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*Electronic Filing
& By Hand*

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., Room TW-325
Washington, DC 20554

*Re: CC Docket No. 96-128
The Legal Implications of TON Services, Inc., v.
Qwest Communications and Other Post-Filing
Matters*

Dear Ms. Dortch:

The Payphone Association of Ohio ("PAO") is a not-for-profit corporation organized under the laws of the State of Ohio and is comprised of independent payphone providers that purchase from AT&T the local exchange services required to provide payphone services to its customers. On December 26, 2006, PAO filed a petition asking the FCC for a declaratory ruling establishing the rights of the members of the PAO to the refund of overcharges for amounts collected in excess of lawful payphone rates back through to April 15, 1997.

As explained in the PAO Petition, the Public Utility Commission of Ohio ("PUCO") determined that AT&T's payphone rates were well in excess of the applicable cost standard. However, unlike other states, the PUCO did not address the refund issue, concluding, *inter alia*, that refunds for any period of time prior to the imposition of interim rates were not within the scope of the proceedings." Indeed, as AT&T is well aware, PUCO expressly and repeatedly

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refused to allow PAO to make any substantive argument or to present any witness or evidence on the refund issue. Indeed, in its order, PUCO

... emphasized that the PAO has raised the issue of refunds on several occasions [footnote omitted]. On each occasion, the Commission stated that **refunds are beyond the scope of this proceeding** . . .”

Public Utilities Commission of Ohio, 96-1310-TP-COI, at p.5 (emphasis added). This conclusion was affirmed by the Ohio Supreme Court. Specifically, in reviewing the PUCO order, the Ohio Supreme Court confirmed that: “PUCO refused to address the issue of refunds for any period before the interim tariff rates were approved in 2003. . . .” *Payphone Assn. v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 459, 2006-Ohio-2988 (2006). Thus, given the absence of action by PUCO, in its Petition, PAO sought an order from the FCC implementing its own directives in CC Docket 96-128, requiring the refund of charges in excess of the cost based rates determined by state authorities.

The facts and legal issues presented to the FCC are really very simple and straightforward. Congress, through its enactment of the Telecommunications Act of 1996 (the “Act”), recognized the need to intervene to create a level playing field in the payphone industry. As part of its efforts, Congress expressly prohibited, in § 276 of the Act, all Bell operating companies providing payphone service (which includes AT&T) from operating in a manner so as to prefer or discriminate in favor of its payphone service. To accomplish this, Bell companies were required, both by the express language and § 276 and by FCC orders, to provide payphone service rates that were based on cost by April 15, 1997.

In this context, the FCC need only consider several facts in order to reach the proper conclusion that AT&T must refund to PAO all monies it collected in excess of the cost based rates under § 276¹. The indisputable facts are: (i) § 276 of the Act requires rates to be cost-based

¹ PAO’s motion for declaratory ruling is properly before the FCC, and none of the barriers suggested by either of AT&T or PUCO are factually or legally sustainable. Pursuant to 47 CFR 1.2, the FCC possesses the authority to issue declaratory rulings to terminate controversy and remove uncertainty and the PAO Petition, like those of many other payphone associations, seeks precisely that relief. PAO’s Motion was tendered for the FCC’s initial consideration and not, as argued by AT&T and PUCO, as an impermissible collateral attack on a prior judgment. Indeed, by PUCO’s own admission and as discussed in PAO’s original Motion and Reply, PUCO determined the refund question to be outside the scope of its proceedings. Further, the Supreme Court of Ohio upheld the PUCO’s decision to not address the refund issue. Consequently, there has never been a hearing on the merits together with the submission of evidence of the matter of refunds. Thus, the suggestion from AT&T and PUCO that the doctrine of res judicata bars PAO from bringing this matter before the FCC is wrong as a matter of fact and law as discussed at length in PAO’s Reply.

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as of April 15, 1997; (ii) in exchange for the immediate right to collect dial around compensation from interexchange carriers, AT&T expressly and unconditionally promised the FCC and PUCO to refund payphone service providers any overcharges back through April 15, 1997, in the event its rates were later determined to exceed rates allowed pursuant to § 276; (iii) AT&T's rates were not cost based, as determined by PUCO in its September 15, 2004 Order and Entry; (iv) PAO overpaid AT&T for payphone services; and (v) neither PUCO nor the Ohio Supreme Court addressed AT&T's obligation to refund. Thus, to be sure, in the instant matter, PAO is not asking the FCC to substitute its judgment for that of PUCO, because PUCO never rendered a judgment in the matter of refunds going back to 1997. Every other issue, defense, excuse or claim presented in this matter by AT&T and the PUCO is superfluous noise, offered with the objective to distract from these dispositive facts.

AT&T and PUCO have argued—*ad nauseam*—the applicability of the filed rate doctrine; however, as PAO argues in its Motion and Reply, and as supported by the *Davel* and *TON Services* opinions, the doctrine clearly cannot be applied in this matter. The higher rates charged by AT&T from April 15, 1997 forward were never established as the lawful rate(s) under § 276, and thus never obtained the status of lawful rates that could be the basis of a claim under the filed rate doctrine. AT&T and PUCO also argue AT&T's rates were always lawful and thus, there is no refund obligation. This argument is predicated on the allegation that AT&T's 1985 tariff was approved by PUCO in 1985 and, therefore, reflected the only lawful rates in Ohio. With respect to the lawfulness of the 1985 rates, this argument completely misses the point. Indeed, even if those rates were lawful when filed, the standard for review in 1985, before cost-based rates were required, was dramatically different from the § 276 standard. Thus, at best, all that can be said about those rates is that they were lawful under the then-applicable costing regime applied by PUCO in 1985.

