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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**

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

**REPLY OF THE  
INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC. TO  
AT&T AND VERIZON PREEMPTION COMMENTS OF MARCH 23, 2009**

The Independent Payphone Association of New York, Inc. (IPANY), hereby replies 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" ("BOC Preemption Comments"). For the reasons set forth below, those comments do not, in any way, undercut the entitlement of IPANY and other payphone petitioners before this Commission to refunds as the remedy for the BOCs' deliberate violation of this Commission's Orders and their own contractual obligations.

**I. PRELIMINARY STATEMENT**

IPANY is the trade association representing independent owners and operators of public pay telephones (IPPs, also known as Payphone Service Providers, or PSPs) in New York. IPANY has been trying, since early 1997, to obtain cost-based payphone rates from Verizon in accordance with this Commission's New Services Test (NST) requirements, and to obtain refunds for

the overcharges to which payphone owners in New York were subjected for nine years.

Initially, IPANY re-emphasizes that it endorses, supports, and joins in the legal arguments set forth by the Illinois Public Telecommunications Association in its Reply to the BOC Comments filed on December 31, 2009 (Illinois Reply). IPANY also here emphasizes, supports and joins in the arguments set forth in the Ex Parte letter filing made on the same date by the Florida Public Telecommunications Association ("Florida Letter"). IPANY has endorsed several alternate grounds justifying refunds, including those previously set forth individually and collectively by the Illinois Association and the American Public Communications Council (APCC).

This IPANY Reply provides additional background to the struggle engaged in by IPPs in New York, since 1997, to require Verizon to comply with this Commission's NST Orders and to reimburse IPPs for systematic overcharges suffered at the hands of Verizon. From the very outset, IPANY has aggressively challenged Verizon's long-standing pre-existing rates as not meeting this Commission's requirements for cost-based NST rates as of April 15, 1997. As directed by this Commission, IPANY challenged Verizon's payphone service rates before the New York PSC, and then sought judicial review of a PSC decision which determined that Verizon's rates complied with the NST because they were based on "embedded costs". In those PSC and court proceedings, IPANY repeatedly requested that the non-conforming rates be set aside; that new, NST-

compliant rates be determined; and that refunds be made, back to April 15, 1997, of the difference between the finally approved NST-compliant rates and the much higher pre-existing rates which had remained in effect long after April 15, 1997.

IPANY will show in the comments below, as do the Illinois Reply and the Florida Letter, that the BOC Comments recitation of the background to the relevant NST Orders is fatally flawed, because it totally ignores the reason for the BOC commitment and binding obligation (as codified by the Refund Order) to refund overcharges to the affected IPPs: the BOCs' desperation to obtain millions of dollars in dial around compensation on their own payphones, as of April, 1997, without having to wait months or years until their pre-existing payphone tariffs – or newly filed tariffs – were determined by the states to be NST compliant.

IPANY will also discuss how the BOC claim that each state was free to decide for itself how to apply federal law, even when those state determinations were directly contrary to this Commission's rulings, cannot be supported on either a policy or legal basis. Congress was emphatically clear that any state "requirement" regarding payphone rules, which was inconsistent with this Commission's rules, would automatically be pre-empted. This Commission has forcefully re-emphasized such pre-emption in its payphone orders: First Payphone Order, 11 FCC Red. 20541, at para. 147; Payphone Reconsideration Order, 11 FCC Red. 21233, at paras. 218-220; Commission Wisconsin Order at paras. 7, 15. As a matter of federal law – which the BOCs have simply chosen to pretend does not exist – this Commission must now ensure that the NST actions of state

agencies taken under delegated authority comply with the binding federal standards established by this Commission. Such action is fully consistent with this Commission's declaration that it would supervise and correct any improper determinations by state authorities that were inconsistent with the Commission's Payphone Orders. See Refund Order 12 FCC Red. 20997 at FN 60.

Finally, IPANY will show that as a matter of federal law, this Commission does not have the ability to delegate away to state authorities the federal duties assigned to this Commission, without the active supervision of those state authorities and without correction of any actions taken by those state authorities inconsistent with the national rules and policies established by this Commission.

## II. PROCEEDINGS IN NEW YORK

IPANY has been actively pursuing relief from Verizon's failure to comply with its NST obligations since 1997, first by initiating action in the forum specified by this Commission, and then through judicial appeals in the New York courts, as required by law.<sup>1</sup>

Between 1997 and September, 2001, IPANY was vigorously litigating the validity of Verizon's rates -- and the IPANY members' entitlement to refunds -- before the New York PSC. At the end of those administrative proceedings, the PSC issued an astonishing order on the validity of the old, pre-existing Verizon rates. The PSC first held that the Bureau Wisconsin Order had

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<sup>1</sup> The complete time line of New York State proceedings was previously submitted as an ex parte to this Commission on December 2, 2008. An updated timeline is attached as Exhibit "A" to this Reply.

no application in New York. It then went on to validate Verizon's pre-existing payphone rates (in effect for many years prior to April, 1997) as being NST compliant because they "recover direct embedded costs plus a reasonable contribution towards common costs" (emphasis added). Because it found Verizon's rates NST compliant, the PSC made no ruling on whether IPPs were, as a matter of law, entitled to refunds back to April 15, 1997, since refunds would be available only where the pre-existing rates were non-compliant.

IPANY challenged the PSC Order on the ground this Commission had specified that an NST rate had to cover forward-looking, direct costs, rather than embedded costs. IPANY asked the reviewing courts to set aside the PSC's approval as arbitrary and capricious; to order the PSC to determine correct NST rates; and to order refunds if the finally approved NST rates were lower than the pre-existing rates.

The reviewing trial court (the New York State Supreme Court) agreed with IPANY that the PSC's approval of the Verizon rates was arbitrary and capricious, since it was clear this Commission had specified that NST rates had to be based on forward-looking costs, not embedded costs. The court also ruled that IPANY members would be entitled to refunds in the event the ultimately approved NST compliant rates were lower than the pre-existing rates. However, the reviewing court also specified that, when the PSC determined on remand what constituted an NST compliant rate, the PSC should not follow the directions of this Commission, as set forth in the Commission Wisconsin Order of January 31,

2002, which specified the ground rules for determining whether a rate was NST compliant.<sup>2</sup>

The reviewing court orders were appealed to the New York Appellate Division, which left standing the lower court's order that the PSC's approval of Verizon rates as being NST compliant was arbitrary and capricious. However, the Appellate Division also held that the PSC had no duty to follow either the Bureau Wisconsin Order or the Commission Wisconsin Order, declaring that the Commission Wisconsin Order was not an "interpretative order" but instead a new legal requirement.<sup>3</sup>

Moreover, the Appellate Division ruled refunds were not available, based solely on an incorrect interpretation of the Regional Bell Operating Company Coalition ("RBOC") Commitment Letters<sup>4</sup> and the Refund Order.<sup>5</sup> According to the Appellate Division, since Verizon did not file tariff revisions to the non-compliant rates by May 19, 1997, there could be no refunds, even if

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2 The reviewing trial court issued two orders: an Initial Decision and Order dated July 31, 2002, and a Decision and Order (on rehearing) issued April 22, 2003. Both were included as Exhibits to IPANY's December 29, 2004, Petition for Preemption.

3 This, of course, was in direct conflict with the Commission Wisconsin Order specifying that the Wisconsin Bureau Order was "consistent with [the Commission's] prior orders concerning pricing and payphones", and that it "simply applies our existing authority". Commission Wisconsin Order at FN 73.

4 Letters dated April 10 and 11, 1997, from Michael K. Kellog, on behalf of the RBOC Payphone Coalition, to Mary Beth Richards, Deputy Chief, Common Carrier Bureau.

5 Order, CC Docket 96-128, DA 97-805, (Common Carrier Bureau) April 15, 1997, 12 FCC Red. 21370, referred to elsewhere as "Bureau Clarification Order", but referred to herein as the "Refund Order".

Verizon's rates never complied with the NST. The Appellate Division did not invoke the filed rate doctrine.

IPANY sought leave to appeal the Appellate Division order to the New York Court of Appeals, and as an alternative asked the Court of Appeals for a stay of further proceedings pending referral to this Commission on proper application of the Refund Order. Verizon and the PSC opposed both the appeal and the referral to this Commission. IPANY's motion was denied without comment.

The BOC Comments' time-line for New York, set forth on page 20 of their pleading, omits critical and relevant detail. For example, it correctly states the PSC found Verizon's pre-existing rates "do satisfy the FCC's New Services Test". However, it fails to indicate that the basis for that PSC finding was that the pre-existing rates covered embedded costs (not forward-looking costs as required by this Commission), and that the PSC approval of the NST rates as NST-compliant was set aside by the New York courts as arbitrary and capricious.

Verizon also skips over the fact that the New York PSC did not finally comply with the applicable NST rules until 2006, when it established the first NST-compliant rates based upon the forward-looking, direct cost directives in the Commission Wisconsin Order. Those 2006 rates represented significant decreases from the rates which had been in effect since April 15, 1997, which

were still under challenge.<sup>6</sup> However, approval of those new rates did not resolve all outstanding issues.

