Ward & Ward, P.C.

Michael W. Ward

John F. Ward, Jr.
of Counsel

July 5, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association, Petition for Declaratory Ruling

Dear Ms. Dortch:

On June 28, 2007, Michael Ward, counsel for the Illinois Public Telecommunications Association ("IPTA"), and Keith Roland, counsel for the Independent Payphone Association of New York ("IPANY"), met with Daniel Gonzalez, Chief of Staff to Chairman Kevin J. Martin. We discussed the matters summarized in the attached documents handed out during the meeting. In addition, we discussed the issues raised in the petitions filed by IPTA and IPANY, which are reflected in the petitions and previously submitted comments.

Sincerely,

Michael W. Ward

Michael W. Ward

Cc: Daniel Gonzalez
Keith Roland

1608 Barclay Blvd., • Buffalo Grove, IL 60089
847-243-3100 • Fax 847-808-1570
E-Mail: mwward@dnsys.com • jward@levelerllc.com

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 1996 [4] ("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*

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[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; s*ee 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/

Michael W. Ward, attorney for the
Illinois Public Telecommunications Association

Michael W. Ward
Michael W. Ward, P.C.
1608 Barclay Blvd.
Buffalo Grove, Illinois 60089
847-243-3100 Telephone
847-808-1570 Fax
mwward@dnsys.com

February 1, 2005

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:

By Electronic Mail

Jon Stover
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
Jon.stover@fcc.gov

Best Copy and Printing, Inc.
Portals II
fcc@bcpiweb.com

HERZOG
LAW FIRM

June 7, 2007

By Electronic Filing Ex Parte Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th 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:

On behalf of the Independent Payphone Association of New York, Inc. (IPANY), I respectfully enclose the "Order Denying Rehearing and Addressing Comments" issued by the New York State Public Service Commission (PSC) on May 24, 2007, in Cases 03-C-0428 and 03-C-0519.

Of particular relevance to the Petition for Declaratory Ruling filed herein by IPANY is the PSC's recitation of the criteria it will apply – and more critically, will not apply – in any further proceedings to review whether Verizon's pre-existing rates on April 15, 1997, complied with the FCC's New Services Test.[1]

Specifically, the PSC states that in making such determination it will not follow the directives and criteria set forth by the FCC in the Wisconsin Commission Order,[2] declaring that the rules established by the FCC are not applicable in New York on whether Verizon's pre-existing rates did or did not comply with the national New Services Test.

Because IPANY believes the New York Commission to be wholly in error in refusing to follow the directives of the FCC, as set forth in the Wisconsin Commission Order, and as mandated by the FCC on other state commissions,[3] IPANY's Petition for a Declaratory Ruling requested the specific relief of the FCC "setting aside New York determinations which refused to apply the holdings of the [FCC's]

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[1] PSC Order, May 24, 2007, at pp. 14-15.

[2] Wisconsin Public Service Commission Memorandum Opinion and Order, 17 FCC Rcd. 2051 (2002) affd New England Public Communications Council v. FCC, 334 F. 3d 69 (DC Circ. 2003).

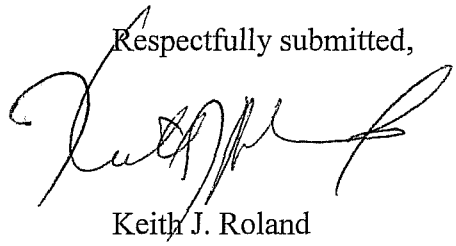
[3] Thus, where a state commission order issued prior to the FCC's Wisconsin Commission Order did not comply with FCC Wisconsin Commission Order, the FCC directed that further state proceedings "ensure compliance with the Wisconsin Order:. See Matter of North Carolina Payphone Association Petition for Declaratory Ruling, Order, Dockets CCB/CPD 99-27, 99-31, DA 02-513, March 5, 2002.

Herzog, Engstrom & Koplovitz PC
7 Southwoods Boulevard
Albany, NY 12211

V 518 . 465 . 7581
F 518 . 462 . 2743
www.herzoglaw.com

Wisconsin Orders." The reaffirmation by the PSC in its May 24, 2007 Order that is has no intention of following the Wisconsin Commission Order, provides compelling justification for issuance of the Order of Pre-emption requested by IPANY.

Respectfully submitted,



Keith J. Roland

KJR:tlm
Enclosure
cc: VIA e-mail
Daniel Gonzalez, Chief of Staff to Chairman Kevin J. Martin
gonzalez.daniel@fcc.gov
Scott Deutchman, Legal Advisor to Commissioner Michael J. Copps
deutchman.scott@fcc.gov
Scott Bergmann, Legal Advisor to Commissioner Jonathan S. Adelstein
bergmann.scott@fcc.gov
John Hunter, Chief of Staff and Senior Legal Advisor to Commissioner Robert M. McDowell
hunter.john@fcc.gov
Nicholas Alexander, Legal Advisor to Commissioner Deborah Taylor Tate
alexander.nicholas@fcc.gov
Thomas Navin, Chief, Wireline Competition Bureau
navin.thomas@fcc.gov
Donald Stockdale, Associate Chief and Chief Economist, Wireline Competition Bureau
stockdale.donald@fcc.gov
Albert Lewis, Chief, Pricing Policy Division, Wireline Competition Bureau
lewis.albert@fcc.gov
Pamela Arluk, Acting Assistant Chief, Pricing Policy Division, Wireline Competition Bureau
arluk.pamela@fcc.gov
Lynne Engledow, Pricing Policy Division, Wireline Competition Bureau
engledow.lynn@fcc.gov
Christopher Killion, Deputy Associate General Counsel
killion..christopher@fcc.gov
Diane Griffin, Assistant General Counsel
griffin.diane@fcc.gov
Tamara Preiss, Office of the General Counsel
preiss.tamara@fcc.gov
Paula Silberthau, Office of the General Counsel
silberthau.paula@fcc.gov

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on May 16, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 03-C-0428 - Complaint of Phone Management Enterprises, Inc. and Other Pay Telephone Operators Against Verizon New York Inc. for Refunds Relating to Unlawful Underlying Payphone Service Rates.

