

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

<p>In the Matter of</p> <p>Petition of TON Services, Inc. for Declaratory Ruling on a Primary Jurisdiction Referral</p> <p>Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996</p>	<p style="text-align:center">CC Docket No. 96-128</p>
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REPLY COMMENTS OF TON SERVICES, INC.

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I. INTRODUCTION AND SUMMARY

In response to the Commission's Public Notice permitting interested parties to file comments on TON Services, Inc.'s Petition, AT&T and Verizon (collectively, "AT&T") filed comments, while Qwest Corp. filed a voluminous "Further Opposition," notwithstanding that on May 12, 2008, it had already filed a comprehensive 31-page opposition to the TON Petition, as permitted by 47 C.F.R. § 1.45(b). Qwest provides no reason why such additional materials were not or could not have been presented in its initial Opposition.

Qwest's Further Opposition does not address two of the three questions raised by the TON Petition, namely (1) whether Qwest's procedural non-compliance with the Commission's requirements to obtain state regulators' approval of PAL rates as NST-compliant constituted a violation of 47 U.S.C. §§ 201(b), 276(a), and/or 416(c), and (3) what the proper measure of damages is if Qwest's rates were not NST-compliant. Rather, Qwest seeks to persuade the Commission that Qwest reasonably evaluated its 1997 rates for public access line ("PAL") service and correctly determined that its rates complied with the New Services Test ("NST"), and that the *Wisconsin Order*¹ changed the NST and cannot be applied retroactively to invalidate Qwest's internal opinion that its PAL rates met the NST.

As the comments herein demonstrate, Qwest's own self-evaluation of its rates does not establish that they were NST-compliant. Qwest has not obtained specific rulings of state public service commissions ("PUCs") that its PAL rates were NST-compliant. Moreover, Qwest's

¹ Memorandum Opinion and Order, *In re Wisc. Pub. Serv. Comm'n*, 17 F.C.C.R. 2051 (2002) ("*Wisconsin Order*"), *aff'd New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert denied sub nom North Carolina Payphone Ass'n v. FCC*, 124 S. Ct. 2065 (2004).

argument that the *Wisconsin Order* changed the NST and cannot be applied retroactively fails as a matter of both law and fact.

The AT&T Comments argue that 47 U.S.C. §§ 201(b) and 416(c) provide no basis for relief, but do not assert that Qwest's procedural violations of the Commission's orders do not violate 47 U.S.C. § 276(a). Instead, AT&T argues that the Commission cannot override the states' authority to make determinations of compliance with the New Services Test ("NST"), and that the Commission did not and cannot legally order refunds. This is the same argument made in other related cases, and has been adequately briefed in those cases. AT&T also raises other issues that have been adequately dealt with in other related cases, including the filed tariff doctrine, the rule against retroactive rulemaking, and reliance on the *Waiver/Refund Order*, none of which constitutes sufficient grounds to deny TON's Petition. TON will respond briefly to all of the issues raised by AT&T.

Because the respective filings of Qwest and AT&T follow disparate tracks, TON will respond to each separately.

II. RESPONSE TO QWEST'S FURTHER OPPOSITION.

Qwest's Further Opposition does not address two of the three questions raised by the TON Petition, namely (1) whether Qwest's procedural non-compliance with the Commission's requirements to obtain state regulators' approval of PAL rates as NST-compliant constituted a violation of 47 U.S.C. §§ 201(b), 276(a), and/or 416(c), and (3) what the proper measure of damages is if Qwest's rates were not NST-compliant. Rather, as it did in its initial Opposition, Qwest seeks to persuade the Commission that Qwest reasonably evaluated its 1997 rates for public access line ("PAL") service and correctly determined that its rates complied with the New Services

Test (“NST”). This, of course, is an irrelevant red herring. This primary jurisdiction referral asks the Commission, not Qwest, to determine whether Qwest’s 1997 PAL rates were substantively NST-compliant. Despite over 200 pages of materials included in its Further Opposition, Qwest has still not provided the cost data necessary for the Commission to make that determination. Instead, Qwest focuses on its *processes*, hoping to divert attention from the lack of evidence it is required to produce to meet its burden. *See* Further Opposition at 12.

