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A5691-543

EX PARTE OR LATE FILED

April 10, 1998

EX PARTE PRESENTATION

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

RECEIVED
APR 10 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **CC Docket No. 97-231**

Dear Ms. Salas:

On Thursday, April 9, 1998, Robert Aldrich of Dickstein Shapiro Morin & Oshinsky LLP, on behalf of American Public Communications Council ("APCC"), Keith Roland of Roland, Fogel, Koblenz & Carr, LLP, on behalf of the Independent Payphone Association of New York ("IPANY"), Raymond Mastroianni of Telebeam Telephone Systems, Inc., and John Sweeney of Coastal Communications Service, Inc. (both members of IPANY) met with the following FCC staff: Lisa Sockett, Katherine Schroder, Michael Pryor, Florence Setzer, Bill Dever, and Daniel Shiman, of the Policy Division, Common Carrier Bureau, and Patrick DeGrabe of the Office of Plans and Policy.

The meeting did not address the specific Section 271 application that is the subject of this proceeding. In the meeting, APCC and IPANY urged the Commission, as part of its "public interest" inquiry under Section 271, to consider a Bell Company applicant's history of fair dealing with customers, such as payphone providers, who currently compete with the Bell company in other local-exchange-bottleneck segments of the telecommunications business. The fairness or unfairness of a Bell company's anticompetitive practices vis-vis payphone providers with whom it currently competes is indicative of a Bell company's likely behavior toward its long-distance competitors if and when it is allowed to enter the interLATA long distance business.

At the meeting, IPANY discussed examples of the type of unfair practices that should be taken into account in the Commission's public interest review of Section 271 applications. The examples, which relate to Bell Atlantic – New York, are described in the enclosed materials which were distributed at the meeting.

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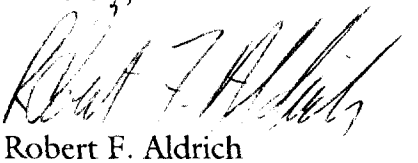
Please contact the undersigned if you have any questions.

Sincerely,



Robert F. Aldrich

RFA/nw
cc: Lisa Socket
Katherine Schroder
Michael Pryor
Florence Setzer
Bill Dever
Daniel Shiman
Patrick DeGrabe

Enclosure

FILE COPY

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EDMUND A. KOBLENZ
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November 22, 1996

Hon. John C. Crary
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: New York Telephone Company - Refusal to Provide Telephone Service

Dear Secretary Crary:

Teleplex Coin Communications, Inc., through the undersigned, its attorney, hereby complains over the unlawful refusal of New York Telephone Company to provide regulated telephone service. Request is made that the Commission issue an Order directing New York Telephone to install service, and that the Commission initiate a penalty action pursuant to Section 25 of the Public Service Law as a result of New York Telephone's willful violation of its statutory duty.

In 1992 and 1993, Teleplex installed three public telephones on two pedestals on the public sidewalk adjacent to 241-245 Ninth Avenue in New York City. Teleplex ordered PAL lines from New York Telephone for the two locations, and is the billed party for these lines. In accordance with Commission rules and tariffs, New York Telephone terminates its network wiring in network interface devices located in the pay telephone pedestals.

As indicated, the two pedestals are located on the New York City public sidewalk, and are thus accessible from the public right-of-way. All of the telephones are fully registered with the City of New York, and are lawfully installed in accordance with New York City's franchising rules.

Since August 15, 1996, the PAL lines have not functioned, and New York Telephone refuses to repair them.

It is Teleplex's understanding that New York Telephone feeds these PAL lines from a New York Telephone junction box located in the basement of 241-245 Ninth Avenue. However, because the owner of that building does not wish Teleplex to operate the pay telephones, it apparently is denying New York Telephone access to the terminal box.[1]

When Teleplex reported its lines were not working, NYT stated it was unable to repair the out-of-service condition because it could not gain access to the junction box. It also stated it would not provide service to Teleplex using an alternate routing.

New York Telephone's refusal to provide service is a violation of its duties under the Public Service Law and its tariffs.

Under its tariffs, New York Telephone has a duty to bring its PAL line into the network interface device located in the pay telephone pedestal. The manner in which New York Telephone provisions the facility, and the routing used by its cables, is a matter entirely up to New York Telephone.