Based on PUCO's downward adjustment order to AT&T, we know with absolute certainty that those same rates were *never* consistent with the costing standards established under § 276. Accordingly, even if the 1985 tariffed rates were lawful as a matter of the 1985 Ohio costing regime, that is not now, nor was it ever the standard relevant to the determination of whether refunds are required. Refunds are required because, contrary to AT&T's self-serving and false certification, its 1985 tariffed rates were never consistent with the New Services Test ("NST") standard, which is the sole determinant of cost and thus the obligation to make refunds.

The FCC, and the *TON Services* opinion discussed hereunder, has made clear RBOCs are ineligible to collect dial-around compensation until their rates meet this cost standard. However,

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the FCC granted a waiver of this eligibility limitation on the express condition that each of the RBOCs would make full refunds of any amounts collected in excess of the cost-based rate as subsequently determined by the state regulatory authority. Moreover, AT&T, both as a part of the RBOC coalition and yet again on its own, specifically and expressly promised to the FCC *and to the PUCO* that it would make such refunds without regard to any available defenses, including the filed rate doctrine. Notwithstanding these orders and the independent obligation created by AT&T's promises, for many years, AT&T has charged payphone rates well in excess of prescribed levels and it has steadfastly refused to make any refund for those overcharges.²

AT&T's refusal to make refunds is not only in direct violation of its express agreement and the FCC's express mandate that it do so, it is plainly anticompetitive. Indeed, not only has AT&T materially overcharged the payphone providers with which it competes—causing them the very competitive harm that Congress sought to prevent—it has retained those revenues for nearly a decade while simultaneously collecting millions in dial-around revenues. As set forth in PAO's filed Motion and Reply, the FCC is obligated by law to consider the anticompetitive effect of AT&T's conduct as a part of its public interest review, in addition to any specific statutory or policy considerations.

Not only does PAO have the law on its side, it is also right as a matter of simple justice. By overcharging PAO and refusing to make refunds, AT&T not only derived substantial excess revenue in payphone line charges, thereby filling its coffers and economically crippling its competitors, it specifically and intentionally breached its commitment to the FCC to act in an agreed, lawful manner and denied PAO the benefits to which it is lawfully entitled. Such conduct should not be rewarded.

As set forth in detail in PAO's Petition and in its Reply Comments, the established law clearly mandates both the payment of refunds to PAO and the disgorgement of the dial around revenues that AT&T has collected to date. However, as the Commission and its Staff are no doubt aware, the decision of the Tenth Circuit U.S. Court of Appeals decision in the *TON*

² Section 503 of the Act sets forth the circumstances in which the Commission has the authority to impose monetary forfeiture penalties. Not surprisingly, one such circumstance is where a party has "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation or order issued by the Commission . . ." 47 U.S.C. § 503. The FCC also has the right to apply remedies other than monetary forfeitures. For example, where, as here, the party's violation includes the breach of an agreement with the FCC, the FCC has the right to, and in this case most certainly must require that party to disgorge all monetary gains obtained through violation of that agreement. A failure to impose this remedy would have the perverse effect of continuing to reward AT&T both for its failure to charge cost-based rates, as well as for its willful and blatant breach of its refund agreement.

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Services, Inc. v. Qwest Corporation, published July 23, 2007 (“*TON Services*”) closely tracks and wholly sustains the analysis presented in PAO’s Petition and Reply Comments on each of the most critical issues before the Commission for resolution. Moreover, inasmuch as the essential facts and legal arguments presented by Qwest in *TON Services* are identical to the facts and legal arguments presented by AT&T in the PAO proceeding, the *TON Services* decision provides strong guidance to the Commission as to how these issues must be resolved. Finally, as set forth in PAO’s Petition, and discussed below, the facts presented in the PAO proceeding present an even further and compelling basis for granting the relief requested.

The TON Services Case

TON Services is a Utah-based PSP and operates payphones in several states throughout the Qwest region. TON Services sued Qwest for certain violations of the Communications Act of 1996 including: (i) Qwest’s failure to file tariffs and supporting cost data for services Qwest provided to TON Services together with claims relating to the rates Qwest charged TON Services from April 1997 through April 2002, both of which TON Services asserts was violative of the anti-discrimination and anti-subsidization provisions of 47 U.S.C. § 276(a) and the prohibition of unjust and unreasonable carrier conduct pursuant to § 201 (b); and (ii) for Qwest’s violation of § 416(c), which creates a statutory obligation to obey Commission orders.

Qwest moved to dismiss TON Services’ complaint under Rule 12 (b)(6) and, arguing the applicability of the doctrine of primary jurisdiction, asked the district court to refer the complaint to state regulatory agencies. Qwest urged the court not to consider whether its rates were consistent with applicable regulations since, under the doctrine of primary jurisdiction, the issue fell within the exclusive province of these regulatory agencies.

