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February 6, 1997

**FEDERAL EXPRESS**

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

FEB 7 1997

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

Dear Secretary Caton:

Enclosed please find an original and nine copies of the Comments of the Independent Payphone Association of New York, Inc. (IPANY) on the Pay Telephone CEI Plan filed by NYNEX on January 3, 1997. These Comments are submitted in conformance with the Public Notice issued on January 8, 1997 (DA 97-31).

One copy of these comments is being forwarded to Janice Myles of the Common Carrier Bureau, and to the International Transcription Service, Inc. by overnight mail.

All questions should be addressed to the undersigned.

Sincerely,

Keith J. Roland

KJR:tlm
Enclosures
cc: Campbell L. Ayling, NYNEX Telephone Companies (Federal Express)

Janice Myles (Federal Express)

IPANY Board of Directors

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Before the
Federal Communications Commission
Washington, D.C.

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| In the Matter of | ) | |
| | ) | |
| NYNEX Telephone Companies | ) | CC Docket No. 96-128 |
| | ) | |
| Offer of Comparably Efficient Interconnection to Payphone Services Providers | ) | CC Docket No. 91-35 |

**COMMENTS OF THE**
**INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.**
**ON THE NYNEX COMPARABLY EFFICIENT**
**INTERCONNECTION PLAN FOR PAYPHONE SERVICES**

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February 6, 1997

## SUMMARY

The NYNEX CEI Plan - as it applies to New York Telephone Company - does not demonstrate that New York Telephone will provide just, reasonable and non-discriminatory service to all providers of pay telephone service. Instead, the CEI Plan is either silent in critical areas, or demonstrates, through the accompanying tariff filed in New York State, that New York Telephone will give special and preferred treatment to its own payphone operations.

The tariff filed in New York, to be effective on April 1, 1997, provides significant pricing benefits for the Basic Coin Access Line (BCAL) to be used by PUBCOMM, New York Tel's own payphone operation, compared to the rates to be paid for the Public Access Lines (PALs) used by Independent Payphone Provider (IPP) competitors.

The CEI Plan is replete with promises that all payphone providers will be treated on an equal basis. However, the actual experience with New York Telephone today suggests a far different result. Among the current anti-competitive practices employed by New York Tel is to give to building landlords a veto power over whether facilities can be used to serve IPPs. It is doubtful such veto power exists when New York Tel wishes to use its own facilities to serve its pay telephone operations.

New York Tel, and its wholly owned subsidiary, Empire City Subway Company, are also refusing to install underground conduit necessary to serve IPPs, and are erecting significant

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economic and technical barriers which may preclude independent contractors from providing such conduit. As such, New York Tel continues to use its monopoly power to keep its competitors from doing business.

New York Telephone is today demanding, without any tariff authority, unjust and unreasonable upfront "special construction" charges for providing the Public Access Lines to the curbside IPPs. Unless challenged and set aside by this Commission, that practice will preclude any competition from developing in the pay telephone market.

Finally, in light of New York Telephone's requiring IPPs to install and pay for their own conduit, while conduit is provided to PUBCOMM at no charge, New York Telephone's asset valuation must be reviewed.

Before the
Federal Communications Commission
Washington, D.C.

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**COMMENTS OF THE**
**INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.**
**ON THE NYNEX COMPARABLY EFFICIENT**
**INTERCONNECTION PLAN FOR PAYPHONE SERVICES**

Pursuant to the Commission's January 8, 1997, Public Notice (DA 97-31), the Independent Payphone Association of New York, Inc. (IPANY) respectfully submits the following Comments on the NYNEX CEI Plan, dated January 3, 1997.

## I. PRELIMINARY STATEMENT

IPANY is a trade association representing owners and operators of independent pay telephones (IPPs) in the State of New York. IPANY members operate primarily in New York Telephone Company service areas, although certain members provide independent payphone service in the territories of other Local Exchange Carriers.