In its Opposition to the TON Petition, Qwest admitted several crucial points, which its Further Opposition does not repudiate, namely:

- Qwest did not submit cost studies to the state PUCs in connection with any request for the state PUCs to evaluate its PAL rates for NST-compliance. In its May 17, 2007 *ex parte* letter to the Commission, Qwest stated: “Qwest believed its rates were compliant and that it **had not filed** any tariff revisions **or cost studies.**”² Qwest’s Further Opposition confirms this fact: “Having at that time determined that its rates were compliant, Qwest made no formal intrastate cost support filings in April/May of 1997 other than filings to increase rates.” Further Opposition at 5.
- Qwest “does not have all of the relevant cost studies.” Opposition at 12.³
- Qwest did not seek **specific** state PUC approval of its PAL rates as being in

² May 17, 2007 letter, attached to TON’s TON Petition as Exhibit C (emphasis added).

³ Qwest now asserts that it has “located much of the cost support confirming that its 1997 Basic PAL rates were NST compliant.” Further Opposition at 6. However, Qwest does not provide such materials, nor explain why they were not previously available. In any event, the statement that Qwest does not have *all* the relevant cost studies appears to remain true.

compliance with the NST, because it believed such approval was not necessary.

A. QWEST HAS NOT DEMONSTRATED THAT ITS PRE-2002 PAL RATES WERE NST-COMPLIANT.

As it did in its Opposition, Qwest seeks in its Further Opposition to establish that it reasonably evaluated its PAL rates and found them to be NST-compliant, all of which is beside the point, because the Commission delegated that task to state PUCs, not to the BOCs.

Qwest also seeks to dispel the perception that it did not take its obligations under the Commission's orders seriously. The Declaration of Glenda Weibel, for example, details the fact that Qwest held several meetings and discussed the Commission's payphone orders. Tellingly, however, the Weibel Declaration reveals that Qwest made incorrect assumptions about and failed to carefully read and follow the Commission's orders. For example, Qwest assumed that the NST requirement only applied to new tariff filings at the federal level and not to existing intrastate payphone service tariffs, notwithstanding that there is nothing in the Commission's orders that supports such an assumption. Weibel Decl. at 3 ¶ 4.

Further, Qwest did not notice or, if it noticed, did not believe the Commission's clear statement in the *Reconsideration Order*⁴ that LECs were required to comply with *Computer III* guidelines, which included the NST, for tariffing intrastate payphone services. Weibel Decl. at 4. Moreover, this requirement did not just appear for the first time in the *Reconsideration Order*. The requirement that PAL rates comply with *Computer III* requirements appears in the governing

statute, 47 U.S.C. § 276(b)(1)(C). Furthermore, in the *First Payphone Order*, the Commission expressly stated:

Because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, we conclude that **the new services test is necessary to ensure that central office coin services are priced reasonably**. Incumbent LECs not currently subject to price cap regulation must submit cost support for their central office coin services . . . no later than January 15, 1997.

*First Payphone Order*⁵ ¶ 146 (emphasis added). Thus Qwest can hardly claim to have been unfairly surprised when the Bureau reiterated in its April 4, 1997 Order that PAL rates would have to be NST-compliant.⁶ Given the BOCs' sophistication and expertise, the statement in the Kellogg Letter of April 10, 1997 that "none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's 'new services' test" deserves some healthy skepticism.

Qwest's self-determination of NST-compliance, whether done in good faith or not, is irrelevant, because self-certification of NST-compliance does not constitute actual compliance with Commission orders to obtain NST-compliance review by and approval from the states. *See TON Services*, 493 F.3d at 1241 n. 18.⁷

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⁴ Order on Reconsideration, *In Re Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecomms. Act of 1996*, CC Docket No. 96-128, 11 F.C.C.R. 21233, 21308, ¶ 163 (Nov. 8, 1996), 11 FCC Rcd. at 21308, ¶ 163 ("Reconsideration Order")

⁵ Report and Order, *In Re Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecomms. Act of 1996*, CC Docket No. 96-128, 11 F.C.C.R. 20541, 20614, ¶ 146 (Sep. 20, 1996).

⁶ Order, *In re Implementation of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996*, Docket No. 96-128, 12 FCC Rcd. 20997, ¶ 30 n. 91 (Apr.4, 1997).

⁷ Qwest argues that "no state regulator found that Qwest's PAL rates had violated the NST." Further Opposition at 11. However, the more salient point is that Qwest has not established that the state PUCs found that Qwest's PAL rates complied with the NST.

