

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)	
)	
Implementation of the Pay Telephone)	
Reclassification and Compensation Provisions)	CC Docket 96-128
of the Telecommunications Act of 1996)	
)	
Petition of the Independent Payphone Association)	
of New York, Inc. to Pre-empt Determinations of)	
the State of New York Refusing to Implement the)	
Commission's Payphone Orders, and For a)	
Declaratory Ruling)	

REPLY COMMENTS OF THE
ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION

The Illinois Public Telecommunications Association (“IPTA”) hereby replies to the comments of BellSouth Telecommunications, Inc., SBC Communications, Inc. and the Verizon Telephone Companies (collectively “RBOCs”) and the New York Department of Public Services (“NYDPS”) filed in opposition to the Petition of the Independent Payphone Association of New York (“IPANY”) for a declaratory ruling to enforce the Commission’s orders implementing Section 276 of the Telecommunications Act of 1996.

The RBOCs and NYPDS ask this Commission to reject the IPANY Petition on the basis of claim preclusion (res judicata) and issue preclusion (collateral estoppel).¹ They argue that the implementation and enforcement of the Commission’s *Payphone Orders*² and the *Wisconsin*

¹ RBOCs at 10-16; NYDPS at 1-3.

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 Pubic 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) (“*Bureau Waiver Order*”); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) (“*Bureau Clarification Order*”) (collectively “*Payphone Orders*”).

*Orders*³ has been determined by the New York administration agency and the state courts and should not be subject to further review by the Commission regarding the enforcement of its orders. The NYDPS ruled that it need not apply the *Bureau Wisconsin Order* in determining whether Verizon complied with Section 276 of the Federal Communications Act as amended by the Telecommunications Act of 1996⁴ (“1996 Telecom Act”). This order was appealed to the New York Supreme Court, the state trial court, which failed to apply either the *Bureau Wisconsin Order* or the *Commission Wisconsin Order*. However, the state court did find other grounds for remand and further found that, should the correction of those errors result in lower rates to payphone service providers, a refund would be due them. This decision was then appealed to the New York Supreme Court, Appellate Division. By then the U.S. Court of Appeals for the District of Columbia not only had affirmed the *Commission Wisconsin Order*, but also had found that by this order the Commission had established “a rule that affects payphone line rates in every state.”⁵ Nevertheless, the New York Appellate Division failed to apply any of the *Wisconsin Orders*. This court proceeded to reverse the lower state court’s holding that payphone providers would be entitled to refunds as reparations for any Verizon rate in excess of a rate compliant with the Commission’s new services test.

From this history, the RBOCs and the NYDPS argue that the IPANY Petition should be dismissed based on the principles of claim preclusion and issue preclusion. They contend that the decision of the New York Supreme Court, Appellate Division, precludes any consideration by this Commission of the implementation and enforcement of the Commission’s *Payphone*

³ *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, DA No. 00-347, Order, 15 FCC Rcd 9978 (March 2, 2000) (“*Bureau Wisconsin Order*”); *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, ¶ 31 (Jan. 31, 2002) (“*Commission Wisconsin Order*”) *aff’d sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 rehearing and rehearing en banc denied (Sep. 22, 2003) (collectively “*Wisconsin Orders*”).

⁴ 47 U.S.C. Section 276.

⁵ *New England Public Communications Association*, 334 F.3d at 75; *in accord Northwest Public Communications Council v. Public Utility Commission of Oregon*, 196 Or.App. 94, 100 P.3d 776 (November 10, 2004).

Orders and the *Wisconsin Orders* to the extent that the New York court has reached a different determination. Although it is uncontested that the Commission established certain criteria for the implementation of the Section 276 rates compliant with the new services test, and that the United States Circuit Court of Appeals has found that such decision applies to the “payphone line rates in every state,” the RBOCs and NYDPS would have the Commission find that the Commission is preempted from enforcing these requirements by these contrary state decisions. The RBOCs and the NYDPS argue against the application of a uniform and consistent federal policy regarding the requirements of Section 276.

These commentators contend that common law principles of claim and issue preclusion should prevent the Commission from its statutory mandate to implement and enforce Section 276. They base their argument upon the decisions of *Montana v. U.S.*, 440 U.S. 147 (1979) and *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993). However, these decisions are inapposite and unsupportive of the position argued by the RBOCs and NYDPS. When the decisions of a state administrative agency or state court interfere with a federal agency’s discharge of its statutory duty to interpret and implement a uniform and consistent policy applying federal law, the Supremacy Clause of the United States Constitution prevails over common law principles claim and issue preclusion. *Arapahoe County Public Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213 (10th Cir. 2001). In particular, the federal court has held that the 1996 Telecom Act specifically supplants common law principles of claim preclusion and issue preclusion where the decisions of the state administrative agency or state court have failed to apply the federal requirements consistent with federal law and policy. *Iowa Network Services, Inc. v. Qwest Corporation*, 363 F.3d 683 (8th Cir. 2004).

