

ORIGINAL

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED-PPSC

06 MAR -3 AM 10:14

COMMISSION
CLERK

In the Matter of)

) CC Docket No. 96-128

Implementation of the Pay Telephone)

Reclassification and Compensation Provisions)

of the Telecommunications Act of 1996)

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)

**COMMENTS OF THE
INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.**

Keith J. Roland
Herzog Law Firm
7 Southwoods Boulevard
Albany, New York 12211
Tel: (518) 465-7581
Fax: (518) 462-2743
Email: kroland@herzoglaw.com

Albany, New York
February 27, 2006

CMP
COM
CTR
ECR
GCL
OPC
RCA
SCR
SGA
SEC
JTH

DISTRIBUTION CENTER
06 MAR -3 AM 8:40

DOCUMENT NUMBER-DATE

01862 MAR -3 g

FPSC-COMMISSION CLERK

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

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

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)

COMMENTS OF THE
INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.

The Independent Payphone Association of New York, Inc. (IPANY), pursuant to the Public Notice released on February 8, 2006 (DA 06-310), respectfully submits the following comments on the Petition of the Florida Public Telecommunications Association (FPTA) for a Declaratory Ruling and for an Order of Preemption regarding the failure of BellSouth to comply with its obligations under the Telecom Act of 1996 and this Commission's New Services Test and Payphone orders.

As discussed below, IPANY urges the Commission to grant the relief requested by FPTA by declaring (a) the payphone line charges imposed by BellSouth between April 15, 1997, and November 10, 2003, did not comply with the Commission's New Services Test and (b) BellSouth is obligated to provide

refunds, back to April 15, 1997, for its unlawful overcharges, with interest. Both forms of relief are fully supported by the Commission's New Services Test Orders; the RBOC commitments to this Commission to make refunds to PSPs, contained in the RBOC Coalition letters of April 10 and 11, 1997; and the codification of those commitments in the Commission's Bureau Refund Order of April 15, 1997.¹

I. INTRODUCTION AND SUMMARY

The Independent Payphone Association of New York, Inc. (IPANY) is the trade association representing independent owners and operators of public pay telephones (PSPs) in the State of New York. For more than nine years, IPANY and its individual members have, like payphone owners in Florida, been vigorously prosecuting proceedings to obtain payphone rates that comply with the NST, and to obtain refunds for the unlawful overcharges imposed on payphone owners since April, 1997. IPANY's efforts have included proceedings before the New York State Public Service Commission (PSC) and the New York State courts, only to be frustrated by the refusal of the New York authorities to follow the mandates of this Commission. IPANY files these comments because its

¹ In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket 96-128, ORDER, April 15, 1997, DA 97-805 (Bureau Refund Order) (12 FCC Rcd. 21370).

members, like the PSPs in Florida, have turned to this Commission for the relief, including refunds, which this Commission has required be made available.

IPANY now has pending before this Commission, in the within Docket, its own Petition for preemption of the determinations of New York State authorities which fly in the face of applicable law and the policies established in this Commission's Payphone Orders.² The principles of law raised in the Florida Petition are the same raised in the IPANY Petition: do this Commission's Payphone Orders allow Verizon, BellSouth, and other RBOCs to escape their binding commitments and their obligations under the law to file NST compliant rates and to provide refunds for unlawful overcharges.

At stake here is the very integrity of this Commission's regulatory process. The Commission required the RBOCs to establish underlying payphone rates that complied with the Commission's New Services Test by April 15, 1997. The Commission also made the effectiveness of NST compliant rates a condition precedent for the RBOCs to be eligible to receive Dial-Around Compensation for their payphones. The RBOCs made an unequivocal, unambiguous, and binding commitment to this Commission, and to PSPs across the country, to give refunds, back to April 15, 1997, if their existing underlying payphone rates were subsequently found not to be in compliance with the NST. Those promises for refunds, contained in the two RBOC commitment letters of April 10 and 11, 1997,

² Petition of the Independent Payphone Association of New York, Inc. For an Order of Pre-emption and Declaratory Ruling, CC Docket 96-128, December 29, 2004; Public Notice Establishing Pleading Cycle, DA 05-49, January 7, 2005.

were specifically codified, as a matter of binding federal law, by this Commission in its Bureau Refund Order.

Permitting BellSouth, Verizon, and other RBOCs to renege on their obligations, and thus allowing them to unjustly enrich themselves by retaining hundreds of millions of dollars in Dial-Around revenues, will severely undermine the integrity and credibility of this Commission's regulatory processes.

