DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128.

Pay telephones (now commonly referred to as "payphones") continue to be a vital link for consumers during public safety events, such as Super Storm Sandy, and when mobile service is otherwise unavailable. Not all low-income consumers have had the opportunity to obtain phone service through the Commission's Lifeline program, so for them the availability of payphones remains a necessity in order to stay connected to employers, healthcare providers, friends, and family. Congress set forth a federal mandate for the Commission to ensure that the payphone market is competitive and that these telephones are widely available, and because I believe that the majority's decision is contrary to the pro-competitive, federal policy encapsulated in Section 276 of the Communications Act and the Commission's prior Orders implementing that policy, I respectfully dissent.

Historically, payphone services were provided by the local telephone company and regulated by the states. With the passage of the Telecommunications Act of 1996, Congress opened up the local telephone markets for competition and included the payphone market in its provisions. Specifically, in Section 276, Congress provided that the regional Bell operating companies (the "RBOCs") would no longer subsidize their payphone service with their other operations; that they would not discriminate against third party operators offering payphone service; and that the Commission would establish the necessary regulations to implement regulations "[i]n order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276 (a) & (b)(1). Furthermore, in order to advance competition and ensure widespread deployment of payphones, Congress directed the Commission to "take all actions necessary (including any reconsideration) to prescribe regulations that—establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every call . . . discontinue all intrastate and interstate payphone subsidies . . . [and] prescribe a set of nonstructural safeguards for [the RBOCs] . . . [that] at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding . . . ." *Id.* § 276(b)(1)(A)-(C). Finally, Congress prioritized this new federal policy for payphones by stating that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." *Id.* § 276(c).

In response to this new federal mandate, the Commission, through a series of Orders, implemented new payphone service policies to allow independent service providers to purchase payphone access lines from incumbents at reasonable prices so that competition would be promoted in the marketplace. In addition, the Commission instituted per call compensation requirements so that all payphone providers would be compensated when consumers use a payphone to reach third party providers. The FCC's *Initial Payphone Order* directed that all payphone tariffs be filed with the FCC and be treated "as a new service under the Commission's price cap rules" which is "necessary to ensure that central office coin services are priced reasonably" and "do not include subsidies." *Initial Payphone Order*, 11 FCC Rcd 20541, 20614 ¶ 146. The Commission further stated that "Section 276 specifically refers to the application of *Computer III* and *ONA* requirements, at a minimum for BOC provision of payphone services. Accordingly, we conclude that *Computer III* tariff procedures and pricing are more appropriate for basic payphone services provided by LECs to other payphone providers." *Id.* Similar to the statute, the Order provided that state requirements inconsistent with these regulations are superseded by the Commission's regulations. *Id.* at 20615 ¶ 147.

In the *Payphone Reconsideration Order*, the Commission directed carriers to file their intrastate payphone tariffs with state utility commissions, and it further explained how carriers should comply with

the new services test. *Payphone Reconsideration Order*, 11 FCC Rcd 21233, 21308 ¶ 163. They must be "(1) cost-based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory." *Id.* The *Payphone Reconsideration Order* further stated that "[s]tates must apply these requirements and the *Computer III* guidelines for tariffing such intrastate tariffs," citing FCC rule 61.49(g)(2), which requires forward-looking cost supportive data, and the Commission's *Open Network Architecture Order* that also describes forward-looking cost requirements. *See id.* at 21308 ¶ 163 & n. 492.[1] The Commission explicitly retained its jurisdiction to review intrastate tariffs where a state could not do so. *Id.* at 21308 ¶ 163. In a separate section of the *Payphone Reconsideration Order*, the Commission provided for dial-around compensation once a carrier was able to certify it had completed the requirements for implementing the new federal Section 276 regulatory scheme. *Id.* at 21293 ¶ 131. As part of its certification obligation, a carrier must certify its tariff rates were compliant with the new services test, *i.e.*, that they "reflect[ed] the removal of charges that recover the costs of payphones and any intrastate subsidies." *Id.* The *Order on Reconsideration* delegated authority to the Common Carrier Bureau to determine whether a LEC has complied with all the requirements for receiving dial-around compensation.

