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**FILED/ACCEPTED**

**OCT 31 2006**

Federal Communications Commission  
Office of the Secretary

October 31, 2006

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
455 12th Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

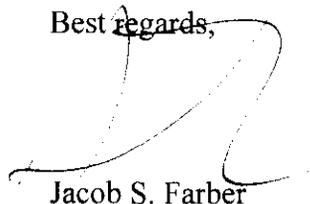
**Re: CC Docket 96-128**

Dear Ms. Dortch:

Attached are two (2) copies of a letter that was hand-delivered to Thomas Navin of the Wireline Competition Bureau. Please place the copies in the above-referenced docket.

Thank you for your assistance in this matter.

Best regards,



Jacob S. Farber

JSF/dj

Enclosures

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October 31, 2006

Mr. Thomas Navin  
Chief, Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, SW, Room 5 C356  
Washington, DC 20554

**Re: CC Docket 96-128**

Dear Mr. Navin:

The Commission has before it the issue of whether to require payphone line rate refunds as a remedy for the Bell Companies' prolonged failure to comply with the new services test ("NST"). In previous submissions, the American Public Communications Council and others have demonstrated why the refunds are required by Section 276 of the Communications Act ("Act"), 47 U.S.C. § 276, and the Commission's implementing orders. In a last-ditch attempt to forestall refunds, the Bell Companies have argued that the doctrine of res judicata<sup>1</sup> precludes the Commission's consideration of the issue.<sup>2</sup> This letter explains why res judicata is not even arguably applicable and, even if it were, why the Commission's obligation to implement the important federal policies of Section 276 trump any possible basis for preclusion.

## Introduction

At the outset, the Commission should recognize that, even if res judicata did apply to some extent (which it does not), it would not eliminate the need for the Commission to issue a ruling definitively determining whether refunds are required under the *Waiver Order*<sup>3</sup> and Section 276. The Commission has before it four requests for declaratory ruling (the "Requests"), each filed by a state payphone association that litigated this issue before a state public utility

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<sup>1</sup> The Bell Companies occasionally refer to res judicata as claim preclusion. The terms are generally synonymous, and the doctrine is generally referred to here as res judicata.

<sup>2</sup> See Letter from Aaron Panner to Thomas Navin, Chief, Wireline Competition Bureau, CC Docket 96-128 (June 21, 2006) ("Bell Companies June 21 Letter").

<sup>3</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 (CCB 1997).

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commission and then in state court.<sup>4</sup> In addition, the Commission also has before it three referrals from other tribunals formally or informally seeking “primary jurisdiction” guidance from the Commission as the expert agency on whether refunds are required (the “Referrals”). The Referrals are from a state public utility commission,<sup>5</sup> a state court hearing an appeal from a state commission decision,<sup>6</sup> and a federal court hearing an action for damages under Section 206 and 207 of the Act.<sup>7</sup> As none of the Referrals arises from a final proceeding to which res judicata could apply, even if res judicata barred consideration of the Requests, the Commission would still need to issue a ruling in response to the three Referrals.<sup>8</sup>

As for whether res judicata applies to the Requests, the fundamental flaw in the Bell Companies’ argument is that it fails to acknowledge that the Commission’s consideration of the

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<sup>4</sup> See Illinois Public Telecommunications Association (“IPTA”), Petition for Declaratory Ruling (filed July 30, 2004); Southern Public Communications Association (“SPCA”), Petition for Declaratory Ruling (filed Nov. 9, 2004); Independent Payphone Association of New York (“IPANY”), Petition for Declaratory Ruling (filed Dec. 29, 2004); Petition of the Florida Public Telecommunications Association, Inc. (“FPTA”), for a Declaratory Ruling and for an Order of Preemption at 2 (filed January 31, 2006). The four Requests have similar but not identical procedural postures. In all four cases, state payphone associations asserted claims for refunds on behalf of their members before the state public utility commission; those claims were improperly rejected, and the PSPs filed court appeals. In Illinois and New York, the IPTA and IPANY appeals have run their course in the period since the petitions were filed at the Commission. In Mississippi and Florida, the SPCA and FPTA appeals remain pending. (The Mississippi appeal was removed to federal court.) Each of the four PSP groups has filed a request for declaratory ruling asking the Commission to preempt the state commission and/or court decisions and rule that refunds are required.