In approving the new rates in 2006, the PSC declined to determine whether the pre-existing – and much higher – rates based on embedded costs violated this Commission's NST requirements. The PSC based its refusal to judge the old rates on the uncertainty (at that time) of an entitlement to refunds: If payphone owners were not entitled to refunds, simply because Verizon did not file compliant tariffs by May 19, 1997, the PSC concluded there would be no reason to evaluate the old rates. While IPANY urged the PSC to conduct the proper analysis of the old rates, Verizon opposed such an effort. Accordingly, the PSC has never ruled, under the Commission Wisconsin Order, whether Verizon's pre April 15, 1997 rates complied with the NST.

### III. ARGUMENT

#### **POINT A: Res Judicata Does Not Bar This Commission's Review Of A State Requirement Which Violates FCC Orders**

The BOCs assert the ruling of the Intermediate New York State Court interpreting and applying this Commission's Payphone Orders cannot be reviewed by this Commission under principles of res judicata. That is wrong as a matter of law. Indeed, not only can this Commission review and set aside a state court order which misapplies federal regulatory requirements implemented by the FCC, it must do so.

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<sup>6</sup> For example, usage rates were reduced from \$0.08 for three minutes to approximately \$0.005 per minute, and BUCL charges were properly credited.

First, this Commission never stated, as the BOC Comments incorrectly assert, that it would pre-empt a state determination only in cases where a state was "unable to review" the state tariffs. The specific command of Section 276(c), that any state requirements inconsistent with the Commission's regulations are pre-empted, equally applies to an inconsistent regulatory determination which a state actually makes. If a state declined to review the tariffs, the determination would be made by the FCC, and there would then be no occasion to pre-empt any inconsistent state requirement. Accordingly, the statute speaks directly to a situation where the state has in fact exercised delegated authority, and reached a determination inconsistent with the FCC's regulations. Such an inconsistent determination is pre-empted.

This Commission has repeatedly stressed that any determination by a state commission must be consistent with the requirements specified by the FCC. (See e.g.: Payphone Reconsideration Order, para. 163). This Commission has at all times retained jurisdiction, under both the enabling federal statute and its own orders, to set aside any action by a state which did not comply with the federal rules implementing Section 276 of the Act. Refund Order, fn. 60; Bureau Wisconsin Order, para. 6.

Indeed, this Commission has not limited its review, or its ability to pre-empt a state order, to cases where a state has refused to issue an NST Ruling. To the contrary, where states have issued rulings inconsistent with the NST requirements, as those requirements were set forth, for example, in the

Commission Wisconsin Order, this Commission has pre-empted and set aside such inconsistent state requirements. Thus, when the North Carolina Utility Commission and the Michigan Public Service Commission were found to have issued orders inconsistent with the Commission Wisconsin Order, the Commission ordered those state agencies to conduct further proceedings consistent with the requirements set forth in the Commission Wisconsin Order. See In the Matter of North Carolina Payphone Association Petition for a Declaratory Ruling, CCB/CPD 99-27, Order released March 5, 2002, DA 02-513.

Moreover, under the USTA II decision,<sup>7</sup> while this Commission can utilize state commissions as a “short cut” to achieve compliance with federal regulations, it may do so only if those state agencies are “superintended by the [Commission] in every respect”. That fundamental principle of law, which requires Commission oversight, together with the specific statutory pre-emption of inconsistent state rulings contained in Section 276, requires this Commission to set aside the incorrect rulings in New York that are contradictory to and do not follow this Commission’s orders and rules.

In USTA II, the DC Circuit reviewed this Commission’s UNE Remand Order issued August 21, 2003, and the question of whether the Commission’s delegation to the states to make individual decisions on which UNEs were subject to “impairment” was lawful. The Court concluded it was not. To the contrary, the Court found the FCC’s delegation of substantive decision

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<sup>7</sup> United States Telecom Association v. FCC, 359 F3d 554 (DC Circuit 2004, cert denied 543 US 925).

making authority to the states – as distinct from a simply fact-finding role – would not be lawful unless the FCC retained full authority to supervise the actions taken under delegated authority in order to assure compliance with the FCC's “own regulatory requirements”. 359 F3d 554 at 567.

The BOCs are simply wrong that IPANY is constrained by res judicata, and has no right to challenge the determinations of the New York PSC and State courts that refunds are not available as a matter of law. Indeed, the specific pre-emption mandate of Section 276( c ) would supercede any common law principle of res judicata, even if it were applicable – which it is not here.

The BOCs rely on Town of Deerfield v. FCC, 992 F.2d 420 (2<sup>nd</sup> Cir., 1993), but that reliance is misplaced. Deerfield does not restrict the ability of this Commission to set aside and pre-empt a state court decision which conflicts with federal policy as established by this Commission. The law is clear that this Commission is not bound by such state court decisions, and under Section 276 of the Communications Act, this Commission has both the authority and duty to pre-empt and set aside any such contrary state decisions.<sup>8</sup>

Town of Deerfield involved a landowner who initiated a state court proceeding to challenge a local zoning decision, on the ground that the zoning board's action was pre-empted by FCC rules. The state court denied the claim. Thereafter, the landowner commenced a second suit in Federal District Court, again arguing the pre-emption claim. The District Court found the pre-emption issue had been fully and

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<sup>8</sup> Moreover, as discussed below, the New York court rulings on refund rights were merely dicta, so this Commission may properly take the position that it is not overruling a binding state court ruling on refunds.

fairly litigated in the New York State court action, and granted preclusive effect to the state court decision. The Second Circuit affirmed. While the litigation was continuing in federal court, the landowner also filed a Petition for Declaratory Ruling with the FCC. In that proceeding, the FCC ruled the zoning ordinance was pre-empted, notwithstanding the prior federal court decision to the contrary.

On review of the resulting FCC Order, the Second Circuit, based on the Separation of Powers Doctrine, concluded the FCC had no power to set aside the determinations of the federal courts:

“A judgment entered by an Article III Court having jurisdiction to enter that judgment is not subject to review by a different branch of the government, for if a decision of the judicial branch were subject to direct revision by the executive or legislative branch, the court’s decision would in effect be merely advisory.”

(emphasis added).

992 F2d 420 at 428.

Town of Deerfield thus speaks to the inability of a federal agency to overrule a federal court decision; it has absolutely nothing to do with the authority of this Commission to pre-empt an improper decision of a state court which, of course, is not an Article III court. In IPANY’s case, the conflict is not between this Commission and a federal Article III court, but rather between the Commission and a state court which issued a final order flatly inconsistent with federal policy as established by the Commission. Not only is Town of Deerfield wholly inapplicable,

the correctly applicable federal law is clear that an administrative agency such as this Commission has full authority to set aside and pre-empt an order of the highest court of a state which conflicts with federal policy. See Arapahoe County Public Airport v. FAA, 242 F3d 1213 cert denied 534 US 1064, 122 S. Ct. 664 at 242 F3d 1213 at 1219:

“We further agree these common law doctrines [referring to collateral estoppel and res judicata] extending full faith and credit to state court determinations are trumped by the supremacy clause if 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 policy.”

See also American Airlines Inc. v. Dept. of Transportation, 202 F3d 788 at 799 (CA-5, 2000).<sup>9</sup>

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<sup>9</sup> The BOCs’ citations to the First Circuit cases of Puerto Rico Mar. Shipping Auth. v. Federal Mar. Comm’n, 75 F.3d 63 (1<sup>st</sup> Cir. 1996) and NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31 (1<sup>st</sup> Cir. 1987) are also inapposite. As in Town of Deerfield, both deal with a federal agency making a determination contrary to an earlier determination of an Article III court. Furthermore, both cases specifically noted that they did not involve strong policies involved in implementing a federal statutory scheme. Puerto Rico Mar. Shipping Auth., 75 F.3d at 68; Donna-Lee Sportswear Co., 836 F.2d at 35. In contrast, the Petition addresses enforcement of Commission orders that preceded the state determinations, that the Commission ruled the states must enforce, and that the Commission expressly found to be fundamental to the achieving the dual statutory goals of promoting competition among payphone service providers and promoting the widespread deployment of payphone services to the benefit of the general public. First Payphone Order at para. 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

Most notably, the holding of Arapahoe County was specifically applied “within the context of the Telecommunications Act of 1996”. Iowa Network Services Inc. v. Qwest, 363 F3d 683 at 690 (CA-8, 2003). Thus, this Commission is not bound by a state ruling which contravenes uniform federal law and policy established by this Commission, but instead is fully within its lawful rights and power to correct such an erroneous state ruling.<sup>10</sup>

Another critical holding in Arapahoe County was that the administrative agency, which in that case chose to pre-empt the state court’s order, could not be subject to the doctrine of collateral estoppel because it was not a party to, nor in privity with a party to, the state court proceedings: “Without the FAA as a party, the Colorado Supreme Court decision does not satisfy a fundamental requirement of issue preclusion under federal or Colorado law” (citing Baker v. General Motors, 522 US 222 at 237, to the effect that “In no event...can issue preclusion be invoked against one who did not participate in the prior adjudication”). Arapahoe County Public Airport, 242 F3d 1213 at 1220.

New York law is to the same effect: the doctrine of collateral estoppel can only apply when the entity which is sought to be bound by a court decision was a party in the proceedings before the court. Liss v. Trans Auto

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public ...”); Payphone Reconsideration Order at para. 2; Bureau Waiver Order at para. 3; Refund Order at para. 3; Commission Wisconsin Order at paras. 2 - 3.