Teleplex understands that in certain circumstances, New York Telephone's tariff states that a premise owner must obtain necessary easements and consents. That clause, however, is applicable only where the customer is located on private property which is inaccessible to NYT. The language does <u>not</u> apply when the customer can be accessed directly from a public right of way, which is the case with Teleplex's pay telephones.

---

[1] Because the pay telephones are located on the New York City right-of-way, and not any private building, the adjacent building owner has no authority over operation of the pay telephones.

It is not Teleplex's responsibility to obtain an easement from the adjacent building owner to allow New York Tel personnel to access its terminal in the property owner's basement. If New York Tel chooses to locate its terminal in that basement, it has the obligation of assuring it has access to serve all customers connected through that box; it cannot allow the property owner to dictate which customers can or cannot be served by New York Tel.

If New York Tel is, for any reason, unable to utilize that junction box to serve Teleplex, it must find another method or routing to bring service to Teleplex's locations.

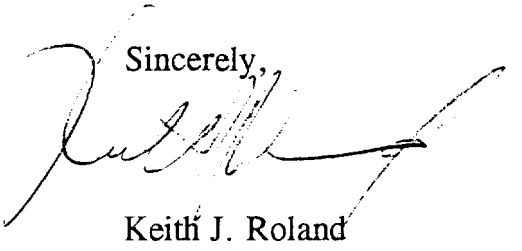
Teleplex has previously brought this matter to the attention of New York Telephone, and on October 3, 1996, served a written demand on the company's COCOT area operations manager for service to be repaired (copy enclosed). New York Telephone responded to that correspondence on October 31 by stating it was Teleplex's obligation to obtain the landlord's consent, and that it would not find an alternate routing for Teleplex's lines.

New York Telephone's refusal to provide service is particularly egregious because it is using its monopoly stranglehold to prevent its competitors from providing public pay telephone service. When New York Telephone installs its own pay telephones on a New York City public right of way, it finds a way to bring network wire to those phones. It must do the same for Teleplex. New York Telephone's refusal to provide comparable installations to Teleplex violates not only the anti-discrimination provisions of Sections 91 and 92 of the Public Service Law, but also violates Section 276(a)(2) of the Telecommunications Act of 1976 which prohibits a Bell Operating Company from preferring or discriminating in favor of its own payphone service.

In view of the foregoing, the Commission should find New York Telephone in violation of its statutory duty to provide telephone service, and should issue an order

directing the company to promptly provide service to Teleplex.[2] Furthermore, to demonstrate that the Commission will not tolerate the unlawful refusal to provide service to a competitor, a penalty action should be commenced seeking damages of $100,000 per day for each day that New York Telephone has refused to provide service.

Sincerely,



Keith J. Roland

KJR/mac
Enclosure
cc: Dennis Novick
Sandra D. Thorne, Esq.
Dan Martin

---

[2] One method of accomplishing this would be to direct NYT to cease providing telephone service to any tenant at the building because of the owner's refusal to grant full access to all NYT facilities in that building. That would be likely to obtain speedy cooperation from the building owner.

TCC

TELEPLEX COIN COMM

1123 Broadway, New York, NY 10010
Tel: (212) 463-7500 Fax: (212) 675-7469

October 3, 1996

Mrs. Linda Klein
Area Operations Manager
COCOT Unit
NYNEX
140 West Street, 26th Fl.
New York, N.Y. 10007

Via fax: (212)346-0987

Re: TCC'S OUTDOOR PAYPHONES AT 241-245 9TH AVE, NYC
(212)807-8153
(212)243-9488
(212)243-9297

Dear Mrs. Klein,

Teleplex has been the vendor and billing party for the above three (3) PAL lines for several years. These lines terminate in the base of TCC's free standing outdoor payphones on NYNEX NW2 network interfaces. These legal public pay telephones (PPTs) are not attached or affixed to the building facade at the above referenced street address. TCC's pedestal installation is secured to the City sidewalk.

As I had discussed with you two weeks ago, NYNEX is not fulfilling its obligation of providing service to these three PAL lines. NYNEX's obligation under New York State PSC authority is to provide dial tone to a subscriber network interface, by whatever method the company deems to be an appropriate method of service delivery. Teleplex has reported this out of service condition to NYNEX Repair Service "611" without any apparent satisfaction. I have been informed that the adjacent property owner has refused to grant your personnel access to your serving terminal. This does not alter NYNEX's duty and obligation to provide service.

