

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)

Petition of TON Services, Inc. for)
Declaratory Ruling on a Primary)
Jurisdiction Referral)

CC Docket No. 96-128

**REPLY COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

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SUMMARY

The Commission's prior orders provide no legal support for Qwest's claims that in 1997 it complied procedurally and substantively with Section 276 and the FCC rules. First, it was clearly insufficient for Bell Companies to *self-review* their *own* rates and costs for compliance with the federal new services test ("NST") standard. As the Commission expressly stated, it was relying on *state commissions* to conduct that review. As AT&T and Verizon implicitly acknowledge, the Bell Companies were required to submit their rates and costs for state commission review regardless of whether they themselves believed any revisions were necessary to comply with the new federal requirements.

Second, the Commission's 2002 *NST Order*³ did not modify or amend the NST rule. It simply clarified the rule. The standards set forth in the *NST Order* – not the Bell Companies' own conception of appropriate standards -- are the standards that the Bell Companies had to satisfy in 1997. Qwest admits it failed to do so.

Contrary to AT&T's and Verizon's position, the law is clear that *procedural* compliance with the *Payphone Orders*⁴ state review requirement did not insulate those Bell Companies from liability when they were found to be *substantively* out of compliance with federal law. The Commission had no authority to nullify the otherwise applicable statutory remedy of reparations, and nothing in the *Payphone Orders* or the *Waiver/Refund Order*⁵ suggests that the Commission intended to do so.

³ *Wisconsin Public Service Commission*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002).

⁴ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 ("First Payphone Order"), recon. 11 FCC Rcd 21233 (1997) ("First Payphone Reconsideration Order") (collectively, "Payphone Orders").

⁵ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 (CCB 1997) ("Waiver/Refund Order").

Finally, it is quite clear that the Common Carrier Bureau's temporary waiver of the Bell Companies' noncompliance with the NST – and the refund requirement imposed as a condition of that waiver -- applied to *all* rates that the Bell Companies had to submit for state commission review. As AT&T and Verizon implicitly recognized when they submitted *all* their rates for review under the waiver's protection, neither the benefits of the waiver nor its refund condition were limited solely to the rates that the Bell Companies themselves identified as noncompliant in advance of state commission review. If the waiver and refund condition had been so limited, as the Bell Companies now claim, the *Waiver/Refund Order* could not possibly have achieved the Bell Companies' acknowledged objective – preserving their eligibility for dial-around compensation – especially once it became clear that the Bell Companies had grossly underestimated the extent of noncompliance in their existing payphone line rates.

I. THE PAYPHONE ORDERS REQUIRED BELL COMPANIES TO SUBMIT THEIR RATES AND COSTS FOR REVIEW BY STATE COMMISSIONS

Qwest's factual submissions, which attempt to justify Qwest's failure to submit its rates and costs for state commission review, are based on the premise that the Bell Companies were not required to submit their payphone line rates and costs for state commission review unless they affirmatively proposed to change those rates. That premise is clearly incorrect.

The *Payphone Orders* did not require the Bell Companies merely to self-review their *own* rates and costs for NST compliance, as Qwest appears to believe; rather, the *Payphone Orders* required the Bell Companies to *submit* their rates and costs for *state* commission review under the new federal requirements – regardless of whether the Bell Companies themselves believed any revisions were necessary to comply with those new requirements. A key passage in the *First Payphone Reconsideration Order* states:

States must apply these requirements and the Computer III guidelines for tariffing such intrastate services. . . . We will rely on the *states to ensure* that the basic payphone line is tariffed by the [local exchange carriers (“LECs”)] in accordance with the requirements of Section 276. Where LECs have already filed intrastate tariffs for these services, *states may, after considering* the requirements of this order, the [First Payphone Order], and Section 276, *conclude*: 1) that *existing tariffs are consistent* with the requirements of the [*First Payphone Order*] as revised herein; and 2) that in such case no *further* filings are required.

First Payphone Reconsideration Order, 11 FCC Rcd at 21308 ¶ 163 (emphasis added).