<sup>5</sup> See Letter from Lee Beyer, Chairman, Oregon Public Utility Commission, to Chairman Kevin Martin (November 23, 2005).

<sup>6</sup> See *New England Public Communications Council, Inc. Filing of Letter from Supreme Judicial Court of Massachusetts Regarding Implementation of the Pay Telephone Compensation Provisions of the Telecommunications Act of 1996*, Public Notice, DA 06-780 (April 3, 2006).

<sup>7</sup> See Petition of Davel Communications, Inc., et al. for Declaratory Ruling (September 11, 2006).

<sup>8</sup> It should be noted that, as the Commission is aware, in addition to the proceedings underlying the Requests and Referrals, several other states have addressed the issue and have ruled in PSPs’ favor, requiring the Bell Companies to pay refunds. A list of the states requiring refunds was included as Attachment 2 to the Letter from Robert F. Aldrich to Marlene H. Dortch, Secretary, FCC, CC Docket 96-128 (December 23, 2005). Recently, the Court of Appeals of Indiana has joined several other state appellate courts in upholding a state commission decision requiring refunds. See *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, No. 93A02-0410-EX-896 (Oct. 19, 2006).

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Requests is not separate from the underlying state proceedings. Rather, the review sought by the Requests is a necessary step in the Commission's implementation of Section 276. As discussed in Section I below, in the typical *res judicata* situation, one court renders a decision and then, in an unrelated proceeding between the same litigants, a second court must determine if it is bound by the prior court's ruling. Here, however, the state commission and court decisions that gave rise to the Requests were the result of the Commission's limited, nonexclusive delegation to the states of the authority uniquely conferred upon the Commission to implement Section 276. While the Commission directed the states to rule on the issue in the first instance, it never relinquished to the states ultimate oversight over payphone line rates. Indeed, under *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied. sub nom. NARUC v. USTA*, 543 U.S. 925 (2004) ("*USTA II*"), it would have been impermissible for the Commission to have handed review of payphone line rates to the states without retaining ultimate oversight and authority.<sup>9</sup> Thus, *res judicata* does not apply, as a Commission ruling here would not constitute the improper "second bite at the apple" that the doctrine is intended to prevent, but rather a necessary step in the Commission's implementation of Section 276.

In any case, even if the Commission were to engage in a *res judicata* analysis, controlling precedent makes clear that *res judicata* does not apply to bar the Commission's consideration of the four Requests. Where, as here, if the effect of a state court judgment "would be to restrain the exercise of the sovereign power of the United States by imposing requirements that are contrary to important and established federal policy, [the judgment] would not be given any effect in a federal court." *American Airlines v. DOT*, 202 F.3d 788, 800 (5<sup>th</sup> Cir. 2002) (citing *Midgett v. United States*, 603 F.2d 835 (Ct. Cl. 1979)). As discussed in Section II below, Section 276 is unquestionably an "important and established federal policy," that the Commission is the expert federal agency directly charged with overseeing. While the Bell Companies' June 21, 2006 Letter is full of rhetoric, the Bell Companies do not cite a single case where *res judicata* has applied to bar an expert federal agency charged with implementing the federal statute at issue from reviewing the decision of a state court. Instead, the federal courts of appeal that have addressed the issue have held that considerations of federal policy objectives, and the consistent application of those policies, trump any arguable basis for the application of *res judicata*.

In light of the clear precedent that *res judicata* does not apply, the Bell Companies are left having to stretch the cases that they claim support *res judicata* far beyond their breaking points. As we discuss in Section III below, not only do none of the cases cited by the Bell Companies actually support their position, in more than one instance a fair reading of the case makes clear that it directly undercuts their position.

