Ann D. Berkowitz
Director
Federal Regulatory Affairs

1300 I Street, NW
Suite 400 West
Washington, DC 20005
(202) 515-2539
(202) 336-7922 (fax)
aberkowitz@verizon.com

September 11, 2012

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128**

Dear Ms. Dortch:

Today, Aaron Panner of Kellogg Huber Hansen Todd, Evans & Figel, Mark Montano of Verizon, and I met with Priscilla Delgado Argeris of Commissioner Rosenworcel's office to discuss the petitions for declaratory ruling and preemption filed in the above captioned docket. The attached documents reflect the substance of our discussions. Should you have any questions concerning this matter, please contact me.

Sincerely,

Ann D Berkowitz

Attachments

cc: Priscilla Delgado Argeris

The Commission Should Deny the Petitions

- Independent payphone providers have brought petitions challenging state commission decisions denying refunds of amounts paid under valid state tariffs.

- The Commission has determined that states are responsible for regulating basic payphone line rates in accordance with federal pricing standards, indicating that the availability of refunds depends on state law, including state procedural rules.

- Whether a particular state determination is correct under the particular facts of the case is not an appropriate topic for a declaratory ruling.

- Contrary to the independent payphone providers, LECs never promised to provide refunds voluntarily; LECs' sole commitment was to make specific filings – that is, those made pursuant to a Bureau waiver order – effective 34 days prior to their actual filing.

- These petitions constitute improper collateral challenges to state commission determinations and, in most cases, state court judgments. They are barred by *res judicata*.

Regulatory Background – the 1996 Payphone Orders

- In the *First Report and Order*, the Commission held that "tariffs for payphone services must be filed with the Commission as part of the LECs' access services to ensure that the services are reasonably priced and do not include subsidies." 11 FCC Rcd at 20615, ¶ 147.

- In the *Order on Reconsideration*, however, the Commission – over independent payphone providers' objections – eliminated the requirement that LECs file federal tariffs for "basic payphone line[s]." 11 FCC Rcd at 21308, ¶ 163.

- Instead, the Commission held that it would "*rely on the states* to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Id.* (emphasis added).

- The Commission did not require all BOCs to file new tariffs for basic payphone line services. Instead, the Commission noted that "[w]here LECs have already filed intrastate tariffs for these services, states may," after considering federal requirements, "conclude: (1) that existing tariffs are consistent with the requirements of the [*Payphone Orders*]; and (2) that in such case no further filings are required." *Order on Reconsideration*, 11 FCC Rcd at 21308, ¶ 163.

Procedural Background – Payphone Refund Petitions

- In several states, payphone providers have challenged LECs' existing payphone line rates as inconsistent with pricing rules adopted in the *Payphone Orders* and subsequently clarified in the *Wisconsin Order*.

- In some states, LECs have filed new rates that have been approved by state commissions; in other states, state commissions have ordered new rates.

- Payphone providers – in a variety of proceedings, including some initiated years after the fact – have sought refunds of amounts paid under prior tariffs, dating back to April 15, 1997.

- Some state commissions have ordered refunds. While LECs have sought judicial review of those refund determinations, LECs have not asked the Commission to review any state commission decisions ordering refunds.

- Some state commissions have denied refunds. Independent payphone providers have generally sought judicial review in state court. In several cases, after the state courts had adjudicated and rejected their claims, payphone providers have filed petitions at the Commission seeking to mount a collateral attack on the state determinations.

The Petitions Are Contrary to the Commission's Allocation to the States of Responsibility for Administration of Rules Governing Basic Payphone Line Rates

- In determining that state tariffs would continue to govern basic payphone line rates, the Commission made clear that state procedures and remedies would apply.

- The Commission will not take over that state commission role unless state commissions are "unable" to carry it out. *Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 16.

- It would have been evident to the Commission that disputes about state tariffs' compliance with federal requirements might arise, either immediately or at a later date. By "rely[ing] on the states," the Commission ensured that any proceedings for enforcement of these requirements would take place before state commissions with judicial review as provided under state statute.

- Nothing in the *Payphone Orders* supports any suggestion that the Commission intended to require automatic refunds (or equivalent relief) in the event that a state eventually determined that a BOC's payphone line rates should be reduced in light of the New Services Test.

The Facts of Specific Cases Are Not an Appropriate Topic for a Declaratory Ruling

- Each of the state commission decisions at issue is largely based on the specific procedural posture of individual cases.

- This Commission is well aware that the procedural choices of individual litigants may have a significant effect on the relief available. *See*, *e.g.*, *Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004).

- Whether a state commission applied the law correctly to the facts of a particular case is a question for the reviewing court, not for the FCC.

LECs Never Agreed to Voluntary Refunds

- To qualify for per-call compensation in 1997, LECs had to certify that existing rates were compliant with FCC pricing rules or file new, compliant rates.

- When uncertainty over the scope of requirements delayed filing of certain rates, LECs sought an extension until May 19, 1997, promising to hold payphone providers harmless by giving those specific filings retroactive effect to April 15, 1997.

- The LECs honored that commitment.

- The argument that LECs made a blanket commitment to waive all procedural objections to subsequent refund claims is absurd.

Where States Have Rendered Final Judgments, *Res Judicata* Bars Collateral Challenge

- "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979)

- All the requirements for estoppel are met here: same parties, same claim, state tribunal with jurisdiction, and final judgment.

- Commission cannot, acting in an adjudicatory capacity, disregard judgment of state tribunal. *Town of Deerfield v. FCC*, 992 F.2d at 420 (2d Cir. 1993); *Wabash Valley Power Ass'n, Inc. v. Rural Electrification Admin.*, 903 F.2d 445 (7th Cir. 1990).

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

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-128
	)	

NO FEDERAL RULE PREEMPTS STATE PROCEDURAL RULES GOVERNING THE AVAILABILITY OF REFUNDS FOR STATE PAYPHONE LINE RATES

AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

March 23, 2009

TABLE OF CONTENTS

I. BACKGROUND 4

A. Independent Payphones 4

B. Payphone Deregulation – Section 276..5

C. The First Payphone Orders 6

D. The Waiver Orders..8

E. State Proceedings..10

F. The *Wisconsin Bureau Order* 14

G. The *Wisconsin Order* 16

H. Further State Proceedings 18

II. DISCUSSION..24

A. In Determining That State Tariffs Would Continue To Govern Basic Payphone Line Rates, the Commission Made Clear That State Procedures and Remedies Would Apply 24

B. The Commission Cannot Interpret Section 276(a) To Require Retroactive Refunds 27

1. *Payphone Providers Have Filed No Claim Against AT&T or Verizon That Would Allow the Commission To Adjudicate Liability Under Section 276* 28

2. *A Legal Ruling Purporting To Require Refunds Would Be Impermissibly Retroactive* 30

C. The Claim That RBOCs Voluntarily Committed To Make Refunds, or That the Common Carrier Bureau Ordered Refunds, Is Wrong 32

D. Most Payphone Providers' Claims Are Barred by Res Judicata............................36

E. A Refunds Requirement Would Conflict With Neutral State Procedural Rules That the Commission Has Incorporated Into Federal Law..........................42

F. The Commission Cannot Retroactively Preempt State Commission Proceedings Merely Because State Commissions Failed To Order Refunds 51

NO FEDERAL RULE PREEMPTS STATE PROCEDURAL RULES GOVERNING THE AVAILABILITY OF REFUNDS FOR STATE PAYPHONE LINE RATES

Before 1996, Bell Operating Companies ("BOCs") offered payphone service subject to broad regulatory restrictions that placed them at a disadvantage compared to independent payphone providers ("IPPs"). In an effort to level the playing field, Congress adopted Section 276 of the Communications Act, which freed BOCs to compete, eliminated existing subsidies, and protected IPPs from unfair discrimination. As part of that deregulatory initiative, the Commission required BOCs to offer local exchange services used by payphone providers on a non-discriminatory basis, at cost-based rates consistent with the "new services test" pricing standard – a standard that requires that rates for new services be based on direct costs and a reasonable amount of overhead.

In the case of basic intra-state payphone lines, the Commission – after initially ruling that BOCs would have to file federal tariffs with the Commission – determined that BOCs should maintain those tariffs at the state level. The Commission thus decided to "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276."[1] Only in cases where states were "unable to review" the state tariffs would the Commission more broadly preempt state authority.[2]

BOCs were not required, in all cases, to file new state tariffs. Across the country, BOCs had had non-discriminatory, cost-based payphone line tariffs in place for years. Recognizing this, the Commission made clear that *existing* state tariffs could fully comply with the requirements of its orders. "Where LECs have already filed intrastate tariffs for these services,

---

[1] Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233, 21308, ¶ 163 (1996) ("*Order on Reconsideration*").

[2] *See id.*

states may, after considering the requirements of this order, the [*First Payphone Order*][3], and Section 276, conclude: 1) that *existing tariffs* are *consistent* with the requirements of the [*First Payphone Order*] as revised herein; and 2) that in such case *no further filings are required*."[4]

AT&T and Verizon did exactly what they were supposed to do under the Commission's orders. In each state, the companies either filed new state tariffs or submitted cost data to state commissions to demonstrate that existing tariffs complied with the requirements of Section 276. In some states, IPPs challenged BOCs' tariffs; in other states they never did so, failed to pursue challenges that had been filed, or filed challenges years after the fact. As part of those challenges, in some cases where state commissions required rate reductions going forward, IPPs sought refunds of amounts charged under existing state tariffs. In some states – depending on the specifics of the procedural posture and the timing and nature of IPPs' challenges – state commissions did award refunds; where BOCs were required to pay refunds, they did so. But in other states, state commissions considered and rejected IPPs' refunds claims, including their arguments that such refunds were required as a matter of federal law. IPPs pursued those federal law arguments in state court, challenging state commissions' refusal to provide refunds. Their arguments that federal law requires refunds were broadly rejected.

Having lost the refunds issue after fully and fairly litigating their claims in the state forum with authority over the tariffs at issue, IPPs now seek to revive their refund claims with petitions for declaratory ruling,[5] claiming that Section 276 of the Communications Act or the

---

[3] *See* Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*").

[4] *Id.* (emphases added; footnote omitted).

[5] *See* Illinois Public Telecommunications Association Petition for a Declaratory Ruling (filed July 30, 2004); Southern Public Communication Association Petition for a Declaratory Ruling (filed Nov. 9, 2004) ("SPCA Pet."); Petition of the Independent Payphone Association of New

Commission's rules require BOCs to provide refunds of amounts paid under state payphone line tariffs in circumstances where IPPs establish that the rates in those tariffs exceeded the rates allowed under federal law. IPPs' efforts to relitigate issues that they have already lost in the forum in which they chose to litigate them fail for any number of legal reasons. *First*, having determined that state commissions would continue to regulate payphone lines unless they proved "unable" to do so, the Commission cannot preempt state authority simply because IPPs are unhappy with the results of litigation in their chosen forum. *Second*, if the Commission were to interpret Section 276(a) to require the refunds that independent payphone providers seek, such an interpretation would be impermissibly retroactive. *Third*, there is no merit to arguments that "BOCs" offered, or that the Common Carrier Bureau required, such refunds as a condition of a short extension of time for BOCs to comply with eligibility requirements for per-call compensation in 1997 – to the contrary, BOCs sought a short extension of time to comply with certain eligibility requirements and merely promised to ensure that other parties would not be prejudiced by that extension. *Fourth*, the Commission cannot, under *res judicata* principles, overturn the decisions of state courts regarding independent payphone providers' eligibility for refunds. *Fifth*, the Commission cannot over-ride state procedural bars to recovery of refunds, which are neutral remedial limitations that pose no obstacle to effective enforcement of federal

---

York, Inc. for an Order of Pre-emption and Declaratory Ruling (filed Dec. 29, 2004) ("IPANY Pet."); Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption (filed Jan. 31, 2006); Michigan Pay Telephone Association's Second Petition for Declaratory Ruling (filed May 22, 2006); and Petition of the Payphone Association of Ohio to Preempt the Actions of the State of Ohio . . . and for a Declaratory Ruling (filed Dec. 28, 2006). *See also* Letter from Maura S. Doyle, Clerk, Massachusetts Supreme Judicial Court to the Honorable Kevin J. Martin, Chairman, Federal Communications Commission (Mar. 6, 2006). We also understand that independent payphone providers in Virginia have argued that they are somehow entitled to refunds from Verizon, but there is no request for relief before the Commission with respect to that state.

law. *Sixth*, the Commission cannot retroactively preempt state authority over state tariffs on the grounds that a state commission failed to order refunds.

