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June 27, 1996

DELIVERED BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554-0001

DOCKET FILE COPY ORIGINAL

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JUN 27 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: **COMMENTS OF THE NEW YORK CITY
DEPARTMENT OF INFORMATION TECHNOLOGY
AND TELECOMMUNICATIONS in
In the Matter of Implementation
of the Pay Telephone Reclassification
and Compensation Provisions of the
Telecommunications Act of 1996
(CC Docket No. 96-128)**

Dear Mr. Caton:

Enclosed is an original and fourteen (14) copies of the Comments of the New York City Department of Information Technology and Telecommunications in the above-referenced docket. By copy of this letter we are also providing two copies of the Comments and a diskette to the Common Carrier Bureau, Enforcement Division.

If you have any questions regarding the enclosed filing, please call the undersigned at 202-942-5505.

Sincerely,

Stephanie M. Phillipps
Stephanie M. Phillipps

Enclosures

cc: **Common Carrier Bureau, Enforcement
Division
International Transcription Services, Inc.**

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Before the
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Washington, D.C. 20554

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the Telecommunications Act of 1996)
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CC Docket No. 96-128

To: The Commission

COMMENTS OF THE NEW YORK CITY
DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

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To: The Commission

COMMENTS OF THE NEW YORK CITY
DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

The New York City Department of Information Technology and Telecommunications ("City of New York," "City," or "DoITT") submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* ("*Notice*") in the above-captioned proceeding. To reduce the Commission's burden, and in light of the abbreviated period given the Commission to prescribe the regulations called for by the Telecommunications Act of 1996,¹ the City will limit its comments to only those issues of greatest concern to its citizens.

¹ See Telecommunications Act of 1996, § 151(a), Pub. L. No. 104-104, 110 Stat. 56, 106 (1996) (establishing a new Part II of the Communications Act of 1934, to be codified at 47 U.S.C. § 276(b)(1)) ("1996 Act" or "Act").

I. INTRODUCTION

New Section 276(b)(2) of the Communications Act provides that "the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably."²

In the *Notice*, the Commission seeks comment on "whether it would be consistent with the statute and better serve the public interest to allow the states to develop their own guidelines regarding which payphones are 'public interest payphones.'"³

The City agrees with the Commission that the determination of which payphones are to be treated as "public interest payphones" is, as suggested in the *Notice*, "primarily a matter of state concern."⁴ Moreover, such an approach is entirely consistent with the statute.

The Commission also seeks comment on new Section 276(b)(1)(A), which, in pertinent part, calls upon the Commission to "establish a per call compensation plan to

² See 1996 Act § 151(a) (to be codified at 47 U.S.C. § 276(b)(2)).

³ *Notice*, ¶ 81.

⁴ *Id.*

ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."⁵ The concerns in this area are much the same as those in the arena of public interest payphones, and the City urges that the Commission reach the same result.

II. DISCUSSION

A. Public Interest Payphones

The City of New York believes it is in the public interest to maintain payphones in locations normally deprived of adequate payphone service.⁶ In the absence of incentives, providers are unlikely to erect payphones in indispensable locations such as underserved residential neighborhoods and areas with significant emergency demands. Payphones in these areas would provide the public with basic communications, an avenue to obtain information, and access to emergency services.

The City is sensitive to the great burden placed on the Commission under the 1996 Act. Nothing in the Act, however,

⁵ See 1996 Act § 151(a) (to be codified at 47 U.S.C. § 276(b)(1)(A)); Notice, ¶ 19.

⁶ The City concurs in the definition of "public interest payphone" offered in the Joint Explanatory Statement for Section 276. See Telecommunications Act of 1996 Conference Report, S. Rep. No. 104-230, 104th Cong., 2d Sess. 159 (1996).

requires the Commission to shoulder the public interest payphone burden alone. Not only has the power to regulate payphones traditionally been left to the states,⁷ but this approach is also better reasoned. Deferring to individual states the power to regulate public interest payphones better serves the interests of the public, and is thus consistent with the Act. As noted above, the Act simply directs the Commission to determine whether public interest payphones should be maintained, and, if so, to ensure that they are supported fairly and equitably.⁸ The Commission undoubtedly has the power to delegate this responsibility to the several states.

As every state is unique, uniform federal regulations may be inappropriate for public interest payphones. States, and even cities, are geographically and demographically diverse. It is in the best interests of the public to leave to states the right to develop their own regulations. The City of New York believes that no national standard could be prescribed to encompass the best interests of our citizens, and, at the same time, address the needs of those in rural areas, or areas with less developed telecommunications infrastructures.

⁷ See Notice, ¶ 2.

⁸ See 1996 Act § 151(a) (to be codified at 47 U.S.C. § 276(b)(2)); see also 1996 Act § 151(a) (to be codified at 47 U.S.C. § 276(c)) (requiring preemption only where state requirements are inconsistent with federal regulations).

A "cookie cutter" approach would yield undesirable results. Because the public interest may vary from state to state, any attempt by the Commission to promulgate national regulations will at best benefit only some areas, and at worst, benefit none. Homogenization is not the answer.

