ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSOLIDATED CASE NOS. 13-1059, 13-1083, 13-1149

ILLINOIS PUBLIC TELECOMMUNICATIONS
ASSOCIATION, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Intervenors

All parties, intervenors, and amici appearing in this Court are listed in the Brief for the Petitioners.

B. Rulings under Review

The ruling at issue is *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Declaratory Ruling and Order, 28 FCC Rcd 2615 (2013) (JA 1–36).

C. Related Cases

The ruling at issue has not previously been before this Court. Counsel is not aware of any related cases.

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GLOSSARY

APCC	American Public Communications Council.
AT&T	Except as otherwise indicated, the Illinois and Ohio BOCs, which have changed names multiple times during the period relevant to this matter.
BOC	Bell Operating Company. A local telephone company subsidiary of the Bell System that became independent under the consent decree that settled the Bell System antitrust litigation.
Dial-around compensation	Payment from IXCs to payphone service providers for coinless calls in which a payphone caller elects to use a long-distance carrier other than the payphone's presubscribed carrier, for example by employing an access code.
FCC	Federal Communications Commission.
ICC	Illinois Commerce Commission.
IPANY	Independent Payphone Association of New York.
IPTA	Illinois Public Telecommunications Association.
IXC	Interexchange carrier, commonly known as a long-distance carrier.
LEC	Local exchange carrier, commonly known as a local telephone company.
NYPSC	New York Public Service Commission.
PAL	Public access line. Infrastructure that connects a payphone to the telephone network when that payphone does not rely for its operation on processing equipment at a LEC's central office. PALs are a subset of "payphone access lines" (defined below).

Payphone access line	Infrastructure that connects payphones to the telephone network, including both payphones that rely for their operation on processing equipment at a LEC's central office and those that do not.
PAO	Payphone Association of Ohio.
PUCO	Public Utilities Commission of Ohio.
SLC	Subscriber line charge. A flat, monthly, federally tariffed fee that LECs charge customers to recover the expenses that LECs incur to build and operate the part of the telecommunications network that runs from the customer's premises to the LEC's switch (a mechanism for transporting voice data).
Trade Associations	Petitioners the IPTA, IPANY, and PAO.

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

Section 276 of the Communications Act of 1934, as amended, directs the Federal Communications Commission (FCC or Commission) to adopt rules to prevent Bell Operating Companies (BOCs)[1] from improperly subsidizing or discriminating in favor of their payphone service to the

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[1] The BOCs are local telephone companies that were formerly subsidiaries of the integrated AT&T (or "Bell System"): they became independent pursuant to the consent decree that settled the Bell System antitrust litigation. *See Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 141 (D.C. Cir. 2010).

competitive disadvantage of independent payphone providers (IPPs).[2] *See* 47 U.S.C. § 276(a), (b)(1)(C). In implementing that directive, the agency required BOCs to file certain new or revised intrastate payphone tariffs (or cost data to support existing tariffs) with state regulatory commissions instead of with the FCC. The agency entrusted to state regulators the determination of whether the BOCs' tariffs satisfied the agency's competitive pricing test. If a state commission was unable to make that determination, it could ask the FCC to do so instead. And if an IPP wished the FCC itself to assess whether a BOC's tariffed rates met the agency's requirements, the IPP could initiate a complaint under Section 208 of the Act. 47 U.S.C. § 208.

In the *Order* under review,[3] the FCC held it will not second-guess state decisions in refund disputes that arise from state commission proceedings to assess whether a BOC's rates satisfy the FCC's competitive pricing test. In addition, the agency decided not to issue a declaratory ruling on whether a

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[2] IPPs are payphone service providers not affiliated with a local telephone company.

[3] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Declaratory Ruling and Order, 28 FCC Rcd 2615 (2013) (*Order*) (JA 1–36).

BOC that began collecting so-called "dial-around compensation"[4] before lowering its state-tariffed rates to satisfy the FCC's competitive pricing test was ineligible to have collected such compensation and should disgorge it.

The consolidated petitions for review present the following questions:

(1) Whether the FCC reasonably determined that state authorities were better positioned than the agency to decide refund disputes arising from pricing proceedings that the FCC did not conduct.

(2) Whether the FCC reasonably determined that Section 276 and the agency's rules create no automatic entitlement to refunds.

(3) Whether petitioners lack standing to challenge the FCC's decision to refrain from ruling on the BOCs' eligibility for dial-around compensation, and whether, in the event the Court finds jurisdiction to reach that claim, it should uphold the FCC's decision as a valid exercise of agency discretion.

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[4] "Dial-around calls" are coinless calls in which "the caller uses a long distance carrier other than the payphone's presubscribed carrier," for example by using an access code to reach the long-distance carrier of the caller's choice. *Am. Pub. Commc'ns Council v. FCC*, 215 F.3d 51, 53 (D.C. Cir. 2000). Under the FCC's orders implementing Section 276, callers' preferred long-distance carriers pay "dial-around compensation" to payphone service providers. *See Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 560 (D.C. Cir.) (*IPTA*), *supplemented by* 123 F.3d 693 (D.C. Cir. 1997).

JURISDICTION

The *Order* under review is a final FCC order over which this Court has jurisdiction under 28 U.S.C. § 2342(1). The *Order* was released on February 27, 2013, and the petitioners—three IPP trade associations (collectively, Trade Associations)—timely filed their respective petitions for review within sixty days: the Illinois Public Telecommunications Association (IPTA) on March 8, 2013; the Independent Payphone Association of New York (IPANY) on March 27, 2013; and the Payphone Association of Ohio (PAO) on April 26, 2013. *See* 28 U.S.C. § 2344.

Although the Court has jurisdiction over the consolidated petitions for review as a whole, the Trade Associations lack standing to complain that the FCC impermissibly withheld a declaratory ruling on the BOCs' eligibility for dial-around compensation. The Court therefore lacks jurisdiction to decide that particular claim. *See infra* pp. 48–51.

STATUTES AND RULES

An addendum to this brief sets forth the relevant statutes and rules.

COUNTERSTATEMENT

A. History of the Payphone Industry

1. The Payphone Industry before 1996

Until 1996, twentieth century payphone service was largely state-regulated. *See Implementation of the Pay Telephone Reclassification and*

Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 11 FCC Rcd 6716, 6718 ¶ 2 (1996) (*Payphone NPRM*). For much of that era, local telephone companies (known as local exchange carriers or "LECs") were the only entities that offered payphone service, because payphones depended for their operation on processing equipment at a LEC's central office. *See C.F. Commc'ns Corp. v. FCC*, 128 F.3d 735, 737 (D.C. Cir. 1997). Then, in the mid-1980s, manufacturers developed a new type of payphone that, unlike traditional payphones, could function without connecting to a LEC's central office. *See id.*; *IPTA*, 117 F.3d at 558. With the advent of that new technology, IPPs began offering payphone service in competition with LECs. *See C.F. Communications*, 128 F.3d at 737; *IPTA*, 117 F.3d at 558.

LECs and IPPs did not initially compete on a level playing field. For example, only LECs could offer payphone service using the less expensive traditional payphone technology. *See Payphone NPRM* ¶ 43. In addition, whereas there were some payphone calls—including dial-around calls—for which IPPs went uncompensated, *see id.* ¶ 40, LECs were able to recover at least some costs for such calls because they used other telecommunications operations to subsidize their payphone service, *see N.E. Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 71 (D.C. Cir. 2003) (*NEPCC*); *Payphone*

NPRM ¶ 40. By contrast, for certain long-distance calls, IPPs enjoyed an advantage: they could earn commissions from interexchange carriers (IXCs, commonly known as long-distance carriers) that the BOCs could not.[5] *See Payphone NPRM* ¶ 8.

2. The Payphone Industry under the Telecommunications Act of 1996

As part of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996 Act), Congress enacted Section 276 of the Communications Act to foster both "competition among payphone service providers and . . . the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1). Congress accordingly prohibited BOCs from continuing to subsidize their payphone service from their other telecommunications operations, *see id.* § 276(a)(1), and barred them from "prefer[ring] or discriminat[ing] in favor of [their own] payphone service," *id.* § 276(a)(2). In place of the existing "intrastate and interstate payphone subsidies," *id.* § 276(b)(1)(B), Congress required the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call," *id.*

[5] The terms of the consent decree in the Bell System antitrust litigation effectively prevented BOCs from earning commissions from IXCs. *See Payphone NPRM* ¶ 8.