Obviously, the question whether “further filings are required” cannot even arise until an initial filing has been made. More fundamentally, there is clearly no way that state commissions could determine whether “existing tariffs are consistent with” the cost-based NST without a filing being made with the appropriate cost showing. In short, the idea that Qwest could self-review its own rates and costs, determine that they satisfied the NST, and not bother submitting NST cost showings to the state commissions is flatly contradicted by the *Payphone Orders* themselves.⁶

II. THE COMMISSION’S NST ORDER ONLY CLARIFIED – IT DID NOT AMEND – THE NST RULE

Even Qwest acknowledges that its pre-2002 rates did not comply with the NST as set forth in the *NST Order*.⁷ According to Qwest, such noncompliance could not be corrected by

⁶ See also *Waiver/Refund Order*, 12 FCC Rcd at 21378 ¶ 18 (“the Commission’s payphone orders . . . mandate that the payphone services a LEC tariffs at the state level are subject to the new services test and that *the requisite cost support must be submitted to the individual states*”) (emphasis added). It is telling that the other Bell Companies (of which there were six at that time) *all* interpreted the *Payphone Orders* differently from Qwest, as they all followed a “practice” of submitting their existing rates and costs for Commission review. AT&T/Verizon at 8.

⁷ See Qwest, Att. A, Declaration of Jerrold L. Thompson, ¶ 98 (“Qwest needed to lower its PAL rates even further due to the FCC’s *Wisconsin Order*”). Although the text of Qwest’s Further Opposition seems to argue that the rate reductions had nothing to do with the *NST Order*, even Qwest admits that its own computation of its overhead loadings (a critical aspect of the NST standard) in 1997 showed that they were very high, and that its post-2002 filings reduced those overhead loadings to 5%. See Qwest, Att. A ¶ 98. It is simply not credible that Qwest

refunds because the *NST Order* was not retroactive and cannot lawfully be applied retroactively. Qwest at 13. The *NST Order*, however, is not a rulemaking decision that amended FCC regulations; rather, it is a declaratory ruling that clarified *existing* law. As the D.C. Circuit recently stated:

“Retroactivity is the norm in agency adjudications no less than in judicial adjudications” Clarifying the law and applying that clarification to past behavior are routine functions of adjudication.⁸

Indeed, the Commission could not have significantly altered the content of the *NST* without following notice-and-comment rulemaking procedures.⁹ Furthermore, the *NST Order* itself repeatedly states that the guidance provided in that order followed “the Commission’s longstanding precedent” (*NST Order* ¶ 43), such as the *ONATariff Order*¹⁰ and the *Physical Collocation Tariff Order*,¹¹ as well as the *Payphone Orders* themselves. See, e.g., *NST Order* ¶¶ 43, 46, 48, 52, 53, 54, 56, 57, 58, 64. Subsequently, the Commission characterized its *NST Order* as “clarifying application of the new services test for the benefit of state public service commissions.”¹² The Commission never suggested that the *NST Order*, which explicated longstanding *NST* precedent, altered the *NST*.¹³

would have made a change of this magnitude if it really could have somehow justified the original rates under the *NST Order*.

⁸ *Qwest Services Corp. v. FCC*, 509 F.3d 531, 539-40 (D.C. Cir. 2007) (quoting *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)).

⁹ See *Sprint Corp. v. FCC*, 315 F.3d 369, 372-77 (D.C. Cir. 2003).

¹⁰ *Open Network Architecture Tariffs of Bell Operating Companies*, Order, 9 FCC Rcd 440 (1993).

¹¹ *Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, 12 FCC Rcd 18730 (1997).

¹² *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, ¶ 60 (2004).

¹³ Qwest also suggests that the *NST Order* departed from its previous rulings allowing much higher overhead loadings for certain federally tariffed payphone features and functions. Qwest, Att. A, ¶ 60, citing *Local Exchange Carriers’ Payphone Functions and Features*, Memorandum Opinion and Order, 12 FCC Rcd 17996 (1997) (“*Payphone Features Order*”). In the *NST Order*

Qwest's argument that the *NST Order* could not apply retroactively is thus a belated challenge to the *NST Order* itself. If Qwest or other members of the LEC Coalition that participated in the Commission's *Wisconsin Public Service Commission* proceeding believed that the Commission's rulings were unsupported by precedent or that they could not be adopted without a rulemaking proceeding, they should have raised those issues in a petition for reconsideration or review of the *NST Order* itself (as they did with respect to the issue of the Commission's jurisdiction). It is far too late to raise those issues today.