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The lengthy Declaration of Jerrold Thompson does no more than establish that Qwest misapplied the NST in setting and evaluating its PAL rates. For example, although Qwest claims to have used forward-looking TSLRIC studies to support its PAL rates, it is now clear that prior to the *Wisconsin Order*, Qwest treated the subscriber line charge (“SLC”) as a price rather than as a reduction in cost, which accounted for much if not all of the higher rates that Qwest maintained throughout the 1997-2002 period. Thompson Declaration at 59 ¶ 93. Once the *Wisconsin Order* clarified that SLC cannot be used in that manner, Qwest lowered its rates to comply with that aspect of the Commission’s clarifying order. *Id.* at 60-65, ¶¶ 95-100. Qwest acknowledges that this change in its application of TSLRIC produced dramatic reductions in its PAL rates. *Id.* Qwest’s entire defense hinges on the faulty assumption that it properly used TSLRIC cost studies to set and evaluate its PAL rates from 1997 to 2002. The *Wisconsin Order* and Qwest’s response thereto show conclusively that Qwest’s earlier processes were fatally flawed, however well-intentioned they may have been.

B. THE WISCONSIN ORDER DID NOT CHANGE THE NST, AND MUST BE APPLIED RETROACTIVELY.

In its Further Opposition, Qwest repeats the argument in its Opposition that the *Wisconsin Order* changed the NST and cannot be applied retroactively to invalidate Qwest’s internal conclusion that its PAL rates met the NST. Further Opposition at 13-14. As explained in TON’s Reply, the *Wisconsin Order* did not alter the NST, as Qwest claims, but rather clarified the application of the NST to PAL rates. *See* TON’s Reply at 16-19. The Commission itself stated in the *Wisconsin Order* that the Bureau Order, which the Commission largely affirmed, “adheres to

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the commands of section 276 and also is consistent with our prior orders concerning pricing and payphones.” *Wisconsin Order*, ¶ 30 n. 73.⁸

Qwest’s Further Opposition demonstrates most convincingly why the Commission should rule, in response to the District Court’s second issue, that Qwest’s 1997-2002 PAL rates were not substantively NST-compliant. That is, despite its newly-found TSLRIC cost studies, and despite its purported good intentions, Qwest simply misread and misapplied the NST prior to the *Wisconsin Order*. This conclusion follows inexorably from the *Wisconsin Order* itself, which set forth the proper and only permitted way in which the NST should have been applied. Qwest’s pre-2002 processes for calculating costs and setting PAL rates clearly did not correspond to the *Wisconsin Order* guidelines, which is why, following the issuance of the *Wisconsin Order*, Qwest undertook a radical revision of its rates in all states where it operated as a local exchange carrier, even as it was appealing from the Order. See Thompson Declaration at 56-66.

Qwest recognizes that retroactive application of the *Wisconsin Order* spells doom for its case; hence it argues that the *Wisconsin Order* must be applied prospectively only. Further Opposition at 13-14. However, Qwest has cited no authority for that argument. Unfortunately for Qwest, the law and the facts require retroactive application. First, the setting for the *Wisconsin Order* was not a rulemaking proceeding, where notice and comment requirements of the Administrative Procedures Act would have applied. 5 U.S.C. § 553(b). The case came before the full Commission on the LEC Coalition’s application for review of a Bureau Order

⁸ See also, *TON Services*, 493 F.3d at 1230 n. 7 :

The FCC ultimately clarified that, in the context of PAL tariffs, the NST requires a forward-looking, cost-based methodology that prohibits BOCs from charging “more for payphone line service than is necessary to recover from PSPs all monthly

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requiring LECs to submit PAL tariffs and supporting documentation to the Bureau following the Wisconsin Public Service Commission's decision that it could not review the LECs' PAL rates for compliance with the Commission's rules and the requirements of section 276. Such circumstances constitute an adjudicatory proceeding, not a rulemaking proceeding.⁹

A decision or rule in an adjudicatory proceeding is presumed to be retroactive, and will only be held not retroactive when doing so would produce a manifest injustice. As stated in *Qwest Services Corp. v. F.C.C.*, 509 F.3d 531, 539 (D.C. Cir. 2007), a case with which Qwest is undoubtedly familiar:

We start with the presumption of retroactivity for adjudications. As we said recently, reviewing the Commission's decision to give retroactive application to its order on AT&T's "enhanced" prepaid calling cards,

Retroactivity is the norm in agency adjudications no less than in judicial adjudications. . . . For our part we have drawn a distinction between agency decision that "substitut[e] . . . new law for old law that was reasonably clear" and those which are merely "new applications of existing law, clarifications, and additions." The latter carry a presumption of retroactivity that we depart from only when to do otherwise would lead to "manifest injustice."