In the Comments which follow, IPANY shows that NYNEX has not provided sufficient information in its CEI Plan, or in the tariff filed with the New York State Public Service Commission, to demonstrate that it is in full compliance with the

requirements of this Commission's Orders and the Telecommunications Act of 1996.[1]

New York Telephone will not provide payphone service through an affiliate, but instead through an internal division known as "PUBCOMM". Based on filings with this Commission and the New York PSC, and ongoing experience with New York Tel, IPANY members are deeply concerned that New York Telephone will not be providing pay telephone service to PUBCOMM and its IPP competitors on an equitable and non-discriminatory basis.

In recent days, informal discussions have been held between IPANY members and New York Telephone representatives. On February 4th, New York Telephone regulatory personnel and a representative of IPANY met with Staff members of the New York State Public Service Commission in an effort to address issues raised by these filings. In that session, New York Tel representatives provided helpful information, and agreed to research and report back on a number of the issues and concerns expressed by both IPANY and the PSC Staff. However, full responses were not available by the deadline for filing these Comments, and accordingly these Comments must by necessity set forth areas where IPANY lacks assurance that New York Telephone's

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[1] IPANY is not familiar with the operations of NYNEX through its New England Telephone subsidiary, or with the tariffs which were filed in the New England States. These Comments, therefore, address solely the operations of New York Telephone, the tariff filed in New York, and whether NYT's provision of pay telephone services through its "PUBCOMM" organization will comply with regulatory requirements.

CEI Plan will result in fair and non-discriminatory treatment.

IPANY hopes that further discussions with New York Tel and the PSC Staff will eliminate the concerns expressed herein, but until such time IPANY believes the burden of proof remains on New York Telephone to demonstrate the appropriateness of its CEI Plan and the implementing tariff. As of yet, that burden has not been met.

In the pages which follow, IPANY will address the more serious deficiencies of the NYNEX Plan.

## II. ARGUMENT

### POINT A: Installation and Maintenance Service Is Discriminatory And Anti-Competitive

As with other aspects of its CEI Plan, New York Telephone offers only vague generalities and promises that it will treat PUBCOMM and competing IPPs in "an impartial, efficient, non-discriminatory manner". To accomplish that, New York Tel alleges that it will establish procedures and processes to insure that non-affiliated IPPs will be treated the same with regard to the quality and time period associated with installation, maintenance and repair of basic services.

Based on current experience, which is likely to be a more accurate predictor of future conduct than promises in a regulatory plan, IPANY has little faith that New York Telephone will live up to those representations.

Two specific examples involving recent New York Tel failure to provide installation service to IPPs, in stark contrast to the installation service it provides to its own payphone operations, will demonstrate this point.

The first involves New York Telephone's newly found (and deeply suspect) concern over the wishes of building owners as to which New York Tel customers may be served from facilities located in such buildings. It demonstrates New York Telephone's willingness to use any excuse to deny PAL[2] lines and other monopoly bottleneck services to its competitors.

In the case at issue, a private payphone operator had located three payphones on the New York City sidewalk adjacent to a commercial building.[3] The payphones were fully authorized under the New York City Franchise Law. For several years, New York Telephone - in accordance with longstanding practice - provided connections to those pay telephones through a terminal box located in the adjoining commercial building on Ninth Avenue.

However, last Fall, the owner of the commercial building arbitrarily decided it did not want New York Telephone to provide service to the payphone owner, and refused to allow New York Tel to use the terminal box to provide service to the

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[2] A PAL line is a Public Access Line used by IPPs to connect "smart" payphones to the New York Tel network.

[3] See, New York PSC Case _____, Complaint of Teleplex Coin Communications, Inc. against New York Telephone Company (COCOT Locations 241-245 Ninth Avenue, New York City) December 18, 1996.

IPP. But rather than enforce its right to access its own network facilities, and honor its obligations to provide service to its competitor, New York Tel declared that the owner of a commercial building has the right to tell New York Telephone which customers New York Telephone could or could not serve through use of New York Tel's own facilities.

It is hardly likely that New York Telephone would allow an outside third party to dictate which New York Tel customers can be served from a New York Tel terminal box, or that it would allow building owners to prevent NYT from extending access lines to PUBCOMM phones. Nor is it likely NYT will go back to every landlord in the City of New York and ask for consent to serve its existing pay telephones (which will be transferred to PUBCOMM), or future installations made on behalf of PUBCOMM. NYT's willingness to cowtow to what it claims are the landlord's wishes in this case simply demonstrates NYT's readiness to manufacture any excuse to avoid providing service to competitors on a non-discriminatory basis.