III. SUBMISSION OF EXISTING RATES TO STATE COMMISSIONS DID NOT INSULATE AT&T AND VERIZON FROM PROVIDING REPARATIONS FOR VIOLATIONS OF FEDERAL LAW

AT&T and Verizon seek to distinguish themselves from Qwest based on their "practice" of "submit[ting] to state commissions, by May 19, 1997, either new tariffs or cost data to demonstrate that existing tariffs were compliant with . . . the new services test pricing standard." AT&T/Verizon at 8. Such *procedural compliance* with the *Payphone Orders*, however, could not and did not insulate AT&T and Verizon from liability for reparations for their *substantive violations* of those orders and of Section 276.

A. The 10th Circuit's *TON Services* opinion confirms that the Bell Companies' "procedural compliance" did not insulate them from refunds/reparations

The ruling of the 10th Circuit court of appeals in the *TON Services* case specifically affirms that procedural compliance could not insulate the Bell Companies from being required to

itself, however, the Commission specifically distinguished the rulings in the *Payphone Features Order*, pointing out that the features at issue had "monthly costs [that] did not exceed a few cents per line" and that in the *Payphone Features Order* the Commission had explicitly ruled that "we do not find that it will necessarily be determinative in evaluating overhead loadings for other services." See *NST Order* ¶ 57, quoting *Payphone Features Order* at 18003 ¶ 13.

provide refunds/reparations. *See TON Services v. Qwest Corp.*, 493 F.3d 1225 (10th Cir. 2007). In directing the referral of the issues now before the Commission, the 10th Circuit explicitly distinguished “procedural” compliance with the *Payphone Orders* from “substantive” compliance with the NST, the *Payphone Orders*, and Section 276. *Id.* at 1242. As noted above, Qwest is alleged to have committed both procedural and substantive violations. The 10th Circuit ruled that regardless of any procedural violation, substantive violation of the NST gives rise to liability:

Even if a procedural violation of FCC orders does not give rise to statutory liability, a substantive evaluation of Qwest’s NST compliance would nevertheless be necessary If Qwest’s rates did not comply substantively with the requirements of the NST . . . TON is entitled to seek damages under § 206

Id. While AT&T and Verizon may have complied procedurally, there is no dispute that they failed to “comply substantively with the requirements of the NST.” *Id.* Thus, in arguing that their procedural compliance insulated them from substantive liability, AT&T and Verizon are asking the Commission to overrule a federal court of appeals and to adopt a novel interpretation that conflates substance and procedure – something clearly at odds with basic legal principles.

B. The *Payphone Orders* did not explicitly or implicitly limit the remedies available for violations of Section 276

Apart from the inconsistency with the 10th Circuit’s ruling, nowhere in the *Payphone Orders* did the Commission state or even suggest that the remedies available for NST violations were limited to those provided by state law. AT&T/Verizon at 2 (arguing that state *remedies* as well as *procedures* should govern). With the exception of the *Waiver/Refund Order*,¹⁴ the Commission’s prior orders in this proceeding did not directly address refunds at all. Those prior

¹⁴ AT&T’s and Verizon’s argument that the refund requirement of the *Waiver/Refund Order* would have been unnecessary if there was a statutory refund/reparations remedy for NST violations is addressed below.

orders did “make clear,” however, that the NST is a federal requirement, that noncompliance with the NST is a violation of Section 276(a), and that the Commission’s reliance on state commissions to conduct NST rate review did not relieve the Bell Companies of any of their federal obligations under Section 276.¹⁵

As APCC has previously explained, Congress entrusted implementation of Section 276 solely to the FCC. Under *United States Telecomms. Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), the Commission could not lawfully delegate authority to the states to implement and enforce federal law while abdicating responsibility for effective supervision of their decisions. It would have been a blatant violation of *USTA II* if the involvement of state commissions deprived PSPs of an effective remedy for BOCs’ violations of Section 276.¹⁶ It is precisely for that reason that the Commission explicitly retained jurisdiction to ensure BOC compliance with Section 276.¹⁷

¹⁵ See *First Payphone Reconsideration Order*, 11 FCC Rcd at 21308 ¶ 163; *Waiver/Refund Order*, 12 FCC Rcd at 21379, ¶ 19, n.60; *NST Order*.

