

Before the  
Federal Communications Commission  
Washington, D.C. 20554

|  |   |                      |
|--|---|----------------------|
| In the Matter of                                   | ) |                      |
|  | ) |                      |
| Implementation of the Pay Telephone                | ) |                      |
| Reclassification and Compensation Provisions of    | ) | CC Docket No. 96-128 |
| the Telecommunications Act of 1996                 | ) |                      |
|  | ) |                      |
| Illinois Public Telecommunications Association's   | ) |                      |
| Petition for a Declaratory Ruling                  | ) |                      |
| Regarding the Remedies Available for Violations    | ) |                      |
| of the Commission's Payphone Orders                | ) |                      |
|  | ) |                      |
| The Southern Public Communication                  | ) |                      |
| Association's Petition for a Declaratory Ruling    | ) |                      |
| Regarding the Remedies Available for Violations    | ) |                      |
| of the Commission's Payphone Orders                | ) |                      |
|  | ) |                      |
| Petition of the Independent Payphone Association   | ) |                      |
| of New York, Inc. to Pre-empt Determinations of    | ) |                      |
| the State of New York Refusing to Implement the    | ) |                      |
| Commission's Payphone Orders, and For a            | ) |                      |
| Declaratory Ruling                                 | ) |                      |
|  | ) |                      |
| Petition of the Florida Public Telecommunications  | ) |                      |
| Association, Inc. for a Declaratory Ruling and for | ) |                      |
| an Order of Preemption Concerning the Refund of    | ) |                      |
| Payphone Line Rate Charges                         | ) |                      |
|  | ) |                      |
| Petition of the Payphone Association of Ohio 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    | ) |                      |
|  | ) |                      |
| The Michigan Pay Telephone Association's           | ) |                      |
| Petition for Declaratory Ruling Regarding          | ) |                      |
| The Prices Charged by AT&T Michigan                | ) |                      |
| For Network Access Services Made                   | ) |                      |
| Available to Payphone Providers in Michigan        | ) |                      |

**DECLARATORY RULING AND ORDER**

**Adopted: February 20, 2013**

**Released: February 27, 2013**

By the Commission: Commissioner Clyburn dissenting and issuing a statement.

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## I. INTRODUCTION

1. In this order, the Commission provides further guidance to state commissions and payphone service providers (PSPs) regarding the requirements of section 276 of the Communications Act, as amended (the Act) and the Commission’s interpretation of that provision.<sup>1</sup> We reinforce that section 276 of the Act requires Bell Operating Companies (BOCs) to have cost-based rates for payphone access lines, that the Commission has determined that rates that comply with the new services test (NST) meet this statutory requirement, and that BOCs that did not have NST-compliant rates in effect could be

<sup>1</sup> 47 U.S.C. § 276. See 47 C.F.R. § 64.1300 *et seq.* See also *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996) (*Initial Payphone Order*), Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) (*Payphone Reconsideration Order*), *aff’d in part and remanded in part*, *Illinois Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct. 9, 1997) (*Second Payphone Order*), *vacated and remanded*, *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb. 4, 1999) (*Third Payphone Order*), *aff’d*, *American Pub. Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); *Wisconsin Pub. Serv. Comm’n; Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2064, para. 42 (2002) (*Wisconsin Payphone Order*), *aff’d* *New England Pub. Comms. Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003). (The *Initial Payphone Order* and the *Payphone Reconsideration Order* are collectively known as the *Payphone Orders*.)

required to issue refunds. Also, we deny five petitions for declaratory ruling filed by PSP associations<sup>2</sup> because we find that the state commissions acted within the scope of the Commission's delegation of authority to determine whether payphone rates are tariffed in accordance with section 276 of the Act. We also find that the requirements in the state commissions' decisions were not inconsistent with the Commission's regulations, and therefore we decline to grant any requests for preemption of the requirements imposed in those decisions.<sup>3</sup> We further clarify that a state commission may order refunds for any time period after April 15, 1997 if it concludes that a BOC was charging PSPs a rate that was not NST-compliant, as a number of states have.<sup>4</sup> Finally, we reject the PSPs' assertion that the April 1997 *Second Bureau Waiver Order* requires the refunds they seek. We note, however, that the *Second Bureau Waiver Order* does not limit states' ability to reconsider prior actions denying refunds and to order refunds based on their own analysis of state and federal law and the application of those laws to the particular facts in the cases before them.<sup>5</sup>

2. This order also responds to a petition for declaratory ruling filed by the Michigan Pay Telephone Association (MPTA) by determining that the current payphone usage rate in Michigan is not NST-compliant.<sup>6</sup> As such, we remand to the Michigan Public Service Commission (Michigan Commission), and direct them to require the carrier to establish a new, NST-compliant payphone usage rate consistent with the guidance in this order, and the Commission's *Payphone Orders*.

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<sup>2</sup> See Illinois Public Telecommunications Association Petition for a Declaratory Ruling, CC Docket No. 96-128 (filed July 30, 2004) (IPTA Petition); The Southern Public Communication Association Petition for a Declaratory Ruling, CC Docket No. 96-128 (filed Nov. 9, 2004) (SPCA Petition); Petition of the Independent Payphone Association of New York, Inc. for an Order of Pre-emption and Declaratory Ruling, CC Docket No. 96-128 (filed Dec. 29, 2004) (IPANY Petition); Petition of the Florida Public Telecommunications Association, Inc. for Declaratory Ruling and for an Order of Preemption, CC Docket No. 96-128 (filed Jan. 31, 2006) (FPTA Petition); Petition of the Payphone Association of Ohio 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, CC Docket No. 96-128 (filed Dec. 28, 2006) (PAO Petition). Both SPCA and IPANY filed motions to consolidate their petitions with the other pending petitions. See Motion of the Southern Public Communication Association to Consolidate its Petition for a Declaratory Ruling with the Petition for a Declaratory Ruling of the Illinois Public Telecommunications Association, CC Docket No. 96-128 (filed Nov. 9, 2004); Motion of the Independent Payphone Association of New York, Inc. to Consolidate its Petition for an Order of Pre-emption and a Declaratory Ruling with (1) the Petition for a Declaratory Ruling of the Illinois Public Telecommunications Association and (2) the Southern Public Communication Association Petition for a Declaratory Ruling, CC Docket No. 96-128 (filed Dec. 29, 2004) (IPANY Motion to Consolidate). In this order, we grant the SPCA and IPANY Motions to Consolidate.

<sup>3</sup> See *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163.

<sup>4</sup> See *infra* para. 48.

<sup>5</sup> See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, 12 FCC Rcd 21370 (CCB rel. Apr. 15, 1997) (*Second Bureau Waiver Order*).

<sup>6</sup> See The Michigan Pay Telephone Association's Second Petition for Declaratory Ruling Regarding The Prices Charged by AT&T Michigan for Network Access Services Made Available to Payphone Providers in Michigan, CC Docket No. 96-128 (filed May 22, 2006) (MPTA Petition). As explained below, MPTA had filed a previous petition for declaratory ruling in this proceeding in 1999. See *infra* para. 34.

## II. BACKGROUND

### A. Payphone Services

3. Congress enacted section 276 to “promote competition among payphone service providers and promote the widespread deployment of payphone service to the benefit of the general public.”<sup>7</sup> To advance these pro-competitive statutory goals, Congress directed the Commission to “terminat[e] the current system of payphone regulation” and “eliminate all discrimination between BOC and independent payphones and all subsidies or cost recovery for BOC payphones.”<sup>8</sup> In addition, section 276 required the Commission 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 using their payphone”<sup>9</sup> and to discontinue “all intrastate and interstate payphone subsidies”<sup>10</sup> in favor of the per-call compensation plan.

4. In its 1996 *Initial Payphone Order*, the Commission concluded that, in order for a BOC to be eligible for dial-around compensation, it must offer individual central office coin transmission service to PSPs under nondiscriminatory, public, tariffed offerings if the BOC provided those services for its own payphone operations.<sup>11</sup> The Commission also concluded that BOCs must provide coin service so competitive payphone providers can offer payphone services using either “smart payphones” or “dumb payphones” that utilize central office coin services.<sup>12</sup> Because the Commission recognized that BOCs may have an incentive to charge their competitors unreasonably high prices for these services, it concluded that “the [NST] is necessary to ensure that central office coin services are priced reasonably.”<sup>13</sup> The NST requires a BOC to provide cost studies for its payphone service rates sufficient to establish that such charges will not recover more than a just and reasonable portion of its overhead costs from a particular service.<sup>14</sup>

5. The Commission concluded in the *Initial Payphone Order* that tariffs for payphone services should be filed with the Commission as part of the BOC’s access services to ensure that the

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<sup>7</sup> 47 U.S.C. § 276(b)(1).

<sup>8</sup> H.R. Rep. No. 104-204, at 88 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 54.

<sup>9</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>10</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>11</sup> *Initial Payphone Order*, 11 FCC Rcd at 20614-15, para. 146. We note that, in the *Initial Payphone Order* and the *Payphone Reconsideration Order*, the Commission referred to “incumbent [local exchange carrier] LEC” obligations, not “Bell Operating Company” or BOC obligations. In the *Wisconsin Payphone Order*, however, the Commission clarified that section 276 requires only BOCs, and not incumbent LECs generally, to provide payphone lines at cost-based rates. The Commission stated that, “[b]ecause sections 276(a) and (b)(1)(C) apply only to BOCs, we do not find that Congress has expressed with the requisite clarity its intention that the Commission exercise jurisdiction over the intrastate payphone prices of non-BOC LECs.” *Wisconsin Payphone Order*, 17 FCC Rcd at 2064, para. 42. The court of appeals agreed. *New England Pub. Comms. Council, Inc. v. FCC*, 334 F.3d at 78.

<sup>12</sup> See *Initial Payphone Order*, 11 FCC Rcd at 20614-15, para. 146.

<sup>13</sup> *Id.*

<sup>14</sup> “Each tariff filing submitted by a price cap LEC that introduces a new loop-based service, as defined in § 61.3(pp) of this part – including a restructured unbundled basic service element (BSE), as defined in § 69.2(mm) of this chapter, that constitutes a new loop-based service – that is or will later be included in a basket, must be accompanied by cost data sufficient to establish that the new loop-based service or unbundled BSE will not recover more than a just and reasonable portion of the carrier’s overhead costs.” 47 C.F.R. § 61.49(f)(2).

services are reasonably priced and do not include subsidies.<sup>15</sup> The Commission also concluded that BOCs must file revised carrier common line (CCL) tariffs with the Commission no later than January 15, 1997 “to reduce their interstate CCL charges by an amount equal to the interstate allocation of payphone costs [that were] currently recovered through those charges, scheduled to take effect April 15, 1997.”<sup>16</sup> In discussing tariffing requirements, the Commission stated that section 276 does not refer to, or require, the application of sections 251 and 252 to incumbent LEC payphone services, and it instead concluded that *Computer III* tariff procedures and pricing are more appropriate for basic payphone services provided by BOCs to other payphone providers.<sup>17</sup> The Commission stated that any inconsistent state requirements with regard to pricing of payphone services are preempted.<sup>18</sup>

6. In the *Payphone Reconsideration Order*, the Commission modified the federal tariffing requirements of payphone services and provided additional guidance for BOC tariff filings.<sup>19</sup> In that order, the Commission specified the appropriate cost methodology for payphone lines and expressly required that the tariffs for LEC payphone services 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.”<sup>20</sup> The Commission also required that tariffs for payphone access lines be filed with the states, rather than the Commission, and it directed that state commissions apply the appropriate cost methodology and the *Computer III* guidelines for tariffing such intrastate services. The Commission also permitted states to ask the Commission to review these tariffs if they were unable to do so themselves.<sup>21</sup> The Commission explained that it “will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of section 276” as articulated by the Commission.<sup>22</sup> A subsequent order made clear, however, that “[a]ny party who believes that a particular LEC’s intrastate tariffs fail to meet [the Commission’s] requirements has the option of filing a complaint with the Commission.”<sup>23</sup> The Commission required tariffing in both the federal and state jurisdiction of any basic network services or unbundled payphone features used by the BOC’s payphone operations.<sup>24</sup>

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<sup>15</sup> *Initial Payphone Order*, 11 FCC Rcd at 20615, para. 147.

<sup>16</sup> *Id.* at 20633, para. 183.

<sup>17</sup> *Id.* at 20615, para. 147.

<sup>18</sup> *Id.* See also 47 U.S.C. § 276(c).

<sup>19</sup> See *Payphone Reconsideration Order*, 11 FCC Rcd 21233. The Commission reiterated its conclusion from the *Initial Payphone Order* that BOCs must provide tariffed, nondiscriminatory basic payphone services that enable independent providers to offer payphone services using either “smart payphones” or “dumb payphones” or some combination of the two in a manner similar to the BOCs. See *id.* at 21307-08, para. 162.

<sup>20</sup> *Id.* at 21308, para. 163.

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecomms. Act of 1996*, CC Docket No. 96-128, Order, 12 FCC Rcd 20997, para. 30 n.93 (CCB rel. Apr. 4, 1997) (*First Bureau Waiver Order*). To file a complaint, “[a]ny person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to [common carrier regulation], in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.” 47 U.S.C. §208(a).

<sup>24</sup> See *Payphone Reconsideration Order*, 11 FCC Rcd at 21307-08, para. 162.



7. In the *Payphone Reconsideration Order*, the Commission further concluded that, where the BOCs had already filed intrastate tariffs for these services, no further tariff filings would be required if the states determined that those previously filed tariffs were consistent with the Commission's *Payphone Orders*.<sup>25</sup> The Commission also permitted the BOCs to begin receiving dial-around compensation if they were able to self-certify compliance with the requirement that their rates be NST compliant.<sup>26</sup>

8. On April 4, 1997, and April 15, 1997, the Common Carrier Bureau (Bureau)<sup>27</sup> granted limited waivers to the BOCs, which allowed them additional time to file interstate and intrastate tariffs for payphone services in compliance with the guidelines contained in the *Payphone Orders*.<sup>28</sup> In the waiver orders (one for federal tariffs and one for state tariffs), the Bureau extended until May 19, 1997, the deadline for BOCs to file NST-compliant interstate and intrastate tariffs and remain eligible to receive dial-around compensation as of April 15, 1997, as long as they were in compliance with all of the other requirements set forth in the *Payphone Reconsideration Order*.<sup>29</sup> The Bureau ruled, however, that a BOC that seeks to rely on the waiver "must reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates."<sup>30</sup>

9. On March 2, 2000, the Bureau released the *Wisconsin Bureau Order*, which directed the four largest incumbent local exchange carriers in Wisconsin to submit to the Commission copies of their tariffs for intrastate payphone services that set forth the rates, terms and conditions associated with payphone services.<sup>31</sup> The *Wisconsin Bureau Order* responded to a letter order from the Wisconsin Commission, which concluded that it "lacks jurisdiction under state law to ensure that the rates, terms, and conditions applicable to providing basic payphone services comply with the requirements of section 276 of the Act and the Commission's implementing rules."<sup>32</sup> The *Wisconsin Bureau Order* also required the carriers to provide supporting documentation in compliance with the requirements of section 276 and the Commission's implementing rules, including the NST.<sup>33</sup> Finally, the *Wisconsin Bureau Order* provided additional guidance as to what the BOCs needed to demonstrate to satisfy the NST.<sup>34</sup>

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<sup>25</sup> See *id.* at 21308, para. 163.