As the due date for compliance with the new requirements neared, the Common Carrier Bureau issued two consecutive waiver orders that extended the filing deadlines for the new tariffs. In both, the Bureau stressed the linkage between the dial-around compensation with incumbent carriers' compliance with the tariff requirements, and it reiterated the requirements for the tariffs. For example, in the *First Bureau Waiver Order*, it said "state tariffs for payphone services must be cost based, consistent with the requirements of Sections 276, nondiscriminatory, and consistent with the *Computer III* guidelines." *First Bureau Waiver* Order, 12 FCC Rcd. 20997, 21012, ¶ 31. It further stated that "the guidelines for state review of intrastate tariffs are essentially the same as those included in the *[Initial] Payphone Order* for federal tariffs." *Id.* 21012, ¶ 32. Also, the Bureau emphasized that "[t]he intrastate tariffs for payphone services, including unbundled features, and the state tariffs removing payphone equipment costs and subsidies must be in effect for a LEC to receive compensation in a particular state." *Id.* 21012, ¶ 33. In the *Second Bureau Waiver Order*, the Bureau extended the state tariff deadline beyond the dial-around compensation date, so that tariffs would be due on May 19, 1997, but dial-around compensation would begin on April 15. *Second Bureau Waiver Order*, 12 FCC Rcd 21370, 21374 ¶10. Again, the Bureau emphasized the requirement that the tariffs comply with the Section 276 and the Commission's requirements, although it had "delegated some of the tariffing requirements to the state jurisdiction." *Id.* 21374, ¶ 11. Relying upon the RBOC Coalition's commitment to reimburse or credit independent payphone providers where their rates would be lowered between April 15 and May 19 in order to come into compliance, the Bureau held that carriers "must reimburse it customers or provide them credit from April 15, 1997." *Id.* 21379-80, ¶ 20.

Specifically noting the concern of MCI that the subsidies from payphone services will not have been removed before the incumbents receive dial-around compensation beginning April 15, 1997, the Bureau noted that the waiver does not waive the requirement that subsidies be removed, and again stated that carriers will be required to reimburse their customers from the date when dial-around compensation begins. *Id.* 21379-80, ¶ 20. Rather than showing proof of the subsidy removal, the Commission permitted the carriers to certify to IXCs that they had done so. The Commission ordered the states to "act on the tariffs filed pursuant to this Order within a reasonable period of time," *id.* at 21379 ¶ 19 n. 60, but was silent as to whether the LECs, payphone service providers, or the Commission itself should take action if the states failed to conduct the inquiry required by the *Payphone Orders* and was similarly silent on a suggested process for regulators or payphone service providers to follow if carriers failed to submit the required tariffs and supporting documentation. Additional Orders dealing with intrastate tariffs in Wisconsin were released—the first one by the Bureau in 2000, and then the Commission in 2002. *Wisconsin Pub. Serv. Comm'n*; *Order Directing Filings*, CCB/CPD No. 00-01, Order, 15 FCC Rcd 9978

[1] If carriers' tariffs already met these requirements, then they had the option to rely upon them.

(CCB rel. Mar. 2, 2000); *Wisconsin Pub. Serv. Comm'n; Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) (collectively, the *"Wisconsin Payphone Orders"*). Both provided more specific information for states in their review of the intrastate payphone tariffs. After that additional guidance was provided, payphone rates were decreased in the five jurisdictions at issue in the case before us, and the question presented is whether Section 276 and/or the Commission's policies require refunds between April 15, 1997 when the incumbents began receiving dial-around compensation and the lowering of their rates after May 19, 1997.

The majority finds that based on the evidence before us, the Commission's Orders were followed and that refunds are not required, although it permits that the states may find that refunds are warranted based on their own reviews. In doing so, the majority believes that the states may rely on their own analysis and if under state law, refunds are not due then they are not required to issue them under federal law. The majority holds that there is a dual regulatory scheme under the statute, with both the Commission and states having roles, and declares that instead of one federal policy, the Commission delegated to the states the authority to consider whether refunds are appropriate. The majority also rejects the argument that the Commission's decisions clearly established the requirement that the intrastate tariffs be based on forward-looking cost methodologies. I disagree with these conclusions as discussed below.

Congress established a new federal policy for the payphone marketplace in the 1996 Act and directed the Commission to ensure that it was pro-competitive, including that the implicit subsidies in the RBOC phone rates would be extracted. With respect to intrastate payphone rates, the Commission delegated its tariffing responsibilities to the states, but Congress clearly contemplated one federal policy—not a dual regulatory scheme—to promote competition and the widespread deployment of payphones. The Commission has a responsibility to ensure that the state proceedings comply with the Section 276 and the federal policy for a pro-competitive market and widespread deployment of payphones. Overseeing its delegation is critical for ensuring compliance with Congress' directive. At no time, until the instant Declaratory Ruling and Order, has the Commission determined that it should not review the outcome of state proceedings when compliance issues have been raised. Indeed, the Commission's decision here to not review the state actions from 1997 to 2003 is troublesome in that regard, but also on several other scores. First, the Commission's Orders are clear that not only did the incumbents have to file their tariffs, but they had to comply with the statute, and the Commission's requirements that they be cost-based, nondiscriminatory, and consistent with *Computer III*. While the majority is satisfied with that compliance, I am not—(more on that point in a moment.) Second, many states followed the new federal policy and implemented the statutory and Commission requirements faithfully, ensuring that in those states the pro-competitive requirements Congress directed and that the Commission required, were met. By abdicating its responsibility to oversee its delegation and to ensure the state proceedings are consistent with the statute and the Commission's requirements, the Commission cannot ensure that there is one federal policy that is fulfilling Congress' pro-competitive goals in payphone marketplace.[2]