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<sup>9</sup> The significance of *USTA II* is also discussed in the memorandum submitted as an attachment to the Letter from Robert F. Aldrich, counsel for the American Public Communications Council, to Marlene H. Dortch, Secretary, FCC, CC Docket 96-128 (Oct. 25, 2006) at 12-14.

**Discussion**

**I. Res Judicata Does Not Apply Given the Commission's Obligation to Implement Section 276 and the D.C. Circuit's Decision in *USTA II***

The state court decisions underlying the Requests are the result of a limited, nonexclusive Commission delegation of authority to the states. In Section 276, Congress directed the Commission to adopt regulations to, among other things, ensure that the Bell Companies “shall not prefer or discriminate in favor of [their] payphone service.” 47 U.S.C. § 276 (a)(2), (b)(1)(c). Pursuant to that directive, the Commission found that “incumbent LECs must offer payphone service “to PSPs under nondiscriminatory, public, tariffed offerings . . . .” *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, ¶ 146 (1996) *recon'd in part*, Order on Reconsideration, 11 FCC Rcd 21233 (1996) (“*Payphone Reconsideration Order*”). The Commission then found that application of the NST was necessary to ensure that the ILECs’ services are priced reasonably. *Id.* Initially, the Commission required the Bell Companies to file their payphone line tariffs with the Commission for its review. On reconsideration, at the Bell Companies’ urging, the Commission chose to rely on state commissions to review the Bell Companies’ payphone line tariffs for compliance with the NST and other Section 276 safeguards. *See Waiver Order* ¶ 2.

By directing state commissions to conduct the initial review of the NST tariffs, however, the Commission did not abdicate its ultimate responsibility for ensuring compliance with Section 276. Rather, the Commission “stated that [it] would rely *initially* on state commissions to ensure the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276.” *Wisconsin Public Service Commission*, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2071 (2002) (“*NST Review Order*”) (emphasis added). The Commission specifically retained jurisdiction over, and ultimate responsibility for, application of the NST to payphone line rates. *Waiver Order* ¶ 19 n.60 (the Commission directed the states to act on NST tariff revisions “within a reasonable period of time,” and “retain[ed] jurisdiction under Section 276 to ensure that all requirements of that statutory provision . . . have been met.”); *see North Carolina Utilities Commission*, Order, 13 FCC Rcd 5313, ¶ 2 (CCB 1998). Indeed, since its decision in 1996 to allow the states to perform the initial review of payphone line rate tariffs, the Commission has issued numerous orders addressing the issue. *See, e.g. id.*; *Wisconsin Public Service Commission, Order Directing Filings*, Order, 15 FCC Rcd 9978 (CCB 2000) (“*NST Designation Order*”), *aff'd in part and modified in part NST Review Order, aff'd New England Pub. Comms. Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert denied*, 524 U.S. 2065 (2004) (collectively, the “*NST Orders*”).

By arguing that res judicata bars the Commission’s consideration of the Requests, the Bell Companies are essentially saying that, because the Commission chose to allow NST review

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by the states, it must now defer absolutely to their judgments and let the decisions underlying the Requests stand without review.

The Commission, however, cannot do so. Section 276 gave the Commission the sole authority and responsibility to issue regulations carrying out its provisions. If the Commission fails to correct the state commissions' and courts' misinterpretations and misapplications of clear federal law, it will have failed to carry out its responsibilities under Section 276 of the Act.

As the D.C. Circuit recently made clear in *USTA II*, the Commission's authority to rely on state public utility commissions to handle the Commission's statutory responsibilities is limited and must be constrained to ensure the Commission retains an appropriate degree of oversight. In *USTA II* the court held that the Commission had unlawfully subdelegated its Congressionally assigned task of making Section 251(d)(2) impairment determinations by allowing the states to "make crucial decisions regarding market definition and application of the FCC's general impairment standard to the specific circumstances of those markets, with FCC oversight neither timely nor assured." *Id.* at 567.