In response, TON Services argued it was not challenging the reasonableness of Qwest’s rates, but rather, challenged Qwest’s unlawful failure to file NST-compliant rates or supporting documentation and Qwest’s failure to pay refunds under the Waiver/Refund Order once Qwest filed NST-compliant rates in 2002. In addition to arguing the inapplicability of the filed rate doctrine, TON Services argued that referral of the complaint to regulatory agencies was unnecessary because “it sought relief for Qwest’s failure to file required rates and cost data, an issue which a federal court is equipped to adjudicate and which does not involve agency expertise or policymaking discretion.” *TON Services* at 17.

The district court granted Qwest’s motion and dismissed TON Services’ complaint and subsequently denied its motion for reconsideration. TON Services appealed the district court’s decision to the Tenth Circuit United States Court of Appeals. The 10th Circuit Court reversed

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and remanded the district court's decision, finding that Qwest could not properly assert the defense afforded by the filed rate doctrine and further held that referral of the matter to the Commission was appropriate pursuant to the doctrine of primary jurisdiction.

*The TON Services Decision Recognizes the FCC's
Authority and Obligation to Determine Whether Refunds Are Appropriate*

As stated above, the district court in *TON Services* accepted Qwest's argument that, "absent an initial administrative ruling that Qwest's filed rates from 1997 to 2002 were unlawful, the filed rate doctrine barred the relief TON Services sought." See *TON Services* at 4. Consequently, the court dismissed TON Services' complaint and invoked the doctrine of primary jurisdiction. The 10th Circuit held "[t]he district court in this case properly invoked the doctrine of primary jurisdiction, but did so without the evaluation of the issues to be referred, the purposes to be served by the referral, or a clear statement that the FCC is the appropriate agency to consider the referred issues." *Id.* The Court then concluded the "district court's invocation of the primary jurisdiction was apparently based on its mischaracterization of TON Services' claims" and "the court conflated *TON Services*' allegations concerning Qwest's procedural failure to file required tariffs and cost studies with allegations concerning the reasonableness of Qwest's rates. The court never considered whether Qwest's procedural non-compliance might have affected state regulators' ability to assess Qwest's substantive compliance with § 276(a) and the FCC's regulations implementing that statutory provision." *Id.* at 28-9.

In the same way the district court declined to address the ultimate issue of *TON Services*—whether it was entitled to refunds as a result of Qwest's non-compliance—PUCO also declined to address the refund question with respect to PAO and AT&T, concluding that those issues were beyond the scope of the proceeding. The district court resolved the question by the invocation of the primary jurisdiction doctrine, under which the FCC could perform its proper role in ordering refunds without regard to any claim that doing so would be in violation of the filed rate doctrine.

We address below and at length, the 10th Circuit's holding that the filed rate doctrine does not preclude refunds to PSPs where the rates they were charged by the incumbent LEC exceeded the FCC's cost standards. However, as the 10th Circuit reasoned that this issue should be before the Commission, we suggest again, in the strongest terms possible, that the Commission should preempt this matter for the purpose of completing the implementation of § 276, which PUCO failed completely to do.

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In its Petition, PAO argued that the Telecom Act establishes a clear national policy favoring cost-based rates and full competition in the provision of payphone services. The Act also provides the absolute statutory authority for the FCC to preempt state regulatory schemes or other requirements that fail to implement or conflict with the federal mandate and that §276 could not be more explicit in mandating pre-emption in the case of a conflict between the states and the FCC; to wit: “to the extent that any state requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall pre-empt such state requirements.” 47 U.S.C. § 276. That is, unlike many circumstances where pre-emption is allowed but reluctantly implemented, in this instance, pre-emption is not optional; the FCC is required to pre-empt where, as here, a state’s requirements are inconsistent with the federal mandate.

More specifically, as set forth in the PAO Petition, in the payphone arena, the Commission has consistently recognized its right, and indeed its obligation, to preempt inconsistent state requirements. Indeed, in its Payphone Orders, the Commission specifically states it would preempt any state action inconsistent with the requirements of those payphone orders. See *Report and Order*, at ¶ 147; *Order on Reconsideration*. 11 FCC Rcd. 21233, 21328 (at ¶ 218). And, the Commission has followed through on its commitment to do so. For example, *In the Matter of New England Public Communications Council Petition for Pre-emption Pursuant to Section 253*,³ the Commission, after finding that the “purpose of §276 is ‘to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public,’” went on to conclude that “the *DPUC Decision*, on its face, is inconsistent with the terms, tenor and purpose of §276 and our implementing rules, and therefore is preempted.” Memorandum Opinion and Order, at ¶ 27.

PAO maintains its argument that preemption is also clearly appropriate in this instance, as it was in *New England Public Communications Council*, as both the federal mandate and policy, as set forth in §276 of the Act, and as implemented through the Commission’s Payphone Orders, is clear and specific both with respect to the obligation to establish cost-based rates and to make refunds for all amounts charged in excess of those rates after April 15, 1997. In Ohio, unlike some other jurisdictions where the RBOC is denying that it “took advantage” of the waiver, it is absolutely clear that AT&T knew, understood and specifically agreed in 1997, when it made its filings, that any refund obligation based on the assessment of charges in excess of lawful levels would relate back to April 15, 1997.