IPPs have exhaustively litigated the issue of independent payphone providers' entitlement to refunds in state commissions and state courts. The Commission has stated that it would displace state commission authority over basic payphone lines only where states are "unable to review" the relevant tariffs and to apply federal standards; that is nowhere the case in the petitions at issue. "If a state commission fails to act, preemption is a viable option; however, if the state agency takes final action disposing of the pending claim, that action can be undone only by direct judicial review in the appropriate forum." *Global NAPs, Inc. v. FCC*, 291 F.3d 832, 836-37 (D.C. Cir. 2002). Having litigated their claims to refunds and lost, IPPs cannot revive their claims now.

I. BACKGROUND

A. Independent Payphones

Prior to 1984, FCC rules effectively prohibited anyone other than telephone companies from connecting payphones to the telephone network. *See* 47 C.F.R. § 68.2(a)(1) (1981). In 1984, however, the FCC permitted certain newly developed payphones – "smart" payphones that, unlike local exchange carrier ("LEC") payphones, are controlled by built-in processing equipment, rather than by the LEC central office switch – to be connected to the network. *See Registration of Coin Operated Telephones*, 49 Fed. Reg. 27763 (1984). As a result, "any person purchasing . . . a coin telephone will have the right to attach it" to the local network. *Id.*

Although IPPs' and telephone companies' payphones were largely indistinguishable to casual users, they operated quite differently. Independents provided service over ordinary telephone lines – known as "dumb" lines – purchased from local telephone companies' state tariffs. Telephone companies' payphones – which generally lacked the built-in call-rating and timing equipment of independent payphone providers' phones – were usually controlled by processors in the telephone companies' central offices over so-called "smart" lines. *See C.F. Communications Corp. v. FCC*, 128 F.3d 735, 737 (D.C. Cir. 1997).

Independent payphone providers and telephone companies were also compensated differently. Both earned local coin revenues on an equivalent basis. But telephone companies recovered interstate costs through access charges only; that is, they included such costs in their regulated costs and recovered them in the charges they assessed long-distance carriers for originating and terminating all long distance calls (whether made from a payphone or not). BOCs could not be compensated directly for placement of long-distance calls from their payphones because of restrictions on provision of inter-LATA service. By contrast, long-distance carriers paid independent providers commissions on long-distance calls from their payphones. *See generally Payphones NPRM*,[6] 11 FCC Rcd at 6721, ¶¶ 7, 8.

B. Payphone Deregulation – Section 276

Section 276 of the Communications Act – adopted as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 151, 110 Stat. 56, 106 – was intended to "promote a more evenhanded competitive environment" for independent payphone providers and payphone providers affiliated with local telephone companies. S. Rep. No. 104-23, at 58 (1996). Congress thus prohibited any BOC from "subsidiz[ing] its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations" and from "discriminat[ing] in favor of its payphone service." 47 U.S.C. § 276(a)(1), (2). Congress

[6] Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 6716 (1996) ("*Payphones NPRM*").

directed the FCC to adopt regulations that would eliminate "all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues" as well as "intrastate and interstate carrier access charge payphone service elements" – that is, those elements that provided for regulated recovery of the costs of providing payphone service. Congress also required the FCC to "prescribe a set of nonstructural safeguards for [BOC] payphone service" at least equal to those governing BOCs' provision of enhanced services – so-called "*Computer III*" safeguards.[7] And Congress mandated that all payphone providers receive fair compensation for all calls made from their payphones and lifted restrictions on BOC-affiliated payphone providers' ability to negotiate commissions with long-distance companies on behalf of premises owners for long-distance calls. Under the new regulatory regime, then, both BOC-affiliated and independent payphone providers would have comparable sources of revenue and would be similarly required to support their operations without support from access charges or subsidies.

C. The First Payphone Orders

In its first set of orders implementing Section 276, the FCC adopted rules to govern BOCs' provision of service to payphone providers – affiliated and unaffiliated.[8] The Commission concluded that BOCs would be required to offer services that would permit independent payphone providers to offer service using either "smart" phones (as they had been doing) or "dumb" phones (as telephone companies usually did). *First Payphone Order*, 11 FCC

[7] In the *Computer III* proceeding, the FCC adopted rules to govern BOCs' provision of enhanced services – computer processing and other information services delivered over telephone networks – on a non-structurally separated basis. Previously, BOCs had been permitted to offer enhanced services only through a structurally separate affiliate.

[8] The rules at issue apply only to BOCs, a point that the FCC clarified only in its 2002 *Wisconsin Order*. *See* Memorandum Opinion and Order, *Wisconsin Public Service Commission Order Directing Filings*, 17 FCC Rcd 2051, 2057, ¶ 42 (2002), *aff'd sub nom. New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003) ("*Wisconsin Order*"). Thus, while pre-2002 FCC payphone orders at times refer broadly to LECs instead of BOCs, the Commission has made clear that its rules do not apply to non-BOC LECs.

Rcd at 20614, ¶ 146. To make that possible, telephone companies were required to make available on an unbundled basis – that is, separately from the basic telephone line – the central office functions that payphone providers may find useful in providing service. *See id.*; *see also April 4 Waiver Order,*[9] 12 FCC Rcd at 21005, ¶ 18 & n.49 (identifying payphone-specific features and functions). The FCC required provision of those services on an unbundled basis to be treated as a "new service under the Commission's price cap rules." *First Payphone Order*, 11 FCC Rcd at 20614, ¶ 146.[10] The FCC held that "[b]ecause incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, we conclude that the new services test is necessary to ensure that central office coin services are priced reasonably." *Id.*

The FCC required BOCs to file federal tariffs for "central office coin services." *Id.* On reconsideration, however, the FCC clarified that it was not requiring federal tariffing of basic payphone lines. *See Order on Reconsideration*, 11 FCC Rcd at 21303, ¶¶ 152-153. Instead, the FCC made clear that its federal tariffing requirement applied only to payphone-specific network features that are used in the provision of both intrastate and interstate service. *See id.* at 21308, ¶ 163. Other services that BOCs provide to payphone providers would continue to be tariffed at

---

[9] Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 20997 (CCB 1997) ("*April 4 Waiver Order*").

[10] The "new services" test, described in 47 C.F.R. § 69.2(g), governs the pricing of certain new interstate access services, and requires rates for such services to be above direct costs and to include a reasonable measure of overhead. *See* Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy*, 6 FCC 4524, 4531, ¶¶ 38-41 (1991). "Price caps" refers to a system of regulation that directly regulates carrier rates by taking rates developed under rate-of-return regulation as a starting point and adjusting those rates each year to reflect increasing productivity. Such regulation provides an incentive for carriers to improve efficiency, because any efficiency gains in excess of the gains built into the price-caps system would result in higher profits. The "new services" test provides a methodology for incorporating new access services into the existing price-cap rate structure.

the state level: "LECs must file *intrastate* tariffs for [basic] payphone services and any unbundled features they provide to their own payphone services." *Id.* (emphasis added). The FCC stated that "tariffs for these LEC payphone services must be: (1) cost based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory. States must apply these requirements and the *Computer III* guidelines for tariffing such intrastate services." *Id.* "We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Id.*

The FCC also made clear, however, that *existing* state tariffs – under which basic payphone lines were priced at the same level as basic business lines – might fully comply with the requirements of its orders. "Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the [*First Payphone Order*], and Section 276, conclude: 1) that *existing tariffs* are *consistent* with the requirements of the [*First Payphone Order*] as revised herein; and 2) that in such case *no further filings are required*." *Id.* (emphases added; footnote omitted).

D. The Waiver Orders

Shortly after the release of the *Payphone Orders*, controversy arose concerning the scope of federal requirements governing intrastate tariffs for services to be provided to payphone providers. In the *April 4 Waiver Order*, the Common Carrier Bureau granted BOCs a 45-day extension to file federal tariffs for unbundled payphone features and functions as required by the *Payphone Orders*. In that order, the Bureau also made clear, contrary to BOCs' previous understanding, that basic payphone line rates tariffed in the intrastate jurisdiction would have to comply with the New Services Test. *See* 12 FCC Rcd at 21011-12, ¶¶ 30-32.

In response, the RBOC Coalition sought a second waiver to allow its members a brief additional period to determine whether any additional state filings would be necessary to comply with this requirement. The Coalition said that at the end of the brief additional period, its members would "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." April 11, 1997 Letter from Michael K. Kellogg to Mary Beth Richards at 1 (IPANY Pet. Ex. A). The Coalition then stated that "*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." *Id.* (emphasis added). Thus the Coalition's commitment was expressly limited to the sole circumstance where a member filed new or revised tariffs and did *not* apply at all in situations where a member certified that existing tariffs were compliant. The RBOC Coalition's only commitment was to reimburse the difference between newly filed tariffs (*i.e.*, tariffs filed pursuant to the waiver order) and the tariffs in effect on April 15, 1997.

The Bureau issued a second waiver order on April 15, 1997.[11] The *April 15 Waiver Order* granted the request for an extension – until May 19, 1997 – to certify compliance with the intrastate tariff filing requirements of the *Payphone Orders*. That waiver was conditioned on the RBOC Coalition's commitment to provide the refunds that they had voluntarily offered to provide. *See* 12 FCC Rcd at 21376, 21379-80, ¶¶ 14, 20. But the order also expressly recognized both of the limitations that BOCs had articulated in their waiver request – that is, the order required reimbursement only for BOCs that "seek[] to rely on the waiver" and only "in

[11] *See* Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 21370 (CCB 1997) ("*April 15 Waiver Order*").

situations where the newly tariffed rates are lower than the existing tariffed rates." *Id.* at 21379-80, ¶ 20.

E. State Proceedings

In all of the AT&T and Verizon states that are implicated in this docket, by May 19, 1997, the BOC operating in that state either filed new payphone line tariffs or filed additional cost support to show that the existing tariffs complied with the Commission's New Services Test.[12] For example:

Illinois: The Illinois Commerce Commission's ("ICC") order[13] examined both AT&T's existing tariff and Verizon's existing tariff. That order noted that "[b]ecause [AT&T] had already tariffed its payphone services, and because those tariffs had already been reviewed and found reasonable by the [ICC], [AT&T] did not file any new tariffs" in response to the Commission's *Payphone Orders*. ICC Order at 6. "Instead, [AT&T] supplied additional cost documentation" to demonstrate compliance with the New Services Test which was "accepted by the Commission." *Id.* Similarly, the rate for Verizon's Customer Owned Coin Telephone service (*i.e.*, "dumb" payphone lines used with the "smart" payphones that IPPs almost invariably use) had been approved by the ICC in Verizon's last general rate case. *Id*. In compliance with the requirements of the *Payphone Orders*, Verizon filed a tariff for "Coin Line" service (*i.e.*, "smart" lines) in January 1997; that tariff was not suspended and was therefore deemed lawful. *Id.* In addition, on May 19, 1997, Verizon filed supplemental documentation to demonstrate that its payphone line rates complied with the New Services Test; it also reduced rates for certain network functions. *See id*.

---

[12] For simplicity, we refer to all predecessors of AT&T and Verizon simply as AT&T or Verizon.

[13] *See* Interim Order, *Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, Docket No. 98-0195 (ICC Nov. 12, 2003) ("ICC Order").

