

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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)	
In the Matter of)	
)	CC Docket No. 96-128
Implementation of the Pay Telephone)	
Reclassification and Compensation)	
Provisions of the Telecommunications Act of)	
1996)	
)	
Independent Payphone Association Of New)	
York's Petition For Pre-Emption And)	
Declaratory Ruling Concerning Refund Of)	
Payphone Line Rate Charges)	
.)	

**COMMENTS OF THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL AND
THE MINNESOTA INDEPENDENT PAYPHONE ASSOCIATION,
IN SUPPORT OF PETITION FOR A DECLARATORY RULING**

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The Northwest Public Communications Council and the Minnesota Independent Payphone Association (“Associations”) support the petition of the Independent Payphone Association Of New York (“IPANY”) for a declaratory ruling.¹

Apart from ensuring that IPANY members receive the refunds they are due, it is critically important for two policy reasons that the Commission grant the IPANY petition. First, if the Commission fails to effectively enforce its orders and policies, that will give all the companies it regulates strong incentives to "see what they can get away with." Second, regrettably Verizon is not the only RBOC that delayed compliance with the Commission's New Services Test ("NST") pricing requirements for seven years by using and *abusing* state regulatory and appellate processes. Like Verizon, Qwest delayed NST compliance from 1997 until 2002, 2003—and beyond—and steadfastly refused to refund the millions of dollars it overcharged the Associations' members for all those years. The Qwest state commissions and appellate courts could benefit greatly from the FCC's proper interpretation of its orders that would result from granting IPANY's petition

I. GRANTING IPANY'S PETITION WOULD ENSURE THAT REGULATED COMPANIES DO NOT GET THE MESSAGE THAT IGNORING OR MISINTERPRETING COMMISSION ORDERS CAN BE REWARDING.

In deciding whether to address and grant IPANY's petition, the Commission needs to ask, what message does it want to send to the RBOCs and other companies it regulates? Like the IRS, the FCC relies almost entirely on voluntary compliance with its rules and orders by the industries it regulates. These industries are both savvy and motivated by their own financial interests. If they perceive that the Commission will allow them to delay or

¹ The Associations also support the petitions of the IPTA and the SPCA, filed earlier in 2004. The Associations filed comments on the IPTA petition on August 26, 2004, which are incorporated herein by reference in further support of the IPANY petition.

avoid entirely the implementation of Commission's *Payphone Orders*² that have a negative financial impact, they will behave accordingly in the future. That is precisely the situation implicated by the IPANY petition.

Verizon, Qwest, and the other RBOCs were ordered to file or seek approval of their payphone access line ("PAL") rates with the states in early 1997. Rather than file the substantial rate reductions that the NST required, Qwest and Verizon instead decided to first ignore the NST or to mislead state commissions regarding the requirements of the NST. Later they decided to challenge the Commission's interpretation of the NST and its authority to require cost-based tariffs—a battle the RBOCs lost. *New England Public Comm. Coun. v. F.C.C.*, 334 F.3d 69, 72-74 (D.C. Cir. 2003) (explaining the tortured history of those challenges).³ Thus, through artful dodging and direct and collateral challenges to the Commission's orders that continued until 2003, the RBOCs enjoyed at least six years of unlawful and excessive rates at the expense of their payphone service provider ("PSP") competitors. If the RBOCs are not ordered to pay refunds retroactive to April 15, 1997, they will succeed in benefiting from either their intentional violation of the Commission's orders or (to be charitable) their erroneous interpretation of those orders.

² *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) ("First Payphone Order"), and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 ("Payphone Reconsideration Order") *aff'd in part and remanded in part sub nom. Illinois Public Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("Waiver Order"); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("Refund Order") (collectively "Payphone Orders").

³ On May 13, 2002, Qwest, along with other RBOCs and LECs, definitively lost their second facial challenge to the FCC's authority to require state commissions to establish cost-based tariffs. *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467 (2002).

Whether the RBOCs intentionally twisted the Commission's orders or acted in good faith, the signal that denying refunds would send is the same. There is huge benefit to be gained from "seeing what you can get away with" and no downside. Even a refund order is a relatively mild remedy. It has no punitive element whatsoever. It merely restores the PSPs and RBOCs to the financial position that the Commission intended all along would exist effective April 15, 1997.

II. OTHER RBOCS SUCH AS QWEST CONTINUE TO TRY TO USE STATE LAW PRINCIPLES TO CONVINC STATE COMMISSIONS TO DENY THE REFUNDS THAT THIS COMMISSION ORDERED.

A. Like Verizon, Qwest fought NST-compliant PAL rates and now fights the Commission ordered refunds.

The Associations fully support the IPANY petition because they understand first hand how difficult it is to force an RBOC to comply with the NST at a state commission. The RBOCs simply did not or do not want to file compliant rates. Now they do not want to issue refunds. Unfortunately, as this Commission has noted in the past, state commissions have struggled to interpret and enforce the Commission's *Payphone Orders*.⁴ The Commission's *Wisconsin Order* was invaluable to the states in getting some of the RBOCs, such as Qwest, to finally comply with the NST. But Qwest and others continue to fight refunds, tooth and nail, using many of the same state laws and procedures that they used to delay NST compliance for so many years. Qwest's actions in Oregon, discussed below, are a prime example.