<sup>10</sup> In fact, the Supreme Court’s decision in National Cable & Telecom Assoc. v. Brand X Internet Services, 125 S. Ct. 2688 (2005), suggests the principle that the Commission cannot override an earlier decision by a federal Article III court may no longer be applicable. In Brand X, the Supreme Court held the Ninth Circuit should have deferred to the ruling of the Commission, rather than rely on an earlier ruling of the Ninth Circuit which was inconsistent with the Commission’s position.

Supply, 68 NY2d 15; Staatsburg Water Company v. Staatsburg Water District, 72 NY2d 147.

In the present instance, the Commission was not a party before either the PSC or the state courts in New York, and thus cannot be barred from correcting erroneous state action by the doctrine of collateral estoppel.

The BOC citation of Wabash Valley Power Association Inc. v. REA is similarly without merit. That case involved state court proceedings in Indiana, in which REA was a party, regarding REA's right to pre-empt state authorities by setting its own rates for a cooperative electric utility.<sup>11</sup> Moreover, the issue litigated in the state courts was one of state law, where the statute did not provide the federal agency with pre-emptive authority. It did not involve the application of federal law that by its express terms clearly pre-empted inconsistent state law.<sup>12</sup>

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<sup>11</sup> Wabash Valley Power was based on 28 USC §1738, which gives full faith and credit in the federal courts to state court decisions to the extent the state court would, under state law, grant collateral estoppel. But, as noted above, a state court in New York would not grant collateral estoppel and hold the FCC was bound by the state court order (because the FCC was not a party), and thus the federal courts may not impose collateral estoppel against the FCC.

<sup>12</sup> REA argued a letter it had written to the utility established binding federal law which pre-empted state law. That contention was rejected on the ground REA's letter did not constitute binding federal law because it "neglected to use the procedures required by the Administrative Procedure Act". But at the same time, the Court noted that upon establishment of a "source of authority" to overrule inconsistent state actions, "under the Supremacy Clause the federal obligation would prevail." 903 F2d 455 at 453-454. In the review of a subsequent REA regulation attempting to pre-empt the state, the Seventh Circuit found that the statute did not grant the REA the authority to pre-empt. Wabash Valley Power v. REA, 988 F2d 1480 (CA-7, 1993). But that is not the situation here. Here, this Commission's authority to establish NST rules is firmly set forth in §276 and §201; the Payphone Orders were properly promulgated under statutory authority (and have been upheld as valid and enforceable federal law – See New England Public Communications Council v. FCC, 334 F3d 69, D.C. Cir., 2003); the refund requirements were codified in relevant orders; and the source of pre-emptive authority is expressly set

While the court found REA to be bound by the state court decision, it was based on three factors: (1) REA was a party in the state court; (2) REA did not raise the issue of pre-emption in the state proceeding to which it was a party; and (3) state law controlled the outcome:

"The REA was a party to the administrative proceedings and obtained review from the state courts. It did not argue that Wabash's rates should be increased because federal law pre-empts the used-and-useful rule or otherwise required the state to set rates high enough to repay the loans. Its argument was based on state law."

903 F2d 445 at 455.

None of those factors is present here, and Wabash Valley Power has no relevance to the case now before this Commission. This Commission did not participate as a party in the New York State PSC or court proceedings, and accordingly cannot be bound thereby. Similarly, the controversy here involves the proper application of federal law and Commission rulings implementing that law—which by its terms was to have, and under the statute must have, preemptive effect. By contrast, the Court in Wabash Valley Power made clear there was no applicable federal law which clearly pre-empted the state agency's ratemaking decision, and suggested instead that the applicable federal law there specified that state law should apply in the ratemaking proceeding. The exact opposite is the case here. Section 276(e) of the Telecom Act explicitly and forcefully pre-empts "any state

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forth in §276 of the Telecom Act and confirmed by this Commission in the First Payphone Order at para. 147.

requirements” which are inconsistent with the FCC’s regulations. Moreover, this Commission has repeatedly held with respect to matters governed by §276, as it did in the First Report and Order, at para. 147, that “any inconsistent state requirements with regard to this matter are pre-empted”.

The policy underlying the Arapahoe County, American Airlines, and Iowa Network Services’ decisions is sound and fully consistent with the relief being requested here by IPANY. To hold otherwise would allow an entity seeking to undermine the authority of the FCC to bring an action in a state where it had a cozy relationship with the local regulators and courts. By obtaining a favorable court decision in the entity’s “back yard”, the entity could loudly proclaim that the FCC’s rules and policies do not apply to it, because it obtained a contrary ruling in the friendly state forum. That approach could easily result in 50 different applications of federal law, wholly inconsistent with uniform national policy established by this Commission pursuant to its preemptive jurisdiction under the applicable provisions of the Communications Act.

Entities regulated by this Commission cannot be allowed to subvert this Commission’s jurisdiction, and free themselves from applicable law as established by this Commission, simply by obtaining a “friendly decision” from a home state court. Yet, that is exactly what the BOCs are urging this Commission to permit here.

**POINT B: Enforcement By This Commission Of Its Requirement For Refunds Does Not Constitute Retroactive Ratemaking**

The BOCs argue that because the pre-existing, non-compliant payphone rates in New York were not changed until 2006 to conform to the NST,

refunds are precluded under doctrines prohibiting retroactive ratemaking. That is not correct as a matter of law.

The general rule that tariffed rates cannot be subject to retroactive refunds, and that any changes ordered by a regulator can be prospective in effect only, does not apply where a regulatory order is in effect that conditions the rate or subjects the rate to further scrutiny. Davel Communications Inc. v. Qwest, 460 F3d 1075(CA-9, 2006). That is explicitly the case here.<sup>13</sup>

IPANY's entitlement to refunds does not depend upon state law, but rather is grounded in and assured by federal law which trumps any inconsistent state provisions, including state common law doctrines. That federal obligation to order refunds arises in the form of (a) the RBOC commitment to this Commission to give the refunds and the waiver of any objection under the Filed Tariff Doctrine; (b) the Refund Order of April 15, 1997, which codified the requirement for refunds; (c) the preemptive provisions of Section 276 as embraced by this Commission; and (d) the inherent authority of this Commission to enforce its own orders.

From the issuance of the First Payphone Order and the Payphone Reconsideration Order, there has been in effect a federal requirement to have cost

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<sup>13</sup> The BOC Comments assert the New York state common law rule against retroactivity "was never challenged by IPANY on review of the NYPSC's Order Denying Refunds." That is misleading. The New York State common law doctrine is not applicable, because the refunds are available under federal, not state, law. Moreover, the state common law doctrine is pre-empted here, and cannot be used to block action by this Commission to enforce uniform federal policy. TON Services, Inc. v. Qwest, 493 F3d 1225 (CA-10, 2007). See also Arapahoe County, American Airlines, and Iowa Network Services, supra. IPANY vigorously made that argument to both the PSC and the New York courts.

based rates in effect by April 15, 1997.<sup>14</sup> Since the Refund Order of April 15, 1997, there has been in effect a regulatory order from this Commission which requires, as a matter of federal law, that refunds be made as of that date for the difference between any non-compliant rates being charged by the RBOCs and lawful NST-compliant rates as finally approved. That regulatory order, applicable on a forward looking basis, eliminates any claim of retroactive ratemaking.

As such, the Filed Tariff Doctrine is completely inapplicable to the current circumstance. When a regulatory agency specifically issues an order subjecting rates to possible later refunds, any amounts collected by the utility after the effective date of that order are, as a matter of law, conditional, and if shown to have been improper, are subject to refund in accordance with the terms of the regulatory order.<sup>15</sup> See, for example, 47 USC §205, authorizing the Commission to issue orders determining what will be the just and reasonable charges to be thereafter observed.

This Commission's Refund Order did not affect the validity of rates before April 15, 1997, and did not require refunds for any periods prior to that

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14 A BOC's certification of compliance with the NST does not substitute for its obligation to be in actual compliance. See In the Matter of Bell Atlantic-Delaware v. Frontier Communications Services, Bureau Order, DA 99-1971, para. 28, 1999 WL 754402 (F.C.C.) (Bell Atlantic-Delaware); In the Matter of Ameritech Illinois v. MCI Telecommunications Corporation, Bureau Order, DA 99-2449, para. 27, 1999 WL 1005080 (Ameritech Illinois).

15 As the New York Supreme Court found, "The general rules prohibiting retroactive rate changes do not apply where, as here, there is an order directing such refunds, made at the request of the LEC's, including Verizon, in exchange for other benefits received by them". (Supreme Court Order of July 31, 2002, at Mimeo pg. 21). That holding was not overturned on appeal; instead, the appellate division held the Refund Order did not apply because Verizon did not file revised tariffs by May 19, 1997.

date. But, once the Refund Order was issued, any charges after that date (whether set forth in a pre-existing tariff which was never changed to comply with the NST, or set forth in a newly filed non-compliant tariff) which failed to conform to the April 15<sup>th</sup> Order, were unlawful, and subject to refund, as of the date of that Order.

The fact that the PSC decided not to require Verizon to file replacement payphone tariffs in October of 2000 does not somehow magically invoke the Filed Tariff Doctrine or the prohibition against retroactive ratemaking as a bar to reparations being made. Since April 15, 1997, the then-existing rates were always subject to refund if later found to be non-compliant, as a condition for this Commission allowing those rates to be charged, and for allowing the RBOCs to collect dial around compensation on their payphones as a quid pro quo for the promise of refunds.