Mississippi: In Mississippi, AT&T filed a new tariff on May 19, 1997, and the Mississippi Public Service Commission ("MPSC") approved those rates on July 14, 1997,[14] effective as of April 15, 1997.[15] On June 17, 1997, before the MPSC approved AT&T's tariff, the Gulf States Public Communications Council ("GSPCC"), the "SPCA's [(Southern Public Communication Association's)] predecessor entity,"[16] filed a motion to intervene in the proceeding out of time, which the Mississippi PSC granted. In its motion, the GSPCC argued that AT&T had "not demonstrated that its rates offered to PSPs [(payphone service providers)] are cost-based and meet federal pricing guidelines."[17] The Mississippi PSC noted, however, that AT&T had "file[d] cost data in support of its tariff filing,"[18] which was made available to GSPCC.[19] Nevertheless, although the Mississippi PSC had invited the parties to "submit a jointly proposed procedural schedule in this matter,"[20] no party pursued any challenge to the MPSC's approval of AT&T's rates.

New York: Following the *Payphone Orders*, the New York Public Service Commission ("NYPSC") instituted a proceeding in which it directed Verizon and other LECs in New York to file any tariff revisions that would be necessary to comply with the *Payphone Orders*, with such

---

[14] *See* Order, *BellSouth Telecommunications, Inc., Notice of Tariff Filing for Flat Rate Option(s) Customer Provided Public Telephones and Smartline Service for Public Telephones*, Docket No. 97-UN-0302 (Miss. PSC July 14, 1997) ("Miss. PSC 7/14/97 Order") (SPCA Pet. Ex. B).

[15] *See* Order, *Complaint of the Southern Public Communication Association for Refund of Excess Charges by BellSouth Telecommunications, Inc. Pursuant to Its Rates for Payphone Line Access, Usage, and Features*, Docket No. 2003-AD-927, at 2 (Miss. PSC Sept. 1, 2004) ("Miss. PSC 9/1/04 Order") (SPCA Pet. Ex. A).

[16] *Id*. at 2.

[17] Miss. PSC 7/14/97 Order at 3.

[18] *Id*.

[19] *See* Miss. PSC 9/1/04 Order at 2.

[20] Miss. PSC 7/14/97 Order at 4.

revisions to take effect on April 15, 1997.[21] Verizon concluded that while certain changes to its payphone tariffs were necessary to comply with that order – for example, filing new rates for smart-line service – no changes were required to its existing, NYPSC-approved, permanent public access line ("PAL") rates (*i.e.*, the service used by IPPs). The NYPSC, in a March 31, 1997 order, recognized that Verizon's PAL service "will continue to be offered as at present" and noted that "rates for grandfathered PAL services now used by [independent PSPs] are not affected" by the revisions to Verizon's tariff.[22] Verizon made an additional filing on May 19, 1997, which included cost-studies demonstrating that its existing tariffs complied with the New Services Test.

Florida: The Florida Public Service Commission ("FPSC") issued an order on August 11, 1998, in which it found that AT&T's existing tariffs for payphone line services were cost-based, consistent with Section 276 of the Telecommunications Act of 1996, and non-discriminatory. As the FPSC found, "based on our review of these studies, we believe that these LECs' current tariffed rates for intrastate payphone services are cost-based and thus meet the 'new services' test." 1998 Florida Order[23] at 5; *see also id.* at 6 ("We have considered the

---

[21] *See* Order Instituting Proceedings, *Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996; Rules and Regulations of the Public Service Commission*, Case Nos. 96-C-1174, 93-C-0142 (N.Y. PSC filed Dec. 31, 1996), *available at* http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId={13B00A75-5C9D-47A4-B74B-253DA7189CD3}.

.

[22] Order Approving Tariff on a Temporary Basis, *Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996*, Case No. 96-C-1174, at 3, 5 (N.Y. PSC Mar. 31, 1997), *available at* http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/EFB2608F0BB3DCA685256DF1007569CE/$File/doc1614.pdf?OpenElement.

[23] Notice of Proposed Agency Action Order Approving Federally Mandated Intrastate Tariffs for Basic Payphone Services, Docket No. 970281-TL, Order No. PSC-98-1088-FOF-TL (Fla. PSC

requirements of the FCC Orders and Section 276 of the Act and find the existing tariffs for LEC payphone services are appropriate.").

Ohio: Following the release of the *Payphone Orders* in 1996, the Public Utility Commission of Ohio ("PUCO") initiated a proceeding to implement those orders. *See* Opinion and Order, *Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, 2004 Ohio PUC LEXIS 363, at *3-*4 (Ohio PUC Sept. 1, 2004) ("Ohio Order"). PUCO approved AT&T's tariff on September 25, 1997, *id.* at *4, and found "that the tariff filings were consistent with the Act, the FCC's decisions in CC Docket NO. 96-128, and the Commission's May 22, 1997 entry in this proceeding." *Id.* at *6.

Massachusetts: Verizon filed with the Massachusetts Department of Telecommunications and Energy ("DTE") proposed tariff changes to comply with the *Payphone Orders* on December 31, 1996. That tariff filing did not make any changes to existing basic payphone line tariffs. On May 16, 1997, Verizon filed cost information to show that its existing tariffs were compliant with the New Services Test. The DTE opened an investigation and sought comment on whether Verizon's PAL rates were compliant with the New Services Test. *See* Procedural Notice, Request for Comments on PASL phase of proceeding, *Investigation by the Department of Telecommunications and Energy on its own motion*, DPU / DTE 97-88/97-18 (Phase II) (Mass. DTE Dec. 12, 1997). The DTE left Verizon's tariffs in place while it reviewed Verizon's rates and subsequently rejected a request from payphone providers to change Verizon's tariffs to interim rates that would be subject to refund if they were lowered. *See* Order

---

Aug. 11, 1998) ("1998 Florida Order"), *available at* http://www.floridapsc.com/library//FILINGS/98/08517-98/98-1088.ORD.

on Motion for Reconsideration, *Investigation by the Department of Telecommunications and Energy on its own motion*, DPU / DTE 97-88/97-18 (Phase II), at 6 (Mass. DTE Aug. 8, 2001).

Virginia: On May 19, 1997, Verizon informed the Virginia State Corporation Commission ("SCC") that no changes to its existing basic payphone line rates were necessary because "these previously approved tariff rates were already cost-based, nondiscriminatory and consistent with Section 276 of the Act." At the same time, Verizon filed cost data with the SCC to show that its existing tariffs were compliant with the New Services Test. Although the SCC ordered that the new rates that Verizon and other companies filed – which are not at issue here – would be temporary rates subject to refund, the SCC made no such conversion to Verizon's existing tariffs that the payphone providers now challenge.[24]

F. The *Wisconsin Bureau Order*

In the wake of the FCC's *Payphone Orders*, proceedings were initiated in various states to examine existing payphone service offerings to ensure that those tariffs were consistent with new federal requirements. In Wisconsin, however, the public service commission stated that it had no jurisdiction to "review the rates, terms, and conditions of basic payphone services for compliance with the requirements of section 276 and the Commission's rules." *Wisconsin Order*, 17 FCC Rcd at 2057, ¶ 20. Subsequently, the Chief of the FCC's Common Carrier Bureau sent a letter to the Wisconsin PSC indicating that – absent further action by the state commission – the

[24] *See* Order Authorizing Interim Rates and Initiating Investigation, *Motion to Reject and Petition of Paytel Communications, Inc.*, Case. No. PUC970029, 1997 Va. PUC LEXIS 830, at *3 (Va. SCC Mar. 28, 1997) ("[T]he *proposed rates which are allowed to take effect* should be interim and subject to refund.") (emphasis added) ("*Virginia Order*"). In a recent ex parte filing, APCC misleadingly suggests that all of Verizon's payphone rates were converted to temporary rates. *See* Ex Parte Presentation of APCC, Docket No. 96-128, at 2 (filed Dec. 1, 2008). The order makes clear, however, that it "specifically address[es]" the proposed tariffs filed by the various LECs. *Virginia Order* at 2. The two Verizon tariffs as to which payphone providers seek refunds were *not* filed in early 1997; rather, they have been permanent rates since 1985 and 1990.

FCC would require the four largest LECs in Wisconsin to file with the "FCC tariffs that set forth the rates, terms, and conditions associated with pay phone services, along with the required supporting documentation." *Bureau Letter*, 13 FCC Rcd 20865, 20865 (1998). The Wisconsin PSC did not respond.

In March 2000, the Bureau directed "the four largest incumbent local exchange carriers (LECs) in Wisconsin . . . to submit to the [FCC] copies of the currently effective tariffs for intrastate payphone service offerings that have not been determined by the Wisconsin [PSC] to comply with section 276." Order, *Wisconsin Public Service Commission, Order Directing Filings*, 15 FCC Rcd 9978, 9978, ¶ 1 (2000) ("*Bureau Order*"). In addition, the Bureau "[i]n order to avoid unnecessary confusion and delay, . . . set forth briefly below some of the methodological principles applied under Computer III and other relevant FCC proceedings addressing the application of the new services test and cost-based ratemaking principles to services and facilities offered by incumbent LECs." *Id.* at 9981, ¶ 8.

The Bureau held that direct costs under the New Services Test had to be calculated using an "economic cost methodology that is consistent with the principles the Commission set forth in the Local Competition First Report and Order." *Id.* at 9981, ¶ 9 (citation omitted). This appeared to refer to the Commission's TELRIC standard, adopted as the standard applicable to provision of unbundled network elements and interconnection to competing telecommunications carriers under Sections 251 and 252. This holding conflicted with the Commission's prior determination "that the pricing regime under Sections 251 and 252" does *not* apply "to LEC payphone services." *First Payphone Order*, 11 FCC Rcd at 20615, ¶ 147.

In addition, the Bureau stated that "[f]or purposes of justifying overhead allocations," unbundled network elements ("UNEs") provided to competing telecommunications providers under Sections 251 and 252 "appear to be 'comparable services' to payphone line services, because both provide critical network functions to an incumbent LEC's competitors and both are subject to a 'cost-based' pricing requirement." *Bureau Order*, 15 FCC Rcd at 9982, ¶ 11. The Bureau's determination on this score was inconsistent with the Commission's prior determination that "elements and services to be offered under Sections 251 and 252 are not available" to payphone providers, which are "not telecommunications carriers." *First Payphone Order*, 11 FCC Rcd at 20615, ¶ 147; *see also Local Competition Order*,[25] 11 FCC Rcd at 15936, ¶ 876 ("independent public payphone providers . . . are not 'telecommunications carriers'").

Shortly *before* the Bureau Order was released, independent payphone providers made a series of new filings in various states seeking to reopen proceedings addressing the consistency of existing state payphone line tariffs with federal requirements. In the subsequent proceedings, payphone providers sought to rely on the *Bureau Order* as establishing a federal requirement that payphone line rates be set at TELRIC.

G. The *Wisconsin Order*

Several local telephone companies filed an application for review of the *Wisconsin Bureau Order*, which the Commission granted; the Commission also affirmed important aspects of the *Bureau Order*. In particular, the Commission held that BOCs must justify their intrastate rates for both "smart" and "dumb" lines on the basis of forward-looking cost studies. However, the Commission rejected the *Wisconsin Bureau Order*'s holding that TELRIC rates were

[25] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ("*Local Competition Order*"), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand*, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

applicable, holding that "we do not impose on payphone line services the sections 251 and 252 pricing regime for local interconnection services." *Wisconsin Order*, 17 FCC Rcd at 2066, ¶ 50. Instead, the Commission left it open for the states to decide which forward-looking cost methodology to apply. *See id.* at 2066, ¶ 49.

Once the state determined direct costs, the Commission directed it to apply an overhead loading factor calculated by using one of two methodologies, rejecting the Bureau's suggestion that states are required to apply overhead loading factors comparable to UNE overhead loading.[26] The Commission, however, barred states from simply applying whatever "markup over direct costs is incorporated in their business line rates," at least to the extent "business line rates may include subsidies for other BOC services." *Id.* at 2068, ¶ 55. Instead, the Commission found that "BOCs bear the burden of affirmatively justifying their overhead allocations"; the fact that business lines provide a "plausible benchmark" for payphone lines – indeed are functionally indistinguishable – does not, in and of itself, supply such affirmative justification. *Id.* at 2069, ¶ 56.