Both the RBOCs and the NYDPS cite the *Montana* decision. *Montana* dealt with a state statute which imposed a tax on public construction projects, including those conducted by the federal government. The Montana Supreme Court upheld the tax in a challenge brought by a contractor in a public dam project for the federal government. Afterward, the United States government sought to challenge the validity of the state tax on federal government projects in a federal court. The U.S. Supreme Court held that the second lawsuit was precluded by the state court's earlier determination of the validity of the state statute. *Montana* involves a state court's interpretation and application of a state's own statute. Having reached a final judgment as to the validity of the state statute, the U.S. Supreme Court held that common law principles of preclusion prevent the federal government from initiating a second stream of litigation on the same issue.

However, the instant matter does not deal with a state court's final judgment as to the application and validity of the state's own statute. The instant proceeding involves a state agency and state courts implementation of a federal statute and the preeminent federal interest in a uniform enforcement of this Commission's *Payphone Orders* and the *Wisconsin Orders* implementing federal law and policy. In circumstances as in the instant IPANY Petition, the federal courts have found a conflict between the common law principles of preclusion and the Supremacy Clause of the United States Constitution. In reconciling these distinct concepts, the federal courts have held that federal supremacy trumps common law principles of claim and issue preclusion where the effect of the state judgment restrains the exercise of the United States' sovereign power by imposing rulings contrary to important and established federal policy. *Arapahoe County Public Airport Authority*, 242 F.3d at 1219.

These commentators' reliance upon *Town of Deerfield* is similarly unavailing. The Second Circuit's decision held that when an Article III federal court has reached a final judgment on an issue of federal law between the parties, a federal agency may not proceed to overrule the federal court as to that issue. To do so would in effect reduce the federal court proceedings to the rendering of an advisory opinion, which is not permitted by the Constitution. *Town of Deerfield*, 992 F.2d at 427-28. However, as *Arapahoe County Public Airport Authority* specifically noted, it was the agency's conflict with the federal district court's ruling, as an Article III Court, that controlled that decision. This distinction is inapposite to the facts in the instant case. The facts presented to the Commission in the IPANY Petition do not involve an Article III federal court's determination of federal law. As previously noted, the history of the IPANY proceedings involves a state agency and state courts seeking to interpret and apply the *Payphone Orders* and *Wisconsin Orders* of this Commission implementing Section 276. Such state determinations can not be held to effectively preempt the Commission's enforcement of its orders or its implementation of its statutory obligations under Section 276.

The Tenth Circuit succinctly analyzed the conflicting principles between the common law doctrines of preclusion and the Supremacy Clause, that prohibits a state court judgment or decree from restraining the exercise of the United States' sovereign power by imposing requirements contrary to important and established federal policy. Its holding further established that the RBOCs' and NYDPS' reliance on the *Town of Deerfield* is misplaced under the given procedural circumstances. In contrast, *Arapahoe County Public Airport Authority* had a procedural history very close to the instant proceedings.

In that case, Centennial Express Airlines complained that the Arapahoe County Public Airport Authority was in violation of federal statutes and federal grant requirements by refusing

to allow Centennial Airlines to use the Arapahoe County Public Airport for regularly scheduled service. When Centennial Airlines commenced flight operations, the Arapahoe County Airport Authority obtained temporary and permanent injunctions against the airline in the state courts. One of the airline's shareholders, and ultimately the airline, filed complaints with the Federal Aviation Administration alleging that the Airport Authority was in violation of federal statutes and grant provisions. The Colorado state district court, and the ultimately the Colorado Supreme Court, granted a permanent injunction against Centennial Airlines' use of the Arapahoe County Public Airport for its scheduled service. Subsequent to the final decision of the Colorado Supreme Court, the FAA ruled that the Airport Authority's ban violated its federal grant requirements and federal law. The Airport Authority appealed the FAA decision, arguing that a federal agency's determination coming after the final judgment of the Colorado Supreme Court was in violation of the doctrines of claim and issue preclusion. Like the RBOCs and NYDPS comments here, the Airport Authority argued that the Colorado Supreme Court determination was final, preclusive, and depositive of the issues addressed in the federal agency's order. The Tenth Circuit held that

“common law doctrines (of claim and issue preclusion) extending full faith and credit to state court determinations are trumped by the Supremacy Clause if the effect of the state court judgment or decree is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy.”