The RBOCs did not offer to make refunds to PSPs in Florida, New York, and elsewhere out of the goodness of their hearts, but rather for a very self-serving reason. They desperately wanted to participate in the Dial-Around Compensation Program, under which they would be entitled to receive the Dial-Around payments from long distance companies.

The pre-requisite for receiving those payments was that the RBOCs' payphone tariffs first had to be found in actual compliance with the NST. But the RBOCs didn't want to wait until they actually complied with that duty, so they proposed a bargain: If they were permitted to immediately begin receiving Dial-Around, they would promise to correct non-complying payphone service rates, and be liable for refunds to PSPs until the corrections were made. In this manner, the RBOCs could begin collecting Dial-Around Compensation from April 15, 1997, while the payphone providers would effectively receive the benefit of cost-based rates back to that date.

It was a pretty good deal: the Dial-Around monies received by the RBOCs dwarfed the potential liability for NST refunds to PSPs. And it became an

even better deal when BellSouth, Verizon, and other RBOCs breached their commitments to the Commission and the PSPs by refusing to change their tariffs or to make the promised refunds.

By making the promise to modify their tariffs to become NST compliant, and by promising to make refunds for rates which exceeded NST-compliant rates, the RBOCs immediately began to receive hundreds of millions of dollars in Dial-Around compensation. But now, once the Dial-Around monies have been received, the promises ring hollow, the commitments are nullified, and the memories have become exceedingly selective. Such unprecedented bad faith, and attempted manipulation of this Commission, cannot be tolerated.

As demonstrated in the FPTA Petition, BellSouth has always known its payphone line rates were not in compliance with the NST, due to imposition of the EUCL charge on top of already fully cost recovering intrastate tariffed rates. No excuse whatsoever existed for BellSouth not refilling its state rates – as mandated by the NST – to eliminate the double recovery. No excuse, that is, except for BellSouth's desire to enjoy an unjust enrichment, in violation of its unambiguous pledge to this Commission, at the expense of its PSP competitors.

The passage of time cannot excuse BellSouth's conduct, or relieve it from its continuing obligations to make whole the PSPs in Florida. To find otherwise would only encourage future recalcitrance, gaming of the regulatory process, and contempt for the integrity of this Commission's processes.

II. THIS COMMISSION SHOULD NOT PERMIT STATES TO OVERRIDE AND IGNORE THIS COMMISSION'S ORDERS AND THE NATIONAL POLICY ESTABLISHED IN THE TELECOM ACT OF 1996

Congress passed §276 of the Telecom Act “to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public.” 47 USC §276(b)(1). In interpreting §276, this Commission has highlighted “Congress’ stated intent to preserve the availability of payphones [and] the universal service functions payphones provide.” Order on Reconsideration, CC Docket 96-262 and 94-1, 11 FCC Rcd. 21233, November 8, 1996, at para. 8.

This Commission has continued to implement the requirements of §276, including its efforts to ensure that payphone providers are fairly compensated for calls placed from their facilities. Thus, the Commission recognized, as did Congress in passing §276, that payphones should be accessible on demand to consumers, and that they “provide a unique back-up communications option when subscription services - whether wireline or wireless - are unaffordable or unavailable” and that “payphone services are particularly critical to those with few other communications service options - including low-income customers, the elderly, and residents of rural areas.” Critical to public policy, the Commission affirmatively stated “Payphones also enhance access to

emergency (public health and safety) services.” Dial-Around Update Order, at para. 20.³

The RBOCs, including BellSouth in Florida and Verizon in New York, have unfortunately been successful in having states issue decisions in direct conflict with those policies, and which run directly counter to this Commission’s requirements, by putting forth false assertions which cannot pass the red-faced test. Among these baseless claims are the following:

1. The collection of the EUCL charge, on top of state tariffed rates which already recover all unseparated costs, is consistent with NST requirements;
2. The RBOC commitment letters of April 10 and 11, 1997, did not constitute binding commitments made by the RBOCs to this Commission, and to PSPs, to make refunds back to April 15, 1997, in the event pre-existing payphone rates were subsequently determined not to be in compliance with the NST;
3. The RBOC commitment to make refunds, as codified in the April 15, 1997 Bureau Refund Order, had no relationship to the RBOCs’ immediate entitlement to Dial-Around compensation, and that RBOCs would be entitled to receive and retain Dial-Around compensation even

³ In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones, WC Docket 03-225, Report and Order, FCC 04-182, August 12, 2004 (“Dial-Around Update Order”).

if they deliberately chose to keep in effect rates they knew did not comply with the NST; and

4. Granting refunds back to April 15, 1997, would constitute unlawful “retroactive ratemaking.”

This Commission should use the FPTA Petition (along with the petitions of IPANY and other PSPs pending in this Docket) as an opportunity to declare that those assertions are baseless and without merit, and to reconfirm that the collection of the EUCL charge on top of already fully compensatory state tariff rates violates the NST. To the extent that states have refused to implement this Commission’s unequivocal requirements that payphone rates be NST compliant, and that refunds be provided where RBOCs have refused to file NST-compliant tariffs, as has occurred in Florida, those state rulings should be pre-empted as inconsistent with the mandates of Congress and the policies adopted by this Commission.