Moreover, in Ohio, it is also absolutely clear and undeniable that the PUCO found AT&T’s payphone rate to be in excess of that allowed under the “New Services Test” and that it specifically and

³ CC Docket 96-11, Memorandum. Opinion and Order, FCC 96-470, 1996 WL 709132 (December 10, 1996),

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expressly ordered AT&T to file tariffs containing the required lower rates. Further, there is also no doubt that the limited refund requirement established by the PUCO is facially and materially inconsistent with the Commission's mandate that refunds relate all the way back to April 15, 1997, not just until the January 30, 2003 interim rate date, arbitrarily set by the PUCO. Finally, there is no doubt that the inconsistency between the Commission's refund mandate and the PUCO's refund order is material—inasmuch as the applicable refund period is nearly six years fewer under the PUCO order—and would result in the failure by AT&T to refund tens of millions of dollars in overcharges collected during that seven-year period.

In this instance, any institutional reluctance by the Commission to preempt and subsequently order refunds because of its delegation of review to state regulatory authorities would not be consistent with long-standing precedent or statutory obligation. Moreover, as set forth above, the *TON Services* opinion clearly establishes that such a delegation does not absolve the RBOC's liability. Indeed, as the American Public Communications Council ("APCC") eloquently explains in its August 8, 2007 letter to the Commission, the *TON Services* Court's clearly distinguished "the 'procedural' violation of failing to submit rates and costs for state commission review from the 'substantive' violation of failing to ensure actual 'substantive' compliance with the NST. APCC Letter at 3. The PAO concurs with APCC's conclusion that "*TON Services* makes clear that independent of any procedural violation, substantive violation of the NST still gives rise to liability." *Id.*

*The TON Services Decision Recognizes the FCC's Distinction Between Certification For
Purposes of Collecting Dial-Around Compensation and Actual NST Compliance*

The *TON Services* opinion relies on the Commission's orders for "guidance about BOC's obligations in complying with the FCC's NST requirements" and further state "[t]hese Orders make clear the Commission's intention that the LECs are to bear the burden of demonstrating NST compliance to regulators and illuminate the difference between the per-call compensation "certification" requirement and the burden of demonstrating actual compliance." *See TON Services* at 12.

The Commission required any LEC which sought per-call or dial-around compensation need only attest authoritatively (i.e., certify) that it had met the requirements set forth in paragraph 131. *See In re Bell Atlantic-Delaware v. Frontier Communications Services, Inc., Mem. Op. and Order*, 17 Comm'ns Reg. 955, 1999 WL 754402 (1999). The Commission declared that certification did not require LECs to provide evidence in support of its compliance, but again, mere attestation of compliance. *Id.* However, the Commission expressly states "a LEC's certification letter does not substitute for the LEC's obligation to comply with the requirements as set forth in the Payphone Orders." *Id.* at ¶ 28.

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According to the *TON Services* Court, the heart of TON's complaint is the allegation that, from April 1997 to April 2002, Qwest failed to file new intrastate PAL tariffs with state regulatory commissions and also failed to file cost data supporting the rates in its existing tariffs as required by 47 C.F.R. § 27, the LEC-defendant in *TON Services*, was sued because: "(i) it failed to timely file tariffs and supporting cost data with state regulators; (ii) such failures precluded regulators from determining Qwest's NST compliance; and (iii) under the Waiver/Refund Order, *TON Services* was entitled to refunds once NST-compliant rates were filed." See *TON Services* at 22. As discussed above, "Qwest filed a motion to dismiss, claiming the filed rate doctrine, the prohibition on retroactive ratemaking, the primary jurisdiction doctrine, and the statute of limitations barred *TON Services*' ability to proceed in federal court." *Id.* at 16.

AT&T's conduct is remarkably similar to Qwest's in that, rather than file its NST-compliant tariff by the May 19, 1997 deadline, as it had agreed to do and was so ordered by the Commission, no such NST-compliant tariff was filed until at least January 10, 2003. With respect to the certification required to collect dial-around compensation, AT&T did "attest authoritatively" by its May 16, 1997 letter to the PUCO that its tariff—filed in 1985—"met the FCC's new services test at the time of such tariffs' filing and that the documentation accompanying this letter, had it been submitted at that time, would have fully demonstrated their compliance. Therefore, the further documentation does not result in any change in the existing rates in those tariffs. Consequently, it will not be necessary for this Commission to take any further action." See *Cyvas* Letter to PUCO dated May 16, 1997.

AT&T's obligation to make refunds is further established through the *Cyvas* letter, which ties AT&T's right to collect dial-around compensation to its express promise to make refunds if—and which was subsequently determined to have occurred—its rates were in excess of the §276 cost regime. Indeed, inasmuch as AT&T's commitment to the PUCO was set forth in a letter covering its submission of cost data in support of its payphone tariffs, it puts the lie to the creative, after-the-fact argument, made by other RBOCs, that since they did not make the required tariff filing during the forty-five day grace period, they never "took advantage" of the waiver, and, thus, the refund obligation never came into existence. By associating its refund commitment with the filing of its cost data during the forty-five day grace period, and by expressly tying its refund commitment to the refund obligations of the FCC's April 15, 1997 Order, AT&T's May 16, 1997, letter specifically and directly links its right to collect dial-around compensation in Ohio to its refund commitment back to April 15, 1997. Thus, even if the RBOC's disingenuous attempt to limit its refund obligation is accepted in other jurisdictions, it cannot rescue AT&T here as its commitment was made during the