<sup>26</sup> See *id.* at 21293, para. 131 (dial-around compensation is the payment carriers make to PSPs when the carrier's customers use payphones to make calls that do not directly compensate PSPs, such as access code calls, subscriber 800 calls, and other toll-free calls). See *id.* at 21238, para. 7.

<sup>27</sup> The Common Carrier Bureau became the Wireline Competition Bureau in 2002 as part of organizational changes at the Commission. See generally *Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau*, Order, 17 FCC Rcd 4672 (2002).

<sup>28</sup> See *First Bureau Waiver Order*, 12 FCC Rcd 20997 (1997) (regarding interstate tariffs); *Second Bureau Waiver Order*, 12 FCC Rcd 21370 (1997) (regarding intrastate tariffs).

<sup>29</sup> See *Second Bureau Waiver Order*, 12 FCC Rcd at 21379, para. 19.

<sup>30</sup> See *id.* at 21379-80, para. 20.

<sup>31</sup> *Wisconsin Pub. Serv. Comm'n; Order Directing Filings*, CCB/CPD No. 00-01, Order, 15 FCC Rcd 9978 (CCB rel. Mar. 2, 2000) (*Wisconsin Bureau Order*) (the *Wisconsin Bureau Order* and the *Wisconsin Payphone Order* will be collectively referred to as the *Wisconsin Payphone Orders*).

<sup>32</sup> *Id.* at 9979, para. 3.

<sup>33</sup> See *id.* at 9980, para. 5.

<sup>34</sup> See *id.* at 9981-82, paras. 9-12.

10. On application for review, the Commission, in the *Wisconsin Payphone Order*, affirmed in part and modified in part the *Wisconsin Bureau Order*.<sup>35</sup> The Commission provided states more specific guidance regarding the calculation of BOC payphone line rates pursuant to the NST. Specifically, the Commission determined that: (1) states should use an appropriate forward-looking economic cost methodology, such as TELRIC or TSLRIC; (2) states may use overhead loading factors applicable to unbundled network elements (UNE) or may establish ceilings for loading factors using the methodology from either the *Physical Collocation Tariff Order* or the *ONA Tariff Order*; (3) BOCs must reduce the monthly per-line charge determined under the NST by the amount of the applicable federally tariffed subscriber line charge (SLC); and (4) the NST applies to usage-sensitive as well as flat-rate elements of the charges for services offered to PSPs.<sup>36</sup>

11. Subsequent to the release of the *Wisconsin Payphone Order*, a number of state commissions required the BOCs to lower the payphone line rates being charged to PSPs, and in some states the BOCs voluntarily lowered their payphone line rates to ensure compliance with the NST, as clarified by the Commission.<sup>37</sup>

## **B. Petitions for Declaratory Ruling**

12. There are five petitions for declaratory ruling pending before the Commission in this docket, all regarding whether various state commissions erred in failing to provide refunds to PSPs. As discussed below, although all the petitions raise similar questions and request similar relief, each petition presents unique procedural facts. There is an additional petition filed by the MPTA requesting relief based on the local usage service rate established by the Michigan Commission. The MPTA petition raises a different but related issue to the other petitions and is also resolved in this order.

### **1. Illinois Public Telecommunications Association (IPTA) Petition for a Declaratory Ruling**

#### **a. The Petition**

13. On July 30, 2004, the IPTA filed a petition for declaratory ruling claiming that Illinois Bell Telephone Company d/b/a SBC Illinois (SBC), Verizon North, Inc. and Verizon South, Inc. (collectively Verizon) violated the Commission's requirements that rates for local telephone network services provided to competing PSPs meet the NST.<sup>38</sup> The petition requests a ruling that: (1) the PSP members of the IPTA are entitled to refunds from SBC and Verizon for the time periods in which BOC payphone rates and charges in Illinois exceeded the NST; (2) the Illinois Commerce Commission (ICC) decision denying the IPTA members refunds is inconsistent with the Commission's *Payphone Orders*; and (3) SBC and Verizon were ineligible to receive dial-around compensation for the period of time in which

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<sup>35</sup> See *Wisconsin Payphone Order*, 17 FCC Rcd at 2051.

<sup>36</sup> See *id.* at 2067-71, paras. 51-65; see also *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730 (1997); *Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, Order, 9 FCC Rcd 440 (1993).

<sup>37</sup> See, e.g., Mississippi Pub. Serv. Comm'n, Complaint of the Southern Pub. Communication Ass'n for Refund of Excess Charges by BellSouth Telecommunications, Inc. Pursuant to its Rates for Payphone Line Access, Usage and Features, Order, Docket No. 2003-AD-927, at 2 (rel. Sept. 1, 2004) (MPSC Refund Order); 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 Telecomms. Ass'n, Final Order on Arbitration of Complaint, Order No. PSC-04-0974-FOF-TP, at 5 (rel. Oct. 7, 2004) (FLPSC Payphone Order).

<sup>38</sup> See IPTA Petition at 3.

their rates were in excess of the NST.<sup>39</sup> The Bureau issued a public notice requesting comments on IPTA's petition on August 6, 2004.<sup>40</sup>

**b. State Procedural History**

14. In 1995, prior to this Commission's *Payphone Orders*, SBC and the IPTA agreed to a discounted rate schedule for payphone usage, to extend through June 30, 2005, which was approved by the ICC.<sup>41</sup> Similarly, prior to release of the *Payphone Orders*, the ICC approved Verizon's payphone rates.<sup>42</sup> In response to the Commission's *Payphone Orders*, SBC did not file any new tariffs with the ICC.<sup>43</sup> Instead, SBC relied upon the tariffs already on file and submitted additional cost documentation on May 15, 1997, which was accepted by the ICC.<sup>44</sup> Pursuant to the *Payphone Orders*, however, Verizon filed supplemental documentation and reduced certain payphone rates on May 19, 1997.<sup>45</sup> The ICC declared Verizon's rates competitive on October 7, 1997 and did not act to suspend the tariffs.<sup>46</sup>

15. On May 8, 1997, the IPTA filed a petition with the ICC asserting that SBC and Verizon were charging network service rates to IPTA payphone service providers in excess of the cost-based rates required by the NST.<sup>47</sup> IPTA requested, among other things, that the ICC order refunds to its members of any amounts that SBC or Verizon charged in excess of cost-based rates that complied with the NST. On December 17, 1997, the ICC initiated an investigation into SBC's and Verizon's compliance with the NST.<sup>48</sup> On November 12, 2003, the ICC issued an order which concluded that: (1) SBC's rates for payphone services did not satisfy the NST; (2) Verizon's rates for payphone services did not satisfy the NST; and (3) refunds to PSPs were prohibited by federal and Illinois law and should not be issued.<sup>49</sup> IPTA appealed the ICC's decision to the Appellate Court of Illinois.

16. On November 23, 2005, the Appellate Court of Illinois affirmed the ICC's decision.<sup>50</sup> The court agreed with the ICC's decision that, because it had previously approved the payphone rates being

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<sup>39</sup> *See id.*

<sup>40</sup> *Comments Sought on Illinois Pub. Telecomms. Association's Petition for a Declaratory Ruling Concerning Refund of Payphone Line Rate Charges*, CC Docket No. 96-128, Public Notice, 19 FCC Red 14939 (WCB 2004). A list of parties who filed comments and reply comments on this petition is in the attached Appendix.

<sup>41</sup> Illinois Commerce Comm'n, Investigation Into Certain Payphone Issues as Directed in Docket 97-0225, ICC Docket No. 98-0195, at 5-6 (rel. Nov. 12, 2003) (ICC Payphone Order).

<sup>42</sup> *See* BOC IPTA Comments at 5.

<sup>43</sup> *See id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.* at 6.

<sup>46</sup> *See* ICC Payphone Order at 6.

<sup>47</sup> *See* IPTA Petition at 5.

<sup>48</sup> *See* ICC Payphone Order at 2.

<sup>49</sup> *See id.* at 42-43. The ICC reasoned that, because it had already approved SBC's and Verizon's rates, the filed tariff doctrine barred refunds. Moreover, the ICC noted that "from the time that the FCC established its NST through today, there had been *no complaint to formally challenge the rates at issue in this case.*" *Id.* (emphasis in original).

<sup>50</sup> *Illinois Pub. Telecomms. Ass'n v. Illinois Commerce Comm'n, Illinois Bell Telephone Company d/b/a/ SBC Illinois, Verizon North, Inc., and Verizon South, Inc.*, ICC Docket No. 98-0195, Order, Case No. 1-04-0225 (Ill. App. Ct. 2005).



charged, SBC and Verizon were entitled to rely on those rates for as long as they were in effect.<sup>51</sup> Accordingly, the court held “that the subsequent reduction in those rates in November 2003 afford[ed] no right of action for a refund of the difference between the old and new rates” based on the doctrine prohibiting retroactive ratemaking.<sup>52</sup> The Illinois Supreme Court subsequently denied IPTA’s petition for leave to appeal the state court decision.<sup>53</sup>

## **2. The Southern Public Communication Association (SPCA) Petition for Declaratory Ruling**

### **a. The Petition**

17. On November 9, 2004, the SPCA filed a petition for declaratory ruling with the Commission.<sup>54</sup> The petition seeks a ruling that: (1) SPCA members are entitled to refunds of the tariffed payphone line rate charges they paid to BellSouth Telecommunications, Inc. (BellSouth) from April 15, 1997 to October 1, 2003 to the extent those charges exceeded rates that comply with the NST; (2) the Mississippi Public Service Commission (MPSC) did not properly follow and apply the Commission’s NST; (3) the MPSC should not have dismissed the SPCA’s complaint without an evidentiary hearing; and (4) MPSC should re-evaluate its dismissal of the claims in the complaint. The petition also asked the Commission to determine whether or not BellSouth was eligible to receive dial-around compensation on or before October 1, 2003.<sup>55</sup> The Bureau issued a public notice requesting comments on SPCA’s petition on November 19, 2004.<sup>56</sup>

### **b. State Procedural History**

18. On May 19, 1997, BellSouth filed with the MPSC a monthly, flat pay telephone access service rate of \$46.00 per-line per-month.<sup>57</sup> In an order dated July 14, 1997, the MPSC approved the BellSouth tariff to be effective as of April 15, 1997, which the SPCA did not appeal.<sup>58</sup> In 2003, pursuant to a settlement agreement between BellSouth and SPCA, BellSouth agreed to lower the pay telephone access rate from \$46.00 per-line per-month to \$24.99 per-line per-month and to reduce the line rate by the amount of the SLC, which further reduced the rate to \$17.86 per-line per-month.<sup>59</sup> This rate became effective on October 1, 2003.<sup>60</sup> On December 19, 2003, SPCA filed a complaint with the MPSC

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<sup>51</sup> *See id.* at 8.

<sup>52</sup> *See id.*

<sup>53</sup> *Illinois Pub. Telecomms. Ass’n v. Illinois Commerce Comm’n*, No. 102166, 219 Ill.2d 565 (2006).

<sup>54</sup> *See* SPCA Petition. “The SPCA is a Louisiana not-for-profit trade association representing 14 independent payphone providers in Mississippi.” *Id.* at 5.

<sup>55</sup> *See id.* at 4-5.

<sup>56</sup> *Comments Sought on Southern Public Telecomms. Association’s Petition for a Declaratory Ruling Concerning Refund of Payphone Line Rate Charges; Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, 19 FCC Red 22796 (WCB 2004). A list of parties who filed comments and reply comments on this petition is in the attached Appendix.

<sup>57</sup> SPCA Petition at 7. *See also id.* at Exhibit C.

<sup>58</sup> Mississippi Pub. Serv. Comm’n, *BellSouth Telecommunications, Inc., In re: Notice of Tariff Filing for Flat Rate Options Customer Provided Public Telephones and Smartline Service for Public Telephones*, Order, Docket 97-UN-0302 (rel. July 14, 1997) (MPSC Payphone Order).

<sup>59</sup> SPCA Petition at 8. *See also* SPCA Petition at Exhibit F.

<sup>60</sup> *Id.*

requesting refunds of excess payphone line charges by BellSouth.<sup>61</sup> SPCA claimed that the MPSC did not properly evaluate BellSouth's rates in 1997, and that BellSouth's subsequent lowering of the rate in 2003 indicates that the rate was never compliant with the NST.<sup>62</sup> On September 1, 2004, the MPSC denied SPCA's request and granted BellSouth's motion to dismiss.<sup>63</sup> The MPSC concluded that issuing refunds would violate the prohibition against retroactive ratemaking, as well as the filed rate doctrine.<sup>64</sup> The MPSC also rejected SPCA's claim that the *Wisconsin Payphone Order* preempted the MPSC's order approving the BellSouth tariffs.<sup>65</sup> The SPCA's petition for judicial review of the MPSC's decision is currently pending in federal court.

### **3. Petition of the Independent Payphone Association of New York, Inc. (IPANY) for an Order of Pre-Emption and Declaratory Ruling**

#### **a. The Petition**

19. On December 29, 2004, the IPANY filed a petition for declaratory ruling and order of preemption with the Commission.<sup>66</sup> IPANY's petition requests that the Commission: (1) preempt rulings of the State of New York, which it claims conflict with the Commission's various *Payphone Orders*; and (2) require Verizon to give refunds to PSPs where rates were not compliant with the NST.<sup>67</sup> The Bureau issued a public notice requesting comments on IPANY's petition on January 7, 2005.<sup>68</sup>

#### **b. State Procedural History**

1. In December 1996, 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*.<sup>69</sup> Verizon filed new payphone tariffs for its smart-line services but did not file new tariffs for its public access lines (PAL), or "dumb" payphone lines.<sup>70</sup> Verizon claimed that no changes were required to the existing PAL rates for the rates to comply with the NST.<sup>71</sup> The NYPSC approved the tariffs on a temporary basis on March 31, 1997.<sup>72</sup> Verizon

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<sup>61</sup> See MPSC Refund Order at 1.