§ 276(b)(1)(A). Congress also required the FCC to "prescribe a set of nonstructural safeguards" at least "equal" to those the agency had adopted in its "Computer Inquiry-III" (*Computer III*) docket, in which the agency established a number of measures, including cost-based pricing, to prevent BOC discrimination against competitors. 47 U.S.C. § 276(b)(1)(C); *see NEPCC*, 334 F.3d at 72. Finally, Congress specified that the FCC's rules implementing Section 276 would preempt state requirements to the extent they were "inconsistent with the Commission's regulations." 47 U.S.C. § 276(c).

B. FCC Implementation of Section 276

The FCC adopted rules to implement Section 276 in a series of orders. In the first of those orders, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996) (*First Report and Order*), the FCC required the BOCs to file tariffs for central office coin services that would satisfy the agency's "new services test"—a pricing standard originally developed as an outgrowth of *Computer III*,[6] *see NEPCC*, 334 F.3d at 72; *Implementation of the Pay Telephone Reclassification and*

[6] The new services test requires that subject rates be based on the direct cost of providing the service in question, plus a reasonable level of overhead. *See NEPCC*, 334 F.3d at 72.

Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Rcd 21233, 21308 ¶ 163 (1996) (*Payphone Reconsideration Order*). After initially determining that BOCs should file those tariffs with the FCC, *see First Report and Order* ¶ 147, the FCC ultimately directed that BOCs file their tariffs for payphone access lines and related services with state regulators,[7] *see Payphone Reconsideration Order* ¶ 163. The FCC explained that it would "rely on the states to ensure" that tariffed rates for those "payphone line" services met "the requirements of Section 276." *Id.* A state unable to conduct the necessary review, however, could request review at the federal level instead. *See id.*

The FCC directed that "all required tariffs, both intrastate and interstate, . . . be filed no later than January 15, 1997," and that they take effect "no later tha[n] April 15, 1997," *id.*, with one exception: When BOCs already had relevant intrastate tariffs on file that they believed satisfied the requirements of Section 276 and the *First Report and Order* and *Payphone Reconsideration Order* (collectively, *Payphone Orders*), they could provide state commissions with supporting cost data and explain that the existing

[7] "Payphone access lines" connect payphones to the telephone network, including both traditional payphones and payphones that do not depend for their operation on equipment at a LEC's central office.

tariffs did not require revision. *See id.* State commissions could then excuse the BOCs from any "further filings," *id.*, leaving in place the existing tariffs.

The FCC also established a plan to ensure that IXCs would compensate payphone service providers for dial-around calls. *See IPTA*, 117 F.3d at 559–60. Consistent with Section 276(b)(1)(B), the plan provided for dial-around compensation to all payphone service providers, whether IPPs or LECs. *See* 47 U.S.C. § 276(b)(1)(B). Before BOCs would be eligible to receive compensation, however, the FCC required them to complete the requirements set forth in the *Payphone Orders* to implement Section 276. *See Payphone Reconsideration Order* ¶ 131. Thus, to receive dial-around compensation, BOCs would need to "be able to certify" on or before April 15, 1997, that they had in effect "intrastate tariffs for basic payphone services," both for traditional payphones and for payphones that did not depend for their operation on equipment at a LEC's central office. *Id.*

The FCC's Common Carrier Bureau, acting under delegated authority, subsequently clarified that all intrastate tariffs—including those for previously tariffed services and those filed only with the states—were required to comply with the new services test. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997, 20998, 21011–

12, 21013 ¶¶ 2 & n.5, 30–32, 35 (Common Carrier Bur. 1997) (*First Bureau Waiver Order*). The bureau also made clear that if IPPs questioned whether a particular BOC's intrastate tariffs satisfied the FCC's requirements, they could challenge those tariffs by "filing a complaint with the Commission" under 47 U.S.C. § 208. *Id.* ¶ 30 n.93.

Based on the bureau's clarification that existing, intrastate tariffs needed to satisfy the new services test, a coalition of BOCs (the RBOC Coalition) wrote the FCC to request an extension of time in which to determine whether they needed to make any additional state filings. *See* Letter from Michael K. Kellogg to Deputy Bureau Chief of the FCC Common Carrier Bureau at 1–2 (JA 508–09) (Apr. 10, 1997). To assure the FCC that the requested extension would not disadvantage IPPs, the RBOC Coalition pledged: "[W]here 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." Letter from Michael K. Kellogg to Deputy Bureau Chief of the FCC Common Carrier Bureau at 1 (JA 511) (Apr. 11, 1997).

The Common Carrier Bureau granted the requested extension. *See Implementation of the Pay Telephone Reclassification and Compensation*

Provisions of the Telecommunications Act of 1996, Order, 12 FCC Rcd 21370 (Common Carrier Bur. 1997) (*Second Bureau Waiver Order*). Assuming compliance with all of the other requirements set forth in the *Payphone Reconsideration Order*, the bureau determined that BOCs would remain eligible to receive dial-around compensation as of April 15, 1997, so long as they filed compliant tariffs (or cost data to support existing tariffs) on or before May 19, 1997. *See id.* ¶¶ 2, 19; *see also id.* ¶ 20 (rejecting a proposal to require BOCs to refile all existing payphone line tariffs). With regard to reimbursement or credits, the bureau stated: "A [BOC] *who seeks to rely* on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates." *Id.* ¶ 2 (emphasis added); *accord id.* ¶ 20.

Finally, in 2002, the FCC provided additional guidance on what was required for BOCs to establish compliance with the new services test. *See Wisconsin Public Service Commission Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) (*Wisconsin Payphone Order*), *aff'd*, *NEPCC*, 334 F.3d 69. In determining whether BOC payphone line rates satisfy the new services test, the FCC explained, state commissions should apply a forward-looking economic cost methodology.

See id. ¶ 49. The FCC also clarified what methodologies states could apply to determine overhead costs for purposes of the new services test. *See id.* ¶ 54. In addition, the FCC provided that BOCs must subtract the amount of a certain federally tariffed charge—the "subscriber line charge" (SLC)[8]—from its state payphone access line charge. *See Wisconsin Payphone Order* ¶¶ 59–61. Finally, the FCC clarified that the new services test governs not only the monthly, fixed rates for payphone access lines, but also "usage" rates—rates for employing a payphone access line to connect a call, calculated on a per-call or per-minute basis. *See id.* ¶¶ 62–65.

C. State Compliance Proceedings

Numerous state regulatory commissions—and their reviewing courts—have conducted lengthy, procedurally complex, and fact-intensive proceedings to enforce Section 276 as implemented by the FCC. In a number of such proceedings, the 2002 *Wisconsin Payphone Order* marked a turning point, prompting the BOCs to lower their intrastate payphone line rates either

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[8] The SLC is a flat, monthly fee that LECs charge customers "to recover the expenses [that] LECs incur to build and operate local loops—the part of the telecommunications network that runs from the LEC's switch to the customer's premises." *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454, 456 (D.C. Cir. 2004); *see Payphone NPRM* ¶ 50.

at the direction of state authorities or voluntarily.[9] Some state authorities awarded IPPs refunds—including, in some cases, refunds extending back to April 15, 1997.[10] Authorities in other states declined to award refunds, or awarded them for only a limited period of time, taking into account the facts and procedural considerations of their proceedings.[11]

The proceedings in Illinois, New York, and Ohio about which the Trade Associations complain illustrate the factual and procedural complexity of Section 276 compliance proceedings, and of the individualized determinations that state regulators and reviewing courts have reached on the

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[9] *See, e.g.*, *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*, Final Order on Arbitration of Complaint, PSC-04-0974-FOF-TP, slip op. at 4–5 (JA 892–93) (Fla. Pub. Serv. Comm'n Oct. 7, 2004) (*Florida Order*) (explaining that the Florida IPP trade association filed its petition in March 2003, invoking the *Wisconsin Payphone Order*, and that BellSouth subsequently revised its intrastate payphone line rates to comply); *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*, Order, No. 2003-AD-927, slip op. at 2 (JA 884) (Miss. Pub. Serv. Comm'n Sept. 1, 2004) (*Mississippi Order*) (noting BellSouth's voluntary pricing revisions in 2003).

[10] *E.g.*, *BellSouth Telecommunications, Inc.*, Order Setting Rates for Payphone Lines and Associated Features, No. 97-124-C, 1999 WL 595213, at *10, 12 (S.C. Pub. Serv. Comm'n Apr. 19, 1999) (*South Carolina Order*).

[11] *See, e.g.*, *Florida Order*, slip op. at 13–14 (JA 901–02) (declining to award refunds).

issue of refunds: Illinois denied refunds altogether, New York awaits the resolution of this case on the issue of refunds, and Ohio awarded refunds for a limited period of time, as summarized further below.