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forty-five day grace period and it is expressly tied to the refund obligations of the FCC's April 15, 1997 Order.⁴

AT&T's certification is untenable, at best. To accept as true AT&T's certification requires this Commission, as it did of PUCO, to take the position that Congress was unfounded in its belief that the conduct of the RBOCs toward competitors was grossly discriminate and anticompetitive, and that AT&T, on its own initiative, passed through cost-based rates to its competitors eleven years before it was required to do so. Even more telling and without exception, the RBOCs' rates exceeded NST-compliant rates one hundred percent of the time, and in AT&T's case in Ohio, not by a small margin, but by nearly two hundred percent! It should come as no surprise then, that Qwest found it necessary to argue in the *TON Services* case, and AT&T finds it necessary to argue now, that the filed rate doctrine can be used as a weapon to defend them against the natural and agreed consequences of their knowing misrepresentation and associated overcharges.

*The TON Services Decision Supports PAO's Assertion That
The Filed Rate Doctrine Is Not A Barrier To Refunds*

The PUCO and AT&T argue in their respective Comments that PAO is barred at the state level from refunds from AT&T for monies it collected in excess of §276(a)-compliant rates. In addition, AT&T proffers the additional argument that, as a federal matter, refunds are precluded because of the filed rate doctrine. See PUCO Comments at 13, and AT&T Comments at 9.

The *TON Services* Court addressed whether Qwest could properly assert the defense of the filed rate doctrine in order to avoid refunding monies in excess of the lawful rates. It recognized the filed rate doctrine as a "central tenet of telecommunications law," and that "once a carrier's tariff is approved by the [Commission] the terms of the federal tariff are considered to be the law and therefore conclusively and exclusively enumerate the rights and liabilities as between the carrier and the customer." The *TON Services* Court also concluded that "in order to prevent price discrimination and preserve agencies' exclusive role in ratemaking, courts have no

⁴ This evidence—which the PUCO refused to consider as beyond the scope of the hearing—clearly establishes that SBC knew, understood and specifically agreed in 1997 that any refund obligation based on the assessment of charges in excess of lawful levels would relate back to April 15, 1997. While the PUCO improperly refused to consider SBC's direct admission of liability, the FCC is clearly not bound by this evidentiary ruling and should consider this evidence in the fulfillment of its federal obligations. Indeed, to the extent the FCC considers a claim that SBC never "took advantage" of the waiver, and, thus, the refund obligation never came into existence it would be prejudicial in the extreme to fail to consider SBC's specific and repeated admissions to the contrary.

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power to adjudicate claims which would ‘invalidate, alter, or add to the terms of the filed tariff.’”
See TON Services at 21, citing *Davel*.

However, as troubling as this issue was, and as aggressively as the doctrine has been enforced by the courts in other contexts, the doctrine has never been applied in circumstances where, as here, the tariffed rate was unlawful, as a matter of federal law from the outset of the refund period. Consistent with this history, citing *Davel*, the *TON Services* Court concluded that “the filed rate doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff.” *See* TON Services at 21 citing *Davel*. In other words, the filed rate doctrine affords no defense to a carrier which fails to comply with a regulatory order to modify its tariffs, even when the effect of the enforcement of the order is to modify the filed rates. The reason the filed rate doctrine cannot be argued as a defense under such circumstances is clear; the doctrine is an applicable defense where there is a filed, approved (*i.e.*, lawful) rate; it is not available where, as determined by the PUCO here, the rate is unlawful.

The *TON Services* and *Davel* opinions also recognize that the uniform application of the filed rate doctrine in the instant context would interfere with Congress’ clear intent with respect to its instruction to the Commission to adopt non-structural safeguards to implement § 276(a) by preventing RBOCs from cross-subsidization of their payphone services. “In essence, a[n RBOC] must place its own payphones on equal footing with those that PSPs operate, and it must not obtain a profit from PSP payphones.” *NW Pub. Commc’ns Council v. Pub. Util. Comm’n*, 100 P3d 776, 779 (Or. Ct. App. 2004)). Accordingly, the *Davel* opinion together with the *TON Services* opinion state “as the Waiver/Refund Order expressly anticipated that PSPs might be entitled to pay PAL rates lower than those on file during the waiver period, an application of the filed rate doctrine would be contrary to the purposes behind the congressionally-sanctioned regulatory scheme.” *TON Services* at 25, citing *Davel Commc’ns*, 460 F3d at 1086.

In this context, it is not surprising that the *TON Services* Court expressly refused to apply the filed rate doctrine where the carrier’s filed rates were unlawful. Moreover, and most significantly, the *TON Services* Court concluded that a subsequent judicial and/or quasi-judicial enforcement of the Commission’s Order requiring the payment of refunds, which has the effect of modifying those unlawful rates, does not constitute retroactive ratemaking, stating “the failure to file a required tariff has been held to defeat the application of the filed rate doctrine.” *TON Services* at 34-35, and citing *Rushton v. Am. Pac. Wood Prods., Inc. (In re Americana Expressways, Inc.)*, 133 F.3d 752, 757-58 (10 Cir. 1997).