CASE 03-C-0519 - Complaint of American Payphone Communications, Inc. Against Verizon New York Inc. Concerning Alleged Refunds Relating to Unlawful Underlying Payphone Service Rates.

ORDER DENYING REHEARING AND ADDRESSING COMMENTS

(Issued and Effective May 24, 2007)

BY THE COMMISSION:

INTRODUCTION AND SUMMARY

A previous order in these proceedings ("the Rate Order") revised the tariffed rates and charges that Verizon New York Inc. (Verizon, the company) collects from payphone service providers (PSPs, the complainants),[1] for public access lines (PALs) and related services through which the PSPs obtain access to the network.[2] As a result, four matters remain to be decided in today's order.

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[1] In these proceedings, PSPs also have been referred to as independent payphone providers or IPPs.

[2] Cases 03-C-0428 and 03-C-0519, Order Resolving Complaints and Inviting Comments Regarding Public Access Line Rates (issued June 30, 2006). An extensive summary of the litigated issues and procedural history as of that date may be found in the Rate Order and in a Procedural Ruling by the Administrative Law Judge (issued January 14, 2005).

First, the complainants have petitioned for rehearing of the Rate Order in various respects.[3] We shall deny the petition.

Second, the Rate Order invited comment on whether, in addition to setting prospective rates in compliance with Federal Communications Commission (FCC) criteria, we also should further review the propriety of the rates that preexisted the Rate Order.[4] Albany County Supreme Court had ordered us to conduct such a review by reference to FCC standards as they existed in 1997.[5] The parties' comments in response to the Rate Order reveal a consensus that we may properly defer any such inquiry, at least until the FCC makes a final determination affecting whether refunds would be due the PSPs should it be shown that the preexisting rates were excessive.[6]

Third, the Rate Order invited Verizon to propose a method for recognizing, in PAL rates and charges, its revenues from certain access charges associated with payphone generated toll calls.[7] On reviewing Verizon's response to that inquiry,[8] we convened a technical conference and called for additional

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[3] Petition (denominated "petition for reconsideration") filed on behalf of Phone Management Enterprises, Inc. and Independent Payphone Association of New York, Inc., dated July 28, 2006 (complainants' petition). Verizon has filed a Brief in Opposition dated August 17, 2006.

[4] Rate Order, p. 24, Clause 2.

[5] IPANY v. PSC and Verizon, Albany Co. Index No. 413/02 (Sup. Ct. Decision and Orders dated July 31, 2002 and April 22, 2003).

[6] Verizon filed Initial Comments on this issue, dated August 15, 2006. The complainants filed Comments dated August 15, 2006, and supplemental updates dated August 24 and October 30, 2006 to report further developments in proceedings before state and Federal courts and the FCC.

[7] Rate Order, pp. 22-23.

[8] Letter to the Secretary from Bruce P. Beausejour, Esq. on behalf of Verizon, dated July 31, 2006, transmitting the company's compliance filing pursuant to the Rate Order.

comments.[9] Upon review of the comments,[10] we determine in today's order that the PAL tariffs need not be modified to reflect cost offsets from access charge revenues, other than those offsets already incorporated in the new rates that Verizon has submitted in its July 31, 2006 compliance filing.

Fourth, the complainants' comments on Verizon's compliance filing propose two modifications of the new tariffs. One would provide for automatic adjustment of PAL rates to reflect any increase in access charges, and the other would address an asserted inconsistency among the tariffs' references to recognition of access charge revenues as a cost offset. Today's order adopts the first proposal to a limited extent, and declines to adopt the second.

PETITION FOR REHEARING

The complainants' petition for rehearing takes issue with four aspects of the Rate Order. However, as Verizon observes, each element of the petition fails to establish the legal or factual error required under 16 NYCRR 3.7(b) as a predicate for reconsideration.

Moreover, Verizon is correct that the complainants are misreading the Rate Order insofar as they construe it to mean we must either (a) indiscriminately apply all the cost inputs we adopted as part of our Total Element Long Run Incremental Cost (TELRIC) analysis when setting unbundled network element (UNE) rates in Case 98-C-1357 ("the UNE rate case"),[11] or (b) indiscriminately reexamine all the UNE rate case inputs for purposes of this case. On the contrary, as the Rate Order explains, the scope of our discretion is not confined to those two alternatives. A rational determination of PAL costs and

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[9] Notice of Filing Dates and Conference (issued August 3, 2006).

[10] Letter to the Secretary from Keith J. Roland, Esq. on behalf of PSP members of Independent Payphone Association of New York, Inc., dated August 15, 2006; Verizon's and complainants' Initial Comments dated respectively August 11 and August 24, 2006; Verizon's Reply Comments dated September 5, 2006.

[11] N.Y. Telephone Co. - Rates, Order on Unbundled Network Element Rates (issued January 28, 2002).

rates may properly take into account evidence that relevant circumstances have changed since the UNE rate case. But it does not follow that we must embark on a plenary new TELRIC investigation, better suited to a generic proceeding where a broad array of parties other than PSPs would have an incentive to contribute to the creation of a comprehensive record.

Common Overhead Loading Factor

In the proceedings leading up to the Rate Order, the parties advocated that PAL rates incorporate a greater or lesser retail common overhead loading factor on theories that PAL services resemble retail services to a greater or lesser degree. The Rate Order adopted the 10% factor advocated by Verizon, rather than the 6.1% proposed in our advisory staff's January 14, 2005 white paper or the 5.9% adopted in the UNE rate case.[12]

The complainants' petition renews their argument, previously advanced in response to the white paper, that Verizon has failed to sustain its evidentiary burden of justifying an allowance greater than 6.1%. The complainants base their criticism on the FCC's requirement that, to satisfy its New Services Test (NST), incumbent local exchange carriers "bear the burden of affirmatively justifying their overhead allocations."[13] The complainants also reiterate their argument that PSPs' asserted efficiency and sophistication enable Verizon to serve PSPs without incurring all the overhead costs typical of service to retail customers. Thus, according to the complainants, the retail type costs that PSPs impose on Verizon are comparable to those imposed by the competitive local exchange carriers (CLECs)

[12] Rate Order, p. 11.