1. Illinois

Before the enactment of Section 276, the IPTA negotiated with AT&T[12] (then Ameritech Illinois) for members to receive discounts from the usage rates that AT&T was at that time legally entitled to charge. *See Investigation into Certain Payphone Issues as Directed in Docket 97-0225,* Interim Order, ICC Dkt. No. 98-0195, slip op. at 5–6 (JA 188–89) (ICC Nov. 12, 2003) (*ICC Order*). The parties agreed that the discounted usage and other negotiated payphone line rates "would extend through June 30, 2005," and the Illinois Commerce Commission (ICC) approved the rates as lawful. *Id.* at 6 (JA 189) (internal quotation marks omitted). Subsequently, after the FCC released the *Payphone Orders* and the ensuing *First* and *Second Bureau Waiver Orders*, AT&T filed cost data with the ICC to support that its existing rates satisfied the new services test. *See Ill. Pub. Telecomms. Ass'n v. Ill. Commerce Comm'n*, Case No. 1-04-0225, slip op. at 3 (JA 332) (Ill. App. Ct. Nov. 23, 2005) (*Illinois Appellate Order*).

[12] For ease of reference, we refer to the BOCs in both Illinois and Ohio—which have changed names a number of times in the relevant period, *see* Br. xv—as "AT&T."

The IPTA challenged AT&T's rates, and the ICC ultimately determined that those rates did not satisfy the new services test as clarified in the *Wisconsin Payphone Order*.[13] *See ICC Order*, slip op. at 36 (JA 219). The ICC therefore required AT&T to file reduced tariffs that would apply going forward. *See Illinois Appellate Order*, slip op. at 4 (JA 333). The ICC declined, however, to award IPTA members refunds. *See ICC Order*, slip op. at 43 (JA 226). Among other reasons, the ICC viewed as "[s]ignificant[]," *id.* at 42 (JA 225), the IPTA's "desultory pursuit" of its challenge to AT&T's rates over the course of eight years, during which time IPTA members continued to benefit from the existing rates' discounts on usage, *id.* at 43 & n.16 (JA 226); *see id.* at 42–43 (JA 225–26); ICC Comments in Opposition to the IPTA Petition for Declaratory Ruling at 17 & n.50 (JA 267) (Aug. 26, 2004).[14]

2. New York

In New York, Verizon informed the New York Public Service Commission (NYPSC) that its existing rates for public access lines (PALs)

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[13] In the course of its proceeding, the ICC received written testimony and conducted two separate rounds of evidentiary hearings. *See ICC Order*, slip op. at 3–5 (JA 186, 188).

[14] The Appellate Court of Illinois affirmed the ICC's denial of refunds, *see Illinois Appellate Order*, slip op. at 9 (JA 338), and the Illinois Supreme Court denied leave to appeal, *see Ill. Pub. Telecomms. Ass'n v. Ill. Commerce Comm'n*, 852 N.E.2d 239 (Ill. 2006) (table of dispositions).

satisfied the new services test.[15] *See* Comments of BellSouth Telecommunications, Inc., et al. on IPANY's Petition for an Order of Preemption and Declaratory Ruling at 5 (JA 917) (Jan. 18, 2005) (BOC Comments); Letter from Robert P. Slevin to John Crary at 2 & Attachment (JA 458, 460) (May 19, 1997) (Slevin Letter) (providing cost and revenue information). IPANY thereafter challenged Verizon's PAL rates, and ultimately Verizon's usage rates as well. *See* BOC Comments at 5 (JA 917); *Order Approving Permanent Rates and Denying Petition for Rehearing*, Case Nos. 99-C-1684, 96-C-1174, slip op. at 1 (JA 625) (NYPSC Oct. 12, 2000). In October 2000, the NYPSC determined that Verizon's rates should continue at their then-current levels. *See id.* at 8 (JA 632). IPANY sought review before the Supreme Court of New York, New York's trial-level court, which remanded the matter to the NYPSC to reassess Verizon's compliance with the new services test under a forward-looking economic cost methodology. *See Indep. Payphone Ass'n of N.Y., Inc. v. Pub. Serv. Comm'n*, Index No. 413-02, slip op. at 19, 22 (JA 660, 663) (N.Y. Sup. Ct. July 31, 2002) (*N.Y. Supreme Court Order*). On appeal, the Supreme Court's Appellate Division affirmed the trial court's remand order. *See Indep. Payphone Ass'n of N.Y., Inc. v.*

[15] PALs are payphone access lines that connect payphones to the telephone network when those payphones do not depend for their operation on equipment at a LEC's central office.

Pub. Serv. Comm'n, 774 N.Y.S.2d 197, 199–200 (N.Y. App. Div. 2004) (*N.Y. Appellate Order*).[16]

On the availability of refunds, however, the Appellate Division modified the decision of the trial court, holding that IPANY members should not receive refunds in the remand proceeding. *See id.* at 200. Before the trial court, IPANY had based its claim for refunds on the RBOC Coalition's letter of April 11, 1997, and the *Second Bureau Waiver Order*. *See N.Y. Supreme Court Order*, slip op. at 9 (JA 650). The trial court, in turn, had relied on those materials in concluding that refunds were available. *See id.*, slip op. at 21–22 (JA 662–63). The Appellate Division held that such reliance was misplaced. *See N.Y. Appellate Order*, 774 N.Y.S.2d at 200. On the facts of the New York proceeding, because Verizon had not filed new tariffs during the Spring 1997 extension period, the *Second Bureau Waiver Order* did not apply. *See id.*

3. Ohio

In Ohio, on September 25, 1997, the Public Utilities Commission of Ohio (PUCO) approved AT&T's previously tariffed rates as consistent with

[16] The NYPSC has stayed the remand proceeding in IPANY's case pending the FCC's final resolution of the refund issue; that proceeding thus awaits this Court's decision here. *See Order Denying Rehearing and Addressing Comments*, Case Nos. 03-C-0428, 03-C-0519, slip op. at 17 (JA 721) (NYPSC May 24, 2007); Br. 21.

Section 276 and the FCC's implementing orders. *Payphone Ass'n v. Pub. Utils. Comm'n*, 849 N.E.2d 4, 8 (Ohio 2006) (*Ohio Supreme Court Order*). At the PAO's request, however, the PUCO subsequently agreed to hold an evidentiary hearing in which, after the FCC issued the *Wisconsin Payphone Order*, the "core issue" became whether AT&T was "providing payphone services at forward-looking, cost-based rates." *Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Entry, Case No. 96-1310-TP-COI, slip op. at 11 (JA 764) (PUCO Nov. 26, 2002); *see id.* at 7 (JA 760). In a September 2004 decision, the PUCO directed AT&T to make downward revisions to its tariffs. *See Ohio Supreme Court Order*, 849 N.E.2d at 8.

Under the terms of a previous PUCO order that established interim rates and included a "true-up" condition, the PUCO ordered AT&T to reimburse IPPs for the difference between the revised and the interim rates extending back to January 16, 2003. *See Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Opinion and Order, Case No. 96-1310-TP-COI, slip op. at 30 (JA 796) (PUCO Sept. 1, 2004). The PUCO denied, however, the PAO's request for refunds back to April 15, 1997. *See Commission's Investigation into the Implementation of Section 276 of the*

Telecommunications Act of 1996 Regarding Pay Telephone Services, Entry on Rehearing, Case No. 96-1310-TP-COI, slip op. at 16–17 (JA 814–15) (Oct. 27, 2004).

On further review, the Ohio Supreme Court upheld the PUCO's determination that the PAO's arguments were procedurally barred and had relied on documents outside the record. *See Ohio Supreme Court Order*, 849 N.E.2d at 9–10. In addition, the court rejected the PAO's contention that refunds would not constitute retroactive ratemaking, which rested on the faulty premise that AT&T's "tariff was never filed or approved," and on the unproven assertion (based on documents outside the record) that AT&T had voluntarily committed to provide refunds. *Id.* at 10.

D. *Order*

Unable to persuade their respective states to award refunds, the Trade Associations filed petitions for declaratory ruling with the FCC. *See generally* Petition of the PAO to Preempt the Actions of the State of Ohio Refusing to Implement the FCC's Payphone Orders, Including the Refund of Overcharges to Payphone Providers in Ohio, and for a Declaratory Ruling (Dec. 28, 2006) (Ohio Petition) (JA 822–50); Petition of the IPANY for an Order of Pre-Emption and Declaratory Ruling (Dec. 29, 2004) (IPANY Petition) (JA 461–506); IPTA Petition for a Declaratory Ruling (July 30,

2004) (IPTA Petition) (JA 231–48). Their petitions and supporting comments requested that the FCC (1) preempt (or effectively preempt) the decisions of state commissions and reviewing courts that declined to award refunds, (2) declare that the Trade Associations' members should receive the requested refunds, and (3) declare that the BOCs were not entitled to have collected dial-around compensation and should disgorge it. *See* IPTA Reply to AT&T and Verizon Preemption Comments of March 23, 2009 at 65 (JA 409) (Dec. 31, 2009); Ohio Petition at 1–2 (JA 823–24); Reply Comments of IPANY at 21 (JA 703) (Feb. 1, 2005); IPANY Petition at 1–2 (JA 464–65); Illinois Petition at 3 (JA 233). Trade associations from Mississippi and Florida raised similar claims. *See Order* ¶¶ 17, 25 (JA 9, 13).