Finally, and critically, even if the Filed Tariff Doctrine were available to Verizon (which as conclusively shown above it is not), Verizon specifically waived any right to invoke that doctrine in the April 10 and April 11, 1997, RBOC Commitment Letters to the FCC. Therein, while the RBOCs noted what they claimed to be their rights under the Filed Tariff Doctrine, they specifically and without reservation waived those rights, and voluntarily undertook to provide retroactive rate adjustments in accordance with their commitments. RBOC Coalition Commitment Letter, April 10, 1997, at page 2:

"I should note that the filed-rate doctrine precludes either the state or federal government from ordering

such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance.”

That waiver is binding on Verizon, plain and simple, and this Commission cannot in good conscience countenance allowing Verizon to go back on its word.

**POINT C: IPANY Followed The Proper Procedure In Challenging Verizon's Rates**

Verizon asserts IPANY did not properly pursue challenges to Verizon's pre-existing, non NST-compliant rates in New York. Nothing could be further from the truth. Since 1997, IPANY has been challenging the validity of Verizon's rates and seeking remedies for Verizon's violation of this Commission's orders.

IPANY had originally complained to the PSC about the Verizon tariffs filed at the end of 1996 because they did not modify rates for the “dumb” payphone lines used by IPPs. The Verizon tariff filing, which addressed only the “smart line” phones utilized by Verizon, was allowed to go into effect on a temporary basis. The PSC then initiated a full proceeding on July 30, 1997, (Cases 96-C-1174 and 93-C-0142) “to address and implement the requirements of the new Federal payphone regulations”. IPANY submitted extensive comments in that proceeding on September 30, 1997 – the date established by the PSC for such comments. Those comments demonstrated that Verizon's pre-existing rates failed

to comply with the New Services Test because they were not based on forward-looking, economic costs, and, among other things, failed to give credit for the End User Common Line Charge (EUCL).

Unfortunately, after receiving comments from IPANY, Verizon, and others, the PSC took no action in this docket for more than two years. Accordingly, in an effort to "jump start" the ongoing proceeding, IPANY filed an additional complaint on December 2, 1999, which reaffirmed Verizon's failure to comply with the NST rules; urged the PSC to resolve matters which had been pending since 1997, and direct Verizon to file revised tariffs with rates retroactive to April 15, 1997; and requested refunds. The two matters were consolidated and dealt with by the PSC as a single proceeding and resolved in a single order. The PSC took almost another two years before that proceeding was completed in September, 2001. IPANY thereafter filed timely judicial appeals to the PSC order, and actively prosecuted those appeals – consistent with state procedural law – through the highest court in the state.

As such, the BOC comment that IPANY "took no further action for more than two years" after filing its initial comments in September, 1997, is disingenuous and contrary to the actual facts of the case. There was an ongoing PSC proceeding, and the matter was being fully reviewed and investigated by the PSC. IPANY was at all times an active participant in that proceeding, was

vigorously pursuing its remedies, and eagerly awaiting the PSC's determination. The PSC, not IPANY, controlled the timing of the PSC's investigation.<sup>16</sup>

Verizon asserts that if IPANY believed it had a federal right to a refund, it could have filed an action at any time with the Commission or in Federal Court. That, too, is not correct. This Commission instructed IPANY to prosecute its claims for NST-compliant rates at the PSC, not in federal court and not before the FCC. IPANY followed the Commission's directive. It used the PSC administrative process, which did in fact (albeit incorrectly) consider the validity of Verizon's rates. After the PSC issued its final order, IPANY was bound to challenge that PSC order through the state courts, otherwise any challenge to the PSC order would be disallowed because the order was not a final administrative order under New York law. But once finality under New York law attached, which occurred when the state's highest court refused to hear an appeal, or refer

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<sup>16</sup> Verizon complains that IPANY did not specifically demand refunds until 1999, and usage refunds until 2002. That is not factually correct. IPANY challenged Verizon's rates as improper and in violation of the NST rules in 1997, and continuously prosecuted its claims and request for relief – in the form of refunds – in the administrative proceedings. The actual relief to be awarded depended on the PSC's findings as to the validity of the pre-existing rates, and all issues – including the form of relief – were integrally related to each other in the administrative proceeding. After issuance of the Bureau Wisconsin Order holding the NST also applied to usage rates, IPANY submitted that Order to the PSC and urged the PSC to direct Verizon “to pay refunds for excessive and unlawful rates which have been in effect since April, 1997”. The request was not limited to line rates, but applied to all rates – including the usage rates which had also been challenged. (Position for Rehearing, Cases 99-C-1684 and 96-C-1174, December 8, 2000). The fact refunds were on the table is evidenced by the very caption of the PSC proceeding, which referenced the request to “Award Refunds”.

the matter to the Commission<sup>17</sup>, it was at that time that IPANY properly invoked its right to come to this Commission for an order – pursuant to Section 276(c) and this Commission’s own Payphone Orders – to pre-empt the New York state requirements which were inconsistent with the FCC’s rules.

If the BOCs are suggesting that the only avenue to seek pre-emption of the inconsistent state requirement was before a federal court, as opposed to this Commission, they are mistaken. This Commission has always retained jurisdiction over these NST matters, repeatedly instructing the states that their actions had to be in compliance with the Commission’s rules. Since this Commission has retained full jurisdiction (Refund Order, fn. 60) IPANY’s seeking a declaratory judgment and order of pre-emption is procedurally correct.<sup>18</sup>

If the BOCs are arguing that IPANY’s sole remedy to obtain refunds – from the very beginning - was to file a complaint with this Commission, that assertion is also not supported. This Commission directed IPPs to first go to the state commissions for relief (Payphone Reconsideration Order, para. 163), which is what IPANY did. And because this Commission specifically retained jurisdiction over the actions which had been delegated to the states, a petition for a

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17 As indicated above, while Verizon criticizes IPANY for not coming to the Commission earlier, it opposed IPANY’s request to the Court of Appeals for a referral to this Commission.

18 In this regard, the BOC reliance on Global NAPs v. FCC, 291 F3d 832, is entirely misplaced. That case ruled appeals from a state commission order under Section 251/252 arbitrating an interconnection agreement can only be brought in a Federal District Court. The actions now before this Commission fall under §276 and §201, not §251/252. Section 276 includes a broad and mandatory preemption provision, as previously recognized by this Commission, and places the ultimate responsibility for implementing the Payphone and NST Orders on the Commission.

declaratory ruling, and request for pre-emption of the inconsistent state requirement, following issuance of such inconsistent state requirement, is the proper procedure. Indeed, that is the mechanism that has been followed by the Commission in addressing incorrect determinations by the North Carolina Utilities Commission and the Michigan Public Service Commission which had been issued before the Commission Wisconsin Order. On request for pre-emption, this Commission did in fact grant the petitions of those states, and remanded the matters back to the state commissions for corrective action consistent with the Commission Wisconsin Order. See North Carolina Payphone Association Petition for a Declaratory Ruling, CCB/CPB 99-27, March 5, 2002.

Finally, the BOC pre-occupation with the state procedures followed by IPANY -- procedures specified by this Commission -- are little more than diversionary tactics. Even if IPANY had not sought pre-emption from this Commission, the self-effectuating mandate of §276(c), by itself, renders the inconsistent rulings in New York void ab initio. This Commission has the responsibility, under §276, §201, and USTA II, to act on its own to set aside any state action which violates this Commission's Payphone and NST Orders. That includes specifying the remedies for violation of the Commission's orders.

The BOC claim that the two year statute of limitations for filing a complaint has expired is also wrong. IPANY has been challenging Verizon's non-compliance with this Commission's NST orders since 1997 in accordance with the

procedure specified by the Commission. It did not “sit back” and wait for others to challenge Verizon’s improper rates, but has done so itself.<sup>19</sup>

In this regard, the BOC reliance on Communications Vending Corp. v. FCC, 365 F3d 1064 (CA DC, 2004) is misplaced. In that case, certain IPPs were charged BUCL fees by various LECs, but took no action to challenge the rates until long after they were imposed, and not until after they were declared to be improper in litigation commenced by someone else. That is not what happened here. Verizon was required to have NST compliant rates in effect by April 15, 1997, and its imposition of non-compliant rates after that date was unlawful. This Commission directed that challenges to rates as non-compliant were to be brought to the states – not the Commission – and that is precisely what IPANY did in 1997 before the PSC. IPANY has continued, on an uninterrupted basis, for more than 12 years, to challenge those rates as unlawful, to seek enforcement of the NST rules, and to obtain refunds.

Thus, unlike what occurred in Communications Vending, IPANY did not fail to “take action”; did not fail to use “due diligence”; and did not await until after the law “became settled”, but immediately brought its challenges to the

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<sup>19</sup> Technically, the specific time to demand refunds – as part of an ongoing challenge to the validity of Verizon’s rates – does not arise until, as this Commission specified in the Refund Order, that a determination is made that the challenged rate is not NST-compliant, and until it is replaced by a NST-compliant rate. Only then can it be known if refunds are available under the Commission’s Orders. Those are specifically the claims IPANY has been making in the designated administrative proceedings since 1997. In New York, the replacement NST-compliant rate did not go into effect until 2006, and that is when the “discovery of injury” rule commenced to apply. But IPANY had long before that both challenged the rate itself and sought refunds.

validity of Verizon's rates in the forum specified for such challenges. It has vigorously prosecuted its claims for relief on a continuing basis since then.<sup>20</sup>

Nor has IPANY "waived" a claim for refunds. IPANY properly challenged Verizon's rates, beginning in 1997, before the PSC. While the proceeding was ongoing, IPANY urged the PSC, if it found that Verizon's pre-existing rates were not NST-compliant, to order refunds. Verizon argued to the trial court that IPANY's request for refunds was untimely, but the trial court rejected Verizon's argument (Decision of April 22, 2003, at pg. 8) and agreed with IPANY that it was entitled to refunds. The Appellate court demurred, based on an incorrect interpretation of this Commission's Refund Order.<sup>21</sup>

Contrary to the BOCs' assertion, IPANY's claim for refunds has never been based exclusively on the Refund Order. Throughout the PSC proceedings, and in the New York court review, IPANY emphasized that Verizon had failed to comply with all of the FCC's Payphone Orders, and the requirements

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<sup>20</sup> Even assuming, *arguendo*, that the IPANY complaint for refunds should have been brought to this Commission instead of the PSC, the pursuit of the relief (even if in the wrong venue) 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 IPANY Petition for Declaratory Ruling establishes IPANY's continuous "parallel pursuit" of this matter. As such, any running of the statute of limitations during this time period would be tolled. Id.