[13] Matter of Wisconsin PSC, CCB/CPD No. 00-1, released January 31, 2002 ("second Wisconsin order"), at 19, cited in complainants' Petition, note 7.

for whom we set rates in the UNE rate case on the basis of a 5.9% overhead factor.[14]

Verizon points out that the complainants are incorrect in alleging a lack of cost evidence because, after the complainants initially made that allegation in their comments on the white paper, Verizon did in fact provide our advisory staff the calculation and work papers supporting the company's 10% estimate. And, more fundamentally, Verizon is correct that the affirmative justification needed to support "overhead allocations" under the second Wisconsin order inevitably entails the application of theories and judgment because overheads, by their very definition, are costs that cannot be allocated solely on the basis of empirical studies.[15] In this instance, the Rate Order properly adopted the 10% factor as a means of assigning PAL rates an overhead allocation comparable to that borne by other, comparably competitive services. The Rate Order's approach is fully consistent with the second Wisconsin order's requirement that overhead allocations be "justified," as well as with our broader obligation to set rates based on forward-looking cost estimates pursuant to the NST.

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[14] Use of a 6.1% overhead factor is described as Proposal 4 at the conclusion of the complainants' petition. The complainants' Proposal 3 is that we "require Verizon's payphone rates to be calculated using [a] retail cost figure equivalent to that used for CLEC TELRIC rates." (Petition, p. 13.) We assume Proposal 3 is either a general request that we adopt without modification the cost inputs used in the UNE rate case (a point addressed elsewhere in today's order), or an allusion to the complainants' argument that we should recognize the PSP migration likely to result from increases in CLECs' PAL rates relative to Verizon's (as discussed in the accompanying text). Otherwise, complainants' Proposal 3 seems to have no antecedent in the text of their petition. Compare complainants' Comments on Staff White Paper, dated March 14, 2005, pp. 14-17.

[15] In a different context (the imputed ratio of Integrated Digital Loop Carrier and Universal Digital Loop Carrier deployment, discussed in the next section), the complainants themselves cite approvingly the Rate Order's statement that "it is not the use of actual data that renders a rate cost-based within the meaning of the NST; rather, what the NST requires is a forward-looking cost methodology." Rate Order, p. 21, quoted in complainants' petition at p. 5.

Loop Costs: IDLC vs. UDLC

The estimated average cost of a loop used by PSPs or other customers depends partly on the extent to which the network is assumed to use Integrated Digital Loop Carrier (IDLC) equipment, as distinguished from older, more costly Universal Digital Loop Carrier (UDLC) equipment. To derive loop costs reflecting the relative prevalence of IDLC and UDLC technology in Verizon's network, the Rate Order adopted the 57%/43% IDLC/UDLC ratio indicated by Verizon's Total Service Long Run Incremental Cost (TSLRIC) study filed in these proceedings, rather than the 85%/15% IDLC/UDLC ratio adopted in the UNE rate case and the white paper (which neither Verizon nor the complainants supported) or the 100%/0% IDLC/UDLC ratio advocated by the complainants. The complainants continue to advocate a ratio of 100%/0%, but would accept 85%/15% as a fallback position.

As we explained in the Rate Order, the IDLC/UDLC ratio used in the UNE rate case was intended to approximate the 85%/15% ratio of UNE-Platform (UNE-P) to UNE-Loop (UNE-L) provisioning for CLECs in 2001 (the most recent year for which data were available), but we have since recognized that the 2001 UNE-P/UNE-L ratio itself failed to reflect subsequent growth in UNE-L provisioning as compared with UNE-P. The Rate Order therefore supplanted the 85%/15% ratio with the 57%/43% ratio from the TSLRIC study. We thus struck a reasonable compromise between imputing the maximally efficient, all-IDLC network implied by the complainants' proposed 100%/0% ratio, or imputing absolutely no efficiency gains relative to Verizon's present network configuration.[16]

In opposition to any ratio other than 100%/0%, the complainants renew their argument that the recognition of some UDLC deployment as part of the IDLC/UDLC ratio in the UNE rate case--and, by extension, in the Rate Order--historically is rooted in now irrelevant concerns about whether Verizon could provide unbundled IDLC loops to CLECs. According to the complainants, such considerations are inapt in a PAL rate

[16] Rate Order, pp. 13-15.

determination because Verizon provides PSPs no unbundled service offerings. Moreover, the complainants argue, a ratio that assumes some UDLC deployment will perversely reward Verizon for imprudently failing to optimize the efficiency of its PALs and other basic services while the company focuses its investment on competitive wireless and fiber optic services. The complainants also question the reliability of Verizon's planning assumptions incorporated in the 57%/43% ratio.

As Verizon observes, the complainants' arguments are simply unresponsive to the Rate Order insofar as it already has taken them into consideration. The complainants are correct that the uncertainties regarding service offerings to CLECs at the time of the UNE rate case are merely tangential to the Rate Order in these proceedings. However, that is not because we should be estimating loop costs specifically for PSPs that use no unbundled loops, as the complainants imply;[17] but because the Rate Order does not even use the 85%/15% ratio which had resulted from concerns about unbundled loops in the UNE case. As for the alleged suboptimality of a 57%/43% deployment, the Rate Order notes that the complainants have made no showing of imprudence, and their mere allegation of a bias favoring competitive services does not cure that deficiency. Moreover, the Rate Order explains that in this case we can effectively satisfy the NST's mandate of a forward-looking cost methodology by exercising our discretion to recognize the costs of both a maximally efficient "end state" network and the present network as it actually exists. That approach forecloses the complainants' proposed evidentiary standard--for which they provide no rationale, in any event--that any modification of the inputs adopted in the UNE rate case must be based on "irrefutable evidence that the assumptions made in [the UNE case] are compelled to be changed."[18] Finally, the

[17] The Rate Order rejected the theory that loop costs imposed by PSPs should be estimated separately from loop costs generally, because (as the Order observes in discussing loop growth rates) "any given loop can be used for PAL services or other purposes." Id., p. 16, note 16. The complainants' petition cites no error of fact or law in that approach.

[18] Complainants' petition, p. 6.

complainants' argument that Verizon may fail to achieve a 57% IDLC ratio is paradoxical, at best, given the complainants' advocacy of even higher IDLC deployment rates such as 85% or 100%.