Kindly acknowledge in writing this letter and the appropriate actions the company shall undertake to fulfill its obligation to us, your subscriber.

Very truly yours,
TELEPLEX COIN COMM., INC.

Dennis Novick
President

DN/at

cc: Keith Roland, Esq.

New York Telephone
A NYNEX Company

Robert P. Slevin
Counsel
Robert P. Slevin
Counsel

1095 Avenue of the Americas
New York, New York 10036
Phone (212) 395-6103
Fax (212) 768-7568

December 13, 1996

Honorable John C. Crary
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Teleplex Coin Communications, Inc. -- Complaint Regarding PAL Service to Three COCOT located at 241-245 Ninth Avenue, New York, NY

Dear Secretary Crary:

Teleplex Coin Communications, Inc. ("Teleplex") filed a letter with the Commission on November 22, 1996. As set forth in this letter, Teleplex alleges that New York Telephone Company ("NYT") -- in contravention of its obligations under existing rules and regulations promulgated by the Commission -- has failed to provide public access line ("PAL") services to three of Teleplex's customer owned coin operated telephones ("COCOTs") located in New York City. This letter shall serve as NYT's formal response to Teleplex's complaint.

BACKGROUND

In 1992 and 1993, Teleplex apparently installed three COCOTs on two pedestals on the public sidewalk adjacent to a building located at 241-245 Ninth Avenue, New York, NY (the "Premises"). NYT understands that the Premises are owned by ELK Investors (the "Owner"), an entity not affiliated with Teleplex. NYT's records reflect that

NYNEX Recycles

Teleplex is the customer of record for these three COCOTs. The COCOTs are not physically attached to the Premises but instead are mounted on pedestals located on the sidewalk within three (3) feet of the Premises. Counsel for Teleplex represents that his client has received all of the necessary permits from the City of New York to maintain and operate the COCOTs. NYT has no basis to dispute or contest that representation at this time. When the COCOTs were installed in 1992 and 1993, Teleplex apparently was able to negotiate access to the Premises in order to enable NYT to connect the COCOTs to a junction box located in the basement of the Premises. NYT was and remains unaware of what, if any, arrangements Teleplex made with the Owner regarding Teleplex's ability to obtain access to the junction box. NYT was simply provided access at the time of installation to connect the PAL lines from Teleplex's pedestal to the junction box at the Premises.

NYT was first notified of a service interruption to these COCOTs on October 8, 1996 and has since dispatched repair services on no less than three (3) occasions -- October 8th, October 31st and November 4th -- in attempts to reinstate service. On each instance, NYT was denied access to the Premises. On the initial repair visit on October 8, 1996, Mr. James Lynch, Area Operations Manager (Repair) for NYT, visited the site with his repair crew and was able, albeit temporarily, to gain access to the Premises. Apparently, however, neither the Owner or its representative, the building's superintendent, had been advised in advance of the visit that NYT would be entering the Premises to attempt to restore service to the COCOTs. Thus, as NYT was in the process of restoring service during the October 8th service call, the superintendent of the Premises confronted Mr. Lynch and asked him which of the phone lines he was repairing.

Upon learning that NYT was on the Premises to repair Teleplex's COCOT lines, the superintendent instructed NYT to leave the Premises immediately. The superintendent further informed Mr. Lynch that NYT would not be permitted access to the Premises in the future for the purpose of restoring or otherwise maintaining service on the COCOT lines. (In fact, Mr. Lynch had difficulty gaining permission from the superintendent to re-enter the Premises in order to retrieve NYT's tools and equipment). A padlock has since been placed on the junction box, and while NYT has been back to the Premises for service calls related to telephone lines of tenants at the Premises, the superintendent inquires on each visit as to the individual phone to be repaired. Access will not be given if scheduled repair involves one of the COCOTs.