<sup>62</sup> See *id.* at 2.

<sup>63</sup> See generally, MPSC Refund Order.

<sup>64</sup> See *id.* at 3.

<sup>65</sup> See *id.*

<sup>66</sup> See IPANY Petition. "IPANY is a not-for-profit trade association representing over 80 IPPs in the State of New York." *Id.* at 7.

<sup>67</sup> See *id.* at 1-2. Verizon was formerly known as New York Telephone.

<sup>68</sup> *Independent Payphone Ass'n of New York's Petition for Pre-Emption and Declaratory Ruling Concerning Refund of Payphone Line Rate Charges; Pleading Cycle Established*, CC Docket No. 96-128, Public Notice, 20 FCC Rcd 476 (WCB 2005). See also, *Implementation of the Pay Telephone Reclassification and Compensation Provisions Of the Telecomms. Act of 1996*, CC Docket No. 96-128, Order Extending Time For Reply Comments, 20 FCC Rcd 1609 (WCB 2005). A list of parties who filed comments and reply comments on this petition is in the attached Appendix.

<sup>69</sup> IPANY Petition at 7. See also BOC IPANY Comments at 4.

<sup>70</sup> See IPANY Petition at 7.

<sup>71</sup> See BOC IPANY Comments at 4.

filed tariff revisions on May 19, 1997 for certain additional features for its smart payphone lines but did not file any new rates for the PALs.<sup>73</sup>

20. On July 30, 1997, the NYPSC sought comment on the tariffs submitted by the incumbent LECs.<sup>74</sup> IPANY filed comments arguing that Verizon's rates were excessive and unlawful and did not comply with the NST.<sup>75</sup> The NYPSC kept the proceeding open but took no action for more than two years.<sup>76</sup> On December 2, 1999, IPANY filed a petition with the NYPSC urging it to take final action on its proceeding, to determine that the pre-existing tariffs are unlawful, and to order refunds.<sup>77</sup> The NYPSC instead instituted a second proceeding on these issues.<sup>78</sup>

21. In an October 12, 2000 order, the NYPSC ruled that Verizon's payphone rates, including the PAL rates, were reasonable and satisfied the NST.<sup>79</sup> The NYPSC concluded that, with regard to the PALs, the current rates for Verizon's payphone services recover direct-embedded cost plus a reasonable contribution toward common costs and overhead.<sup>80</sup> However, the NYPSC noted that traditionally, under the NST, the Federal Communications Commission allowed rates one to two times above direct-embedded costs, and Verizon's payphone rates included common costs and overhead at 30% above direct-embedded cost.<sup>81</sup> Although IPANY had submitted the *Wisconsin Bureau Order* during the course of the proceeding to argue that rates should be set using a TELRIC type methodology, the NYPSC found that IPANY's reliance on the *Wisconsin Bureau Order* was misplaced.<sup>82</sup> The NYPSC concluded that the *Wisconsin Bureau Order* only applied to the named Wisconsin LECs, and that the approach used in the order did not preclude the methodology used by the NYPSC in evaluating Verizon's rates.<sup>83</sup> IPANY filed a petition for rehearing of the NYPSC's order, which was denied on September 21, 2001.<sup>84</sup>

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<sup>72</sup> New York Pub. Serv. Comm'n, Proceeding on Motion of the Comm'n to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecomms. Act of 1996, Order Approving Tariff on a Temporary Basis, Case No. 96-C-1174 (rel. Mar. 31, 1997).

<sup>73</sup> See BOC IPANY Comments at 5.

<sup>74</sup> See IPANY Petition at 8.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* at 8-9.

<sup>78</sup> See New York Pub. Serv. Comm'n, Petition filed by the Independent Payphone Ass'n of New York, Inc. that the Comm'n Modify New York Telephone Company's 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, Order Approving Permanent Rates and Denying Petition for Rehearing, Case Nos. 99-C-1684, 96-C-1174 at 6 (rel. Oct. 12, 2000) (NYPSC Payphone Order).

<sup>79</sup> See NYPSC Payphone Order at 7-8.

<sup>80</sup> See *id.* at 6.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.* at 6-7.

<sup>83</sup> *Id.* at 7.

<sup>84</sup> New York Pub. Serv. Comm'n, Petition filed by the Independent Payphone Ass'n of New York, Inc. that the Comm'n Modify New York Telephone Company's Wholesale Payphone Service Rates and Award Refunds; Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal

(continued . . .)

22. IPANY then appealed the NYPSC's decision to the Supreme Court of New York, New York's trial-level court. Rejecting IPANY's argument that the *Wisconsin Payphone Orders* had to be considered by the NYPSC, the Supreme Court concluded that neither of the *Wisconsin Payphone Orders* was applicable to the proceeding, because IPANY had failed to exhaust its administrative remedies and should have filed a petition with the NYPSC asking for Verizon's rates to be modified prospectively based on the *Wisconsin Payphone Orders*.<sup>85</sup> Accordingly, the court considered the state of the law as of December 1996. The court expressed concern that Verizon's pre-existing PAL rates apparently were based on embedded costs, which are historical and would not necessarily comply with the NST, and it remanded the issue to the NYPSC to determine whether the rates complied with the NST.<sup>86</sup> The court also concluded that IPANY would be entitled to refunds should the NYPSC conclude that Verizon's rates did not comply with the NST.<sup>87</sup>

23. Both Verizon and IPANY appealed the Supreme Court decision to the State Supreme Court, Appellate Division. The Appellate Division agreed that the Supreme Court did not have to consider the *Wisconsin Payphone Orders* in making its decision, because IPANY could have petitioned the NYPSC to change Verizon's rates in response to the *Wisconsin Payphone Orders*, but did not, and, therefore, failed to exhaust its administrative remedies.<sup>88</sup> Moreover, the 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 the period between April 15, 1997 and May 19, 1997.<sup>89</sup> IPANY's requests for rehearing and permission to appeal were denied.<sup>90</sup>

24. On June 30, 2006, pursuant to complaints from PSPs regarding Verizon's PAL rates, the NYPSC reduced the rates Verizon could charge PSPs on a prospective basis.<sup>91</sup> The NYPSC based its decision on a white paper proposed by its advisory staff which estimated costs on the basis of a long-run incremental cost analysis. The NYPSC also sought comment as to whether it should further review the propriety of the rates that were in effect prior to the June 2006 Rate Order.<sup>92</sup> On May 24, 2007, the NYPSC noted the existing IPANY Petition before the Commission and concluded that, pending a Commission decision, it would not investigate whether the prior PAL rates complied with the NST

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Regulations Adopted Pursuant to the Telecommunications Act of 1996, Order Denying Petition for Rehearing of October 12, 2000 Order, Case Nos. 99-C-1684, 96-C-1174 (rel. Sept. 21, 2001).

<sup>85</sup> *Independent Payphone Ass'n of New York, Inc., and Teleplex Coin Communications, Inc. v. Pub. Serv. Comm'n of the State of New York and Verizon New York, Inc.*, Decision and Order, Index No. 413-02, RJI No. 01-02-ST2369, at 17-18 (State of New York Supreme Court rel. July 31, 2002) (*NY Supreme Court Order*).

<sup>86</sup> *See id.* at 19.

<sup>87</sup> *See id.* at 21-22.

<sup>88</sup> *Independent Payphone Ass'n of New York, Inc., et al. v. Pub. Serv. Comm'n of the State of New York and Verizon New York, Inc.*, Memorandum and Order, 5 A.D.3d 960, at 4 (New York, Supreme Court, Appellate Division, Third Judicial Department, rel. Mar. 25, 2004) (*NY Appellate Court Order*).

<sup>89</sup> *See id.* at 5.

<sup>90</sup> *See* IPANY Petition at 13.

<sup>91</sup> *See* New York Pub. Serv. Comm'n, Complaint of Phone Management Enterprises, Inc. and Other Pay Telephone Operators Against Verizon New York, Inc. for Refunds Relating to Unlawful Underlying Payphone Services Rates; Complaint of American Payphone Communications, Inc. Against Verizon New York Inc. Concerning Alleged Refunds Relating to Unlawful Underlying Payphone Service Rates, Order Resolving Complaints and Inviting Comments Regarding Public Access Line Rates, Case Nos. 03-C-0428, 03-C-0519 (rel. June 30, 2006) (June 2006 Rate Order).

<sup>92</sup> *Id.* at 14.

before they were superseded.<sup>93</sup> The NYPSC concluded that the Commission's ruling on the IPANY petition might render the remand proceeding unnecessary or affect the relief provided in that proceeding, and therefore that the prudent course would be to refrain from conducting further proceedings until the Commission had issued a final decision.<sup>94</sup>

**4. Petition of the Florida Public Telecommunications Association, Inc. (FPTA) for a Declaratory Ruling and for an Order of Preemption**

**a. The Petition**

25. On January 31, 2006, the FPTA filed a petition for declaratory ruling and order of preemption with the Commission.<sup>95</sup> The petition asks the Commission to: (1) find that, from April 15, 1997 to November 10, 2003, BellSouth collected end user common line (EUCL) charges in addition to unadjusted local payphone access line charges in contravention of section 276 of the Communications Act; (2) order BellSouth to refund to the relevant PSPs the payphone line charges those providers paid to BellSouth from April 15, 1997 to November 10, 2003 with interest, to the extent those charges exceeded rates that complied with section 276 of the Act, including any EUCL charge amounts collected during that time period; and (3) preempt the Florida Public Service Commission (FLPSC) ruling that BellSouth's rates were legally sustainable.<sup>96</sup> The Bureau issued a public notice requesting comments on FPTA's petition on February 8, 2006.<sup>97</sup>

**b. State Procedural History**

26. On August 11, 1998, the FLPSC issued an order, which concluded that the existing BellSouth tariffs for payphone line services were cost-based, consistent with section 276 of the Communications Act, and non-discriminatory.<sup>98</sup> FPTA protested the order but subsequently withdrew its protest, and the order became final on January 19, 1999.<sup>99</sup> On March 26, 2003, subsequent to the release of the *Wisconsin Payphone Order*, FPTA filed a petition with the FLPSC, requesting an expedited review of BellSouth's tariffs that included payphone line rates.<sup>100</sup> In its petition before the FLPSC, FPTA argued that BellSouth's payphone rates did not meet the NST, because the rates included the amount of

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<sup>93</sup> New York Pub. Serv. Comm'n, Complaint of Phone Management Enterprises, Inc. and Other Pay Telephone Operators Against Verizon New York, Inc. for Refunds Relating to Unlawful Underlying Payphone Services Rates; Complaint of American Payphone Communications, Inc. Against Verizon New York Inc. Concerning Alleged Refunds Relating to Unlawful Underlying Payphone Service Rates, Order Denying Rehearing and Addressing Comments, Case Nos. 03-C-0428, 03-C-0519 (rel. May 24, 2007).

<sup>94</sup> *Id.* at 17, 24.

<sup>95</sup> See FPTA Petition. "The FPTA is a trade association that serves the legal, regulatory and legislative interests of independent PSPs and related public telecommunications providers in Florida." *Id.* at 1-2.

<sup>96</sup> See *id.* at 2.

<sup>97</sup> *Pleading Cycle Established for Florida Pub. Telecomms. Ass'n, Inc. Petition for Declaratory Ruling and Order of Preemption*, CC Docket No. 96-128, Public Notice, 21 FCC Rcd 1373 (WCB 2006). A list of parties who filed comments and reply comments on this petition is in the attached Appendix.

<sup>98</sup> See Fl. Pub. Serv. Comm'n, Establishment of Intrastate Implementation Requirements Governing Federally Mandated Deregulation of Local Exchange Company Payphones, Notice of Proposed Agency Action Order Approving Federally Mandated Intrastate Tariffs For Basic Payphone Services, Order No. PSC-98-1088-FOF-TL (rel. Aug. 11, 1998).

<sup>99</sup> See FLPSC Payphone Order at 4.

<sup>100</sup> See *id.*



the EUCL.<sup>101</sup> FPTA also argued that Florida independent PSPs were entitled to refunds for the rates that exceeded the Commission's NST from April 15, 1997 to November 10, 2003, "because these rates failed to reflect any reduction or provide any credit for the collection of the EUCL charge."<sup>102</sup> On October 27, 2003, BellSouth filed a revision to its General Subscriber Services Tariff to reduce its approved and effective payphone rates by the amount of the federal EUCL charge.<sup>103</sup> The rate reduction became effective on November 10, 2003.<sup>104</sup>

27. On October 7, 2004, the FLPSC issued an order which concluded that BellSouth's payphone line rates between April 15, 1997 and November 10, 2003 were legally sustainable, and were consistent with BellSouth's tariffs and the FLPSC's controlling orders.<sup>105</sup> The FLPSC further concluded that refunds were not appropriate because FPTA withdrew its protest of the FLPSC's order approving BellSouth's initial rates, did not challenge the state commission's orders in any forum, and for years its members paid the rates set forth in BellSouth's tariffs.<sup>106</sup> On December 6, 2004, the Supreme Court of Florida dismissed the FPTA's appeal of the FLPSC Payphone Order as not timely filed.<sup>107</sup>

## **5. Payphone Association of Ohio (PAO) Petition for Preemption and Declaratory Ruling**

### **a. The Petition**

28. On December 28, 2006, PAO filed a petition for preemption and declaratory ruling with the Commission.<sup>108</sup> The petition asks the Commission to: (1) establish the rights of PAO members to refunds of payphone access line rate overcharges dating back to April 15, 1997; (2) preempt the actions of the Public Utilities Commission of Ohio (PUCO) that PAO alleges are inconsistent with this Commission's regulations and the NST; and (3) order SBC to disgorge itself of dial-around compensation collected pursuant to section 276 of the Act and the Commission's rules and orders promulgated under it.<sup>109</sup> The Bureau issued a public notice requesting comments on PAO's petition on January 12, 2007.<sup>110</sup>

### **b. State Procedural History**

29. On December 9, 1996, the PUCO initiated a proceeding to implement the requirements of section 276 of the Act and the Commission's *Payphone Orders*.<sup>111</sup> By entry issued December 19, 1996,

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<sup>101</sup> See FPTA Petition at 9-11.

