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February 15, 2001

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Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

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01 FEB 16 AM 9:53
RECORDS AND REPORTING

Re: Docket No. 001762-TC

Dear Ms. Bayó:

Enclosed for filing in the above-styled docket are the original and seven (7) copies of the Florida Public Telecommunications Association, Inc.'s Analysis of the Legal Authority of the FPSC to Impose Restrictions on the Location of Pay Telephones. Also enclosed for filing in the same docket are the original and seven (7) copies of the Florida Public Telecommunications Association, Inc.'s Comments on Staff's Proposed Changes to Pay Telephone Rules.

An extra copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me.

Thank you for your assistance with this filing.

Sincerely,

Angela B. Green
General Counsel

Enclosures

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cc: Ms. Mary Anne Helton, Esquire
Ms. Felicia Banks, Esquire
Mr. Richard Moses
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Analysis
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FPTA'S ANALYSIS OF THE LEGAL AUTHORITY OF
THE FPSC TO IMPOSE RESTRICTIONS ON
THE LOCATION OF PAY TELEPHONES

The Federal Telecommunications Act of 1996, 47 U.S.C. Section 251 et seq. ("FTA"), dramatically changed the structure and regulation of the telecommunications industry in the United States. By opening the local telecommunications market to competition and mandating the competitive provision of all telecommunications services, the FTA has become the legal foundation for the industry. The FTA preempts all state and local statutes and regulations that contradict its provisions.

At 47 U.S.C. Section 253, the FTA provides:

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

It is clear from the above language that states may regulate telecommunications providers in order to provide for universal service, to protect consumers, to ensure quality, and to protect the public safety and welfare. However, unless the state has explicitly delegated some of its

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authority to local government, local governments may only act to manage the public rights-of-way and to collect fair and reasonable compensation for the use of their rights-of-way. There has been no such delegation of authority by the State of Florida to local government that would in any way grant to local government any regulatory authority beyond the provisions referred to in Section 253 of the FTA. The Florida Public Service Commission (“FPSC”) has formally agreed with this view by filing an *amicus curiae* brief in a recent federal lawsuit filed by the Florida Public Telecommunications Association (“FPTA”) against the City of Miami Beach. The FPSC previously adopted this view in another lawsuit filed by the FPTA against the Town of Lake Park in the 15th Judicial Circuit in Palm Beach County, Florida. In that suit, the FPTA obtained an injunction against enforcement of Lake Park’s ordinance banning outdoor pay telephones on private property. FPTA had sought declaratory relief that would have declared the ordinance invalid as preempted by the FPSC’s obligation and authority to provide access to telecommunications services to all citizens of the State of Florida. Subsequently, the Town of Lake Park withdrew its ordinance, rendering FPTA’s lawsuit moot. At the present time, the FPTA has a Motion for Summary Judgment pending in federal court in its lawsuit filed against the City of Miami Beach. The City has enacted a voluntary moratorium against enforcement of its ordinances during the pendency of the lawsuit.

Section 364.01(2), Florida Statutes, grants the FPSC exclusive jurisdiction to regulate services provided by telecommunications companies. Pursuant to Section 364.3375, Florida Statutes, this includes services provided by payphone service providers (“PSPs”). Section 364.3375 requires that providers of pay telephone service must obtain a certificate of public convenience and necessity from the FPSC prior to providing such services. That section also sets forth a number of service standards that must be adhered to by PSPs.

Section 364.01(2) clearly states that the FPSC's exclusive jurisdiction to regulate services provided by telecommunications companies, including PSPs, preempts any local or special act or municipal charter where any conflict of authority may exist. However, this preemption does not affect the authority and powers granted in Section 166.231(9), Florida Statutes, or Section 337.401, Florida Statutes. Section 166.231(9) grants municipalities the authority to impose, by ordinance, a tax on the purchase of telecommunications services as defined in Section 203.012, Florida Statutes. In addition, Section 364.0361, Florida Statutes, states that local government shall treat each telecommunications company in a nondiscriminatory manner when exercising its authority to grant franchises or to otherwise establish conditions or compensation for the use of rights-of-ways or other public property by a telecommunications company.

Section 337.401 provides that the Florida Department of Transportation ("FDOT") and local governmental entities (together referred to as "the authority"), may prescribe reasonable rules or regulations with reference to placing and maintaining telecommunications facilities along, across, or on any road or publicly owned rail corridors. Section 337.401(2) further provides that the authority may grant a utility permission to use a right-of-way in accordance with rules or regulations it may adopt. This section further states that no utility shall be installed without prior written permission from the authority. Section 337.401 (6) states that a local governmental entity may not use its authority over the placement of facilities in its roads and rights-of-way as a basis for asserting or exercising regulatory control over a telecommunications company regarding matters within the exclusive jurisdiction of the FPSC or the Federal Communications Commission ("FCC").

As indicated above, the FDOT and local governments are given authority to enact reasonable rules and regulations regarding the use of rights-of-way. Also as indicated above,

Section 364.0361 states that local government shall treat each telecommunications company in a nondiscriminatory manner when exercising its authority to grant franchises or to otherwise establish conditions or compensation for the use of the rights-of-way or other public property by a telecommunications company.

It is clear that the FTA has caused dramatic changes in the telecommunications industry including, most significantly, ending the local exchange companies' monopoly for the provision of local exchange telecommunications services that had existed prior to the FTA's passage. The FTA preempts all state and local governmental law inconsistent with its provisions. Subsequent to the passage of the FTA, several companies and industry groups have challenged local ordinances as being invalid on the basis of federal and state preemption of the regulation of telecommunications services. Some of the challenges have been made before the FCC and some have been filed in federal court. The decisions resulting from those challenges give critical insight into the authority of the FPSC to regulate pay telephone services.

