

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
Implementation of the Pay Telephone) CC Docket No. 96-128
Reclassification and Compensation Provisions)
Of the Telecommunications Act of 1996)

**ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION REPLY TO AT&T
AND VERIZON PREEMPTION COMMENTS OF MARCH 23, 2009**

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December 31, 2009

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The Illinois Public Telecommunication Association (“Illinois Association”) hereby replies (“Petitioner’s Reply”) to the March 23, 2009 filing by AT&T Corp. and Verizon (“BOCs”) entitled “No Federal Rule Preempts State Procedural Rules Governing the Availability of Refunds for State Payphone Line Rates” (“BOCs Preemption Comments”). The most prominent aspect of the BOCs Preemption Comments is the complete absence of any mention of, much less response to or rebuttal of the numerous, specific rulings of the Federal Communications Commission (“Commission”) that the Illinois Public Telecommunications Association Petition for a Declaratory Ruling (“Petition”) requests the Commission to enforce, i.e. the dual and separate federal mandates adopted by the Commission through its implementation of Section 276 of the Telecommunications Act of 1996 (“Act”) (1) that the basic payphone services provided by the BOCs to other payphone providers must have cost based rates that comply with the *Computer III* new services test *in effect no later than April 15, 1997* (“cost-based rate requirement”), and (2) that *actual* compliance with the cost-based rate requirement in a state is a precondition for a BOC to be eligible to receive compensation for access code and subscriber 800 calls (“dial around compensation”) made on the BOC payphones in

that state (collectively “Dual Federal Mandates”). Furthermore, although the BOCs Preemption Comments purport to address the procedural implementation of the cost-based rate requirement¹, the BOCs further fail to even mention, much less respond to, the procedural structure implementing the Dual Federal Mandates as established by the Commission. Instead of addressing the actual rulings of the Commission that the Petition requests be enforced, the BOCs invent rulings (without citation) to argue that such imagined “rulings” support their position. In addition to the Commission’s own initial orders, which the Commission has repeatedly *emphasized in later rulings*, and to the well established BOC violations of those orders, the vacuous BOCs Preemption Comments demonstrate the absence of any valid legal support for the BOCs’ self-serving position that they cannot be required to follow federal statutory and administrative requirements, despite being repeatedly so ordered by the Commission. In truth, neither federal law nor policy supports such position.

The essence of the BOCs’ argument is that, where the Commission did not specifically reference in advance that refunds would be required for violations of the Dual Federal Mandates, no refunds can be required nor enforcement implemented for the BOC violations. To make this argument, the BOCs wholly avoid the facts that the Commission did mandate, in advance, (1) that cost-based rates must be in effect no later than April 15, 1997², (2) that the BOCs were not eligible to receive dial around

¹ The BOCs Preemption Comments provide no reference whatsoever, much less defense, to the BOCs’ collection and retention of hundreds of millions of dollars of dial around compensation before they were eligible under the Commission’s orders to do so, or to the Commission’s rulings that both the Commission and the states would ensure enforcement of the quid pro quo for and condition precedent to such dial around compensation collection by the BOCs. See Petitioner’s Reply, Section II.

² *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 F.C.C.R. 20541, ¶¶146-147 (1996) (“*First Payphone Order*”), and Order on Reconsideration, 11 F.C.C.R. 21233 (1996), ¶163 (“*Payphone Reconsideration Order*”) *aff’d in part and remanded in part on other grounds sub nom. Illinois*

compensation on their own payphones until they were in actual compliance with the cost-based rate requirement³, (3) that, although the implementing tariffs would be filed with the state regulatory bodies, the states are obligated to enforce the Dual Federal Mandates as ordered by the Commission⁴, (4) that the Commission retained jurisdiction to ensure that the Dual Federal Mandates are met⁵, and (5) that any state regulation inconsistent with the full and timely implementation of the cost-based rate requirement is expressly preempted⁶. Neither the BOCs Preemption Comments nor any other self-serving BOC presentation can deny these expressed orders of the Commission or explain how the orders can be complied with absent the refunding of the basic payphone line charges that exceeded the cost-based rate requirement on and after April 15, 1997.

If refunds are the only available means to accomplish the requirements of Section 276 as implemented by this Commission, then refunds are effectively mandated by federal law. But the BOCs Preemption Comments never address *any form of compliance*

Pubic Telecommunications Assn. v. FCC, 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n. v. FCC*, 523 U.S. 1046 (1998); Bureau Waiver Order, DA 97-678, 12 F.C.C.R. 20997, ¶¶ 2, 30, 35 (Com. Car. Bur. released April 4, 1997) (“*Bureau Waiver Order*”); Bureau Clarification Order, DA 97-805, 12 F.C.C.R. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) (“*Bureau Clarification Order*”).

³ *Payphone Reconsideration Order*, ¶¶130-131; *Bureau Waiver Order*, ¶¶ 2, 30-33, 35; *Bureau Clarification Order*, ¶ 10; *In the Matter of Bell Atlantic-Delaware v. Frontier Communications Services*, Bureau Order, DA 99-1971, ¶28 (Com. Car. Bur. released September 24, 1999), 1999 WL 754402 (F.C.C.), 17 Communications Reg. (P&F) 955 (“*Bell Atlantic-Delaware*”); *In the Matter of Ameritech Illinois v. MCI Telecommunications Corporation*, Bureau Order, DA 99-2449, ¶27 (Com. Car. Bur. released November 8, 1999), 1999 WL 1005080 (“*Ameritech Illinois*”).

⁴ *Payphone Reconsideration Order*, ¶163; *Bell Atlantic-Delaware*, ¶28; *Ameritech Illinois*, ¶27.

⁵ *Bureau Clarification Order*, n.60; *In the Matter of Wisconsin Public Service Commission*, Bureau Order, DA 00-347, ¶2 (Com. Car. Bur. released March 2, 2000), 15 F.C.C.R. 9978 (“*Bureau Wisconsin Order*”) *aff'd* Memorandum Opinion and Order, FCC 02-25, released January 31, 2002, 17 F.C.C.R. 2051 (“*Commission Wisconsin Order*”), *aff'd sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003) (in the *Commission Wisconsin Order* the Commission “establishes a rule that affects payphone lines in every state”, 334 F.3d at 75), *rehearing and rehearing en banc den.*(Sep. 22, 2003), *cert. den. sub nom. North Carolina Payphone Association v. FCC*, 541 U.S. 1009 (2004) ; *In the Matter of the North Carolina Payphone Association Petition for Declaratory Ruling, Oklahoma Local Exchange Carrier Petition for Declaratory Ruling, Michigan Payphone Association Petition for Declaratory Ruling*, Bureau Order, DA 02-513 (Com. Car. Bur. Released March 5, 2002), 17 F.C.C.R. 4275 (“*North Carolina and Michigan Payphone Associations Petitions for Declaratory Rulings*”).

⁶ *First Payphone Order*, ¶147.

with these federal requirements, instead devoting their entire contents to various theories of how actual compliance with the federal statute and with the Commission orders *may be avoided*. But, neither the BOCs' misstated facts nor miscited authorities support their arguments. Instead, the BOCs Preemption Comments are a tome of avoidance of and distraction to the fundamental implementation and enforcement of the Dual Federal Mandates that the Petition asks the Commission to address.

The BOCs Preemption Comments seek to obfuscate these clearly articulated federal requirements. Therefore, the Petitioners will first address the details of the Dual Federal Mandates as established by the Commission (Sections I and II), then address the procedural structure related to implementation of the Dual Federal Mandates as established by the Commission (Section III), and, finally, respond to the misdirected and ill-founded arguments of the BOCs that seek to avoid adherence to the Dual Federal Mandates (Section IV). The bottom line of this analysis is that Section 276 and the Commission's implementing orders require that actual cost-based rates for basic payphone line services be in effect no later than April 15, 1997, and additionally require that the BOCs were not eligible to receive dial around compensation on their pay telephones until such actual compliance with the cost-based rate requirement was effectuated. Numerous Commission orders, none of which are addressed in the BOCs Preemption Comments, assured the independent payphone providers that these Dual Federal Mandates would be enforced, which commitment is the essence of what the pending Petition seeks to have the Commission implement.

I. The BOCs Violated the Federal Mandate that Cost-Based Rates Be in Effect No Later Than April 15, 1997.

Nowhere in the BOCs Preemption Comments is there any recognition of the federal requirement that their cost-based payphone line rates must be effective no later than April 15, 1997. The reason is obvious: the BOCs have no response or defense to their blatant violation of this Commission requirement. Yet, this is one of the two federal requirements ordered by the Commission and presented in the pending Petition. This requirement was established at the very outset of Commission's implementation of Section 276.

Because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for the services, we conclude that the New Services Test is necessary to ensure that central office coin services are priced reasonably.

First Payphone Order, ¶146.

The Commission determined that the requirements of Section 276 necessitated *Computer III* pricing for basic payphone line and ancillary services provided by the BOCs to other payphone providers. Moreover, from the outset, the Commission preempted any and all state regulations inconsistent with this federal cost-based rate requirement.

Pursuant to Section 276(c), any inconsistent state requirements with regard to this matter (cost-based pricing) are preempted.

First Payphone Order, ¶147.

In its *Payphone Reconsideration Order*, the Commission found that the implementing tariffs would be filed at the state level. But, in doing so, the Commission also expressly held that the states are mandated to apply the federal requirement that the resulting rates must be cost-based and effective no later than April 15, 1997.

LECs⁷ must file intrastate tariffs...for these LEC payphone services (which) must be: (1) cost based ... *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 LECs in accordance with the requirements of Section 276. As required in the Report and Order, and affirmed herein, all required tariffs, both intrastate and interstate, must be filed no later than January 15, 1997 and *must be effective no later than April 15, 1997*.

Payphone Reconsideration Order, ¶163. (Emphasis added.)

The BOCs Preemption Comments argue that the Commission should not preempt those states that did not require actual cost-based pricing effective April 15, 1997.

However, the BOCs wholly omit the fact that the Commission has already preempted the states on this issue, as referenced above. The BOCs' expound on arguments about whether the Commission should preempt the states, only because the BOCs omit any reference to the fact that the Commission preempted the states on this point from the very outset. Any state requirement which enables or authorizes a BOC to charge a payphone provider a rate which is not cost-based on or after April 15, 1997 is, and always has been, preempted under both Section 276(c) and the Commission's implementing orders. *First Payphone Order*, ¶147.

Twice more, in advance of April 15, 1997, the BOCs raised the question of the cost-based rate deadline and both times the Commission⁸ emphasized that the intrastate tariffs must comply with the federal mandate for cost-based rates to be in place and effective no later than April 15, 1997. First in the *Bureau Waiver Order*:

⁷ The Commission originally held that all LECs must comply with these federal requirements, but later modified the order to apply the federal requirements only to the BOCs pursuant to Section 276. *Commission Wisconsin Order*, ¶42.

⁸ Some of these Commission orders were issued by the Common Carrier Bureau, as noted herein, pursuant to the Commission's valid delegation of authority. See *Bureau Waiver Order*, n.8. (The Bureau speaking on behalf of the Commission also is generally referred to as the Commission.)

We emphasize that LECs must comply with all the enumerated requirements established in the Payphone Reclassification Proceeding⁹ . . . These requirements are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, and nondiscriminatory . . . LEC intrastate tariffs must comply with these requirements by April 15, 1997 . . .

Bureau Waiver Order, ¶30.

Then again in the *Bureau Clarification Order*:

The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines... (and) that LEC intrastate tariffs must comply with these requirements by April 15, 1997 . . .

Bureau Clarification Order ¶ 10.

No less than four times the Commission ruled that federal law mandated that the intrastate tariffs be cost-based, and no less than three times did the Commission emphasize that those rates had to be effective no later than April 15, 1997.

Any and all state requirements inconsistent with implementing these federal mandates are preempted, both by the express statement of Congress and by the holdings of the Commission. 47 U.S.C. §276(c); *First Payphone Order*, ¶147. Notably, not a single one of these rulings, or citation to Section 276(c) of the statute, can be found in the BOCs Preemption Comments, for the obvious reason that the BOCs have no defense to their violation of the requirements imposed thereby. In contrast, the Petition now before the Commission rests squarely upon the preemption plainly set forth in the enabling statute and in the conforming orders issued by the Commission. What the Petition presents to the Commission are the violations of its orders, the statute, and the Dual Federal Mandates, to which violations the BOCs have no defense. The Commission should not allow itself to be misdirected by the BOCs Preemption Comments but,

⁹ The Payphone Reclassification Proceeding refers to the *First Payphone Order* and the *Payphone Reconsideration Order* combined. *Bureau Waiver Order*, n.2.

instead, resolutely embrace and enforce these federal requirements, which in its own orders the Commission has repeatedly emphasized.