III. FEDERAL LAW, AS MANDATED BY CONGRESS AND THIS COMMISSION, REQUIRE THAT REFUNDS BE GIVEN TO PSPs IN THE STATE OF FLORIDA

The FPTA Petition demonstrates that BellSouth’s unlawfully charging the EUCL on top of pre-existing state tariff rates (which already recovered all relevant unseparated costs), rendered BellSouth in violation of the NST, the Telecom Act, and this Commission’s Payphone Orders. It is clear BellSouth’s payphone rates in Florida, between April 15, 1997, and November 10,

2003, violated the NST. Since the pre-existing state tariffs already recovered total relevant unseparated costs, charging the EUCL on top of the tariff rates resulted in a significant overrecovery in direct violation of the NST standards. Commission Wisconsin Order, FCC 02-25, FCC Rcd. 2051 (January 31, 2002), at para. 60. By knowingly refusing to file corrective tariffs, BellSouth deliberately violated its obligations under the Commission's Orders, as well as its enforceable commitments in the RBOC Coalition Letters. Accordingly, as a matter of law, refunds are required, and any state decision to the contrary must be pre-empted under the plain language of §276(c): "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". (emphasis added).

The duty to make refunds arises from the RBOC commitment letters, as codified in the Bureau Refund Order; they cannot be understood in a vacuum, but must be evaluated in the context of the background leading to their issuance.

As discussed at the outset, the RBOCs did not promise to give refunds to PSPs out of the goodness of their hearts, but rather for a very self-serving reason. The RBOCs were salivating over the possibility they could receive hundreds of millions of dollars in Dial-Around compensation. However, this Commission made clear the RBOCs would not be entitled to receive those monies until their underlying payphone tariffs were deemed to be in full compliance with the New Services Test. But the RBOCs did not wish to wait the months (or even years) it might take for state commissions to review the existing

rates and determine whether or not they were NST-compliant. Accordingly, the RBOCs were able to entreat this Commission into allowing them to immediately begin receiving Dial-Around compensation on April 15, 1997, rather than having to wait for state certifications of NST compliance. To induce this Commission to grant that largesse, they promised that, if RBOC existing rates were eventually found not to comply with the NST, refunds would be given to PSPs, back to April 15, 1997, of the difference between the existing rates and the subsequently effective lower NST-compliant rates.

This Commission, believing the RBOCs were acting from honorable intentions, accepted that promise, at face value, in good faith. But it is now clear the RBOCs never intended to honor their obligation. Inexcusably, after engorging themselves on hundreds of millions of dollars of Dial-Around compensation, many of the RBOCs, including BellSouth, have shown their utter disregard and contempt for this Commission, and its regulatory process, by refusing to honor their side of the bargain. They delayed for years – in BellSouth’s case over six years – before filing NST complaint tariffs. And they refused to give the refunds required as a matter of law. Rather than respecting this Commission, those RBOCs have made a mockery of its process.

The RBOC Coalition letters were originally generated by the alleged “misunderstanding” by the RBOCs on whether the Commission’s NST Orders applied to previously-tariffed intrastate payphone services. But once the RBOCs “understood” the clear meaning of the Commission’s Bureau Waiver Order of

April 4, 1997, the RBOCs acknowledged that in some states “there may be a discrepancy between the existing state tariff rate and the ‘new services’ test; as a result, new tariff rates may have to be filed.” RBOC Coalition Letter, April 10, 1997, p. 1.

Accordingly, the RBOCs asked for additional time to file NST-compliant tariffs on the state level, and also asked for the privilege of receiving Dial-Around compensation immediately. To induce the Commission to grant that request, they promised, without reservation, that:

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

Letter of Michael K. Kellogg, Counsel to RBOC Payphone Coalition, to Mary Beth Richards, Deputy Bureau Chief, Common Carrier Bureau, April 10, 1997, at p. 2.