DISCUSSION

NYT stands ready, willing and able to provide PAL service to Teleplex's COCOTs. However, notwithstanding Teleplex's unsubstantiated allegations to the contrary, NYT's tariff places the duty on Teleplex -- not NYT -- to make all necessary arrangements to enable NYT to gain access to the Premises on which the facilities are located so as to perform maintenance functions on the line. Specifically, Section 3 of NYT's PSC No. 900 Tariff provides that "usage rates and charges for local and toll message usage and all other regulations governing business individual access lines apply to PAL access lines." See PSC No. 900 Tariff, Section 3.E(5)(d.). (Emphasis supplied). In fact, the PSC No. 900 Tariff is quite clear that "PAL Access lines and PAL optional features are furnished subject to availability of facilities." See PSC No. 900 Tariff, Section 3.E(5)(i).

Section 1 of the PSC No. 900 Tariff sets forth the general rules and regulations relating to NYT's provisioning of telephone services in New York, and which apply equally to the provisioning of public access lines. Generally speaking, NYT's obligation to provide telephone services to a requesting subscriber is dependent on the subscriber providing NYT with the means to connect its network to the subscriber's premises. For instance, pursuant to Section 1.A(5) of the PSC No. 900 Tariff, it is the subscriber's responsibility to provide "suitable electric power at a suitable outlet when and where required." Section 1 of the PSC No. 900 Tariff provides further in Section C that:

> [NYT's] obligation to furnish service and/or facilities is dependent upon its ability (a) to service and retain, without unreasonable expense, suitable facilities and rights for the construction and maintenance of the necessary circuits and equipment, (b) to secure and retain, without expense to it, suitable space for its plant and facilities in the building where service is or is to be provided, (c) to secure reimbursement of all costs where the owner or operator of a building demands reallocations or rearrangement of plant and facilities used in providing service therein, or (d) to secure compliance with the provisions of Section 14.E.4 of this Tariff as to underground construction by the subscriber or any other party in interest, such as the applicant for service or the owner or operator of the premises where service is or is to be provided.

Teleplex's pedestal on the sidewalk constitutes, in essence, its "premises." Under the PSC No. 900 Tariff, it is Teleplex, and not NYT, which must provide the means whereby NYT can then furnish telephone services to Teleplex's pedestal.

For obvious reasons, Teleplex would like NYT to have access to the junction box located on the Owner's Premises, since this approach would be far less expensive than Teleplex's other alternative which is to obtain the necessary permits and

rights of way from the City of New York and to have (at its own expense) a trench dug under the sidewalk to a point where NYT can connect to its network. However, absent such an arrangement with the Owner, NYT has no right to go on to the Premises to connect these PAL access lines to the junction box. And since Teleplex has not provided NYT with the requisite means to connect its system to Teleplex's pedestal, NYT has no obligation -- let alone the ability through the junction box on the Premises -- to provide PAL service to the COCOTs.

The situation would be far different if Teleplex in fact had a contractual right, much like that of a legal tenant of the Premises, to be physically on the Premises. Under those circumstances, generally speaking, a landlord can not lawfully discriminate between one tenant over another, and the tenant whose services were interrupted could obtain an order from a court of competent jurisdiction to compel the landlord to permit NYT access to the junction box. Here, Teleplex apparently has no legal right to have access to the Premises for the purpose of enabling NYT to connect its system to the COCOTs,[1] and therefore has no recourse against the Owner.

Teleplex also incorrectly states that NYT has refused to provide Teleplex with an alternate route of service. NYT will indeed provide a PAL access line through an

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[1] The Commission should similarly reject Teleplex's suggestion that the Commission direct NYT to disconnect service to the Premises as a means of forcing the Owner to grant NYT access to the junction box for purposes of connecting the COCOTs to NYT's system. Leaving aside the serious constitutional ramifications of such a direction, it would be patently unfair to the innocent tenants in the building to have their services disrupted in the context of what for all intents and purposes is a dispute between the Owner and Teleplex. Moreover, to the extent the Commission would consider such a solution as a possible means to afford Teleplex access to the Premises as even within the realm of possibility, the Commission should afford the Owner an opportunity to be heard.

underground feed to the pedestal pursuant to the requirements of Section 14 of the PSC No. 900 Tariff. Again, however, the obligation is that of Teleplex and not NYT to make the necessary arrangements. Pursuant to Sections 14.E(4)(a) and (i) of the PSC No. 900 Tariff, it is Teleplex's responsibility to pay for the expense associated with the opening and closing of a trench through the sidewalk and to obtain the necessary permits and rights-of-way authorizing the placement and maintenance of the underground facilities. In the event such access is provided by Teleplex, NYT will provide service to Teleplex's COCOTs. However, until then, legally, NYT has no obligation to provide PAL service to Teleplex by means of an underground feed. See PSC No. 900 Tariff, Section 1.C.

