15, ¶¶ 38-45. See also Reply at 2-3 & n.4. The Commission has held that failure to pay payphone compensation in accordance with the Commission's rules requiring such payment constitutes a violation of section 201(b) of the Act. See, e.g., *APCC Services, Inc. v. Radiant Telecom, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 8962 (2008); *Comtel of the South v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548 (2008).

<sup>26</sup> 47 C.F.R. § 64.1300 (2003) – (2006).

*Payphone Orders*.<sup>27</sup> As support, FSH points to a statement in a footnote in the *2001 Payphone Order* that 0+ calls were not at issue in that order.<sup>28</sup> We disagree, and find that FSH has misconstrued the Commission's intent in those subsequent orders. The *2001* and *2003 Payphone Orders*, and the rules adopted in those orders, make clear that the default compensation provisions no longer apply to calls other than coinless access code and subscriber toll-free payphone calls. The footnote cited by FSH does not override the clear statement of the Commission's intent, as evidenced by the unambiguous language of the rules promulgated by the *2001* and *2003 Payphone Orders*, to limit default compensation going forward to coinless access code and subscriber toll-free calls.<sup>29</sup> Thus, FSH's claim that the Commission intended for calls other than coinless access code and subscriber toll-free payphone calls to continue to be subject to default compensation is not supported by the Commission's orders and rules.

10. FSH argues further that the *2001* and *2003 Payphone Orders*, and the rules promulgated therein, cannot be construed to eliminate 0+ compensation because they do not contain a reasoned explanation for such a rule change.<sup>30</sup> We find, however, that the time for raising this type of procedural challenge to those orders and rules has long passed.<sup>31</sup> To the extent that FSH believes that the current rules are deficient, then the appropriate course of action would be to file a petition for rulemaking with the Commission.<sup>32</sup>

11. Finally, while not determinative, FSH cannot claim to be unfairly prejudiced by the Commission denying its Complaint. The default compensation rates for 0+ calls were originally adopted as a transition mechanism for BOC PSPs bound by Pre-existing Contracts; FSH is not a BOC and does not argue that the Prison Payphones are subject to Pre-existing Contracts.<sup>33</sup> What is more, FSH purchased the Prison Payphones in August 2004, long after the Commission ended that transition in the *2001* and *2003 Payphone Orders*.<sup>34</sup>

<sup>27</sup> See, e.g., Complaint at 6, ¶ 14, 16, n.18; Reply at 3, 24-26.

<sup>28</sup> See Complaint at 6, ¶ 14 and Reply at 25 (citing *2001 Payphone Order*, 16 FCC Rcd at 8104, ¶ 12 n.30 ("Other coinless payphone calls such as '0' (operator) and '411' (directory assistance) are not at issue in this clarification.")).

<sup>29</sup> See para. 7 *supra* (comparing 47 C.F.R. § 64.1300 (1996) (requiring carriers to pay default compensation for all completed calls in the absence of a compensation agreement) with 47 C.F.R. § 64.1300 (2001 *et seq.*) (requiring carriers to pay default compensation *only* for completed coinless access code or subscriber toll-free payphone calls in the absence of a compensation agreement)).

<sup>30</sup> Reply at 3, 26 (citing *Atchinson, Topeka & Santa Fe Rwy Co. v. Wichita Brd of Trade*, 412 U. S. 800 (1973) and *NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982)).

<sup>31</sup> See, e.g., *JEM Broadcasting Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (procedural challenges to agency regulations will not be entertained outside the statutory period for seeking direct judicial review of the order adopting the regulation).

<sup>32</sup> To the extent that FSH argues that the Commission's payphone compensation plan for 0+ calls fails to fulfill the Commission's obligations under section 271(d)(6) of the Act, see Reply at 25-26, FSH is incorrect. The Commission did not, in the *2001* and *2003 Payphone Orders* or elsewhere, eliminate all compensation for 0+ calls. Rather, the Commission merely changed its rules to eliminate *default compensation* for 0+ calls. See *supra* para. 7. Nor does the fact that AT&T may have paid compensation for certain 0+ calls placed from the Prison Payphones alter the Commission's 0+ compensation plan established in the *Payphone Orders* and rules. See Reply at 26-27; Joint Statement at 8, ¶ 8.

<sup>33</sup> See *supra* para. 6.

<sup>34</sup> See Joint Statement at 7, ¶ 2. Although at the time FSH purchased them, the Prison Payphones were subject to contracts providing no per-call compensation, FSH presumably was aware of this fact at the time, and thus could have (and, indeed, may have) protected itself by, for example, paying a reduced purchase price. Moreover, FSH has not established that it received no compensation for the Inmate Calls in place of per-call compensation, such as commissions. See AT&T Answer at 23-24, 34, ¶ 7 (alleging that FSH received commissions for the Prison

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12. Thus, we conclude that FSH has not demonstrated that Defendants violated the Commission's payphone compensation rules by failing to pay default compensation for the Inmate Calls, because the Commission's rules in effect at the time the Inmate Calls were placed do not provide for such compensation. We therefore also conclude that FSH has not demonstrated that Defendants violated sections 201(b) or 276(b) of the Act.

#### IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, that the Complaint is DENIED, and that THIS PROCEEDING IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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Payphones); Global Tel\*Link Corporation Answer File No. EB-09-MD-003 (filed June 29, 2009) at 27-28, ¶ 56  
(alleging that FSH was aware that it would not receive per-call 0+ compensation for certain Prison Payphones).