A second area where New York Telephone has demonstrated its unwillingness to install services for its competitors relates to the provision (or, more properly, the failure to provide) connections between New York Telephone manholes and curbside IPPs in the City of New York.

Until recently, IPPs located on rights-of-way in New York City were installed on free standing pedestals adjacent to buildings away from the actual curb. In those situations, the

IPP pedestal was fed by New York Tel facilities from the adjacent building. However, with new franchise legislation having been approved by the City of New York in 1996, IPPs may now receive permits and be placed at curbside.

New York Tel has arbitrarily determined it will feed those curbside phones only from manholes located in the street. This has forced IPPs to arrange for trenching and the installation of conduit from the manhole to the IPP pedestal, at a cost to the IPP of many thousands of dollars per telephone.

IPANY does not believe IPPs should have to pay for this trenching and conduit, because New York Tel never charged its own payphones for that work. And regardless of what happens with new PUBCOMM phones, requiring IPPs to pay for conduit - when the embedded base of NYT/PUBCOMM phones obtained it for free - will pose severe competitive handicaps on IPPs.

However, separate and apart from conduit construction costs, New York Telephone is demanding payment of thousands of dollars in "special construction charges" to install a PAL line in an IPP pedestal. Allegedly, those charges are for "special construction", including determining the availability of access lines to serve the IPP, making a connection in the manhole, and extending the telephone cable from the manhole (through the conduit paid for by the COCOT) to the pedestal. Price quotes for these services - for which up-front payment is required - range from $1,700 to $6,000 per telephone. It is highly doubtful NYT will charge PUBCOMM those same rates, or demand up-front payment.

Absolutely no basis for the outrageous charges being imposed by New York Telephone exist. First, they cannot possibly be cost based. Secondly, what New York Telephone should be charging the IPP is only its standard non-recurring installation charge of approximately $150.

The outrageous charge demanded by New York Tel to install a PAL line is not the only concrete barrier New York Tel has erected to prevent its competitors from installing curbside phones.

Recent experience in attempting to have New York Telephone install service - at any price - is instructive.

The following experience of an IPANY member is typical. This IPP obtained 29 permits from the City of New York to install curbside telephones in September of 1996. For more than ninety days, all its efforts to obtain price quotes and installation service from New York Telephone were to no avail. It was, in fact, subjected to an experience which combined the worst (or, from NYT's perspective, the best) of Kafka and the Three Stooges. The right hand at New York Tel did not know what the left hand was doing. The Engineering Department had no idea of how to provision PAL lines for IPPs from manholes.

In the borough of Manhattan, all of the manholes and conduits are owned by Empire City Subway Company (ECS), a wholly owned subsidiary of New York Telephone. For the most part, all of the conduit work needed by New York Tel for its payphones is performed by Empire City Subway, including the installation of

conduit between a manhole and a New York Telephone curbside payphone. However, when this IPANY member asked if Empire City Subway would install conduit for the IPP, just as it was installing conduit for New York Telephone, the answer came back as a flat no. Accordingly, the IPP was forced to find an independent vendor authorized to work in utility manholes, and to pay that vendor to install conduit.[4]

The installation of conduit between the manhole and a curbside pedestal is - by NYT's fiat - an absolute prerequisite for operation of IPP curbside payphones in New York City. Yet nothing in NYNEX's CEI Plan addresses how a competing IPP will be able to obtain such conduit, and whether New York Tel's wholly owned subsidiary would be willing to perform the same work for an IPP as it performs for New York Telephone.[5]

However, despite the fact use of authorized outside contractors has been standard practice in New York City, when New York Telephone learned that the IPP had been able to obtain conduit through this independent contractor, NYT announced new

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[4] As discussed further below, when NYT/ECS learned an independent contractor had installed conduit for this IPP, they immediately adopted new rules which may well preclude use of such contractors for this purpose.