<sup>102</sup> *Id.* at 8.

<sup>103</sup> See *id.* at 5.

<sup>104</sup> See *id.*

<sup>105</sup> See FLPSC Payphone Order at 14.

<sup>106</sup> See *id.* at 13.

<sup>107</sup> *Florida Public Telecomms. Ass'n, Inc. v. J. Terry Deason*, Case No. SC04-2271 (rel. Dec. 6, 2004) (unpublished decision).

<sup>108</sup> See PAO Petition. "The PAO is a not-for-profit corporation organized under the laws of the State of Ohio and is comprised of independent payphone providers operating therein." *Id.* at 3.

<sup>109</sup> See *id.* at 1-2.

<sup>110</sup> *Pleading Cycle Established for Payphone Association of Ohio Petition to Preempt the Actions of the State of Ohio, and for a Declaratory Ruling*, CC Docket No. 96-128, Public Notice, 22 FCC Rcd 296 (WCB 2007). A list of parties who filed comments and reply comments on this petition is in the attached Appendix.

<sup>111</sup> PAO Petition at 4.

the PUCO directed all incumbent LECs operating within Ohio to file by January 15, 1997, tariffs with the requisite access line provisions for “smart” and “dumb” payphones.<sup>112</sup> The PUCO issued another entry on May 22, 1997, in which it noted the requirement for incumbent LECs to remove from their intrastate rates, any charges that recover the costs of the payphones.<sup>113</sup> To ensure that requirement was satisfied, the PUCO required all incumbent LECs to file by June 12, 1997, “case information detailing all 1996 payphone revenues and expenses, and payphone plant, reserve, and other payphone related items in rate base as of December 31, 1996.”<sup>114</sup> The PUCO also instructed each incumbent LEC to review its respective payphone tariff to ensure it is consistent with the requirements of section 276 of the Act, the Commission’s regulations and the PUCO investigation, and to file any proposed tariff amendments by June 22, 1997.<sup>115</sup> On September 25, 1997, the PUCO issued an entry approving SBC’s tariff as consistent with the Act, the Commission’s decisions in this docket and the PUCO’s May 22, 1997 entry.<sup>116</sup>

30. On June 30, 1997, PAO filed a motion to conduct an evidentiary hearing to determine if incumbent LECs are in compliance with section 276 of the Act.<sup>117</sup> By entry dated January 28, 1999, the PUCO granted PAO’s motion for an evidentiary hearing.<sup>118</sup> The PUCO concluded that there was insufficient evidence at that time to satisfy it that the payphone tariffs of SBC fully comply with the requirements of section 276 of the Act and the Commission’s rules.<sup>119</sup> However, the PUCO noted that SBC had approved payphone tariffs in effect, and its decision to investigate “does not relieve any person from the terms and conditions of those tariffs pending a Commission order once the investigation is completed.”<sup>120</sup>

31. On June 17, 2002, PAO filed a motion to expand the scope of the proceeding and to compel the incumbent LECs to comply with the NST as set forth by the *Wisconsin Payphone Order*.<sup>121</sup> By entry dated November 26, 2002, the PUCO revisited and revised the issues relevant to the proceeding

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<sup>112</sup> Public Utilities Comm’n of Ohio, 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 (rel. Dec. 20, 1996).

<sup>113</sup> Public Utilities Comm’n of Ohio, 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 at 4 (rel. May 22, 1997).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 7.

<sup>116</sup> Public Utilities Comm’n of Ohio, 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 at 2-3 (rel. Sept. 25, 1997).

<sup>117</sup> PAO Petition at 4-5.

<sup>118</sup> Public Utilities Comm’n of Ohio, 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 (rel. Jan. 28, 1999).

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.*

<sup>121</sup> Public Utilities Comm’n of Ohio, 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 at 1 (rel. Nov. 26, 2002).

in light of the *Wisconsin Payphone Order*.<sup>122</sup> The PUCO dismissed the non-RBOCs from the proceeding and concluded that the core issue was whether SBC was providing payphone services at forward-looking, cost based rates.<sup>123</sup> In addition, the PUCO imposed an interim, forward-looking rate for payphone services that was to be subject to a true-up.<sup>124</sup> On January 16, 2003, the PUCO issued an entry on rehearing, which ordered SBC to file tariff revisions incorporating the interim rates.<sup>125</sup> On September 1, 2004, the PUCO issued an opinion and order in its proceeding.<sup>126</sup> The PUCO concluded that the overhead loading factors SBC proposed were not compliant with the NST, and therefore reduced the rates for payphone services.<sup>127</sup> Although the PUCO did require a true-up between the interim rates and the permanent rates, it did not address PAO's claim that refunds were required back to April 15, 1997.<sup>128</sup> However, in its October 27, 2004 entry on rehearing, the PUCO rejected PAO's claims for refunds back to April 1, 1997.<sup>129</sup> The PUCO agreed with SBC's arguments that such refunds would constitute retroactive ratemaking and PAO inappropriately relied on documents that were previously stricken from the record.<sup>130</sup> The Supreme Court of Ohio affirmed the PUCO's decision on June 28, 2006.<sup>131</sup> The court concluded that the PUCO's refusal to address the issue of refunds for any period before the interim tariff rates were approved in 2003 was not manifestly against the weight of the evidence, and therefore, rejected PAO's claim.<sup>132</sup>

## 6. Michigan Pay Telephone Association (MPTA) Petition for Declaratory Ruling

### a. The Petition

32. On May 22, 2006, the MPTA filed a petition for declaratory ruling with the Commission.<sup>133</sup> MPTA asks the Commission to "resolve an outstanding legal controversy with respect to

<sup>122</sup> *Id.* at 11.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 11-12.

<sup>125</sup> Public Utilities Comm'n of Ohio, Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services, Second Entry On Rehearing, Case No. 96-1310-TP-COI (rel. Jan. 16, 2003).

<sup>126</sup> Public Utilities Comm'n of Ohio, 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 (rel. Sept. 1, 2004)(PUCO Payphone Order).

<sup>127</sup> *Id.* at 30.

<sup>128</sup> *Id.*

<sup>129</sup> Public Utilities Comm'n of Ohio, 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 (rel. Oct. 27, 2004)(PUCO Rehearing Order).

<sup>130</sup> *Id.* at 16-17.

<sup>131</sup> *Payphone Association of Ohio v. Public Utilities Commission of Ohio*, 849 N.E.2d 4 (Ohio 2006).

<sup>132</sup> *Id.* at 9-10.

<sup>133</sup> *See generally* MPTA Petition. "The [MPTA] is a Michigan nonprofit corporation organized for the purpose of promoting and advancing the interests of Independent Payphone Providers ("IPPs") operating in the state of Michigan." *Id.* at n.1. The MPTA had filed a previous petition with the Commission in which it argued that the Michigan Commission had filed to set rates according to the NST, which the Commission granted and remanded

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the Commission's directives regarding intrastate payphone access line rates, and to preempt a decision by the Michigan Public Service Commission that is inconsistent with 47 U.S.C. § 276."<sup>134</sup> In its state proceedings reviewing AT&T Michigan's payphone line rates, the Michigan Commission adopted two separate, non-uniform overhead allocations for two parts of the payphone line rate, one for the fixed recurring rate and one for the local usage service rate.<sup>135</sup> MPTA contends that this use of non-uniform overhead allocations without justification makes the local usage service rate not NST compliant.<sup>136</sup> The Bureau issued a public notice requesting comments on MPTA's petition on June 2, 2006.<sup>137</sup>

#### b. Procedural History

33. On May 8, 1999, the Michigan Commission issued an order denying in part a complaint filed by the MPTA challenging the rates charged by Ameritech and GTE<sup>138</sup> in response to the Commission's *Payphone Orders*.<sup>139</sup> The Michigan Commission found, among other things, that the MPTA did not meet its burden to prove that the BOCs' payphone service rates were not NST compliant.<sup>140</sup> The Michigan Court of Appeals affirmed the Michigan Commission's determinations.<sup>141</sup> MPTA applied for leave to appeal to the Michigan Supreme Court<sup>142</sup> and also sought this Commission's review of the Michigan Commission's decision in a petition for declaratory ruling filed November 10, 1999.<sup>143</sup> Shortly after this Commission released the *Wisconsin Payphone Orders* providing additional clarification to the industry, the Common Carrier Bureau released an order granting the MPTA First Petition.<sup>144</sup> Specifically, the order found that the decision of the Michigan Commission appeared "to be

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back to the Michigan Commission. See *Michigan Payphone Association Petition for Declaratory Ruling*, CCB/CPD No. 99-35, Order, 17 FCC Rcd 4275 (CCB 2002) (*MPTA 2002 Order*).

<sup>134</sup> *Id.* at 1.

<sup>135</sup> See MPTA Petition at 2.

<sup>136</sup> See generally MPTA Petition. The MPTA Petition is different than the five other petitions for declaratory ruling discussed in this order because it asks the Commission to address the appropriate application of the new services test, whereas the other five petitions for declaratory ruling request that the Commission address a controversy involving the appropriateness of refunds when charges are allegedly in excess of NST-compliant rates.

<sup>137</sup> See *Pleading Cycle Established for Michigan Pay Telephone Association Petition for Declaratory Ruling*, CC Docket No. 96-128, 21 FCC Rcd 6289 (WCB 2006). A list of parties who filed comments and reply comments on this petition is in the attached Appendix.

<sup>138</sup> "At the time of initiating the underlying proceeding at the Michigan Public Service Commission, Michigan Bell Telephone Company was an affiliate of Ameritech Corporation. Through various corporate transactions in the interim years, Michigan Bell Telephone Company is now an subsidiary of AT&T, Inc." See MPTA Petition at n.2.

<sup>139</sup> See In the matter of the complaint of the Michigan Pay Telephone Association, et al. v. Ameritech Michigan and GTE North Incorporated, MPSC Case No. U-11756, Order (rel. Mar. 8, 1999) (Michigan Commission 1999 Order).

<sup>140</sup> See *id.* at 8.

<sup>141</sup> See In the matter of the complaint of the Michigan Pay Telephone Association, et al. v. Ameritech Michigan and GTE North Incorporated, MPSC Case No. U-11756, Order, at 2 (rel. Mar. 16, 2004) (Michigan Commission 2004 Order).

<sup>142</sup> See *id.* at 3.

<sup>143</sup> See Michigan Pay Telephone Association's Petition for Declaratory Ruling Regarding The Prices Charged by Ameritech Michigan And GTE North, Inc. for Network Access Services Made Available to Payphone Providers in Michigan, CC Docket No. 96-128 (filed Nov. 10, 1999) (MPTA First Petition).

<sup>144</sup> See generally *MPTA 2002 Order*. After the Commission's order was released, the MPTA and the Michigan Commission "filed a joint motion before the Michigan Supreme Court to remand this matter back to the [Michigan]

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inconsistent with the *Wisconsin Order*<sup>145</sup> and remanded the proceeding back to the state commission to re-evaluate its decision “concerning the pricing of BOCs’ intrastate payphone line rates and overhead ratios to ensure compliance with the *Wisconsin Order*.”<sup>146</sup>

34. On May 26, 2006, MPTA filed this petition for declaratory ruling with the Commission.<sup>147</sup> MPTA argues that on remand the Michigan Commission “failed to implement this Commission’s mandates with respect to one of the largest cost components the payphone providers face in their monthly billing—AT&T Michigan’s usage rates.”<sup>148</sup> MPTA says that the Michigan Commission “adopted a separate overhead allocation for usage, and not only failed to identify what the overhead allocation was, but reached its conclusion by merely comparing local usage rates with the rates charged for toll usage to business customers, which is not a cost-based service.”<sup>149</sup> By comparing “local usage to the non-cost-based toll usage service” the Michigan Commission’s actions were “antithetical to the specific mandates of the new services test and Section 276.”<sup>150</sup> The MPTA asks that the Commission grant the MPTA Petition and find “that the [Michigan Commission] failed to properly interpret and follow the Commission’s New Services Test with respect to AT&T’s local usage overhead allocation service and rate.”<sup>151</sup>

### C. Other Requests for Commission Action

35. In addition to the six petitions for declaratory ruling discussed above, the Commission received other requests for guidance or clarification with regard to the implementation of the NST. The Supreme Judicial Court of the Commonwealth of Massachusetts sent the Commission a letter requesting the Commission’s guidance as to the appropriateness of ordering refunds when a state commission subsequently determined that payphone rates were not NST compliant, but had earlier allowed the existing rates to remain in effect based upon the incumbent LEC’s certification that the rates were NST compliant.<sup>152</sup> The court sent this letter several weeks after it issued an order staying for six months from February 16, 2006, an appeal by the New England Public Communications Council, Inc., so relevant questions could be presented in letter format to the Commission.<sup>153</sup> The Bureau issued a public notice on

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Commission for further consideration in light of the *Wisconsin Order*. On June 24, 2002, the Michigan Supreme Court vacated the Court of Appeals’ decision and remanded this case back to the [Michigan] Commission.” Michigan Commission 2004 Order at 3.

<sup>145</sup> See *MPTA 2002 Order*, 17 FCC Rcd at 4276, para. 3.

<sup>146</sup> See *id.*

<sup>147</sup> See generally MPTA Petition.

<sup>148</sup> MPTA Petition at 2.

<sup>149</sup> *Id.* at 3.

<sup>150</sup> *Id.*

<sup>151</sup> See Letter from Henry T. Kelly, Counsel, Michigan Pay Telephone Association to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128, at Attach., p. 12 (filed Jan. 28, 2010).

<sup>152</sup> See Letter from Maura S. Doyle, Clerk, Commonwealth of Massachusetts, Supreme Judicial Court, to Kevin J. Martin, Chairman, Federal Communications Commission, CC Docket No. 96-128 (filed Mar. 15, 2006) (Massachusetts Letter).