Id. (quoting *American Tel & Tel. Co. v. F.C.C.*, 454 F.3d 329, 332 (D.C. Cir. 2006)); *see also*, *Verizon Tel. Cos. v. F.C.C.*, 269 F.3d 1098, 1109 ("retroactive application is appropriate for 'new applications of [existing] law, clarifications, and additions.'") (quoting *Pub. Serv. Co. of Colo v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)); *Health Ins. Assoc. of America, Inc., v. Shalala*, 23

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recurring direct and overhead costs incurred by BODs in providing payphone lines."

[quoting the *Wisconsin Order* ¶ 60]

⁹ In the *Wisconsin Order* itself, the Commission rejected Qwest's argument that the Bureau order was a "legislative rule," holding instead that "[t]he Bureau Order simply applies our existing authority." *Wisconsin Order*, 17 FCC Rcd. at 2060 ¶ 30 n. 73.

F.3d 412, 424 (D.C. Cir. 1994) (“agency interpretations in adjudications typically are retroactive”).

Qwest has identified no manifest injustice in this case, nor has it established that its reliance on its mistaken interpretation of the NST was reasonable. *See Qwest Services Corp.*, 509 F.3d at 540 (“[A] mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct.”) The *Wisconsin Order* applied existing law—the NST—in the PAL rate context, and clarified the application of the NST in that setting. Accordingly, it must be given retroactive effect.

III. RESPONSE TO AT&T COMMENTS.

A. THE COMMISSION DID NOT ABDICATE ITS REGULATORY AUTHORITY BY DELEGATING RESPONSIBILITY TO THE STATES TO EVALUATE AND APPROVE PAL RATES FOR NST-COMPLIANCE.

AT&T argues that the Commission declined to preempt state authority over intrastate payphone line tariffs. AT&T Comments at 9, 11. This is a distorted view both of the history of payphone regulation and of the relationship between the Commission and state PUCs with regard to regulation of PAL rates. The underlying basis for the requirement for BOCs to charge non-discriminatory PAL rates is a federal statute, 47 U.S.C. § 276(a), which the Commission—not the states—was authorized and instructed to implement. *Id.* § 276(b)(1)(C). Thus authority over PAL rates was vested in the Commission, not the states, by virtue of federal law, not state law. In fact, inconsistent state law was specifically preempted. *Id.* § 276(c). Therefore, it is incorrect for AT&T to argue that the Commission declined to preempt state authority, because the

operative federal statute automatically and expressly preempted state authority.¹⁰

Accordingly, the Commission did delegate to the states the function of reviewing PAL tariffs for NST-compliance, retaining oversight of the states' performance of that function. There was no other independent source of any duty on the states to perform such a review. That delegation of authority by the Commission does not and could not constitute an abrogation or relinquishment of the Commission's original authority under Section 276, including the authority to enforce the Commission's implementing rules and regulations. In fact, nowhere has the Commission stated that enforcement of the requirements of Section 276 or the Commission's orders implementing Section 276 is a function that only the states can perform. On the contrary, the Commission has specifically "retain[ed] jurisdiction under section 276 to ensure that all requirements of section 276 and the Payphone Reclassification Proceeding are met." Order, *In the Matter of Wisconsin Public Service Commission Order Directing Findings*, 15 FCC Rcd. 9978, 9979 ¶ 2 (2000).

In arguing that "the Commission necessarily mandated that state procedures and remedies would apply to the enforcement of federal rights," [AT&T Comments at 9] AT&T reads far too much into the Commission's statement that it would "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Reconsideration Order*, ¶ 163. In light of 47 U.S.C. § 207, which permits a party damaged by a

¹⁰ AT&T cites as a "general rule" that "[s]tates may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law. *Howlett v. Rose*, 496 U.S. 356, 372 (1990)." Not only are inconsistent state rules expressly preempted by 47 U.S.C. § 276(c), but the case cited by AT&T does not even apply, because it deals with lawsuits in state court, and TON did not file its case in a state court.

carrier's violation of Section 276 to seek relief before the Commission or in federal court, the Commission could not simply wash its hands of enforcement responsibilities and pass the buck to the states, as AT&T argues. TON's rights under Section 207 are not dependent on or limited by state PUC procedures or remedies.