Because the Commission assumed that BOC cost studies and overhead loading will capture unseparated total costs – that is, both interstate costs and intrastate costs – it concluded that BOCs would over-recover their costs if they collected the subscriber line charge ("SLC") (designed to recover interstate costs) on top of the intrastate rates established on the basis of these cost studies. Accordingly, once the state has established payphone line rates by determining direct costs and applying an appropriate loading factor, the state must reduce that "monthly per line charge determined under the new services test by the amount of the applicable

[26] Because not all costs of telephone companies' operations are directly attributable to particular services, some portion of remaining costs must be added on to the rates charged for each service. The relative proportion of such costs included is referred to as the overhead load.

federally tariffed SLC." *Id.* at 2071, ¶ 61. Finally, the Commission affirmed the Bureau's holding that the New Services Test applies to per-call or per-minute usage rates. *See id.* at 2070-71, ¶ 64.

The Commission also reaffirmed in the *Wisconsin Order* that application of the federal pricing standard was a responsibility for state commissions in the first instance. *See id*. at 2056, ¶ 15 (noting state commissions, and not the Commission, should "ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276"); *id.* at 2071, ¶ 66 (refusing to address Wisconsin-specific rates, and urging the Wisconsin commission to do so).

The D.C. Circuit affirmed the *Wisconsin Order*, denying petitions for review filed by BOCs and by independent payphone providers. *See New England Pub. Communications*, 334 F.3d 69.

H. Further State Proceedings

BOCs complied with the *Wisconsin Order* by filing, in many cases, new, lower tariffs for basic payphone line services. Those rates are not, generally, subject to any challenge.

State commissions have also had to address claims by independent payphone providers that BOCs should be required to refund amounts paid under existing state tariffs, retroactive to April 15, 1997. In some cases, independent payphone providers obtained requested refunds. In others, however, state commissions and state courts have determined that refunds were not available. For example:

Illinois: The Illinois Commission rejected the request for refunds filed by the Illinois Public Telecommunications Association ("IPTA"). The ICC noted that, as a matter of both federal and state law, "rates that have been reviewed and approved by the appropriate agency cannot later be subject to refund." ICC Order at 42. The ICC noted that it had approved AT&T's rates and that the terms of the ICC's prior order had governed AT&T's rates since 1985. In one key passage, the ICC noted:

> Significantly, from the time that the FCC established its NST through today, there has been *no complaint to formally challenge the rates at issue in this case.* This lack of direct action on the part of the IPTA (a party to the 1995 settlement establishing current rates) is consistent with [AT&T's] observations that the IPTA has benefited from . . . . deep discounts on IPP usage rates and other advantages conferred by our Order.

Id. at 42-43 (emphasis added).

IPTA appealed to the Appellate Court of Illinois. That court affirmed the ICC's holding that the claimed refund constituted retroactive rate-making under established Illinois law. The Illinois Supreme Court denied IPTA's petition for leave to appeal. IPTA's petition for certiorari to the United States Supreme Court was denied.

Mississippi: The Southern Public Communications Association filed a complaint in 2003, seeking refunds paid under AT&T's tariff, which was filed May 19, 1997 and approved on July 14, 1997. The Mississippi PSC issued an order on September 1, 2004, noting that "its July 14, 1997, Order approving AT&T's tariffed PTAS rates was never appealed or contested by any party, despite the fact that SPCA's predecessor entity, the Gulf States Public Communications Council ('GSPCC'), was a party to that proceeding and had been furnished with the proprietary cost studies and underlying cost data filed by [AT&T]." Miss. PSC 9/1/04 Order at 2. The MPSC held that the requested refund would violate state law prohibitions against "retroactive ratemaking . . . as well as the filed rate doctrine," and that this "Commission cannot grant such a request." *Id.* at 4. The MPSC noted that both "federal and state statutes of limitation, as well as [AT&T's] approved tariffs," require parties to seek relief in a limited time, whereas SPCA waited until six years later to seek a refund. *Id.* at 5. Thus, SPCA's claim was time-barred.

SPCA's challenge to the MPSC's order is pending before the U.S. District Court for the Southern District of Mississippi (Docket No. 04-881).

New York: The Independent Payphone Association of New York ("IPANY") first sought refunds for PAL rates (not usage rates) in December 1999 based solely on the *April 15 Waiver Order*. After examining Verizon's cost-based rates, the NYPSC found that Verizon's rates "do satisfy the FCC's new services test."[27] IPANY appealed the NYPSC's order in January 2002. In that appeal, IPANY raised, for the first time, refunds for usage rates. The New York appellate court found that refunds were unavailable both as a matter of state and federal law.[28] The court explained that the *April 15 Waiver Order* only applied if BOCs filed new rates on May 19, 1997, rather than on April 15, 1997. Because Verizon did not file new rates during this period, "the refunds order was thus never effective."[29] The fact that the NYPSC has since lowered rates "cannot be the basis of potential refunds that were only agreed to and contemplated for a period ending May 19, 1997."[30] As the NYPSC pointed out: "[i]nasmuch as a range of

---

[27] Order Approving Permanent Rates and Denying Petition for Rehearing, *Petition by the Independent Payphone Association of New York, Inc. to Modify New York Telephone Wholesale Payphone Service Rates and Award Refunds; Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996*, Case Nos. 99-C-1684, 96-C-1174, at 7 (N.Y. PSC filed Oct. 12, 2000), *available at* http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId={C3D9A127-D158-49DD-8598-15C800B09F6B}.

[28] *Independent Payphone Ass'n of New York, Inc. v. Public Serv. Comm'n*, 774 N.Y.S.2d 197, 200 (App. Div. 2004).

[29] *Id.*

[30] *Id.*

possible rates could comply with the NST, our order does not constitute a finding that current rates fail to comply."[31]

Florida: The Florida PSC held that there "is no FCC requirement obligating [AT&T] to 'voluntarily' or automatically change its payphone rates upon a change in costs, absent Commission review." Florida Order[32] at 7. Because there had been no challenge or appeal to the Florida PSC's 1998 order, "the tariffed rates that [AT&T] had in place at that time were the rates that were in effect and the rates that [AT&T] was authorized and required to charge." *Id.* Thus, "[a]ny reductions must occur on a going-forward basis when this Commission reviews a BOC's payphone line rates for NST compliance." *Id.* The Florida Public Telecommunications Association filed a notice of appeal with the Florida Supreme Court that was dismissed as untimely.[33]

Ohio: In Ohio, the commission repeatedly rejected a request for refunds. The initial Ohio Order noted that the Payphone Association of Ohio ("PAO") had "raised the issue of refunds on several occasions," but "[o]n each occasion, [PUCO] stated that refunds are beyond the scope of this proceeding and, in any event, would be tantamount to unlawful retroactive

[31] Order Resolving Complaints and Inviting Comments Regarding Public Access Line Rates, *Complaint of Phone Management Enterprises , Inc. and Other Pay Telephone Operators Against Verizon New York Inc; Complaint of American Payphone Communications, Inc. Against Verizon New York Inc.*, Case Nos. 03-C-0428; 03-C-0519, at 3 (N.Y. PSC filed June 30, 2006), *available at* http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId={F9A9C0D5-066F-4094-8063-86D73E34138E}.

[32] Final Order on Arbitration of Complaint, *Petition for expedited review of BellSouth Telecommunications, Inc.'s intrastate tariffs for pay telephone access services (PTAS) rate with respect to rates for payphone line access, usage, and features, by Florida Public Telecommunications Association*, Docket No. 030300-TP, Order No. PSC-04-0974-FOF-TP (Fla. PSC Oct. 7, 2004) ("Florida Order"), *available at* http://www.psc.state.fl.us/library/filings/04/10830-04/04-0974.ord.doc.

[33] *See* Order, *Florida Public Telecomms. Ass'n v. Deason*, Case No. SC04-2271 (Fla. Dec. 6, 2004), *available at* http://www.floridasupremecourt.org/clerk/disposition/2004/12/04-2271.pdf.

ratemaking." 2004 Ohio PUC LEXIS 363, at *11-*12. On reconsideration, the payphone providers tried to raise the refund issue once again. *See* Entry on Rehearing, *Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, 2004 Ohio PUC LEXIS 475 (Ohio PUC Oct. 27, 2004) ("Ohio Reconsideration Order"). PUCO again took note of the fact that "PAO has raised the issue of refunds eight times over the course of this proceeding," *id.* at *25, and found that PAO's refund claim raised "no new issues, facts, or questions of law that the Commission has not previously considered." *Id.* at *29. The Ohio Supreme Court affirmed, finding that PUCO had properly "refused to address the issue of refunds for any period before the interim tariff rates were approved in 2003, finding that the issue had been previously considered in the proceedings and that PAO had not presented any new facts or questions of law," *Payphone Ass'n of Ohio v. Public Util. Comm'n of Ohio*, 849 N.E.2d 4, 9 (Ohio 2006). The Ohio Supreme Court also rejected the payphone providers' attempt to circumvent the ban on retroactive ratemaking, finding that this argument depended "on the erroneous premise that no tariffs were ever filed or approved" and "upon the existence of refund commitments by [AT&T] that were not proven." *Id.* at 10.

Massachusetts: In December 1998, payphone providers in Massachusetts petitioned the Department there to conduct evidentiary hearings on Verizon's tariffed payphone rates, as well as to order retroactive refunds back to April 15, 1997.[34] Lengthy state commission proceedings ensued. The DTE rejected the request of IPPs to convert Verizon's rates to interim rates subject to refund during the investigation, holding that "[i]nterim rates would only be appropriate, if at all, were the [DTE] to find that Verizon's existing rates did not comply with the FCC's new

[34] *See* Opinion, *Investigation by the Department of Telecommunications and Energy on its own motion*, DTE 97-88, 97-18, 2000 Mass. PUC LEXIS 42, at *2, *12 (Mass. DTE Nov. 28, 2000).

services test." *See* Order on Motion for Reconsideration, (DTE Aug., 8, 2001) at 6. On June 23, 2004, the DTE held that Verizon was not required to refund the difference between the new PAL rates and those that had been in effect since April 1, 1997 because the DTE had allowed Verizon's existing PAL rates "to stay in effect throughout the [DTE's] investigation in this docket."[35] Unlike in other rate investigations, the DTE did not require interim rates or state that a "true-up" or refund mechanism would apply if lower rates were established.[36] The DTE also made clear that it "has never made a determination" that Verizon's prior rates were unlawful or inconsistent with FCC requirements, and the fact that new rates were ordered based on "deliberations and regulatory changes . . . [and] additional guidance on pricing standards from the FCC and reviewing courts . . . does not render the prior PAL rates either unlawful for the period the prior rates were in effect or subject to a refund."[37] Finally, the DTE rejected the New England Public Communications Council, Inc.'s ("NEPCC") reliance on the *April 15 Waiver Order* to support refunds because Verizon did not rely on the FCC's waiver and file new rates.[38] NEPCC's appeal of the DTE order is currently pending.

Virginia: In response to a challenge to Verizon's rates brought by Virginia payphone providers, the SCC issued an order on May 11, 2001 in which it declined to evaluate Verizon's tariffs and dismissed the proceeding without prejudice due to concerns that the FCC's delegation of responsibilities to the SCC violated the Tenth Amendment. However, the SCC did not leave payphone providers without a means to challenge Verizon's tariffs. The SCC explained, "[A]ny

---

[35] *See* Order, *Investigation by the Department of Telecommunications and Energy on its own motion*, DPU / DTE 97-88/97-18 (Phase II), at 32-33 (Mass. DTE June 23, 2004) ("Mass. DTE 6/23/04 Order").

[36] *Id.*

[37] *Id.* at 33.

[38] *See id.* at 34.

party may directly request the FCC to require the ILECs to file payphone tariffs with the FCC which comply with § 276 of the Act."[39] Payphone providers have made no federal or state filings since 2001.

II. DISCUSSION

A. In Determining That State Tariffs Would Continue To Govern Basic Payphone Line Rates, the Commission Made Clear That State Procedures and Remedies Would Apply

The Commission made clear in its original *Payphone Orders* that payphone line rates would continue to be governed by state tariffs. In so doing, the Commission necessarily mandated that state procedures and remedies would apply to the enforcement of federal rights. AT&T and Verizon, in compliance with the Commission's orders, filed new tariffs or cost support for existing tariffs with responsible state commissions. There is no basis for allowing IPPs – which had a full and fair opportunity to pursue their refunds claims – to collaterally challenge that process.