<sup>153</sup> See *New England Public Communications Council, Inc. v. Department of Telecommunications and Energy and Verizon Communications of New England, Inc.*, Order, No. SJ-2004-0327 (Mass. Sup. Jud. Ct. Mar. 6, 2006).



the court's order and letter and announced that it would consider the court's request in conjunction with the PSP petitions for declaratory ruling pending before it.<sup>154</sup>

36. The Oregon Public Utility Commission also sent a letter to the Commission requesting prompt action on the pending petitions for declaratory ruling and specifically asking whether the *Second Bureau Waiver Order* requires refunds of a portion of payphone access line rates back to April 15, 1997 if those rates do not comply with the Commission's NST.<sup>155</sup>

### III. DISCUSSION

#### A. Preemption of State Commission Orders Regarding Refunds in This Proceeding Is Not Warranted

37. We deny the IPTA, SPCA, IPANY, FPTA, and PAO petitions. As discussed more fully below, section 276(c) states that "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."<sup>156</sup> Because we conclude that the requirements in the state commission decisions before us are not inconsistent with the Commission's regulations, we do not preempt those decisions.<sup>157</sup>

38. In its *Payphone Reconsideration Order*, the Commission charged the states with the responsibility to ensure that BOC intrastate payphone line rates comply with the NST and provided the states with general guidance regarding compliance.<sup>158</sup> The Commission stated that rates 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.<sup>159</sup> The Commission further stated that states must apply these requirements and the *Computer III* guidelines for tariffing such intrastate services, but that they may ask the Commission to review these tariffs if they are unable to do so themselves.<sup>160</sup> Moreover, the Commission permitted the BOCs to self-certify compliance with the NST and to begin collecting dial-around compensation as of April 15, 1997.<sup>161</sup> The Commission

<sup>154</sup> *New England Public Communications Council, Inc. Filing of Letter from Supreme Judicial Court of Massachusetts Regarding Implementation of the Pay Telephone Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Public Notice, 21 FCC Rcd 3519 (WCB 2006).

<sup>155</sup> See Letter from Lee Beyer, Chairman, and John Savage and Ray Baum, Commissioners, Oregon Public Utility Commission, to Kevin Martin, Chairman, Federal Communications Commission, CC Docket No. 96-128 (filed Nov. 23, 2005) (Oregon Letter).

<sup>156</sup> 47 U.S.C. § 276(c).

<sup>157</sup> Because we conclude that the state commission decisions are not inconsistent with the Commission's orders, we decline to order reparations as requested by the PSPs. See, e.g., IPTA Petition at 3; Letter from Robert F. Aldrich, Attorney, APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 at 2-8 (filed Oct. 25, 2006) (APCC Oct. 25<sup>th</sup> *Ex Parte* Letter).

<sup>158</sup> See *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163.

<sup>159</sup> See *Id.*

<sup>160</sup> See *Id.*

<sup>161</sup> *Id.* at 21293, paras. 130-31. We reject PSP arguments that the Commission should determine that the BOCs were not entitled to begin collecting dial-around compensation as of April 15, 1997. See IPTA Petition at 3; SPCA Petition at 12; PAO Petition at 25. The petitioners have 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 NST-compliant. See *Ameritech Illinois, US West Communications Inc., et al., v. MCI Telecommunications Corporation, and Ameritech Illinois, Pacific Bell, et al., v. Frontier Communications Services, Inc. et al.*, Memorandum Opinion and Order, 14 FCC Rcd 18643 (CCB 1999) (finding that certification letters were

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did not specifically address whether refunds should be issued if a subsequent proceeding determined that the rates the BOCs self-certified were not consistent with the NST. Like other tariff and rate-setting procedures, the issue of refunds was properly administered by the states.<sup>162</sup> Significantly, however, the Commission made clear that NST-compliant rates were a quid pro quo for receiving dial-around compensation.<sup>163</sup> To the extent that states ultimately determine that BOC rates were not NST-compliant while the BOC was receiving dial-around compensation at any time after April 15, 1997, the date on which the BOC obligation to have NST-compliant rates took effect, we clarify that states may consider that fact when determining whether refunds are appropriate.

39. In the *Wisconsin Payphone Order*, the Commission provided states with more specific guidance on how to implement the NST. Specifically, the Commission stated that, in applying the NST: (1) states should use an appropriate forward-looking economic cost methodology, such as TELRIC or TSLRIC; (2) states may use overhead loading factors applicable to unbundled network elements or may establish ceilings for loading factors using the methodology from either the *Physical Collocation Tariff Order* or the *ONA Tariff Order*; (3) BOCs must reduce the monthly per-line charge determined under the NST by the amount of the applicable federally tariffed subscriber line charge (SLC); and (4) states should apply the NST to usage-sensitive as well as flat-rate elements of the services offered to PSPs.<sup>164</sup>

40. Pursuant to the guidance provided in these orders, the state commissions at issue held proceedings on whether payphone rates were NST-compliant and thus met the requirements of section 276 of the Act. Each state commission, after considering the specific facts before them, concluded that refunds for the differences in rates were not appropriate. The orders resulting from these proceedings are the subject of the petitions addressed in this order.<sup>165</sup> Based on the evidence submitted in the record, we conclude that these state commissions followed the Commission's orders and fulfilled the duties with which the Commission charged them in the *Payphone Orders* and the *Wisconsin Payphone Order*.<sup>166</sup> Indeed, each state commission analyzed whether refunds were appropriate, and determined, for different

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satisfactory certification of compliance with the prerequisites to receiving payphone compensation outlined in the *Payphone Orders*). Nonetheless, should a state determine that a particular BOC's rates were not NST-compliant, even though the BOC had certified that they were and that the BOC had been collecting payphone compensation, this would present a strong argument that refunds should be ordered.

<sup>162</sup> “[M]any of the FCC’s orders specify LECs bear the burden of demonstrating or justifying their tariff rates to state regulators and are responsible for ensuring their rates are NST compliant.” *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1241 (10th Cir. 2007) (*TON v. Qwest*) (internal citations omitted).

<sup>163</sup> See *Initial Payphone Order*, 11 FCC Rcd at 20605, para. 127; see also *First Bureau Waiver Order*, 12 FCC Rcd at 21011-12, para. 30. We note that, in order to receive dial around compensation, Qwest (then US West) certified, by letters to IXC’s, to state commissions, and to the Commission, that, as of May 20, 1997, it had met all requirements necessary to receive payphone compensation in all of its states except for New Mexico. Qwest certified its compliance for New Mexico on November 12, 1997. See Letter from Lynn Starr, Vice President, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 at Attachment 3 (filed May 17, 2007) (*Qwest Certification Letters*). Thus, any state commission proceeding considering Qwest’s compliance with section 276 may properly consider whether Qwest’s certifications of compliance alone satisfy its obligations to comply with the *Payphone Orders* and section 276, or whether an affirmative demonstration of NST-compliant rates is required to resolve issues of refund liability.

<sup>164</sup> *Wisconsin Payphone Order*, 17 FCC Rcd at 2065-71, paras. 45-65.

<sup>165</sup> See generally ICC Payphone Order; MPSC Refund Order; NYSPC Payphone Order; FLPSC Payphone Order; PUCO Payphone Order; PUCO Rehearing Order.

<sup>166</sup> “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.” *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163.

reasons, that they were not.<sup>167</sup> Nothing in the record here persuades us that the state commissions misapplied federal or state law or regulations, or established requirements that are inconsistent with the Commission's regulations. Accordingly, we conclude that preemption is not warranted under these circumstances.

41. In reaching this conclusion, we reject the PSPs' arguments that section 276 provides them with an absolute right to refunds in the cases before us.<sup>168</sup> Although section 276 establishes requirements for payphone rates, it does not dictate whether refunds are due under any given set of circumstances. Notably, no party to this proceeding is contending today that the payphone line rates are currently out of compliance with the NST or otherwise inconsistent with federal law; rather, the sole question is whether certain states improperly denied refunds. Nothing in section 276 requires that the Commission be the arbiter of specific refund disputes. Thus, in deciding whether to award refunds, the state commissions properly looked to applicable state and federal law and regulations, and decided, for reasons specific to each state's analysis, not to order refunds. In Illinois, the ICC based its rejection of refunds on the Illinois filed tariff doctrine and the IPTA's failure to file a formal complaint.<sup>169</sup> In Mississippi, the MPSC concluded that refunds would violate the filed tariff doctrine and the prohibition against retroactive ratemaking.<sup>170</sup> The courts in New York ruled that IPANY was not entitled to refunds in part because it failed to properly raise the *Wisconsin Payphone Order* before the state commission, and therefore failed to exhaust its administrative remedies.<sup>171</sup> In Florida, the FLPSC concluded that refunds were not appropriate, in part because the FPTA did not challenge the FLPSC's orders approving BellSouth's rates.<sup>172</sup> Finally, in Ohio, the PUCO concluded that refunds were not appropriate because of the state prohibition against retroactive ratemaking and the filed rate doctrine.<sup>173</sup> Although these decisions deny refunds in situations where a BOC's rates were not NST-compliant by April 15, 1997, they are not inconsistent with the Commission's orders and regulations implementing section 276 of the Act. Consequently, preemption is not warranted.<sup>174</sup>

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<sup>167</sup> See generally ICC Payphone Order; MPSC Refund Order; NYSPSC Payphone Order; FLPSC Payphone Order; PUCO Payphone Order; PUCO Rehearing Order.

<sup>168</sup> See, e.g., IPTA Petition at 9-13; IPANY Petition at 15-17; SPCA Petition at 12-15.

<sup>169</sup> ICC Payphone Order at 42-43.

<sup>170</sup> MPSC Refund Order at 4.

<sup>171</sup> *NY Appellate Court Order* at 4.

<sup>172</sup> FLPSC Payphone Order at 13-14.

<sup>173</sup> PUCO Rehearing Order at 16-17; PUCO Comments at 14-16.

<sup>174</sup> We reject APCC's argument that the *Verizon New England* case requires the Commission to preempt the state actions here. See Letter from Albert H. Kramer and Robert F. Aldrich, Attorneys, APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128, pp. 2-3 (filed Oct. 1, 2007); *Verizon New England, Inc. v. Maine Public Utilities Commission*, 2007 WL 2509863 (1<sup>st</sup> Cir., No. 06-2151, Sept. 6, 2007) (*Verizon New England*). In *Verizon New England*, the court noted a clear conflict between the Commission interpretation of the requirements of federal law and the states' implementation of the Commission's direction. Specifically, the states required Verizon to make certain network elements available that the Commission said no longer need be made available, and the states applied a pricing methodology, TELRIC, that the Commission held was inapplicable in the relevant circumstances. *Verizon New England* at 6-7. The court found that before the district court in Maine could resolve the dispute between Verizon and the state public utility commission, the question of whether line sharing and dark fiber are required to be unbundled should be referred to the Commission. Here, the Commission provided guidance to the states regarding how payphone rates should be set, but was silent as to the circumstances that would justify refunds. No party suggests that the states misapplied the Commission's pricing

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42. Further, we reject APCC's argument that the Commission must order refunds for overcharges for payphone line rates because any failure to do so would result in an improper subdelegation of our authority to the states.<sup>175</sup> Consistent with the statute, the Commission created a flexible regulatory framework under which states administer intrastate payphone line rates, with recourse being tariff review by the Commission should the states be unable to do that themselves.<sup>176</sup> Under this framework, BOCs tariff their payphone line rates at the states; the states review those rates consistent with the NST methodology adopted by the Commission; and the states order reductions as appropriate. In turn, the Commission has retained oversight to ensure that payphone access lines are NST-compliant, and more broadly, that the requirements of section 276 are followed.<sup>177</sup> The Commission's implementation of section 276(a) reflects this dual regulatory structure, and both the states and the Commission have significant roles. We find that states, as part of their tariff review responsibilities, are well-positioned to resolve refund disputes arising from the tariffs they review. In fact, the states that have reviewed the tariffs and/or cost support filed by BOCs, or that have considered whether existing BOC tariffs were NST-compliant, are better positioned than we are to decide related refund disputes, because they are more familiar with the specific details of each case. In the instant proceedings, the state commissions were able to decide the refund disputes before them, and we find that they acted in a manner not inconsistent with the statute and the approach the Commission formulated in the *Payphone Reconsideration Order*.<sup>178</sup> Thus, no improper delegation resulted from the states deciding refund issues.

43. We also reject arguments from the PSPs that the state commissions should have known that payphone rates must be established using forward-looking costs.<sup>179</sup> Prior to the clarification provided by the *Wisconsin Payphone Order*, it is evident that some state commissions believed that payphone rates based on historical costs were consistent with the NST. We note that the Commission initially created the NST in the Price-Cap Proceeding to encourage the introduction of new services while preventing the avoidance of price-cap rules.<sup>180</sup> The Commission required carriers seeking to introduce a new service to meet a "net revenue test" which relied on a forecast increase in demand reflected in the

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guidance, nor is there any basis for reviewing, much less preempting, the states' refund decisions, beyond any further direction states may find in this order.

<sup>175</sup> See APCC Oct. 25<sup>th</sup> *Ex Parte* Letter at 8-14; Letter from Albert H. Kramer and Robert F. Aldrich, Attorneys, APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (filed Dec. 22, 2006) (APCC Dec. 22<sup>nd</sup> *Ex Parte* Letter); see also Letter from Robert F. Aldrich, Attorney, APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (filed Feb. 23, 2007) (APCC Feb. 23<sup>rd</sup> *Ex Parte* Letter).

<sup>176</sup> See *supra* paras. 5-7.

<sup>177</sup> See *Second Bureau Waiver Order*, 12 FCC Rcd at 21379, n.60 (noting that the Commission "retains jurisdiction under Section 276 to ensure that all requirements of that statutory provision[,] . . . including the intrastate tariffing of payphone services, have been met"); see also *Wisconsin Payphone Order*, 17 FCC Rcd at 2060, para. 31 (retaining jurisdiction over the intrastate component of payphone line rates).

<sup>178</sup> In other words, neither section 276 nor our orders and regulations implementing section 276 requires a state to order refunds to PSPs if it later determines that a filed tariff overcharged PSPs. Rather than adopt a single, federal policy in this area, the Commission has delegated to the states authority to consider whether refunds are appropriate. See *infra* section III.B.

<sup>179</sup> See, e.g., Letter from Robert F. Aldrich, Attorney, APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (filed Oct. 12, 2006) (APCC Oct. 12<sup>th</sup> *Ex Parte* Letter).