Loop Costs: Loop Growth Rate

A forward looking estimate of PAL costs requires a forecast of growth in the number of loops Verizon will maintain, as some per-loop costs tend to vary inversely with the number of loops. Rather than accept the 3% loop growth rate used in the UNE rate case and the white paper, the Rate Order adopted the 0% growth rate advocated by Verizon. We reasoned that use of the 0% forecast would recognize not only that actual growth has been negative, but also that per-loop cost increases due to negative growth may be mitigated by corresponding decreases in capitalization and operating and maintenance expense. Accordingly, for purposes of this case, we found the 0% rate reasonably accurate as a proxy for those countervailing cost impacts, regardless of whether the growth rate might be examined more closely if we convened a comprehensive proceeding to review rate design for all services.[19]

On exceptions, the complainants renew their argument that negative growth in loops will turn positive as PSPs migrate from CLECs to Verizon, in reaction to the PAL rate adjustments in these proceedings; and in reaction to the increasing price of CLECs' PAL offerings to PSPs, now that Verizon has ceased to offer the CLECs unbundled loops at TELRIC based UNE-P rates.[20] Verizon correctly responds that we expressly acknowledged the complainants' argument in the Rate Order, and found it was not "realistic" to infer that a PSP migration to Verizon loops could transform the negative growth rate into a positive 3%.[21] (Indeed, the complainants do not even suggest or acknowledge how much growth would have to occur, in the number of Verizon loops

[19] Rate Order, pp. 15-17.

[20] Complainants' petition, p. 9.

[21] Rate Order, p. 16.

used for PAL service, to produce a 3% growth rate in loops overall.) By simply calling attention to those same circumstances again, the complainants present no persuasive reason to believe that the Rate Order has understated the loop growth rate.

Geographic Deaveraging

In the UNE rate case, to recognize that loop costs tend to be lower in urban areas than elsewhere, we estimated loop costs separately for each of three geographic zones: Zones 1A (Manhattan), 1B (major cities outside Manhattan), and 2 (all other). In these proceedings, the Rate Order accepted the white paper's presumption that PAL lines are distributed among the three zones in the same proportion as all Verizon's other loops, despite the complainants' allegation that the white paper's loop cost estimate was overstated insofar as PSPs use PAL lines predominantly in the two low-cost, urban zones (1A and 1B).

In the Rate Order, we questioned whether the complainants' proposal was useful or economically significant, because the PAL lines used by Verizon's own payphone service are concentrated in Zone 2 where they tend to negate the cost savings associated with the PSPs' lines in the urban zones. We also cited the complainants' obligation to address the customer impacts of their proposal, which, by imputing the low urban costs of Zones 1A and 1B to higher cost PAL lines in Zone 2, might impair the economic viability of Verizon's own non-urban payphone service in Zone 2.[22]

On exceptions, the complainants ask that we reconsider that decision on the ground that Verizon's own payphone operations in Zone 2 are being curtailed and may even be divested, thus eliminating our concern about recognition of relatively high loop costs in that zone. In opposition, Verizon says we should dismiss the complainants' argument because it already was considered in the Rate Order.

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[22] Id., pp. 18-19.

In fact the Rate Order does not address the complainants' assertions about the prospects for Verizon's payphone business in Zone 2 (other than the potential effects of the complainants' proposal on Zone 2 loop costs, discussed above), as the parties have not raised the matter until now.[23] However, the complainants' focus on curtailment of Verizon payphones reflects a misinterpretation of the Rate Order. Our point was that the alleged concentration of PSPs' PAL loops in the urban zones provides no indication that all PAL loops collectively--regardless of whether they serve Verizon's or PSPs' payphones--are distributed among zones differently from non-PAL loops. The complainants' subjective observation that Verizon payphones seem scarce in Zone 2, and that Verizon might divest its payphones, not only falls short of providing credible evidence but also begs the question whether Verizon's and PSPs' PAL loops collectively are, or will be, concentrated disproportionately in Zones 1A and 1B. Thus, the complainants' argument on reconsideration fails to rebut the Rate Order's conclusion that there is no evidence sufficient to support a geographic cost differential or justify the potential customer impact of a geographically based cost imputation.

Conclusion Regarding Petition

Complainants' petition does not dispute that, as stated in the Rate Order, "we have substantial discretion in performing the analyses needed to set NST-compliant rates, including discretion to determine which inputs are appropriate for that purpose."[24] In further support of that conclusion, Verizon notes that our decisions are sustainable if they have a rational basis,

[23] See complainants' Comments on the Staff White Paper, dated March 14, 2005, pp. 3-4.

[24] Id., p. 15; similarly, id., p. 6, as to why the NST does not require reconsideration, in this case, of all inputs applied in the UNE case ("we have the discretion and obligation to tailor the administrative process to the circumstances and issues actually presented").

including evidentiary support;[25] and that in deciding highly technical questions, we are not compelled to consider or ignore any particular factor or assign it some preordained weight.[26] For the reasons discussed above, complainants' petition presents only matters previously considered and addressed in the Rate Order, or other criticisms that fail to identify errors in that order. Accordingly, the petition is denied.

NST CRITERIA AND PRIOR RATES

We initiated these proceedings partly in response to a State Supreme Court directive that we determine whether the PAL rates antedating the Rate Order complied with the NST's requirement (as of April 15, 1997, the relevant date as determined by the Supreme Court) that rates reflect a forward-looking cost methodology.[27] On appeal, however, the Appellate Division had found that we need not order Verizon to pay refunds to PSPs, should we determine that the pre-existing rates had been excessive, i.e., not NST compliant. The Appellate Division based this conclusion on a letter to the FCC from representatives of Verizon's predecessor, requesting an extension of time in which to review existing rates and file new rates and proposing a refund in the event the new rates were indeed lower than existing rates.[28] The Rate Order noted that the Independent Payphone Association of New York, Inc. (IPANY, representing many of the complainants in these proceedings) subsequently had petitioned the FCC to determine, as an exercise of preemptive Federal jurisdiction, that noncompliance with the NST would necessitate

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[25] Brief in Opposition, p. 3, citing Campo Corp. v. Feinberg, 279 A.D. 302, 307 (3d Dept. 1952), aff'd, 303 N.Y. 995 (1952).