¹⁶ Moreover, if state remedies governed whether refunds/reparations were available for NST violations, then the effect of such a delegation would be to frustrate the uniform implementation of federal policy. See *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1089-90 (9th Cir. 2006) (“*Davel*”) (recognizing the need for uniformity in implementation of Section 276). Worse, if remedies were left up to state law, there would be situations where the availability of refunds/reparations would depend on whether the state commission found it had jurisdiction to apply the federal NST. If the state commission could lawfully deny refunds based on state law, PSPs would be entitled to refunds/reparations only if the state found it lacked jurisdiction and directed the Bell Companies to submit their rates and costs to the FCC.

¹⁷ See *Waiver/Refund Order*, 12 FCC Rcd at 21379, ¶ 19, n.60. AT&T and Verizon argue that there was no delegation, but merely a refusal to preempt the pre-existing state regulation of payphone line rates. AT&T/Verizon at 11-12. To the extent that this contention is more than a semantic quibble, it is clearly wrong. The pre-existing regulatory role of state commissions was solely to carry out the requirements of state law. Section 276, however, imposed new federal obligations on the Bell Companies and assigned sole responsibility to the FCC to enforce those obligations. To the extent that the FCC relied on state commissions to review Bell Companies’ compliance with those obligations, the Commission did not “defer” to state commissions – it assigned those tasks to the state commissions as its agents in implementing federal law. The state commissions, of course, could opt out of their assignment if they found they were unable to perform their assigned tasks (*First Payphone Reconsideration Order* ¶ 163) -- a choice that was made, at least initially, by a number of state commissions, including the Wisconsin commission

It would also violate Section 276 if Bell Companies were liable for damages only if PSPs went to federal court (as in the *Davel* and *TON Services* cases) but could escape liability for the very same violation if PSPs participated in the state review process established in the *Payphone Orders*. PSPs, in effect, would be unjustly penalized for having pursued their refund claims before the state commissions pursuant to the Commission's assignment of review functions in the *Payphone Orders*.

AT&T and Verizon nevertheless contend that the *Payphone Orders* "mak[e] clear" that no refund remedy was intended. AT&T/Verizon at 2. According to AT&T and Verizon, when the Commission "did not require all BOCs to file new tariffs for basic payphone line services," that meant that "the Commission did *not* anticipate that payphone providers would automatically be entitled to refunds." AT&T/Verizon at 10. For this apparent *non sequitur*, the underlying reasoning appears to be as follows:

1. In the *First Payphone Reconsideration Order*, the Commission stated that state commissions could find that existing tariffs are consistent with the NST. *First Payphone Reconsideration Order*, 11 FCC Rcd at 21308, ¶ 163.

2. The Commission stated that if a state commission found that existing tariffs were consistent with the NST, it could conclude that "no further filings are required." *Id.*

3. Therefore, the Commission intended that if a state commission found existing tariffs were *non-compliant*, the state commission would conclude that "further filings are required."

4. Because the Commission only referred to "further filings" and not to refunds, it must have intended that "further filings" would be the sole remedy for noncompliance with the NST.

whose initial finding of lack of NST review jurisdiction led to the *NST Order*. See also Virginia State Corporation Commission, *Petition of PayTel Communications, Inc., et al*, Case No. PUC970029, Order (May 11, 2001) (finding that the Virginia commission lacked authority to evaluate intrastate tariffs' compliance with federal regulations). Once a state commission undertook to conduct the NST review, however, it had to apply federal law. Moreover, for the Commission's assignment of responsibility to the states to be valid – and not an illegal delegation under *USTA II* -- the Commission must closely supervise its agents, including their application of effective remedies for violations of federal law.

5. It is reasonable to draw this inference because “[t]he Commission would have understood that, under ordinary filed tariff principles,” there would be no provision for refunds. AT&T/Verizon at 10-11.