1. In the *First Payphone Order*, the Commission held that "tariffs for payphone services must be filed with the Commission as part of the LECs' access services to ensure that the services are reasonably priced and do not include subsidies." 11 FCC Rcd at 20615, ¶ 147. In the *Order on Reconsideration*, however, the Commission – *over IPPs' objections* – eliminated the requirement that BOCs file federal tariffs for "basic payphone line[s]." 11 FCC Rcd at 21308, ¶ 163. Instead, the Commission held that it would "*rely on the states* to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Id.* (emphasis added). It would have been evident to the Commission that disputes about state tariffs' compliance with federal requirements might arise, either immediately or at a later date.

[39] Final Order, *Petition of Paytel Communications, Inc*, Case No. PUC970029, 2001 Va. PUC LEXIS 1207, at *10 (Va. SCC May 11, 2001).

By "rely[ing] on the states," the Commission ensured that any proceedings for enforcement of these requirements would take place before state commissions with judicial review, as provided under state statute. *Id.*

Nothing in the *Payphone Orders* supports any suggestion that the Commission intended to require automatic refunds (or equivalent relief) in the event that a state eventually determined that a BOC's payphone line rates should be reduced in light of the New Services Test. There is no such statement anywhere in those orders or in any of the subsequent *Bureau Waiver Orders*. To the contrary, those orders make clear that the Commission did *not* anticipate that payphone providers would automatically be entitled to refunds. Most revealingly, in the *Order on Reconsideration*, the Commission did *not* require all BOCs to file new tariffs for basic payphone line services. Instead, the Commission noted that "[w]here LECs have already filed intrastate tariffs for these services, states may," after considering federal requirements, "conclude: (1) that existing tariffs are consistent with the requirements of the [*Payphone Orders*]; and (2) that in such case no further filings are required." *Order on Reconsideration*, 11 FCC Rcd at 21308, ¶ 163.

The Commission thus made clear two critical points: first, that existing state tariffs could continue to govern charges for payphone lines and, second, that the remedy in cases where such tariffs were later reviewed and found to be inconsistent with federal requirements would be *prospective* (*i.e.*, "further filings"). *Id.* The Commission would have understood that, under ordinary filed tariff principles, such a procedure would not include any provision for refunds of amounts charged under valid state tariffs. *See generally Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932). Had the Commission intended to ensure that refunds or reparations would be available to PSPs, it would have ordered a quite different procedure. For example, it could have ordered all BOCs to file new state tariffs and directed state commissions to require reparations in the event that such tariffs were found to be inconsistent with federal requirements (leaving to one side the question whether such a requirement would have been lawful). The Commission did not follow any such course.

The *April 15 Waiver Order* likewise makes clear that nothing in federal law mandates automatic refunds in cases where a state reduces payphone line rates based on the New Services Test. In that Order, the Common Carrier Bureau granted a limited waiver to allow BOCs to file intrastate tariffs for certain payphone services within 34 days after the original April 15, 1997, deadline. The Bureau expressly conditioned the waiver, however, on a commitment to "reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates." 12 FCC Rcd at 21379-80, ¶ 20. If, as payphone providers have argued, BOCs were under an independent obligation to reimburse payphone providers in all cases where existing tariffs were later found to exceed levels dictated by the New Services Test, there would have been no reason to impose this condition on the waiver.

2. In compliance with the Commission's orders, AT&T and Verizon either filed new tariffs or filed cost data to show that existing tariffs complied with the pricing standards of Section 276. In various states IPPs pursued a variety of procedural avenues to challenge those rates, in some cases seeking refunds, in others not doing so, or doing so only years later. As relevant here, state commissions exercised their authority over those state tariffs, applying the federal pricing standards as set out in the Commission's orders.

Where IPPs disagreed with state commissions' resolution of their claims – including their claims for refunds – they had every opportunity to raise such challenges in court, and they did so.

Only in those cases where IPPs were disappointed with the results they achieved in their chosen forum did they appeal to the Commission, hoping for a "do-over." But to re-open any of these settled cases would contradict the basic premise of the Commission's determination that states – not the Commission – would continue to have responsibility for regulation of basic payphone line rates under the regulatory scheme established pursuant to Section 276.

As the Commission made clear, the Commission would not displace state regulatory authority unless a state proved to be "*unable to review* these tariffs." *Order on Reconsideration*, 11 FCC Rcd at 21308, ¶ 163 (emphasis added). Where a state commission has carried out its regulatory responsibilities, it would be contrary to the Commission's explicit determination for the Commission now to attempt to displace state authority. The mere claim that a state commission has made an error is no basis for the Commission to act. As the D.C. Circuit held in an analogous context, "[i]f a state commission fails to act, preemption is a viable option; however, if the state agency takes final action disposing of the pending claim, that action can be undone only by direct review in the appropriate forum." *Global NAPs*, 291 F.3d at 836-37. "[O]nly if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option." *Id.* at 837. A challenge that goes not to "supposed inaction" but to "the quality of [a state commission's] action" is not a basis for the Commission to unsettle the results of state commission and state court action. *Id.*

B. The Commission Cannot Interpret Section 276(a) To Require Retroactive Refunds

Implicitly recognizing that no prior Commission order supports their refund claims, the payphone providers now argue instead that BOCs violated Section 276(a)(2) by charging all payphone providers (affiliated and unaffiliated) PAL rates that exceeded rates allowed under the

New Services Test. The payphone providers further argue that "[t]he only remedy that can undo the BOCs' years of noncompliance is for the FCC to order the BOCs to pay refunds." Ex Parte Presentation of APCC, Docket No. 96-128, at 2 (filed Feb. 28, 2008). The Commission has no authority to do so.

1. ***Payphone Providers Have Filed No Claim Against AT&T or Verizon That Would Allow the Commission To Adjudicate Liability Under Section 276***

As an initial matter, no payphone provider has filed any claim against AT&T or Verizon claiming a violation of Section 276. If, as payphone providers argue, AT&T or Verizon violated the statute, payphone providers had a remedy under the Communications Act – an action in federal court pursuant to Sections 206 and 207 or a complaint at the Commission under Section 208. Any such action, however, would be subject to the Communications Act's two-year statute of limitations. *See* 47 U.S.C. § 415.

Independent payphone providers have argued that "[i]n challenging BOC rates and claiming refunds in state proceedings, PSPs followed the FCC-prescribed procedure." Ex Parte Presentation of APCC, Docket No. 96-128, at 5 (filed Feb. 28, 2008). As an initial matter, this argument simply emphasizes what AT&T and Verizon have argued all along: that the Commission expressly determined that state procedures would determine whether refunds would be available in a particular case. Payphone providers filed no petition for review to challenge that procedure when the Commission adopted it in 1996 – though they challenged many other aspects of the *Payphone Orders*. They cannot challenge that rule now, particularly in the context of a declaratory ruling proceeding.

If the argument is intended to provide an excuse for payphone providers' failure to pursue a federal remedy when state commission proceedings were pending, the argument is incorrect: nothing prevented payphone providers from filing a parallel action in federal court to preserve their rights. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 294 n.9 (2005); *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1379 n.5 (Fed. Cir. 1998). (The payphone providers did not file a Section 208 complaint with the Commission, which is the only thing that could have barred federal court relief. *See TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1242-45 (10th Cir. 2007)). Moreover, once state commission proceedings were completed and all appeals exhausted, payphone providers were fully on notice that state procedures would not afford refunds. Even if the payphone providers were permitted to hold their federal claims in reserve – and, of course, payphone providers did *not* hold those claims in reserve, but instead litigated them unsuccessfully before state commissions and in state court – they were fully on notice of injury no later than the completion of state court proceedings. At that point, even assuming for the sake of argument that payphone providers had no earlier obligation to pursue their federal claims, they were plainly under an obligation to do so then or risk the running of the statute of limitations.[40]

Nor could the payphone providers preserve any claim under Section 276 by filing petitions for declaratory ruling or preemption with the Commission. Indeed, the Commission and the D.C. Circuit had explained this very point at the time that the payphone providers were filing the petitions in question. *See Communications Vending Corp.*, 365 F.3d 1064. In that case, payphone providers filed claims alleging that local exchange carriers had violated the statute by imposing end user common line ("EUCL") charges on independent payphone

[40] APCC has argued that it would have been futile to pursue its claims while Verizon was litigating the scope of the Commission's regulatory authority. *See* Ex Parte Presentation of APCC, Docket No. 96-128, at 2-3 (filed Dec. 1, 2008). The argument that a limitations period is tolled because the underlying claim is uncertain to succeed has been rejected by the D.C. Circuit. *See generally Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004) (rejecting APCC's lawyers' arguments that they could hold claims in reserve because it would have been futile to pursue them in light of FCC holdings that were later reversed on appeal).

providers prior to the adoption of the *Payphone Orders*. Many payphone providers filed their complaints in 1997; they argued before the Commission, however, that the statute of limitations should be equitably tolled and that they should be permitted to recover EUCL charges going back to the 1980s. Among the arguments they made for equitable tolling was that their "industry trade association filed a petition in 1989 challenging the EUCL charges on their behalf." *Id.* at 1076. The Commission rejected that argument, as did the D.C. Circuit, noting that "that petition sought only a declaratory ruling . . ., so it could neither have tolled the statute nor otherwise excused the IPPs failure to pursue complaints for damages, especially when other IPPs did so." *Id.* The same is true here: other IPPs have filed claims for damages in federal court. *See, e.g.*, *TON Servs.*, 493 F.3d at 1242.

Payphone providers who have not filed claims under Section 276 – that is *all* of the payphone providers seeking refunds from AT&T and Verizon – are thus barred by the statute of limitations from seeking monetary relief for supposed violations of Section 276 for amounts paid more than two years prior to the filing of any claims.

2. *A Legal Ruling Purporting To Require Refunds Would Be Impermissibly Retroactive*

A Commission order purporting to require Verizon and AT&T to pay refunds would be impermissibly retroactive. Although the Commission can announce new legal principles or policies through either rulemaking or adjudication, *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974); *see also Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("[m]ost norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication"), an agency cannot escape substantive limitations on its authority to adopt retroactive norms by the manner in which it characterizes its decision. The Supreme Court has held that, at least absent express congressional authorization, agencies cannot engage in retroactive rulemaking. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988). That prohibition extends to the promulgation of "interpretive" rules that nevertheless change settled expectations. *See Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

Likewise, the principle that new rules announced in adjudications cannot be applied retroactively prevents an agency from evading the norm against retroactive rulemaking by simply labeling its pronouncements "adjudicatory." Thus, courts have long drawn a distinction between "agency decisions that substitute new law for old law that was reasonably clear and those which are merely new applications of existing law, clarifications, and additions." *Id.* (internal quotation marks and alterations omitted). Here the law was clear that state procedures would govern the availability of refunds, not merely because of the Commission determination in the *Order on Reconsideration* but also because many the payphone providers' claims – including their claims under federal law – have already been fully adjudicated at the state level by courts with unquestioned authority to rule on matters of federal law. The Commission would thus be seeking to upset that settled law by promulgation of a new and unprecedented legal norm. When an agency seeks to promulgate a new legal rule through adjudication, especially in derogation of a previous norm that was clear and gave rise to settled expectations, retroactive application is prohibited. *E.g.*, *Epilepsy Found. of NE Ohio v. NLRB*, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.) ("But the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates.");

see also Qwest, 509 F.3d at 539; *Verizon Tel. Cos. v. FCC,* 269 F.3d 1098, 1109 (D.C. Cir. 2001); *Williams Natural Gas Co. v. FERC,* 3 F.3d 1544, 1553-54 (D.C. Cir. 1993); 2 Richard J. Pierce, *Administrative Law Treatise* § 13.2, at 881-82 (4th ed. 2002).

