

LOAD BOX TEST

Month (1994)	IMAS Call Volumes	AMA Call Volumes	Difference
October	641,532	641,438	94
November	641,645	641,573	72
December	619,990	619,892	98
Total	1,903,167	1,902,903	264

NYT will provide responsive presentations to those remaining issues not addressed in our direct presentation. Additionally, our responsive presentations will address matters raised by the other parties in their direct presentations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amy D. Kanengiser". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Amy D. Kanengiser

Attachment

cc: Honorable John C. Crary (5 copies)
All parties

SUPREME COURT
COUNTY OF ALBANY

STATE OF NEW YORK

In the Matter of

NEW YORK TELEPHONE COMPANY,
Petitioner,

For a Judgment Pursuant to
Article 78 of the Civil
Practice Law and Rules

-against-

Index: 5655-97
RJI: 0197-ST8129

PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK, PHONE
PROGRAMS, INC., ACCURATE INFO LTD.,
STATISTICAL PHONE PHILLY,
8484 ASSOCIATES, 3232 ASSOCIATES,
ERIC SINGLETON D/B/A "PHONE SERVICE",
ANTHONY COLANGELO, BLACK RADIO
NETWORK, INC., and NEWS TRANSMISSION
SERVICE, INC.,

Respondents,

In the Matter of

BLACK RADIO NETWORK, INC. and
NEWS TRANSMISSION SERVICES, INC.,
Petitioners,

-against-

Index: 5949-97
RJI: 0197-ST8167

PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK and
NEW YORK TELEPHONE COMPANY,
Respondents.

(Second Action)

In the Matter of
ARTHUR EVANS, pro se, and
ARTHUR EVANS, AS A MEMBER OF THE
AD HOC COMMITTEE OF INDEPENDENT
INFORMATION PROVIDERS and ARTHUR EVANS,
AS REPRESENTATIVE OF THE AD HOC
COMMITTEE OF INDEPENDENT INFORMATION
PROVIDERS, pursuant to Section 2.1,
Chapter I, of the Rules of the Public
Service Commission, and the AD HOC
COMMITTEE OF INDEPENDENT INFORMATION
PROVIDERS,

Petitioners,

Index: 6019-97
RJI: 0197-ST8179

-against-

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK and
NYNEX CORPORATION, NEW YORK TELEPHONE
COMPANY, also known as Bell Atlantic,
Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

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DECISION/ORDER

George B. Ceresia, Jr., Justice:

At issue in these three combined CPLR Article 78 proceedings is a May 29, 1997 determination of the Public Service Commission ("PSC") concerning New York Telephone's ("NY Tel") Mass Announcement Services ("MAS"), a service utilized by many different Information Providers ("IP's") to offer to the public recorded information messages accessed by calling the specific "976" number assigned to the IP (see, PSC Opn. No. 97-7). The "976" recorded messages of approximately one minute's duration offer information regarding weather, time, financial news, horoscopes, lottery results, sports and entertainment, inter alia. Calls to "976" exchanges incur a fixed charge (.40¢ at the time of the determination), and the per-call revenues are collected by NY Tel and divided equally between NY Tel and the IP called, pursuant to the governing tariff filed with the PSC. NY Tel is required to provide billing and collection services to the

IP's for "976" calls, and to tabulate call volumes or counts for each IP. These numbers provide the basis for NY Tel's tariff-based obligation to pay the IP's for each completed call billed and collected.

From 1984 to 1990, NY Tel used a system called Autrax or Audiochron to tabulate the "976" call volumes for purposes of paying the IP's. The Autrax System experienced call counting errors on a regular basis, requiring NY Tel employees to manually "adjust" the call counts. In 1990, NY Tel transferred or "cut-over" the "976" calls to the Ericsson Switch to tabulate "976" calls. The cutover was attended by a variety of problems. For clarification, the original system is referred to as the pre-cutover Autrax System, and the replacement system is called the Ericsson post-cutover system.

After the cutover to the Ericsson Switch, various IP's complained to the PSC that the new switch was not completing or counting all calls with the result that their call counts dropped significantly from their pre-cutover call counts, causing them to lose revenues and business. They sought compensation from NY Tel in amounts which ranged up to \$15.6 million for these claimed losses. The IP's also raised many other complaints concerning "976" service, including dissatisfaction with compensation levels and allocation of revenues, system reliability and shortcomings, and inaccuracies in call counting. The IP's suggested alternatives to enable them to offer their services more competitively in view of emerging competition from other types of

information providers. Many of the IPs' concerns were addressed by NY Tel or by prior PSC proceedings, but many more remained to be resolved.