AT&T/Verizon’s logic is riddled with fatal flaws. First, in paragraph 163 of the *First Payphone Reconsideration Order*, the Commission was not talking about *remedies* at all – it was talking about the steps required for *compliance* with Section 276.¹⁸ Earlier in the same paragraph, the Commission had just finished explaining that *compliance* with Section 276 required the Bell Companies to *file* nondiscriminatory, cost-based, NST-compliant payphone line rates with state commissions. The Commission then noted the possibility that the existing rates, when reviewed by state commissions (after being re-filed with underlying costs so that they *could* be reviewed), would be found to comply. The reference to “further filings” referred to the additional steps that would be necessary to bring the Bell Companies into *compliance* in the event that the rates initially filed for review (*i.e.*, the existing tariffs) did *not* comply. In this context, therefore, there was no reason for the Commission to be talking about remedies and no basis for inferring any intention to limit remedies.¹⁹

¹⁸ The Commission typically expects that carriers will comply with the statute and implementing regulations and does not, as a matter of course, explicitly address in advance the sanctions for noncompliance when it adopts new rules. In this instance, the Commission’s *First Payphone Reconsideration Order* required compliance filings with state commissions by January 15, 1997, a full three months before the April 15, 1997 effective date, signaling an expectation (however unrealistic in hindsight) that the three-month review period would be sufficient for state commissions to complete their review and order any necessary revisions in tariffs, thereby ensuring *compliance* as of the effective date and making it unnecessary to award refunds for noncompliance. The Commission clearly “would have understood,” however, that a federal statutory violation must have a federal remedy. To the extent that there remains any ambiguity as to the availability of a refund/reparations remedy in the event of noncompliance, that ambiguity should be resolved based on the “policy considerations that gave rise to the FCC’s 1996 and 1997 orders applying the new services test to intrastate payphone rates.” *Davel*, 460 F.3d at 1089 (9th Cir. 2006). Such considerations clearly favor the provision of refunds.

¹⁹ There is thus no basis whatever for AT&T’s and Verizon’s position that a ruling in favor of refunds “would be impermissibly retroactive” by adding a new remedy not previously available. *Id.* at 12. *See generally id.* at 12-13. In any event, the Commission had no authority to exempt the Bell Companies from the statutory remedy of reparations.

Second, it is clear that “ordinary filed tariff principles” do *not* apply here. As has been discussed in previous *ex partes*, and affirmed by 9th and 10th Circuit courts of appeals, the federal filed tariff doctrine does *not* preclude the award of refunds where payphone line rates did not comply with the NST. The filed rate doctrine “does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirements, even where the effect of enforcement would be to change the filed tariff” *Davel*, 436 F.3d at 1085; *see also TON Services*, 493 F.3d at 1236.

Moreover, even if “ordinary filed tariff principles” would have otherwise prevented the award of refunds, they could not do so here. Section 276 and the *Payphone Orders* established wholly new *federal* requirements and obligations. In addition, as the Commission and others have repeatedly stressed from 1997 onwards, Section 276(c) preempted any inconsistent state requirements. *See, e.g., First Payphone Order*, 11 FCC Rcd at 20614 ¶ 147. Therefore, “[s]tate filed rate doctrines are . . . preempted by 47 U.S.C. §276(c).” *TON Services* at 20-21, n. 14. As a result, there could be no presumption that existing state payphone line tariffs – whether or not they had previously been reviewed – were lawful or otherwise insulated from remedies by “ordinary filed tariff principles.” To the contrary, Bell Companies whose rates did not satisfy the NST as of the April 15, 1997, effective date of the new federal requirements *were out of compliance* with federal law and were charging unlawful rates, making them liable for reparations until they made a corrective rate filing that did comply. Thus, contrary to the AT&T/Verizon argument, the Commission “would have understood” that, under federal law, PSPs *were* entitled to reparations for any violations of Section 276 occurring after that effective date, and that, in the event of such violations, state commissions would either award such reparations or – if they lacked jurisdiction to execute federal law -- refer the matter to the FCC. *First Payphone Reconsideration Order*, 11 FCC Rcd at 21308 ¶ 163.

C. The refund requirement of the *Waiver/Refund Order* was necessary regardless of whether there is a statutory remedy of reparations

The AT&T/Verizon argument that the refund provision of the *Waiver/Refund Order* would not have been necessary if PSPs were independently entitled to refunds is totally implausible because it ignores the reason the Bell Companies requested the waiver in the first place. Because the background of the *Waiver/Refund Order* has been extensively discussed in this proceeding, APCC will mention only a few of the key points.

Based on a misinterpretation of the *First Payphone Reconsideration Order*, the Bell Companies had neglected to submit their “dumb” payphone line rates and costs for state commission review until it was too late to meet the April 15, 1997, compliance deadline. Noncompliance with the NST requirement meant that the Bell Companies would be ineligible for dial-around compensation for their own payphones.²⁰ Therefore, the Bell Companies requested a temporary waiver of that requirement so that they could become eligible for dial-around compensation despite the failure to comply.