II. The BOCs Violated the Federal Mandate Requiring Actual Compliance with the Cost-Based Rate Requirement as a Condition Precedent to Receipt of Dial Around Compensation on the BOC Payphones.

In addition to the requirement for cost-based payphone line rates and ancillary services, such as usage, the Commission imposed a second requirement that the BOCs would not be eligible to receive dial around compensation on their own payphones until the BOCs were in actual compliance with the cost-based rate requirements in respect to the line and ancillary charges imposed upon their payphone service competitors. This second federal mandate was required for the express purpose of enforcing compliance with the cost-based rate requirement. Recognizing that the BOCs had every incentive to charge their payphone service competitors unreasonably high prices for essential payphone line and ancillary network services, *First Payphone Order*, ¶146, the Commission ruled that the BOCs must have cost-based rates in effect no later than April 15, 1997, as a precondition to eligibility for the BOCs to receive dial around compensation on their own payphones.

The RBOCs, BellSouth, and Ameritech request that ... (they) be eligible to receive payphone compensation, by April 15, 1997, as opposed to on that date. We clarify that the LECs may complete all the steps necessary to receive compensation by April 15, 1997... We must be cautious, however, to ensure that LECs comply with the requirements we set forth in the Report and Order. Accordingly, we conclude that LECs will be eligible for (dial around) compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276. LECs may file and obtain approval of these requirements earlier than the dates included in the Report and Order, as revised herein, *but no later than those required dates*. To receive compensation a LEC must be able to certify the following: . . . (5) it has in effect intrastate tariffs for basic payphone services (for “dumb” and “smart” payphones) . . .

Payphone Reconsideration Order, ¶¶130-131. (Emphasis added.)

Not only have the BOCs violated this federal mandate that cost-based rates must be effective no later than April 15, 1997, but the BOCs began collecting and have retained dial around compensation on their own payphones on and after April 15, 1997, when they were not eligible to receive such dial around compensation under the quid pro quo established by the Commission's rulings.

Evidence of this second violation of the Dual Federal Mandates is found throughout the Petition. However, nowhere in the BOCs Preemption Comments is there any reference to the relevant Commission rulings on this point, nor is there any defense of the BOCs' violations. Not only have the BOCs failed to deny this threshold dial around eligibility requirement, they themselves focused on such requirement during the course of the underlying proceedings by repeatedly bringing it back before the Commission for clarification. In each of the resulting rulings, the Commission emphasized that the BOCs must be in compliance with the cost-based rate requirement before being eligible to receive dial around compensation on their own payphones.

We emphasize that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived herein, before the LECs' payphone operations are eligible to receive the payphone compensation provided in that proceeding. Both independent PSPs and IXC claim that some LECs have not filed state tariffs that comply with the requirements set forth in the Order on Reconsideration. These requirements are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, and nondiscriminatory . . . LEC intrastate tariffs must comply with these requirements by April 15, 1997 in order for the payphone operations of the LECs to be eligible to receive payphone compensation.

Bureau Waiver Order, ¶30.

Following this ruling, the BOCs once more asked the Commission to rule on the precondition for eligibility to receive dial around compensation. Again, the Commission emphasized that the BOCs must be in compliance with the cost-based rate requirement as a precondition for compensation eligibility.

In the recent Bureau Waiver Order, we emphasized that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for the intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines . . . We stated in the Bureau Waiver Order that LEC intrastate tariffs must comply with these requirements by April 15, 1997 in order for the payphone operations of the LECs to be eligible to receive payphone compensation.

Bureau Clarification Order, ¶10.

The BOCs Preemption Comments, like all of the other BOC filings in the Petition proceedings, take the position *sub silentio* that all the BOCs needed to do to meet the federal precondition for dial around compensation eligibility was to file a tariff, any tariff, regardless of whether the rates contained in the tariff were actually cost-based, and to self-certify that the BOC had satisfied the cost-based rate requirement. However, nothing could be further from the truth. In point of fact, the Commission has already repeatedly rejected this BOCs' position, ruling that the BOCs' false self-certification of compliance does not satisfy the precondition for dial around compensation eligibility. In its own words, the Commission again emphasized that only actual compliance with the cost-based rate requirement would make the BOCs eligible for compensation. Furthermore, the Commission expressly stated that the requirement for dial around compensation eligibility was to be enforced by both the Commission and the state commissions.

We emphasize that 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. The Commission consistently has stated that LECs must satisfy the requirements set forth in the Payphone Orders, subject to waivers subsequently granted, to be eligible to receive compensation. Determination of the sufficiency of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction.

Ameritech Illinois, ¶27; *In accord Bell Atlantic-Delaware*, ¶28 (“We emphasize that 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.”)

The Commission has ruled repeatedly, emphasizing the federal requirement that actual compliance with the cost-based rate mandate is a precondition for a BOC to be eligible to receive dial around compensation. The perfunctory filing of a tariff or self-certification of compliance, without actual compliance, does not meet this precondition.

Ameritech Illinois; Bell Atlantic-Delaware.

It was expressly to implement compliance with the cost-based rate requirement that the Commission made such compliance a precondition for BOC eligibility to receive dial around compensation on its own payphones. As noted in the Petition, not only did the BOCs (1) fail to comply with the requirement that cost-based rates must be effective no later than April 15, 1997, but they also (2) violated the additional federal requirement that actual compliance with the cost-based rate requirement was a precondition for eligibility to receive dial around compensation. None of the applicable orders, rulings, or federal requirements on this point are even recognized, much less rebutted, in the BOCs Preemption Comments, because the BOCs have no valid or effective defense to these blatant violations.

This federal requirement for timely implemented cost-based payphone line rates as a condition precedent to the BOCs' collecting dial around compensation on their own

payphones is a mandate that the Commission looked to the states to enforce in the first instance through the intrastate tariffs. Although the Commission may have initially relied upon the states to implement this federal requirement, the Commission expressly retained jurisdiction over these matters to ensure that implementation of federal law and policy would be met.¹⁰ If the quid pro quo established by this Commission was not actually implemented at the state level, then it is up to this Commission to now enforce its orders and the underlying federal policy emanating from Section 276 of the Act.

III. The Commission's Procedural Scheme Expressly Retained Commission Jurisdiction to Ensure State Implementation of the Dual Federal Mandates.

Contrary to the BOCs Preemption Comments, claiming that the vagaries of various inconsistent state procedures and remedies would be determinative of the federal rights and obligations to be enforced under Section 276, the Commission expressly mandated that the state actions taken pursuant to delegated authority must meet the federal requirements for (1) cost-based rates, effective no later than April 15, 1997 and (2) compliance with the cost-based rate requirement as a precondition for the BOCs' eligibility to receive dial around compensation on their payphones. Although the BOCs Preemption Comments repeatedly assume and argue that the Commission intended that the various inconsistent state procedures and remedies would be determinative of the underlying federal rights and obligations, the BOCs provide no citations for any such ruling, because no such ruling exists. See BOCs Preemption Comments, p. 24. To ensure that the states properly implemented the federal framework and requirements, the Commission expressly retained jurisdiction over the implementation of the Section 276

¹⁰ See Petitioner's Reply, Section III.

mandates. See e.g. *Bureau Clarification Order*, n.60. The Commission did in fact set up a procedural scheme for implementation of the Section 276 mandates. However, the BOCs simply omit the Commission's rulings and invent a contrary position. Such BOC arguments are unsupported and unsustainable.

As a starting point, in the *Payphone Reconsideration Order* the Commission determined that the BOCs should file intrastate tariffs for the local exchange services provided to the payphone providers. At the same time, however, the Commission established the attendant obligations of the states in implementing the federal scheme.

LECs must file intrastate tariffs . . . for these LEC payphone services (which) must be: (1) cost based . . . *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 LECs in accordance with the requirements of Section 276. As required in the Report and Order, and affirmed herein, *all required tariffs*, both intrastate and interstate, must be filed no later than January 15, 1997 and *must effective no later than April 15, 1997*.

Payphone Reconsideration Order, ¶163. (Emphasis added).

In deciding that the tariffs should be filed at the state level, the Commission simultaneously established the mandate that the states must apply the cost-based rate requirement effective no later than April 15, 1997. The Commission has consistently and repeatedly emphasized this federal mandate. *Bureau Waiver Order*, ¶30 & n.75 (“The Commission provided guidelines pursuant to which the states are to review state tariffs subject to the Payphone Reclassification Proceeding. [*Payphone Reconsideration Order*] at para. 163.”); *Bureau Clarification Order*, ¶10. Furthermore, the Commission ruled that the states must facilitate the Commission's enforcement of the second federal mandate that actual compliance with the cost-based rate requirement is a precondition to the BOCs' eligibility to receive dial around compensation. *Ameritech Illinois*, ¶27

(“Determination of the sufficiency of the LEC’s compliance, however, is a function solely *within the Commission’s and state’s jurisdiction.*” [Emphasis added.]); *in accord Bell Atlantic-Delaware*, ¶28.

The Commission repeatedly noted its continuing jurisdiction and intended oversight to ensure that the states properly implement the Section 276 requirements as ordered by the Commission.

The states must act on the tariffs filed pursuant to this Order within a reasonable period of time. The Commission retains jurisdiction under Section 276 to ensure that all requirements of that statutory provision and the Payphone Reclassification Proceeding, including the intrastate tariffing of payphone services, have been met, 47 U.S.C. §276.

Bureau Clarification Order, n.60.

Again, in the *Wisconsin* proceedings, the Commission reiterated its finding that it retains jurisdiction to ensure compliance with the federal mandates of Section 276.

The Common Carrier Bureau (Bureau) has emphasized that the Commission retains jurisdiction under section 276 to ensure that all requirements of section 276 and the Payphone Reclassification Proceeding are met.

Bureau Wisconsin Order, ¶2.

In affirming the *Bureau Wisconsin Order*, the Commission found that the statute requires the Commission to direct the states in applying the cost-based new services test and specifically noted that the Commission was issuing directives to all of the states to ensure compliance with the *Payphone Orders* and Congress’ directives in Section 276.

Commission Wisconsin Order, ¶¶2, 39, 68; *in accord New England Public*

Communications Council, Inc., 334 F.3d at 75 (“the order on review is more than just ‘an adjudicatory-type proceeding . . . pertaining to rates in Wisconsin.’ Respondents’ Br. at 18. Instead, it establishes a rule that affects payphone line rates in every state. Indeed,

the Commission itself acknowledged as much . . .”). Reviewing the *Payphone Reconsideration Order*, the Commission further reiterated that, although it directed the implementing tariffs to be filed at the state level, it would require the states to ensure compliance with the federal mandates as implemented by the Commission.

We stated that LECs should file tariffs for basic payphone lines at the state level only . . . We confirmed that, even if LEC payphone tariffs were filed at the state level, they should nevertheless comply with section 276 *as implemented by the Commission* and, as such, should be cost-based, nondiscriminatory, and consistent with both section 276 and our *Computer III* tariffing guidelines (citing the *Payphone Reconsideration Order*, ¶163, requiring cost-based rates to be effective no later than April 15, 1997). Thus, rates assessed by LECs for payphone services tariffed at the state level should satisfy the new services test.

In the interest of federal-state comity, we stated that we would rely *initially* on state commissions to ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276.

Commission Wisconsin Order, ¶¶14-15. (Emphasis added.)

In the *Commission Wisconsin Order*, the Commission reaffirmed its position that it retained jurisdiction over the state proceedings to ensure implementation of the federal mandates. It found that Section 276 established a comprehensive intrastate and interstate federal scheme for payphone regulations to be administered by the Commission that expressly preempted any inconsistent state requirement.

Section 276 establishes a comprehensive federal scheme of payphone regulation, both intra- and interstate, to be administered by the Commission . . . That focus on intrastate regulation alone indicates Congress’ intent that the Commission occupy the field. This is not surprising. An overarching federal program is necessary to achieve Congress’ goal of eliminating subsidies in order to “promote competition among payphone service providers and promote the widespread deployment of payphone services.” The importance of federal control is driven home by section 276(c), which expressly preempts “any State requirements . . . inconsistent with the Commission’s regulations” implementing the statute . . .

The preemption provision of section 276(c) comes strongly into play here. That provision preempts “*any* State requirement” that is “inconsistent with the

Commission’s regulations” implemented pursuant to section 276(b)(1). Nonstructural safeguards implemented under subsection C would, of course, be implemented pursuant to Section 276(b)(1) and would fall within the scope of the preemption provision. Thus, a federal policy that payphone line rates be cost-based would be binding on the states . . .

. . . Congress’ directive in section 276(b)(1)(C) to implement, “at a minimum,” *Computer III* safeguards requires that we direct the states to apply the cost-based new services test to the payphone line rate.