The FCC concluded that neither Section 276 nor the agency's implementing rules and orders supported the petitioners' asserted "absolute right" to refunds. *Id.* ¶ 41 (JA 21); *see id.* ¶¶ 1, 42 n.178, 45 n.187, 46, 47 (JA 2–3, 22–26). "Although section 276 establishes [pricing] requirements for payphone rates," the *Order* explains, "it does not dictate whether refunds are due under any given set of circumstances." *Id.* ¶ 41 (JA 21). Similarly, the FCC explained that its earlier orders entrusting to state regulators the assessment of whether the BOCs' intrastate payphone line rates satisfy the new services test and "permit[ing] the BOCs to self-certify [their] compliance" do "not specifically address whether refunds should be issued if a subsequent proceeding determine[s] that the rates the BOCs self-certified" exceed what the new services test, correctly understood, allows. *Id.* ¶ 38 (JA 19–20).

Whether refunds are warranted in a particular case, the FCC recognized, will depend on that case's "specific details"—including factual, procedural, and legal considerations. *Id.* ¶ 42 (JA 22); *see id.* ¶¶ 1, 40, 41, 49 (JA 3, 20–21, 26). Emphasizing both the case-specific nature of refund decisions and the agency's 1996 determination to assign primary responsibility for conducting intrastate payphone line pricing proceedings to state regulators, the FCC found that states are "well-positioned to resolve refund disputes arising from the tariffs they review." *Id.* ¶ 42 (JA 22). "In fact," the FCC explained, "the states that have reviewed the tariffs and/or cost support filed by BOCs, or that have considered whether existing BOC tariffs were [new services test]-compliant, are better positioned than [the agency] to decide related refund disputes, because they are more familiar with the specific details of each case." *Id.*; *see id.* ¶¶ 40, 47, 49 (JA 20–21, 25–26). Finding that the agency has no obligation under Section 276 or its own orders to interfere, the FCC refused to second-guess the state refund decisions. *See id.* ¶¶ 41, 42 & n.178, 46–48, 49 & n.204 (JA 21–22, 24–26).

Finally, the FCC elected not to render the Trade Associations' requested declaratory ruling on the BOCs' eligibility to have collected dial-around compensation. *See id.* ¶ 38 n.161 (JA 19). The agency noted, in doing so, that the payphone providers had "not submitted any evidence that the BOCs' self-certifications were defective or fraudulent, or that the BOCs knew when the self-certifications were submitted that their payphone rates were not [new services test]-compliant." *Id*.

SUMMARY OF ARGUMENT

1. The FCC sensibly refrained from second-guessing state decisions in refund disputes arising from complex and lengthy Section 276 pricing proceedings that the agency did not itself conduct. As a form of equitable relief, refund determinations require a discretionary balancing of multiple, case-specific factors. Consistent with that familiar principle, the FCC concluded that the state commissions that lawfully conducted the pricing proceedings that gave rise to these refund disputes were better positioned than the agency to resolve them. That conclusion was reasonable. The Trade Associations could have chosen to challenge the BOCs' rates before the FCC, instead of state commissions, by filing complaints with the agency under 47 U.S.C. § 208. But they did not.

2. The FCC also reasonably determined that Section 276 does not guarantee IPPs an automatic right to refunds, without regard to the facts or procedural histories of individual proceedings, whenever a BOC lowers its intrastate payphone line rates to satisfy the new services test after April 15, 1997. In Section 276, Congress required the FCC to adopt specified rules to prevent BOCs from improperly subsidizing or discriminating in favor of their own payphone services. There is no dispute that the FCC has done so; like all petitioners before the agency, the Trade Associations recognize that the BOCs in their states now have new services test-compliant rates in place. Section 276 is silent on the issue of remedies, however. The statute thus leaves it to traditional equitable principles to resolve whether the facts of any particular case justify refunds. The FCC reasonably determined that state authorities are better positioned to engage in that inquiry. Similarly, because FCC rules and prior orders say nothing on the issue of remedies in the circumstances presented here, Section 276(c) does not operate to preempt state decisions denying refunds.

3. Contrary to the Trade Associations' contention, it was neither an improper subdelegation of authority nor arbitrary and capricious for the FCC to decline to intervene in refund disputes arising from pricing proceedings that state regulators, not the FCC, conducted in the first instance. By

preempting state requirements only insofar as they are inconsistent with FCC rules, Section 276(c) embodies Congress's assumption that states will continue to play a role in payphone regulation, especially when, as here, the FCC found that state authorities are better positioned to untangle the lengthy and often tortured procedural histories that necessarily bear on the equities of awarding or denying payphone line refunds.

4. The Trade Associations complain of inconsistent state refund decisions but fail to demonstrate anything more than a divergence in outcome that understandably follows from the case-by-case, equitable nature of such determinations. The application of the filed rate doctrine and the prohibition against retroactive ratemaking is just one of many, intertwined fact-based and case-specific considerations that the arbiter of a refund dispute must evaluate.

5. The Court should likewise reject the IPTA's and IPANY's petitioner-specific arguments. Their contentions that the FCC misread specific aspects of the decisions in their respective state proceedings are irrelevant, because the *Order* under review nowhere ratifies the analysis of those decisions. And now that the NYPSC has required Verizon to bring its rates into compliance with the *Wisconsin Payphone Order* on a prospective basis, IPANY's argument that the FCC should have corrected the state decisions that declined to apply that order is moot.

6. Finally, the Court should not reach the Trade Associations' claim that AT&T and Verizon were ineligible to begin receiving dial-around compensation before they reduced their rates. The FCC's decision not to issue the Trade Associations' requested declaratory ruling on that issue caused no injury to any Trade Association member that is capable of redress: IPPs do not pay dial-around compensation, IXCs do. Thus, the relief the Trade Associations seek—that the FCC consider requiring the BOCs to forfeit the dial-around compensation they have collected—can in no way benefit their members. The Trade Associations lack standing to bring this claim against the BOCs, and thus the Court lacks jurisdiction to consider it. In any event, it was well within the FCC's discretion to refuse the requested declaratory relief.

STANDARDS OF REVIEW

The Trade Associations bear a heavy burden to establish that the *Order* under review is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the *Order* is entitled to a presumption of validity. *E.g.*, *Verizon Tel. Cos. v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). The Court must affirm unless the agency failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Insofar as the Trade Associations challenge the FCC's interpretation of Section 276—a provision of the agency's organic statute—the Court applies the framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *E.g.*, *City of Arlington*, *Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013). Under *Chevron*, the Court must first determine "whether Congress has directly spoken to the precise question at issue" and, if so, "give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842–43. When "the statute is silent or ambiguous" on the relevant issue, however, the Court should defer to the Commission's "permissible construction of the statute." *Id.* at 843; *see Global Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 744 (D.C. Cir. 2001).

Similarly, this Court gives a "high level of deference" to the FCC's interpretation of its own orders and regulations. *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997). The Court accepts the agency's interpretation "unless [it] is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1093 (D.C. Cir.

2012) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (internal quotation marks, citations, and alteration omitted)).

ARGUMENT

I. THE FCC REASONABLY DETERMINED THAT STATE AUTHORITIES ARE BEST POSITIONED TO DECIDE REFUND DISPUTES THAT ARISE FROM STATE-CONDUCTED PAYPHONE PRICING PROCEEDINGS.

Section 276(b)(1)(C) of the Communications Act directs the Commission to adopt specified pricing rules "to implement the provisions of [Section 276(a)]." 47 U.S.C. § 276(b)(1)(C). Section 276(a) in turn prohibits BOCs from improperly subsidizing, *id.* § 276(a)(1), or otherwise improperly favoring, *see id.* § 276(a)(2), their own payphone services. "To the extent . . . State requirements are inconsistent with the Commission's regulations," Section 276(c) provides that "the Commission's regulations on such matters . . . preempt such State requirements." *Id.* § 276(c).