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Similarly damning facts are present with respect to AT&T. Indeed, even under AT&T's shell-game tariff approach in Ohio, it is undisputed, and beyond dispute, that AT&T's rates were in excess of the cost-based rates allowed under § 276 at all times prior to the PUCO-ordered downward adjustments and setting a compliant rate. In addition and unlike Qwest, which eventually filed tariffs setting forth rates it alleged to be compliant with the New Services Test and §276, AT&T never made such a filing. To the contrary, AT&T merely certified, falsely, that its rates were compliant. Moreover, the tariffs on which it claims to rely did not even contain payphone (COCOT) rates. *PUCO Opinion and Order*, at 30. By making the certification, rather than filing compliant rates, AT&T took the risk that its rates would exceed those lawfully allowed and that it would, be required to refund any and all excess charges in the event the filed rates were adjudged to be in excess of the statutory costing regime.

Finally, even absent AT&T's agreements to refund, neither the filed rate doctrine nor any doctrine based on retroactive ratemaking provides a legally cognizable basis for refusing to require refunds back to April 15, 1997. This conclusion is required by the fact that the Commission's Refund Order specifically established the refund obligation back to the Congressionally-mandated date, thus rendering any excessive rates conditional *ab initio*.⁵ As such, any downward adjustment in the lawful rate is nothing more than a proper implementation of rates which were conditioned on, and subject to refund from April 15, 1997, through the date they were finally implemented. This position is clearly supported in *TON Services*, where the Court's interpretation of the Refund Order is that an RBOC's reliance on the waiver required it to provide refunds for the difference between its NST-compliant rates and its prior rates. *TON Services* at 35.

In addition to its obligation to provide refunds under FCC's Orders, AT&T is also clearly obligated to provide such refunds by its own statements. Indeed, as discussed at length above, the RBOCs—including AT&T—separately and specifically committed to the Commission that they would refund amounts collected in excess of the filed rate, and that they would do so back to April 15, 1997. Specifically in its letters to the Commission of April 10, 1997, the RBOCs' coalition, which included AT&T, directly represented through their counsel that such retroactive refunds would voluntarily be made⁶:

⁵ PAO concurs with the APCC's position that "the Tenth Circuit correctly construes the Refund Order, not as a procedural standstill order, but rather as a substantive measure to ensure timely (though retroactive) NST compliance by the RBOCs despite their failure to meet the filing deadline for submitting rates and costs to state commissions." APCC at 7.

⁶ The facts pertaining to PAO's dispute with AT&T is distinguished from disputes other PSPs may have with the RBOCs in light of AT&T's second, express affirmation that it would provide refunds to the PSPs if the new rates were lower than

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I should note that the Filed-Rate Doctrine precludes either the state or federal government from ordering such retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance.

As with the underlying representation and commitment to make refunds, this additional representation and commitment was offered, and accepted, as direct consideration for the right immediately to commence collecting millions of dollars in dial around compensation. As AT&T has benefited materially from this right, it must, both as a matter of contractual and ethical commitment, and as a matter of its compliance with its obligations under Section 201, be required to make refund of all excess revenues back to April 15, 1997. The *TON Services* Court further supports PAO's assertion—together with the other PSPs—that the promises made by the RBOC Coalition in its two letters constitute an “explicit promise [to] the FCC that, notwithstanding the filed rate doctrine, the BOCs would voluntarily undertake to provide a retroactive rate adjustment in the event their NST-compliant rates were lower than their prior rates in exchange for permission to delay the effective date for NST-complaint tariffs.” *TON Services* at 23.

Comments on AT&T's September 4, 2007 Letter

On September 4, 2007, AT&T submitted an *ex parte* letter to the Commission setting forth its additional views on the impact of the *TON Services* decision on its refund obligation. In that letter, AT&T contends the APCC's interpretation of *TON Services* is incorrect in that, “the Common Carrier Bureau's Waiver/Refund Order cannot be legally interpreted as granting a waiver of the statutory NST requirement that allowed the BOCs to charge non-compliant rates—in violation of the statute—without requiring full refunds to ensure retroactive compliance with the statute”. Notably, AT&T fails to provide any support for its position and, quite frankly, there is none. Most significantly, despite the claim that its letter was filed to address the impact of *TON Services*, AT&T does not even attempt to suggest its position is supported by *TON Services* because, in fact, *TON Services* stands for exactly the opposite proposition; that is, the proposition asserted by PAO and by APCC. Indeed, the *TON Services* opinion recognizes the express language of the *Waiver Order* that “a LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the

those already on file with the applicable state regulatory authorities; and the Commission should take notice that this second representation was made after the deadline for compliance had occurred, not before.

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newly tariffed rates, when effective, are lower than the existing tariffed rates.” *Order on Reconsideration and the Bureau Waiver Order* at 21371 (emphasis added).

AT&T also argues the “only relief” provided in the *Waiver Order* was an extension of 34 days in which the LECs were required to file tariffs with NST-complaint rates and that the “only additional obligation” in exchange for the extension required the LECs to “put payphone providers in the same position” they would have otherwise occupied had the revised LEC tariffs been filed on the originally ordered April 15, 1997 deadline. As noted above, AT&T’s assertion that the applicable refund period was limited to the 34-day extension to file lawful tariffs requires an interpretation in direct contradiction to the express “when effective” language of the *Waiver Order*. *TON Services* also applied a plain and ordinary meaning with respect to the interpretation of the refund period (thereby concluding the filed rate doctrine is inapplicable) when it recognized, under the *Waiver Order*, “PSPs might be entitled to pay PAL rates lower than those on file during the waiver period” and that PSPs may be entitled to lower (i.e., compliant) rates where the incumbent failed to make any filing in support of its payphone rates until after the extended compliance date of May 19, 1997. In all events, as set forth above, AT&T’s obligation to make full refunds back to April 15, 1997 is undeniably clear in Ohio from both the language and the timing of the Cyvas letter.