Arapahoe County Public Airport Authority, 242 F.3d at 1219.

The Court of Appeals concluded that the federal agency is not required to give preclusive effect to the decisions of the Colorado Supreme Court. *Ibid.* The court further noted that the federal agency, which was not a party to the other proceedings, has its own interest in assuring compliance with the federal statute and policy that the agency has been statutorily mandated to discharge.

Like here, the issue in *Arapahoe County Public Airport Authority* involved whether the respondent complied with conditions imposed upon it by federal law, as implemented by the federal administrative agency. This is an issue of federal supremacy. The court held that the federal concerns are preeminent. A federal agency's statutorily mandated duty to implement those concerns tilts the balance in favor of the supremacy principles over common law preclusion. The Colorado Supreme Court's ruling would create a direct and significant conflict if deemed preclusive. Such conflict would frustrate the federal agency's ability to discharge its statutory duty to interpret and implement federal statutes and law in a uniform manner and could lead to inconsistent enforcement of the federally mandated requirements. This strong policy of federal supremacy prevails over the extending full faith and credit to state determinations that are contrary to important and established federal policy. *Arapahoe County Public Airport Authority*, 242 F.3d at 1220-21; *see also American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788 (5th Cir.), *cert. denied*, 530 U.S. 1284, 120 S.Ct. 2762, 147 L.Ed. 2d 1022 (2000).

In addressing similar issues of claim and issue preclusion specifically in the context of the 1996 Telecom Act, the Eight Circuit reached the same determination. It found that common law doctrines of res judicata and issue preclusion are trumped by the Supremacy Clause. *Iowa Network Services, Inc. v. Qwest Corporation*, 363 F.3d 683, 690, quoting *Arapahoe County Public Airport Authority*, 242 F.3d at 1219. *Iowa Network Services* specifically held that a review of the 1996 Telecom Act "convinces us that Congress intended to supplant the common law principles of claim preclusion when it enacted the 1996 Act, at least with respect to the issues here involved". 363 F.3d at 690. There Iowa Network Services had received an unfavorable determination from the Iowa Utilities Board regarding whether Qwest owed access fees to Iowa Network Services for the termination of wireless calls. Rather than appeal the state

agency's final determination, Iowa Network Services brought a collection action in the federal district court. The district court decided that the Iowa Network Services claims had been decided by the Iowa Utilities Board and were barred by the doctrine of res judicata. The Eight Circuit reversed the district court, finding instead that Iowa's res judicata or claim preclusion law was trumped by the Supremacy Clause. The state agency was indisputably interpreting federal law. However, the Court held that the federal courts have the ultimate power to interpret the provisions of the 1996 Telecom Act. If the "state commission is not regulating in accordance with the federal policy, they may bring it to heel." *Iowa Network Services*, 363 F.3d at 693 quoting *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). The court noted that to allow a state administrative agency to make a determination of federal law, that binds a district court as to that interpretation through claim or issue preclusion, while other federal courts proceed to reach an inconsistent determination of federal law, is something that cannot be condoned. *Iowa Network Services*, 363 F.3d at 694.

It is just such inconsistency that comes before the Commission. The Commission and the United States Court of Appeals for the District of Columbia have determined that the *Commission Wisconsin Order* is applicable to all of the states in the implementation of Section 276. *New England Public Communications Council*, 334 F.3d at 75. The administrative agency and state courts of New York have failed to apply those criteria. This inconsistency in the application of federal statute and policy is precisely what the Supremacy Clause does not condone. *Iowa Network Services; Arapahoe County Public Airport Authority; American Airlines*. For these reasons, the U.S. Court of Appeals have held that common law principles of claim and issue preclusion are superceded through the Supremacy Clause due to the preeminent concern to prevent the frustration of the federal agency's discharge of its statutory duty to

determine and implement uniform and consistent federal law and policy. As demonstrated by these court decisions, the position taken by the RBOCs and NYDPS have been rejected by the federal courts and should be denied by the Commission. To do otherwise, would handicap the federal agency to being preempted by any of the numerous state agencies and courts through defenses of claim and issue preclusion on matters of federal law and policy which this Commission is vested with the duty to interpret and implement.

CONCLUSION

Wherefore for the above stated reasons the Illinois Public Telecommunications Association respectfully submits that the Commission should grant the Independent Payphone Association of New York's Petition and order the relief requested therein.

/s/
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CERTIFICATE OF SERVICE

I hereby certify that, on February 1, 2005, a copy of the foregoing Reply Comments of the Illinois Public Telecommunications Association was served by electronic mail to the parties below:

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