B. THE COMMISSION MAY ADJUDICATE QWEST'S LIABILITY WITHOUT VIOLATING THE RULE AGAINST RETROACTIVE RULEMAKING.

In a brave attempt to invoke the rule against retroactive rulemaking, AT&T argues that the "Commission cannot lawfully rule . . . that section 276 creates an obligation to provide refunds in any case where new rates have been filed after May 1997 to comply with the new services test because such a ruling would be impermissibly retroactive." AT&T Comments at 12. AT&T fails to comprehend the law applicable to this case, as articulated in the very cases it cites. *See* discussion, *supra* pp. 6-9.

AT&T argues that a ruling that Section 276 creates an obligation to provide refunds in any case where new rates have been filed after May 1997 to comply with the new service test would be "impermissively retroactive." AT&T Comments at 2, 12. However, as the above authorities establish, an adjudicative ruling that clarifies or applies existing law is presumed to have retroactive effect. Thus any order the Commission may issue in this declaratory judgment proceeding¹¹ is presumed to be retroactive. AT&T has identified no "manifest injustice" from retroactive application of the Commission's orders. In particular, AT&T has not pointed and cannot point to a settled rule on which it or Qwest reasonably relied in the context of these and

¹¹ Declaratory rulings are a form of "adjudication." *See Qwest Services*, 509 F.3d at 535.

similar proceedings. *See AT&T*, 454 F.3d at 332. Indeed, rather than relying on the Commission’s rules, Qwest flaunted them by failing to submit cost studies to the state PUCs, by failing to seek and obtain PUC approval of its PAL rates as NST-compliant, and by failing and refusing to pay the refunds ordered by the Commission.

Furthermore, AT&T’s claim that the law is well settled and clear [AT&T Comments at 13] is belied by the fact that no less than five hotly contested petitions are currently pending before the Commission, as well as at least two federal court lawsuits, all dealing with the interpretation and application of Section 276(a) and the Commission’s orders relating to refunds for overpayments of PAL charges. The very purpose of the present primary jurisdiction referral is to seek clarification and interpretation of the Commission’s rules and Section 276. As the D.C. Circuit recently noted, “Clarifying the law and applying that clarification to past behavior are routine functions of adjudication.” *Qwest Services*, 509 F.3d at 540.

C. REFUNDS ARE THE APPROPRIATE REMEDY FOR DISCRIMINATORY PAL RATES, UNDER BOTH THE WAIVER/REFUND ORDER AND 47 U.S.C. § 276(A).

AT&T also argues that “nothing in federal law mandates automatic refunds in cases where a state reduces payphone line rates based on the new services test.” AT&T Comments at 11. In support of that assertion, AT&T cites the *Waiver/Refund Order*, arguing that if refunds were available independent of the *Waiver/Refund Order*, the Commission would not have needed to expressly impose a refund obligation in that order. *Id.* The argument is specious. The fact that the Commission imposed a refund obligation in a specific order does not in any way mean that violation of the anti-discrimination provisions of Section 276 would otherwise be without remedy. Such a remedy is expressly provided for in Section 207, which authorizes an action for damages for violation of a provision of chapter 5 of Title 47, which includes Section 276.

In a case of discrimination of a monetary nature, the measure of damages has to be the monetary loss proximately caused by the discrimination, which in this case is equivalent to the difference between the discriminatory rates and rates that should have been charged. Thus in ordering refunds, the Commission merely recognized the inherent measure of damages for violation of § 276(a), and did not create a new right. Therefore, contrary to AT&T's argument [AT&C Comments at 15], the obligation to refund excess PAL charges applies not just to BOCs that relied on the *Waiver/Refund Order*, nor just to BOCs that filed new tariffs, but to all BOCs that maintained non-NST-compliant PAL rates after April 15, 1997, including Qwest. The Commission's order for refunds is both consistent with and required by § 276. If AT&T's argument were accepted, it would allow BOCs to evade and violate the antidiscrimination provisions of Section 276 with impunity, as Qwest attempted to do, merely by failing to file new, NST-compliant tariffs. Thus the *Waiver/Refund Order* must be interpreted to apply to all BOCs that maintained non-NST-compliant PAL rates after April 15, 1997.