<sup>21</sup> In fact, the Appellate Division's determination that refunds were not available under the Refund Order is dicta, because the Appellate Division did not disturb the lower court's ruling that the PSC's approval of Verizon's pre-existing rates had to be set aside, and re-examined on remand as to whether those rates complied with the NST utilizing a forward-looking standard. Because the PSC never issued a ruling on whether the Refund Order required refunds, any discussion of that issue by the New York courts was actually dicta.

of §276; while it emphasized the Refund Order (and the RBOC Commitment Letters), IPANY never limited its claims exclusively to the Refund Order.

IPANY has endorsed, and cited as applicable to IPANY, alternate legal theories, including that refunds are required as reparations for the BOC violations of the Act, and that refunds are available as an exercise of the Commission's enforcement powers under Section 276 and the general provisions of the Communications Act.

Finally, the BOCs are incorrect in asserting that the New York six year statute of limitations, if applicable, would preclude relief. The fact IPANY was vigorously challenging Verizon's conduct and pursuing its remedies in the administrative proceedings – and had been doing so since 1997 -- puts that argument to rest. IPANY's challenges were brought within months of the improper conduct, not years. And whether Verizon's breach is viewed as one of overcharges under an unlawful tariff; as a breach of the RBOC contract with the FCC – as contained in the RBOC Commitment Letters – of which IPPs were third party beneficiaries; or for conduct “for which no limitation is specifically prescribed by law” (See CPLR §213), the New York statute of limitations would be six years.

**POINT D: The BOCs Are Required To Give Refunds For NST Overcharges Under Multiple Legal Theories**

**A. BOCs Are Liable For Refunds As Reparations For Violations Of The Act And Under This Commission's Authority To Enforce Its Own Orders**

The authority of this Commission to order refunds, in the form of reparations, or pursuant to the ability of this Commission to enforce its own orders, is extensively addressed in the Illinois Reply, and in several ex parte presentations previously submitted by APCC and others in this proceeding. IPANY has previously endorsed and adopted those legal arguments, and restates and includes them by reference herein.

**B. BOCs Are Liable For Refunds Under Their Contractual Commitment To This Commission, And Under This Commission's Refund Order**

Noticeably absent from the BOC Comments is any discussion of the hundreds of millions of dollars in dial around compensation they were allowed by this Commission to collect, in return for their commitment to give refunds to IPPs back to April 15, 1997.

The background of the RBOC refund promise confirms Verizon's legal, contractual, and ethical obligation to provide refunds of overcharges imposed upon Verizon's PSP competitors. In early 1997, the RBOC's (including Verizon) asserted the Payphone Orders, and the NST, did not apply to pre-existing state tariffs. The BOCs were forcefully disabused of that "misunderstanding" when the Common Carrier Bureau issued its Clarification of State Tariffing

Requirements Order on April 4, 1997. (Bureau Waiver Order, 12 FCC Rcd. 20997). That Order let the BOCs know, in no uncertain terms, that the NST requirements applied to pre-existing state tariffs.

The RBOC Coalition sent a letter to the Commission on April 10, 1997, which expressed surprise that the Payphone Orders applied to pre-existing state tariffs and stated the BOCs would, one way or another, assure that their state tariffs did in fact meet the New Services Test in a timely manner. To accomplish this, the BOCs would, in some states, be "gather[ing] the relevant cost information and will be prepared to certify that those tariffs satisfy the costing standards of the new services test". In other states, the RBOC's acknowledged "there may be a discrepancy between the existing state tariff rate and the new services test" and further acknowledging "as a result, new tariff rates may have to be filed". RBOC Coalition Letter, April 10, 1997, pg. 1.

Accordingly, the RBOCs (including Verizon) specifically asked the FCC to grant them an additional forty-five days "to file new intrastate tariffs, in those states and for those services where new tariffs were required". The commitment was made that "In those states and for those services where the tariff rates do not comply [the RBOCs will] file new tariff rates that will comply..." (emphasis added).

The RBOC Coalition continued:

"Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997". (emphasis added).

Critically, the BOCs put no time limit on this commitment, and expressly waived any claim they could avoid giving refunds under the Filed Tariff Doctrine.

That commitment to give refunds was reaffirmed by a second letter from the RBOC Coalition to the FCC on April 11, 1997. Together, those letters constituted a binding contractual obligation between Verizon and this Commission – of which IPPs were the intended third party beneficiaries – to give refunds from April 15, 1997 until such time as NST compliant rates were in effect.

The RBOC promise to make refunds was codified in the Refund Order issued on April 15, 1997.

The RBOCs did not offer to make refunds out of the goodness of their hearts, but rather for a very self-serving reason. The RBOCs desperately wanted to participate in the “dial around compensation program”, under which they would be entitled to receive payment (from long distance companies) of approximately \$45 per month for each of their own payphones. However, the Commission established pre-requisite for receiving those dial-around payments was that the RBOCs’ payphone tariffs, governing their payphone competitors’ means and costs for local network access and usage, had to first comply with the NST. Payphone Reconsideration Order, para. 131. Accordingly, by obtaining a waiver of the April 15, 1997, deadline, the RBOCs gained the privilege of immediately receiving millions of dollars of dial-around money, without being

forced to wait for many months (or years) until state commissions finally approved their payphone tariffs as NST compliant.

Now that Verizon has enjoyed the privilege of receiving substantial dial-around compensation since April of 1997, it seeks to wiggle out of its refund commitment. In one of the more inventive acts of boot-strapping ever witnessed, Verizon asserts that since it did not make the required tariff filing during the waiver period, even if it should have, it never "took advantage" of the waiver, and thus the refund obligation never applied. That argument is factually wrong and without merit.

The trial court in New York rejected that argument, and found Verizon did in fact take advantage of the waiver by waiting to file revisions to its intrastate tariff until May 19, 1997, to bring that tariff into what it claimed was compliance with the NST. A supplemental tariff filing was made on July 21, 1997, again, allegedly bringing all its pre-existing payphone tariffs into compliance with the NST.<sup>22</sup> But those filings changed only the rates for the "smart" lines used by Verizon's own payphones; the pre-existing (and non-compliant) rates for the "dumb" lines used exclusively by IPPs were not changed.

Neither Verizon's May 19, 1997, nor its July 21, 1997, tariff filings fulfilled Verizon's obligation to re-file state tariffs for all payphone line and ancillary services where the then existing rates did not meet the NST. What Verizon was required to do - but deliberately chose not to do - was to also re-file

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<sup>22</sup> Both of those filings indicated they were being made pursuant to the Refund Order and the Waiver Order.

rates for non-compliant Public Access Lines and usage services. Its failure to do so means that it never complied with what the Refund Order, and its own commitment required it to do: either have in effect tariffs that actually complied with the NST, or file new state tariffs which met those criteria. By claiming wrongly that its pre-existing state tariffs were compliant, and by not filing revised tariffs, Verizon never fulfilled its obligations under the Refund Order, and it remains liable for refunds until the state commission or this Commission properly approves rates which do in fact comply with the NST. See Matter of Bell Atlantic Delaware v. Frontier Communications, Common Carrier Bureau, September 24, 1999, 1999 WL 754402.<sup>23</sup>

Under Verizon's strained theory, an RBOC which complied with its obligations under federal law, properly evaluating its pre-existing tariff, determining the tariff did not meet the NST standards, and responsibly filing a replacement tariff within forty-five days, would be liable for refunds. In contrast, according to Verizon, a recalcitrant RBOC, fully recognizing that its pre-existing tariff did not meet the NST standard, but arrogantly refusing to file an appropriate tariff which met the required standards, would be immunized from making any refunds. Such an argument is totally without merit and should be forcefully rejected by this Commission.

The New York trial court rejected Verizon's assertion as "illogical":

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<sup>23</sup> Because of the PSC's reluctance to revisit this issue, and the fact the ultimate determination of whether a tariff is NST-compliant falls to this Commission, IPANY supports this Commission declaring IPPs may directly pursue a federal remedy before this Commission, with this Commission directly reviewing the validity of Verizon's pre-existing rates, and ordering remedies in the form of refunds.