CONCLUSION

Accordingly, NYT respectfully requests that Teleplex's complaint be dismissed.

Respectfully submitted,

Robert P. Slevin (M.S.)

Robert P. Slevin

cc: Keith J. Roland, Esq.
Mr. Dan Martin

FILE COPY

ROLAND, FOGEL, KOBLENZ & CARR, LLP

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EDMUND A. KOBLENZ
1908-1972
A. ABBA KOBLENZ
1922-1979

December 18, 1996

Hon. John C. Crary
Secretary
New York State Public Service
Commission
Three Empire State Plaza
Albany, New York 12223

Re: Complaint of Teleplex Coin Communications, Inc. Against New York Telephone Company
(COCOT Locations 241-245 9th Avenue, New York City)

Dear Secretary Crary:

Teleplex Coin Communications, Inc. (Teleplex) hereby responds to the submission of New York Telephone dated December 13, 1996.

Teleplex has lawfully installed three public pay telephones on pedestals, in the public right-of-way, adjacent to 241-245 9th Avenue. Until recently, service had been provided to those phones by New York Telephone since 1992 or 1993 through use of a junction box located in the adjacent property.

The three payphones at issue appear in two installations, one a single and the other a double. The pedestals are located on the public sidewalk only a few inches from the exterior of the building. Prior to the interruption of service to these phones,

New York Telephone ran wire from its junction box through the premises of two different commercial tenants in order to reach the pedestals. In one instance, wire ran through the commercial tenant premises, through an opening above the ground, and fed into the top of the pedestal. In the other case, wire ran through the basement controlled by the commercial tenant, and through a short run of conduit into the pedestal. The conduit had been installed by Teleplex through the sidewalk. Once the conduit was placed, New York Telephone simply fed its wire through the conduit into the pedestal.

The two commercial tenants have no objection to use of their premises to run wire to Teleplex. Indeed, each of those tenants has a contract authorizing Teleplex to install the payphones outside its store, and each tenant receives commissions from Teleplex.

It is only the owner of the building who objects to placement of the pay telephones, and its appears to be the owner of the building who is preventing the provision of service to those installations.[1]

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[1] There is some evidence that the landlord deliberately cut the lines serving the Teleplex phones. The likelihood of this is confirmed by New York Telephone's narrative indicating the hostility on the part of the landlord, and its refusal to allow New York Tel access to the junction box for the repair of the Teleplex lines, while not objecting to access for repair of other lines.

New York Tel defends its conduct by arguing (1) that Teleplex has the responsibility for obtaining all rights-of-way and facilities in order to allow New York Telephone to provide service to Teleplex, (2) NYT cannot serve Teleplex, from NYT's facilities, without landlord approval, and (3) NYT's conduct is in accordance with its tariff. Teleplex disagrees.

First and foremost is the notion that New York Telephone cannot permit a building landlord to determine which tenants can be served by a New York Telephone junction box.[2] To allow a landlord to specify which tenants New York Tel may serve in a building, and which tenants it may not serve, is unacceptable, and could well lead to arbitrary or extortionist conduct on the part of the landlord. It also opens the door to collusion when some excuse is necessary for New York Telephone's refusal to provide service to one of its competitors.

Furthermore, such selective use of New York Tel facilities is flatly prohibited by Federal Law.

Section 251(b)(4) of the Telecommunications Act of 1934, as added

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[2] NYT states "...absent such an arrangement with the Owner, NYT has no right to go on the premises to connect these PAL lines to the junction box." Teleplex doubts NYT really believes this, or that NYT has obtained consent from every landlord in New York City to serve each and every tenant in the building in which a junction box is located. Nor does Teleplex believe NYT obtains consent from landlords to service tenants in other buildings who may be connected to a junction box in the landlord's building.

by the Telecommunications Act of 1996, states that each local exchange carrier has the duty "to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rights, terms, and conditions that are consistent with Section 224."

In interpreting that provision of the statute, the FCC has held that the obligation to provide equal access to rights-of-way applies to rights-of-way obtained from third party property owners. While the FCC indicated interpretation of easements or rights-of-way is a matter of State Law,[3] it reiterated "that the access obligations of Section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access." See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98 and 95-185, First Report and Order, August 8, 1996, para. 1178-1181. (Local Interconnect Order).