The remedy for violation of § 276 cannot be limited to prospective relief, because such a result would not be a "remedy" at all. Discrimination made illegal by § 276 can only be remedied through an action for damages, which is specifically contemplated and authorized by § 207.

D. THERE WAS NO "NEW INTERPRETATION" OF FEDERAL LAW THAT PRECLUDES REFUNDS.

Unlike Qwest, AT&T understood the requirement "to submit to state commissions, by May 19, 1997, either new tariffs or cost data to demonstrate that existing tariffs were compliant with the requirements of the Payphone Orders, including the new-services-test pricing standard." AT&T Comments at 8. Thus AT&T takes no position on whether the failure to do so constitutes

a statutory violation. *Id.* However, AT&T argues against the related proposition that failure to provide refunds when rates were reduced “to comply with new interpretations of the new services test, was contrary to federal law.” *Id.* at 9. AT&T does not specifically identify the supposed “new interpretations” to which it alluded.¹² If AT&T is referring to the *Wisconsin Order*, it is plainly wrong, because the *Wisconsin Order* did not create a “new interpretation” of the Commission’s prior orders or regulations, but merely clarified the correct application of the NST, as previously explained in pages 16-19 of TON’s Reply in this matter. *See* discussion, *supra* pp. 6-9.

E. QWEST RELIED ON THE WAIVER/REFUND ORDER.

AT&T argues that the BOCs’ promise to pay refunds and the Commission’s *Waiver/Refund Order* were limited in scope to situations where BOCs sought to rely on the waiver extending the time to have NST-compliant tariffs on file and where newly filed tariff rates were lower than existing tariffed rates. AT&T Comments at 7. In the case at hand, without admitting the validity of AT&T’s argument, Qwest clearly fulfilled both conditions. Its PAL rates filed beginning in 2002 were much lower than its existing rates, and Qwest relied on the *Waiver/Refund Order* in multiple ways. First, the *Waiver/Refund Order* provides that “[a] LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers” *Waiver/Refund Order* ¶ 2. The reliance referred to by the Commission is the collection of dial-around compensation, as indicated by the Commission’s next sentence: “This Order does not

¹² AT&T also speaks vaguely of “the Commission’s later articulation of the requirements of the [new services] test” without identifying or citing to any Commission order. AT&T Comments at 13.

waive any of the other requirements with which the LECs must comply *before receiving [dial-around] compensation.*” *Id.* (emphasis added). Qwest began collecting DAC as of April 15, 1997, thereby relying on the Waiver/Refund Order.

Furthermore, the argument that a BOC could only rely on the *Waiver/Refund Order* by filing NST-compliant tariffs in the window between April 15 and May 19, 1997, is nonsensical. The *Waiver/Refund Order* allowed Qwest to *delay* filing of NST-compliant tariffs past the April 15, 1997 deadline previously imposed. Qwest took full advantage of that order by failing to have NST-compliant PAL tariffs in place by April 15, 1997. That it took the additional, unwarranted liberty of waiting five years instead of 34 days to file its NST-compliant tariffs does not wipe away its reliance on the *Waiver/Refund Order* to delay filing NST-compliant tariffs.

F. NON-RELIANCE ON THE WAIVER/REFUND ORDER CANNOT AVOID LIABILITY FOR VIOLATION OF 47 U.S.C. § 276(A).

AT&T’s argument seems to assume that non-reliance on the *Waiver/Refund Order* can avoid liability under § 276(a). However, § 276(a) flatly prohibits discrimination against independent PSPs, whether or not a BOC “relied” on the *Waiver/Refund Order*. After May 19, 1997, Qwest continued to discriminate against TON, in violation of Section 276(a), by charging TON substantially more for network access than it paid for its own payphones. The natural, logical, and necessary remedy for violation of § 276(a)’s ban on discrimination is to require payment by the offending LEC of the difference between discriminatory rates actually charged and non-discriminatory rates that should have been charged. Whether such payment is enforced by the Commission through application of the *Waiver/Refund Order* or by a court in an action brought under 47 U.S.C. § 207, the result should be identical. Without such a remedy, the anti-discrimination prohibition of § 276 would be meaningless and toothless, contrary to

congressional intent. The position advocated by AT&T would eviscerate Section 276(a). Thus refunds are required for the entire period in which Qwest's PAL rates were not NST-compliant, whether or not the *Waiver/Refund Order* so provided.