By Order Instituting Proceeding (May 29, 1993), the PSC commenced an omnibus proceeding to address in a single consolidated proceeding all issues not already resolved relating to "976" MAS Service including rates, charges, rules and regulations. Interested members of the industry were invited to participate, and were encouraged to develop alternative approaches and mutually acceptable resolutions of the issues. By Opinion and Order Concerning MAS, the PSC approved in part a Joint Proposal filed by NY Tel and 12 IP's to resolve many of the issues in contention (see, PSC Opn. No. 94-14-Opinion and Order Concerning MAS [6-1-94], on reconsideration, modified in part by PSC Opn. 95-10 [8-2-95]). Pursuant to the Administrative Law Judge's subsequent Procedural Ruling, MAS-related issues not resolved by the approved Joint Proposal were to be addressed in Phase II of these proceedings. Extensive hearings and motion practice were conducted during 1996 in Phase II resulting in a record of over 5000 pages and 175 exhibits. During the hearings, as the evidence and testimony developed, the scope of the inquiry expanded considerably from the harm the IP's claimed due to NY Tel's misconduct related to the cutover to the Ericsson Switch and NY Tel's liability therefor, to include NY Tel's recently revealed conduct in manually adjusting the erroneous pre-cutover Atrax call counts and concealment of these adjustments, and the

IPs' entitlement to compensation for Autrax call counting problems.

The Administrative Law Judge issued a comprehensive recommended Decision ("RD") of 189 pages on January 17, 1997. As pertinent to this special proceeding and detailed infra, the Administrative Law Judge found that NY Tel had been grossly negligent and had engaged in willful misconduct in connection with the September 1990 installation and cutover to the new Ericsson Switch used to provide "976" service to the IP's. The mishandling of the cutover caused the IP's to lose a large volume of calls and, consequently, customers. While recognizing that the PSC has no authority to award conventional negligence damages and that NY Tel's liability to the IP's under the governing tariff is limited in a court action to gross negligence/willful misconduct, the Administrative Law Judge recommended that IP's be awarded "refunds" from NY Tel totaling \$25.2 million, which took into consideration the harm suffered by the IP's due to NY Tel's defective service. The Administrative Law Judge determined that the Ericsson Switch was not a suitable vehicle for counting "976" calls and set forth a new call counting procedure for NY Tel to follow until the switch was properly replaced.

The Administrative Law Judge rejected all claims by two IP's (Black Radio News ["BRN"] and Ad Hoc Committee of Independent Information Providers ["Ad Hoc"--an IP trade group]) for compensation based upon the pre-cutover Autrax call count errors and manual adjustments of those counts, finding they had not

demonstrated entitlement to be compensated further based upon unadjusted Autrax raw call count date. The Administrative Law Judge then made a variety of recommendations for prospective changes in the manner in which "976" service is provided to the IP's. These included requiring that NY Tel unbundle the various cost elements of "976" service, and requiring that NY Tel establish the charge for each of these elements on a cost basis without any "contribution" or subsidy factor. In the past, NY Tel had retained as a "contribution" or subsidy increment from the "976" per-call revenues, causing "976" providers to subsidize basic local service. Increased competition from alternate information providers such as NYNEX Information Resource Company ("NIRC") which did not provide any such contribution required leveling the playing field and eliminating the contribution element altogether from "976" pricing and revenue allocation.

The Administrative Law Judge also recommended that the voluntary call blocking options available to customers be modified so that customers could separately block more controversial, adult entertainment services without also requiring that they block the "976" information services as they were forced to do under the existing blocking options. Additionally, the Administrative Law Judge recommended modification of existing protocols for involuntarily blocking

¹Unbundling merely means separating "976" service into its component parts and allowing competitors to provide these services to the IP's, e.g. billing and collecting, call processing, advertising, accounting, bill formatting.

calls invoked when customers fail to pay their telephone bills in full -- to the extent that the protocols lump "976" calls in a billing category with all other non-NY Tel pay-per-call services. Under the existing protocol, "976" service may be blocked for a customers who fail to pay in full their bill for calls other than "976" service. Exceptions were taken to that Recommended Decision.