The *TON Services* court is not alone in its thinking. Indeed, *TON Services* correctly cites Tenth Circuit precedent which “previously held that once a party has notice about a possible future rate change, the [filed rate] doctrine may be inapplicable. *TON Services, Inc. v. Qwest Corp.*, --- F.3d ---, No 06-4052 (10th Cir. July 23, 2007) at 24, citing *Nw. Pipeline Corp. v. FERC*, 61 F.3d 1479, 1490-91 (10th Cir. 1995). The *TON Services* Court also notes that, “the filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service. Certainly, this same reasoning is especially applicable where, as here, [and as to AT&T], it is the [supplier] []...who is put on notice that its requested rate increase may be subject to refund.” *TON Services* at 24. Further, and in direct conflict with AT&T’s argument, *TON Services* and *Davel* each conclude “the *Waiver Order* contemplated a future departure from a filed rate in the form of refunds once a BOC filed NST-compliant PAL tariffs.” *Id.* at 24, citing *Davel Commc’ns*, 460 F.3d 1085-86 (relying on *ICC v. Transcon Lines*, 513 U.S. at 147).

Finally, the *TON Services* opinion properly recognizes, all else aside, that “the FCC justified departure as a means of furthering the Commission’s overall policies in implementing § 276(a).” In this regard, the opinion further states:

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Transcon Lines specifically approves of a regulatory agency's decision to "require[] departure from the filed rate when necessary to enforce other specific and valid regulations adopted under the Act" and emphasizes that "the [agency] can require that filed rates be suspended or set aside in various circumstances." *Transcon Lines* at 147. Although *Transcon Lines* involved an ICC proceeding against a particular shipper, the same logic applies to a more general order promulgated by the FCC. This is especially so where the FCC was attempting to carry out, as quickly as practicable, congressional intent to promote competition in the telecommunications industry by ensuring both the absence of subsidies for BOCs and fair compensation for all ILECs. See 47 U.S.C. § 276(a) and (b)(1)(C). Accordingly, as the *Waiver/Refund Order* expressly anticipated that PSPs might be entitled to pay PAL rates lower than those on file during the waiver period, an application of the filed rate doctrine would be contrary to the purposes behind the congressionally-sanctioned regulatory scheme. See *Davel Commc'ns*, 460 F.3d at 1086.

TON Services at 25.

Consequently, *TON Services* emphatically affirms the PSPs are entitled to refunds in all instances where an RBOC's NST-compliant rates are lower than those already filed with the applicable state regulatory commissions from April 15, 1997. However, the refund requirement is especially clear in the State of Ohio, where AT&T (then operating as Ameritech-Ohio) failed to file NST-compliant tariffs until ordered to do so. This proposition is expressly supported by the *TON Services* opinion and, most importantly, AT&T even attempts to distinguish itself from Qwest's culpable conduct in *TON Services*. Consequently, even if the Commission were to accept AT&T's assertion that the filed rate doctrine should be applied, notwithstanding its several representations to the Commission, the Public Utilities Commission of Ohio, and the PSPs (including PAO), together with the Tenth Circuit's *TON Services* opinion, and the 9th Circuit's *Davel* opinion, the Commission could not logically or reasonably reach the same conclusion in Ohio.

AT&T, concludes its letter with a "last gasp" argument that the "Commission made clear" in its Payphone Orders "that payphone line tariffs would continue to be tariffed in the states, and that state procedures and remedies would govern the availability of refunds." In making this argument, AT&T conveniently ignores that it was the clear and undisputable intent of Congress in enacting §§276(a), (b) to prohibit "BOCs from subsidizing their own payphone services with revenues from their other operations and from discriminating in favor of their own payphone services." *TON Services* at 6. (§ 276(a) reflects congressional intent to replace a state-

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regulated monopoly system with a federally facilitated, competitive market.”) *New Eng. Pub. Commc'ns Council*, 343 F.3d at 77. The New Services Test (a/k/a NST), codified at 47 C.F.R. §61.49(g)(2), requires carriers to base payphone rates solely on its costs plus a reasonable overhead. The FCC ordered LECs to file the NST-compliant intrastate tariffs with the applicable state utility commission. *11 F.C.C.R. 21233, 21307-08 ¶¶ 162-163*, 1996 WL 658824 (1996).⁷ The collection of any amount in excess of the NST-compliant rate, anytime after April 15, 1997, is a *prima facie* violative of § 276.

Following the Commission's Order, the BOC coalition, including AT&T, represented to the Commission, the PUCO, and the PSPs that, in an exchange for an extension of time to file NST-compliant tariffs and the right to collect dial-around compensation from the PSPs, it would refund the excess monies collected between the old rates and the compliant rates, and would, to the extent it applied, waive any assertion of the filed rate doctrine as a defense of the question of refunds. AT&T received the extension (although it grossly failed to comply in a timely manner) and collected dial-around compensation from the PSPs; AT&T must—finally—be held to its end of the bargain.