The refund requirement of the *Waiver/Refund Order* was necessary because otherwise the waiver granted by the Commission would have been an impermissible waiver of the statutory

²⁰ See *First Payphone Reconsideration Order*, 11 FCC Rcd at 21293 at ¶ 131; *Waiver/Refund Order*, 12 FCC Rcd at 21370 ¶ 1. Indeed, Section 276 itself required that the transition to the new federal regulatory scheme be carefully coordinated so that the new compensation system and the various competitive safeguards – including NST rate compliance – all took effect at the same time. Section 276(a) explicitly prohibited any discrimination by the Bell Companies after the effective date of the Commission’s regulations promulgated under Section 276(b). 47 U.S.C. § 276(a). Effective April 15, 1997, those regulations were to (1) implement removal of the Bell Companies’ payphones from the rate base, (2) establish a system of payphone compensation, and (3) institute “Computer III” safeguards to prevent discrimination, including NST rate compliance. *Id.* § 276(b)(1). With the Bell Companies’ dial-around compensation taking effect on April 15, 1997, they had to be in compliance with the NST on the same date or the Bell Companies would be in violation of the nondiscrimination provision of the statute.

nondiscrimination requirement.²¹ Lacking power to waive a statutory requirement, the Commission required, as a condition of granting the waiver, that the Bell Companies commit in advance, where rate reductions were necessary, to refunding, back to April 15, 1997, the difference between NST-compliant rates, “when effective,” and the previously applicable non-NST-compliant rates.²²

Relying on the availability of reparations as a remedy for NST *violations* would not have been an adequate substitute for the refund requirement of the waiver, because the reparations *remedy* presupposes a statutory *violation*. Yet, the *violation* was precisely what the Commission was being asked to waive. To the extent that the waiver was applicable, the Bell Companies would not be deemed liable for their statutory violation and there would be no reparations remedy. Therefore, a specific refund requirement had to be incorporated into the *Waiver/Refund Order*.

IV. THE REFUND REQUIREMENT OF THE *WAIVER/REFUND ORDER* IS BROADLY APPLICABLE

AT&T and Verizon make no new arguments in their attempt to revisit the issue of the scope of the *Waiver/Refund Order*. For reasons stated numerous times previously, the

²¹ As explained in the preceding footnote, the statute tied together compensation, the removal of rate base subsidies, and compliance with the various nondiscrimination safeguards, including the NST, so that they all had to take effect on the same date. Short of requiring NST refunds, the only other way the Bureau could have legally waived the statutory NST requirement would have been to delay the effective date for all three requirements, as APCC had proposed. See *Waiver/Refund Order*, 12 FCC Rcd at 21378 ¶ 17 (describing APCC proposal to defer the effective date of detariffing, LEC compensation, and NST compliance for 90 days). The Bureau explicitly rejected this alternative because it “would unduly delay, and possibly undermine, the Commission’s efforts to implement Section 276 and the congressional goals . . .”). *Id.* at 21380 ¶ 21. The only other alternative was to impose a refund requirement to ensure that the Bell Companies were in “retroactive” compliance with the statute.

²² The refund requirement was proposed by the Bell Companies as part of their April 10 waiver request, presumably after negotiations with the Common Carrier Bureau.

Waiver/Refund Order's refund requirement "makes sense" (AT&T/Verizon at 15) only if it applies to *all* situations where a Bell Company's existing tariffs were found noncompliant and not, as AT&T and Verizon argue, just to the few cases where the Bell Company itself identified the noncompliance and proposed rate reductions (*id.*). As the Bell Company's own waiver request made clear, their major concern and fundamental motivation for seeking a waiver was that they might be found ineligible for dial-around compensation.²³ Whether noncompliance with the NST was identified by the Bell Company itself or by a state commission, the consequence would still be that the Bell Company would be ineligible for compensation until the noncompliance was corrected.