Section 276 is silent on the issue of refunds. Nowhere did Congress require the FCC to order refunds or any other remedy when a BOC's intrastate payphone line rates fail to satisfy the FCC's pricing rules. Until the release of the *Order* under review, moreover, no FCC rule or order addressed whether or under what circumstances refunds might be warranted when, as here, a BOC self-certified in 1997 that its existing rates satisfied the new services test, but the BOC subsequently lowered its rates to comply with the *Wisconsin Payphone Order*.

Against this backdrop, the agency reasonably concluded that state authorities are best positioned to resolve payphone refund disputes like those at issue here.

A. Refunds Are an Equitable Remedy.

As this Court has emphasized, refunds are a form of equitable relief, and whether they are warranted depends on the specific facts of individual cases. *See, e.g.*, *Pub. Serv. Comm'n v. Economic Regulatory Admin.*, 777 F.2d 31, 35 (D.C. Cir. 1985) (adhering to the "familiar[]" and "sage statement" that, "as is traditional in cases sounding in equity, the facts of the particular case" should govern the adjudication of refund disputes (internal quotation marks omitted)); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981) ("[T]he standard of review of an agency refund order is whether the agency decision is equitable in the circumstances of this litigation." (internal quotation marks omitted)); *see also V.I. Tel. Corp. v. FCC*, 989 F.2d 1231, 1240 (D.C. Cir. 1993) ("Naturally, the specific factors to be considered in any given [rate-of-return refund] case will vary with the circumstances."). The arbiter of a refund dispute must weigh all relevant factors but "enjoys a broad discretion in weighing [them]." *Public Service Commission*, 777 F.2d at 35 (quoting *Las Cruces*, 645 F.2d at 1047–48).

In addition, although the relevant factors will vary by case, procedural considerations—for example, failure to file a complaint—may sometimes affect the analysis. *See Virgin Islands*, 989 F.2d at 1240 ("[The] customers' failure to file petitions or complaints . . . is also a relevant factor." (second alteration in original) (quoting *Commc'ns Satellite Corp.*, Memorandum Opinion and Order, 3 FCC Rcd 2643, 2646 ¶ 23 (1988))).

B. State Authorities Are Best Positioned to Evaluate Equitable Considerations Arising from the Specific Histories of State Proceedings.

In the 1996 *Payphone Reconsideration Order*, the FCC gave state regulators primary responsibility for conducting payphone pricing proceedings to ensure that BOC rates comply with the new services test. *See Payphone Reconsideration Order* ¶ 163. The Trade Associations do not contest that decision, *see* Br. 67, and that allocation of authority is not before the Court.

When the FCC has not conducted the underlying pricing proceeding, however, the agency may not be attuned to all of many, case-specific factors relevant to an equitable decision on refunds. It may be difficult, for example, for the FCC to assess the diligence with which IPPs seeking refunds pursued their claims, the extent to which (whether as a matter of law or equity) a BOC reasonably relied on the validity of its existing tariffs, or whether state law procedural considerations should operate to limit or bar the requested relief.

Thus, as the FCC explained in the *Order* under review, "states that have reviewed [payphone] tariffs and/or cost support filed by BOCs, or that have considered whether existing BOC tariffs were [new services test]-compliant, are better positioned than [the agency] to decide related refund disputes, because they are more familiar with the specific details of each case." *Order* ¶ 42 (JA 22). "[E]ach individual proceeding," the FCC recognized, "involves its own unique set of facts, procedural postures, and relevant state and federal statutes." *Id.* ¶ 49 (JA 26). Because the states' responsibility for pricing proceedings means they will be more familiar with the particulars of each refund dispute, the FCC left "to the states the responsibility for deciding whether refunds are appropriate." *Id.*[17]

[17] Although the agency has not had occasion to address the point, considerations might well be different if the FCC itself conducted the underlying pricing proceeding. If, for example, a state were unable to conduct the pricing proceeding and the FCC therefore assumed responsibility for doing so, *see Order* ¶¶ 6, 9, 44 (JA 5, 6, 23), or if the FCC were adjudicating an IPP's Section 208 complaint challenging a BOC's compliance with the new services test, *see* 47 U.S.C. § 208; *First Bureau Waiver Order* ¶ 30 n.93, the FCC could more effectively weigh relevant factors and decide whether to award refunds in the specific circumstances. The Trade Associations in this case could have chosen to file Section 208 complaints with the FCC, as expressly provided in the *First Bureau Waiver*

The histories of the various state proceedings set forth in the *Order* illustrate the reasonableness of the FCC's position. In Florida, for example, a trade association representing Florida IPPs initially challenged the state commission's order finding that the BOC tariffs for payphone line services satisfied the new services test, but the association thereafter withdrew its protest and allowed the order to become final. *See Order* ¶ 26 (JA 13). Florida IPPs then paid the tariffed rates for several years without dispute, until eventually—only after the FCC released the *Wisconsin Payphone Order*—their trade association challenged those rates before the state commission and sought refunds going back to April 15, 1997. *See id.* ¶¶ 26, 27 (JA 13–14). The BOC subsequently lowered its rates pursuant to the *Wisconsin Payphone Order*, *see id.* ¶¶ 26, 41 (JA 14, 21), but the state commission concluded that Florida IPPs were not entitled to refunds, *see id.* ¶ 27 (JA 14). When the Florida trade association failed to timely file its appeal to the Supreme Court of Florida, the court dismissed that appeal and the state commission's refund decision became final. *See id.*

Order. *See id.* ("Any party who believes that a particular LEC's intrastate tariffs fail to meet these requirements [for cost-based, nondiscriminatory pricing as required by the *Payphone Reconsideration Order*] has the option of filing a complaint with the Commission."). When the Trade Associations instead elected to proceed before their respective state commissions, the FCC was not obligated to relieve them of the consequences of that choice.

In Mississippi, the state commission approved the payphone access line tariff that the BOC filed after the 1996 Act, and Mississippi's IPP trade association did not appeal that approval. *See id.* ¶ 18 (JA 9). Yet when the BOC lowered its rates in the wake of the *Wisconsin Payphone Order*, the trade association sought refunds for the period before the lowered rates took effect. *See id.* Under the circumstances, the state commission denied the request for refunds. *See id.*; *Mississippi Order*, slip op. at 4–5 (JA 886–87).

By contrast, there may be cases in which equitable considerations favor refunds. In South Carolina, for example, the state IPP trade association promptly challenged the BOC's tariffs, asked the state public service commission to stay the tariffs' effectiveness, and sought an accounting order providing for refunds "from April 15, 1997, if any newly approved rates [proved] lower than existing tariff rates." *See South Carolina Order*, 1999 WL 595213, at *1. The state commission granted the requested accounting order. *See id.* In addition, it rejected a request from BellSouth for a declaratory order "certifying that [the BOC's] existing tariff rates for its payphone services compl[ied] with the FCC's new services test." *Id.* Ultimately, upon concluding its investigation into BellSouth's rates in 1999 and ordering certain rate reductions, the South Carolina commission ordered refunds back to April 15, 1997. *See id.* at *12. The commission emphasized in doing so that it had "twice . . . confirmed that any rate reductions resulting from [the] proceeding [would] be applied retroactively." *Id.*

The Illinois, New York, and Ohio proceedings similarly involved relevant equitable considerations. In Illinois, as the ICC emphasized, the IPTA's "desultory pursuit" of its challenge to AT&T's rates, *ICC Order*, slip op. at 43 n.16 (JA 226)—all the while enjoying discounts under the existing, negotiated tariff—"severely undercut[]" the case for refunds, *id.* at 43 (JA 226). Likewise, in New York, IPANY never "petitioned the [NYPSC] to change Verizon's rates" based on the *Wisconsin Payphone Order* (or the related bureau order that preceded that order); IPANY thus "failed to exhaust . . . administrative remedies" under New York law to the extent its claim for refunds depended on the application of that order. *N.Y. Appellate Order*, 774 N.Y.S.2d at 199; *see Order* ¶ 41 (JA 21). In addition IPANY based its argument for refunds on the *Second Bureau Waiver Order* in a context when that order did not apply. *See N.Y. Appellate Order*, 774 N.Y.S.2d at 200 ("Suffice to say that new rates were not filed and the refund order was thus never effective."); *Order* ¶ 23 (JA 12) ("[T]he Appellate Division concluded that, even if the NYPSC lowered Verizon's rates, IPANY would not be entitled to refunds because the Commission's refund orders only contemplated refunds for [cases in which BOCs filed new tariffs during] the period between April 15, 1997 and May 19, 1997."); *see also N.Y. Supreme Court Order*, slip op. at 9 (JA 650) (noting IPANY's reliance on the *Second Bureau Waiver Order*). Finally, in Ohio, the PAO relied on documents outside the record and on a faulty factual premise that AT&T's "tariff was never filed or approved." *Ohio Supreme Court Order*, 849 N.E.2d at 10.