[26] Id., pp. 3-4, citing, inter alia, N.Y. Tel. Co. v. PSC, 95 N.Y.2d 40, 48-49 (2000).

[27] IPANY v. PSC and Verizon, Albany Co. Index No. 413/02 (July 31, 2002). Complainants had sought refunds of any excess charges imposed from April 15, 1977 onward, because that was a deadline set by the FCC for implementation of NST compliant payphone rates.

[28] IPANY v. PSC and Verizon, 5 A.D.3d 960, 963-64 (3d Dept. 2004), app.den., 3 N.Y.3d 607 (2004).

refunds notwithstanding the Appellate Division's decision.[29] Accordingly, although the Rate Order set new, NST compliant PAL rates only prospectively, it also invited the parties to comment on whether we should examine the pre-existing rates superseded by the Rate Order and determine whether the superseded rates were forward looking and conformed to the NST standard as it existed on April 15, 1997.[30]

In response to that question, Verizon argues that the Appellate Division, by precluding refunds as a remedy for any past discrepancies between PAL rates and those required under the NST, did not merely limit the scope of the Supreme Court's directive but reversed it altogether. Verizon notes that the Supreme Court's directive narrowly and specifically requires that we clarify whether, in setting the pre-existing PAL rates, we had considered Verizon's forward looking costs (as distinguished from embedded costs). Verizon also construes the remand as being tied to the supposition that refunds might be awarded. The company therefore reasons that, since the Appellate Division has precluded refunds, there can be no potential remedy or other reason to carry out the Supreme Court's mandate that we examine the relation between obsolete PAL rates and the superannuated April 1977 version of the NST.[31]

Further, Verizon argues, if we do conduct additional proceedings in response to the remand, they should not include an investigation into PAL rates that goes beyond the record on which

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[29] Rate Order, pp. 2-3, and cases cited therein. The FCC has yet to act on the IPANY petition.

[30] Id., p. 3 and Ordering Clause 2.

[31] In effect, Verizon argues, the Supreme Court's remand to us, for a review of pre-existing rates and NST compliance, was negated by the Appellate Division's decision to reverse (in the Court's words) "so much of [the Supreme Court's decision] as directed respondent Public Service Commission to determine whether respondent Verizon New York Inc. owed petitioners a refund." IPANY, supra, 5 A.D.3d at 964. Verizon says the review of preexisting rates could not have had any purpose except as an intrinsic part of the Supreme Court's mandate, subsequently reversed by the Appellate Division, that we examine the need for refunds.

we based the PAL rates at issue in the remand order. Verizon observes that those rates were established by decisions we issued in 2000 and 2001,[32] so that a review of past NST compliance not only would be purposeless but might pose the conundrum of having to estimate forward-looking costs retrospectively as of 2000 and 2001. On the other hand, Verizon suggests, we might discharge our obligations under the remand relatively simply, by clarifying to the Supreme Court's satisfaction how the existing record supports our previous representation to the Court that we had based the rates on forward-looking costs.

Verizon apparently believes that refunds conceivably remain an open issue, given the allegedly unlikely possibility that IPANY will prevail in its pending petition to the FCC.[33] Verizon nevertheless contends that the petition at the FCC provides no basis for additional proceedings in response to the Supreme Court's remand, because the remand concerns only compliance with federal law as of 1997 whereas any FCC decision on the IPANY petition would address compliance with subsequent FCC decisions (including the second Wisconsin Order) and would require initiation of new proceedings. Verizon concludes that any further investigation pursuant to the remand would be a wasted effort mandated neither by the courts nor, as yet, by the FCC, which would have to explain its rationale and intent before we could determine what further analysis we must perform to comply with the FCC's decision.

The complainants, meanwhile, argue that we should move forward with the remand proceeding. They claim that the FCC has the authority to set aside state PAL rates and that the FCC is likely to order refunds, based on the preemption theories advocated in IPANY's petition to the FCC. They further argue

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[32] Cases 99-C-1684, IPANY - Petition for Rates and Refunds, and 96-C-1174, Coin Telephone Services, Order Approving Permanent Rates (issued October 12, 2000) and Order Denying Petition for Rehearing (issued September 21, 2001).

[33] Filed December 29, 2004 in CCB No. 96-128.

that the remand requires us to reexamine not only PAL monthly charges but all PAL rates, including usage charges.

In their comments and subsequent supplemental filings, the complainants assert that, under relevant case law, neither the prohibition against retroactive ratemaking nor the filed tariff doctrine precludes refunds of amounts charged in excess of NST compliant rates. Regarding retroactivity, complainants cite Indiana Bell Tel. Co. v. Indiana Util. Regulatory Commission, 855 N.E.2d 357 (2006), in which the Indiana Court of Appeals upheld the Indiana Utility Regulatory Commission's application of NST criteria to direct a refund of payphone charges. Regarding the filed tariff doctrine, they cite Davel Communications v. Qwest Corp., 451 F.3d 1037, as amended at 460 F.3d 1075 (9th Cir. 2006). There the Ninth Circuit found that the doctrine would not bar refunds of payphone charges under review by the FCC, and referred PAL rate issues to the FCC. The complainants emphasize that their petition for NST-based refunds at the FCC is only one of many filed by various states' PSPs, and that we could initiate an investigation of all superseded payphone rates (i.e., not limited to PAL rates but including all payphone tariffs) in anticipation of an FCC decision requiring us to do so.

While Verizon argues that a remand is no longer necessary, that does not change the fact that a remand directive from Albany County Supreme Court remains pending. The Appellate Division recognized the continuing existence of the remand in overturning Supreme Court's conclusion that refunds were available, observing "that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration."[34] The remand directive remains in effect if only because it was not appealed; Verizon only sought relief from the possibility of refunds.

