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December 2, 2008

By Electronic Filing **Ex Parte Presentation**

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

Re: NST Refunds - CC Docket 96-128 – Response to Verizon Ex Parte of November 25, 2008

Dear Ms. Dortch:

The undersigned, counsel to the Independent Payphone Association of New York, Inc. (IPANY), respectfully responds to the ex parte filing made by Verizon herein on November 25, 2008. Regrettably, particularly with respect to Verizon's discussions of activities in New York, the Verizon submission is factually incorrect and legally without merit.

In December, 1996, in response to the FCC's Payphone Orders, Verizon filed revisions to its underlying payphone line rates in New York. However, the only rate changed was for the "smart line" service utilized by Verizon's own pay telephones. No changes were made to the rates for Public Access Line (PALs) and usage services purchased by the Independent Payphone Providers which competed with Verizon. Verizon refused to provide IPANY with the "cost studies" which purportedly supported the new rates. Verizon made a subsequent tariff filing on May 19, 1997, which it again asserted was required by the FCC's NST Orders. However, like the first filing, that second filing left

Herzog Law Firm P.C.
7 Southwoods Boulevard
Albany, NY 12211

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

unchanged the PAL and usage rates which had been in effect since the 1980s or early 1990s.

Verizon asserts that IPANY waited until December, 1999, to challenge Verizon's failure to comply with the NST rates. It also implies (but does not substantiate) that IPANY's request for refunds was not timely. Neither assertion is correct.

In January, 1997, IPANY and others submitted informal comments to PSC Staff regarding Verizon's failure to comply with the NST. In light of objections from IPANY and others, the PSC approved Verizon's December, 1996, tariff filing on a temporary basis only, and on July 30, 1997, initiated a formal proceeding in Case 96-C-1174 to review the lawfulness of Verizon's payphone rates[1]. On September 30, 1997, within the time allowed by the PSC, IPANY submitted detailed objections to Verizon's payphone rates on the ground they did not comply with the New Services Test. Between October 1997 and December 1, 1999, the PSC kept Case 96-C-1174 open as the proceeding in which the Verizon rates were being reviewed.

After the PSC failed to act in that pending proceeding for two years, IPANY filed an additional complaint on December 2, 1999, which asked the PSC to conclude the investigation commenced in 1997, and resolve whether Verizon's rates complied with the

[1] The PSC could not "suspend" or "make temporary" Verizon's NST PAL and usage rates because Verizon hadn't made any tariff filing for them.

NST. While legally the time to request refunds had not yet accrued (because such a request would be required only upon a determination Verizon's rates were not NST compliant), out of an abundance of caution IPANY asked the PSC to award refunds.[2] IPANY's second Complaint was supported by an expert's affidavit and cost study showing Verizon's rates did not comply with the NST.

While Verizon states that "the PSC held that Verizon's rates satisfied the NST", Verizon does not mention that the PSC's approval of those rates was set aside by the New York State courts because the PSC justified its approval of the Verizon rates on the ground they "recover direct embedded costs plus a reasonable contribution toward common costs" (emphasis added). The courts of New York have thus determined the PSC's action was invalid because the NST required rates based on forward-looking, economic costs, and not embedded costs.[3]

Verizon also does not mention that the Supreme Court declared a remand would be necessary for the PSC to apply the proper standard to judge whether Verizon's pre-existing (and unchanged) rates were in fact NST compliant. While that remand was welcomed by IPANY, the Supreme Court also held that during such a remand, the PSC

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[2] In any event, the statute of limitations in New York to request refunds is a sliding 6 years from each overcharge (Capital Properties v. PSC, 91 AD2d 726), and IPANY's demand for refunds falls well within that timeframe. Indeed, since the PSC has not yet ruled on the validity of Verizon's rates in effect on April 15, 1997, the time to demand refunds has still not accrued.

[3] None of the subsequent decisions on appeal changed that ruling.

would not be required to apply the specific directives of the FCC, contained in the Commission Wisconsin Order issued on January 31, 2002, in determining whether Verizon's rates complied with the NST.

On appeal, the Appellate Division of the State Supreme Court left intact the lower court's ruling that the PSC had not properly approved Verizon's pre-existing rates as NST compliant. However, the Appellate Division held that even if, during the remand, Verizon's pre-existing rates were found not to be NST compliant, refunds would not, under any circumstances, be available. The basis for that conclusion was not the "filed tariff doctrine" or "res judicata", but instead the Appellate Division's interpretation of the two letters from the RBOC Coalition to the FCC, dated April 10 and 11, 1997, which (1) promised to give refunds back to April 15, 1997, if eventually approved NST rates were lower than pre-existing rates and (2) waived any possible application of the filed rate doctrine. The Appellate Division interpreted those two self-serving letters, and the FCC's related Orders, as promising refunds only if a Bell Operating Company actually made a tariff filing with purported NST compliant rates within a forty-five day waiver window which ended on May 19, 1997. The appellate court found that since Verizon did not make any changes to its pre-existing (and non-compliant) PAL and usage tariffs

during that forty-five days, it would be immune from refunds even if Verizon never complied with the obligations imposed by the NST Orders.[4]

Verizon also fails to note that the New York Court of Appeals refused IPANY's request to stay proceedings to allow a submission to the FCC asking for the FCC's guidance on what was intended by the Bureau Waiver Order, the Refund Order, and the Commission Wisconsin Order.