C. The Claim That RBOCs Voluntarily Committed To Make Refunds, or That the Common Carrier Bureau Ordered Refunds, Is Wrong

Payphone providers have attempted to rely on the *April 15 Waiver Order* and a letter from counsel to the RBOC Coalition to support the claim that BOCs agreed to provide refunds in any case where a state commission eventually determined that payphone line rates should be reduced. That claim misreads the *April 15 Waiver Order* and the letter. BOCs wanted a short extension of time to comply with the requirements of Section 276 without delaying their eligibility for payphone compensation that would replace access charge revenues that BOCs had already eliminated from their tariffs. BOCs promised that all other parties would be placed in the same position they would have been in had the deadline not been extended. That is all there is to it.

The genesis of the *April 15 Waiver Order* is this: controversy arose after the release of the *Payphone Orders* concerning the scope of federal requirements governing intrastate tariffs for services to be provided to payphone providers. In the *April 4 Waiver Order*, the Common Carrier Bureau granted BOCs a 45-day extension to file federal tariffs for unbundled payphone features and functions as required by the *Payphone Orders*. In that order, the Bureau also made clear, contrary to BOCs' previous understanding, that basic payphone line rates tariffed in the intrastate jurisdiction would have to comply with the New Services Test. *See* 12 FCC Rcd at 21011-12, ¶¶ 30-32. In response, the RBOC Coalition sought a second waiver to allow its members a brief additional period to determine whether any additional state filings would be necessary to comply with this requirement. The Coalition said that at the end of the brief additional period, its members would "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." April 11, 1997 Letter from Michael K. Kellogg to Mary Beth Richards at 1(IPANY Pet. Ex. A). The Coalition then stated that "*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 credit back to April 15, 1997, to those purchasing the services under the existing tariffs." *Id.* (emphasis added).

Thus the Coalition's commitment was expressly limited in two important respects. First, it was limited to the sole circumstance where a member filed new or revised tariffs, and did *not* apply at all in situations where a member certified that existing tariffs were compliant. Second, the Coalition's only commitment was to reimburse the difference between newly filed tariffs (*i.e.*, tariffs filed pursuant to the waiver order) and the tariff in effect on April 15, 1997. The *April 15 Waiver Order* simply reiterates the Coalition's voluntary commitment, limited in both relevant respects. *See* 12 FCC Rcd at 21376, 21379-80, ¶¶ 14, 20 (requiring reimbursement only for BOCs that "seek[] to rely on the waiver" and only "in situations where the newly tariffed rates are lower than the existing tariffed rates").

Not only is that reading the only one that comports with the terms of the letter, but it is also the only reading that makes sense in light of circumstances. The reason that BOCs required the waiver was that BOCs had already filed new tariffs to eliminate, as of April 15, 1997, access charges that recovered interstate payphone costs.[41] As provided under Section 276, dial-around compensation was intended to replace those access charges. Absent a waiver, BOCs would have been deprived of all compensation for interstate calls made from their payphones. That would

[41] State-level access charges were also eliminated.

have handed long-distance carriers a windfall, but it would not have benefited IPPs. BOCs thus had no reason to agree to any refund commitment to IPPs – for whom the waiver should have been a matter of indifference – other than the limited commitment to put IPPs in the same position as they would have been had BOCs completed their state-level tariff review by the original deadline.

Moreover, the Commission had already made clear that, in states where BOCs already had payphone line tariffs on file that complied with the requirements of Section 276, no further filings would be required. These tariffs had already been subjected to the tariff review processes that were in place in the various states. These processes had allowed all interested parties an opportunity to review the costs of these tariffed services and to present arguments about the appropriate level of payphone rates. If, upon further review, one of the Coalition members determined that its existing rates were consistent with federal requirements, it would not have benefited from the waiver – the BOC would simply have had more *time* to review its rates, but it would not have delayed any *change* in rates – and would have had no reason to forfeit any rights. The only BOCs that would have to rely on the waiver to demonstrate compliance with the requirements of the *Payphone Orders* would be those filing new or revised tariffs. They accordingly agreed to ensure that IPPs would be placed in the same position that they would have been in had the tariffs been filed by April 15, 1997, rather than by May 19, 1997. But that is all that the Coalition agreed to do. *See, e.g.*, *BellSouth Telecomms., Inc. v. Alabama Pub. Serv. Comm'n*, 987 So. 2d 1079, 1088 (Ala. 2007) ("The Kellogg Letter and the Waiver Order simply reflect that [AT&T] and the FCC had agreed that in exchange for an extension of the tariff-filing deadline, [AT&T] would ensure that pay-telephone providers would be placed in the same position as they would have been had the tariffs been filed on April 15, 1997, rather than on May

19, 1997”); *Independent Payphone Ass’n of New York*, 774 N.Y.S.2d at 200 (“potential refunds . . . were only agreed to and contemplated for a period ending May 19, 1997”).

Davel Communications, Inc. v. Qwest Corp., 460 F.3d 1075, 1085 (9th Cir. 2006), and *TON Services*, say nothing to the contrary. In *Davel*, the Ninth Circuit simply recognized that, *assuming that* the Common Carrier Bureau’s 1997 Waiver Order requires refunds as a condition of eligibility for per-call compensation – an issue that the Ninth Circuit did not decide – that condition is enforceable, notwithstanding the filed rate doctrine. *See id.* Far from holding that a request for refund of amounts paid under filed tariffs could defeat a filed rate defense, the Court’s opinion makes clear that such refunds are available *only* to the extent required under the Waiver Order. *See* 460 F.3d at 1080 (“The threshold dispute regarding the refund claim centers on whether the Waiver Order entitles Davel to the refund.”). In fact, the Ninth Circuit amended its decision to ensure that its opinion could not be misinterpreted as having stated any position regarding the scope of the Common Carrier Bureau’s 1997 Waiver Order. *See id*. at 1079 n.5 (“[W]e do not decide whether the Waiver Order applies with respect to the particular rates challenged in this case or to any particular time period.”).

In *TON Services*, the Tenth Circuit simply stated that, under the *Waiver Order*, PSPs “might be entitled to pay PAL rates lower than those on file during the waiver period,” 493 F.3d at 1238 – that is, from April 15, 1997 to May 19, 1997 – notwithstanding the filed rate doctrine. The Tenth Circuit also apparently believed, on the allegations of the complaint at issue in that case, that, because the defendant had allegedly failed to make any filing in support of its payphone line rates until 2002, the filed rate doctrine might not apply to amounts paid until such a filing was made. Whether or not that aspect of the Tenth Circuit’s opinion is sound – a question that the Tenth Circuit had referred to this Commission before the case settled, *see id*. at

1241-42 – it has no impact on the pending petitions for declaratory ruling, which, because Verizon and AT&T *did* file cost data in all of the states at issue by May 19, 1997, do not implicate any such circumstance.

D. Most Payphone Providers' Claims Are Barred by Res Judicata

Where payphone providers have litigated their refund claims before the relevant state commissions, their claims are barred by principles of claim and issue preclusion. The procedural posture of all of the declaratory ruling petitions involving AT&T and Verizon (*i.e.*, those arising from proceedings in New York, Illinois, Florida, Ohio, and Mississippi) bears much in common. In each of the cases, the independent payphone providers asserted their refund claims before the relevant state commissions. The state commissions rejected the refund claims, and the independent payphone providers filed appeals in state court seeking review of the state commission decision. Except in one case, where review is pending, the state courts entered final and non-appealable judgments rejecting the challenge.[42] As a matter of state law, the payphone providers' claims are res judicata.

Under these circumstances, the payphone providers cannot continue to pursue a claim for refunds. "A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States,* 440 U.S. 147, 153 (1979) (internal quotation marks omitted) (alteration in original). "Under res judicata, a final

[42] In Mississippi, the SPCA's petition for judicial review is pending in federal court. Under Mississippi law, however, "res judicata or collateral estoppel precludes relitigation of administrative decisions." *Smith v. University of Miss.*, 797 So. 2d 956, 963 (Miss. 2001). The SPCA therefore cannot mount a collateral attack on the MPSC's decision. As noted, NEPCC's appeal of the Massachusetts commission's decision is pending in state court.

judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Id.* (citations omitted).[43]

All the requirements for application of res judicata (and for collateral estoppel) are met here. The independent payphone providers were parties to the earlier litigation, they are pursuing precisely the same claims that were rejected by the relevant state tribunals – that is, for refunds of amounts paid under pre-existing state tariffs – and the state courts had jurisdiction over the providers' claims, including the federal claims. As the Supreme Court has said, a "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, *the judgment of the rendering State gains nationwide force*." *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (emphasis added; footnote omitted); *see also Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs*, 125 F.3d 18, 20-21 (1st Cir. 1997). Furthermore, all of the arguments that the independent payphone providers seek to raise before the Commission were necessarily rejected by the responsible state tribunals.

The Second Circuit's decision in *Town of Deerfield v. FCC*, 992 F.2d 420, 429 (2d Cir. 1993), illustrates the impropriety of the relief that IPANY seeks here. In that case, a homeowner challenged a town ordinance prohibiting the installation of a satellite dish on any lot smaller than

[43] These principles apply in the relevant states as well. *See Gramatan Home Investors Corp. v. Lopez*, 386 N.E.2d 1328, 1331 (N.Y. 1979); *Board of Managers v. Horn*, 651 N.Y.S.2d 326, 327 (App. Div. 1996) (citing *Smith v. Russell Sage Coll.*, 429 N.E.2d 746, 749 (N.Y. 1981)); *Topps v. State*, 865 So. 2d 1253, 1255-56 (Fla. 2004); *State v. McBride*, 848 So. 2d 287, 290 (Fla. 2003); *Northeast Illinois Reg'l Commuter R.R. Corp. v. Chicago Union Station Co.*, 832 N.E.2d 214, 217 (Ill. App. Ct. 2005).

one-half acre, arguing that it was preempted by an FCC regulation. *See* 992 F.2d at 422. His challenge – which, like IPANY's, was pursued through an Article 78 proceeding in New York state court – was rejected by the state court, which determined, *inter alia*, that the ordinance was not preempted. *See id.* at 425. The homeowner then brought a suit against the town under 42 U.S.C. § 1983; the district court held that the claim was foreclosed by principles of collateral estoppel. *See id.* The FCC then ruled that the ordinance *was* preempted, and held that application of collateral estoppel would result in unfairness because the FCC had required the homeowner to exhaust all judicial remedies before applying to the FCC. *See id.* at 425-26.

The Second Circuit reversed. The court noted that the district court had rightly determined that it was "required by 28 U.S.C. § 1738 to accord the [state court] judgment . . . preclusive effect." *Id.* at 429. The FCC was, in turn, required to "recognize the conclusive effect of the judgment" of the federal district court "with respect to any issue of the preemptive effect" of the FCC's regulation. *Id.*

The payphone providers' efforts to distinguish *Deerfield* are unavailing. Although that case directly involved the res judicata effect of a federal district court judgment, the federal district court judgment itself depended on the preclusive effect of a state court judgment – of precisely the type at issue here, that is, a judgment rejecting a petition for judicial review of state commission action. The Second Circuit specifically approved the district court's determination that the state court judgment was entitled to preclusive effect, even though the party mounting a collateral attack on the judgment argued that the state court judgment was preempted by a federal regulation. *See* 992 F.2d at 429 (noting that the federal district court "was *required* . . . to accord the [state court] judgment the same preclusive effect" as the judgment would have in state court); *id.* ("we see no unfairness" from granting state-court judgment preclusive effect when private party was required to "exhaust his judicial remedies before the agency would step in" because party "had an adequate opportunity to litigate the issue in the state courts"). As the Second Circuit held, the Commission cannot "arrogate to itself the power to (a) review or (b) ignore the judgments of the courts." *Id.* at 430.