Verizon is, however, correct to the extent it argues for the narrowness and specificity of the remand. Albany County Supreme Court observed that "[a]lthough the PSC now asserts that

[34] IPANY v. PSC and Verizon, 5 A.D.3d at 964.

it considered forward-looking cost data and that Verizon's rates were based on that data, it cannot assert for the first time in this proceeding a different ground for its determination than what is expressed in its initial determination."[35] The Court accordingly concluded that "although the pre-existing PAL rates may have been based on forward looking costs, the PSC's determination indicated that they were based on embedded costs, which do not necessarily comply with the new services test."[36] Verizon is, moreover, correct that the remand would only apply the new services test as it existed on April 15, 1997, as Supreme Court rejected complainants' argument that later FCC decisions should be applied. Further, Verizon also seems correct that, in principle, the remand directive should not be difficult to fulfill, as it requires only a comparison between the preexisting rates at issue and the relevant incremental cost data to show whether the rates are supported by forward looking costs.[37]

Complainants' request for a more expansive investigation on remand is not supported by the New York Court proceedings. The complainants have not focused on the language of the Supreme Court decisions, but argue that we should rely on the Indiana and Davel cases as guidance or precedent. Those cases are inapposite because, in both instances, it was found that the regulatory commission had set the rates subject to a possibility of further examination. Thus, the Davel decision was based partly on a finding that a statutory "just and reasonable" proviso (in §201 of the 1996 Federal Communications Act) defeated any presumption that filed tariffs were valid; but a separate, critical factor was the court's finding of an intention, on the FCC's part, that rates applied after April 15, 1977 would be subject to refund. The majority in the Indiana case found a similar intention on the part of the Indiana commission, and

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[35] July 31, 2002 Albany County Supreme Court Decision and Order at 19.

[36] Id. at 22.

[37] As a practical matter, however, there may be difficulty identifying the relevant data given the lapse of time since the rates were established.

sustained the Indiana commission's refund order specifically for that reason. Here, in contrast, we did not adopt the rates at issue subject to possible adjustment after further examination (other than reviewing them for compliance with the Rate Order). It was only the Supreme Court's remand that required further examination, limited to whether PAL rates were based on forward-looking costs under the NST as it existed on April 15, 1997.

More important, we are not free to follow other state or Federal cases as precedent now that we are subject to a series of judicial determinations by the courts of our own state in this very case. In particular, the New York Courts have rejected the conclusion reached in Davel that a refund obligation arose from Verizon's predecessor's letter to the FCC seeking an extension of time to file.[38] The complainants seem to suggest that we could in 2000 or 2001 have declared the previous rates subject to refund as of April 15, 1977. Whether we could have done so then is highly questionable under the "filed rate" doctrine. Such a declaration is impossible now that the New York Courts have ruled.

Complainants may also believe we can anticipate the terms of the decision the FCC allegedly will issue concerning IPANY's petition. Such a premise is not realistic enough to justify complainants' proposed continuation of these proceedings at this time. As Verizon says, any proceeding the FCC might require would involve standards and evidence very different from those implicated in the remand. For instance, the petition to the FCC seeks retroactive application of the second Wisconsin order, while the New York Courts have precluded such application and require that we use the NST as it existed on April 15, 1997.

We therefore conclude that Verizon's comments are persuasive as to how any procedures on remand should be conducted. The complainants, meanwhile, have offered no justification for the sweeping review of past PAL rates they propose, other than a sheer presumption that the FCC will grant the relief sought in their petition. While the Davel decision

[38] IPANY v. PSC and Verizon, 5 A.D.3d at 964.

could affect the FCC's disposition of the petition, Verizon is correct that it would be a waste of resources for us to analyze possible discrepancies between the NST and superseded PAL rates before receiving the FCC's guidance (if any) as to the purpose and scope of such an inquiry.

The question remains, however, whether we should take further action in response to the remand. At this juncture it seems that there is no basis for doing so, as Verizon opposes it and the complainants have offered no sound reason for proceeding. One dispositive consideration is that an FCC ruling on IPANY's petition might render the remand proceeding unnecessary or affect the relief provided in that proceeding; both parties seem to recognize that possibility. We therefore conclude that the prudent course here is to conduct no further proceedings pursuant to the remand until the FCC has issued a final decision enabling us to evaluate how best to proceed.

ACCESS CHARGE REVENUES

Verizon's plant may be categorized as traffic sensitive (TS) or non-traffic-sensitive (NTS), depending on whether the plant's costs vary with usage volumes. To comply with the New Services Test (NST), payphone rates must be designed to avoid a double recovery of NTS costs that Verizon already is recovering once through carrier access charges approved by the FCC or through the federal access charges' intrastate counterparts approved by this Commission.[39]

In their comments on the advisory staff white paper, the complainants acknowledged that the white paper would properly recognize payphone revenues generated from one type of access

[39] Access charges were devised as a new source of cost recovery for the Bell operating companies, in lieu of the toll rate system that had prevailed until the 1984 AT&T divestiture. In New York, the intrastate access charge regime for recovery of intrastate costs was designed initially in Case 28425, Impact of Modification of Final Judgement and FCC's Docket 78-72. There and in subsequent cases, we developed intrastate access charges similar in purpose and design to the interstate charges designed by the FCC.

charge--namely, the Subscriber Line Charge (SLC)--[40] and that, insofar as SLC revenues exceed TS costs, the white paper would apply the SLC revenues as contributions offsetting the NTS loop costs recoverable by Verizon through PAL rates. However, the complainants objected that the white paper did not similarly recognize the revenues that Verizon collects from third parties through other, non-SLC access charges, incidental to 8XX payphone calls and other intrastate and interstate payphone calls.[41]

In response to the complainants' concern, the Rate Order directed Verizon to include in its compliance filing a proposed method for quantifying, as cost offsets, revenues from access charges other than the SLC. In the compliance filing, however, Verizon insisted that only SLC revenues may properly be used to mitigate PAL rates, citing reasons it had not mentioned initially in its reply to complainants' comments on the white paper. On receiving the compliance filing, we initiated a comment phase in these proceedings to examine the issue further.[42] Having reviewed the comments, we now conclude that Verizon is correct, and the Rate Order is hereby modified to that extent.

Verizon says only three types of access charge generate revenues arguably exceeding TS costs for PAL service, and therefore have, at one time or another, been deemed a source of cost offsets applicable against PAL rates: the Subscriber Line Charge (SLC), the Carrier Common Line (CCL) charge, and the Presubscribed Interexchange Carrier Charge (PICC). Among these, according to Verizon, the FCC has determined that the only

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[40] The Rate Order referred to the SLC as the End User Common Line (EUCL) charge.