I believe the Commission's *Initial Payphone Order* and *Order on Reconsideration* were clear that in filing cost-based tariffs that such tariffs had to meet the new services test and be based on forward-

[2] The majority asserts that their decision is consistent with the *Wisconsin Reconsideration Order*, "in which the Commission denied the Wisconsin Pay Telephone Association's request for the Commission to evaluate all cost support materials submitted by Ameritech and Verizon and determine an appropriate payphone line rate for the state of Wisconsin." *See* para. 45, *citing Wisconsin Public Service Commission, Order Directing Filings*, CCB/CPD No. 00-1, Order on Reconsideration, 21 FCC Rcd 7724 (2006) . That Order is inapposite, as the state regulatory body had reversed its initial decision and found that it had the jurisdiction to review the intrastate tariffs and was in process of doing so, and the Commission said it would not interfere with that process. Here, the petitioners are asking that the Commission review the state *decisions* with respect to payphone rates and whether refunds are warranted under Section 276 and the Commission's Payphone Orders.

looking cost methodologies. First, the *Computer III* and *ONA* proceeding requirements are cited in both Orders. Second, in the *Order on Reconsideration*, the Commission cites both FCC rule 61.49(g)(2) and the *Open Network Architecture Order*. Third, the *Second Bureau Waiver Order* states that the filing guidelines for state tariffs "are essentially the same" as federal tariffs. All of these proceedings and rule cited relied upon forward-looking cost supportive data. Where RBOCs did not file cost-based tariffs using forward-looking cost methodologies by May 19, 1997, they were not in compliance with the Commission's Orders. No RBOC should be excused from this requirement at this late date by this Commission or any state regulatory commission. Not only is that outcome inequitable for independent payphone operators and consumers, it is a disservice to those states that followed the Commission's requirements. The fact that carriers adjusted their rates after the Commission's 2002 Wisconsin Payphone Order is evidence that these carriers' tariffs were not cost-based and did not rely upon forward-looking cost methodologies by May 19, 1997. While the Commission provided more specific guidance about the types of forward-looking cost methodologies that would be appropriate and how they should be used in the Wisconsin Payphone Orders, incumbents' earlier obligations were not altered so that they no longer had to comply with the Commission's previous Payphone Orders.

Those not in compliance with the new services test by May 19, 1997 benefitted from receiving dial-around compensation, contrary to the Commission's stated policy that such compensation is only available once carriers complied with the market-opening provisions of Section 276. In both Waiver Orders, the Bureau determined that it was not waiving the requirement that the tariffs meet the new services test, only that it was allowing additional time for the tariff filings. In fact, it stated in those Orders that the incumbents' tariffs must still meet the other requirements to remove subsidies, be nondiscriminatory, and consistent with *Computer III*. Moreover, in the *Second Bureau Waiver Order*, the Bureau gave assurances to competitors that refunds would be forthcoming where the tariffed rate is lowered. Today's decision finds that the *Second Bureau Waiver Order* was time-limited to when the tariffs were filed on May 19, and by doing so, removes the condition that the tariffs actually comply with the statute and the Commission's requirements as of May 19. I cannot agree that we should interpret the *Second Bureau Waiver Order* in this manner. The obligation to refund did not cease on May 19, which is why other states, including the South Carolina PSC, ordered refunds after that date when they completed their reviews of the tariff filings to ensure that they complied with the Commission's new services test.

Moreover, I disagree that it is appropriate for states to consider whether other principles, such as the filed rate doctrine, trump the underlying tariff requirements in Section 276 and the Commission's requirements. As discussed above, it is the Commission's responsibility to ensure that the statute and the FCC's requirements have been met. It is appropriate for the Commission to consider these other issues itself. Indeed, several courts have held that the filed rate doctrine cannot be used as a defense to the tariff filing requirements themselves. *See, e.g.*, *TON v. Qwest*, 493 F.3d 1225, 1236-37 (10th Cir. 2007); *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1085 (9th Cir. 2006). We have no assurances that consideration of these issues will result in a satisfactory outcome that is consistent with Congress' direction in Section 276 and judicial precedent; thus, I do not agree with the majority on this point.

To the extent that states are reviewing compliance and considering the majority opinion and my opinion, which I hope they will, and should they disagree with my interpretation of the statute and the Commission's Orders, I would like them to consider the equities. The incumbents clearly were instructed to remove the implicit subsidies in their payphone rates in order to obtain dial-around compensation in 1997. Where they did not do so for five years, it is inequitable and unjust that they received both dial-around compensation and unreasonable rates from independent payphone providers. Accordingly, they should be required to refund excessive rates.

Finally, I think it is important for us to consider why the implementation of the 1996 Act's pro-competitive goals are important—even at this late date of February 2013. Consumers benefit when there is competition. In this instance, where carriers can avoid the market opening provisions of the Act by

keeping rates high and hampering their competitors, consumers are not served and the pro-competitive goals of the Act are unfulfilled. For five years in these five states, the marketplace for payphones was impacted, and consumers did not receive all the benefits that Congress intended.