“The interpretation urged by Verizon would have the result that, so long as Verizon properly identified those pre-existing rates which required modification in order to comply with the new services test and made such modification by May 19, 1997, purchasers would be entitled to refunds to the extent that the modified rates were lower than the pre-existing rates. However, in the event that Verizon did not properly identify those pre-existing rates which required modification – intentionally or unintentionally – no refunds would be due even if the PSC (or the Court) ultimately determined that the pre-existing rates failed to comply with the new services test and, therefore, **should have been modified by May 19, 1997.** Stated otherwise, Verizon would be rewarded for failing to properly identify those pre-existing rates which did not comply with federal law. This interpretation is illogical. Furthermore, the language pointed to by Verizon actually supports the interpretation adopted by this Court that refunds would be due at such time as new tariffs in compliance with the new services test actually took effect.” (emphasis in original).

Decision and Order (Denying Rehearing), IPANY v. PSC and Verizon, April 22, 2003, at Mimeo pg. 7.

The trial court had it right. The purpose of the April 15, 1997, Refund Order was not to reward RBOCs, like Verizon, which ignored their obligations under federal law and refused to file replacement tariffs which met the NST standards. To the contrary, the purpose of the Refund Order was to assure that RBOCs would be penalized if they failed to replace non-compliant tariffs, and to assure IPPs would not be harmed or prejudiced by any delay in the filing of necessary replacement tariffs.

Verizon was fully aware that its pre-existing tariffs in New York, which had been in place since 1990 or 1991, did not comply with the New Services Test. Verizon deliberately chose not to file replacement tariffs, because that would have resulted in Verizon receiving lower revenues, as is evident from the 2006 reduction to NST-compliant rates. It would also have given Verizon's IPP competitors a better opportunity to compete—a result not favored by Verizon. At the same time, Verizon was not reticent about immediately collecting the vast amount of dial around compensation to which it was not entitled. To hold that Verizon's flagrant disregard for this Commission's requirements and the rights of the IPPs now somehow protects Verizon from having to honor its commitment to make refunds, would wholly undercut the Payphone Orders, including the Refund Order; the rights of IPP competitors; the public interest; and the fundamental Congressional purpose underlying Section 276 of the Act.

Verizon is also incorrect in asserting that the "limited" waiver granted to the RBOCs in the Refund Order, which deferred the time to have in place intrastate tariffs in compliance with the NST until May 19, 1997, limits Verizon's refund liabilities solely to the 45 day extension period granted to the RBOCs by this Commission.

The language in the Refund Order (at para. 2) stating that the "waiver...is for a limited duration" had nothing to do with limiting the period for which Verizon would be liable for refunds regardless of the duration of its non-compliance. Instead, the "limited duration" referred only to the brief extension, until May 19, 1997, to file correct tariffs to be in compliance with the Payphone Orders and in order to be eligible to receive dial around compensation as of April 15, 1997. After that date Verizon would not be eligible to collect dial around compensation unless it was in actual compliance with the NST.

The Refund Order cannot, under any logical construction, be read to limit refunds for only 45 days. It expressly requires refunds to be made "once the new intrastate tariffs are effective, where NST rates, "when effective are lower than existing rates." Refund Order, para. 20. (emphasis added). Again, there was no time limitation expressed either in the RBOC's commitment letters nor in the Refund Order accepting the RBOC commitment.

Consistent with this interpretation, it was virtually certain that new tariffs to be filed in the states, which would be subject to proceedings in which

extensive cost data would have to be produced and examined, could not actually receive approvals and be effective, in 45 days.

At no time did this Commission declare that compliance with the NST requirements was limited to 45 days. To the contrary, it has mandated continued, ongoing compliance, to be enforced by the Commission or the states. See Bell-Atlantic Delaware, supra.

To hold that Verizon's maximum possible liability was for forty-five days, which is only the blink of an eye in regulatory time, regardless of its deliberate and continuing violation of federal law, is absurd. That limitation would totally undercut the strong state and federal public policy of holding common carriers to their legal obligations - to say nothing of undercutting the rights of the IPPs to receive reparations by virtue of Verizon's continued violation of federal law, and its commitment to make good on timely compliance with that law.

Again, the New York trial court rejected Verizon's claim:

"Verizon argues that, even if it is assumed that the Order was intended to provide for refunds of rates that were not changed during the waiver period, the relief provided by the April 15, 1997 Order was only applicable for a very limited period of time. For example, the Order provides that it was "granting a limited waiver of brief duration" and that "the states

must act on the tariffs filed pursuant to this Order within a reasonable period of time". However, this language merely applies to the limited time that Verizon was given to file revised tariffs to comply with the new services test and to the time given to the states to act on the tariffs filed, not to the period for which refunds might be given. In addition, petitioners should not be penalized by failure of the state to act in a timely manner if, in fact, there was an undue delay in the review process."

Decision and Order (Denying Rehearing), IPANY v. PSC and Verizon, April 22, 2003, at Mimeo pp. 7-8.

IPANY is aware of two states, South Carolina and Tennessee, where the fact pattern is almost identical to that in New York. In both cases, the RBOC (Bell South) was ordered to pay refunds, back to April 15, 1997, even though Bell South did not file new payphone access line tariffs to replace its pre-existing tariffs. As here, Bell South argued that its pre-existing rates fully complied with the New Services Test, and therefore did not have to be changed. Bell South also argued, as does Verizon now, that it should not be liable for refunds because it never filed replacement tariffs for its "dumb" payphone lines. The South Carolina PSC rejected Bell South's claim, and when it finally determined that the pre-existing rates did not comply with the NST, it ordered refunds back to April 15,

1997, with interest. See Public Service Commission of South Carolina Docket 97-124-C - Order Number 1995-285, April 19, 1999, "Order Setting Rates for Payphone Lines and Associated Features".<sup>24</sup>

In Tennessee, Bell South filed new tariffs for usage services, but did not change the pre-existing Public Access Line flat rates. When those pre-existing rates were subsequently found, on February 1, 2001, not to comply with the New Services Test, refunds were ordered back to April 15, 1997, with interest. The Tennessee Commission ordered the refunds because it was necessary to "complete the obvious intent of the federal scheme to return the refund to the class that ultimately has had to pay it" (citing an earlier Tennessee case and holding the same principle as applied here). Notably, Bell South appealed the PSC Order solely with respect to the payment of interest (which the Court subsequently ordered it to pay) and not regarding the fundamental refund ruling. See Tennessee Regulatory Authority, Interim Order, Docket 97-00409, February 1, 2001.<sup>25</sup>

Those holdings were correct as a matter of federal law, and should be uniformly enforced by this Commission with respect to the other state jurisdictions that failed to provide refunds, with interest, for overcharges based upon non-compliant BOC tariffs back to April 15, 1997.

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<sup>24</sup> The determination that Bell South was liable for refunds was confirmed in SCPSC Order Number 1999-497, July 19, 1999, "Order Ruling on Request for Reconsideration and Clarification", and this ruling was not challenged by the RBOC to the state or federal courts.

<sup>25</sup> The Order of the Tennessee Regulatory Authority was upheld by the Court of Appeals of Tennessee at Nashville in Bell South v. Tenn. Regulatory Auth., 98 SW 3d 666, July 16, 2002.

**POINT E: The Bureau Wisconsin Order And The Commission Wisconsin Order Did Not Constitute Retroactive Ratemaking**

The BOCs are simply incorrect in alleging that the Bureau Wisconsin Order and the Commission Wisconsin Order set forth new principles of law, and accordingly could not be applied as of April 15, 1997. The reason, quite simply, is that "the question of retroactivity does not arise in an FCC ruling that is merely interpretative". Wisconsin Bell v. Ble, 216 F. Supp. 2d 873 at 878, citing Manhattan General Equipment Company v. Commissioner, 297 US 129 at 135, 56 S. Ct. 397. As indicated below, this Commission has already rejected the BOC claim that the Wisconsin Orders are impermissibly retroactive. Wisconsin Commission Order, FN '73.

Particularly relevant is the quotation from Manhattan Gen'l Equip. at 297 US 135 explaining that agency rulings interpreting a statute "are no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand".

The criteria defining an interpretive order (which would not be deemed impermissibly retroactive) are cited in Farmers Telephone Company v. FCC, 184 F.3d 1241 (CA-10, 1999). They include whether the FCC Order "overruled or disavowed any controlling precedent" or "altered petitioners' existing rights or obligations".

The two Wisconsin Orders were not "new law", but merely confirmed longstanding principles. Verizon, in furtherance of its own agenda,

chose to close its eyes and adopt a self-serving interpretation of the NST Orders. But that was done at Verizon's own risk. The holding in Farmers Telephone Company, as to any alleged "burden" which would be imposed on carriers that relied upon their own erroneous interpretation of a rule, is highly instructive:

"However, this burden arises not from their reliance on any previous FCC policies, but from their reliance on NBCA's faulty interpretation of 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 a court or agency decision) that their interpretation was wrong".

Farmers Telephone Company, Inc. v. Federal Communications Commission, 184 F.3d 1241 at 1252.