<sup>180</sup> See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3320-22, paras. 232-36 (1988) (*Further Notice*); see also *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6824-25, paras. 312-21 (1990) (*Second Report and Order*).



annual access filing, and would in essence establish a “price floor” for the new service.<sup>181</sup> Although the Commission discussed and applied the NST in subsequent orders, it was not until the *Wisconsin Payphone Order* that the Commission clearly explained that, with regard to payphone rates, states should apply a forward-looking methodology consistent with TELRIC or TSLRIC.<sup>182</sup>

44. Moreover, our conclusion with regard to the pending petitions seeking refunds is consistent with the *Wisconsin Reconsideration Order*, in which the Commission denied the Wisconsin Pay Telephone Association’s request for the Commission to evaluate all cost support materials submitted by Ameritech and Verizon and determine an appropriate payphone line rate for the state of Wisconsin.<sup>183</sup> The Commission found that the Wisconsin Commission had initially decided that it did not have jurisdiction over payphone rates, which resulted in the request for Commission review of the state filings.<sup>184</sup> Following the Commission’s *Wisconsin Payphone Order*, the state commission reconsidered its decision and reviewed the BOC payphone rates.<sup>185</sup> The Commission found that there was no reason to interfere with the state proceeding.<sup>186</sup> Likewise, there is no justification for the Commission to interfere with the state commission proceedings at issue here.

45. Finally, we clarify the refund obligation established in the *Second Bureau Waiver Order*.<sup>187</sup> That order granted a narrow and limited waiver to the BOCs to permit them a short additional period of time—from April 15, 1997 until May 19, 1997—to file tariffs for payphone lines that comply with the Commission’s orders implementing section 276 of the Act. With regard to refunds, the *Second Bureau Waiver Order* states, “[a] LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates.”<sup>188</sup> Thus, in conjunction with granting a limited extension of time for the BOCs to file NST-compliant rates, the order held the PSPs harmless by requiring refunds in situations where the newly tariffed rates are lower than the existing tariffed rates.<sup>189</sup> In this way, the refund mechanism confirmed the date upon which the Commission had required that NST-compliant rates must be in effect. Accordingly, if a BOC filed a tariff after April 15, 1997, but on or before May 19, 1997, that lowered payphone rates, we find that once that tariff was effective, the

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<sup>181</sup> *Further Notice*, 3 FCC Rcd at 3376-77, paras. 323-24. Specifically, the “net revenue test” would require a new service to “generate a net revenue increase in the following time periods: within the lesser of a 24-month period after an annual price cap tariff becomes effective that incorporates the new service or 36 months from the date the new service becomes effective.” *Id.* at 3377, para. 323. The Commission also stated that “the net revenue increase be measured against revenues generated from services in the same price cap basket, and should be calculated based on present value.” *Id.* at 3377, para. 324.

<sup>182</sup> *See Wisconsin Payphone Order*, 17 FCC Rcd at 2065-67, para. 43-50.

<sup>183</sup> *Wisconsin Public Service Commission, Order Directing Filings*, CCB/CPD No. 00-1, Order on Reconsideration, 21 FCC Rcd 7724 (2006) (*Wisconsin Reconsideration Order*).

<sup>184</sup> *See id.* at 7726-27, para. 6.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Thus we reject the petitioners’ argument that the *Second Bureau Waiver Order* requires open-ended refunds. *See* IPTA Petition at 11-12; SPCA Petition at 12-14; IPANY Petition at 23-29; FPTA Petition at 4-5; PAO Petition at 12-15.

<sup>188</sup> *Second Bureau Waiver Order*, 12 FCC Rcd at 21382, para. 25; *see also id.* at 21371, para. 2 (also discussing the terms upon which a LEC may rely on the waiver request).

<sup>189</sup> *See Second Bureau Waiver Order*, 12 FCC Rcd at 21379, para. 19.



*Second Bureau Waiver Order* requires that refunds be paid from April 15, 1997, to the effective date of the tariff. The *Second Bureau Waiver Order* did not specifically discuss the applicability of refunds where a carrier filed tariffs after May 19, 1997, or did not file new tariffs, but instead relied on existing rates, or only filed cost studies for existing rates.<sup>190</sup> We find that this would raise very different issues with regard to potential liability for refunds. Under the *Reconsideration Order*, we expressly required that tariffs setting forth compliant rates be filed with the states by April 15, 1997. This tariff filing obligation was mandatory, except where the states acted to exempt the carriers from the necessity of a new filing.<sup>191</sup> Nothing in the *Second Bureau Waiver Order* modified this Commission requirement; it merely extended the filing date to May 19, 1997, for those carriers availing themselves of the waiver. Accordingly, we reject Qwest's contention that BOCs that relied on existing tariffs for payphone services were not required to make further filings with the states on or before May 19, 1997.<sup>192</sup> Therefore, absent a state exemption, a BOC that filed tariffs after May 19, 1997, or that simply relied on existing rates or filed cost studies for existing rates, would have been in violation of our orders.<sup>193</sup> A state commission may well find refunds to be appropriate pursuant to section 276, Commission regulations, and relevant state laws if the rates in such cases were challenged under state regulatory procedures and found to be non-compliant.

46. Our conclusion that the *Second Bureau Waiver Order* did not impose an open-ended refund obligation is not "inconsistent with the clear purpose of the . . . [*Second Bureau Waiver Order*] to

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<sup>190</sup> See, e.g., FPTA Petition at 8; *TON v. Qwest*, 493 F.3d at 1232 ("The Commission ordered the states to 'act on the tariffs filed pursuant to this Order within a reasonable period of time,' but was silent as to whether the LECs, PSPs, or the Commission itself should take action if the states failed to conduct the inquiry required by the Payphone Orders and was similarly silent on a suggested process for regulators or PSPs to follow if LECs failed to submit the required tariffs and supporting documentation.") (internal citation omitted).

<sup>191</sup> *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163. This order created a limited exception to the filing requirement that could be triggered only by affirmative action by the states: "Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the Report and Order, and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the Report and Order as revised herein; and 2) that in such case no further filings are required." *Id.*; see also *Second Bureau Waiver Order*, 12 FCC Rcd at 21373, para. 8 (reiterating that states could exempt LECs from the tariff filing requirement under these limited circumstances).

<sup>192</sup> Letter from Lynn Starr, Vice-President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128, at 2-3 (filed Sept. 26, 2007) (Qwest September 2007 *Ex Parte* Letter). Qwest argues that the Bureau had explicitly rejected a request from APCC that the Commission order all payphone tariffs to be refiled, without exception. Although the Bureau did reject "the various alternatives to granting a waiver that were suggested by APCC," see *Second Bureau Waiver Order*, 12 FCC Rcd at 21380, para. 21, the Bureau did not—and indeed could not—eliminate the tariff filings required by the Commission's orders. Instead, it appears that APCC sought, and the Bureau rejected, tariff filing obligations more stringent than those previously mandated by the Commission. APCC's letter failed to mention that the Commission's order allowed states, at their discretion, to determine that no further tariff filings were necessary and thus to exempt particular LECs from filing new tariffs, and the Bureau declined to eliminate this option. As already noted, in paragraph 8 of the *Second Bureau Waiver Order*, the Bureau explained that "no further filings are required" only where the states, after review, concluded that existing tariffs satisfied the Commission's requirements.

<sup>193</sup> We also reject Qwest's argument that subsequent orders addressing the Wisconsin payphone filings somehow modified the Commission's previous tariff filing requirements. Qwest September 2007 *Ex Parte* letter at 3. See *Wisconsin Bureau Order*, 15 FCC Rcd 9978. In that case, the Bureau ordered Wisconsin LECs to file payphone tariffs and cost support for review by this Commission because the Wisconsin Commission had concluded that it lacked jurisdiction to determine whether the rates at issue satisfied the NST. Nothing in that order, or the subsequent Commission order largely affirming it, speaks to the separate and distinct question of when tariffs or cost support had to be filed with the states. See *Wisconsin Payphone Order*, 17 FCC Rcd 2051.

‘bring the . . . [BOCs] into compliance’ and to ‘mitigate any delay’ in establishing NST-compliant rates.”<sup>194</sup> As we explain below, the *Second Bureau Waiver Order* imposed a limited refund obligation on the BOCs, but, importantly, did not in any way divest the state commissions of their authority to review payphone line tariffs for compliance with section 276 and Commission orders and to order refunds where appropriate. The Bureau’s order notes repeatedly that the payphone line tariffs are subject to review by state commissions.<sup>195</sup> The refund provision in that order leaves both the BOCs and the PSPs subject to precisely the same rights and obligations, including the obligation for BOC payphone services tariffs to be NST-compliant, that applied had the April 15, 1997 deadline for NST-compliance not been extended.<sup>196</sup> If the BOCs failed to file NST-compliant rates, the PSPs could (and in many cases did) invoke state procedures to remedy the non-compliance, and in many such cases the PSPs received refunds. Given the availability of these remedies, denying refunds in those cases where the PSPs did not exercise their rights on a timely basis, failed to exhaust their administrative remedies, or otherwise failed to show they were legally entitled to refunds is in no way inconsistent with the *Second Bureau Waiver Order*.

### **B. Refunds in Other Proceedings Should Be Decided on a State-by-State Basis**

47. We confirm that, consistent with section 276 and the Commission’s *Payphone Orders*, states may, but are not required to, order refunds for any period after April 15, 1997 that a BOC does not have NST-compliant rates in effect. Further, we find that the *Second Bureau Waiver Order* was intended to provide only a limited extension of time within which the BOCs could file NST-compliant rates. Nothing in the *Second Bureau Waiver Order* affected a state commission’s authority and obligation to apply relevant law and regulations to determine whether a BOC’s rates were NST-compliant, including whether refunds are appropriate for periods where it finds a BOC’s rates were not NST-compliant.<sup>197</sup> For this reason, we reject BOC claims that the *Second Bureau Waiver Order* prohibits refunds for periods after May 19, 1997.<sup>198</sup> Section 276 requires that any BOC providing payphone service “(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange operations or its exchange access operations, and (2) shall not prefer or discriminate in favor of its payphone service.”<sup>199</sup> To meet these statutory requirements, the Commission’s *Payphone Orders* required that BOC payphone rates be NST-compliant. Consistent with the statute and these Commission decisions, states can find that refunds are necessary for any period of time after April 15, 1997 during which BOCs’ rates were not NST compliant. The states that are involved in the pending petitions are at various points in the procedural processes. Although they concluded, based upon the facts of the particular proceedings and

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<sup>194</sup> See, e.g., Letter from Robert F. Aldrich, Attorney, APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128, at 17 (filed Sept. 12, 2006) (APCC Sept. 12<sup>th</sup> *Ex Parte* Letter).

<sup>195</sup> See, e.g., *Second Bureau Waiver Order*, 12 FCC Rcd at 21374 n.20 (“The Commission provided guidelines pursuant to which the states are to review the state tariffs . . . .”); *id.* at 21379 n.60 (“The states must act on the tariffs filed pursuant to this Order within a reasonable period of time.”).

<sup>196</sup> See *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163.

<sup>197</sup> We believe this analysis provides the guidance the Oregon Commission requested in its letter to us. See *supra* para. 37.

<sup>198</sup> See, e.g., BOC IPTA Reply Comments at 7 (“In fact, the language of the [RBOC Coalition] letter and the surrounding circumstances make absolutely clear that the commitment referred to in the [*Second Bureau Waiver Order*] is of limited scope and cannot be read to mean that the LECs agreed to provide refunds whenever state commissions determine that payphone line rates should be lowered.”).

<sup>199</sup> 47 U.S.C. § 276(a).

the relevant laws, that refunds were not required, states in these and other proceedings may well find that refunds are appropriate.

48. Indeed, the Commission is aware that several other state commissions have ordered refunds, and we do not question those conclusions in this order.<sup>200</sup> For example, in the *Indiana Payphone Order*, the Indiana Utility Regulatory Commission in 2000 found that the BOC payphone tariffs should only be approved on an interim basis, retroactive to April 15, 1997, and subject to refund pending further review. Accordingly, once the review was complete, the Indiana Commission required the BOCs to lower their payphone rates and ordered refunds retroactive to April 15, 1997.<sup>201</sup> Similarly, in the *South Carolina Payphone Order*, in 1999, the South Carolina Public Service Commission initiated an investigation into BellSouth's rates and confirmed that any rate reductions resulting from the proceeding would be applied retroactively. Accordingly, once the proceeding was concluded and the rates lowered, BellSouth was required to pay PSPs refunds back to April 15, 1997.<sup>202</sup>

49. Refund determinations should be made by the various state commissions based on the specific facts of the case before them. We recognize that each individual proceeding involves its own unique set of facts, procedural postures, and relevant state and federal statutes. With regard to similar proceedings and consistent with our previous direction to the states regarding their administration of intrastate payphone rates pursuant to section 276, we therefore leave to the states the responsibility for deciding whether refunds are appropriate.<sup>203</sup> Because we conclude that the refund issue may properly be adjudicated by the states, we do not reach other issues raised by the parties, and find that those issues also may be considered by the states in their proceedings.<sup>204</sup>

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<sup>200</sup> See, e.g., Indiana Utility. Reg. Comm'n, *Indiana Payphone Association*, Cause No. 40830, Order on Less Than All of the Issues (rel. Sept. 6, 2000) (*Indiana Payphone Order*); South Carolina Pub. Serv. Comm'n, *BellSouth Telecommunications, Inc.*, Docket No. 97-124-C, Order Setting Rates for Payphone Lines and Associated Features (rel. Apr. 19, 1999) (*South Carolina Payphone Order*); Letter from Robert F. Aldrich, Attorney, APCC, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 at Tab 2, page 2 (filed Dec. 23, 2005).

<sup>201</sup> *Indiana Payphone Order* at 5. This decision of the Indiana Commission was recently upheld in part. See *Indiana Bell Telephone Company, Inc., et al. v. Indiana Utility Regulatory Commission, Office of Utility Consumer Counselor, et al.*, 855 N.E.2d 357 (Ind. Ct. App. 2006).

<sup>202</sup> *South Carolina Payphone Order* at 12.

<sup>203</sup> Accordingly, we advise the Oregon Commission and the Commonwealth of Massachusetts Supreme Judicial Court to apply this guidance in considering the refund issues in their respective pending cases.

<sup>204</sup> For example, the BOCs raised defenses such as res judicata, collateral estoppel, filed rate doctrine, and the ban on retroactive ratemaking, which the PSPs argued were not applicable. See, e.g., BOC IPANY Comments at 10-16 (raising defenses of res judicata and collateral estoppel); Implementation of the Local Competition Provision in the Telecommunications Act of 1996; No Federal Rule Preempts State Procedural Rules Governing the Availability of Refunds for State Payphone Line Rates, CC Docket No. 96-128 (filed Mar. 23, 2009); Implementation of the Local Competition Provision in the Telecommunications Act of 1996; Illinois Public Telecommunications Association Reply to AT&T and Verizon Preemption Comments of March 23, 2009, CC Docket No. 96-128 (filed Dec. 31, 2009); Implementation of the Local Competition Provision in the Telecommunications Act of 1996; Reply of the Independent Payphone Association of New York, Inc. to AT&T and Verizon Preemption Comments of March 23, 2009 (filed Jan. 21, 2010); BOC IPTA Comments at 15-17 (raising defense of filed rate doctrine); BOC SPCA Comments at 8 (raising defense of retroactive ratemaking); BOC FPTA Comments at 12-13 (arguing that ratemaking is a legislative function and any change would have to be prospective); IPTA Petition at 8-11 (raising the issue of the unlawful receipt of dial-around compensation); see also Letter from Brooks Harlow, Attorney, Northwest Public Communications Council (NPCC), to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-128 (filed Sept. 19, 2006) (arguing against the application of laches and res judicata to NPCC's claim

(continued . . .)