As with Section 251(d)(2), the authority to implement Section 276 was conferred by Congress on the Commission and the Commission alone. And, as in *USTA II*, pursuant to that grant, the Commission has allowed states to "make crucial decisions regarding . . . application of the FCC's general [NST] standard" to the "specific circumstances" in each state. *Id.* Leaving such a "crucial" decision to the states cannot survive scrutiny under *USTA II* unless the Commission exercises effective oversight of the states' decisions. *Id.*

The subdelegation case law reviewed in *USTA II* clearly demonstrates the critical importance of active FCC scrutiny of state determinations such as those the Commission directed the states to undertake with respect to payphone line rates. As the D.C. Circuit explained, federal agencies may legitimately rely on state agencies to perform limited functions such as fact gathering, the provision of policy recommendations, and even actual determinations of relevant issues, but only if the federal agency itself controls the process and retains final decision-making authority. *Id.* at 567-68. For example, in an earlier case where the D.C. Circuit had allowed a federal agency to utilize the processes of state agencies or other outside parties as "a reasonable 'shortcut' . . . to satisfy one of the [agency's] own regulatory requirements," the court stressed that it permitted the "shortcut" because "the process was 'superintended by the [agency] in every respect,'" so that "no subdelegation of decision-making authority had actually taken place."<sup>10</sup>

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<sup>10</sup> *USTA II* at 567 (quoting *Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977), where a federal board charged with certifying actuaries to administer ERISA pension plans was permitted to require applicants "either to pass a Board exam or to pass an exam administered by one of the recognized private national actuarial societies" (emphasis in original)). This is arguably similar to the Commission's requirement for Bell Companies to submit their rates for NST review either with the state public service commission, or, if the state

Therefore, while the Commission's reliance on the states to conduct NST review may be otherwise justifiable under *USTA II*, that is only so to the extent that the Commission "superintend[s] [the review process] in every respect."<sup>11</sup> Not only can the Commission review the state decisions underlying the Requests, it *must* do so to avoid running afoul of *USTA II*. Res judicata considerations are thus not applicable here.

**II. *American Airlines and Arapahoe Make Clear that Where, as Here, There Are Important Federal Interests at Stake, Those Interests Trump Res Judicata Considerations***

Even if the Commission were obligated to engage in a res judicata analysis, the important federal interests it is charged with overseeing trump any considerations militating in favor of preclusion. *American Airlines v. DOT*, 202 F.3d 788 (5<sup>th</sup> Cir. 2002), is directly on point. In response to a ruling by DOT's predecessor agency, Dallas and Fort Worth had entered into an agreement to terminate service at their respective competing airports and build a jointly-operated airport. Subsequently, Congress passed legislation that, while generally banning interstate service from Dallas' Love Field, contained exceptions for certain commuter flights. In response to plans by several airlines to operate under the exception, Fort Worth sued Dallas and the airlines in Texas state court to block the proposed Love Field service. The state court found that Dallas' agreement with Fort Worth to end service at Love Field was not preempted by federal law and thus ruled in Fort Worth's favor. While the state action was on appeal, DOT issued a "Declaratory Order" that, contrary to the state court decision, found the Dallas/Fort Worth agreement was preempted by federal law, and that the proposed operations at Love Field could go forward. On appeal, Fort Worth and the airlines argued that DOT's decision was barred by the full faith and credit statute.

The Fifth Circuit began by finding that the full faith and credit statute, 28 U.S.C. § 1738, which generally requires federal courts to grant preclusive effects to state court decisions, did not apply to federal agencies.<sup>12</sup> The court then went on to observe that courts "have frequently

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commission is unable to conduct the review, with the Commission itself. *Payphone Reconsideration Order* at 21308 ¶ 163.

<sup>11</sup> The Bell Companies are thus wrong in their assertion that "the Commission necessarily understood that state commissions, in exercising [their delegated] responsibility, would reach determinations that would become final and binding." Bell Companies June 21 Letter at 4. The opposite is true. The Commission's delegation was necessarily predicated on its retention of ultimate oversight.