[41] Rate Order, pp. 22-23.

[42] Notes 8 through 10 above provide citations to the notice and pleadings.

revenue source potentially available to reduce PAL rates is the SLC.[43]

There is no dispute that the PICC's availability for PAL rate mitigation, as authorized by the FCC's Common Carrier Bureau in the first Wisconsin order, ceased when the full Commission in the second Wisconsin order expressly modified that aspect of the Bureau's decision.[44] Thus the only remaining question is whether PAL rates may be offset by CCL revenues.[45]

To begin, the complainants claim that the Bureau's decision in the first Wisconsin order was modified or reversed by the full FCC in the second Wisconsin order only insofar as the FCC removed PICC revenues from PAL rate calculations. They argue that, because the FCC in the second Wisconsin order expressly upheld the Bureau's recognition of SLC revenues and expressly disallowed the Bureau's recognition of PICC revenues, the FCC must have intended tacitly to leave undisturbed the Bureau's decision that CCL revenues should be used to mitigate rates in the same manner as SLC revenues. The complainants further suggest that we need not design intrastate access charges strictly analogous to the system of interstate access charges constructed by the FCC. Thus, according to the complainants, even if the FCC had intended to disallow CCL revenues in the PAL rate calculation--so as to reverse the Bureau by implication--the FCC's decision would not preempt us from following the Bureau's lead and recognizing CCL revenues in the same manner as SLC revenues when setting intrastate rates.

Verizon responds, and we agree, that one cannot reasonably read the second Wisconsin order as complainants propose. The order's clear purpose is to review the Bureau's

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[43] Matter of Wisconsin PSC, CCB/CPD No. 00-1, released January 31, 2002, supra ("second Wisconsin order"), ¶61. That order modified a prior decision, released March 2, 2000 in the same proceeding ("first Wisconsin order"), which had stated that all three types of revenue should be available as PAL rate offsets.

[44] First Wisconsin order, ¶12; cf. second Wisconsin order, ¶60.

[45] Unlike the interstate CCL set by the FCC, which has no rate impact because it has declined to zero, the intrastate CCL continues to generate a revenue contribution.

overall treatment of the SLC, CCL, and PICC collectively in the first Wisconsin order, and then endorse the Bureau's approach only with respect to the SLC. While the complainants argue that the FCC could have ruled more explicitly had it intended to disallow CCL revenues in mitigation of PAL rates, one could as well say the FCC could have been more explicit if, as the complainants suppose, it had intended to recognize CCL revenues. Moreover, Verizon's reading of the FCC decision is not merely as compelling as complainants', but more so, because the FCC's adoption of the SLC as the sole permissible source of PAL cost offsets was obviously intended to supplant an entire scheme of interrelated revenue sources adopted by the Bureau and portrayed as such in the FCC's decision. And, as Verizon observes, had the complainants' interpretation ever occurred to them prior to the comments in these proceedings, the complainants or other PSPs undoubtedly would have advocated it four years ago upon issuance of the second Wisconsin order and in subsequent state commission proceedings.[46]

For the reasons noted, we find no indication in the second Wisconsin order that CCL revenues should be applied as an offset to PAL rates. Even if, hypothetically, the complainants were interpreting the second Wisconsin order correctly, the next question would be whether the use of CCL revenues as an offset would comply with the NST and would otherwise constitute sound public policy. In this connection, Verizon correctly observes that the complainants' theory, conceiving of CCL revenues as a component of the net costs and revenues of a PAL line, confuses the incremental costs which the NST is intended to capture versus the residual historic costs sought to be recovered by access charges in lieu of the pre-1984 toll charge system.

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[46] The complainants' attempted reliance on elements of the first Wisconsin order allegedly left undisturbed by the second Wisconsin order also is inconsistent with the courts' understanding in these proceedings, where the Appellate Division observed that the second Wisconsin order "rejected a number of [the first Wisconsin order's] premises and, thus, became the only order upon which [complainants] may now rely." IPANY v. PSC, supra, 5 A.D.3d 960, 963.

In its compliance filing, Verizon initially described the CCL charge as a "source of contribution to a broad range of Verizon's services," as distinguished from a contribution to PAL loop costs.[47] The company's characterization has led to an exchange of arguments about issues that are not germane, such as whether Verizon's intrastate services as a whole are profitable; whether the company's intrastate return can properly be calculated without including revenues from broadband access charges, inside wire maintenance, and wireless services; and whether CCL revenues may properly be used to subsidize flexibly priced non-basic services. These considerations fail to address the overall purpose of access charges such as the CCL which, as noted, were established to recover all the historic costs formerly recoverable through toll charges rather than the incremental cost of specific plant such as PAL lines.

For argument's sake, we can accept for the moment the complainants' perspective that the design and magnitude of intrastate access charges remain open to debate as long as Verizon's financial condition continues to change for better or worse. Even then, however, in asserting that the basic purpose of the CCL should shift to recovering specific loop costs within the framework of the NST, complainants "prove too much." If, as their argument implies, the NST were fundamentally inconsistent with the scheme of access charges adopted for recovery of residual costs in the aftermath of divestiture, that conflict long since would have been addressed in post-divestiture proceedings other than this case. Most notably, it did not arise in the second Wisconsin order where the FCC directly considered in detail the use of access charges as cost offsets. Instead, rate litigation since divestiture has established no authority for the complainants' proposition that the NST precludes the continued use of access charges for general cost recovery as intended at the time of divestiture.

Finally, the complainants assert that the failure to recognize CCL revenues as a cost offset violates the NST by

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[47] July 31, 2006 letter, supra, p. 2.

forcing PSPs to subsidize Verizon's general costs, in excess of the incremental costs specific to the PAL loops for which we must set NST compliant rates.[48] As an illustration of the NST principles that complainants say we should apply here, they cite the FCC's decision to exempt PSPs from paying the PICC on the ground that such payments would extract a subsidy by recovering costs additional to those of a PAL line.[49] Verizon aptly objects that the CCL in this case is distinguishable from the PICC at issue in the FCC decision because the CCL--in contrast to the PICC--is paid solely by interexchange carriers (IXCs) or is flowed through to IXCs' toll customers, and thus never has been paid by PSPs in the first place.