In 1997, the California Payphone Association ("CPA") filed a petition before the FCC challenging the legality of an ordinance that completely banned the placement of outdoor pay telephones on private property in the central business district of Huntington Park, California. The petition filed by the CPA stated that Huntington Park's ordinance should be preempted by the FCC on the basis of its violation of several provisions of the FTA. The FCC determined that the ordinance should not be preempted because the record in the proceeding before the FCC did not establish that Huntington Park's ordinance completely prohibited viable competition by pay telephone companies in Huntington Park's central business district. While at first this decision appears unfavorable to the pay telephone industry, upon further examination, it becomes clear that the FCC felt seriously constrained by the lack of sufficient information in the record before

it. The FCC continually related all of its findings in terms of the record before it, leading the reader to believe that it is necessary to show without equivocation that an ordinance is either prohibiting or has the effect of prohibiting a telecommunications company from providing service in order for the FCC to exercise its preemptive powers. However, as seen below, the courts have been less tentative than the FCC in interpreting the FTA.

In *AT&T vs. City of Austin*, 975 F.Supp. 928 (W.D. Tex. 1997), the U.S. District Court enjoined the City of Austin from enforcing its ordinance requiring AT&T to obtain municipal consent prior to operating as a local provider in Austin. AT&T's most persuasive argument, according to the court, was its FTA preemption claim. The court found that Section 253(a) of the FTA "proscribes state or local statutes, regulations, or legal requirements that 'may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.'" The court found that the Texas Public Utilities Commission has the exclusive authority to grant a telecommunications company a certificate of authority to provide local telephone services. The court went on to conclude that the local ordinance "turns our federal system on its head by allowing the City, rather than the State, to be the final authority regarding who can and cannot provide service in a particular locality." According to the court, the City's only legitimate interest under federal and state law was "to regulate its public rights-of-ways."

In *AT&T vs. City of Dallas*, 8 F.Supp.2d 582 (N.D. Tex. 1998), the court granted AT&T's request for an injunction against the City of Dallas' enforcement of its franchise ordinance. The City's ordinance required that a substantial amount of information be provided and reviewed by the City before AT&T would be allowed to provide certain services in the City's rights-of-way. In overturning the City's ordinance, the court held that the City had very

limited authority to inquire into anything other than AT&T's willingness to comply with reasonable regulations of the right-of-way and to pay reasonable fees for such use.

In *BellSouth vs. City of Coral Springs*, the U.S. District Court for the Southern District of Florida issued a declaratory ruling striking down numerous portions of the City's ordinance that went beyond management of the rights-of-way and reasonable compensation for their use. The Court found that provisions of the City ordinance that required telecommunications providers to submit financial, technical, and legal qualifications to the City as a condition of obtaining a franchise were preempted by both state and federal law, as were conditions requiring providers to comply with the City's universal service plan. The Court only upheld those narrow portions of the ordinance that were properly within the scope of managing the rights-of-way.

Based upon the various authorities set forth above, it is quite clear that no state or local government could possibly have the authority to completely forbid pay telephones in any location. As telecommunications companies duly certificated by the FPSC to operate statewide in Florida, PSPs may not then be prohibited from providing pay telephone services on a general basis. Of course, a PSP wishing to provide service within a public right-of-way can be required to obtain prior approval from local government and then submit to the local government's reasonable regulation of its rights-of-way, including being required to pay reasonable compensation for such use. However, any across-the-board prohibition against pay telephone companies, as a class, is clearly not permitted by the FTA or under the laws of the State of Florida.

The FTA does allow the State to impose, on a competitively neutral basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Read in harmony with the provisions contained in Section 364.01(2), the FPSC most certainly possesses the authority to impose restrictions on the placement of pay telephones, including restrictions on their placement on private property, so long as such restrictions are necessary to protect the public safety and welfare, ensure the continued quality of telecommunications services, or safeguard the rights of consumers. If these requisite findings are made by the FPSC, then reasonable restrictions can be imposed on the placement of pay telephones.

The Bert J. Harris, Jr., Private Property Rights Protection Act, Section 70.001 (“the Act”), does not, on the whole, appear to constitute an impediment to the FPSC’s ability to impose reasonable restrictions on the placement of pay telephones on private property, provided that those restrictions are designed to protect public safety and welfare, ensure the continued quality of telecommunications services, or safeguard the rights of consumers. However, if the FPSC were to promulgate rules prohibiting placement of pay telephones in certain locations, then installed pay telephones in non-conforming locations might have to be “grand-fathered.” This possibility in and of itself should not in any way deter the FPSC if it concludes that certain locational restrictions are in the public interest. The existence of a small number of pre-existing non-conforming locations would not constitute a serious barrier to the overall effectiveness of the FPSC’s regulatory goals. It should also be noted that a court might not interpret the inability of a property owner to maintain a pay telephone on a particular type of property as an “inordinate burden” in that this might not, standing alone, result in the owner being

permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

Section 70.001(3)(e). For example, if the FPSC were to enact a rule which prohibited placement of pay telephones outdoors in single-family residential neighborhoods, this restriction would not likely rise to the level of burden envisioned by the statute as this would arguably have little impact on a property owner's reasonable, investment backed expectation for the use of a single-family residential property. A different result might obtain, however, if the FPSC were to bar installing pay telephones at certain type of commercial establishments. At least the equities would be much stronger in such a scenario.

In conclusion, the FPTA is not aware of any barrier that would prevent the FPSC from enacting reasonable restrictions on the placement of pay telephones, so long as those restrictions are competitively neutral and are necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, or safeguard the rights of consumers. Within these parameters, the FPSC is, in fact, the only body within the State of Florida that has such authority.