<sup>12</sup> The court found that the "plan language of this section establishes that it does not apply here: § 1738 applies only to 'every court within the United States,' and DOT is an agency, not a 'court.'" *American Airlines*, 202 F.3d at 799 (emphasis in original). The Fifth Circuit based its holding that "court" means "court" and not an agency on the Supreme Court's decision in

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fashioned federal common-law rules of preclusion in the absence of a governing statute,” and engaged in a res judicata analysis. The court examined “whether the policies favoring full faith and credit . . . outweigh the federal interests present here.” 202 F.3d at 800 (citation omitted).

The court found that the case “involve[d] aviation regulation, an area where federal concerns are preeminent and DOT is charged with representing those concerns.” *Id.* at 800 (citations omitted). The court also found that the case involved a matter “on which Congress has twice specifically legislated,” and that “DOT’s interpretive order is the first time that DOT, the agency specifically charged with implementing [the legislation] has interpreted [it.]” *Id.* at 801. The court thus found that “to allow the state court effectively to foreclose the administering agency from further consideration of the [legislation] as to the parties that appeared before the state court would trump the key federal interests that motivated Congress to create DOT and give it authority over these laws.” *Id.*

In ruling that the existence of a strong federal interest trumped any arguable basis for the application of res judicata, the court also found that applying preclusion principles “would lead to inconsistent results.” *Id.* citing *Access Telecommunications v. Southwestern Bell Tel Co.*, 137 F.3d 605, 608 (8<sup>th</sup> Cir. 1998) (noting the importance of “promot[ing] uniformity and consistency within the particular field of regulation” for matters within agency discretion). The court found that as “[s]ome of the parties before DOT are litigating these issues for the first time . . . [f]orcing DOT to grant preclusive effect to the state court ruling would lead to inconsistent application of the [federal legislation] to the parties that did not appear before state court.” *American Airlines*, 202 F.3d at 801.

Finding that important federal interests were at stake, the only analysis the Fifth Circuit gave to the res judicata principles was to observe that the importance of repose was limited by the posture of the case because at “the time the state court issued its ruling, parallel agency proceedings were underway.” *Id.* at 800.<sup>13</sup> The importance of repose is similarly limited here. As discussed above, the cases underlying the Requests were only before the states because the Commission had directed them to review the payphone line rate tariffs on delegated authority

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*University of Tennessee v. Elliott*, 478 U.S. 788 (1986). There, presented with the question of whether a federal court must accord full faith and credit to a state agency decision, the Court held that Section 1738’s references to “courts” excluded agencies. *Id.* at 794.

<sup>13</sup> Indeed, it is interesting to note, although not necessary to decision here, that while the court framed its inquiry as a weighing of the federal interests at stake with considerations supporting preclusion, its actual analysis makes clear that it did not engage in any real balancing. Instead, the court’s analysis consisted of looking to see whether there were any federal interests at issue. Finding that there were, the court declined to apply res judicata principles. *Id.* at 801 (“because of the important federal interests here, we decline to hold that common law preclusion doctrines apply in this case.”). Thus, the court’s analysis makes clear that the mere presence of strong federal interests is sufficient to obviate the need for any res judicata analysis.

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subject to the Commission's ultimate oversight. Under such circumstances, there can be no expectation that the Commission's review of the matter is foreclosed by the state decisions.

Even more significantly, all of the factors supporting the Fifth Circuit's holding that federal interests prevailed over *res judicata* considerations are also present here. Interstate communications, like interstate aviation, is "an area where federal concerns are preeminent." *Id.* at 800, and the FCC is the expert agency "charged with representing those concerns." *Id.* at 801. The proceeding before the Commission involves a directly controlling federal statute, Section 276, that expresses specific national communications policies and charges the Commission with the implementation of those policies. Beginning in 1996, the Commission has issued literally dozens of decisions carrying out that mandate. Foreclosing its ability to continue to do so would "trump the key federal interests that motivated Congress," 202 F.3d at 801, to adopt Section 276 and charge the Commission with its implementation. This is all the more the case here where the Commission, as the author of the implementing regulations in question, is far better suited to interpret them than the state courts that have no expertise in the matter.