Similarly, nothing in either of the Wisconsin Orders "overruled or disavowed any controlling precedent" which could have been relied upon by Verizon. Nor did they negatively alter Verizon's "existing rights or obligations" under the regulations which had been in effect since April 15, 1997. The trial court in New York noted that the NST was fully understood by Verizon by December 31, 1996, "to require that rates recover no more than the direct cost of service plus a just and reasonable portion of the carrier's overhead costs...and that costs were required to be calculated by use of 'an appropriate forward-looking, economic cost methodology'..." Initial Supreme Court Decision, July 31, 2002, pp. 18-19. Neither of the Wisconsin Orders changed those obligations.<sup>26</sup>

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<sup>26</sup> Even if the two Wisconsin Orders had "upset Verizon's expectations" (which in reality they did not), they would still not be deemed impermissibly retroactive so long as they were reasonable, i.e. not arbitrary or capricious. Direct TV v. FCC, 110 F.3d 816 at 826 citing Hell Atlantic v. FCC, 79 F.3d 1195 at 1207 (DC Cir. 1996). Since the DC Circuit has upheld the

There are two types of rules: "Legislative rules and Interpretative rules". NYC Employees Ret. Sys. v. SEC, 45 F.3d 7 at 12 (CA-2, 1995). Interpretative rules "do not create rights, but merely " 'clarify an existing statute or regulation' ". Ibid. "An agency's conclusion that its order is interpretative 'in itself is entitled to a significant degree of credence' ". Viacom v. FCC, 672 F.2d 1034 at 1042 (CA-2, 1982). Here, the Commission itself has rejected the BOC claims that the Commission Wisconsin Order was a legislative rule. Commission Wisconsin Order, FN 73, pg. 10. Accordingly, the Bureau Wisconsin Order, as modified by the Commission Wisconsin Order, is an interpretative rule, and not impermissibly retroactive.

This Commission has stated a declaratory ruling – the relief sought by IPANY – is "a form of adjudication" and that "generally, adjudicatory decisions are applied retroactively". Qwest Services v. FCC, 509 F.3d 531 (DC Cir., 2007) at 535.

The Qwest Services Court agreed:

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

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Commission's NST requirements (New England Public Comm. Connell v. FCC, 334 F.3d 69, D.C. Cir., 2003) . , they cannot be said to be unreasonable, arbitrary or capricious.

"Retroactivity is the norm in agency adjudications no less than in judicial adjudications...For our part we have drawn a distinction between agency decisions that "substitut[e]...new law for old law that was reasonably clear" and those which are merely "new applications of existing law, clarifications, and additions". The latter carry a presumption of retroactivity that we depart from only when to do otherwise would lead to "manifest injustice". [citing AT&T v. FCC, 454 F3d 329, at 332] Qwest v. FCC, 509 F3d 531 at 539.

The Court continued:

First, a mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct. Clarifications, which obviously fall on the no-manifest-injustice side of the line drawn in the above passage from *AT&T*, must presuppose a *lack* of antecedent clarity. They stand in contrast to rulings that upset settled expectations - expectations on which a party might reasonably place reliance..." Clarifying the law and applying that

clarification to past behavior are routine functions of adjudication.” 509 F.3d 531 at 540.

But for reliance to establish manifest injustice, it must be reasonable – reasonably used on settled law contrary to the rule established in the adjudication. The mere possibility that a party may have relied on its own (rather convenient) assumption that unclear law would ultimately be resolved in its favor is insufficient to defeat the presumption of retroactivity when that law is finally clarified. 509 F.3d 531 at 540.

Here, the proper classification of services provided by various “enhanced” prepaid calling cards has been long the subject of active debate. In particular, the Commission has been scrutinizing IP-transport and menu-driven cards at least since AT&T’s November 2004 letter to the Commission seeking a declaratory ruling classifying those prepaid calling card variants. As we have said in another context, once the issue was “expressly drawn into question...we do not see how the Commission could possibly find that [those

objecting to retroactive application] reasonably relied upon [their view of the law].” *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996). 509 F3d 531 at 540.<sup>27</sup>

In the present case, there is no “manifest injustice” in requiring Verizon to comply with clear Commission precedents on what constitutes a forward looking rate, precedents going back to the 1980’s in the Enhanced Service and ONA proceedings. Verizon’s refusal to follow those precedents – in the hope its strained (and “rather convenient”) interpretation of the rules might somehow be adopted – was at Verizon’s sole risk.

Moreover, Verizon’s coffers have been swelled by hundreds of millions of dollars in dial around compensation – monies allowed to Verizon only as a quid pro quo for actual compliance with this Commission’s NST orders and the promise to make refunds. The only “manifest injustice” which would occur would be to allow Verizon to take the benefits of the agreement – receiving dial around compensation – while allowing it to renege on its commitment to implement NST-compliant rates and provide refunds of overcharges.

Finally, if there were ever a doubt that ordering refunds would not constitute improper retroactive ratemaking, such doubt has been resolved by two Courts of Appeals rulings which have expressly held such NST refunds are not

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<sup>27</sup> Interestingly, the BOC Comments (p. 30) rely on Qwest v. FCC as precluding retroactivity. However, those comments fails to note the Court did in fact rule the FCC’s actions were not impermissibly retroactive.

barred by any retroactive ratemaking doctrine: Davel Communications v. Qwest, 460 F.3d 1075 (CA-9) and TON Services v. Qwest, 493 F.3d 1225 (CA-10).

**POINT F: This Commission Must Pre-Empt The New York State "Requirements" Which Directly Conflict With Federal Law And This Commission's Own Rulings**

As described above, the current status of NST proceedings in New York is that the PSC's 2001 approval of Verizon's pre-existing rates has been set aside by the courts as arbitrary and capricious. The PSC is under a mandate to re-examine Verizon's original tariffs, and determine whether they complied with the applicable NST requirements that rates be forward-looking and based on direct costs.<sup>28</sup>

Since 2006, the PSC has refused to comply with the court mandate on remand, asserting there is no reason to re-examine the pre-existing rates unless this Commission confirms that refunds are potentially available.<sup>29</sup>

Accordingly, the New York State "requirements" are in direct conflict with federal law, as established by this Commission, in at least two respects:

1. The New York state courts have ruled that, in determining whether the pre-existing rates were

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<sup>28</sup> However, in determining whether those pre-existing rates comply with NST rules, the New York courts have said the PSC should not apply this Commission's Wisconsin Order.

<sup>29</sup> Cases 03-C-0428 and 03-C-0519, Order Denying Rehearing and Addressing Comments, May 24, 2007, at pg. 24: "Pending a Federal Communications Commission decision regarding the petition of the Independent Payphone Association of New York, Inc. for pre-emption...this Commission will not investigate whether those prior rates complied with the New Services Test before they were superseded".

NST-compliant, the PSC cannot and should not apply the directives of this Commission in the Bureau Wisconsin Order or the Commission Wisconsin Order.

2. The New York state courts have held that, even if Verizon's rates have never been in compliance with this Commission's Payphone Orders; even if Verizon has been unjustly enriched by hundreds of millions of dollars in dial around compensation; even if Verizon has always known that its pre-existing rates did not comply with the NST standards; even if Verizon has never filed NST compliant rates; and even if Verizon has willfully violated its contractual obligation to this Commission and to IPPs to give refunds, Verizon should be completely excused from the obligation to make refunds.

This Commission has already determined that the BOCs were required to have NST compliant rates in effect by April 15, 1997. First Payphone Order; Payphone Reconsideration Order. It has also specified the Wisconsin Orders must be complied with by the state commissions, and that a state commission order issued prior to the Wisconsin Orders, which was not fully

compliant with the Wisconsin Orders, would be pre-empted and set aside. North Carolina Payphone Association Petition for a Declaratory Ruling, CCB/CPD 99-27, March 5, 2002.

Because the New York state commission and courts refuse to follow the Commission's dictates, and comply with the §276 requirements and the determinations in the Wisconsin Orders, the New York rulings must be preempted, as were those of the North Carolina Utilities Commission and the Michigan Public Service Commission, and the PSC must be directed to follow the Wisconsin Orders.

With respect to the New York State determination that refunds are not available as a matter of state or federal law, that, too, is in direct conflict with the requirements of this Commission; is inconsistent with uniform principles of federal law intended by Congress to be observed on a nationwide basis; is contrary to the RBOCs own commitments and waivers; and, accordingly, cannot be allowed to stand, both because the New York ruling violates federal policy, and because it is pre-empted by Section 276( c ) and the First Payphone Order.

#### IV. CONCLUSION

At stake in this proceeding is nothing less than the integrity of the Commission's regulatory process. This Commission has in the past allowed parties to take certain actions, or has granted certain authority, conditioned upon subsequent fulfillment of commitments made. What Verizon has done is to make a firm commitment to this Commission in return for the right to receive many

millions of dollars in dial around compensation, which it has gleefully pocketed. Now that Verizon has its money, it wants out from under its commitment.

If this Commission declines to enforce the commitments it has received from entities subject to its jurisdiction, its ability to regulate in the public interest will be irreparably undermined.

The issue pending before this Commission is whether Verizon will be rewarded for willfully flaunting its obligations under the Payphone Orders to file NST compliant rates in the State of New York. Verizon made an agreement with this Commission in 1997, that in return for its immediate ability to receive hundreds of millions of dollars in dial-around compensation, Verizon would file NST compliant rates in the various states, and if those NST compliant rates were ultimately found to be lower than the rates in effect on and after April 15, 1997, refunds would be made back to that date. Verizon did not hesitate to grab the dial-around compensation monies, but when it came time for Verizon to honor its side of the bargain – to file NST compliant rates and give refunds in order to make payphone providers whole – it has contemptuously reneged.

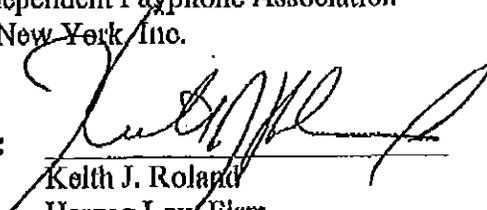
For the reasons set forth herein, and in all previous submissions in this docket (including but not limited to the Illinois Reply and the Florida Letter), the BOC Comments are without merit, and the IPANY Petition for an Order of

Pre-emption and Declaratory Ruling should be expeditiously granted.