Commission Wisconsin Order, ¶¶ 35, 38-39. (Emphasis in original.)

In reaching these conclusions, the Commission rejected both the LECs’ challenge to the underlying jurisdictional basis for federal review of intrastate line rates and the LECs’ claim that the Commission could not dictate the content of state law. *Commission Wisconsin Order*, n.70 and n.73. Noting that Section 276 simply sets a federal standard, the Commission observed that the “Supreme Court has repeatedly validated ‘Congress’ power to offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation.’ *New York v. United States*, 505 U.S. 144, 167 (1992)”. *Id.*, at n.73. Accordingly, the Commission found that it had continuing jurisdiction over the intrastate payphone line rates of the BOCs under Section 276. *Id.*, ¶31. The federal court agreed. *New England Public Communications Council, Inc.*, 334 F.3d at 75.

Pursuant to the *Commission Wisconsin Order*, the Commission exercised its retained jurisdiction and granted petitions for declaratory rulings brought by two state payphone associations that complained that their state commissions’ decisions did not comply with the federal cost-based rate requirement. The Commission agreed, finding that both the North Carolina Utilities Commission and the Michigan Public Service Commission decisions appeared to be inconsistent with the Commission’s orders, and

directed the state commissions to re-evaluate their decisions to ensure compliance with the federal requirements as implemented by the Commission. *North Carolina and Michigan Payphone Associations Petitions for Declaratory Rulings, supra.*

In directing that the tariffs for basic payphone line and ancillary services be filed at the state level, the Commission required the states to enforce the federal requirements as implemented by the Commission. The Commission looked to the parties to initially pursue the Section 276 requirements in the states. However, pursuant to its statutory duty to administer Congress' comprehensive statutory scheme, the Commission expressly retained jurisdiction over the state tariffs to ensure that the federal requirements are met. This continuing jurisdiction has been upheld by the federal court. *New England Public Communications Council, Inc., supra.*

When a state commission has failed to comply with the federal requirements according to the Commission's orders, the Commission has exercised its authority to ensure a uniform and consistent application of federal law and policy, as directed by Congress in Section 276, and as implemented in the Commission's own orders. This is the procedure established by the Commission and followed by the Petitioner. Consistent with this well established framework, the Commission should act here and now to enforce the mandates of Section 276 and the Commission's implementing orders, by granting approval of the long pending Petition. .

IV. Neither Substantive Nor Procedural Issues Prevent the Commission From Enforcing Its Payphone Orders Implementing Congress' Comprehensive Plan to Promote Competition and the Widespread Deployment of Payphones. (Response to BOCs Preemption Comments II. A. – F.)

After avoiding all of the above-cited Commission rulings as presented in the instant Petition, the BOCs Preemption Comments have proffered collateral arguments designed to obstruct implementation of the comprehensive federal scheme required by Section 276 and the Commission's *Payphone Orders*. In addition to their bald omission of the applicable Commission orders implementing Section 276's key mandates, the BOCs' arguments are supported neither by the facts nor the authorities referenced.

The BOCs first seek to distract the Commission by arguing, in effect, that the absence of an express reference in the Payphone Orders speculating as to what the Commission would do in response to violations of the Section 276 requirements now, *sub silentio*, immunizes the BOCs from enforcement of the Commission's Orders, precluding the ordering of such refunds, and entitling the BOCs to retain both the resulting excessive revenues and the illegally collected payphone compensation, despite the BOCs' noncompliance. This false hypothesis rests upon the equally spurious foundation of the BOCs' conveniently omitting the explicit Commission findings that Section 276 requires: (1) cost-based rates to be in effect no later than April 15, 1997; and (2) BOC eligibility for dial around compensation to be preconditioned upon actual compliance with the cost-based rate requirement.¹¹ In reality, there was no need for the Commission to expressly announce the possibility of refunds for potential BOC violations, because the Commission's general enabling statute provides that the Commission is authorized to take *all such actions and to issue such orders as may be necessary to perform its*

¹¹ See Petitioner's Reply, Sections I and II.

functions. 47 U.S.C. §154(i). Moreover, with respect to the specific subject matter here at issue, Section 276 expressly authorizes the Commission to take all actions necessary to implement the *Computer III* safeguards. 47 U.S.C. §276(b)(1). This statutory language has been found to authorize the Commission's ordering of refunds. *See MCI Telecommunications Corporation v. FCC*, 143 F.3d 606, 609 (D. C. Cir. 1998).

Similarly, BOC arguments that preempting the states for failing to enforce the Dual Federal Mandates would amount to retroactive ratemaking rest once again upon the BOCs' complete omission (1) of the numerous Commission orders establishing such mandates – and their prospective effect –and (2) that Congress, in Section 276(c), and the Commission's ruling in the *First Payphone Order*, already have preempted inconsistent state actions in this area.

Moreover, Congress charged the Commission with implementing the requirements of Section 276(b)(1)(A) and (C), to accomplish the goals of promoting competition among payphone providers and the widespread deployment of payphones. The Commission has held that implementation of the Dual Federal Mandates is necessary to accomplish these vital Congressional goals. Although the BOCs Preemption Comments attempt to argue that state decisions preclude the Commission from meeting its duties under the Act, the federal courts have found that the Supremacy Clause trumps such arguments where, as here, they would serve to frustrate the federal agency's discharge of its statutory duties and lead to inconsistent enforcement of federally mandated requirements.¹²

In contrast, the BOCs offer no means of enforcing the Dual Federal Mandates in the face of inconsistent and deficient state actions. They simply argue that the

¹² See Petitioner's Reply, Section IV.D.

Commission turned the matter entirely over to the states and that, where a given state commission violates the federal requirements, the Commission's orders are not subject to ultimate Commission enforcement. However, both the Commission and the federal court have already rejected the BOCs' espoused position. *Commission Wisconsin Order; New England Public Communications Council, Inc.*¹³ The BOCs' arguments simply fly in the face of and are wholly unsupported by both federal law and policy, and as such should be rejected once again by this Commission.

A. The Commission Preempted Any And All State Procedures, Remedies And Regulations Inconsistent With the Implementation of the Dual Federal Mandates And Expressly Retained Jurisdiction to Ensure the States Would Meet the Federal Requirements.

The BOCs Preemption Comments premise their entire position on the assumption that, by directing the filing of state tariffs, the Commission "necessarily mandated that state procedures and remedies would apply to the enforcement of federal rights." BOCs Preemption Comments at 24. As is the case throughout the BOCs Preemption Comments, the BOCs make this statement while (1) failing to cite any authoritative support for their proposition, and (2) avoiding the express rulings of the Commission that have rejected their underlying assumptions. The BOCs offer no citation for the principle that the Commission ordered state procedures and remedies to be finally determinative of the payphone providers' federal rights, in contrast to the federal requirements expressly implemented by the Commission, for no such rulings exist.

To maintain this fiction, the BOCs conveniently omit that, in the very same paragraph where the Commission directed the payphone line tariffs to be filed at the state

¹³ See Petitioner's Reply, Section III.

level, the Commission also ordered that the “(s)tates must apply these requirements and *Computer III* guidelines”, including that cost-based rates in compliance with the new services test must be in place and “must be effective no later than April 15, 1997.” *Payphone Reconsideration Order*, ¶163. *See also Commission Wisconsin Order*, ¶14 (“We confirmed that even if LEC payphone tariffs were filed at the state level, they should nevertheless comply with section 276 as implemented by the Commission...”). The BOCs further omit the fact that the Commission ordered that any state requirement inconsistent with implementing the cost-based rate requirement was expressly preempted *ab initio*. *First Payphone Order*, ¶147; *see also* 47 U.S.C. §276(c). Not only do the BOCs Preemption Comments omit these key aspects of the Commission’s rulings, but the BOCs fail to note that the Commission emphasized time and again that the cost-based rate requirement was expressly required to be effective no later than April 15, 1997. *Payphone Reconsideration Order*, ¶163; *Bureau Waiver Order*, ¶30; *Bureau Clarification Order*, ¶10. By preempting any inconsistent state regulation, the Commission preempted any and all state authorization for tariffs and rates covering basic payphone line and ancillary service that were not cost-based in compliance with the new services test on and after April 15, 1997.

Again, although the Commission expressed the intent to rely *initially* on the states as the repositories for such tariffs, the Commission clearly retained jurisdiction to ensure that the states met all of the federal requirements. *Bureau Clarification Order*, n.60; *Bureau Wisconsin Order*, ¶2; *Commission Wisconsin Order*, ¶¶14-15, 35, 38 - 39, n.70, n.73. Responding to the BOCs’ challenge to the Commission’s retained jurisdiction over the intrastate tariffs, the Commission found that Section 276’s “comprehensive federal

scheme of payphone regulation” indicated “Congress’ intent that the Commission occupy the field”, established “a federal policy that payphone line rates be cost-based would be binding on the states”, and “requires that (the Commission) direct the states to apply the cost-based new services test to the payphone line rate.” *Commission Wisconsin Order*, ¶¶35, 38-39. Contrary to the BOCs’ argument that the Commission “would not displace state regulatory authority unless the state proved to be ‘unable to review these tariffs’” (emphasis in original), BOCs Preemption Comments at 27, the Commission explicitly held that it had broad jurisdiction for continuing federal review of intrastate payphone line rates and that the states had the choice of either regulating that activity according to the federal standards or having state law preempted by federal regulation. *Commission Wisconsin Order*, n.70 and n.73. The federal court agreed. *New England Public Communications Council, Inc.*, 334 F.3d at 75 - 78.

Contrary to the BOCs assertions, it was not only where the state “proved to be ‘unable to review these tariffs’” that the Commission “displaced state authority.” As noted above, Congress’ mandate and the Commission’s implementing orders preempted all state authority inconsistent with the federal cost-based rate requirement from the outset. 47 U.S.C. §276(c); *First Payphone Order*, ¶147. Accordingly, the Commission exercised its continuing jurisdiction not only over states unable to review state tariffs, but over all state actions, including those undertaking review for compliance with the Dual Federal Mandates. In *New England Public Communications Council, Inc.*, the D. C. Circuit found that in the *Commission Wisconsin Order* the Commission recognized that it was establishing a rule to be followed by every state, including those undertaking review of the tariffs. *New England Public Communications Council, Inc.*, 334 F.3d at 75.

Furthermore, the Commission exercised its continuing jurisdiction to review the actions of state commissions that were reviewing state tariffs, where the state decisions were inconsistent with the applicable federal requirements of Section 276 as implemented by the Commission. *North Carolina and Michigan Payphone Associations Petitions for Declaratory Rulings, supra*. In point of fact, the Commission has exercised its retained jurisdiction to direct that the states ensure consistent and uniform application of the federal requirements of Section 276, and there is nothing different in what is being requested of the Commission in the pending Petition.

Again, the BOCs argue that the Commission's orders do not mention refunds or equivalent relief. BOCs Preemption Comments at 24-25. However the Commission did identify the need for refunds in circumstances where the BOC did not have cost-based rates in effect on April 15, 1997, but sought to collect dial around compensation for the BOC payphones. *See Bureau Clarification Order*, ¶25 ("A LEC who seeks to rely on the waiver granted in the instant Order [i.e. collect payphone compensation on its payphones before it has cost-based rates effective] must reimburse its customers or provide credit, from April 15, 1997 in situations where the newly tariffed rates [i.e. compliant cost-based rates], when effective, are lower than the existing [non-cost-based] tariffed rates."

[Explanation added.]

This is the same situation addressed in the instant Petition. See Petitioner's Reply, Section IV.C. Furthermore, the Commission's rulings specifically held that, in exercising their delegated tariffing authority, the states must enforce federal requirements for cost-based rates to be in effect no later than April 15, 1997. As such, BOC claims that the states' "procedures and remedies" would govern the payphone providers' federal

rights, in contrast to the Commission's determination of those federal rights, run directly contrary to the numerous Commission orders explicitly detailing the federal mandates of Section 276.

It was not that the Commission did not anticipate that payphone providers would be entitled to refunds as claimed by the BOCs. BOCs Preemption Comments at 25. Instead, the Commission expected that the BOCs would comply with the cost-based rate requirement to be eligible to receive dial around compensation. *Payphone Reconsideration Order*, ¶¶ 130-131. What the Commission did not anticipate was that the BOCs would violate both the requirement for cost-based rates to be effective no later than April 15, 1997, and the corresponding requirement that the BOCs were not eligible to collect dial around compensation until they were in actual compliance with the cost-based rate requirement. The Commission fully anticipated that it had the authority to, and would, enforce the requirements of Section 276, by refunds or by whatever other means might be necessary. *Ameritech Illinois; Bell Atlantic-Delaware; Commission Wisconsin Order*.