⁴ *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, 17 FCC Rcd. 2051, ¶ 2 and Note 10 (Jan. 31, 2002) (“*Wisconsin Order*”) *aff’d sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

The RBOCs need the Commission to tell them—*again*—that they must pay refunds from the date of compliance with the NST back to April 15, 1997. Hopefully the RBOCs will stop fighting refunds in the states and will voluntarily comply. If not, at least the FCC's order will provide helpful guidance to the state commissions and appellate courts, which are still struggling with the RBOC's arguments that misinterpret the letter and spirit of the Commission's orders.

B. Verizon's arguments to the New York tribunals that are contrary to the Commission's orders are similar to Qwest's ongoing arguments to the Oregon PUC to disregard Federal law and follow state law.

The tortured path the Payphone Service Providers ("PSPs") have been forced to travel in New York seems almost too incredible to be anything but a bad fiction novel. Yet it is virtually the same path that PSPs in Oregon have had to take. Like the PSPs in New York, PSPs in Oregon have had to contend with delays and continual litigation against Qwest from 1996 to date—over eight years—to get Qwest to comply with the NST. As Verizon misled the New York PSC, Qwest for years misled the Oregon PUC on application of the Commission's *Payphone Orders* and NST. Finally, on November 10, 2004, the Oregon Court of Appeals put an end to Qwest's artful dodging, reversing the OPUC for its failure (at Qwest's strong urging) to follow federal law.⁵

While the OPUC has yet to approve a PAL rate for Qwest as complying with the NST—nearly eight years after Qwest was supposed to have complied with it—indications are that Qwest over charged PSPs for PAL service by between \$20 and \$50 per line per month

⁵ *Northwest Public Comm's Council v. PUC*, 196 Ore. App. 94, 100 P.3d 776 (2004). The time for Qwest to further appeal has run, making the decision final. However, the case will still have to be remanded to the OPUC for a final determination of compliant Public Access Line (PAL) rates. Thus, when this matter is finally concluded, it will have been eight or more years that Qwest's compliance with the NST will have been delayed in Oregon from the FCC's intended implementation date of April 15, 1997.

from April 15, 1997 through March 2003. In 1997 Qwest charged up to \$60 per month or more⁶ for PAL service. For most of 1998 to 2003, Qwest charged about \$30 for PAL service. In 2003, Qwest slashed its Oregon PAL rate to under \$10, alleging that the new rate complied with the NST. Thus, for seven years Qwest charged PSPs three times to six times the rate it should have been charging under the NST.

While the PSPs in Oregon are finally on the brink of obtaining an order from the OPUC that establishes what Qwest's PAL rates must be and should have been to comply with the NST, Qwest steadfastly refuses to honor its obligation to pay refunds once the rates are set. In a pending motion for summary judgment on the refund issue,⁷ Qwest argues at length to the OPUC that the OPUC should follow the decision of the New York PSC and courts. The rest of Qwest's brief argues the same faulty rationale that the New York tribunals used to deny refunds. For example, Qwest argues that "Oregon law" prohibits a refund. Qwest argues that state law principals of "filed rate doctrine," "res judicata," and "standing" bar the NPCC from enforcing federal law requiring refunds. These state-law based defenses should have no relevance to the state proceedings relating to NST-compliance and refunds because of Federal pre-emption. As the NPCC and MIPA discussed in their August 26, 2004 comments in this docket, state laws (including state tariffs) that frustrate or block implementation of Section 276 and the FCC's orders were expressly pre-empted by Congress and the FCC.

⁶ Until late 1997, Qwest imposed mandatory measured service on PSPs in Oregon with exorbitant usage charges, meaning that there was almost no upward limit to the PAL rate.

⁷ The NPCC's refund complaint is a separate docket from Qwest's rate case. The NPCC has sought a partial summary judgment on liability only, with refunds to be determined after the OPUC sets a final PAL rate on remand from the Court of Appeals.

Even though Qwest's years of reliance on state law doctrines that Congress and this Commission pre-empted was struck down just two months ago by the Oregon Court of Appeals as to going-forward PAL rates, on refunds Qwest is once again trying to lead the OPUC astray. Qwest is misinterpreting this Commission's orders and urging the OPUC to apply state law doctrines to override the Commission's orders. The Commission's guidance on NST compliance going forward was extremely helpful to the states. In Qwest's 14 states, the *Wisconsin Order* led to PAL rate reductions averaging about 50% to as much as about 70% within a year after the order was issued. By giving guidance on refunds, the Commission might similarly help to bring resolution to this contentious issue within a reasonable timeframe.