[5] Notwithstanding the initial flat refusal of Empire City Subway to perform any of this work for the IPP, the IPP recently received a telephone call from another employee of Empire City Subway indicating that company might be willing to do work for the IPP. However, as of the date of these Comments, there has been no resolution of this conflicting information, and IPPs to this day have not been informed that Empire City Subway will install conduit for IPPs.

rules which erect extremely burdensome requirements, and place significant obstacles, in the way of any independent contractor installing conduit for an IPP. Thus, through the combination of Empire City Subway refusing to install conduit for an IPP, and the creation of economic and technical barriers to any other entity installing conduit for an IPP, New York Telephone has once again demonstrated that its corporate policy is to use its monopoly power to prevent competition from developing. That is not the type of conduct which this Commission should tolerate.

## POINT B: The New York State Tariff Filed by New York Telephone Is Unacceptable

### 1. PAL And BCAL Tariff Rates

Since 1985, New York Tel payphones have competed with IPPs. Originally, NYT would connect IPPs to the switched telephone network only through Public Access Lines used for "smart" payphones. New York Tel refused to offer a central office based "coin line" for use with "dumb" sets, such as its own; it subsequently provided that service - known as "CCPAL" - but only after being ordered to do so by the New York State Public Service Commission.[6]

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[6] New York PSC Case 27946, Opinion 90-12, "Opinion, Order, and Resolution Adopting Revised Regulations", March 19, 1990, at p. 14-17. In that Order, the Commission found "that LEC payphones should not have the advantage of services and technical features denied to COCOTs. As a general principle of equity and fair competition this is unexceptionable, and will be enforced, with LECs expected to comply by filing the appropriate tariff

The two services available to competing IPPs, PAL lines and CCPAL lines, were priced by New York Tel at $19.80[7] and $31.50, respectively.[8] The CCPAL differential, allegedly associated with the central office coin functions, was thus approximately $11.70.

Now that NYT/PUBCOMM phones will have to purchase access lines from the tariff, NYT has created a new service, known as Basic Coin Access Line (BCAL), which it will be using for PUBCOMM phones. The BCAL is for all intents and purposes functionally equivalent to the old CCPAL, which is to be grandfathered under the new tariff.

Amazingly, however, now that PUBCOMM will be purchasing the "dumb" phone line, the price suddenly drops from $31.50 to $23.72, or by $7.78. Meanwhile, there has been no similar decrease in the rate paid for the PAL, which is the service purchased by NYT's competitors.

New York Tel will argue that its rates are not discriminatory, because its BCAL will be available at $23.72 to both PUBCOMM and IPPs. That, however, is not a reasonable measure of whether a rate is unjust, unreasonable or

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additions". Opinion 90-12, at p. 17.

[7] The $19.80 rate is for the Enhanced Limited Inter-LATA Dialing Access Line, used by the great majority of IPPs, which provides the screening and blocking services necessary to deter fraud.

[8] See New York Telephone PSC No. 900 - Telephone Tariff, Section 3, 9th Rev page 11.2.

discriminatory. What is also critical is the relationship between the rate for the PAL line, purchased by NYT's competitors, and the rate for the BCAL, to be used by PUBCOMM. No justification for the reduced price differential - which undoubtedly was designed to enhance PUBCOMM's competitive standing vis-a-vis IPPs - has been put forth.

### 2. Failure to Specify Services and Features

New York Tel's new pay telephone tariffs are also deficient because they do not specify the exact services which are provided to an entity ordering BCAL service.

In today's environment, when a member of the public utilizes a New York Telephone payphone, and reaches a NYT operator, the operator provides a number of services for New York Tel. For example, if the caller reports that the phone is not working properly, the operator will report that to New York Telephone repair service. If the caller indicates he or she is owed a refund, the operator will process payment of that refund. If the customer wishes to use a New York Telephone credit card for a local or intra-LATA toll call, the operator will process the charges.

The owner of premises where a New York payphone is located can also arrange for a special message to be played to the caller. For example, a caller using a New York Telephone payphone at a local supermarket in Albany hears the message

"Thank you for shopping at Price Chopper".[9]

Nowhere in New York Telephone's BCAL tariff is there a listing of any of these special features or services. Nor is there any indication a New York Tel operator will treat an IPP subscribing to a BCAL in the same manner as PUBCOMM, including reporting trouble conditions, arranging for refunds, and processing credit card or collect calls. Nor is there any evidence the IPP subscriber can arrange for its own message to be heard by the caller.