In short, the record before the FCC amply supports the agency's determination that state authorities are "better positioned" to decide refund requests arising out of the post-1996 Act tariff review proceedings for which they were responsible. *Order* ¶ 42 (JA 22). Such proceedings, the record shows, are often lengthy and complex, with tangled procedural and substantive histories. Because the states are "more familiar with the specific details of each case," *id.*, and such details could bear directly on the equitable considerations underlying a remedy of refunds, it was entirely appropriate for the agency to defer refund disputes to state resolution.

II. NEITHER THE STATUTE NOR PRIOR COMMISSION RULINGS REQUIRE REFUNDS.

A. Section 276 Does Not Require Refunds.

The Trade Associations contend that by refusing to award refunds in all cases the FCC has "failed to enforce" Section 276. Br. 27; *see id.* at 36–39. But as the agency found, the statute is silent on that issue: "Although section

276 establishes requirements for payphone rates, it does not dictate whether refunds are due under any given set of circumstances." *Order* ¶ 41 (JA 21).

Section 276(a) provides that, after the effective date of the FCC's implementing rules, a BOC may neither "subsidize its payphone service" from its other telecommunications operations, 47 U.S.C. § 276(a)(1), nor "prefer or discriminate in favor of its payphone service," *id.* § 276(a)(2). Section 276(a) does not require refunds or any other remedy.

In Section 276(b), Congress directed the FCC to implement Section 276(a)'s prohibitions against improper subsidization and discrimination by "prescrib[ing] a set of nonstructural safeguards" at least "equal" to those the agency had adopted in its *Computer III* proceedings. *Id.* § 276(b)(1)(C). Yet nothing in Section 276(b)(1)(C) (or any other provision of Section 276(b)) directs the FCC to guarantee refunds either.[18] *See* 47 U.S.C. § 276(b).

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[18] There is also no absolute right to refunds under Section 276(b)(1)(A). *See* 47 U.S.C. § 276(b)(1)(A). To the extent the Trade Associations seek to suggest otherwise—citing *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998) (per curiam), and the FCC's orders on remand, *see* Br. 47–48—the Court should not be misled. *MCI* involved the FCC's chosen default rate for dial-around calls, not BOC payphone line rates. *See* 143 F.3d at 607. Although directing the FCC to reconsider that rate on remand, this Court elected not to vacate the rate because "if and when on remand the [FCC] establish[ed] some different rate," the agency would have the option of ordering refunds for any overcompensation. *Id.* at 609. On remand, the FCC ultimately did revise its chosen rate and order refunds. *See Implementation of*

When a statute is silent on the issue of remedies, whether and under what circumstances to award retrospective relief is a matter of agency discretion, and an agency decision adopting a permissible reading of the statute is entitled to deference. *See, e.g.*, *AT&T v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006) (citing the "long-standing principle that 'the breadth of agency discretion is, if anything, at zenith when the action assailed relates . . . to the fashioning of . . . remedies and sanctions" (second alteration in original) (quoting *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967)); *see also Chevron*, 467 U.S. at 843. Here, confronted with Congress's silence in Section 276 on the question of remedies, the FCC was free to determine that whether refunds are warranted is a fact-specific and fact-intensive question best resolved by the state authorities entrusted to conduct the related pricing proceedings. *See Order* ¶¶ 42, 49 (JA 22, 26).

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the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2635–36 ¶¶ 195–98 (1999). But as the Trade Associations themselves acknowledge, *see* Br. 47, *MCI* establishes only that the FCC had the "authority" to order refunds, not that refunds were required on the facts of that case—let alone in the very different context presented here, *see* 143 F.3d at 609.

B. FCC Rules Do Not Guarantee Refunds in Every Case.

The Trade Associations contend that the FCC's *Order* is inconsistent with Section 276(c) of the Communications Act, which provides that, "[t]o the extent . . . State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters . . . preempt such State requirements." 47 U.S.C. § 276(c). But nothing in the FCC's prior orders requires refunds in all cases.

To be sure, the FCC provided in the *Second Bureau Waiver Order* that if a BOC needed an extension beyond April 15, 1997, to file new or revised tariffs to satisfy the agency's new services test, and if "the newly tariffed rates [were] lower than the existing tariffed rates," the BOC would be required to issue refunds. *Order* ¶ 45 (JA 23) (citing *Second Bureau Waiver Order* ¶ 19). But as the FCC explained in the *Order* under review, the *Second Bureau Waiver Order* "[does] not impose an open-ended refund obligation." *Order* ¶ 46 (JA 24). Moreover, that order "[does] not specifically discuss the applicability of refunds where," as here, BOCs "did not file new tariffs" in reliance upon the extension that the order allowed "but instead . . . filed cost studies [to support the new services test compliance of their] existing rates." *Id.* ¶ 45 (JA 24). Thus, when state authorities properly require BOCs to comply with the new services test on a prospective basis, nothing in the *Second Bureau Waiver Order* requires that IPPs automatically, in all cases, receive refunds or other retrospective relief. *See id.* ¶¶ 40–41 (JA 20–21).

The FCC's interpretation of the *Second Bureau Waiver Order* not to require refunds when BOCs did not file new or revised tariffs during the Spring 1997 extension period merits a "high level of deference," *MCI Worldcom*, 274 F.3d at 548, surviving review unless "clearly erroneous," *id.* at 547 (internal quotation marks omitted). The agency reasonably determined that cases in which BOCs maintained that their existing tariffs already satisfied the new services test were quite different from those in which BOCs took advantage of the Spring 1997 extension to delay their filing of new or revised tariffs, and that the *Second Bureau Waiver Order* applies only in the latter scenario. *See Order* ¶ 45 (JA 23–24) (concluding that the former scenario "would raise very different issues with regard to potential liability for refunds").[19]

[19] The Trade Associations also contend that permitting authorities in some states to deny refunds when authorities in other states have permitted them is inconsistent with the *Payphone Reconsideration Order*'s requirement that each state have new services test-compliant tariffs. *See* Br. 40 (citing *Payphone Reconsideration Order* ¶ 163). But the *Payphone Reconsideration Order* "[does] not specifically address . . . refunds." *Order* ¶ 38 (JA 20). And as the *Order* here suggests, the FCC's decision to let state authorities resolve payphone line refund disputes is a logical outgrowth of its decision in

The scope of preemption under Section 276(c) is limited to state requirements "inconsistent" with FCC rules or orders. 47 U.S.C. § 276(c). Because the FCC reasonably determined that the *Second Bureau Waiver Order* did not require refunds in all cases, the state decisions at issue here are not preempted under Section 276(c).

C. The *Order* Is Not an Unlawful Subdelegation of the Commission's Authority over Payphone Services.

While on the one hand recognizing the legitimacy of the FCC's decision in the *Payphone Reconsideration Order* to give state regulators the primary responsibility for conducting pricing proceedings for intrastate payphone line rates, *see* Br. 67, the Trade Associations nevertheless claim it was an unlawful subdelegation of authority for the FCC to leave the resolution of refund disputes arising from those proceedings to state authorities, *see* Br. 62–66. To support that claim, the Trade Associations rely on this Court's decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

In *USTA II*, this Court considered the FCC's implementation of Section 251 of the Communications Act, as amended by the 1996 Act, in which Congress directed the agency to "determin[e] what network elements"

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the *Payphone Reconsideration Order* to entrust state regulators to conduct the underlying pricing proceedings, *see id.* ¶ 42 (JA 22).

incumbent LECs should be required to make available to their competitors.[20] 47 U.S.C. § 251(d)(2); *see USTA II*, 359 F.3d at 561. Congress expressly required the agency, in doing so, to "consider . . . whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B). Seeking to comply with a directive from this Court to develop a "nuanced" standard of what would constitute "impairment," the FCC "adopted a provisional nationwide rule" but allowed state regulatory commissions to exercise "virtually unlimited discretion" in developing exclusions to that rule. *USTA II*, 359 F.3d at 563–64. That approach was an unlawful subdelegation of authority, this Court held, because Congress had expressly directed the FCC to determine what network elements incumbent LECs should make available, and there was no evidence that Congress intended to permit the agency to delegate that authority to an outside entity. *See id.* at 565.