New York State does, in fact, have public interest payphone regulations. Passed under authority granted in New York's Public Service Law § 94,⁹ New York's Compilation of Codes, Rules and Regulations ("NYCRR"), Title 16, § 603.2(b) reads as follows:

In each wire center, the utility¹⁰ shall provide at least one coin telephone, available to the public at all hours, prominently located and properly maintained and equipped. Additional public telephones shall be provided at locations where, in the judgment of the utility or the commission, the public convenience will be served.¹¹

Furthermore, the City intends to encourage the maintenance of public interest payphones by offering incentives to payphone providers — in the form of favorable consideration, terms, or rebates in granting payphone franchises and permits — for those providers which place

⁹ N.Y. Pub. Serv. Law § 94 (McKinney 1989).

¹⁰ 16 NYCRR § 604.1(m) (1995) defines "utility" as "a telephone corporation subject to the jurisdiction of the [Public Service] Commission." Although § 604.1(m) is not explicitly applicable to § 603.2(b), it is not likely that any departure from this definition was intended.

¹¹ 16 NYCRR § 603.2(b) (1995).

payphones in areas of public interest. In addition to Section 6-41(1) of the Rules of the City of New York, which allows DoITT's Commissioner to waive certain standards in order to provide a pay telephone for the public health and safety, City Council Authorizing Resolution 439-A authorizes DoITT "to grant non-exclusive franchises for the installation of public pay telephones and associated equipment on, over and under the inalienable property of the City."¹² The resolution requires DoITT, in evaluating responses to any Requests for Proposals ("RFP"), to consider criteria including:

(5) the willingness of an applicant to provide public pay telephone service to (a) residential areas of the City underserved in terms of household telephone penetration or public pay telephone service and (b) locations with significant emergency demands such as along arterial highways and at entrances to bridges and tunnels.¹³

Furthermore, the resolution requires, in pertinent part, that any payphone franchise include the following term and condition:

(2) the compensation paid to the City shall be adequate and shall include the payment of fees and the provision of services, which shall include the provision of public pay telephone service in (a) residential areas of the City underserved in terms of household telephone penetration or public pay telephone service and (b) locations with significant emergency demands such as along arterial highways and at entrances to bridges and

¹² N.Y. City Council Auth. Res. No. 439-A (passed Aug. 17, 1995).

¹³ *Id.*

tunnels. Such compensation shall not be considered in any manner to be in the nature of a tax, but such payments shall be made in addition to any and all taxes of whatsoever kind and description which are now or may at any time hereafter be required to be paid pursuant to any local law of the City, law of the State of New York, or law of the federal government.¹⁴

As such, DoITT's forthcoming RFP includes provisions to encourage the placement of public interest payphones.

The 1996 Act provides that, upon determining that public interest payphones should be maintained, the Commission is to ensure that such payphones be supported fairly and equitably. The City's existing provisions in this area are particularly satisfactory: the decision to install public interest payphones is encouraged by the City but remains within the discretion of the payphone provider. In this manner, each provider has an incentive to reap benefits by performing a public service, but no regulation mandates obligations that may be detrimental to smaller payphone providers.

The Commission, of course, would retain the power to scrutinize the adequacy of a state's public interest payphone regulations. A system of review, to ensure the fair and equitable operation of state public interest payphone mechanisms, would allow the Commission to guarantee that Congress's intent is properly carried out. If necessary, parties aggrieved by local payphone regulations

¹⁴ *Id.*

could file a complaint with the Commission.

In the event the Commission determines that national guidelines are appropriate, local governments should be delegated the authority to administer the Commission's guidelines. Even if national guidelines are deemed appropriate, enforcement should still be left to the states. For the reasons set forth above, states are better able to ensure the fairness and adequacy of public interest payphone installation and maintenance. The City would, however, like to stress the inefficiency inherent in this approach — it renders ineffectual many advantages of leaving power within the states. Where supervision is left entirely up to the states, the Commission's burden will be further reduced, and the regulations will be more responsive to local needs and interests.

B. Fair Compensation

The City of New York is equally concerned with the fair compensation of payphone service providers. This area is subject to much the same analysis as that of public interest payphones. As recognized in the *Notice*, "states have long had a traditional and primary role in regulating payphones. . . . [S]tates have a significant interest in setting local call rates paid by end users."¹⁵ States have

¹⁵ *Notice*, ¶ 22.

responded responsibly to this role, and have, even recently, examined the compensation provided for these calls.¹⁶

As with public interest payphones, the City seeks to reduce the Commission's burden in implementing this portion of the 1996 Act. The better reasoned approach is to allow local governments the authority to ensure that compensation is fair. The Commission can adequately fulfill its task and, at the same time, reduce its burden, by overseeing the process. A review procedure may be implemented to prevent state regulation from faltering. As with public interest payphones, states can more efficiently and better ensure fairness and equity. Because the cost of providing payphone service, local needs, and local interests vary from state to state, national regulations would likely result in greater harm than benefit.

¹⁶ Notice, ¶ 19 n.59.

III. CONCLUSION

For the foregoing reasons, the City recommends that, in the interest of public health, safety, and welfare, the determination of which payphones should be treated as "public interest payphones" is a decision best left to the sound discretion of local governments. The City also recommends that the issue of "fair compensation" for payphone service providers is identically left within the purview of the states. A federal review procedure will adequately ensure that the Congress's intent is fully realized.

Respectfully submitted,

NEW YORK CITY DEPARTMENT OF
INFORMATION TECHNOLOGY AND
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Dated: June 25, 1996