G. THE FILED TARIFF DOCTRINE DOES NOT PRECLUDE REFUNDS IN THIS CASE.

AT&T asserts that "filed tariff principles" preclude refunds. AT&T Comments at 10-11, 14. This issue has been extensively briefed in connection with earlier, related proceedings in this docket, and the arguments against application of a filed tariff defense need not be repeated here. Crucial to the present TON Petition, however, is the fact that the two federal circuits that have addressed the issue have both rejected a filed tariff defense in the circumstances of this case and the parallel *Davel* case. See *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1236-38 (10th Cir. 2007); *Davel Comm's Inc. v. Qwest Corp.*, 460 F.3d 1075, 1084-86 (9th Cir. 2006). Accordingly, AT&T cannot rely on a filed tariff argument in connection with the TON Petition.

H. TON'S CLAIM UNDER 47 U.S.C. § 201(b) IS VIABLE.

AT&T's argument that 47 U.S.C. § 201(b) does not provide a basis for relief because TON's claims relate to intrastate, rather than interstate, services, is a variation on the argument made by the BOCs in the *Wisconsin* case, where they asserted that the Commission did not have jurisdiction over payphone access lines because they are furnished on an intrastate basis. The Commission rejected that argument. See *Wisconsin Order* ¶¶ 31-42. The D.C. Circuit similarly rejected such an argument. See *New England Pub. Comm. Council v. F.C.C.*, 334 F.3d 69, 75-77 (D.C. Cir. 2003). As the court noted,

[B]oth intrastate and interstate facilities and services are at issue here. But in passing the 1996 Act's payphone competition provision and the local competition provisions, Congress had exactly the same objective: to authorize the Commission

to eliminate barriers to competition. And much as the Supreme Court concluded it would be impossible to implement the local competition provisions while limiting the Commission's authority to interstate services, so would it make little sense for Congress to command the Commission promulgate rules opening the payphone market to competition while leaving it powerless to address intrastate subsidies and discrimination, which are, after all, no less an obstacle to fair competition than interstate subsidies and discrimination.

Id. at 77. Thus the distinction between interstate and intrastate services has been largely obliterated in the context of payphone regulations under Section 276. Furthermore, the Supreme Court had no difficulty upholding the Commission's decision that failure to pay dial-around compensation constituted a violation of Section 201(b). *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S.Ct. 1513, 1520-22 (2007). Thus the Commission can and should hold that TON has a viable claim under § 201(b).

I. THE COMMISSION MAY RULE THAT QWEST VIOLATED 47 U.S.C. § 416(C).

AT&T argues that 47 U.S.C. § 416(c) provides no basis for relief because the D.C. Circuit has so held. AT&T Comments at 16-17. However, TON's case was filed and will be tried, not in the D.C. Circuit, but in the Tenth Circuit, which has not yet addressed the issue whether § 416(c) provides a private right of action for violation of a Commission order.¹³ This issue is before the Commission on a primary jurisdiction referral from a court in the Tenth Circuit, asking the Commission to express its own views, not the views of the D.C. Circuit. Accordingly, the Commission is free to rule in accordance with positions it took before the D.C. Circuit and the Ninth Circuit, that disobedience to a Commission order constitutes violation of

¹³ The Tenth Circuit stated: [T]his court assumes, without deciding, that for the purposes of this appeal, a private right of action exists under [47 U.S.C. §§ 201(b), 276(a), and 416(c)] in accordance with the facts asserted by TON." *TON Services*, 493 F.3d at 1241 n. 19.

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Section 416(c). *See* TON Petition at 12-13.

IV. CONCLUSION

Neither Qwest's Further Opposition nor AT&T's Comments provide any basis for denying TON's Petition. They both raise arguments previously made and discredited, and add nothing new to the analysis of the three issues referred by the Utah District Court under the doctrine of primary jurisdiction. TON respectfully submits that the Commission should grant its Petition in all respects.

Dated this 16th day of June, 2008.

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CERTIFICATE OF SERVICE

I, Floyd A. Jensen, hereby certify that I caused the foregoing REPLY COMMENTS OF TON SERVICES, INC. to be (1) filed via ECFS with the Office of the Secretary of the FCC in CC Docket No. 96-128; (2) served via e-mail on the FCC's duplicating contractor, Best Copy & Printing, Inc. at fcc@bcpiweb.com; and (3) served via United States mail, postage prepaid, on the following:

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June 16, 2008