New York Telephone apparently has the consent of the landlord to place a junction box on its property. That consent is likely to have matured into an easement by necessity or an easement by

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[3] Questions on the extent of easements have often revolved around whether an easement for telephone purposes could be extended to include facilities owned by other parties, such as Cable TV companies. See, for example, Hoffman v. Capital Cablevision Systems, Inc., 82 M2d 986 (1975). However, no such question arises in this case, since the facilities i.e., the junction box and the network wire, are all owned by New York Telephone itself.

prescription. It is highly doubtful that the consent or easement allows the landlord to determine which tenants may or may not be served from that junction box.

New York Telephone also has easements to run its wires through the landlord's building and into the individual tenant spaces. Again, it is highly doubtful that those easements allow the landlord to specify which persons may or may not be served by NYT's wires when the tenant has no objection.

Because of its duty to provide service, New York Telephone has an obligation to enforce its existing easements by bringing an action against the landlord. In this situation, New York Telephone would not be seeking to enforce an easement on behalf of Teleplex, but rather would be enforcing its own authority to place its own facilities in the landlord's building.

Finally, to the extent that New York Telephone argues its existing authority and easements from the landlord do not cover the provision of service to Teleplex, then New York Telephone is obligated, under State and Federal Law, to use its power of eminent domain to provide service to Teleplex. Specifically, paragraph 1181 of the FCC's August 8 Local Interconnection Order

reads as follows:

> "Finally, we disagree with those utilities that contend that they should not be forced to exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties. We believe a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments. Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that 'intends to modify or alter such...right-of-way...'"

This Commission has also held NYT must use its power of eminent domain to provide service to a customer. See Opinion 85-21, Case 28977, Complaint of Philip C. Bonanno, et al. v. New York Telephone Company for Failure to Provide Telephone Service, "Opinion and Order Requiring Provision of Service", November 18, 1985.

Both the Federal Act and the Public Service Law prohibit discrimination in the provision of telephone service.[4] Yet

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[4] Section 91(3) of the Public Service Law states that no telephone corporation "shall or give any undue or unreasonable preference or advantage to any person, corporation, or locality, or subject any particular person, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The federal statute, Section 276(a)(2), goes much further, and does not prohibit only "undue" or "unreasonable" discrimination, but instead flatly states that New York Telephone "shall not prefer or discriminate in favor of its payphone service."

discrimination is exactly what NYT is doing here.

New York Telephone runs wires to thousands of its own public pay telephones located in the New York City right-of-way. The routing of all those wires is not known to Teleplex, but it is highly likely that it uses conduit under sidewalks, and in many situations the wires connect to terminal facilities in adjacent buildings. What New York Telephone is now arguing is that it may continue to provide service to its own public pay telephones through common junction boxes, but that it can refuse to provide service to competing pay telephones served by the same junction boxes and located in the same right-of-way. Such discriminatory conduct, by itself, constitutes adequate grounds for denying any New York Telephone Company application submitted pursuant to Section 271 for authority to provider inter-LATA service.[5]

The final issue is the extent of New York Tel's obligation to bring service to a customer, located on a public right-of-way, who requests service. This is not a situation where a landlocked customer cannot obtain service; instead, it is a request from a customer which can be accessed under New York Telephone's existing easements and franchises to utilize public rights-of-

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[5] For this reason, Teleplex requests that the files of this proceeding, and the refusal of New York Telephone to provide monopoly service to a competitor, be included in the record of Case 94-C-0095, and particularly associated with the Commission's review of New York Telephone's compliance with the Section 271 checklist.

way.[6] In this regard, Section 1 of New York Tel's PSC No. 900 tariff, Section C, cited by the Company, is not applicable.

That tariff states that "NYT's obligation to furnish service and/or facilities is dependent upon" four items. Each will be dealt with in turn.

(a) New York Telephone has not shown it would incur "unreasonable expense" in providing suitable facilities and rights for the construction and maintenance of the necessary circuits and equipment. To the extent conduit is necessary to connect the pay telephones to the basement wall, that conduit has already been installed by Teleplex. All New York Telephone need do is utilize existing, in place wires.