In short, IPANY's problems with Verizon are not unique. The NPCC trusts that OPUC will not so easily be led astray by Qwest after so recently having been reversed by the Court of Appeals. And the NPCC will continue to litigate against Qwest in Oregon for as long as necessary. However, without FCC guidance, that could be a long time. Assuming the NPCC prevails at the OPUC on refunds, Qwest is likely to appeal, since Qwest has shown no sign of relenting and Qwest's refund obligation is estimated to be in excess of \$6 million in Oregon. Accordingly, the NPCC believes that if this Commission grants IPANY's petition, it would be very helpful in ensuring that refund disputes in Oregon and other states are resolved quickly. Possibly Qwest would finally relent based on clear guidance from the Commission. At a minimum, the Oregon PUC and courts would be able to quickly (and correctly) dispense with Qwest's spurious arguments.

III. QWEST'S AND VERIZON'S ARGUMENTS THEY DID NOT "RELY" ON THE WAIVER ORDER COMPLETELY MISCONSTRUE THE ORDER AND FRUSTRATE THE COMMISSION'S GOAL OF ELIMINATING DISCRIMINATION AS REQUIRED BY SECTION 276.

The New York court agreed with Verizon that Verizon did not rely on the *Refund Order* because Verizon failed to file new PAL rates between April 15 and May 19, 1997. Qwest is currently making the same argument in Oregon. This interpretation thwarts the Commission's essential purpose of implementing Section 276 in its *Payphone Orders*. Specifically, the Commission intended that all the financial provisions of the *Payphone Orders* were to be in place *effective* on April 15, 1997. The NST pricing requirement was an essential part of the entire scheme. Unless and until the RBOCs priced their PAL services based on cost—as established under the NST—the RBOCs would be continuing to discriminate against the PSPs in violation of Section 276(a)(2) and (b)(2)(C).

In order to ensure that the RBOCs took their obligations under the NST seriously and would comply with the pricing requirement, the Commission made compliance with the NST an express prerequisite to receiving dial around compensation ("DAC"). The *Waiver Order* and the *Refund Order* were not intended to upset this important balance and incentive scheme. Rather, the FCC "emphasized" that compliance in fact with the NST remained a prerequisite to the RBOC's entitlement to DAC. *Waiver Order*, ¶ 30 and *Refund Order*, ¶ 10. Since Verizon failed to file NST compliant rates by April 15, 1997, the only way that the Commission can ensure that Verizon's PAL rates in New York complied with the NST effective on April 15, 1997, is to grant IPANY's petition and order refunds retroactive to that date.

The RBOCs all started collecting DAC on April 15, 1997 based on the premise that payphone providers would not be harmed:

[C]ompeting PSPs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above – which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up – will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

RBOC Coalition Waiver Request Letter, April 11, 1997 (emphasis added). The effect of denial of refunds is to render this promise hollow and unfulfilled. Again, using Oregon as an example, Qwest will have charged its PSP competitors a rate of up to six times or more the rate it charged itself in 1997. From 1998 through 2003, Qwest will have charged itself three times the rate it charged itself. Discrimination of such a magnitude, for so many years, cannot possibly be reconciled with the RBOC's assertion that the PSPs "would not be placed at a disadvantage" due to the waiver. Only by ordering refunds can the discrimination be ameliorated.

The interpretation of what it meant to rely on or "take advantage" of the *Waiver Order* advocated by Qwest and Verizon and adopted by the New York Court of Appeals prevents implementation of key provisions of Section 276 of the Act until many years after April 15, 1997, in contravention of all of the Commission's *Payphone Orders*. The only interpretation of the *Refund Order* that will have the effect of timely implementing Section 276 is that an RBOC that did not have NST-compliant rates on April 15, 1997 but began collecting DAC effective on that date, "relied" on the *Refund Order* and must pay refunds retroactive to that date whenever new tariffs first found to comply with the NST take effect.

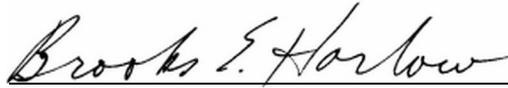
CONCLUSION

It is time for the FCC to end Qwest's and Verizon's charade. The Commission should ensure uniform enforcement of its *Payphone Orders* by declaring that RBOCs must

either refund to PSPs any rates in excess of the lawful rates or to return illegally collected dial around compensation, retroactive to April 15, 1997.

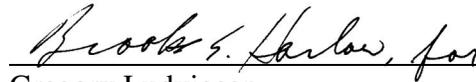
DATED this 18th day of January, 2005.

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CERTIFICATE OF SERVICE
CC Docket 96-128

I hereby certify that I have this day caused to be mailed by U.S. Mail, postage prepaid a true and correct copy of the Comments Of The Northwest Public Communications Council And The Minnesota Independent Payphone Association, In Support Of Petition for a Declaratory Ruling addressed to the following:

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Dated this 18th day of January, 2005.



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