The commitment to pay refunds was reaffirmed in the second RBOC Coalition letter of April 11, 1997:

“The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the ‘new services’ test or to file new or revised tariffs that do satisfy those

standards. Furthermore, as noted, where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with State requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.”

The RBOC commitments were codified, as a matter of law, in the Bureau Refund Order:

“A LEC who seeks to rely on the waiver granted in the instant order must also reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates.”

Bureau Refund Order, paras. 20 and 25.

The purpose of the Bureau Refund Order was not to reward recalcitrant RBOCs like BellSouth, which ignored their obligations under Federal law, and refused to file replacement tariffs which met the NST standards. To the contrary, the purpose of the Bureau Refund Order was to assure that RBOCs would not be unjustly enriched if they failed to promptly replace their non-compliant tariffs, and to assure PSPs would not be harmed or prejudiced by any delay in the filing of replacement tariffs.

IV. **REQUIRING REFUNDS WILL NOT CONSTITUTE UNLAWFUL RETROACTIVE RATEMAKING**

While it is not clear in the FTPA Petition whether BellSouth claimed before the Florida Commission that requiring refunds would constitute unlawful retroactive rulemaking, it is highly likely BellSouth will make that claim here. Thus, it is appropriate to debunk that assertion at the outset.

This Commission's issuance of its April 15, 1997, Bureau Refund Order precludes, as a matter of law, any claim of unlawful retroactive ratemaking.

Even if the RBOC Coalition letters were not independently enforceable by the FCC as a contractual party, or by PSPs as third-party beneficiaries of that contractual promise (which they are), the terms of the Bureau Refund Order specifically create a refund liability, effective as of April 15, 1997, where pre-existing rates, or subsequently filed incorrect rates, did not comply with the legal requirements of the NST.

Accordingly, since April 15, 1997, there has been in continuous effect a binding Regulatory Order which has required, as a matter of federal law, that refunds be made available for the difference between the rates being charged by RBOCs as of that date and the lawful rates as and when finally approved. When a regulatory agency specifically issues an Order subjecting rates to possible refunds, on a going-forward basis, any amounts collected by the utility after the effective date of that Order are, as a matter of law, conditional, and if shown to

have been improper, such rates are to be refunded in accordance with the terms of the Regulatory Order.

And, finally, even if there were an argument that the requirement for refunds was unlawful (which there is not), the RBOCs specifically waived their right to invoke that defense in the April 10, 1997 RBOC commitment letter. Therein, while the RBOCs noted what they claimed to be their rights under the Filed Rate Doctrine, they specifically waived such rights and voluntarily undertook to provide rate adjustments back to April 15, 1997:

“I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we [the RBOCs] can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance.”

April 10, 1997 RBOC Coalition letter, at p. 2.

V. CONCLUSION

The issues raised in the FPTA Petition are of critical importance for the entire independent payphone industry. Granting the relief requested therein is essential to preserving the integrity of this Commission's regulatory process; to ensuring that BellSouth and other RBOCs are not permitted to renege on their binding commitments; to preventing an enormous unjust enrichment to BellSouth

and other RBOCs; and to assuring compliance with the national policy to
“promote the widespread deployment of payphone services to the benefit of the
general public.”

In granting the FPTA Petition, this Commission should
unequivocally declare that the Commission’s NST Orders, the RBOC Coalition
letters, and the Commission’s April 15, 1997 Bureau Refund Order, require that
refunds be made available to PSPs in Florida equal to the amount of the EUCL
charge collected between April 15, 1997 and November 10, 2003 (with interest),
and that any Order of the Florida Public Service Commission to the contrary is
preempted and superceded.

Respectfully submitted,

Independent Payphone Association
of New York, Inc.

By: 

Keith J. Roland
Herzog Law Firm
7 Southwoods Boulevard
Albany, New York 12211
Tel: (518) 465-7581
Fax: (518) 462-2743
email: kroland@herzoglaw.com

Dated: February 27, 2006
Albany, New York

Certificate of Service

The undersigned, as Counsel for the Independent Payphone Association of New York, Inc. hereby certifies that on February 27, 2006, a true and correct copy of the foregoing Comments of the Independent Payphone Association of New York, Inc. on the Petition of the Florida Public Communications Association, Inc. was served in the manner indicated on the following:

By U.S. first class mail, postage paid:

Jonathon Rubin, Esq.
Suite 600
1717 K Street
Washington, D.C. 20036

Pamela Arluk
Acting Ass't Division Chief
FCC – WCB/Pricing Policy Division
Room 5-A225
445 12th Street, S.W.
Washington, D.C. 20554