### 3. Rating of Calls

In the past, few IPPs subscribed to New York Tel CCPAL service, because New York Tel refused to use any rating tables other than its own. Unfortunately, that same deficiency is being carried over to the BCAL, and NYT has indicated it will not allow non-PUBCOMM subscribers to specify their own rating tables until the end of 1998. As a result, NYT cannot be found in compliance with CEI requirements.

Because NYT will determine the pricing on all calls using BCALs - for itself and its competitors - an IPP can subscribe to a BCAL only if it is willing to use the exact same rating tables for local and intra-LATA toll calls which PUBCOMM has chosen to use. This totally undercuts the IPPs' business

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[9] This message is separate and apart from the "branding" provided by an IXC on an operator assisted call.

flexibility, and precludes it from distinguishing its service and pricing from that of New York Tel. Since competitors are able to succeed in markets primarily because they can offer new services and new rating plans, New York Tel's imposition of uniformity will greatly diminish the ability of competition to develop in the provision of pay telephone services.[10]

### 4. Commissions

There is nothing in the CEI Plan, or in the New York tariff, relating to any commissions which New York Telephone might pay to PUBCOMM.

PUBCOMM will be able to designate the PIC for both inter-LATA and intra-LATA traffic. Presumably, intra-LATA traffic will be forwarded to New York Tel for completion. In the competitive marketplace, this would generally entail New York Tel paying a commission to PUBCOMM for that traffic.[11]

There is no objection to New York Tel paying PUBCOMM a commission, provided that NYT makes available the same commissions to other payphone providers who deliver toll traffic

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[10] New York Tel's argument, of course, is that its service is non-discriminatory because the same rating will be applied to all BCAL subscribers. What it ignores, however, is the unlawful discrimination which exists in saying that a network service will be designed to meet the pricing requirements of its own operations, while the needs of similarly situated competitors will be ignored.

[11] In the event New York Tel is authorized to enter the inter-LATA toll business, it would also likely pay a commission on inter-LATA calls.

to New York Tel for completion. Unfortunately, this is not likely to happen. For the past several years, New York Tel has refused to pay commissions to IPPs in the same situation, and has given no indication this policy will change.

While certain aspects of commissions, such as actual rates, may not be subject to tariffing, NYT is still required to treat all customers on a non-discriminatory basis. See Matter of Solomon v. Public Service Commission, 286 App. Div. 636 (Third Department, 1955). When a non-tariffed service is offered, it must nonetheless be made available "to all petitioner's customers upon the same terms and conditions." Matter of New York Telephone v. PSC, 56 A.D.2d 415 at 417. Accordingly, under state law - and presumably under the parallel federal law standards - any commissions must be uniformly available.

The failure of NYT's CEI Plan to commit to this proposition requires its rejection.

In this vein, no rationale exists as to why a commission should be paid on toll calls completed by New York Telephone when they originate from PUBCOMM on a BCAL, but not paid on toll calls which originate from an IPP on a BCAL. Similarly, no reason exists why a similar commission should not be paid for a toll call which originates over a PAL, instead of over a BCAL. New York Tel will earn the same revenue on the toll call regardless of the manner in which the pay telephone is connected to the New York Tel operator. Payment of commissions on calls, placed over BCALs (which will be primarily PUBCOMM

calls), while not paying commissions on calls originated over PALs (which will be IPP calls) is simply an unfair mechanism to enrich New York Tel's deregulated operation while denying revenues to IPPs which would make them more effective competitors in the marketplace.

**POINT C: There Is No Assurance Of Proper Practice In PUBCOMM's Purchase Of Network Facilities And Services**

In its provision of service to the public, PUBCOMM will purchase underlying lines and local usage from New York Telephone. According to NYNEX's CEI Plan, it "will only use tariffed network services that are available to other PSPs and will purchase such services at the same tariffed rates, terms and conditions available to other PSPs". (NYNEX CEI Plan, p. 2).

There are two serious problems with relying on that language to assure non-discriminatory treatment.