Moreover, the BOCs' claim that any remedy could be prospective only is equally unsupported. They conjecture that since a BOC may rely on an existing state tariff or file a new tariff, that going through the motion of filing a new tariff was all that could be required. BOCs Preemption Comments at 25. However, the Commission did not speculate whether any existing tariffs might be cost-based or whether new tariffs would be required, nor did the Commission limit its ability to remedy the BOCs noncompliance with the Dual Federal Mandates in this regard. The Commission instead directed the BOCs to make their own determination whether their existing rates were in fact new

services test compliant and, if not, to fulfill their obligation to file compliant tariffs. The consequences of failing to comply with that requirement – either by falsely claiming that existing rates were new services test compliant, or refusing to file new services test compliant tariffs – falls squarely on the BOCs. As recognized by the Commission, a BOC’s false self certification of compliance would not relieve it of the obligation to be in actual compliance before being eligible to receive dial around compensation for the BOC payphones. *Ameritech Illinois; Bell Atlantic-Delaware*.

It is well established that should a regulated entity fail to comply with an existing obligation or duty, it may be subject to enforcement of that obligation by the regulatory authority. This is true even if the regulated entity’s violation is due to its own faulty interpretation of compliance with the regulation.

The burden is no different from that of other parties who act in reliance on their own, or their agent’s, i.e., their lawyer’s interpretation of the statute or regulation but later find out (via court or agency decision) that their interpretation was wrong.

Farmers Telephone Company, Inc. v. FCC, 184 F.3d 1241, 1252 (10th Cir. 1999).

This has long been the established rule. Here, the Commission required the BOCs to have, and the state to ensure, that a cost-based tariff was effective no later than April 15, 1997. This federal mandate was violated by the BOCs. When a carrier makes its own determination as to the appropriate rates to comply with the law, and those rates are found to be in violation of that law, the rates are subject to reparations as measured by the excess amounts paid by the subscribers utilizing the services. *Arizona Grocery Co.v. Atchison, T. and S.F.RY.CO.*, 284 U.S. 370, 384-385, 390 (1932). In considering the application of the filed rate doctrine, the Supreme Court noted that when a carrier files tariffed rates that it believes to comply with the requirement that rates be reasonable, and

the Commission does nothing more than accept the filing, should the Commission later after a hearing find those rates to be unreasonable it may award reparations. *Arizona Grocery Co.*, 284 U.S. at 384-385, 390 (1932). The Supreme Court reaffirmed this principle in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 128-129 (1990).¹⁴ Here, the BOC made its own determination of rates to meet the cost-based rate requirement, and those rates have been found after hearing to have been in violation of such requirement from April 15, 1997 through December 12, 2003. Refund of the excessive charges are due.

The BOCs also claim that only in the cases where payphone providers were disappointed with the decisions of the state courts of review did they seek to appeal to this Commission. This is plainly false. After the Illinois Commerce Commission (“Illinois Commission”) determined that Illinois Bell had not complied with the federal cost-based rate requirement, yet had collected dial around compensation prior to its eligibility, and after the Illinois Commission failed to enforce the Dual Federal Mandates regarding these violations since April 15, 1997, the Illinois Association directly brought this matter back to the Commission. Before any briefs were filed in the Illinois Appellate Court, the Illinois Association filed a motion to stay the state appellate court proceedings and to refer the matter to the Commission on the basis of primary jurisdiction. The BOCs opposed the motion, suggesting the Commission may not rule for an extended period of time. When the state court refused the stay or to make a primary jurisdiction referral, the Illinois Association immediately filed the pending Petition for Declaratory Ruling. Again

¹⁴ The BOCs’ claim that the *Bureau Clarification Order*’s conditioning the waiver on the BOCs’ commitment to refund any excess charges suggests that there was no...independent obligation to refund. BOCs’ Preemption Comments at 26. The Commission’s acceptance of the BOC offer not to contest refunds does not constitute a Commission waiver of the Section 276 requirements or of its statutory authority to order refunds. See Section IV.C.

before the Illinois Supreme Court and the U. S. Supreme Court, the Illinois Association sought for the courts to refer the matter to the Commission.

At every court level, the Illinois Association sought for the courts to stay or refer the matter for the Commission's ruling, while simultaneously filing the instant pending Petition under the Commission's retained jurisdiction. It is the BOCs that have continually opposed the Commission's review. The payphone providers did not proceed in their "chosen forum", but as directed by this Commission, initially bringing the matter before the state commission, and then proceeding before this Commission when the Dual Federal Mandates were violated. The Petitioner has been seeking Commission action on this issue for over five years, and the absence of resolution is no fault of its own.

The BOCs disingenuously cite *Global Naps, Inc. v. FCC*, 291 F.3d 832 (D.C. Cir. 2002) for the proposition that once a state commission has acted, the decision is only subject to review by a federal court. BOCs Preemption Comments at 4, 27. *Global Naps* involved an interpretation of Section 252 of the Act, which specifically provides that if a state commission fails to act to carry out its responsibilities under Section 252, then the Commission may enter an order preempting the state. However, where a state commission makes a determination under Section 252, review of that determination shall be exclusively in the federal District Court. 47 U.S.C. §252(e)(5) & (6). In that case, the court upheld the Commission's finding that where the state commission makes a determination, the Commission has no statutory basis for preemption since the statute expressly provides in those circumstances for exclusive, review by the federal court. *Global Naps*, 291 F.3d at 836 – 837.

In stark contrast to the provisions found in Section 252 delineating responsibilities between the Commission, the state commission, and the federal courts, Section 276 provides for an expressed and unqualified preemption of inconsistent state action and places the responsibilities for enforcement of Section 276 directly upon the Commission. The Commission's statutory authority to preempt under Section 276 is not based solely on the state's failure to make a determination, as in Section 252, but simply upon the occurrence of state action or inaction that is inconsistent with the mandates of Section 276. 47 U.S.C. §276(c). This state inconsistency has been undeniably established in the pending Petition, thus triggering the Commission's preemption authority. As such, *Global Naps* is completely inapposite to the Commission's authority and responsibilities under Section 276. The inconsistent state action found in the present case is preempted by both the statute and the Commission's orders.

B. The Act Authorizes the Commission to Order Refunds to Enforce Section 276 and the Commission's Orders.

By omitting reference to any of the numerous Commission orders sought to be enforced, the BOCs seek to claim that no prior Commission order supports the issuance of refunds. From this false premise, the BOCs conclude that the Commission has no authority to award refunds. BOCs Preemption Comments at 27 - 28. They are simply wrong.

1. The Payphone Providers' Complaints to Enforce the Dual Federal Mandates Remain Fully Subject to the Commission's Jurisdiction.

The BOCs' argument on this point is premised upon the omissions of: (1) the Commission's mandates (a) that cost-based rates must be effective no later than April 15,

1997 and (b) that a BOC is expressly not eligible for receipt of dial around compensation on its own payphones until it is in actual compliance with the cost-based rate requirement; (2) the Commission's ruling that the states *must* implement the Dual Federal Mandates as implemented by the Commission; (3) the Commission's established procedure where enforcement of the Dual Federal Mandates would *initially* be sought before the state commission, subject to the Commission's expressly retained jurisdiction to ensure that the mandates are in fact met; (4) the Commission's preemption of any and all state requirements that are inconsistent with the implementation of the Dual Federal Mandates; and (5) the Commission's continuing jurisdiction over its established procedure to direct state compliance with the uniform application of the federal mandates. Having avoided reference to each and every one of these Commission rulings, the BOCs falsely assume that the Commission left implementation of Section 276 to the vagaries of a variety of different state procedures and remedies, even if these are inconsistent with one another and with the Commission's own underlying rulings. According to the BOCs, these undeniably inconsistent state procedures and results were intended to be determinative of the federal rights and obligations set forth under Section 276, notwithstanding the mandates of the Commission's orders and the Commission's finding of "a comprehensive federal scheme" and an "overarching federal program" that requires preemption of any inconsistent state requirement. *Commission Wisconsin Order*, ¶¶ 35, 38-39.

The BOCs further claim that the Petitioner did not challenge the procedures adopted by the Commission, so they cannot do so now. BOCs Preemption Comments at 28. But, it is the Petitioner which has followed the Commission's procedures of initially

seeking enforcement of the Section 276 obligations in the states, and now seeks review subject to the Commission's retained jurisdiction. By contrast, it was the BOCs that challenged the Commission's retained jurisdiction over the state tariffs, a BOC challenge that was rejected both by the Commission and the federal court. *Commission Wisconsin Order*, ¶¶ 35, 35, 37; *New England Public Communications Council, Inc.*, 334 F.3d at 75 – 78. It is the BOCs that can no longer challenge either the Commission's rulings as to the Dual Federal Mandates of Section 276 or the procedures for enforcement. Consistent with the notion of retained jurisdiction, Commission precedent confirms the payphone providers' parallel actions of preserving the specified state processes while also engaging the Commission's jurisdiction through declaratory rulings to ensure that the Dual Federal Mandates as implemented by the Commission's orders are in fact met.

As required by law, the Commission must continue to exercise this ongoing jurisdictional oversight. Previously, the Commission has exercised this oversight with respect to the delegated state proceedings not only in the *Commission Wisconsin Order*, but also in granting similar petitions for declaratory rulings brought by the North Carolina Payphone Association and by the Michigan Payphone Association. These petitions for declaratory rulings similarly asked the Commission to address decisions made by their respective state commissions that were inconsistent with the federal requirements. *North Carolina and Michigan Payphone Associations Petitions for Declaratory Rulings, supra*. The instant Petition invokes the Commission's same continuing jurisdiction.

Having avoided virtually every relevant Commission substantive and procedural ruling regarding the Dual Federal Mandates of Section 276, the BOCs attempt to invent a

contradictory process. They argue that PSPs should have filed complaints both at the state commission and before this Commission. BOCs Preemption Comments at 28-29. This both ignores the fact that the payphone providers have been engaged in parallel proceedings, and contradicts the procedural framework to initiate the proceedings at the state level subject to the Commission's retained jurisdiction and oversight, a procedure both established and followed by the Commission for implementing Section 276.

The Illinois Association filed its complaint¹⁵ with the Illinois Commission on May 8, 1997, within three weeks of the April 15, 1997 deadline, and has pursued it continuously since that date. After the Illinois Commission's determination that Illinois Bell had violated the federal requirement to have cost-based rates effective April 15, 1997, and the record further establishing that Illinois Bell had violated the second federal mandate by collecting dial around compensation prior to being eligible, the Illinois Association filed both a state appeal of the order and filed this Petition before the Commission for a ruling requiring enforcement of the Dual Federal Mandates. In light of the Illinois Association's repeated efforts to have the state courts stay or defer the issue until the Commission ruled, and of Illinois Bell's continuous opposition to stay any state proceeding to allow the Commission to act, the BOCs' current critique about pursuing parallel proceedings is vacuous.¹⁶

¹⁵ The Illinois Public Utilities Act recognizes that a complaint is made with the Commission by the filing of a complaint or petition. 220 ILCS 5/10-108 (Section 10-108. "Complaints; Notice; Parties. Complaint may be made... by any person or corporation... by petition or complaint...")

¹⁶ BOCs citation of *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1242-45 (10th Cir. 2007) for the proposition that only a complaint before the Commission could bar federal court relief is again inapposite. BOC Preemption Comments at 29. The issue is not whether federal courts are barred in this matter. The Act and the doctrine of primary jurisdiction contemplate that a party would bring an action either before the federal court or the Commission, but not both. The petitioners brought the issue of enforcing the Commission's orders back to the Commission pursuant to the procedure established and followed by the Commission under Section 276.

The BOCs citation to *Communications Vending Corp. v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004), is also inapposite. BOCs Preemption Comments at 29. *Communications Vending Corp.* involved a proceeding where jurisdiction rested solely with the Commission. The only matter pending before the Commission for the payphone providers in question there was a petition for declaratory ruling that neither sought damages nor refunds. The court ruled that, in those circumstances, those payphone providers did not act diligently to preserve their claims for damages or refunds, particularly in light of the fact that other payphone providers had filed complaints for refunds. *Ibid*, 365 F.3d at 1074 – 1076.

By contrast, under the provisions of Section 276 and the Commission's implementing orders at issue here, two forums are necessarily involved. Both the state commission and this Commission exercised jurisdiction with respect to the relevant Section 276 requirements as implicated by the state filed tariffs. The Commission directed that the proceedings should initially be brought before the state commissions. Pursuant to this directive, the Illinois Association timely filed its petition before the Illinois Commission complaining that Illinois Bell was not in compliance with the Section 276 requirements. When the Illinois Commission found Illinois Bell to be in violation of the Section 276 requirements, but failed to enforce the Dual Federal Mandates as implemented by the Commission, the Illinois Association filed its Petition with the Commission. In both the 1997 Illinois petition and the 2004 Petition filed with the Commission, the Illinois Association has always sought the refunds required for violating the federal cost-based rate requirement. In contrast to *Communications Vending Corp.*, the Illinois Association has timely and diligently pursued damages and refunds for

violation of Section 276 as provided by the procedure established by the Commission. Nothing bars the Commission from providing the relief requested.¹⁷

2. Enforcement of Existing Commission Orders Is Both Permissible And Required.

The BOCs argue that for the Commission to now require them to have cost-based rates effective no later than April 15, 1997 would be a “new legal principle or policy that changes settled expectations.” As such, the BOCs claim that new rules cannot be applied retroactively, especially where the agency alters an established rule. The BOCs concede, however, that the agency may make a new application of existing law, clarifications, and additions. BOCs Preemption Comments at 30-31. Here, the ordering of refunds of charges that exceeded the cost-based rate requirement, and the ordering of the forfeiture of dial around compensation collected by the BOCs before they were eligible to receive such compensation, are neither a “new legal principle” nor a “policy that changes settled expectations”. Instead, they are both permissible and required to enforce the existing Commission orders and the established legal rules.

The whole premise of the BOCs argument is based upon the BOCs’ failure to recognize the numerous Commission rulings mandating both (1) cost-based rates to be effective no later than April 15, 1997, and (2) BOCs’ eligibility for dial around compensation as conditioned upon their actual compliance with the cost-based rate requirement. These orders are the established rules that the Commission has repeatedly emphasized and adhered to. See Petitioner’s Reply, Sections I and II. Where, as here,

¹⁷ Even assuming, *arguendo*, that the Illinois complaint for refunds before the state commission might be the wrong venue, the pursuit of the relief would toll the running of the statute of limitations. *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 96 (1990); *Burnett v. NY Cent. Railroad Co.*, 380 U.S. 424 (1965). The pending Petition for Declaratory Ruling before the Commission establishes the Illinois payphone providers’ continuous “parallel pursuit” of this matter. As such, any running of the statute of limitations during this time period would be tolled. *Id.*

the Commission had repeatedly issued such rulings in advance of their effective date, subsequent enforcement of the rulings does not constitute a retroactive change. Among these rulings are the Commission's enforcement of the September 20, 1996 *First Payphone Order*, preempting all state requirements inconsistent with the federal cost-based rate mandate, and the November 8, 1996 *Payphone Reconsideration Order*, requiring the states to ensure that payphone line rates are cost based, effective no later than April 15, 1997, and making actual compliance with this requirement a condition precedent to the BOCs being eligible for dial around compensation.

The only "settled expectation" of the BOCs that would be changed by the ordering of refunds or the forfeiture of their ill-gotten dial around compensation is the BOCs' unwarranted expectation that they could violate the explicit Dual Federal Mandates without recourse. But the BOCs have no lawful basis for expecting that they would be immune from enforcement of the Commission's orders. The existing federal mandates for cost-based rates to be effective no later than April 15, 1997 and for actual compliance with such cost-based rate requirement as a precondition for the BOCs eligibility to receive dial around compensation are the Commission's long-established and well articulated rules. The BOCs desire that the Commission effectively reverse either or both of these federal requirements would be an alteration of the Commission's established rulings with precisely the type of retroactive application that is prohibited by law and by the Commission's own determinations implementing Section 276.

C. The BOC Commitment To Refund Charges In Excess Of Cost-Based Rates Is As Required Now For Their Eligibility to Collect Dial Around Compensation As It Was For The RBOC Clarification Letter Waiver.

Contrary to the BOCs' argument that their commitment made in the RBOC Clarification Letter¹⁸, and as embraced in the subsequent *Bureau Clarification Order*, only requires refunds for a forty-five day period, the essence of the position expressed in the RBOC Clarification Letter and in the Commission orders establishes that refunds are as required now as they were at the issuance of the waiver. The BOCs argue that the waiver was only applicable to the sole circumstance where (1) a BOC filed new or revised tariffs and, (2) there was a difference between the rates in the new tariff versus the tariff in effect prior to April 15, 1997. BOCs Preemption Comments at 32-33. But this argument is completely at odds with the whole reason the waiver was requested in the first place.

The BOCs were not concerned about the Commission's first mandate, that cost-based rates had to be in effect no later than April 15, 1997, but rather with the Commission's second mandate, that the BOCs that were not in compliance with the cost-based rate requirement would not be eligible to receive dial around compensation. In actuality, the Commission did not waive the cost-based rate requirement, but instead waived only that requirement as a prerequisite to the BOCs' collection of dial around compensation. It was the prerequisite that was waived, not the basic requirement for cost-based rates.

This is clear in the *Bureau Clarification Order*, the RBOC Clarification Letter, and the argument presented in the BOCs Preemption Comments. To obtain the waiver of

¹⁸ Ex Parte Letter of Michael Kellogg, Counsel, RBOC Coalition to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("RBOC Clarification Letter").

the prerequisite for compensation, refunds of any charges in excess of the cost-based rate requirement going back to April 15, 1997 were and still are required. Absent refunds to effectively satisfy this prerequisite, albeit after the fact, the Bureau *Clarification Order*, the RBOC Clarification Letter, and BOCs Preemption Comments all recognize that the BOC would not be eligible to receive or retain dial around compensation. Stated in other words, without the refunds, any collection of dial around compensation is violative of the Commission mandate and must now be forfeited.

The *Bureau Clarification Order* clearly and explicitly stated that its purpose was to address the BOCs' prerequisite to be eligible to receive compensation.

1. In this Order, the Common Carrier Bureau ("Bureau") grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with "new services" test, as said forth in the Payphone Reclassification Proceeding, CC Docket No. 96-128. Local exchange carriers ("LECs") must comply with this requirement, among others, before they are eligible to receive the compensation from interexchange carriers ("IXCs") that is mandated in that proceeding.

2. Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test, pursuant to the federal guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. 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 newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not

waive any of the other requirements with which the LECs must comply before receiving compensation.

3. The Bureau takes its action, in response to a request by the RBOC Coalition and Ameritech, pursuant to the authority delegated to it by the Commission in the Order on Reconsideration to determine whether a LEC has met the requirements of the Payphone Reclassification Proceeding prior to receiving compensation.

Bureau Clarification Order, ¶¶1-3.

It was not the BOCs' concern for having cost-based rates that prompted their waiver request, but, rather, the BOCs' concern that they would not be eligible to receive dial around compensation if cost-based rates were not in effect.

It was the prerequisite for compensation that was waived, on the limited grounds that refunds of overcharges for noncompliant rates would be issued back to April 15, 1997, the date the BOCs began receiving payphone compensation. Only by issuing refunds could the BOCs put the parties in the position they would have been had the BOCs complied with the cost-based rate requirement prior to receiving payphone compensation. The Commission was explicit that compliance with cost-based rates as the prerequisite for compensation was the subject of the waiver, without which noncompliant BOCs would not be eligible to receive their coveted compensation.

10. In the recent Bureau Waiver Order, we emphasized that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines ... We stated in the Bureau Waiver Order that LEC intrastate tariffs must comply with these requirements by April 15, 1997 in order for the payphone operations of the LECs to be eligible to receive payphone compensation. ...

Id., at ¶10.

The Commission again noted that state commissions are required to ensure that state tariffs met the federal requirements.

11. We noted in the Bureau Waiver Order that the guidelines for state review of intrastate tariffs are essentially the same as those included in the Payphone Order for federal tariffs. On reconsideration, the Commission stated that although it had authority under Section 276 to require federal tariffs for payphone services, it delegated some of the tariffing requirements to the state jurisdiction. The Order on Reconsideration required that state tariffs for payphone services meet the requirements outlined above.

Id., ¶11.

The BOCs Preemption Comments falsely assert that meeting the Commission’s prerequisite only necessitated the perfunctory filing of a tariff with the state commission, and self-certifying compliance with the cost-based rate requirements, regardless of whether the rates actually complied with the new services test. BOCs Preemption Comments at 32-34. But the Commission has expressly and repeatedly rejected this position. It has held that a BOC’s certification is not a substitute for actual compliance with the cost-based rate requirement needed to satisfy the prerequisite for eligibility for receipt of dial around compensation. *Ameritech Illinois*, ¶27; *Bell Atlantic-Delaware*, ¶28.

Unless a BOC is in actual compliance with the cost-based rate requirement, it has not satisfied the prerequisite for receipt of dial around compensation. The BOCs recognized this in making the request for the waiver. They sought the waiver to enable them time to later comply with the prerequisite “without delaying (the BOCs’) eligibility to receive compensation.” *Bureau Clarification Order* at ¶14.

The Bureau did not waive the federal requirement for cost-based rates, but instead granted an additional grace period to enable a BOC to come into actual compliance with

the requirement without delaying the time in which a BOC would be able to receive dial around compensation. But, if a BOC did not utilize this waiver, or come into actual compliance with the prerequisite, it remained ineligible for dial around compensation. *Payphone Reconsideration Order*, ¶¶131, 163; *Bureau Waiver Order*, ¶¶2, 30, 35; *Bureau Clarification Order*, ¶10; *Ameritech Illinois*, ¶27; *Bell Atlantic-Delaware*, ¶28.

The RBOC Clarification Letter stated that “*where new or revised tariffs are required* and the new tariffs rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide credit back to April 15, 1997, to those purchasing the services under the existing tariffs.” BOCs Preemption Comments at 33. (Emphasis in original.) The BOCs have always been, and remain, *required* to file new or revised tariffs when the existing tariffs are not in actual compliance with the cost-based rate requirement. The BOCs were so required on April 15, 1997, during the forty-five day grace period, and thereafter to be in actual compliance with such cost-based rate requirement as the prerequisite for eligibility to receive dial around compensation. See Petitioner’s Reply, Section II

As the BOCs noted, “absent a waiver, BOCs would have been deprived of all compensation for interstate calls made from their payphones”. BOCs Preemption Comments at 33. That is because they had not satisfied the prerequisite for eligibility. The BOCs recognized the need to refund the difference between the tariffed rates and the rates that are in actual compliance with the new services test “to ensure that IPPs would be placed in the same position that they would have been in had the tariffs been filed by April 15, 1997”. BOCs Preemption Comments at 34. The IPPs’ need to be placed in the

same position as if the BOCs' had timely complied with the Dual Federal Mandates is as essential now as it was when the BOCs' sought their waiver.

As above noted, it was not just whether any tariff was filed, but whether tariffs in actual compliance with the cost-based rate requirements were in effect that determines whether the BOC is eligible for dial around compensation. The Illinois Commission found that Illinois Bell did not comply with the federal cost-based rate requirement before December 13, 2003, yet it had collected dial around compensation since April 15, 1997, before it was eligible.

To the extent the BOCs now seek to argue that the RBOC Clarification Letter does not apply for the time period after May 19, 1997, then they effectively concede that, under the Commission's orders, the BOCs have no legal basis for receipt of dial around compensation in any state for a time period where the BOC was not in actual compliance with the cost-based rate requirement. Without actual compliance, or an effective remedy for the noncompliance, such as refunds, to bring the BOC into compliance for that time period, the BOC must be divested of any dial around compensation collected during that time the BOC was in violation of the numerous Commission orders.

The BOCs collected dial around compensation before they met the prerequisite. The Commission has stated repeatedly that actual compliance with this prerequisite must be met before the BOCs would be eligible for payphone compensation. The BOCs have recognized that absent waiver of the prerequisite, conditioned upon a promise to refund the difference between the new service test compliant rates and the tariffed rates, they would not be eligible to receive such dial around compensation unless they were in compliance with the cost-based rate requirement.

Both the RBOC Clarification Letter and the *Bureau Clarification Order* recognize the necessity for placing the competitive payphone providers in the position they would have been had the BOCs been in an actual compliance with the cost-based rate prerequisite for the BOCs to receive and retain payphone compensation. That remains as true today as it has been for the past thirteen years of Commission rulings. The BOCs cannot have it both ways. Either they must refund the excessive charges imposed upon the independent payphone providers to put those providers in the same position they would have been had the BOCs complied with the cost-based rate prerequisite prior to collecting dial around compensation, or the BOCs must forfeit the dial around compensation collected for which they were not eligible. The Commission may also order both remedies for the dual violations of the Commission's orders. However, to allow the BOCs to keep the millions of dollars in overcharges imposed upon their payphone competitors, while also retaining hundreds of millions of dollars in dial around compensation for which they were not eligible, is grossly inequitable and unlawful. It makes a mockery of the Commission's orders and these extensive payphone proceedings. In good conscience, the Commission cannot countenance such result.

D. The Supremacy Clause Trumps State Common Law Theories Of Issue Preclusion In The Commission's Implementation Of Federal Law And Policy.

The BOCs argue that the Commission's responsibilities under Section 276 have themselves been preempted by earlier, inconsistent state decisions, despite the contrary holdings of the four federal Circuit Courts that have addressed these circumstances. Where a federal regulatory agency has been charged with the responsibility of discharging its statutory duty to interpret and implement a uniform and consistent policy

in applying a federal statute, the Supremacy Clause requires that the discharge of that duty preempts state common law principles of collateral estoppel and *res judicata*. This holding has been expressly applied to the interpretation and enforcement of the Act. To proceed otherwise, would effectively preempt the Commission from discharging its statutory duty each time a state rendered a decision on federal law and policy prior to Commission action. In the instant Petition, the situation is even more egregious because: (1) the inconsistent state decisions occurred after the Commission had established controlling federal requirements under Section 276, which the Commission held the states must enforce; (2) the various states have issued irreconcilable decisions for Section 276 implementation; and (3) Congress expressly prohibited state regulations that were inconsistent with the Commission's implementation of the statute. In these circumstances, the Supremacy Clause requires that the Commission's discharge of its statutory duties supersede common law principles of claim preclusion.

A final judgment of a court of one state is generally given a preclusive effect by the courts of another state under the Full Faith and Credit Clause of the United States Constitution. Although this constitutional provision is not applicable to the federal courts, the federal Full Faith and Credit Act, 28 U.S.C. §1738, generally requires federal courts to grant preclusive effect to state court judgments. *American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788, 799-800 (5th Cir. 2000). The BOCs cite numerous cases applying this general principle. BOCs Preemption Comments at 36-39. However the federal full faith and credit statute applies to the federal courts, not to the federal agencies, such as the Commission. *American Airlines, Inc.; Arapahoe County Public Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213, 1218-1219

(10th Cir. 2001); *NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320 (3rd Cir. 1991).

Nevertheless, federal common law rules of preclusion may be fashioned in the absence of a governing statute, depending upon whether the policies favoring full faith and credit outweigh the federal interest. *American Airlines, Inc.* But these federal common law doctrines extending full faith and credit to state court determinations are trumped by the Supremacy Clause of the federal Constitution where the effect of the state court judgment or decree is to restrain the exercise of the United States sovereign power by imposing requirements that are contrary to important and established federal policies. *American Airlines, Inc.*; *Arapahoe County Public Airport Authority*, 242 F.3d at 1218-1219; *Yellow Freight Systems, Inc.*, 930 F.2d at 320; *Iowa Network Services, Inc. v. Qwest Corp.*, 336 F.3d 683, 690-694 (8th Cir. 2004).

In an arena where federal regulatory concerns are preeminent, if a federal agency has been statutorily mandated to represent those interests, and if deeming state court rulings preclusive would frustrate the federal agency's ability to discharge its statutory duty to interpret and implement the federal statutes, or would lead to inconsistent enforcement of the federally mandated requirements, the strong policy of federal supremacy prevails over full faith and credit common law principles. *Arapahoe County Public Airport Authority*, 242 F.3d at 1220-1221; *American Airlines, Inc.*, 202 F.3d at 800-801. Within the context of the Act, Congress intended that the Supremacy Clause trump the common law doctrine of preclusion where the state is imposing requirements contrary to important and established federal policy and granting preclusive effect could result in inconsistent implementation. *Iowa Network Services, Inc.*, 336 F.3d at 690-694.

In accord Yellow Freight Systems, Inc., 930 F.2d at 320 (noting that if the federal regulatory agency was dependent upon states' varying views of claim or issue preclusion it would compromise the uniformity of rights intended by the passage of the federal law).

The question becomes one of whether a common law rule of preclusion would be consistent with the intent of Congress in the passage of Section 276. Congress charged this Commission to implement cost-based rates and dial around compensation requirements, expressly preempting any state requirement inconsistent with this Commission's regulations. 47 U.S.C. § 276(a), (b) & (c). It would make little sense for Congress to write such a provision if various inconsistent state decisions were entitled to a preclusive effect upon the Commission's discharge of its responsibilities to implement uniform federal law and policy.

In reviewing the Congressional intent behind Section 252 of the Act, the Eight Circuit found that by charging the federal courts with the responsibility to review and interpret the provisions of the Act, it was an error to give a previous state determination of a similar issue preclusive effect. To grant a preclusive effect to one state's determination, and then allow another case to proceed on the federal issue, could potentially cause an inconsistent result, which cannot be condoned. To prevent such occurrences, "Congress intended to supplant the common law principles of claim preclusion when it enacted the 1996 Act . . ." *Iowa Network Services, Inc.*, 336 F.3d at 690.

Section 276 evinces an even stronger intent by Congress that the Commission not be precluded by certain states from enforcing the Commission's statutory duties. First, Congress fully charged the Commission with the responsibility to interpret and implement Section 276. Second, Congress expressly stated its intent that state

regulations inconsistent with Section 276, as implemented by the Commission, are preempted. 47 U.S.C. §276(c). The potential for inconsistent results in implementing Section 276 has gone beyond the theoretical. Different states are making wholly contradictory decisions, inconsistent with each other and with the Commission's prior rulings. Compare *Illinois Public Telecommunications Association v. ICC* (Ill.App.Ct., 1st Dist. 2005 – unreported decision per IL S. Ct. Rule 23) (no refunds for violation of the federal requirement for cost-based rates effective no later than April 15, 1997), with *Indiana Bell Telephone Co., Inc v. IURC*, 855 N.E.2d 357 (Ind. App. Ct. 2006), *transfer to Ind S. Ct. den.*, 869 N.E.2d 453 (2007) (requiring refunds of excessive charges with interest). See also one state going both ways on refunds, *Independent Payphone Association of New York, Inc. v. PSC of State of New York*, (unpublished trial court decision 2002) (N.Y. S.Ct.) (refunds required) and 5 A.D.3d 960 (N.Y. App. Div. 2004) (refunds prohibited); see Petition of the Independent Payphone Association of New York, Inc. for an Order of Preemption and Declaratory Ruling, CC Docket 96-128, filed December 29, 2004.

At least 26 states have issued refunds to address noncompliant payphone line rates, while at least 6 states have denied refunds for such violations. The Illinois Appellate Court ruled that refunds are barred by the state's filed rate doctrine. Meanwhile, the federal Circuit Courts have ruled that state filed rate doctrines are preempted by Section 276 (c), *TON Services, Inc. v. Qwest Corporation*, 493 F.3d 1225, 1236 n.14, and that refunds for violation of the cost-based rate requirement are not barred by the federal filed rate doctrine. *TON Services, Inc.*, 493 F.3d at 1236 – 1237; *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1084 - 1085 (9th Cir. 2006). These direct conflicts,

resulting in nonuniform application of federal law and policy, are precisely the inconsistencies that the Supremacy Clause prohibits. Both the federal statute and the Commission's implementing orders have stated that state regulations inconsistent with the cost-based rate requirement of Section 276 are preempted. Given this explicit directive of federal law and policy, the federal Supremacy Clause trumps principles of common law issue preclusion.

The circumstances in *American Airlines, Inc.* and *Arapahoe County Public Airport Authority* closely follow those in the pending Petition. In these related proceedings, the state courts had entered rulings contrary to the federal statute. While the state court actions were under review, the parties pursued declaratory rulings or complaints before the federal agency charged with interpreting and implementing the applicable statute. In each case the federal agency entered a contrary ruling to the state court and found the state proceedings preempted. The federal courts upheld the federal agency holding that the principles of common law preclusion were trumped by the Supremacy Clause.

In *American Airlines, Inc.*, the City of Fort Worth sued in state court to enforce a local ordinance that prohibited additional flights from Dallas' Love Field Airport. Dallas and a number of airlines claimed that federal law authorized the flights. After the state court found that the ordinance was not federally preempted, it held that the additional flights were precluded by the ordinance. The state court decision was appealed. While the state proceedings were pending, several of the parties sought for the federal agency to issue declaratory rulings interpreting the federal statute and supporting their claim that federal law preempted the ordinance.

The federal agency issued a declaratory ruling that the operations at Love Field were authorized by federal law and that any limitation on the service by the states was preempted, contradicting the state court decision. On review of the federal agency decision, the federal court considered whether common law preclusion required granting full faith and credit to the state court judgment. The court held that, in implementing the federal agency's duties, the agency properly declined to give preclusive effect to the state court judgment. *Id.*, 202 F.3d at 801.

Competing federal policy considerations weighed against granting preclusive effect to the state court proceedings for numerous reasons. First, at the time the state court issued its ruling, a parallel proceeding seeking a declaratory ruling was pending before the federal agency. 202 F.3d at 800. Second, the case involved regulation in an area where federal concerns are preeminent and the federal agency is charged with representing those concerns. To allow the state courts to foreclose the federal administrative agency from interpreting and applying the appropriate application of the federal statute would trump the key federal interest that motivated Congress to create the agency and give it authority over such laws. 202 F.3d at 800-801. Finally, applying full faith and credit principles to the federal agency would lead to inconsistent results. The primary jurisdiction doctrine seeks to promote uniformity and consistency within the particular field of regulation. To grant the state decision a preclusive effect would create inconsistencies between those directly affected by the outcome of that state court proceeding and others not before the state court. 202 F.3d at 801.

As in *American Airlines, Inc.*, while the Illinois state court review was pending, the parallel Commission proceeding for declaratory ruling was underway.¹⁹ Second, under the Act, and especially under Section 276, Congress has determined that federal interests are preeminent and has expressly charged the Commission with the responsibility for representing those interests. *New England Public Communications Council, Inc., supra*. See also *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6 (1998) (“if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel”). Further, granting preclusive effect to state court decisions in this instance unquestionably creates inconsistent results where the Commission has found that cost-based rates must be in effect no later than April 15, 1997 and that the BOCs would not be eligible for dial around compensation unless in actual compliance with this requirement. Additionally, the fact that some states have ordered refunds while others have not clearly demonstrates the absence of uniform implementation of federal law and policy in this area. Both Congress and the Commission have expressly stated their intent that these inconsistent state requirements are preempted. 47 U.S.C. § 276(c), *First Payphone Order*, ¶ 147, and the Commission should act accordingly here by granting the longstanding Petition for refunds.

The Tenth Circuit came to the same conclusion when it addressed this issue in *Arapahoe County Public Airport Authority*. Here again the state court and the federal agency proceeded on parallel courses. The local airport authority banned scheduled

¹⁹ The Illinois Association sought to have the Illinois Appellate Court stay its proceedings and, under the doctrine of primary jurisdiction, refer the issues to the Commission on the questions of enforcement of the Dual Federal Mandates that were shown to have been violated by AT&T. AT&T opposed this request, not only before the Illinois Appellate Court, but also in the Illinois Association’s petition for leave to appeal to the Illinois Supreme Court and the petition for certiorari to the United States Supreme Court. All of the courts denied same.

passenger service and obtained an injunction against the airlines from the state court. Meanwhile, the airlines filed complaints with the federal agency. After the Colorado Supreme Court held that the ban was not preempted and affirmed the permanent injunction, the federal agency issued a contrary ruling. As with *American Airlines, Inc.*, the Tenth Circuit addressed the competing interests between common law preclusion and the Supremacy Clause and once again found that the Supremacy Clause trumps common law preclusion.

The Circuit Court first noted that the state court focused on the conduct according to state regulations, in contrast to any in-depth analysis of the federal law and policy on these issues. 242 F.3d at 1219. Second, it noted that the opinions on the matter were seriously divided. *Id.* Finally, the Circuit Court noted that the federal agency was not a party to the state proceedings. As the agency charged with fulfilling the statutory responsibilities, the federal administrative body had an obvious interest independent of the private parties. Its absence from the proceeding, and of any privity with parties to the proceeding, failed to satisfy a fundamental requirement of issue preclusion. 242 F.3d at 1219-1220. The court found this weighed heavily against extending full faith and credit to the state court decision.²⁰

Addressing the federal principles of the Supremacy Clause, the court agreed with *American Airlines, Inc.* that the federal concerns are preeminent and that the federal agency is statutorily mandated to represent those concerns. This tilts the balance towards

²⁰ The Tenth Circuit found reliance on *Town of Deerfield v. FCC*, 992 F.3d 420 (2nd Circuit 1993) to be inapposite. That case was based upon a federal agency review a federal court determination. It held that to allow an executive branch decision to overrule an Article III court would effectively render the federal court's decision a mere advisory opinion, which is prohibited by Article III. *Deerfield* is inapplicable to the current circumstance which does not involve an Article III court. *Arapahoe County Public Airport Authority*, 242 F.3d at 1220 n.8.

the application of the supremacy principles to protect against state courts trumping federal interests and concerns. 242 F.3d at 1220-1221. Similarly, the court found that preclusion would frustrate the federal agency's ability to discharge its statutory duties. 242 F.3d at 1221. Finally, if given preclusive effect, state court rulings would lead to inconsistent enforcement of federally mandated requirements. *Id.* All things considered, these factors favored a strong policy of federal supremacy prevailing over full faith and credit principles. *Id.*

These factors again mirror the facts in the Illinois proceedings involved here. Both the Illinois Commission and the Illinois Appellate Court based their opinions on state law requirements. Neither has noted or addressed either the federal statute or the Commission's ruling explicitly preempting any state requirement inconsistent with the Dual Federal Mandates of cost-based pricing no later than April 15, 1997 and actual compliance with the cost-based rate requirement before a BOC was eligible to receive dial around compensation. 47 U.S.C. §276(c); *First Payphone Order*, ¶147.

Second, as previously noted, the various state opinions on the issuance of refunds to implement the April 15, 1997 mandatory date for cost-based rates are sharply divided, with most but not all states following the Commission's directive to enforce these rates being effective no later than April 15, 1997.

Finally, as in *American Airlines, Inc.*, and *Arapahoe County Public Airport Authority*, the federal agency charged with implementing the federal law and policy was not a party to the state court proceedings. To preclude the Commission from implementing its earlier rulings due to inconsistent state decisions would frustrate the Commission's ability to discharge its statutory mandate and would be contrary to the

intent expressed by Congress that uniform federal law and policy preempt all inconsistent state regulations.

Seeking to avoid this federal directive, the BOCs Preemption Comments rely on the earlier cases of *U.S. v. ITT Rayonier*, 627 F.2d 996 (9th Cir. 1980) and *Town of Deerfield v. FCC*, 992 F.2d 420 (2nd Cir. 1993). BOCs Preemption Comments at 37-39. This reliance is misplaced. As noted by the above decisions, these cases are inapposite. *American Airlines, Inc.*, 202 F.3d at 799 n.6 (distinguishing *ITT Rayonier*); *Arapahoe County Public Airport Authority*, 242 F.3d at 1220 n.8 (distinguishing *Deerfield*).

In *ITT Rayonier*, the state Department of Ecology issued a compliance order against ITT Rayonier at the urging of the federal Environmental Protection Agency for noncompliance with federal effluent limitations. On appeal, the state court reversed the DOE in favor of ITT Rayonier, which was affirmed by the state supreme court. The Ninth Circuit considered whether the EPA was estopped from litigating this issue in a subsequent federal lawsuit. The analysis was twofold: (1) whether there was a “countervailing statutory policy” to the concept of collateral estoppel, and, if not, (2) whether collateral estoppel principles were applicable. 627 F.2d at 1000 – 1003.

After noting that “several circuits have refused to give collateral estoppel effect to prior decisions of state agencies under state law” in reviewing the 1964 Civil Rights Act, the court distinguished the Federal Water Pollution Control Act there in question because Congress gave the state concurrent enforcement authority. Therefore, the court found no “countervailing statutory policy” to state determinations. *ITT Rayonier*, 627 F.2d at 1000 – 1002. Unlike *ITT Rayonier*, in Section 276 of the 1996 Act Congress directed the Commission to interpret and implement Section 276, and preempted the states from

making inconsistent determinations. The “countervailing statutory policies” that federal law and policy would prevail over inconsistent state requirements, absent in *ITT Rayonier*, are expressly present in Section 276.

Second, as noted by the Fifth Circuit, in the state court action the state agency was maintaining the position of the EPA at its urging, and as such the federal agency was acting in privity with the state agency. This privity was a necessary element that supported the application of claim preclusion. 627 F.2d at 1002 – 1003. In contrast, privity was not present when the federal agency issued a declaratory ruling interpreting the federal requirements at the urging of the parties, and claim preclusion was denied. *American Airlines, Inc.*, 202 F.3d at 799 n.6.

In *Deerfield*, the Second Circuit did not find that the Commission was required to give preclusive effect to a state court judgment. Rather, a federal District Court had entered a judgment upholding a state determination that a municipal ordinance was not preempted by a Commission regulation. Subsequent to the federal District Court’s determination, the Commission issued a contradictory ruling finding that the ordinance was preempted. The Second Circuit held that the judgment of an Article III court having jurisdiction to enter judgment may not be reviewed by a different branch of the government because such direct revision by the executive or legislative branch would in effect render the court’s decision as merely advisory, and Article III courts are prohibited from giving advisory opinions.

The Second Circuit then proceeded to review whether an Article III court should grant preclusive effect to a state court judgment under 28 U.S.C. §1378, not whether the federal agency should. *Deerfield*, 992 F.2d at 428-430. As distinguished by the Tenth

Circuit, *Deerfield* was specifically concerned with the issue of whether a federal agency may “review, alter, or prevent enforcement of the judgment of an Article III court.” It did not hold that a state court decision could preclude a federal agency from interpreting and implementing federally mandated statutory duties, something the Tenth Circuit concluded the state decision could not do. *Arapahoe County Public Airport Authority*, 242 F.3d at 1220 n.8.

Moreover, even if *Deerfield* were relevant, which it is not, the validity of *Deerfield* is seriously questioned in light of the subsequent U.S. Supreme Court decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). The Supreme Court found there that an agency is not bound even by a federal court’s prior interpretation of a federal statute, unless the statute is unambiguous and subject to only to one interpretation. Congress has left any ambiguity in a statute meant for implementation by an agency to be resolved first and foremost by the agency. To allow a court’s interpretation to override the agency’s, simply because the court’s construction came first, would make statutory construction dependent of which came first. “Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.” *Brand X Internet Services*, 545 U.S. at 983. If a prior Article III court interpretation of a federal statute cannot override a subsequent interpretation by the federal agency, then this principle is at least equally applicable to a prior state court decision.

Federal common law preclusion benefitting a state court does not apply where there is a contrary intent expressed by Congress. A contradictory state court decision is

trumped by the Supremacy Clause where it restrains the exercise of sovereign power and poses requirements contrary to important and established federal law and policy. In line with this, the Congressional intent expressed in the Act has been found to prevent the application of federal common law preclusion.

In *Iowa Network Services, Inc.*, the Eighth Circuit noted that Congress was aware of the split in state and federal authority over telecommunications matters in the passage of the Act. It inferred from the Congressional design that federal courts would have the reviewing authority to interpret the provisions of Section 251(b)(5). Therefore, a state decision of a similar issue in a different context could not preclude a federal court from discharging its statutory responsibilities. To allow the state determination to have preclusive effect could result in inconsistent results, which the court cannot condone. 363 F.3d at 692-694. Under the Act, if a state is not regulating in accordance with federal policy, the federal court may bring it to heel. 363 F.3d at 693, quoting *AT&T Corp.*, 525 U.S. at 378 n.6.

The Congressional intent expressed in Section 276 is even clearer. Congress expressly directed the Commission to implement the regulatory requirements of that section and further expressly preempted any state regulation inconsistent therewith. 47 U.S.C. §276(c). Congressional intent in this matter need not be inferred, since Congress has expressly stated it.

On numerous occasions the Commission has repeatedly found that the Dual Federal Mandates are necessary to promote the statute's twin goals to promote the widespread deployment of payphones and to promote competition in the payphone industry. *First Payphone Order*, ¶2 ("In this proceeding we advance the twin goals of

Section 276 the Act of ‘promot[ing] competition among payphone service providers and promot [[ing] the widespread deployment of payphone services to the benefit of the general public ...”); *Payphone Reconsideration Order*, ¶2; *Bureau Waiver Order*, ¶3; *Bureau Clarification Order*, ¶3; *Commission Wisconsin Order*, ¶¶2 - 3. To allow various states to preclude the Commission’s interpretation and implementation of the mandates of Section 276 would eviscerate the intended effect of the Commission’s payphone proceedings. The Commission has found that the Dual Federal Mandates of (1) cost-based rates effective no later than April 15, 1997, and (2) BOC compliance with the cost-based rate requirement as a prerequisite for eligibility to receive dial around compensation, are fundamental to implementing Section 276’s twin goals of promoting the widespread deployment of payphones and creating competition in the payphone industry. To give preclusive effect to inconsistent state rulings or doctrines would frustrate the Commission’s fulfillment of its statutory responsibilities and be in direct conflict with the Congressional mandates under Section 276, as implemented by the Commission.

E. Preempted State Requirements May Not Prevent Enforcement of Established Federal Law and Policy.

While arguing that state procedural rules which may limit refunds but do not disadvantage federal rights are not preempted, the BOCs Preemption Comments proceed to argue that preempted state requirements may negate federal mandates. Although nowhere mentioned in the BOCs Preemption Comments, the Commission ruled that Section 276 requires cost-based rates for payphone line and ancillary services to be in effect no later than April 15, 1997. The BOCs claim that state procedural rules, such as a

state filed rate doctrine, are neutral rules which do not disadvantage enforcement of the federal regulatory regime. BOCs Preemption Comments at 42. Among the numerous flaws in this proposition is that the state filed rate doctrines are preempted by federal law. *TON Services, Inc.*, 493 F.3d at 1236 n.14. Additionally, neither the BOCs nor the states offer any procedure or mechanism that would assure implementation of the Dual Federal Mandates for (1) cost-based rates effective no later than April 15, 1997 and (2) the BOCs not being eligible for dial around compensation until in actual compliance with the cost-based rate requirement. The complete absence of any state procedure to implement these requirements has not only disadvantaged the enforcement of these federal rights but has effectively negated the underlying federal mandates. The BOCs reliance on case law that the states may employ alternative means of implementing federal requirements is unfounded in the instant circumstances where state requirements actually act to negate the implementation of such federal mandates.

On September 20, 1996, the Commission determined that Section 276 required that rates charged by the BOCs for payphone lines and ancillary services offered to payphone providers must be cost-based. The Commission further determined that any state regulation inconsistent with this federal cost-based rate requirement is preempted pursuant to 47 U.S.C. §276(c). *First Payphone Order*, ¶147. On November 8, 1996, the Commission ruled that such cost-based rates must be filed via state tariffs and that the states must ensure that compliant rates were in effect no later than April 15, 1997. The Commission also required that the BOCs must be in actual compliance with the cost-based rate requirement prior to receiving dial around compensation on their payphones. *Payphone Reconsideration Order*, ¶¶131, 163. On April 4 and April 15, 1997, the

Commission reiterated these federal mandates that cost-based rates must be in effect no later than April 15, 1997 and were a precondition for the BOCs' receipt of payphone compensation. *Bureau Waiver Order*, ¶¶30 - 33; *Bureau Clarification Order*, ¶10. All of these rulings had prospective application as of April 15, 1997. The BOCs have failed to present any basis for claiming that Commission enforcement to address violations of these federal mandates on and after April 15, 1997 constitutes retroactive ratemaking.

Once again, the BOCs Preemption Comments misapply the cited authorities. A state court may apply neutral procedural rules of the forum state, provided that the rules are not preempted and are not outcome determinative in the sense that they would conflict with both the purpose and effect with the federal remedial objectives. If the state procedural rule would produce a different outcome depending upon whether the federal claim was brought in the state court or a different court, it would be inconsistent with the federal interest in uniformity. *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Johnson v. Fankell*, 520 U.S. 911, 920 (1997).

Federal law takes state courts as it finds them only insofar as those courts employ rules that do not "impose unnecessary burdens upon rights of recovery authorized by federal laws." . . . Thus, the very notions of federalism upon which respondents rely dictate that the State's outcome-determinative law must give way when a party asserts a federal right in state court. . . . (T)he Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected."

Felder, 487 U.S. at 150-151.

In the instant Petition, the state rules barring refunds fail the applicable test under the Supremacy Clause. These state rules both have been expressly preempted by federal law and have substantially altered federal law rights to the effect of denying enforcement of the Dual Federal Mandates of Section 276 as implemented by the Commission. Where

the source of the governing law is national, states may not alter those rights established by federal law where the remedy afforded by the state would not enforce, but actually deny, such federal rights. The objective is to assure full protection of the substantive rights intended by the jurisdiction in which the rights themselves originate. *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 245 (1942). State procedural rules cannot be outcome determinative where they defeat the federal rights in a cause of action brought in state courts, particularly where they would produce different outcomes depending on whether the action was brought in state or federal court. This is inconsistent with the overriding federal interest in uniformity. *Johnson*, 520 U.S. at 920 (citing *Felder*, 487 U.S. at 138).

The BOCs Preemption Comments argue that state law does not permit refunds of charges paid under tariffs that have been reviewed and approved by the responsible state regulatory agency. The BOCs argue that the Illinois Commission had approved AT&T's payphone line rates in 1995 and that "AT&T was entitled (indeed, required) to charge those rates until superseded by a subsequent filing or ICC order." BOCs Preemption Comments at 43. The BOCs give no credence to this Commission's orders or authority to supersede the Illinois Commission orders.

The 1995 Illinois Commission approved rates that were not cost-based, nor ever purported to be, as subsequently found by the Illinois Commission in the new services test proceedings. Illinois Commerce Commission Docket No. 98-0195, Interim Order, November 12, 2003, p. 46 (Finding "(20) neither [AT&T's] nor Verizon's existing rates are in compliance with the NST"). When this Commission preempted Illinois' (and all other states') regulations for non-cost-based rates effective on and after April 15, 1997,

neither the Illinois Commission, the Illinois courts, nor the BOCs gave any acknowledgement to the Commission's order preempting these inconsistent state requirements, much less comply with its implementation. This is admitted by the BOCs.

In the Illinois proceeding, the ICC had approved AT&T's prior payphone line rates in 1995. Accordingly, *AT&T* was entitled (indeed *required*) to charge those rates *until superseded by a subsequent filing or ICC order*. This is precisely what the ICC concluded in its order; that holding was affirmed by the Illinois state courts.

BOCs Preemption Comments at 43. (Emphasis added.)

This is a rather candid admission by AT&T that it, the Illinois Commission, and the Illinois court gave no weight either to the Commission's requirement to have cost-based rates effective no later than April 15, 1997 or to the Commission's explicit preemption of the Illinois Commission's pre-Act order which set non-cost-based rates. Contrary to the BOCs Preemption Comments, the Commission not only had the authority to supersede the 1995 Illinois Commission order, 47 U.S.C. Section 276(c), but expressly did supersede that order. *First Payphone Order*, ¶ 147. The state's failure to comply with the Commission's order, and the federal statute, is a violation of the Supremacy Clause and cannot stand.

An additional fatal flaw in the BOCs' "neutral state procedural" argument is that the state procedures here are outcome determinative, effectively defeating the federal rights through application of the state procedures. This conflicts with the purpose and objective of the federal law and is preempted by the Supremacy Clause. Where there is a conflict with a valid federal law, any state law, however clearly within the State's acknowledged power, must yield. *Felder*, 487 U.S. at 138, 151 ("the Supremacy Clause

imposes on state courts a constitutional duty ‘to proceed in such manner that all the substantial rights of the parties under controlling federal law (are) protected.’ *Garrett v. Moore-McCormack, Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.ED. 239 (1942)’).

In *Felder*, the Supreme Court held preempted the Wisconsin procedural requirement to serve on a municipality a notice of claim within a one hundred of twenty days of the incident, which effectively shortened the opportunity to bring a federal civil rights claim that would more appropriately be subject to a two year statute of limitations for personal injury. *Felder*, 487 U.S. at 138 -141. Even though it did not wholly bar the opportunity to enforce a federal right, the mere fact that it placed a burden on the opportunity to enforce the right, which burden was not found in federal law, was in conflict with the Supremacy Clause and was thus preempted. “(T)he theory that States retain the authority to prescribe the rules and procedures governing suits in their courts . . . does not extend so far as to permit States to place conditions on the vindication of a federal right.” *Felder*, 487 U.S. at 147.

In contrast, the Illinois decision excluded any opportunity to enforce the federal requirement of cost-based rates effective April 15, 1997. Illinois Bell did not even declare which rates upon which it would rely for compliance with the Commission’s order until May 15, 1997. It was only after that the Illinois Commission could investigate those rates for compliance, the causes which took over six years (delayed an extra two years by the BOCs’ request for a second hearing, although all parties maintained the same positions in both hearings).

In determining that the rates were not in compliance with the Commission’s orders, the Illinois Commission refused to make the appropriate cost-based rates effective

as of April 15, 1997 based upon its claim that this was prohibited by the filed rate doctrine. *Illinois Payphone Order* at 42 – 43. 46 - 47. Under these circumstances, at no time did Illinois provide the opportunity to enforce the federal cost-based rate requirement effective April 15, 1997. A state procedure which effectively denies a substantial federal right is in conflict with the purpose and objective of the federal statutes and is preempted. *Felder; Garrett*.

The BOCs further argue that under the state filed rate doctrine, AT&T was required to charge the last ICC-ordered non-cost based rates until superseded by another ICC order. BOCs Preemption Comments at 43. Even if the filed rate doctrine was applicable, which it is not, the BOCs specifically waived the application of the filed rate doctrine in their application to the Commission for a waiver. RBOC Clarification Letter. Moreover, as noted above, the BOCs failure to recognize either the Commission’s order preempting the state requirement or the Commission’s authority to preempt the state commission’s requirement is in violation of the Supremacy Clause. (It also fails to explain how AT&T could “certify” that it was in compliance with the Commission’s cost-based rate requirement while it claims it was instead “required” to follow the contrary Illinois requirement during this time.)

No Waivers: The BOCs Preemption Comments cite dicta in the Illinois Commission decision for the proposition of some unstated procedural bar-waiver. (The BOCs actual position is unknown, since they make no argument, but merely a general recitation of dicta from the Illinois Commission order.) The weakness of the BOCs position is reflected by its reliance on a nonsensical statement in the Illinois order that is contradicted by the Illinois Commission’s own findings.

The BOCs allude to the Illinois order's reference that "from the time that the FCC established its NST through today, there has been *no complaint to formally challenge the rates at issue in this case.*" *Illinois Payphone Order* at 42 -43. (Emphasis in original.) BOCs Preemption Comments at 46. First, both the Illinois Commission's own orders and the record in the proceedings state otherwise. The Illinois Commission order recognizes that its investigation arises from the order in ICC Docket No. 97-0225. That order required the investigation pursuant to the petition filed by the Illinois Association on May 8, 1997 to investigate AT&T's compliance with the pricing provisions of the new services test under Section 276. ICC Docket No. 98-0195 at 2-3.²¹ The Final Order in ICC Docket No. 97-0225 states that the Illinois Association's petition requested an investigation of the compliance of AT&T with the Commission's cost-based rate requirement and requested refunds in the amounts charged in excess of the federally required rates.²² This was ordered to be the subject matter of ICC Docket No. 98-0195.²³ ICC Docket No. 97-0225, 1997 WL 33772122, p.2.

²¹ Citing Final Order, *Illinois Public Telecommunications Association, an Illinois not for profit corporation: Petition to determine whether Illinois local exchange carriers are in compliance with the Illinois Public Utilities Act and Section 276 of the Communications Act of 1934*, ICC No. 97-0225 (Dec. 17, 1997) and Initiating Order, *Illinois Commerce Commission on its own motion: Investigation into Certain Payphone Issues as directed in Docket No. 97-0225*, ICC Docket No. 98-0195 (Mar. 11, 1998).

²² The Illinois Public Utilities Act recognizes that compliant is made with the Commission by the filing of a complaint or petition. 220 ILCS 5/10-108. See Petitioner's Reply, n.15.

²³ "The IPTA seeks an investigation on the following three issues:

(1) Whether the LECs provide network services to payphone providers at a price that complies with the federally-mandated "New Services Test" (47 C F R §6149(g)(2)), which requires that such services be priced at the long-run service incremental cost ("LRSIC") plus a reasonable allocation of overhead. The investigation would require the Commission to determine the cost-based price under the New Services Test for each network service provided to payphone providers *and the amount of refunds, if any, owed to payphone providers who purchased network services from the LECs at rates which were not cost-based . . .* The Commission having reviewed the entire record and being fully advised of the premises is of the opinion and finds that: . . . (3) the following three matters proffered by the Illinois Public Telephone Association warrant investigation. LEC compliance with the pricing provisions of the New Services Test in provisioning pay telephone service . . ." ICC Docket No. 97-0225, Final Order, December 17, 1997, 1997 WL 33772122 at pp. 2, 12 – 13. (Emphasis added.)

The Illinois Commission compounds its misstatement by agreeing with the AT&T proposition that the payphone providers “benefited from....deep discounts”, in an order where the Illinois Commission found that the Illinois Association was correct in complaining that the rates AT&T was charging were *excessive* rates and in violation of federal law. If the prior tariffed rates charged were “deep discounts” to the cost-based rates required, there would be no excessive charges to refund. It is of no surprise that neither the Illinois Commission nor the Illinois court relied upon this nonsensical dictum.²⁴

F. Enforcement Of Section 276 And The Commission’s Implementing Orders Authorize And Require Refunds.

Reiterating its unfounded assumptions, and again omitting the Commission’s foundational rulings, the BOCs argue that neither the statute nor the Commission’s orders provide a basis for the Commission to preempt the states and to order refunds of the amounts collected in violation of federal law. The BOCs argue that since current rates are in compliance, the Commission is without authority to enforce the Dual Federal Mandates as required by Section 276 and enunciated in the *First Payphone Order*, the *Payphone Reconsideration Order*, the *Bureau Waiver Order*, the *Bureau Clarification Order*, the *Ameritech Illinois Order*, and the *Bell Atlantic-Delaware Order*. In effect, the BOCs seek refuge in the concept that the Commission does not have the authority to enforce its own orders, to order refunds, or to preempt the states that have pursued state

²⁴ The BOCs also allude to an Illinois staff statement that the Illinois Association was nearly six months late in filing its direct testimony. The record reflects that there were no objections to the delay. This was due to the fact that the various counsel in the new services test proceedings were simultaneously involved in the unbundled network elements hearings being held on an expedited basis. These hearings also arose from the passage of the Act. If any waiver would be applicable it would be the BOCs now raising objection to a delay over ten years after the fact.

regulations inconsistent with the applicable federal law and policy. As is evident by now, this position is wholly at odds with governing federal law.

Section 4(i) of the Communications Act of 1934 expressly authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.” 47 U.S.C. §154(i). The federal courts have already determined that this section authorizes the Commission to order refunds as may be necessary in the execution of these functions. The District of Columbia Circuit Court has further found that the statutory language in Section 276 governing the cost-based rate requirement also authorizes the Commission to take all actions necessary to implement its duties under Section 276, including the ordering of refunds. 47 U.S.C. §276(b)(1).

It is clear that the Commission has the authority to order refunds where overcompensation has occurred, on the basis of the statutory provision permitting the Commission to take such actions “as may be necessary in the execution of its functions.” 47 U.S.C. §154(i) (1994). In addition, the Telecommunications Act of 1996 requires the Commission to “take all actions necessary (including any reconsideration)” to promulgate regulations to ensure fair compensation to payphone service providers. *See* 47 U.S.C. §276(b)(1). This language authorizes the Commission to order refunds where doing so is necessary to ensure fair compensation.

MCI Telecommunications Corporation, 143 F.3d at 609.

The statutory language in Section 276(b)(1) addressed by the Circuit Court applicable to the dial around compensation requirement (Section 276(b)(1)(B)) is equally applicable to the new services test requirement (Section 276(b)(1)(C)) regarding over compensation (or overcharges) by the BOCs for local payphone line services. Both

statutory sections authorize the Commission to require refunds where necessary in execution of the Commission's duty to implement the Section 276(b)(1) requirements.

Furthermore, the BOCs offer no alternative mechanism for enforcing the Dual Federal Mandates for cost-based rates effective April 15, 1997 and for the BOCs to be in actual compliance with the cost-based rate requirement as a precondition for eligibility to receive dial around compensation. That is because the BOCs Preemption Comments are all about how to avoid enforcement of the Dual Federal Mandates. But this Commission's obligation is to see that the Dual Federal Mandates are implemented.

To fulfill its statutory duty, as stated in Section 276, and as explicitly expressed by the Commission in its own implementing orders, the Commission must now order refunds of the charges in excess of cost-based rate requirements for the period from April 15, 1997 until the BOCs brought their rates into compliance, or alternatively require the BOCs to disgorge their unlawfully collected dial around compensation amounts collected for this period. The Commission is also authorized to order both such remedies for the dual violations of the Dual Federal Mandates.

CONCLUSION

WHEREFORE, for the reasons stated in the Petition, in the comments previously filed and the above, the Illinois Public Telecommunications Association respectfully requests that the Commission grant its Petition for Declaratory Ruling. The Illinois Association requests the Commission to issue a declaratory ruling: 1) that the Illinois Commerce Commission decision denying the Illinois Association members refunds or reparations is inconsistent with the Commission's Payphone Orders; (2) that the payphone service provider members of the Illinois Association are entitled to refunds or

reparations from AT&T of the amounts AT&T charged said members from April 15, 1997 through December 13, 2003, for network services to the extent that the rates and charges were in excess of the cost-based rates of the Commission's new services test, plus interest at the rate of 11.25% per year; 3) that AT&T was ineligible to receive dial around compensation for access code and toll free calls originating from their payphones on or before December 13, 2003; and 4) for such other relief arising from the facts in Illinois Commerce Commission Docket No. 98-0195 as deemed necessary to enforce the Commission's Payphone Orders.

Dated: December 31, 2009

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