### C. Resolution of the MPTA Petition

50. As an initial matter, similar to our decision regarding the five petitions above, we decline to preempt the Michigan Commission's orders in response to the MPTA Petition.<sup>205</sup> Although we conclude that the Michigan Commission has erred in its finding that a payphone usage rate is consistent with the NST, we find that the Michigan Commission erred by failing to explain how its usage rate is consistent with the NST and the Commission's *Payphone Orders*. Therefore, we remand to the Michigan Commission and direct it either to provide an adequate explanation of how its usage rate is consistent with the NST and the Commission's *Payphone Orders* or to require the carrier to justify a payphone usage rate consistent with the NST and the Commission's *Payphone Orders*.

51. The Commission's *Payphone Orders* established the requirement that payphone line rates be established in compliance with the NST to ensure the just and reasonable pricing of payphone services.<sup>206</sup> In the *Wisconsin Payphone Order*, the Commission confirmed that LEC tariffs should "comply with section 276 as implemented by the Commission and, as such, [the rates] should be cost-based, nondiscriminatory, and consistent with both section 276 and our *Computer III* tariffing guidelines. Thus, rates assessed by LECs for payphone services tariffed at the state level should satisfy the new services test."<sup>207</sup> The NST is a "cost-based test that sets the direct cost of providing the new service as a price floor and then adds a reasonable amount of overhead to derive the overall price of the new service."<sup>208</sup> In the *Wisconsin Payphone Order* the Commission clarified how states should implement the *Payphone Orders*, the Act, and the Commission's rules, confirming that "our pricing requirements do not mandate uniform overhead loading, provided that the loading methodology as well as any deviation from it is justified."<sup>209</sup> As such, "under the new services test and our precedent, BOCs bear the burden of affirmatively justifying their overhead allocations."<sup>210</sup>

52. The *Wisconsin Payphone Orders* hold that "cost study inputs and assumptions used to justify payphone line rates should be consistent with the cost inputs used in computing rates for comparable services offered to competitors."<sup>211</sup> We note, however, that the *Wisconsin Payphone Orders* did not provide a specific methodology by which LECs could determine "a just and reasonable portion of overhead costs to be attributed to services offered to competitors," but allowed for a "flexible approach to calculating BOCs' overhead allocation for intrastate payphone line rates" as long as the allocation is properly justified.<sup>212</sup>

(Continued from previous page) \_\_\_\_\_

against Qwest); APCC Oct. 25<sup>th</sup> *Ex Parte* Letter at 15-20 (arguing that the filed rate doctrine and prohibition against retroactive ratemaking does not preclude refunds).

<sup>205</sup> See *supra* paras. 38-41.

<sup>206</sup> See *Initial Payphone Order*, 11 FCC Rcd at 20614-15, paras. 146-47; see also *Payphone Reconsideration Order*, 11 FCC Rcd at 21308, para. 163.

<sup>207</sup> *Wisconsin Payphone Order*, 17 FCC Rcd at 2055-56, para. 14 (internal citations omitted).

<sup>208</sup> *Id.* at 2054, para. 12. It has been established that payphone service is a new service subject to the NST. See *id.* at 2065-66, paras. 46-47.

<sup>209</sup> *Id.* at 2067, para. 52.

<sup>210</sup> *Id.* at 2069, para. 56.

<sup>211</sup> *Id.* at 2058, para. 24 (citing *Wisconsin Bureau Order*, 15 FCC Rcd at 9981-82, para. 10).

<sup>212</sup> See *Wisconsin Bureau Order*, 15 FCC Rcd at 9982, para. 11; *Wisconsin Payphone Order*, 17 FCC Rcd at 2069, para. 58.



53. We find that on remand the Michigan Commission chose to use the comparable service standard for applying the NST but erred in its application when it used two separate, non-uniform overhead allocations for AT&T Michigan's payphone rates' without justification and in choosing a service that was not comparable.<sup>213</sup> Specifically, the Michigan Commission adopted a cost-based overhead allocation rate for the monthly fixed recurring rate for AT&T Michigan's payphone service and a non-cost based overhead allocation for the payphone local usage rate.<sup>214</sup> AT&T Michigan has the burden to explain any departure from non-uniform overhead allocations, and AT&T Michigan has not justified the use of non-cost based overhead allocations for usage rates and cost-based overhead allocations for fixed monthly charges as was done by the Michigan Commission. This non-cost based overhead allocation for the usage rate was not requested by AT&T Michigan and thus was also not justified by AT&T Michigan.<sup>215</sup> The Michigan Commission erred in using a non-cost based overhead allocation for the payphone local usage rate without justification as required by the *Wisconsin Payphone Order*.<sup>216</sup>

54. In addition, the Michigan Commission found "that toll service is an appropriate competitive comparable service for local usage" without providing any justification as to why it accepted toll service, a service not subject to cost studies, and a service with which MPTA claims payphone providers do not compete, as a comparable service for purposes of establishing an overhead allocation for AT&T Michigan's payphone local usage rate.<sup>217</sup> Accordingly, we find that this lack of explanation renders the Michigan Commission's findings in violation of the NST.<sup>218</sup>

55. As such, we find that the payphone local usage rate in Michigan at issue in the MPTA's Petition is not compliant with the NST. We remand this proceeding to the Michigan Commission and direct it either to justify how using two different overhead allocations is consistent with the NST or to determine a proper payphone local usage rate in the state of Michigan consistent with this order.<sup>219</sup> We agree with the MPTA and do not find that this Commission needs to initiate a cost study for the state of

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<sup>213</sup> Pursuant to the MPTA Petition, only the appropriateness of the overhead allocation for AT&T Michigan's payphone local usage rate is before this Commission. See MPTA Petition at 2-3.

<sup>214</sup> See MPTA Petition at 2-3.

<sup>215</sup> The *Wisconsin Payphone Order* clarifies that it is the BOC that bears the "burden of affirmatively justifying their overhead allocations." *Id.* at 2069, para. 56. MPTA states that AT&T Michigan did not request, nor advocate for, a separate non-cost based overhead allocation for local usage service. See MPTA Petition at 3. We agree with the MPTA that in this proceeding the Michigan Commission proffered the use of toll service as a comparable service, resulting in the application of non-uniform overhead allocation factors. "However, the [Michigan Commission] ultimately created its own application of the new services test that approved a non-uniform, bifurcated rate structure applying a much higher, non-cost-based overhead allocation factor to be applied only to AT&T Michigan's usage services." MPTA Reply Comments at 9. Use of this non-cost based overhead allocation factor was not justified by AT&T Michigan, as we require, or by the Michigan Commission.

<sup>216</sup> See *supra* para. 52.

<sup>217</sup> Michigan Commission 2004 Order at 18.

<sup>218</sup> See *id.* "[T]he 'comparable competitive service' test requires comparison of overhead loadings for the local exchange service under review with a BOC service with which the competitive service provider competes." See APCC MPTA Comments at 5-6 (citing *Wisconsin Payphone Order*, 17 FCC Rcd at 2067-68, para. 53).

<sup>219</sup> We note that the Michigan Commission was correct in establishing a cost-based overhead allocation rate for the monthly fixed recurring rate for payphone services in Michigan. A similar, singular overhead allocation could be used to establish the per minute rate for local usage services in Michigan. See MPTA Petition at 2-3.



Michigan.<sup>220</sup> We also agree with parties to this proceeding that it is not appropriate for the Commission to address the question of any potential refunds in the state of Michigan, leaving that decision to the Michigan Commission upon its completion of this remand proceeding.<sup>221</sup>

#### IV. ORDERING CLAUSES

56. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 201, 202, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 201, 202, and 276, and sections 1.1 and 1.2 of the Commission's rules, 47 C.F.R. §§ 1.1 and 1.2, the Petition filed by the Illinois Public Telecommunications Association IS DENIED as set forth herein.

57. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 4(i), 201, 202, and 276 of the Communications Act of 1934, as amended 47 U.S.C. §§ 4(i), 201, 202, and 276, and sections 1.1 and 1.2 of the Commission's rules, 47 C.F.R. §§ 1.1 and 1.2, the Petition filed by the Southern Public Communication Association IS DENIED as set forth herein.

58. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 201, 202, and 276 of the Communications Act of 1934, as amended 47 U.S.C. §§ 4(i), 201, 202, and 276, and sections 1.1 and 1.2 of the Commission's rules, 47 C.F.R. §§ 1.1 and 1.2, the Petition filed by the Independent Payphone Association of New York, Inc. IS DENIED as set forth herein.

59. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 201, 202, and 276 of the Communications Act of 1934, as amended 47 U.S.C. §§ 4(i), 201, 202, and 276, and sections 1.1 and 1.2 of the Commission's rules, 47 C.F.R. §§ 1.1 and 1.2, the Petition filed by the Florida Public Telecommunications Association, Inc. IS DENIED as set forth herein.

60. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 201, 202, and 276 of the Communications Act of 1934, as amended 47 U.S.C. §§ 4(i), 201, 202, and 276, and sections 1.1 and 1.2 of the Commission's rules, 47 C.F.R. §§ 1.1 and 1.2, the Petition filed by the Payphone Association of Ohio IS DENIED as set forth herein.

61. IT IS FURTHER ORDERED that, pursuant to section 1.41 of the Commission's rules, 47 C.F.R. § 1.41, the SPCA and the IPANY motions to consolidate ARE GRANTED.

62. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 201, 202, and 276 of the Communications Act of 1934, as amended 47 U.S.C. §§ 4(i), 201, 202, and 276, and sections 1.1 and 1.2 of the Commission's rules, 47 C.F.R. §§ 1.1 and 1.2, the Petition filed by the Michigan Pay Telephone Association IS GRANTED in part, DENIED in part and REMANDED to the Michigan Commission as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>220</sup> “[T]he MPTA is not asking the FCC to analyze the underlying cost studies to determine what the direct cost of the local usage service should be, or to determine what the overhead allocation may be under any other cost methodology or alternative theories. The MPTA only requests that the Commission determine whether the [Michigan Commission] may adopt, without justification, a non-uniform overhead allocation for strictly the local usage service made available to IPPs in Michigan.” MPTA Reply Comments at 3.

<sup>221</sup> See BOC MPTA Comments at 8.

**APPENDIX****List of Comments on Petitions**

Comments regarding the IPTA Petition for a Declaratory Ruling.

American Public Communications Council  
Atlantic Payphone Association, Inc.  
BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies (Bell Operating Companies – BOC) (BOC IPTA)  
Florida Public Telecommunications Association, Inc.  
Illinois Commerce Commission  
Independent Payphone Association of New York, Inc.  
New England Public Communications Council, Inc.  
Payphone Association of Ohio

Reply comments regarding the IPTA Petition for a Declaratory Ruling.

American Public Communications Council  
Atlantic Payphone Association, Inc.  
BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies (BOC IPTA)  
Illinois Public Telecommunications Association  
New England Public Communications Council, Inc.  
Public Utilities Commission of Ohio

Comments regarding the SPCA Petition for a Declaratory Ruling.

American Public Communications Council  
BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Companies (BOC SPCA)  
Mississippi Public Service Commission  
Payphone Association of Ohio  
Public Utilities Commission of Ohio

Reply comments regarding the SPCA Petition for a Declaratory Ruling.

Evercom Systems, Inc.  
Payphone Association of Ohio  
Southern Public Communication Association

Comments regarding the Petition of IPANY for an Order of Pre-Emption and Declaratory Ruling.

American Public Communications Council  
BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies (BOC IPANY)  
Illinois Public Telecommunications Association  
New York State Department of Public Service  
Northwest Public Communications Council and the Minnesota Independent Payphone Association

Reply comments regarding the Petition of IPANY for an Order of Pre-Emption and Declaratory Ruling.

American Public Communications Council  
BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies (BOC IPANY)  
Illinois Public Telecommunications Association  
Independent Payphone Association of New York, Inc.  
Northwest Public Communications Council and the Minnesota Independent Payphone Association

Comments regarding the Petition of the FPTA for a Declaratory Ruling and for an Order of Preemption.

AT&T, Inc., BellSouth Telecommunications, Inc. and the Verizon Telephone Companies (BOC FPTA)  
American Public Communications Council  
Florida Public Service Commission  
Illinois Public Telecommunications Association  
Independent Payphone Association of New York, Inc.  
Northwest Public Communications Council and Minnesota Independent Payphone Association

Reply comments regarding the Petition of the FPTA for a Declaratory Ruling and for an Order of Preemption.

AT&T, Inc., BellSouth Telecommunications, Inc. and the Verizon Telephone Companies  
Florida Public Telecommunications Association, Inc.  
Independent Payphone Association of New York, Inc.  
Illinois Public Telecommunications Association  
Northwest Public Communications Council and Minnesota Independent Payphone Association

Comments regarding the PAO Petition for Preemption and Declaratory Ruling.

AT&T, Inc., and the Verizon Telephone Companies  
Public Utilities Commission of Ohio (PUCO)

Reply comments regarding the PAO Petition for Preemption and Declaratory Ruling.

Payphone Association of Ohio

Comments regarding the Michigan Pay Telephone Association Petition for Declaratory Ruling

American Public Communications Council (APCC MPTA)  
AT&T, Inc.  
AT&T, Inc., BellSouth Telecommunications, Inc. and the Verizon Telephone Companies (BOC MPTA)

Reply comments regarding the Michigan Pay Telephone Association Petition for Declaratory Ruling

American Public Communications Council  
AT&T, Inc.  
Michigan Pay Telephone Association

**DISSENTING STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

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

Pay telephones (now commonly referred to as “payphones”) continue to be a vital link for consumers during public safety events, such as Super Storm Sandy, and when mobile service is otherwise unavailable. Not all low-income consumers have had the opportunity to obtain phone service through the Commission’s Lifeline program, so for them the availability of payphones remains a necessity in order to stay connected to employers, healthcare providers, friends, and family. Congress set forth a federal mandate for the Commission to ensure that the payphone market is competitive and that these telephones are widely available, and because I believe that the majority’s decision is contrary to the pro-competitive, federal policy encapsulated in Section 276 of the Communications Act and the Commission’s prior Orders implementing that policy, I respectfully dissent.