First, PUBCOMM will undoubtedly seek to purchase access lines and local usage under one of New York Tel's tariffed term and volume discount plans, such as the Local Usage Discount Plan. Under such plans, the greater the volume purchased, the larger the discount. That will enable an entity like PUBCOMM, which will have aggregated access line and usage requirements many, many times greater than any of its independent competitors, to obtain far greater discounts than would be available to those competitors. Indeed, such discounts will be tailor made to suit

PUBCOMM's particular needs. Simply saying that the same discount will be available to any other entity which utilizes 150,000 BCALs, or purchases 50 million message units (when only PUBCOMM can meet those criteria) is not fair, equitable and non-discriminatory. What is needed, therefore, is to limit the tariff discounts which may be given to PUBCOMM to those available to IPP competitors.

The second problem is that the tariffed rates for both usage and BCALs may be irrelevant. Under rules in effect in New York State, New York Tel may enter into Individual Contract Basis (ICB) arrangements with any customer, pursuant to which it can negotiate individual rates and charges for bulk purchase of access lines and usage. The published tariff is simply irrelevant. Under these circumstances, it would be highly surprising if New York Tel and PUBCOMM did not enter into such an ICB contract, with PUBCOMM paying rates far below those applicable to its competitors.[12]

Accordingly, any CEI Plan approved for New York Telephone should address the rates paid by PUBCOMM to New York Tel, for all facilities and services, and should preclude New York Tel from offering PUBCOMM any special rates not effectively

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[12] Under New York Rules, general summaries - but not specifics - of ICB's must be filed with the PSC so that, in theory, similarly situated customers can have access to the same rates. However, an ICB which gave a special rate to any customer subscribing to more than 150,000 BCALs, and purchasing more than 50 million message units, would, as a practical matter, be available only to PUBCOMM.

available (because of volume or term conditions) to PUBCOMM's IPP competitors.

**POINT D: The Nature Of The Assets To Be Valued At Transfer Must Recognize Conduit Costs**

Under the Commission's Payphone Orders, pay telephone assets transferred to either non-regulated status, or to an affiliate, must be valued. The standard when assets are transferred to non-regulated status is net book value. Report and Order, Docket 96-128 and 91-35, September 20, 1996, at para. 161 et seq. However, certain assets are excluded from that transfer, including "the loops connecting the payphone to the network, the central office 'coin service', or operator service facilities supporting incumbent LEC payphones...". Report and Order, para. 159.

A major question not addressed by NYNEX is its proposed treatment for the cost of connections between the manhole and its public pay telephone pedestal. Since the actual cabling should be considered as part of the loop connecting the payphone to the network, New York Telephone would undoubtedly exclude that from the value of the transferred assets. However, what is not clear is what New York Tel will be doing with respect to the cost of the conduit between the manhole and the curbside installation.

As discussed above, New York Tel is requiring IPPs to install and pay for that conduit, which can run into many thousands of dollars per installation. Yet, when it comes to its

own installations, NYT is likely to consider that conduit to be a network facility owned by New York Telephone, thus permitting it to exclude its value from the transferred assets.

New York Tel cannot have it both ways. If it is going to require IPPs to install conduit at their own expense, that same rule must apply to PUBCOMM, and all of the existing and future conduit utilized in connection with PUBCOMM phones must be considered PUBCOMM assets.[13]

## V. CONCLUSION

NYNEX's CEI Plan, as it specifically applies to New York Telephone Company, does not provide sufficient information to demonstrate full compliance with the Telecommunications Act and this Commission's Payphone Orders. The Plan should therefore be rejected, and NYNEX should be required to refile its Plan and address the issues raised herein, as well as those which may be identified by other commentors.

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[13] IPANY does not believe that such conduit should be installed and paid for by either PUBCOMM or an IPP. Instead, we believe the conduit should be installed by, and at the expense of, New York Telephone because it is an integral part of the network access facility, in the same manner as telephone pole and other overhead support systems. However, whatever treatment is given to these facilities must be applied equally and a non-discriminatory basis.

Any refiled Plan should be served on all commenting parties and be subject to an additional comment period.

Respectfully submitted,

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February 6, 1997