

# HERZOG LAW FIRM

May 25, 2007

By Electronic Filing

Ex Parte Filing

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Poynter  
445 12<sup>th</sup> Street, Room TW-325  
Washington, D.C. 20554

Re: Docket 96-128 – New Services Test Rates – Independent Payphone  
Association of New York, Inc. Petition for Declaratory Ruling and  
Pre-emption

Dear Ms. Dortch:

The Independent Payphone Association of New York, Inc. (IPANY) hereby responds to the ex parte filing herein dated May 1, 2007, by the firm of Kellogg, Huber on behalf of AT&T and Verizon.

There is no basis for the claim by AT&T and Verizon that state court decisions in conflict with the FCC's NST rules are entitled to res judicata.

The two cases cited by AT&T and Verizon, Town of Deerfield v. FCC, and Wabash Valley Power Association v. REA are wholly inapplicable, and do not restrict the ability of the FCC to set aside and pre-empt a state court decision which conflicts with federal policy as established by the FCC. The law is clear the FCC is not bound by such state court decisions, and under §276 of the Telecom Act, the FCC has a duty to pre-empt and set aside such decisions.

Town of Deerfield involved a landowner who initiated a state court proceeding to challenge a local zoning decision, on the ground the zoning board's action was pre-empted by FCC rules. The state courts denied the claim. Thereafter, the landowner commenced a second suit in Federal District Court, again arguing the pre-emption claim. The District Court found the pre-emption issue had been fully and fairly litigated in the New York State court action, and granted preclusive effect to the state court decision. The Second Circuit affirmed. While the litigation was continuing in federal court, the landowner also filed a Petition for Declaratory Ruling with the FCC. In that proceeding, the FCC ruled the zoning ordinance was pre-empted, notwithstanding the prior federal court decision to the contrary.

On review of the FCC Order, the Second Circuit, based on the Separation of Powers Doctrine, concluded the FCC had no power to set aside the determinations of the federal courts:

“A judgment entered by an Article III Court having jurisdiction to enter that judgment is not subject to review by a different branch of the government, for if a decision of the judicial branch were subject to direct revision by the executive or legislative branch, the court's decision would in effect be merely advisory.”

992 F2d 420 at 428.

Town of Deerfield thus has absolutely nothing to do with the authority of the FCC to pre-empt a decision of a state court which, of course, is not an Article III Court. In IPANY's case, the conflict is not between the FCC and a federal court, but rather between the FCC and a state court which issued a final order wholly inconsistent with federal policy as established by the FCC. Not only is Town of Deerfield wholly inapplicable, the law is clear that an administrative agency such as the FCC has full authority to set aside and pre-empt an order of the highest court of the state which conflicts with federal policy. See Arapahoe County Public Airport v. FAA, 242 F3d 1213 cert denied 534 US 1064, 122 S. Ct. 664 at 242 F3d 1213 at 1219.

“We further agree these common law doctrines [referring to collateral estoppel and res judicata] 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.”

The holding of Arapahoe County was specifically applied “within the context of the Telecommunications Act of 1996”. Iowa Network Services Inc. v. Qwest, 363 F3d 683 at 690 (CA-8,2003).

Another critical holding in Arapahoe County was that the administrative agency, which chose to pre-empt the state court's order, could not be subject to the doctrine of collateral estoppel because it was not a party to, nor in privity with a party to, the state court

proceedings: “Without the FAA as a party, the Colorado Supreme Court decision does not satisfy a fundamental requirement of issue preclusion under federal or Colorado law” (citing Baker v. General Motors, 522 US 222 at 237, to the effect that “in no event...can issue preclusion be involted against one who did not participate in the prior adjudication”).  
Arapahoe County Public Airport, 242 F3d 1213 at 1220.1

New York law is to the same effect: the doctrine of collateral estoppel can only apply when the entity which is sought to be bound by a court decision was a party in the proceedings before the court. Liss v. Trans Auto Supply, 68 NY2d 15; Staatsburg Water Company v. Staatsburg Water District, 72 NY2d 147.

The FCC was not a party before either the PSC or the state courts in New York, and thus cannot be bound under the doctrine of collateral estoppel.

AT&T and Verizon’s citation of Wabash Valley Power Association Inc. v. REA is similarly wholly without merit. That case involved state court proceedings in Indiana, in which REA was a party, regarding REA’s right to pre-empt state authorities by setting its own rates for a

cooperate electric utility.’ Moreover, the issue litigated in the state courts was one of state law, and did not involve a situation where federal law clearly pre-empted state law.<sup>2</sup>

While the court found REA to be bound by the state court decision, it was based on two factors: (1) REA was a party in the state court and (2) state law controlled the outcome:

“The REA was a party to the administrative proceedings and obtained review from the state courts. It did not argue that Wabash’s rates should be increased because federal law pre-empted the used-and-useful rule or otherwise required the state to set rates high enough to repay the loans. Its argument was based on state law.” 903 F2d 445 at 455.

Neither of those factors is present here, and Wabash Valley Power has no relevance to the case now before the FCC. The FCC did not participate as a party in the New York State court proceedings, and accordingly cannot be bound thereby. Moreover, the Court in Wabash Valley Power made clear there was no applicable federal law which clearly pre-empted the state agency’s ratemaking decision, and suggested that existed federal law

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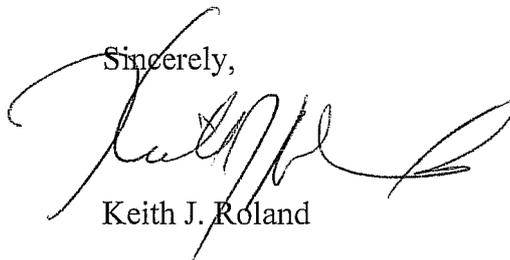
<sup>1</sup> Wabash Valley Power was based on 28 USC §1738, which gives full faith and credit in the federal courts to state court decisions to the extent the state court would, under state law, grant collateral estoppel. But, as noted above, a state court in New York would not grant collateral estoppel and hold the FCC was bound by the state court order (because the FCC was not a party), and thus the federal courts will not grant collateral estoppel against the FCC.

<sup>2</sup> REA argued a letter it had written to the utility established binding federal law which pre-empted state law. That contention was rejected on the ground REA’s letter did not constitute binding federal law because it “neglected to use the procedures required by the Administrative Procedure Act”. But at the same time, the Court noted that upon establishment of a “source of authority” to overrule inconsistent state actions, “under the Supremacy Clause the federal obligation would prevail.” 903 F2d 455 at 453-454. Here, the source of pre-emptive authority is already set forth in §276 of the Telecom Act.

specified state law should apply in the ratemaking proceeding. That is not the case here. Section 276(c) of the Telecom Act explicitly and forcefully pre-empts “any state requirements” which are inconsistent with the FCC’s regulations. Moreover, the FCC has repeatedly held with respect to matters governed by §276, as it did in the First Report and Order, at para. 147, that “any inconsistent state requirements with regard to this matter are pre-empted”.

IPANY appreciates the opportunity to demonstrate the fallacy of AT&T and Verizon’s legal argument.

Sincerely,



Keith J. Roland

KJR:tlm

cc: VIA First Class Mail:  
Daniel Gonzalez, Chief of Staff to Chairman Kevin J. Martin  
Scott Deutchman, Legal Advisor to Commissioner Michael J. Copps  
Scott Bergmann, Legal Advisor to Commissioner Jonathan S. Adelstein  
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