Here, by contrast, nothing in Section 276 reserves to the FCC the responsibility for deciding refund disputes. On the contrary, by limiting federal preemption to state requirements that are "inconsistent with the

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[20] Incumbent LECs are the LECs that succeeded to the Bell System's local operations after the Bell System's dissolution, comprising mainly but not exclusively the BOCs. *See Core Communications*, 592 F.3d at 141.

Commission's regulations," 47 U.S.C. § 276(c), the statute makes plain that Congress contemplated a continued state role in payphone regulation, *see Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) ("[B]y expressly limiting federal preemption to state requirements that are *inconsistent* with the federal regulations, Congress signaled its intent not to occupy the entire field of payphone regulation."), *aff'd*, 550 U.S. 45 (2007). Given the agency's determination that the states are best positioned to resolve refund issues in view of their familiarity with the particulars of each underlying proceeding, it was entirely appropriate for the FCC to defer to the states in resolving whether refunds are (or are not) appropriate in any specific case. *See Order* ¶ 42 & n.178 (JA 22).

D. The *Order* Reasonably Allows State Authorities to Apply the Filed Rate Doctrine and the Prohibition against Retroactive Ratemaking.

The Trade Associations also complain that the FCC "wholly ignore[d] . . . inconsistencies" among state refund decisions. Br. 46; *see id.* at 44–47. The FCC did not, of course, ignore that IPPs succeeded in obtaining refunds in some states, and not in others; the *Order* expressly acknowledges as much. *See Order* ¶ 48 (JA 26). And the Trade Associations have not demonstrated that state authorities reached inconsistent results in proceedings that were factually and procedurally identical. Nor have the Trade

Associations demonstrated that any state decision awarding refunds is on all fours with the Illinois, New York, or Ohio proceedings. On the contrary, the record shows that state refund proceedings were highly fact-dependent and procedurally distinct.

In arguing that state refund decisions were inconsistent, the Trade Associations assert that the FCC unreasonably permitted some states to bar refunds by applying the filed rate doctrine and the prohibition against retroactive ratemaking. But whether those doctrines apply can itself be a complex and fact-dependent question. *Cf. Arroyo-Melecio v. P.R. Am. Ins. Co.*, 398 F.3d 56, 73 (1st Cir. 2005) (characterizing the filed rate doctrine as "a famously complex . . . set of rules"). The question turns, at base, on whether the tariff at issue was properly filed with, and approved by, the governing regulatory authority. *Cf. ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410–11 (D.C. Cir. 2002) (explaining the distinction between "legal" and "lawful" tariffs). And as happened in the Ohio proceeding here, that determination can become a matter of factual dispute.[21] *See Ohio Supreme*

[21] It can also be a matter of legal dispute, and what constitutes the necessary "approval" of a tariff may vary among regulatory regimes. Prior to the 1996 Act, for example, tariffs filed with the FCC "that became effective without suspension or investigation were only legal (not conclusively lawful), and thereby remained subject to refund remedies." *ACS of Anchorage*, 290 F.3d at 411. That changed, however, with the enactment of the current 47 U.S.C. § 204(a)(3); today, so-called "streamlined tariff[s]" that "take[] effect without

Court Order, 849 N.E.2d at 10 (holding that the PAO "rel[ied] on the erroneous premise that no tariffs were ever filed or approved"). In addition, whether the doctrines apply may depend on the related, factual question of whether affected parties "have notice that a rate is tentative and may be later adjusted with retroactive effect." *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007) (internal quotation marks omitted). Thus, for example, the filed rate doctrine and prohibition on retroactive ratemaking do not apply when, as in the South Carolina proceeding here, a regulatory commission accepts a carrier's filed tariff subject to an accounting order in which it expressly warns that any subsequent rate reductions will have retroactive effect. *See supra* pp. 32–33.

Because refunds are an equitable remedy, moreover, whether to award them turns on a myriad of factual and procedural considerations beyond just the application of the filed rate doctrine or the prohibition against retroactive ratemaking. *See supra* pp. 28–29. The arbiter of a refund dispute must consider and balance all relevant factors, *see id.*, and the FCC reasonably elected here to entrust that analysis to state authorities familiar with the

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prior suspension or investigation [are] conclusively presumed to be . . . lawful . . . during the period that [they] remain[] in effect." *Id.* To the extent the Trade Associations maintain that the filed rate doctrine and the prohibition against retroactive ratemaking operate identically, as a matter of law, in every state, *see* Br. 44–45, we do not concede that point.

specific details of each underlying pricing proceeding, *see supra* pp. 29–34. Under the circumstances, the Trade Associations cannot credibly contend that the FCC was required to reserve to itself, from among the many factors bearing on whether to award refunds, the lone question of whether to apply the filed rate doctrine or the prohibition against retroactive ratemaking.

Two cases from outside this circuit on which the Trade Associations heavily rely—*Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006), and *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225 (10th Cir. 2007)—are not to the contrary. *See* Br. 42–44. Those cases involved suits in federal court for damages against a BOC (Qwest) for violation of Section 276(a) and other provisions of the Communications Act. *See TON*, 493 F.3d at 1234; *Davel*, 460 F.3d at 1085. The courts of appeals (the Ninth and Tenth Circuits) held that the filed rate doctrine did not bar the plaintiffs' claims at the earliest stage of litigation. *See TON*, 493 F.3d at 1236–38; *Davel*, 460 F.3d at 1085–86. Critical to those decisions were allegations that Qwest had disregarded the FCC's intrastate tariff-filing requirement altogether—ignoring the May 19, 1997, deadline to file new tariffs or cost data to support existing tariffs. *See TON*, 493 F.3d at 1234; *Davel*, 460 F.3d at 1083. Thus, the crux of the plaintiffs' claims in *Davel* and *TON* concerned procedural noncompliance with the FCC's orders—a failing not at issue here.[22] *See TON*, 493 F.3d at 1237; *Davel*, 460 F.3d at 1084–85. Insofar as the Trade Associations' seek to construe *Davel* and *TON* as providing that the filed rate doctrine and the prohibition against retroactive ratemaking can never bar refunds when a BOC's rates have failed to satisfy the new services test, *see* Br. 42–44, the cases simply do not support that sweeping proposition.

E. The IPTA and IPANY Should Not Prevail on Their Petitioner-Specific Arguments.

Finally, the IPTA and IPANY raise arguments specific to their respective petitions for review that in no way undermine the *Order*.

First, both the IPTA and IPANY contend that the *Order* is arbitrary and capricious because the FCC misconstrued the Illinois and New York authorities' reasons for denying refunds. *See* Br. 49–52 (arguing that the FCC misconstrued the ICC's denial of refunds as hinging in part on the IPTA's failure to file a formal complaint challenging AT&T's rates); *id.* at 52–53 (arguing that the New York courts' determination that IPANY had

[22] The record is clear that AT&T and Verizon filed cost data in support of their existing tariffs by the FCC's May 19, 1997, deadline. *See* PAO Petition at Exh. 3 (JA 861–62) (providing the May 16, 1997, letter in which AT&T (then Ameritech Ohio) informed the PUCO and supplied supporting cost data to show that its existing payphone access line tariffs complied with the new services test); *Illinois Appellate Order*, slip op. at 3 (JA 332) (citing AT&T's submission of cost data in Illinois); Slevin Letter at 2 & Attachment (JA 458, 460) (providing cost and revenue information in support of Verizon's existing rates in New York).

failed to exhaust its administrative remedies had no bearing on the Appellate Division's denial of refunds). The *Order* under review accurately characterized the New York and Illinois decisions. *See N.Y. Appellate Order*, 774 N.Y.S.2d at 199 (holding that IPANY "could have petitioned the PSC to change Verizon's rates" in response to the bureau order that preceded the *Wisconsin Payphone Order* and that, having failed to do so, IPANY had "failed to exhaust [its] administrative remedies"); *ICC Order*, slip op. at 42 (JA 225) ("Significantly, from the time that the FCC established its [new services test] through today, there has been no complaint to formally challenge the rates at issue in this case.").[23] In any event, the FCC did not purport to examine the state authorities' procedural findings in detail; it instead referred (in single-sentence summaries) to the procedural differences among the cases to support its determination that it was appropriate for each

[23] It is true that in New York, as discussed above, *see supra* p.17, the Appellate Division's specific discussion of the refund issue centered on the inapplicability of the *Second Bureau Waiver Order*, *see N.Y. Appellate Order*, 774 N.Y.S.2d at 200. The court's holding with respect to IPANY's failure to exhaust administrative remedies was nonetheless relevant to the question of refunds, because a determination of Verizon's compliance with the new services test as of 1997—and whether the NYPSC should apply the *Wisconsin Payphone Order* in making that assessment—would necessarily underlie any award of refunds.

state to adjudicate refund disputes.[24] *See Order* ¶¶ 1, 40–42, 47 (JA 3, 20–22, 25–26).