Verizon is correct in asserting that the final determination of state law is that refunds are not available to IPPs in New York under IPANY's complaints, even if Verizon breached its obligation under federal law to put into effect NST compliant rates. Verizon is incorrect, however, in asserting that res judicata bars any challenge to that final determination, which was based on state – not federal - law.

Federal law does not permit a state to use state law to usurp the FCC's authority to establish national policy. As IPANY has previously demonstrated, both Section 276(c) and this Commission's own Payphone Orders, including paragraph 147 of the First Report and Order, pre-empt the New York State court rulings which are inconsistent with the FCC's regulations. Moreover, even if pre-emption were not mandated by statute, the law is settled that a federal agency's discharge of its statutory duty to interpret and

[4] In fact, Verizon did file "NST compliant" tariffs within the 45 day window, but only for the "smart" lines used by Verizon's own payphones, and not for the PAL lines and usage utilized by IPPs.

implement a uniform and consistent policy applying federal law prevails over common law principles of res judicata, whether the state decision is one of an agency or court. See Arapahoe County Public Airport Authority v. FAA, 242 F 3d 1213 (10th Circuit 2001); American Airlines, Inc. v. Department of Transportation, 202 F 3d 788 (5th Circuit 2000). Moreover, this very principle has specifically been found to apply under the Telecommunications Act of 1996. Iowa Network Services, Inc. v. Qwest Corporation, 363 F 3d 683 (8th Circuit 2004).

The issue pending before this Commission is whether Verizon will be rewarded for willfully flaunting its obligations under the Payphone Orders to file NST compliant rates in the State of New York. Verizon made an agreement with this Commission in 1997, that in return for its immediate ability to receive hundreds of millions of dollars in Dial-around compensation, Verizon would file NST compliant rates in the various states, and if those NST rates were found to be lower than the old rates in effect in April, 1997, refunds would be made back to that date. Verizon did not hesitate to grab the Dial-around compensation monies, but when it came time for Verizon to honor its side of the bargain – to file NST compliant rates and give refunds in order to make payphone providers whole – it contemptuously reneged.

Accordingly, IPANY respectfully requests that its Petition for Pre-emption and Declaratory Ruling be granted by the Commission.

A complete timeline of the New York State proceeding, which demonstrates that IPANY had objected to, and was engaged in litigating Verizon's NST rates since early 1997, is attached hereto.

Respectfully submitted,

Keith J. Roland

KJR:tlm
Attachment
cc: Daniel Gonzalez
Amy Bender
Scott Deutchman
Scott Bergmann
Gregory Orlando
Nicholas Alexander
Dana Shaffer
Randy Clarke
Albert Lewis
Marcus Maher
Donald Stockdale

INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.

PETITION FOR PRE-EMPTION AND DECLARATORY RULING

CC DOCKET 96-128

TIMELINE OF NEW YORK STATE PROCEEDING

Verizon (then New York Telephone) underlying payphone rates were filed with New York PSC in late 1980's or early 1990's. Rates were based on traditional, embedded or residuary costs.

December 31, 1996 - Verizon files revised line rates, in response to FCC Payphone Orders, to be effective April 15, 1997. Such revised rates were filed only for "smart" payphone lines used by Verizon payphones. Pre-existing rates for "dumb" payphone lines – used by IPPs – were not changed.

January, 1997 – Independent Payphone Association of New York (IPANY) submits objection to PSC Staff over Verizon tariff filing as not meeting FCC Orders, but is denied access to Verizon cost studies supporting filing.

March 31, 1997 – PSC approves Verizon tariff on temporary basis on ground there was "no subsidy of local coin service currently flowing from other intrastate services". There

was no review of whether the FCC's New Service Test standards were followed. In light of IPANY objections, PSC continues review of Verizon's tariff.

April 15, 1997 – FCC Common Carrier Bureau issues "Refund Order" giving Verizon and other RBOCs until May 19 to file NST compliant revisions to state payphone tariffs.

May 19, 1997 – Pursuant to "Refund Order", Verizon files changes to its state payphone tariff for "Smart Line" phones (used by Verizon) but not "Dumb Line" phones used by IPPs, and incorrectly certifies its IPP rates comply with the NST.

July 30, 1997 – PSC continues review of Verizon's tariff by issuing Notice Requesting Comments in Case 96-C-1174. Submission date for comments is extended to September 30, 1997.

September 30, 1997 – IPANY submits comments showing Verizon's payphone rates did not comply with the New Services Test.

October 1997 – December 1, 1999 – PSC keeps proceeding to review tariffs open, but takes no action.