Anticipating Verizon's argument, complainants say it makes no difference that the CCL is imposed on IXCs rather than PSPs, because the CCL is a cost that an IXC can pass along to its customers. However, Verizon is correct that there is a substantial difference between our treating the CCL as a cost offset to relieve PSPs from paying it, versus treating the CCL as an offset merely because IXCs might choose to recover it from toll customers (not PSPs) as part of the IXCs' cost of doing business. Given that the PSPs pay the CCL neither directly to Verizon nor indirectly through the IXC, the complainants are incorrect that failure to recognize the CCL as a cost offset would compel them to support costs exceeding the NST standard or subsidize Verizon's non-PAL services. On the contrary, treating the CCL as an offset to PAL costs would improperly subsidize PSPs (and violate the NST) by providing them below-cost PAL service, as it would "recompense" them for CCL charges they do not actually pay.

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[48] The complainants seek to rely on the NST's principle that rates for a given service may not be designed to recover more than the sum of direct costs plus a reasonable allocation of overheads. Second Wisconsin order, ¶23 and ¶60.

[49] Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, CCB Nos. 96-262 and 94-1, Order on Reconsideration, released June 25, 2003, ¶2.

TARIFF MODIFICATIONS

In their comments on Verizon's compliance filing pursuant to the Rate Order, the complainants propose that we modify the new PAL tariffs in two respects. First, they note that Verizon's calculation of the tariffed rates "is static" insofar as it incorporates a fixed value to represent the cost offset related to EUCL (i.e., SLC) revenues.[50] The complainants' proposed remedy is too broad, insofar as PAL rates would vary automatically if the EUCL were modified or if it were supplanted by newly created access charges. Not all such changes should be implemented automatically, when no similar system is in place for recognizing the many other cost elements that may vary after the tariffed rates have taken effect; instead, any cost and revenue changes materially affecting the PAL revenue requirement are more properly addressed in a new, comprehensive rate analysis.

Nevertheless, the complainants are correct that the intent of the Rate Order was to provide an offset reflecting the prevailing level, rather than a fixed amount, of EUCL revenues. Indeed, that intended result presumably has been achieved through a billing arrangement, implemented pursuant to the July 2006 compliance filing, whereby Verizon charges PSPs whatever amount may be needed to recover any difference between the EUCL charge and the total rate shown in the tariff.[51] Thus, an increase in the EUCL charge will automatically cause a countervailing decrease in the amount collected independently of the EUCL, as the complainants advocate.

However, the mechanism for maintaining such equilibrium is not sufficiently specified in the compliance filing. A related concern is that the PAL rates established in the Rate Order are not subject to flexible pricing, and the compliance

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[50] Roland letter dated August 15, 2006, supra.

[51] For example, if the monthly Basic PAL rate of $21.47, shown in the tariff, reflects a supposition that Verizon will collect a EUCL charge of $6.86, the company should charge the PSP an additional $14.61 to make up the difference. Hypothetically, if the EUCL were to increase by 20 cents to $7.06, the $14.61 non-EUCL component of the bill would be reduced correspondingly to $14.41.

filing therefore should have included revisions such that any contrary provision would be deleted from Verizon's tariffs.[52] We therefore shall direct Verizon to submit a revised filing to correct these deficiencies.

Second, the complainants express concern about a supposed inconsistency between the tariff's provision that PALs are subject to FCC tariffed rates and regulations for the multiline EUCL, and its notation that each monthly rate shown in the tariff "is inclusive of" the EUCL.[53] The complainants would delete the reference to the FCC tariff. We find this proposal unsound because the effects of incorporating by reference the FCC tariff may be broader than merely establishing the applicability of the EUCL, and because there is no inherent conflict between declaring the FCC tariff applicable and reciting that the EUCL has been included in the rate calculation.

The Commission orders:

1. The petition of Phone Management Enterprises, Inc. and Independent Payphone Association of New York, Inc., dated July 28, 2006, for rehearing of the order issued in these proceedings June 30, 2006 (the Rate Order), is denied.

2. Pending a Federal Communications Commission decision regarding the petition of Independent Payphone Association of New York, Inc. for preemption of the Public Access Line and Public Access Smart-Pay Line rates and charges that were specified in the tariffs of Verizon New York Inc. (Verizon) and were superseded by the new rates and charges established in the Rate Order, or other relevant new developments, this Commission will not investigate whether those prior rates complied with the New Services Test before they were superseded.

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[52] See PSC NY No. 1 - Communications, Section 3, Third Revised Page 6.

[53] First Revised Page 5, ¶A.3.g., as contrasted with First Revised Page 34, note accompanying ¶A.4. Analogous provisions for Public Access Smart-Pay Lines, which might be subject to the same concern but which the complainants do not mention, appear respectively at Second Revised Page 12, ¶B.6.f., and Second Revised Page 35, note accompanying ¶B.7.

3. On the basis of the comments filed pursuant to notice issued in these proceedings August 3, 2006, the Rate Order is modified to revoke the requirement that Verizon include in its PAL rates a cost offset on account of revenues from Carrier Common Line charges, and the comment phase pursuant to the August 3, 2006 notice is so concluded.

4. Verizon is directed to file, no later than 30 days from issuance of today's order or as the Secretary may otherwise prescribe, to take effect on a temporary basis on 30 days' notice thereafter, such tariff changes as are necessary to effectuate Public Access Line rates consistent with the discussion in today's order concerning implementation of the offset for End User Common Line Charge revenues and the inapplicability of the flexible pricing option. The Company shall serve copies of its filing upon all parties to these proceedings. Any comments on the compliance filing must be received at the Commission's offices within ten days of service of the Company's proposed amendments. The amendments specified in the compliance filing shall not become effective on a permanent basis until approved by the Commission and will be subject to refund if any showing is made that the revised rates are not in compliance with this order. The requirement of §92(2)(a) of the Public Service Law as to newspaper publication is waived.

5. These proceedings are continued but shall be closed by the Secretary as soon as the compliance filing has been approved, unless the Secretary finds good cause to continue them further.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary