

1. Under *USTA II*, FCC could not delegate either interpretation or enforcement of Section 276 to the states.
 - a. To the extent that the FCC legitimately allowed initial rate review to be conducted by state commissions, the Commission must “superintend” the state review process “in every respect.”¹

B. Theory I: The *Waiver Order* requires refunds.

1. The *Waiver Order* is clearly more than a “standstill” order that only protected PSPs during the period before new rates were *filed*. The order expressly requires refunds “once the new intrastate tariffs are *effective*,” where NST-compliant rates “*when effective*, are lower than the existing rates.”²
2. The scope of the *Waiver Order* was not limited to BOCs that actually proposed to reduce payphone line rates. BOCs who thought their existing rates were in compliance with the NST nonetheless were required to file rates for review and required a waiver to protect their eligibility for compensation if (as actually happened) their rates were found not to comply. BOCs’ state filings purporting to justify their existing rates indicated reliance on the *Waiver Order*.³
3. If the *Waiver Order* had required BOCs to pay refunds only if they proposed to reduce their rates, it would have irrationally and unfairly penalized BOCs that sought to comply with the NST while rewarding BOCs that did not seriously attempt to comply. BOCs that successfully dragged out state review proceedings for years and years would be rewarded many times over.
4. While “the current dilemma may not have been contemplated at the outset by the Commission,”⁴ this does not preclude or excuse the Commission from enforcing the refund condition of the *Waiver Order*.
 - a. At worst, the *Waiver Order* is ambiguous in its application to the current circumstances
 - b. As the U.S. Court of Appeals for the Ninth Circuit stated in its primary jurisdiction referral to the FCC, to the extent that the *Waiver Order* is ambiguous, interpreting it “requires consideration

¹ *USTA II*, 359 F.3d at 567.

² *Waiver Order*, 12 FCC Rcd at 21379 ¶ 20 (emphasis added).

³ See APCC Ex Parte, “The Waiver Order Requires Refunds from the date NST-Compliant Rates Became Effective Back to April 15, 1997” at 7-14 and attachments (September 12, 2006).

⁴ *Davel*, 460 F.3d at 1089.

of policy considerations similar to those that gave rise to the FCC's 1996 and 1997 orders applying the new services test to intrastate payphone rates, as well as to the Waiver Order itself." *Id.*

- c. Among the relevant policy considerations:
- i. Section 276(a) expressly prohibits any BOC payphone discrimination (and thus requires BOC compliance with the NST) after the effective date of the Commission's implementing rules (*i.e.*, as of April 15, 1997).
 - ii. It is the Commission's responsibility to ensure compliance with Section 276.
 - iii. In the *Waiver Order*, the Common Carrier Bureau intended to provide a "limited duration" waiver, not an indefinite-duration one.⁵ In any event, neither the Bureau nor the Commission had authority to grant an indefinite waiver of Section 276 requirements.
 - iv. The waiver was granted "in the interests of bringing LECs into compliance with the requirements" (*id.* at 21379 ¶ 19) of the *Payphone Orders* "within a reasonable time" (*id.* n. 60).
 - v. The *Waiver Order's* refund condition was intended to "help to mitigate *any* delay" in NST compliance (*id.* ¶ 20) (emphasis added).
 - vi. Pursuant to the waiver, the BOCs were able to avoid NST compliance for years, collecting dial-around compensation all the while even though their payphone line rates far exceeded NST levels.
 - vii. After years of non-compliance by the BOCs, the only way to ensure timely compliance with the Act is to require compliance retroactively, by requiring refunds.
 - viii. Withholding refunds not only would leave the PSPs to bear the losses from the BOCs' years non-compliance, but also would reward the BOCs for their persistent noncompliance.
- d. These policy considerations overwhelmingly support a broad application of the *Waiver Order* requiring the BOCs to pay refunds from April 15, 1997, until the date that NST-compliant rates became effective.

⁵ *Waiver Order*, 12 FCC Rcd at 21380 ¶ 21.