The PSC essentially adopted the findings and recommendations of the Administrative Law Judge with a few exceptions, as relevant herein (see, PSC Opn. No. 97-7 [5-29-97]). The PSC agreed with the Administrative Law Judge's finding concerning NY Tel's conduct both before and after the cutover, and with the conclusion that NY Tel committed gross negligence and engaged in deliberate misconduct in connection with the 1990 transfer of "976" service to the Ericsson Switch (id. at 8-9, n. 1, 15). However, the PSC concluded that the proposed "refund" remedy constituted an improper award of damages the agency lacked the authority to make because the only charges NY Tel collected was for completed "976" calls and not for any impaired service (id.²). The PSC agreed with the proposed prospective changes to "976" service, including unbundling and elimination of the contribution factor, but disagreed with the proposals to amend the voluntary call blocking options or the billing category protocols which result in involuntary blocking for payment

²Citing Case 28804.NY Tel (Autotas Service): PSC Opn. No. 86-J(2-28-86), PSC Opn. No. 86-3 (A)(5-6-86) and PSC Opn. No. 86-J(B)(8-28-87).

deficiencies (PSC Opn. No. 97-7, at pp. 12-13). The PSC directed NY Tel to implement its alternate proposal to improve the Ericsson Switch call counts as specified in its exceptions (id. at 14, 15 [53]). On reconsideration, the PSC clarified its ruling regarding voluntary blocking and specified that it was adhering to its January 1996 determination that a fifth blocking option be prospectively offered.

NY Tel and several IP's thereafter instituted three separate article 78 proceedings challenging various aspects of the PSC's May 29, 1997 determination. These proceedings were consolidated by Order of October 24, 1997.

This single opinion and order will resolve all issues raised in these consolidated special proceedings.

I. The PSC's Gross Negligence/
Willful Misconduct Declaration

NY Tel's first cause of action alleges that the PSC's declaration that it was guilty of "gross negligence" and "willful misconduct" in connection with the Ericsson Switch cutover is in excess of the PSC's statutorily conferred jurisdiction, because this finding is relevant only to the issue of damages, i.e. NY Tel's liability to the IP's, which the PSC lacks the power to award. Thus, NY Tel contends the PSC lacks the authority to make a declaratory finding relevant solely to the issue of damages under the applicable tariff. The PSC refutes this contention

arguing that it has jurisdiction to make findings of fact on liability provisions in the tariffs it approves and supervises when such findings are made in connection with its statutory authority to regulate rates, terms and utility services.

Likewise, the IP's argue that the PSC finding on liability falls within its authorized powers to investigate complaints, assure safe and adequate service, oversee telephone utilities' conduct and operations, impose penalties and take corrective action, and issue related findings.

The court's initial analysis must focus on the context in which the gross negligence/willful misconduct issue was raised before the PSC and in which that finding was made by the Administrative Law Judge and PSC, and its relevance, if any, to issues other than damages. The PSC instituted this omnibus proceeding to address myriad complaints filed by IP's. These complaints generally related to dissatisfaction with compensation levels, alleged system shortcomings and inaccuracies in call counting. The PSC in its Order Instituting Proceedings directed the convening of interested members of the MAS industry "to consider the rates, charges, rules and regulations affecting the [MAS] portion of the information provisioning industry in New York Telephone's service territory". In the proceedings Phase I, NY Tel and 12 IP's negotiated a Joint Proposal resolving some points of contention, which was approved (see, PSC Opinion 94-

14'). Meanwhile, Phase II was commenced for consideration of MAS-related issues not covered by the Joint Proposal. Voluminous discovery, extensive hearings and motion practice ensued. The Administrative Law Judge issued a procedural ruling outlining the issues remaining for administrative resolution, and they included NY Tel's "liability, if any, to "976" providers due to its handling of the cutover to the Ericsson Switch", as well as the accuracy of past and current call counts. NY Tel's liability for damages arising from its errors, omissions, interruptions or delays in providing services to subscribers (IP's) was, of course, limited under the applicable tariff to "gross negligence" and "willful misconduct", aside from certain specified interruption allowances. In the recommended decision on Phase II, the Administrative Law Judge indicated that the "main issue" of Phase II was whether NY Tel has an "obligation to compensate" the IP's for call account errors after the cutover to the Ericsson Switch. The IP's raised three basic areas of misconduct: (1) ~~inaccuracy and deception by NY Tel in the pre-cutover Autrax call counts;~~ (2) NY Tel's gross negligence and misconduct in handling the Ericsson Switch cutover and cover-up, for which the IP's sought monetary compensation and (3) litigation abuses and fraudulent conduct by NY Tel in front of

⁴The petition for reconsideration was denied with clarifications (see, FSC Opinion 95-10 [8-2-95]).