Second, IPANY argues that the *Order* under review is arbitrary and capricious because the FCC did not direct the NYPSC to apply the *Wisconsin Payphone Order* in determining, on remand from the reviewing state court, whether Verizon's rates as of April 15, 1997, satisfied the new services test. *See* Br. 66–69. That argument is moot because, for the reasons already stated, the FCC permissibly determined that state authorities are better positioned than the agency to decide refund disputes arising from pricing proceedings that the agency did not conduct. *See supra* pp. 29–34. The *Order* thus leaves in place the New York Appellate Division's decision that refunds are unavailable irrespective of whether the *Wisconsin Payphone Order* applies. *See N.Y. Appellate Order*, 774 N.Y.S.2d at 200.

As IPANY acknowledges, moreover, the NYPSC has already brought Verizon's rates into compliance, on a prospective basis, with the new services test as interpreted in the *Wisconsin Payphone Order*. *See* Br. 20–21, 38. IPANY thus cannot credibly characterize the *Order* under review as a

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[24] The IPTA's and IPANY's arguments that they did in fact formally challenge AT&T's rates (in the IPTA's case), *see* Br. 49–51, and exhaust administrative remedies (in IPANY's case), *see id.* at 53, fail on this same basis.

departure from the FCC's precedent of providing guidance to state regulators on questions of pricing.

III. THE TRADE ASSOCIATIONS LACK STANDING TO CHALLENGE THE FCC'S DECISION NOT TO RENDER A DECLARATORY RULING ON THE BOCS' ELIGIBILITY FOR DIAL-AROUND COMPENSATION, AND IN ANY EVENT THE FCC'S ACTION WAS A VALID EXERCISE OF DISCRETION.

In addition to arguing that the FCC was required to order refunds, the Trade Associations ask this Court to order the agency to decide whether the BOCs should forfeit the dial-around compensation they collected before eventually lowering their rates in the wake of the *Wisconsin Payphone Order*. *See* Br. 70. The Trade Associations lack standing to make this request, and the Court therefore lacks jurisdiction to grant it. In any event, the FCC's decision not to render the Trade Associations' desired declaratory ruling was well within the agency's discretion.

A. The Trade Associations Lack Standing Because Dial-Around Compensation Was Paid by IXCs, Not IPPs.

"[A] showing of standing is an essential and unchanging predicate to any exercise of [federal court] jurisdiction." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011) (internal quotation marks omitted). When, as here, a petitioner seeks to establish associational standing, it must establish, among other requirements, that at least one of its members can individually satisfy the elements of injury-in fact, causation, and redressability. *See id.*; *see also Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) ("The 'irreducible constitutional minimum of standing contains three elements': (1) injury-in-fact, (2) causation, and (3) redressability." (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992))).

Critically, for purposes of the Trade Associations' standing here, it is IXCs, not payphone service providers, that compensate BOCs for dial-around calls. *See, e.g.*, *IPTA*, 117 F.3d at 560 ("The Commission concluded that . . . the IXC should be required to pay these charges . . . ."). The Trade Associations acknowledge as much in their brief. *See* Br. 6, 10, 11, 15, 56. Because no member of the Trade Associations paid dial-around compensation, any injury that members suffered arose from the payments they made for payphone line services, which the Trade Associations allege were unlawfully high. That injury (if any) did not result from the FCC's decision not to declare that the BOCs were ineligible to collect dial-around compensation (or even from the BOCs' collection of dial-around compensation itself), and it would not be redressed by an order directing forfeiture. The Appellate Court of Illinois reached this same conclusion in rejecting the IPTA's dial-around compensation claim in Illinois. *See Illinois Appellate Opinion*, slip op. at 12–13 (JA 341–42).

Without attempting to challenge that logic, the Trade Associations seek to manufacture standing on a threefold theory (1) that the FCC made "actual compliance" with the new services test a prerequisite to BOC eligibility for dial-around compensation, (2) that the new services test was a requirement designed to benefit IPPs (by leveling the playing field with the BOCs), and (3) that therefore the Trade Associations' members had an interest in having the FCC declare AT&T and Verizon ineligible to have begun receiving dial-around compensation when they did. *See* Br. 33, 56–58. As a threshold matter, even under this theory, the Trade Associations still have failed to assert any injury caused by the FCC's decision not to decide the question of BOC eligibility for dial-around compensation. Moreover, were it sufficient for the Trade Associations to assert an injury arising from the BOCs' collection of dial-around compensation itself, rather than from the agency's refusal to address the question of eligibility (and it is not), the Trade Associations would remain unable to show how the relief they request would redress their claimed injury. Ultimately, the relief the Trade Associations seek is an order to the FCC that could lead to the forfeiture of the BOCs' dial-around compensation. *See* Br. 70. Such a forfeiture would in no way benefit the Trade Associations' members when it was IXCs that paid the dial-around compensation, not IPPs. Thus, the Trade Associations lack standing to seek such relief.

B. Declining to Issue a Declaratory Ruling on the BOCs' Eligibility for Dial-Around Compensation Was a Valid Exercise of the FCC's Discretion.

Moreover, whether to issue a declaratory ruling to end a controversy or remove uncertainty is a matter of FCC discretion. *See* 47 C.F.R. § 1.2; *see also* 5 U.S.C. § 554(e) (entrusting whether to issue declaratory orders to the "sound discretion" of agencies generally). "[T]he Commission is not *required* to issue such a declaratory statement merely because a [party] asks for one." *Yale Broad. Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973). Here, in declining to issue the Trade Associations' requested declaratory ruling, the FCC explained that the BOCs had self-certified compliance with the new services test before collecting dial-around compensation, and that there was no "evidence that the BOCs' self-certifications were defective[,] . . . fraudulent," or knowingly false.[25] *Order* ¶ 38 n.161 (JA 19). Under these

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[25] The Trade Associations seek to "impeach[]" AT&T's self-certification, Br. 60, using an unsubstantiated statement concerning AT&T overheads of "hundreds of percent" raised in a lone ex parte letter buried within the voluminous record before the agency, *id.* at 59 (citing an April 25, 2011, letter from Michael W. Ward to then-Commissioner Michael J. Copps). The FCC "need not sift pleadings and documents to identify arguments that are not stated with clarity." *NEPCC*, 334 F.3d at 79 (internal quotation marks omitted). And in any event, the Trade Associations fail to articulate (and failed to show before the agency) why the FCC's assessment of permissible

circumstances, the Trade Associations fail to show that the FCC's decision not to issue their hoped-for declaratory statement was an abuse of discretion.[26]

CONCLUSION

The Court should dismiss the petitions for review to the extent it lacks jurisdiction. In all other respects, the Court should deny the petitions for review.

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overhead levels in other dockets—including in an order released *after* AT&T certified its new services test compliance here, *see* Br. 59—should operate to impeach AT&T's self-certification in the manner the Trade Associations contend.

[26] Although the Trade Associations argue that the FCC's decision not to render their requested declaration amounts to a change in agency policy, *see* Br. 58–59, they offer no examples of previous instances in which the FCC granted equivalent petitions for declaratory ruling.

Respectfully submitted,

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November 5, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	CONSOLIDATED CASE NOS. 13-1059, 13-1083, 13-1149

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Federal Rule of Appellate Procedure 32(a)(7), I hereby certify that the accompanying Brief of Respondents in the captioned consolidated cases contains 11,828 words.

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January 28, 2014

STATUTORY APPENDIX

5 U.S.C. § 554(e)

47 U.S.C. § 267

47 C.F.R. § 1.2

5 U.S.C. § 554

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 554. Adjudications

* * * * * *

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

47 U.S.C. § 276

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART III. SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service--

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on February 8, 1996, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) Public interest telephones

In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) Existing contracts

Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of February 8, 1996.

(c) State preemption

To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) “Payphone service” defined

As used in this section, the term “payphone service” means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

47 C.F.R. § 1.2

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE - GENERAL

§ 1.2 Declaratory rulings.

(a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

(b) The bureau or office to which a petition for declaratory ruling has been submitted or assigned by the Commission should docket such a petition within an existing or current proceeding, depending on whether the issues raised within the petition substantially relate to an existing proceeding. The bureau or office then should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a docketed petition for declaratory ruling will be 30 days from the release date of the public notice, and the default filing deadline for any replies will be 15 days thereafter.

13-1059 et al.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

ILLINOIS PUBLIC TELECOMMUNICATIONS ASS'N,
et al., Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, Respondents

CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on January 28, 2014, I electronically filed the foregoing Final Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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