Independent payphone providers have nevertheless argued that res judicata does not bar their claim for two reasons. *First*, they argue that, because they claim that federal law preempts state law, res judicata is inapplicable. That assertion is incorrect. In their state court review proceedings, independent payphone providers have been free to argue (and they have in fact argued) that their refund claims were based on binding federal law. The state court is fully competent to apply and bound to follow federal law. *See Testa v. Katt*, 330 U.S. 386 (1947). As noted above, there is no dispute that state courts have jurisdiction over those federal claims. Indeed, the payphone providers initiated state court review to have the state court exercise jurisdiction over their claims. Thus, the state court's judgment that payphone providers had no right to a refund under federal law is preclusive. *See, e.g.*, *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1243-44 (9th Cir. 2004) ("It is well settled that claim and issue preclusion apply to state court rulings on federal preemption issues."); *Deerfield*, 992 F.2d at 429 (holding that New York court, in Article 78 proceeding, "had the power to decide the preemption issue, for federal courts have not been given exclusive jurisdiction over such questions"); *id.* at 425 (approving district court holding that "even if the state court erred, that does not mean that this court can disregard the preclusive effect of the prior state court proceeding," even in face of preemption claim) (citation and internal quotation marks omitted); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 455 (7th Cir. 1990) (Easterbrook, J.) (preemption claim barred where it could have been raised in prior state court action).

Second, independent payphone providers have argued that the Commission is not bound by prior state court judgments because it was not a party to them. But the fact that the payphone providers are estopped is enough: *they* cannot be permitted to pursue a claim that they have already litigated to final judgment in state tribunals. The payphone providers ask the Commission to act in a purely adjudicatory capacity by declaring that payphone providers have a right to a refund of amounts previously paid under state payphone line tariffs in particular circumstances. In that adjudicatory capacity, the agency cannot permit a collateral attack on a prior judgment. *See, e.g.*, *Puerto Rico Mar. Shipping Auth. v. Federal Mar. Comm'n*, 75 F.3d 63, 66 (1st Cir. 1996); *see also NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 35 (1st Cir. 1987) (NLRB cannot evade effect of prior judgment, even in enforcement action, where dispute was effectively between private parties). As the Federal Circuit has observed, "the same principles of judicial efficiency which justify application of the doctrine of collateral estoppel in judicial proceedings also justify its application in quasi-judicial proceedings." *Graybill v. United States Postal Serv.*, 782 F.2d 1567, 1571 (Fed. Cir. 1986) (citing *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 46 (3d Cir. 1981)); *cf. Bath Iron Works*, 125 F.3d at 21 (noting that "federal agency is normally bound to respect findings by another agency acting within its competence" and that "the tendency is plainly in favor of applying collateral estoppel in administrative contexts").

Payphone providers rely in support of their argument on the Tenth Circuit's decision in *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001).[44] But in

[44] Payphone providers have also cited the Eighth Circuit's decision in *Iowa Network Services, Inc. v. Qwest Corp.*, 363 F.3d 683 (8th Cir. 2004). That case stands for the proposition that, under Sections 251 and 252, a state commission interpretation of obligations under Section 251 is not entitled to preclusive effect until reviewed by a federal district court. *See id.* at 692-94. That holding has no application here, where the Commission has specifically determined that

ruling that the FAA was not bound to respect a prior state-court judgment in the circumstances at issue in *Arapahoe*, the Tenth Circuit noted that the result would have been different if the agency had been acting "as a disinterested adjudicator to resolve a . . . dispute between two outside parties." 242 F.3d at 1220 n.8; *see also American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 800-01 (5th Cir. 2000). That is precisely the situation here.[45]

Moreover, here, the Commission specifically decided that states, not the Commission, would be responsible for implementing federal regulations governing the pricing of payphone lines. *See Order on Reconsideration*, 11 FCC Rcd at 21308, ¶ 163 (Commission would "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276."); *Wisconsin Order*, 17 FCC Rcd at 2071, ¶ 66 (after clarifying federal standard, refusing to evaluate Wisconsin state payphone line rates). In so doing, the Commission necessarily understood that state commissions, in exercising this responsibility, would reach determinations that would become final and binding. It would be fundamentally inconsistent with the Commission's allocation of responsibility to the states to permit collateral attack on a final state judgment. In this regard, the situations here strongly resembles *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), in which the court held that the EPA was estopped from relitigating, in a federal enforcement action, an issue that had already been decided in a state enforcement action. The court noted that both federal and state governments

basic payphone lines are to remain tariffed in the state jurisdiction, with state commissions responsible for application of federal pricing rules, and with review provided through the ordinary process of state-authorized judicial review.

[45] Payphone providers argue that the Commission has an independent interest in seeing that its rules are enforced, but that interest is no different from the interest that the Commission has in any case in which two private parties dispute the interpretation of a provision of the Act or a Commission rule. *See, e.g.*, *Deerfield*, 992 F.2d at 426. In the case of disputes over refunds, there is no forward-looking interest in enforcement of the Commission's rules; rather, there is simply a backward-looking dispute over money.

had enforcement authority under the statute and that state enforcement authority "is revocable by the EPA." *Id.* at 1002. Precisely for that reason, the court ruled that it would be inappropriate to fail to respect the res judicata effect of a state-court judgment: "[i]f the EPA is dissatisfied with state enforcement efforts or the lack thereof it can revoke permit-issuing authority or bring an independent action in federal court." *Id.* But "[w]here, as here, a state court has entered a final judgment on an identical issue" the EPA could not invoke the federal statute "to avoid any preclusive effect that judgment may have." *Id.*

E. A Refunds Requirement Would Conflict With Neutral State Procedural Rules That the Commission Has Incorporated Into Federal Law

As explained above, the Commission determined that payphone lines would continue to be tariffed in the state jurisdiction. Accordingly, even if state procedural rules have not been affirmatively incorporated into federal law, at a minimum, state procedural rules that may limit refunds – as long as those rules do not particularly disadvantage federal rights – are not preempted.

The payphone providers' argument is that, because BOCs had a federal obligation to have new-services-test-compliant payphone line rates in place effective April 15, 1997, payphone providers have a right to refunds in any case where a state commission eventually determines that the rates in effect on that date have to be lowered to comply with the Commission's later articulation of the requirements of the test. That argument confuses BOCs' federal *obligation* with the *remedies* available to enforce it – which are defined as a matter of federal law by the applicable state rules. Moreover, to the extent that payphone providers have waived particular remedies or arguments in the course of state proceedings – either by failing to pursue available claims or by pursuing only particular arguments and not others – those waivers provide an independent basis for denying any relief that the Commission cannot reverse retroactively.

Even if the Commission had not affirmatively incorporated state procedural rules as a matter of federal law, it is clear that such rules are not preempted. A substantive federal right does not preempt neutral state procedural rules so long as the state's rules do not disadvantage enforcement of the federal right. *See, e.g.*, *Johnson v. Fankell*, 520 U.S. 911, 918-20 (1997) (holding that § 1983 did not preempt state procedural rule barring interlocutory appeals of qualified immunity determinations). The general rule is that "[s]tates may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Howlett v. Rose*, 496 U.S. 356, 372 (1990). As explained above, there has been no such preemption here – to the contrary, the Commission specifically determined that state procedures *would* govern by deciding – over payphone providers' objections – that payphone lines would continue to be tariffed in the states.

In each of the states at issue, there are neutral state procedural tariff rules that bar refunds of amounts paid under the state tariffs at issue – as state commissions and (in virtually every case) state courts squarely held.

Bar on Retroactive Ratemaking: Many states do not permit refunds of amounts paid under tariffs that have been reviewed and approved by the responsible regulatory agency. *See, e.g.*, *Mandel Bros., Inc. v. Chicago Tunnel Terminal Co.*, 117 N.E.2d 774 (Ill. 1954). In the Illinois proceeding, the ICC had approved AT&T's prior payphone line rates in 1995. Accordingly, AT&T was entitled (indeed, required) to charge those rates until superseded by a subsequent filing or ICC order. This is precisely what the ICC concluded in its order; that holding was affirmed by the Illinois state courts.

Likewise, under the New York Public Service Law, "permanent" rates are not subject to retroactive refunds, either by the NYPSC or by a reviewing court. Any finding that permanent rates are unreasonable can be given only prospective effect. *See Purcell v. New York Cent. R.R.*, 197 N.E. 182, 183 (N.Y. 1935); *Concord Assocs. v. Public Serv. Comm'n*, 754 N.Y.S.2d 93, 95 (App. Div. 2003). This rule is so clear and well settled that it was never challenged by IPANY on review of the NYPSC's order denying refunds. Accordingly, while the New York Appellate Division acknowledged "[t]he fact that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration," it properly held that this "*cannot be the basis of potential refunds*." *Independent Payphone Ass'n of New York*, 774 N.Y.S.2d at 200 (emphasis added). The court thus held that IPANY's "request for said refund [is] denied." *Id.*

Under Mississippi law, as the PSC there noted, a claim for refunds would violate two aspects of Mississippi state law, *i.e.*, both the prohibition against retroactive ratemaking and the filed rate doctrine. *See* Miss. PSC 9/1/04 Order at 4 (citing *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 127 So. 2d [404] (Miss. [1961]), and *United Gas Pipe Line Co. v. Willmut Gas & Oil Co.*, 97 So. 2d 530 (Miss. 1957)).

Under Ohio law, refunds of permanent rates are not permitted under the filed rate and retroactive ratemaking doctrines. *See Lucas County Comm'rs v. Public Utils. Comm'n*, 686 N.E.2d 501, 504 (Ohio 1997) ("Thus, utility ratemaking by the Public Utilities Commission is prospective only. . . . In short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme."); *Cincinnati Gas & Elec. Co. v. Joseph Chevrolet Co.*, 791 N.E.2d 1016, 1020-21 (Ohio Ct. App. 2003) ("Thus, 'a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.' The rates published with PUCO are the lawful rates until the Ohio Supreme Court sets them aside as being unreasonable or unlawful.") (quoting *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 141 N.E.2d 465, 468 (1957)).

The Florida PSC held that retroactive refunds would be inconsistent with a long line of Florida caselaw holding that "orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification." Florida Order at 13-14 (quoting *Peoples Gas Sys., Inc. v. Mason*, 187 So. 2d 335, 339 (Fla. 1966)).

The law in Massachusetts is that filed tariffs "have the force and effect of law." *Disk 'N Data, Inc. v. AT&T Communications, Inc.*, 616 N.E.2d 76, 77 (Mass. 1993); *CMG Holdings, Inc. v. AT&T Corp.*, No. 992129E, 2000 WL 230356, at *4 (Mass. Super. Feb. 17, 2000). As a result, although the Massachusetts DTE did not specifically address the filed-rate doctrine in its order denying refunds, the DTE rejected all of the payphone providers' arguments to depart from its practice of disallowing refunds except in very limited circumstances, such as when it has "allowed existing rates to continue, subject to a true-up mechanism." Mass. DTE 6/23/04 Order at 32.

Virginia law prohibits retroactive ratemaking. *See Commonwealth of Va. v. Old Dominion Power Co.*, 34 S.E.2d 364, 367 (Va. 1945) ("There is nothing in any of the statutes . . . which either expressly or impliedly gives the Commission authority to give retroactive effect to rates which may be substituted by it for the existing rates of any public utility. . . . [T]he statutes are designed to fix rates for the future.").[46]

There is and can be no argument that these long-established remedial limitations depend on the nature of the claimed substantive right, whether federal or state. Moreover, federal law

[46] Because the Virginia state commission dismissed the claim against Verizon's payphone rates on jurisdictional grounds (and no further filing has been made), it has not yet had the opportunity to apply this precedent to the independent payphone providers' refund claims.

includes comparable limitations on retroactive ratemaking. *See Arizona Grocery*, 284 U.S. 370. In *Arizona Grocery*, the Interstate Commerce Commission set a maximum allowable rate for a certain route. Later, in another proceeding, the Interstate Commerce Commission set a lower rate and ordered reparations for payments that exceeded the new rate. The Supreme Court rejected the reparation award, holding that "by virtue of the Commission's order" the prior rate was "a lawful – that is, a reasonable – rate." *Id*. at 387. Such rates remain lawful until the Interstate Commerce Commission enters an order setting a lower rate: "As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." *Id.* at 389.