Respectfully submitted,

Independent Payphone Association  
of New York, Inc.

By:



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Albany, New York

A5691-524 April 14

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April 10, 1997

Ex Parte Filing

Mary Beth Richards  
Deputy Bureau Chief  
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Federal Communications Commission  
1919 M Street, N.W., Room 500  
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In re Implementation of the Pay Telephone  
Reclassification and Compensation Provisions  
of the Telecommunications Act of 1996,  
CC Docket No. 96-128

Dear Mary Beth:

I am writing on behalf of the RBOC Payphone Coalition to request a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions, as set forth in the Commission's Orders in the above-captioned docket. I am also authorized to state that Ameritech joins in this request.

As we discussed yesterday, and as I explained in my Letter of April 3, 1997, none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's "new services" test. It was our good faith belief that the "new services" test applied only to new services tariffed at the federal level. It was not until the Bureau issued its "Clarification of State Tariffing Requirements" as part of its Order of April 4, 1997, that we learned otherwise.

In most States, ensuring that previously tariffed payphone services meet the "new services" test, although an onerous process, should not be too problematic. We are gathering the relevant cost information and will be prepared to certify that those tariffs satisfy the costing standards of the "new services" test. In some States, however, there may be a discrepancy between the existing state tariff rate and the "new services" test; as a result, new tariff rates may have to be filed. For example, it appears that, in a few States, the existing state tariff rate for the COCOT line used by independent PSPs may be

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April 10, 1997  
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too low to meet the "new services" test and will therefore have to be raised.

In order to allow deregulation to move forward and ensure that LEC PSPs are able to compete on a level playing field starting, as planned, on April 15, 1997, we propose that the limited waiver issued by the Commission on April 4 for interstate tariffs apply to intrastate payphone tariffs as well. Specifically, we request that the Commission grant us 45 days from the April 4th Order to file new intrastate tariffs, in those States and for those services where new tariffs are required. Each LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised.

Unlike with federal tariffs, there is of course no guarantee that the States will act within 15 days on these new tariff filings, particularly where rates are being increased pursuant to federal guidelines. Provided, however, that we undertake and follow-through on our commitment to ensure that existing tariff rates comply with the "new services" test and, in those States and for those services where the tariff rates do not comply, to file new tariff rates that will comply, we believe that we should be eligible for per call compensation starting on April 15th. Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance. Moreover, we will not seek additional reimbursement to the extent that tariff rates are raised as a result of applying the "new services" test.)

The LECs thus ask the Commission to waive the requirement that effective intrastate payphone tariffs meet the "new services test," subject to three conditions: (1) LECs must file a written ex parte with the Commission by April 15, 1997, in which they attempt to identify any potentially non-compliant state tariff rates, (2) where a LEC's state tariff rate does not comply with the "new services" test, the LEC must file a new state tariff rate that does comply within 45 days of the April 4, 1997 Order, and (3) in the event a LEC files a new tariff rate to comply with the "new services" test pursuant to this waiver, and the new tariff rate is lower than the previous tariff rate as a result of applying the "new services" test, the LEC will undertake

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

Mary Beth Richards  
April 10, 1997  
Page 3

(consistent with state regulations) to provide a credit or other compensation to purchasers back to April 15, 1997.

The requested waiver is appropriate both because special circumstances warrant a deviation from the general rule and because the waiver will serve the public interest. Because the federal "new services" test has not previously been applied to existing state services -- and because the LECs did not understand the Commission to be requiring such an application of the test until the Commission issued its clarification order just a few days ago -- special circumstances exist to grant a limited waiver of brief duration to address this responsibility. In addition, granting the waiver in this limited circumstance will not undermine, and is consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated from payphones. And competing PSPs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above -- which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up -- will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

Accordingly, we request a limited waiver, as outlined above, of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions.

We appreciate your urgent consideration of this matter. Copies of this letter have been served by hand on the APCC, AT&T, MCI and Sprint.

Yours sincerely,



Michael K. Kellogg

cc: Dan Abeyta	Christopher Heimann	Brent Olson
Thomas Boasberg	Radhika Karmarkar	Michael Pryor
Craig Brown	Regina Keeney	James Schlichting
Michelle Carey	Linda Kinney	Blaise Scinto
Michael Carowitz	Carol Matthey	Anne Stevens
James Casserly	A. Richard Metzger	Richard Welch
James Coltharp	John B. Muleta	Christopher Wright
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April 11, 1997

Ex Parte Filing

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

Dear Mary Beth:

This letter will clarify the request I made yesterday on behalf of the RBOCs for a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions.

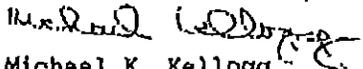
To the best of my knowledge, all the RBOCs have (or will by April 15, 1997, have) effective state tariffs for all the basic payphone lines and unbundled features and functions required by the Commission's order. We are not seeking a waiver of that requirement. We seek a waiver only of the requirement that those intrastate tariffs satisfy the Commission's "new services" test. The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the "new services" test or to file new or revised tariffs that do satisfy those standards. Furthermore, as noted, where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

Mary Beth Richards  
April 11, 1997  
Page 2

I hope this clarification is helpful. Copies of this letter have been served by hand on the APCC, AT&T, MCI and Sprint.

Yours sincerely,

  
Michael K. Kellogg

cc: Dan Abeyta  
Thomas Bossberg  
Craig Brown  
Michelle Carey  
Michael Carowitz  
James Casserly  
James Coltharp  
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Michael Pryor  
James Schlichting  
Blaise Scinto  
Anne Stevens  
Richard Welch  
Christopher Wright

**PROPOSED FCC RELIEF IN RESPONSE TO  
INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.  
PETITION FOR A DECLARATORY RULING**

1. The FCC should declare that the various Payphone Orders require Verizon New York to give refunds to Independent Payphone Providers (IPPs) in New York, back to April, 1997, for line and usage charges which exceeded New Services Test – compliant rates. Such refunds should be made with interest of 11.25%.
2. The decision of the Appellate Division of the New York State Supreme Court, which declared the FCC did not intend to authorize refunds, and that refunds were not available to IPPs, should be pre-empted and set aside as conflicting with orders of the FCC.
3. The amount of the refunds should be the difference between the pre-existing line and usage charges in effect on April 15, 1997, and the lower line and usage rates approved as NST-compliant by the New York State Public Service Commission, which became effective on August 30, 2006.
4. If Verizon disputes using the NST-compliant rates which went into effect in August, 2006 as the basis for calculating the refunds, it should be authorized to file an objection with the FCC within thirty days of the release of the FCC's Order, and the FCC will then determine the amount of refunds (together with interest) which should be made.

**INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.**  
**PETITION FOR PRE-EMPTION AND DECLARATORY RULING**  
**CC DOCKET 96-128**

**TIMELINE OF NEW YORK STATE PROCEEDING**

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

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

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

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

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

April 12, 1997 – IPANY asks PSC to direct Verizon to provide the cost studies supporting its payphone rates. PSC declines to do so.

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

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

July 21, 1997 – Verizon files additional tariff revisions, pursuant to "Refund Order", allegedly to bring payphone rates in conformance with NST.

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

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

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

December 2, 1999 - IPANY files supplemental complaint supported by an expert's affidavit and cost study, asking PSC to resolve issues pending since April 1, 1997, in light of FCC's NST Orders, i.e., the validity of Verizon's payphone rates. Complaint also asks for refunds back to April, 1997, once proper NST rates are established. This complaint is consolidated with original proceeding investigating Verizon's payphone rates.

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

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

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

October 12, 2000 – PSC issues Order holding Bureau Wisconsin Order does not apply in New York, and finding Verizon's pre-existing payphone rates complied with the NST

because they “recover direct embedded cost plus a reasonable contribution toward common costs”. (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

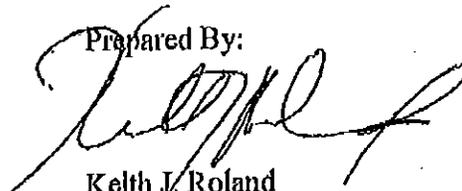
December 29, 2004 – IPANY files Petition for Order of Pre-Emption and Declaratory Ruling at FCC In CC Docket 96-128.

June 30, 2006 – After reviewing Verizon cost studies submitted in June, 2003, PSC issues Order in Second IPP Complaint Resolving Complaints and Inviting Comments Regarding Public Access Line Rates, which applies PSC's interpretation of NST rules, and directs Verizon to file significantly lower payphone line and usage rates. Order also seeks comments on how original rates from 1997 should be treated i.e., should there be a proceeding to determine whether those original rates complied with the NST. (Although the new rates approved in 2006 as NST compliant were significantly lower than the original rates which remained unchanged until 2006, the PSC had not conducted the remand required by the Supreme Court to determine if the original rates met the NST criteria).

May 24, 2007 – PSC issues Order Denying Rehearing and Addressing Comments in Second IPP Complaint, which generally upholds its earlier rate determination (requiring significantly lower IPP line and usage rates) but also refuses to conduct the Court-order

remand to review the 1997 rates until the FCC determines whether refunds are required under the FCC's Orders.

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January 21, 2010