Denise Coca, Esq.
Attorney- Advisor
FCC – WCB/Competition Policy
Division
Room 5-C330
445 12th Street, S.W.
Washington, D.C. 20554

Best Copy and Printing, Inc. (BCPI)
Portals II
Room CY-B402
445 12th Street, S.W.
Washington, D.C. 20554

Hon. Lisa Polak Edgar
Chairman, Florida Public Service
Commission
Division of Commission Clerk and
Administrative Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Blanca S. Bayo, Director
Florida Public Service Commission
Division of Commission Clerk and
Administrative Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Meredith E. Mays, Esq.
BellSouth Telecommunications, Inc.
675 W. Peachtree Street, N.W.
Suite 4300
Atlanta, Georgia 30375

Hon. Jaclyn A. Brillling
Secretary
New York State Public Service
Commission
Three Empire State Plaza
Albany, New York 12223

Saul M. Abrams, Esq.
Assistant Counsel
New York State Public
Service Commission
Three Empire State Plaza
Albany, New York 12223

Robert P. Wise, Esq.
Wise, Carter, Child & Caraway, P.A.
401 East Capitol Street, Suite 600
P.O. Box 651
Jackson, Mississippi 39201

Allison Fry, Esq.
Mississippi Public Service
Commission
2nd Floor, Woolfolk State Office
Building
Jackson, Mississippi 39201

Albert H. Kramer, Esq.
Robert F. Aldrich, Esq.
Dickstein, Shapiro, Morin
& Oshinsky LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526

Paul C. Besozzi, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

Brooks E. Harlow, Esq.
David L. Rice, Esq.
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, Washington 98101

Sandra D. Thorn, Esq.
General Counsel
Verizon New York Inc.
1095 Avenue of the Americas
Room 3745
New York, New York 10036

David S. Tobin, Esq.
Tobin & Reyes
7251 West Palmetto Park Road
Suite 205
Boca Raton, Florida 33433

John C. Henegan, Esq.
Butler, Snow, O'Mara, Stevens
& Cannada, PLLC
17th Floor, AmSouth Plaza
P.O. Box 22567
Jackson, Mississippi 39225-2567

Michael W. Ward, Esq.
Illinois Public Telecommunications
Association
1608 Barclay Boulevard
Buffalo Grove, Illinois 60089

Aaron M. Panner, Esq.
Kellogg, Huber, Hansen, Todd
& Evans, P.L.L.C.
1615 M Street, N.W. – Suite 400
Washington, D.C. 20036

Craig D. Joyce, Esq.
Walters & Joyce
2015 York Street
Denver, Colorado 80205

Gregory Ludvigsen, Esq.
Ludvigsen's Law Offices
1360 University Avenue, West
St. Paul, Minnesota 55104-4086

John P. Kelliher, Esq.
Christine F. Ericson, Esq.
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, Illinois 60601

Howard Meister
President
Payphone Association of Ohio
1785 East 45th Street
Cleveland, Ohio 44103

Matthew J. Satterwhite
Assistant Attorney General of Ohio
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215-3793

By electronic mail:

Best Copy and Printing, Inc
fcc@bcpiweb.com

Samuel Feder.
sam.feder@fcc.gov

Daniel Gonzalez
daniel.gonzalez@fcc.gov

Donald K. Stockdale
donald.stockdale@fcc.gov

Michelle Carey
michelle.carey@fcc.gov

Tamara Preiss
tamara.preiss@fcc.gov

Jessica Rosenworcel
jessica.rosenworcel@fcc.gov

William Dever
william.dever@fcc.gov

Scott Bergmann
scott.bergmann@fcc.gov

Denise Coca
denise.coca@fcc.gov

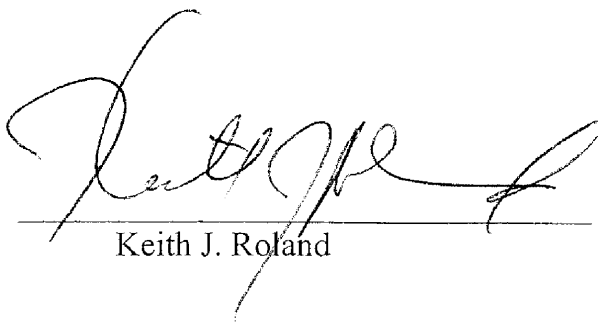
Aaron Goldberger
aaron.goldberger@fcc.gov

Pamela Arluk
pamela.arluk@fcc.gov

Jonathon Rubin
JRubinUS@att.net

David S. Tobin
dst@tobinreyes.com

Bruce Renard
brenard@FPTA.com



Keith J. Roland