Procedural Bar / Waiver: In many of the proceedings at issue here, payphone providers failed to pursue their claims with diligence; ignored statutes of limitations; failed to pursue available remedies under state law; or waived arguments that they are apparently seeking to revive now. The payphone providers cannot be excused from the consequences of such procedural defaults.

1. In Illinois, the ICC staff observed that the reason that the proceeding was so protracted was "'primarily attributable to IPTA's desultory pursuit of this case.'" ICC Order at 43 n.16 (quoting Staff Response to Exceptions at 20). "'For example, IPTA filed its direct testimony nearly *six months* late.'" *Id.* (emphasis added). "While delays . . . have not by any means been exclusively attributable to IPTA, IPTA, as petitioner here, has the laboring oar in pursuing its petition . . . . IPTA has not plied that laboring oar with any great degree of diligence." Staff Response to Exceptions at 20-21. Moreover, the ICC itself noted that "from the time that the FCC established its NST through today, there has been *no complaint to formally challenge the rates at issue in this case.* This lack of direct action on the part of the IPTA (a party to the 1995 settlement establishing the current rates) is consistent with [AT&T's] observations that the IPTA has benefited from . . . . deep discounts on IPP usage rates and other advantages conferred by our Order." ICC Order at 42-43 (emphasis added).[47]

2. In Mississippi, the PSC approved AT&T's tariff, noting that AT&T had "file[d] cost data in support of its tariff filing," Miss. PSC 7/14/97 Order at 3, which was made available to the independent payphone providers, *see* Miss. PSC 9/1/04 Order at 2. Nevertheless, although the MPSC had invited the parties to "submit a jointly proposed procedural schedule in this matter," Miss. PSC 7/14/97 Order at 4, no party pursued any challenge to the MPSC's approval of AT&T's rates.

3. In Ohio, the payphone providers neglected to rely on the RBOC Coalition's 1997 letters supposedly promising a refund. As the PUC there noted, these letters had either been "previously stricken" from the record or had not been "previously proffered and subjected to review." Ohio Reconsideration Order at *29. The Ohio Supreme Court affirmed, finding that "[t]he letters are not properly before the court, however, and will not be considered in this appeal;" the first two letters were stricken from the record "because their introduction as evidence violated earlier orders in which the PUCO held that refunds for any period of time prior to the imposition of the interim rates were not within the scope of the proceedings," and the "third letter was never introduced or proffered at the hearing." *Payphone Ass'n of Ohio*, 849 N.E.2d at 10.

4. In Florida, the PSC noted that even though the Florida Public Telephone Association ("FPTA") "was a party to the proceedings and had the opportunity to challenge" the

---

[47] In addition, IPTA's claims are barred by a prior settlement agreement that IPTA entered into with AT&T in 1995. That settlement specifically provided that AT&T's agreed-upon rates would remain in effect until at least June 30, 2005. There was no exception in the settlement agreement for a potential change in law.

PSC's prior order approving AT&T's payphone tariff, it "decided not to challenge our orders in any forum, and for years its members have paid the rates that are set forth in [AT&T's] filed tariffs." Florida Order at 13. "In seeking refunds, the FPTA indisputably is seeking relief for the payment of rates that were (and are) on file with this Commission," and that "were (and are) consistent with unchallenged orders entered by this Commission." *Id.*

5. In New York, if IPANY believed that Verizon's then-existing rates were unlawful, it had a remedy: it could have filed a petition for review of the NYPSC's decision, in March 1997, to allow Verizon to maintain its rates in effect and not to require Verizon to file new rates. IPANY did not do so.

Instead, IPANY filed comments in September 1997 – in response to a NYPSC notice concerning other issues – arguing that Verizon's PAL rates should be set at TELRIC (a position that this Commission has rejected).[48] Those comments did not ask for refunds and did not even mention usage rates. IPANY then took no further action *for more than two years*. In December 1999, IPANY asked the NYPSC to re-examine Verizon's PAL rates, arguing that they were not new-services-test compliant, and asked for refunds of PAL charges (but not usage charges).[49] It was not until IPANY filed its petition for review of the NYPSC's order, in January 2002, that it first sought a refund of usage rates.

At *any* time, if IPANY or its members believed they had a federal right to a refund, they could have filed an action with the Commission or in federal court – including a protective action

[48] Comments of IPANY, *Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996*, Case No. 96-C-1174, at 7 (N.Y. PSC filed Sept. 30, 1997) (arguing that that PAL lines should be "treated as forms of unbundled network elements.") (IPANY Pet. Ex. B).

[49] *See* Petition, *Petition of the Independent Payphone Association of New York, Inc. to Modify New York Telephone Wholesale Payphone Service Rates and Award Refunds*, Case No. 99-C-1684 (N.Y. PSC filed Dec. 2, 1999) (IPANY Pet. Ex. C).

to be stayed pending resolution of state proceedings. *Cf. Exxon Mobil*, 544 U.S. at 294 n.9; *Alder Terrace*, 161 F.3d at 1379 n.5. But even if IPANY could claim that it was relying on the pendency of the state procedure to excuse its failure to file such an action, the New York Appellate Division rejected IPANY's claim for refunds in 2004 and the Court of Appeals rejected IPANY's request for leave to appeal later that same year. At that point, if IPANY believed it had a claim to a refund – in particular, if it believed that Verizon charged rates in excess of allowed rates and that such rates were unlawful under Section 276 – IPANY could have filed a complaint. It failed to do so, and any such claim filed now would be subject to a two-year statute of limitations, irrespective of the pendency of IPANY's petition for declaratory ruling. *See supra* p. 27.

The bar on IPANY's refunds claim is reinforced by IPANY's failure, throughout the state procedure, properly to preserve any claim for refunds *except* (1) for amounts paid for PAL lines, not usage, (2) based *exclusively* on the Waiver Order. As noted above, IPANY first asked the NYPSC to order a refund of PAL rates in December 1999. Throughout the litigation on that request, however, IPANY failed to request any refund of amounts paid for usage.[50] Thus IPANY first raised a claim that it was entitled to a refund on usage charges in January 2002, when it filed its petition for review of the NYPSC's order. IPANY's failure to raise a claim for refund of usage charges before the NYPSC waived that claim. *See, e.g.*, *Klingaman v. Miller*, 564

---

[50] *See, e.g.*, Reply Comments of IPANY, *Petition by the Independent Payphone Association of New York, Inc. to Modify New York Telephone Wholesale Payphone Service Rates and Award Refunds; Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996*, Case Nos. 99-C-1684, 96-C-1174, at 19-20 (N.Y. PSC filed Mar. 20, 2000) (seeking refunds only with respect to "the PAL rate in effect" not "usage services") (IPANY Pet. Ex. D) ("IPANY Reply Comments"). Furthermore, the refund request on PAL Rates was based on the claim that federal law required setting of PAL rates at "the TELRIC unbundled link UNE rate, less EUCL and PICC," *id.* at 20 – a standard the Commission rejected in the *Wisconsin Order*. *See Wisconsin Order*, 17 FCC Rcd 2051.

N.Y.S.2d 526, 527-28 (App. Div. 1990); *DTE Energy Co. v. FERC*, 394 F.3d 954 (D.C. Cir. 2005). Furthermore, IPANY has waived any claim that it is entitled to a refund based on any source of legal right *other than* Verizon's supposed voluntary commitment that formed the basis for the Bureau's Waiver Order. Throughout the NYPSC proceedings and in state court, that was the sole basis for IPANY's argument that the NYPSC and the state court could ignore the state rule barring refunds of amounts paid under permanent rates.[51] We have explained elsewhere why that reading of the Waiver Order is incorrect (as the New York appellate court held). Moreover, because IPANY failed to claim that Section 276 authorized or required such refunds as a matter of federal law, there is an independent procedural bar to IPANY's raising any such claim for the first time as a basis for refunds.

6. Even if claims based on rates paid in Virginia were not barred by the rule against retroactive ratemaking and the filed rate doctrine – and they are – any claims would be independently barred by the state statute of limitations: Virginia has a three year statute of limitations that would foreclose any state claim on the tariff for services purchased before 2005. *See* Va. Code § 8.01-246(4) ("In actions upon any unwritten contract, express or implied, within three years."); *Atlantic Coast Line R.R. Co. v. Va. Mfg. Co.*, 89 S.E. 103 (Va. 1916) (applying three-year statute of limitations for unwritten contracts to a collection claim under a tariff). Because the Virginia SCC's dismissal of the payphone providers' petition challenging Verizon's rates in May 2001 was not on the merits, the statute of limitations was tolled during the period

---

[51] *See, e.g.*, IPANY Reply Comments 16-19. IPANY's argument that a six-year statute of limitations applies to its refund claim, *see* Ex Parte Presentation of IPANY, Docket No. 96-128, at 3 n.2 (filed Dec. 2, 2008), is incorrect. That statute of limitations applies to contractual claims which seek to enforce tariff terms – *i.e.*, claims that a customer failed to pay (or a carrier failed to charge) the tariffed rate, while IPANY seeks to attack Verizon's rates. Such an attack is not permitted under New York law. *See Ronald Chernow Assocs., Inc. v. Public Serv. Comm'n*, 659 N.Y.S.2d 476 (App. Div. 1997).

from March 1997 through May 2001, but began running again on the date of dismissal. *See* Va. Code § 8.01-229(E)(1). Any remaining time left in the original three-year statute of limitations would have expired no later than May 2004.

Virginia payphone providers never filed a complaint in federal court or with the FCC despite the SCC's order refusing to decide the issue. Furthermore, Virginia payphone providers did not file a new petition with the SCC even when the SCC became obligated by statute to rule on the merits of their claim. Specifically, on March 19, 2003, the Virginia Assembly adopted section 56-265.4:4(B)(4), which states that the SCC "shall discharge the responsibilities of state commissions as set forth in the federal Telecommunications Act of 1996 (P.L. 104-104) (the Act) and applicable law and regulations." Even if the statute of limitations were somehow tolled until the date this section was adopted in March 2003 (on the theory that refiling a petition or complaint with the SCC would have been futile), the statute of limitations would have expired three years later – *i.e.*, in March 2006. Any federal claim filed now would be subject to the Act's two-year limitation period.

F. The Commission Cannot Retroactively Preempt State Commission Proceedings Merely Because State Commissions Failed To Order Refunds

There is no basis in the statute or the *Payphone Orders* for the Commission to preempt state commission authority over state payphone line tariffs where state commissions have not ordered refunds of amounts paid under tariffs that are no longer in effect. As noted above, the Commission determined in the *Payphone Reconsideration Order* that it would "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." 11 FCC Rcd at 21308, ¶ 163; *see also Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 15 (state commissions, and not the Commission, should "ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276"). The Commission has made clear that this determination reflects "interest[s] of federal-state comity." *Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 15. Accordingly, the Commission will not take over that state commission role unless state commissions are "unable" to carry it out. *Id.*[52]

That is not the case in any of the proceedings at issue here. In each case, state commissions acted to implement federal requirements – indeed, payphone providers do not challenge that current rates *are* fully compliant with federal standards. Rather, payphone providers seek "preemption" simply to have a second chance to make arguments that they did make (or could have made) before state commissions and on judicial review. There is no precedent for preemption in these circumstances.

Section 276(c) – which provides for preemption of "State requirements [that] are inconsistent with Commission regulations" adopted under Section 276 – does not affect this analysis. As explained above, the Commission's existing regulations do not provide for automatic refunds – to the contrary, they provide that state procedures will govern. There is accordingly no inconsistency between a state commission determination that no refunds are required under a particular state tariff and Commission regulations, and the Commission cannot create such inconsistency retroactively.

[52] For example, in the *Wisconsin Order*, the Commission addressed the issue presented only because the Wisconsin Public Service Commission found that it had no jurisdiction to address the issue. *See Wisconsin Order*, 17 FCC Rcd at 2057, ¶ 20. Even in light of this, the Commission declined to address Wisconsin-specific rates, instead urging the Wisconsin Commission to do so. *See id.* at 2071, ¶ 66.

CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for declaratory ruling and hold that Section 276 provides no preemptive federal right to a refund of amounts paid under valid payphone line tariffs.

Respectfully submitted,

/s/ ______________________
AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

March 23, 2009