And, as in *American Airlines*, if the Commission were to treat the state court cases underlying the Requests as *res judicata*, it would lead to inconsistent application of federal law. The Commission's decision would apply in the states for which judicial referrals are pending, and in all the other states where there has not been a state court decision, but not in the four states from whose state court decisions the Requests arise. Such a result would run directly counter to Section 276(c), which explicitly directs that the "Commission's regulations on such matters shall preempt" inconsistent state requirements. 47 U.S.C. § 276(c). This is all the more so the case in light of the fact that several other states have already ruled that refunds are required. *See* n.8 above. Not only would the application of *res judicata* produce an inconsistent application of federal policy as between the states from which the Requests arose and the Referral states, but also between the Request states and those states that have ruled refunds are required.<sup>14</sup>

*Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10<sup>th</sup> Cir. 2001) is also directly controlling. There, the Arapahoe airport authority had banned scheduled passenger flights. When an airline initiated passenger service in challenge to the ban, the airport authority sought and obtained from Colorado state court a permanent injunction against the airlines, which was upheld by the Colorado Supreme Court. Roughly contemporaneously with the airport authority's initiation of its state court action, the airline filed a complaint with the FAA, saying that the ban violated federal law. In a decision issued after the Colorado Supreme Court's decision, the FAA granted the complaint. On appeal, the Tenth Circuit agreed with the FAA that the ban violated federal law. In so holding, the court balanced that Supremacy Clause and *res judicata*/collateral estoppel considerations and concluded that the latter considerations "are

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<sup>14</sup> In light of the multiple proceedings and multiple parties before the Commission, it is even more clear that *res judicata* does not apply than it was in *American Airlines*, which involved a single dispute, between a single set of parties.

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trumped 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." *Id.* at 1219.

Here, application of the same factors considered in *Arapahoe* dictates the same result. First, as in *Arapahoe*, where the court gave great weight to the fact that "in the arena of aviation regulation 'federal concerns are preeminent'" (242 F.3d at 1220, quoting *American Airlines*, 202 F.3d at 800-01), this Commission has long recognized that in the arena of payphone regulation, under Section 276, federal concerns are also "preeminent." As the *NST Orders* demonstrate, application of the NST to payphone line charges is fundamental to the Act's objective to promote payphone competition and deployment. The preeminence of federal concerns "certainly tilts the balance" toward "the application of supremacy principles to protect against state courts trumping the federal interests and concerns" expressed in Section 276. *Arapahoe*, 242 F.3d at 1221. Allowing the state court rulings to be preclusive would "frustrate the [FCC's] ability to discharge its statutory duty." *Id.*

Second, like the FAA in *Arapahoe*, the Commission is effectively an "interested party" in these proceedings. *Id.* at 1220 n.8. In *Arapahoe*, the FAA had made grants of federal funds to the airport authority based on the authority's assurances that the airport would be available for public use. *Id.* at 1216. Accordingly, even though its formal role was to adjudicate complaints, the FAA became effectively an "interested party" in the proceedings due to its strong institutional interest in enforcing the conditions that the FAA itself had attached to the grant of funds.

Similarly, here, the Commission is not merely a "disinterested adjudicator" acting "to resolve a . . . dispute between two outside parties." *Id.* at 1220 n.8. Rather, the Commission has a strong institutional interest in enforcing its requirement that the Bell Companies' payphone line rates comply with the NST in order to ensure that Section 276's directive that the Bell Companies "shall not prefer or discriminate in favor of [their] own payphone services," 47 U.S.C. § 276(a)(2), is met.

Third, as was the case with the FAA, the Commission was not a party to the state commission or court proceedings. Therefore, those decisions "do not satisfy a fundamental requirement of issue preclusion under federal or [state] law." *Arapahoe*, 242 F.3d at 1219-20.<sup>15</sup>

The Bell Companies' attempt to distinguish *Arapahoe* is unavailing. They contend that, unlike in *Arapahoe*, the Commission "specifically decided that states, not the Commission,

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<sup>15</sup> In addition, IPANY and others have pointed out that the state court decisions underlying the Requests are like the decision at issue in *Arapahoe* in that they lack any "depth and breadth of analysis," 242 F.3d at 1219. See, e.g. Petition of the Independent Payphone Association of New York, Inc., for an Order of Preemption and Declaratory Ruling, CC Docket 96-128 (Dec. 29, 2004) at 24-32.