(b) There is no issue here of New York Telephone securing and retaining, without expense to it, suitable space for its plant and facilities in the building where service is or is to be provided. First, the "building" where service is to be provided is Teleplex's pedestal; New York Tel is already required by its tariffs to install the network interface device in that

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[6] As indicated above, even in the case of a landlocked customer, the Commission has held New York Telephone has an obligation to utilize its power of eminent domain in order to provide service. See, Case 28977, Complaint of Phillip Bonnano, et al. against New York Telephone Company, supra.

pedestal.[7] But even if the "building" were deemed to refer to the landlord's adjacent premises, New York Telephone has already installed its junction box and wiring in that building.

(c) There is no issue here of reimbursement of costs for reallocations or rearrangements of plant and facilities in either the Teleplex pedestals or in the landlord's premises. New York Telephone will not be moving its existing junction box or wiring, and accordingly no plant will be reallocated or rearranged.

(d) As to securing compliance with its tariff as to underground construction, Teleplex has already installed the conduit for the underground feed of New York Tel's wire into the Teleplex pedestal.

Accordingly, none of NYT's rationalizations for its refusal to provide service have any merit. The Commission should therefore grant Teleplex's Complaint and promptly direct New York Telephone to immediately re-install service to the three pay telephones at issue. If necessary, this could include a direction that NYT bring an action against the landlord to enforce New York

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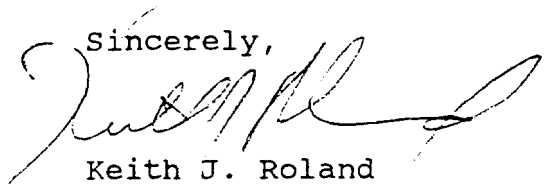
[7] New York Tel would seem to agree with this, since its states that "Teleplex's pedestal on the sidewalk constitutes, in essence, its 'premises'". Thus, "the building where service is or is to be provided" would be equivalent to Teleplex's "premises", which would be the pedestal.

Telephone's rights to connect any customer it chooses to the junction box.[8]

Sincerely,



Keith J. Roland

KJR:tlm
cc: Dennis Novick
Robert P. Slevin, Esq.
Daniel M. Martin

bcc: Thomas W. Knowles

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[8] An alternate mechanism, suggested in Teleplex's Complaint, remains valid. If the landlord seeks to determine which customers may or may not be served by the junction box in his building, New York Telephone should inform the landlord that it cannot discriminate amongst its customers, and that service to all tenants in the landlord's building will be terminated. New York Telephone suggests such action could not be taken without notice to the landlord, and Teleplex has no objection to the Commission notifying the landlord that such relief may be ordered.

FILE COPY

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April 30, 1997

Y. Carolynn Duffy, Esq.
Assistant Counsel
New York State Public
Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Complaint of Teleplex
Coin Communications, Inc.
against New York Telephone
Company (COCOT locations
241 - 245 9th Avenue,
New York City)

Dear Ms. Duffy:

I am writing to urge prompt Commission action on the Complaint filed herein by Teleplex Coin Communications on November 22, 1996.

In that Complaint, Teleplex showed how New York Telephone was violating its statutory duty by refusing to restore service to Teleplex pay telephones located on the public right-of-way adjacent to the 9th Avenue property. New York Telephone's excuse was that the owner of the adjacent property allegedly refused to allow New York Telephone to utilize New York Telephone's own connection boxes and lines to provide service to Teleplex.

This is an issue of the most serious proportions. If New York Telephone is permitted to deny service to its competitors by cowtowing to the restrictions allegedly imposed by third parties, there can be no assurance that any member of the public will ever be able to obtain telephone service.

For example, if a competitor desires to utilize New York Tel links to serve a customer, would this Commission permit the landlord of the customer's building to refuse New York Telephone permission to use its lines to serve that particular customer? Once having obtained the right from the landlord to place facilities to provide services to its own customers, New York Telephone simply cannot be permitted to let an outsider determine which members of the public can receive telephone service.

This is not a situation where an entity other than New York Telephone seeks to place its facilities on private property. This issue deals solely with New York Telephone Company facilities which are already located on the property, and which New York Telephone already has a right to use. What New York Telephone is attempting to do is claim that the rights of access granted by property owners extend only to some, but not all, New York Tel customers. As a matter of law and of sound public policy, that position cannot be upheld.