Historically, payphone services were provided by the local telephone company and regulated by the states. With the passage of the Telecommunications Act of 1996, Congress opened up the local telephone markets for competition and included the payphone market in its provisions. Specifically, in Section 276, Congress provided that the regional Bell operating companies (the “RBOCs”) would no longer subsidize their payphone service with their other operations; that they would not discriminate against third party operators offering payphone service; and that the Commission would establish the necessary regulations to implement regulations “[i]n order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.” 47 U.S.C. § 276 (a) & (b)(1). Furthermore, in order to advance competition and ensure widespread deployment of payphones, Congress directed the Commission to “take all actions necessary (including any reconsideration) to prescribe regulations that—establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every call . . . discontinue all intrastate and interstate payphone subsidies . . . [and] prescribe a set of nonstructural safeguards for [the RBOCs] . . . [that] at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding . . .” *Id.* § 276(b)(1)(A)-(C). Finally, Congress prioritized this new federal policy for payphones by stating that “[t]o 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.” *Id.* § 276(c).

In response to this new federal mandate, the Commission, through a series of Orders, implemented new payphone service policies to allow independent service providers to purchase payphone access lines from incumbents at reasonable prices so that competition would be promoted in the marketplace. In addition, the Commission instituted per call compensation requirements so that all payphone providers would be compensated when consumers use a payphone to reach third party providers. The FCC’s *Initial Payphone Order* directed that all payphone tariffs be filed with the FCC and be treated “as a new service under the Commission’s price cap rules” which is “necessary to ensure that central office coin services are priced reasonably” and “do not include subsidies.” *Initial Payphone Order*, 11 FCC Rcd 20541, 20614 ¶ 146. The Commission further stated that “Section 276 specifically refers to the application of *Computer III* and *ONA* requirements, at a minimum for BOC provision of payphone services. Accordingly, we conclude that *Computer III* tariff procedures and pricing are more appropriate for basic payphone services provided by LECs to other payphone providers.” *Id.* Similar to the statute, the Order provided that state requirements inconsistent with these regulations are superseded by the Commission’s regulations. *Id.* at 20615 ¶ 147.

In the *Payphone Reconsideration Order*, the Commission directed carriers to file their intrastate payphone tariffs with state utility commissions, and it further explained how carriers should comply with the new services test. *Payphone Reconsideration Order*, 11 FCC Rcd 21233, 21308 ¶ 163. They 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.” *Id.* The *Payphone Reconsideration Order* further stated that “[s]tates must apply these requirements and the *Computer III* guidelines for tariffing such intrastate tariffs,” citing FCC rule 61.49(g)(2), which requires forward-looking cost supportive data, and the Commission’s *Open Network Architecture Order* that also describes forward-looking cost requirements. *See id.* at 21308 ¶ 163 & n. 492.<sup>1</sup> The Commission explicitly retained its jurisdiction to review intrastate tariffs where a state could not do so. *Id.* at 21308 ¶ 163. In a separate section of the *Payphone Reconsideration Order*, the Commission provided for dial-around compensation once a carrier was able to certify it had completed the requirements for implementing the new federal Section 276 regulatory scheme. *Id.* at 21293 ¶ 131. As part of its certification obligation, a carrier must certify its tariff rates were compliant with the new services test, *i.e.*, that they “reflect[ed] the removal of charges that recover the costs of payphones and any intrastate subsidies.” *Id.* The *Order on Reconsideration* delegated authority to the Common Carrier Bureau to determine whether a LEC has complied with all the requirements for receiving dial-around compensation.

As the due date for compliance with the new requirements neared, the Common Carrier Bureau issued two consecutive waiver orders that extended the filing deadlines for the new tariffs. In both, the Bureau stressed the linkage between the dial-around compensation with incumbent carriers’ compliance with the tariff requirements, and it reiterated the requirements for the tariffs. For example, in the *First Bureau Waiver Order*, it said “state tariffs for payphone services must be cost based, consistent with the requirements of Sections 276, nondiscriminatory, and consistent with the *Computer III* guidelines.” *First Bureau Waiver Order*, 12 FCC Rcd. 20997, 21012, ¶ 31. It further stated that “the guidelines for state review of intrastate tariffs are essentially the same as those included in the *[Initial] Payphone Order* for federal tariffs.” *Id.* 21012, ¶ 32. Also, the Bureau emphasized that “[t]he intrastate tariffs for payphone services, including unbundled features, and the state tariffs removing payphone equipment costs and subsidies must be in effect for a LEC to receive compensation in a particular state.” *Id.* 21012, ¶ 33. In the *Second Bureau Waiver Order*, the Bureau extended the state tariff deadline beyond the dial-around compensation date, so that tariffs would be due on May 19, 1997, but dial-around compensation would begin on April 15. *Second Bureau Waiver Order*, 12 FCC Rcd 21370, 21374 ¶10. Again, the Bureau emphasized the requirement that the tariffs comply with the Section 276 and the Commission’s requirements, although it had “delegated some of the tariffing requirements to the state jurisdiction.” *Id.* 21374, ¶ 11. Relying upon the RBOC Coalition’s commitment to reimburse or credit independent payphone providers where their rates would be lowered between April 15 and May 19 in order to come into compliance, the Bureau held that carriers “must reimburse it customers or provide them credit from April 15, 1997.” *Id.* 21379-80, ¶ 20.

Specifically noting the concern of MCI that the subsidies from payphone services will not have been removed before the incumbents receive dial-around compensation beginning April 15, 1997, the Bureau noted that the waiver does not waive the requirement that subsidies be removed, and again stated that carriers will be required to reimburse their customers from the date when dial-around compensation

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<sup>1</sup> If carriers’ tariffs already met these requirements, then they had the option to rely upon them.



begins. *Id.* 21379-80, ¶ 20. Rather than showing proof of the subsidy removal, the Commission permitted the carriers to certify to IXC's that they had done so. The Commission ordered the states to "act on the tariffs filed pursuant to this Order within a reasonable period of time," *id.* at 21379 ¶ 19 n. 60, but was silent as to whether the LECs, payphone service providers, or the Commission itself should take action if the states failed to conduct the inquiry required by the *Payphone Orders* and was similarly silent on a suggested process for regulators or payphone service providers to follow if carriers failed to submit the required tariffs and supporting documentation. Additional Orders dealing with intrastate tariffs in Wisconsin were released—the first one by the Bureau in 2000, and then the Commission in 2002. *Wisconsin Pub. Serv. Comm'n; Order Directing Filings*, CCB/CPD No. 00-01, Order, 15 FCC Rcd 9978 (CCB rel. Mar. 2, 2000); *Wisconsin Pub. Serv. Comm'n; Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) (collectively, the "*Wisconsin Payphone Orders*"). Both provided more specific information for states in their review of the intrastate payphone tariffs. After that additional guidance was provided, payphone rates were decreased in the five jurisdictions at issue in the case before us, and the question presented is whether Section 276 and/or the Commission's policies require refunds between April 15, 1997 when the incumbents began receiving dial-around compensation and the lowering of their rates after May 19, 1997.

The majority finds that based on the evidence before us, the Commission's Orders were followed and that refunds are not required, although it permits that the states may find that refunds are warranted based on their own reviews. In doing so, the majority believes that the states may rely on their own analysis and if under state law, refunds are not due then they are not required to issue them under federal law. The majority holds that there is a dual regulatory scheme under the statute, with both the Commission and states having roles, and declares that instead of one federal policy, the Commission delegated to the states the authority to consider whether refunds are appropriate. The majority also rejects the argument that the Commission's decisions clearly established the requirement that the intrastate tariffs be based on forward-looking cost methodologies. I disagree with these conclusions as discussed below.

Congress established a new federal policy for the payphone marketplace in the 1996 Act and directed the Commission to ensure that it was pro-competitive, including that the implicit subsidies in the RBOC phone rates would be extracted. With respect to intrastate payphone rates, the Commission delegated its tariffing responsibilities to the states, but Congress clearly contemplated one federal policy—not a dual regulatory scheme—to promote competition and the widespread deployment of payphones. The Commission has a responsibility to ensure that the state proceedings comply with the Section 276 and the federal policy for a pro-competitive market and widespread deployment of payphones. Overseeing its delegation is critical for ensuring compliance with Congress' directive. At no time, until the instant Declaratory Ruling and Order, has the Commission determined that it should not review the outcome of state proceedings when compliance issues have been raised. Indeed, the Commission's decision here to not review the state actions from 1997 to 2003 is troublesome in that regard, but also on several other scores. First, the Commission's Orders are clear that not only did the incumbents have to file their tariffs, but they had to comply with the statute, and the Commission's requirements that they be cost-based, nondiscriminatory, and consistent with *Computer III*. While the majority is satisfied with that compliance, I am not—(more on that point in a moment.) Second, many states followed the new federal policy and implemented the statutory and Commission requirements faithfully, ensuring that in those states the pro-competitive requirements Congress directed and that the Commission required, were met. By abdicating its responsibility to oversee its delegation and to ensure the state proceedings are consistent with the statute and the Commission's requirements, the Commission

cannot ensure that there is one federal policy that is fulfilling Congress' pro-competitive goals in payphone marketplace.<sup>2</sup>

I believe the Commission's *Initial Payphone Order* and *Order on Reconsideration* were clear that in filing cost-based tariffs that such tariffs had to meet the new services test and be based on forward-looking cost methodologies. First, the *Computer III* and *ONA* proceeding requirements are cited in both Orders. Second, in the *Order on Reconsideration*, the Commission cites both FCC rule 61.49(g)(2) and the *Open Network Architecture Order*. Third, the *Second Bureau Waiver Order* states that the filing guidelines for state tariffs "are essentially the same" as federal tariffs. All of these proceedings and rule cited relied upon forward-looking cost supportive data. Where RBOCs did not file cost-based tariffs using forward-looking cost methodologies by May 19, 1997, they were not in compliance with the Commission's Orders. No RBOC should be excused from this requirement at this late date by this Commission or any state regulatory commission. Not only is that outcome inequitable for independent payphone operators and consumers, it is a disservice to those states that followed the Commission's requirements. The fact that carriers adjusted their rates after the Commission's 2002 Wisconsin Payphone Order is evidence that these carriers' tariffs were not cost-based and did not rely upon forward-looking cost methodologies by May 19, 1997. While the Commission provided more specific guidance about the types of forward-looking cost methodologies that would be appropriate and how they should be used in the Wisconsin Payphone Orders, incumbents' earlier obligations were not altered so that they no longer had to comply with the Commission's previous Payphone Orders.

Those not in compliance with the new services test by May 19, 1997 benefitted from receiving dial-around compensation, contrary to the Commission's stated policy that such compensation is only available once carriers complied with the market-opening provisions of Section 276. In both Waiver Orders, the Bureau determined that it was not waiving the requirement that the tariffs meet the new services test, only that it was allowing additional time for the tariff filings. In fact, it stated in those Orders that the incumbents' tariffs must still meet the other requirements to remove subsidies, be nondiscriminatory, and consistent with *Computer III*. Moreover, in the *Second Bureau Waiver Order*, the Bureau gave assurances to competitors that refunds would be forthcoming where the tariffed rate is lowered. Today's decision finds that the *Second Bureau Waiver Order* was time-limited to when the tariffs were filed on May 19, and by doing so, removes the condition that the tariffs actually comply with the statute and the Commission's requirements as of May 19. I cannot agree that we should interpret the *Second Bureau Waiver Order* in this manner. The obligation to refund did not cease on May 19, which is why other states, including the South Carolina PSC, ordered refunds after that date when they completed their reviews of the tariff filings to ensure that they complied with the Commission's new services test.

Moreover, I disagree that it is appropriate for states to consider whether other principles, such as the filed rate doctrine, trump the underlying tariff requirements in Section 276 and the Commission's

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<sup>2</sup> The majority asserts that their decision is consistent with the *Wisconsin Reconsideration Order*, "in which the Commission denied the Wisconsin Pay Telephone Association's request for the Commission to evaluate all cost support materials submitted by Ameritech and Verizon and determine an appropriate payphone line rate for the state of Wisconsin." See para. 45, citing *Wisconsin Public Service Commission, Order Directing Filings*, CCB/CPD No. 00-1, Order on Reconsideration, 21 FCC Rcd 7724 (2006). That Order is inapposite, as the state regulatory body had reversed its initial decision and found that it had the jurisdiction to review the intrastate tariffs and was in process of doing so, and the Commission said it would not interfere with that process. Here, the petitioners are asking that the Commission review the state *decisions* with respect to payphone rates and whether refunds are warranted under Section 276 and the Commission's Payphone Orders.

requirements. As discussed above, it is the Commission's responsibility to ensure that the statute and the FCC's requirements have been met. It is appropriate for the Commission to consider these other issues itself. Indeed, several courts have held that the filed rate doctrine cannot be used as a defense to the tariff filing requirements themselves. *See, e.g., TON v. Qwest*, 493 F.3d 1225, 1236-37 (10<sup>th</sup> Cir. 2007); *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1085 (9<sup>th</sup> Cir. 2006). We have no assurances that consideration of these issues will result in a satisfactory outcome that is consistent with Congress' direction in Section 276 and judicial precedent; thus, I do not agree with the majority on this point.

To the extent that states are reviewing compliance and considering the majority opinion and my opinion, which I hope they will, and should they disagree with my interpretation of the statute and the Commission's Orders, I would like them to consider the equities. The incumbents clearly were instructed to remove the implicit subsidies in their payphone rates in order to obtain dial-around compensation in 1997. Where they did not do so for five years, it is inequitable and unjust that they received both dial-around compensation and unreasonable rates from independent payphone providers. Accordingly, they should be required to refund excessive rates.

Finally, I think it is important for us to consider why the implementation of the 1996 Act's pro-competitive goals are important—even at this late date of February 2013. Consumers benefit when there is competition. In this instance, where carriers can avoid the market opening provisions of the Act by keeping rates high and hampering their competitors, consumers are not served and the pro-competitive goals of the Act are unfulfilled. For five years in these five states, the marketplace for payphones was impacted, and consumers did not receive all the benefits that Congress intended.