would be responsible for implementing federal regulations governing the pricing of payphone lines.” Bell Companies June 21 Letter at 4. But, as discussed above, while the Commission delegated authority to the states to review payphone line rate tariffs, as required by Section 276, the Commission explicitly retained jurisdiction over, and ultimate responsibility for, application of the NST to payphone line rates. *See* pages 3-4 above. Indeed, as discussed above, under *USTA*, any greater delegation of authority would have been impermissible. *See* pages 4-5 above.

The Bell Companies also point out that “payphone providers ask the Commission to act in a purely adjudicatory capacity by declaring that payphone providers have a right to a refund of amount previously paid under state payphone line tariffs.” Bell Companies June 21 Letter at 5. The suggestion is that this somehow serves to distinguish *Arapahoe*, where there was a “forward-looking interest in enforcement” of the FAA’s rules. *See id.* at 5 n.6. The Bell Companies are, however, wrong that the Commission has no forward-looking interest here. The matter is before the Commission because the Bell Companies’ payphone line tariffs were in violation of the Commission’s rules. It is nothing short of absurd to suggest that if the Commission were enforcing its rules through a Commission-initiated enforcement action to assess penalties on the Bell Companies, *res judicata* would not apply, but that where, as here, it is enforcing those same rules in the context of actions seeking refunds of amounts the Bell Companies collected in violation of the rules, *res judicata* does apply.

### **III. None of the Cases Cited by the Bell Companies Support Their Position**

None of the cases cited by the Bell Companies support their assertion that *res judicata* applies to bar the Commission’s consideration of the requests. *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), on which the Bell Companies chiefly rely, addressed the preclusive effects of a *federal court* decision on a subsequent Commission order. The Second Circuit found that the Commission’s decision could not stand because the Commission has no “power to review judgments of an Article III court” and may not “choose simply to ignore a federal-court judgment.” *Id.* at 428 (emphasis added). Here, unlike in *Deerfield* (and other cases cited by the Bell Companies), no question of interference with judgments of an Article III court is present.<sup>16</sup> Similarly, *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004), involved the review

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<sup>16</sup> In any case, the Second Circuit’s ruling in *Deerfield* is of dubious continuing vitality, in light of the Supreme Court’s decision in *NCTA v. Brand X Internet Services*, 545 U.S. 967, 162 L. Ed. 2d 820 (2005). There, the Court overturned a Ninth Circuit decision on the grounds that the lower court had erred in finding that its own construction of the Communication Act’s definition of “telecommunications services” trumped the Commission’s later interpretation of the same provision. The Court found that under the *Chevron* deference due federal agency decision-making, unless a statute is not capable of conflicting interpretation, a lower court’s ruling must give way to the agency’s interpretation. 162 L. Ed. at 837-38. In the aftermath of *Brand X*, it is clear that a court’s decision cannot stand where the Commission, interpreting the statute it is charged with administering, renders a conflicting interpretation of the statute.

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of a state court decision by a federal court—not the expert federal agency charged with implementing the federal statute at issue.

The Bell Companies also rely on *United States v. ITT Rayonier*, 627 F.2d 996 (9th Cir. 1980), which the Bell Companies say “strongly resembles” the instant proceeding. The Bell Companies, however, omit some crucial details from their description of the case. Unlike the present case, or the cases cited above that make clear the Commission is not precluded from addressing the Requests, in *ITT Rayonier*, the federal agency in question was itself a litigant and was found to be in “privity” with a litigant below. At issue was a paper mill’s alleged violations of its permit to discharge pulp waste. The Washington State Department of Ecology (DOE) issued a compliance order, which the paper mill appealed. Ultimately the Washington State Supreme Court found in favor of the paper mill. While the state proceedings were underway, the federal EPA brought an action against the paper mill in federal district court. The district court held that the EPA’s action was barred by res judicata because it was in privity with the state environmental agency that brought the state action. The Ninth Circuit upheld the district court’s finding of privity, finding that “the interests of DOE and the EPA were identical and their involvement sufficiently similar.” 627 F.32d at 1003 (citation omitted).<sup>17</sup>