December 2, 1999 - IPANY files supplemental complaint supported by an expert's affidavit and cost study, asking PSC to resolve issues pending since April 1, 1997, in

light of FCC's NST Orders, i.e., the validity of Verizon's payphone rates. Complaint also asks for refunds back to April, 1997, once proper NST rates are established.

January 5, 2000 – PSC issues Notice Requesting Comments on IPANY's December 2, 1999, Complaint.

February – April, 2000 – Verizon and IPANY submit comments and replies to PSC.

March 2, 2000 – FCC Common Carrier Bureau issues First "Wisconsin Order" generally endorsing IPANY positions.

October 12, 2000 – PSC issues Order holding First Wisconsin Order does not apply in New York, and finding Verizon's pre-existing payphone rates complied with the NST because they "recover direct embedded cost plus a reasonable contribution toward common costs". (emphasis added).

December 8, 2000 – IPANY timely files Petition for Rehearing of PSC Order of October 12, 2000.

January – March, 2001 – Verizon and IPANY submit comments and legal arguments on IPANY Petition for Rehearing.

September 21, 2001 – PSC issues Order Denying Petition for Rehearing of October 12, 2000, Order.

January 18, 2002 – IPANY timely files Article 78 Petition in New York State Supreme Court challenging PSC's Orders approving Verizon's payphone tariffs, with request for refunds.

January 31, 2002 – FCC issues Second Wisconsin Order upholding, in significant regard, CCB First Wisconsin Order. IPANY immediately brings that Order to the attention of the Court.

March 8, 2002 – PSC Answer to Supreme Court in Article 78 proceeding states PSC will not follow FCC rulings in Second Wisconsin Order.

July 31, 2002 – New York Supreme Court (Leslie E. Stein, J.S.C.) issues Decision and Order (1) setting aside PSC approval of Verizon's payphone rates, and remanding for further proceedings, (2) holding FCC's Wisconsin Orders are inapplicable to determining NST rates, and (3) directing refunds be made if pre-existing rates did not comply with the NST.

August – September, 2002 – Verizon and IPANY submit Petitions for Clarification or Reargument to Supreme Court.

March 17, 2003 – Individual IPPs file Second Complaint with the PSC again asking it to apply the FCC's Second Wisconsin Order and award refunds (hoping to reverse the PSC's earlier refusal). (Second IPP Complaint).

April 17, 2003 – PSC issues Notice Regarding Complaints in Cases 03-C-0428 and 03-C-0519 and refers Second IPP Complaint of March 17, 2003, to Office of Hearings and Alternate Dispute Resolution.

May, 2003 – May, 2006 – Proceedings before PSC in Second IPP Complaint, including review of Verizon cost study submitted in June, 2003. .

May 1, 2003 – Supreme Court issues Decision and Order generally upholding earlier decision of July 31, 2002, including:

a. PSC did not properly approve Verizon's pre-existing rates as NST compliant.
b. On remand, PSC was not required to apply holding of either First Wisconsin Order or Second Wisconsin Order.
c. Refunds would be required as of April 15, 1997, if correct NST rates were lower than Verizon's pre-existing (and unchanged) rates.

August – September, 2003 – Verizon and IPANY both file appeals to the Appellate Division of State Supreme Court.

March 25, 2004 – Appellate Division issues Order reversing Supreme Court, holding:

1. PSC had no duty to follow and apply either the First Wisconsin Order or the Second Wisconsin Order, because they only applied to the four largest LECs in Wisconsin.
2. The FCC's Refund Order did not apply to Verizon because it had not filed corrective tariffs between April 15 and May 19, 1997, and did not require Verizon to pay refunds even if its payphone rates were never in compliance with the NST.

July 2, 2004 – IPANY files Petition for Leave to Appeal to New York Court of Appeals or, in the Alternative, for a Stay of Further Proceedings Pending a Ruling From the FCC After Referral.

September 21, 2004 – New York Court of Appeals denies IPANY Motion without comment.

December 29, 2004 – IPANY files Petition for Order of Pre-Emption and Declaratory Ruling at FCC in CC Docket 96-128.

June 30, 2006 – After reviewing Verizon cost studies submitted in June, 2003, PSC issues Order in Second IPP Complaint Resolving Complaints and Inviting Comments Regarding Public Access Line Rates, which applies PSC's interpretation of NST rules,

and directs Verizon to file significantly lower payphone line and usage rates. Order also seeks comments on how original rates from 1997 should be treated i.e., should there be a proceeding to determine whether those original rates complied with the NST. (Although the new rates approved in 2006 as NST compliant were significantly lower than the original rates which remained unchanged until 2006, the PSC had not conducted the remand required by the Supreme Court to determine if the original rates met the NST criteria).

May 24, 2007 – PSC issues Order Denying Rehearing and Addressing Comments in Second IPP Complaint, which generally upholds its earlier rate determination (requiring significantly lower IPP line and usage rates) but also refuses to conduct the Court-order remand to review the 1997 rates until the FCC determines whether refunds are required under the FCC's Orders.

Prepared By:

Keith J. Roland
Herzog Law Firm P.C.
7 Southwoods Boulevard
Albany, New York 12211

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