Additionally, for the reasons stated in Section III(C) above, the only way that the Commission could waive the Bell Companies' noncompliance without illegally waiving the statute was to condition the waiver on a refund requirement.²⁴ Therefore, under the Bell Companies' current interpretation of the *Waiver/Refund Order* (in which it applied only to rates that the Bell Companies proposed to reduce and not to rates incorrectly certified to be compliant), the only way the Bell Companies could achieved their goal of preserving their eligibility for dial-around compensation would have been to propose at least some reduction in every payphone line rate. They did not do so in the vast majority of cases, but instead (except for Qwest) submitted letters citing the *Waiver/Refund Order* and attaching cost data to justify

²³ See Letter to Mary Beth Richards from Michael K. Kellogg (April 10, 1997), attached as Attachment B to Exhibit D to Petition of the Independent Payphone Association of New York, Inc. for an Order of Pre-emption and Declaratory Ruling (filed December 29, 2004) ("Provided, however, that we undertake and follow-through on our commitment to ensure that existing tariff rates comply with the "new services" test and, in those States and for those services where the tariff rates do not comply, to file new tariff rates that will comply, we believe that we should be eligible for per call compensation starting on April 15th. Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997").

²⁴ Otherwise, the Bureau would have impermissibly waived the statute, as discussed above.

their existing rates.²⁵ Thus, at the time *Waiver/Refund Order* was adopted, the Bell Companies clearly recognized that both the waiver and the refund requirement applied to existing rates.²⁶

* * *

Even if AT&T's and Verizon's current interpretation of the *Waiver/Refund Order* and the *Payphone Orders* as denying PSPs the refund remedy did "make sense," that interpretation contravenes the Commission's clear intent, in the *Payphone Orders*, to ensure that the Bell Companies complied with the statutory mandate to end discrimination by bringing their rates into compliance with the NST by April 15, 1997. Only refunds can effectuate this clear statutory intent. As recognized by the court in *Davel*, where faced with conflicting possible interpretations of its order, the Commission should adopt the one that advances the "policy considerations . . .

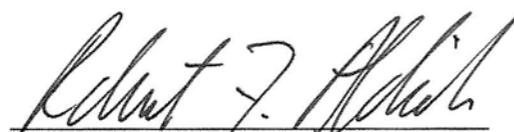
²⁵ See APCC Ex Parte, "The Waiver Order Requires Refunds From the Date NSTS-Compliant Rates Became Effective Back to April 15, 1997" at 13 (filed September 12, 2006). See also *id.*, Attachment 1 ("NYNEX [in Massachusetts] is providing the Department with the requisite cost support information as required in the April 15, 1997 FCC Order granting a limited waiver . . . Public Access Line Service (PALs) and Public Access Smart Line Service (PASLs) tariff rates for Massachusetts conform to the FCC requirements"); Attachment 2 at 2 ("Attachment A to this letter sets forth cost and revenue related information which demonstrates that the Company's existing Public Access Line Service (PALs) and Public Access Smart Line Service (PASLs) tariff rates for New York satisfy the FCC's new services test").

²⁶ Thus, AT&T's and Verizon's argument that Bell Companies who "determined that [their] existing rates were consistent with federal requirements . . . would not have benefited in any way from the waiver and would have had no reason to forfeit any rights" (AT&T/Verizon at 15-16) is patently wrong. They certainly did benefit from the waiver by remaining eligible for dial-around compensation when – as turned out to be the case in virtually every state where the issue was litigated – the rates that the *Bell Companies* "determined . . . were consistent with federal requirements" were found inconsistent with those requirements after review by *state commissions*. In those situations, the waiver protected the Bell Companies from being declared ineligible for dial-around compensation. They did *not* lose their eligibility for compensation even though they were found to be in violation of the NST requirement. Now that there is no longer any practical likelihood that the Bell Companies will be declared ineligible for payphone compensation, they feel free to embrace the much narrower interpretation that they have urged upon the Commission in this proceeding.

that gave rise to the FCC's 1996 and 1997 orders." *Davel*, 460 F.3d at 1089. The Commission should grant the petitions before it and order the Bell Companies to provide refunds, back to April 15, 1997, for charges in excess of NST-compliant rates.

Dated: June 16, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2008, a copy of the foregoing Reply Comments was delivered via first-class U.S. Mail, postage pre-paid to the following parties:

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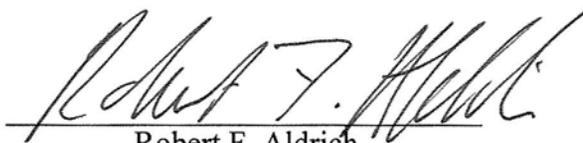
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