Thus, the EPA (1) was itself a litigant, (2) its interests were found to be in privity with an earlier litigant’s, and (3) it was not sitting as a tribunal to interpret its own rules, and on that basis its action was held barred by res judicata. By contrast, in this proceeding, the Commission is acting as the expert agency charged with overseeing the decisions rendered by the lower tribunal on its delegated authority, it is not itself a litigant, and is not (and as a non-litigant could not be) in privity with any party below.

As for the two Commission cases cited by the Bell Companies for the proposition that the “Commission ordinarily *does* afford preclusive effect to the judgments of state courts acting within their jurisdiction,” neither supports the proposition. Indeed, in both cases, the decisions make clear that application of res judicata would be inappropriate in the present proceeding. It should also be noted that the implication of the Bell Companies’ letter is that the two cases are examples of a general rule that the Commission typically affords preclusive effect to state court

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<sup>17</sup> Res judicata applies to bar a party whose claim for relief was decided by one tribunal from relitigating that same claim before another tribunal. It has also been held to bar a party in “privity” with an earlier litigant from relitigating the same claim. Privity is an amorphous concept, and the modern trend is to instead define a number of specific relationships that bind one party by a decision rendered with respect to another, e.g. successors interest, trustee and beneficiary, etc. The type of privity found to apply in *ITT Rayonier*—where a nonparty’s interests are so closely aligned with the litigant’s interests as to make that litigant the nonparty’s “virtual representative”—is increasingly disfavored. See *Moore’s Federal Practice*, § 131.40[3][e]. It is not clear that, if decided today, the Ninth Circuit would have held as it did 26 years ago that the EPA was in privity with DOE.

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decisions. In fact, these are the only two cases of which we are aware that squarely address the issue.

In *Cheyenne River Sioux Tribe Authority and US WEST Communications*, 17 FCC Rcd 16916 (2002), the Commission rejected the notion that a prior decision of the South Dakota Supreme Court precluded the Commission's review of the sales of certain telephone exchanges under Section 253 of the Act. *Id.* ¶ 18. While it so held because the state court had expressly declined to address the issue in question, nothing in the Commission's reasons suggests that otherwise it *would* have been precluded. The Commission also declined to revisit the state court's determination that various federal laws relating to the sovereignty of Indian tribes did not bar the sale. In doing so, the Commission never considered the possibility, much less found, that it was barred by res judicata from doing so. Rather, it said only that it saw "no basis for the Commission to re-litigate these issues." *Id.* at 36. There is not so much as a suggestion that had the statutes in question been within the scope of the FCC's expertise, or if it otherwise found that it had an interest in reviewing the statutes, that the Commission would have been barred from doing so.

In *Broadview Networks v. Verizon Tel. Cos.*, 19 FCC Rcd 22216 (EB 2004), the Commission declined to review a New York state court's decision regarding whether the parties' interconnection agreement applied to require arbitration of the dispute in question. In so holding, the Commission cited and quoted extensively from both *American Airlines* and *Arapahoe* for the proposition that where there are "preeminent federal concerns" state court decisions have no preclusive effect on the Commission. *Id.* ¶ 15 n.54. It was only because no such federal concerns were present, and the dispute involved instead "garden variety matters of contract interpretation that state tribunals have ample ability and authority to resolve," *id.*, that the Commission found that it could let the court's decision stand without review.

### Conclusion

For the reasons shown above, the Commission should find that res judicata does not apply to its consideration of the Requests and that, even if it did, any arguable basis for preclusion is trumped by the Commission's obligation to implement the important federal policy objectives of Section 276. The Commission thus can and should (1) overrule and preempt the state decisions underlying the Requests and any other inconsistent state commission or court

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decisions and (2) order the Bell Companies to refund the monies they collected under payphone line tariffs that violated the NST.

Respectfully submitted,



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