*TON Services Recognizes the PSPs' Cause(s) of Action Against the RBOC's
for Failure to Comply With the Requirements of § 276*

The 10th Circuit in the *TON Services* opinion observed the threshold issue in that case to be “whether Qwest's admitted failure to file new tariffs or cost data supporting its existing tariffs, which violated 47 C.F.R. §61.43(g)(2), the Order on Reconsideration, and portions of the Waiver/Refund Order, gives rise to liability under each of §§201(b), 276(a), and 416(c).” See *TON Services* at 32. “If,” the Court continues, “Qwest's failure to meet its burden is interpreted to constitute a violation of the Communications Act, TON is entitled to have its claim adjudicated by a federal court under §207 and may be entitled to damages under §206.” And, finally, “[i]f Qwest's rates did not comply substantively with the requirements of the NST by failing to be cost-based, containing subsidies, or discriminating in favor of Qwest, TON is entitled to seek damages under §206 for Qwest's violations of §276(a).” *Id.* at 35.

Similar to TON Services' claims as to Qwest, as PAO has argued, in the instant matter AT&T's failures to: (i) certify in good faith that its filed Ohio rates were NST-compliant; (ii) file

⁷ In the same Order, the Commission added that the state commissions should evaluate the tariff to ensure they were “(i) cost-based; (ii) consistent with the requirements of §276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (iii) non-discriminatory.” *Id.* at 21308 ¶ 163

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cost support data to support NST-compliance with its filed (1985) Ohio tariff; and (iii) file an NST-compliant tariff in Ohio, are violative of §§201 and 276(a), and consequently, §416(c). *See generally* PAO Motion and PAO Reply. Because of AT&T's undeniable, unalterable and culpable misconduct, PAO, consistent with the *TON Services* opinion, possesses the same standing to bring a cause of action against AT&T. It is of no consequence that PAO first sought recovery of its damages in the State of Ohio, which concluded refunds were outside the scope of its proceeding.

Indeed, within the context of its discussion of primary jurisdiction, the *TON Services* Court states, "the district court should consider whether the FCC is in the best position to determine in the first instance if its regulatory orders contemplate that failures to comply procedurally with its regulations amount to violations of §§201(b), 276(a), or 416(c). A desire for uniformity in interpretation of the comprehensive regulatory scheme suggests this issue is appropriate for agency [i.e., FCC] resolution." *Id.* at 33. One need look no farther than Ohio to conclude there is a complete absence of uniformity between Congressional intent, subsequent Commission orders issued for the purpose of implementing Congress' intent, and the result at the state level and that this circumstance requires the Commission to step in to ensure that the statutory obligations set forth in §§201(b) and 276(a) of the Act are met.

Conclusion

The *TON Services* decision is entirely consistent with each of the arguments proffered by PAO in its Petition, further demonstrating AT&T's obligation to make full and timely refunds of all amounts charged in excess of the cost based rate as set by the PUCO. Following *TON Services*, it is even more clear that AT&T's arguments regarding primary jurisdiction and the filed rate doctrine simply have no basis in law, let alone any sustainability as a matter of fact or good faith. In this context, PAO urges the Commission to meet its clear legal obligation and to require AT&T to make immediate refund of all amounts collected from the members of the PAO since April 1997 and to make an award of reparations in favor of PAO as required by federal law.⁸

⁸ The Commission's rules prohibit common carriers (and others) from intentionally providing material factual information that is incorrect or to intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading. See 47 CFR 1.17. On information and belief, without exception, the RBOCs' authoritative attestations to the state public utility commissions that their respective filed rates were cost-based were wrong and with respect to Ohio, the certified rates were over 200% higher than the PUCO-ordered interim rates. Indeed, in Ohio, AT&T certified that its payphone rates—filed in 1985—were compliant with the requirements of § 276 and enacted 11 years after AT&T's tariff was filed in Ohio. See Cyvas Letter. AT&T's "certification", together with the "certifications" by the other RBOC's, flaunt the Commission's rules to the point of

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In all events, given its flagrant, continuing and seemingly willful refusal to comply with the FCC's orders or with its express agreement to make refunds, AT&T must also be required to make an immediate deposit of all amounts collected in dial-around compensation—both to date, and on a going forward basis--until all required refunds have been made.

Consistent with 47 C.F.R. §1.1206(a)(2), (3), we submit an original and two copies of this letter for the purpose of inclusion in this matter. Please contact us at (202)895-1707 in the event you have any questions.

Respectfully submitted,
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extreme absurdity. Moreover, AT&T's continuing willful refusal to meet its express commitment to the Commission to make refunds raises real concerns under Section 1.17 of the Commission's Rules and similar statutory and ethical canons. To date, the Commission has not specifically addressed these very issues, either standing alone or in the context of the substantive issues presented. To the extent that AT&T is not required to make refund to PAO, the public interest will most certainly demand that the Commission or an appropriate third party institute investigations—subject to appropriate oral and written discovery—both into the good faith basis of AT&T's certification regarding its rates, but also into whether AT&T intentionally misrepresented to the Commission regarding its intention to pay refunds and not to assert the application of the filed rate doctrine.