⁵Only BKN and the Ad Hoc IP's put forth a claim for pre-cutover call account errors, discussed infra.

the PSC. The Administrative Law Judge then reviewed the parties' claims and the hearing record regarding the pre and post cutover call account inaccuracies, NY Tel's related conduct, and its impact on the IP's. The parties agreed that under the governing tariff the threshold for NY Tel's liability is gross negligence and willful misconduct, but NY Tel maintained that any claim for damages must be brought in court as the PSC could not award damages. The IP's asserted that the PSC could, under the tariff, direct NY Tel to compensate them for their financial loss due to NY Tel's gross negligence or willful misconduct in failing to competently provide service under the tariff.

After reviewing the extensive record and the parties' contentions regarding the availability and propriety of any tariff-based remedy from the PSC, the Administrative Law Judge issued findings that NY Tel had been "guilty of gross negligence and willful misconduct", summarized as follows:

The company's long-term deception of both IP's and the Commission concerning its unauthorized AuTrax call count adjustments was willful misconduct. The company was seriously negligent in pushing ahead with the Ericsson cutover in one gulp, rather than phasing it in, which would have enabled it to deal more efficaciously with the problems and avert serious harm to IP's. The unexpected troubles that did attend the cutover show that the company's planning for it was inadequate. Likewise inadequate was the company's handling of the troubles when they arose, further evidencing insufficient preparation. These basic elements of the cutover picture, taken together, constituted gross negligence. Furthermore, the company engaged in willful misconduct in striving to cover up its negligence and to defeat efforts to call it to account. This extended to willful misconduct in the company's litigation of this proceeding. I also conclude that the IP's were in fact harmed by the

improper, deceitful and grossly negligent way in which New York Telephone provided service to them. (emphasis added).

Thereafter, the Administrative Law Judge made detailed findings on the "main issue", and addressed itself to the Autrax call counts; the cutover and current call count accuracy, concluding the Ericsson Switch "is not a suitable vehicle for counting 976 calls for purposes of payments to IP's". The Administrative Law Judge imposed upon NY Tel the obligation to adopt the IP-proposed alternative or to propose one itself, and to notify the IP's each time that mechanically derived call counts are unavailable or corrupted and to set forth the details of any adjustments made. This burden was imposed by the Administrative Law Judge on NY Tel in light of the record in these proceedings demonstrating its "long pattern of deceptive behavior*** with respect to IP call counts", indicating this burden could be removed if NY Tel timely replaced the Ericsson Switch with one which more accurately counts 976 calls. The Administrative Law Judge ultimately determined to order "refunds" to the IP's, an "equitable remedy", recognizing the PSC could not award conventional negligence damages. The Administrative Law Judge then addressed the remaining issues.

The PSC agreed with and adopted the findings and conclusions of gross negligence and willful misconduct concerning NY Tel's conduct in connection with the cutover to the Ericsson Switch, finding the Administrative Law Judge's outline of the evidence of

NY Tel's gross negligence/willful misconduct "with only very limited exceptions" accurately reflected what happened, both before and after the cutover, and fairly assigns responsibility for the post-cutover operating problems suffered by the IP's" (PSC Opinion No. 97-7). Nonetheless, the PSC concluded that the proposed "refunds" to IP's amounted to an improper award of damages (id. at 9-10). As relevant to this special proceeding, the PSC agreed with several recommendations for prospective changes to "976" service and approved NY Tel's proposed alternative to the Ericsson Switch (id. at pp 12-14 and 15 \$3).

The issue raised by NY Tel which befalls this court in this special proceeding is whether the PSC declaration of gross negligence/willful misconduct is in excess of that agency's jurisdiction and power. This raises two issues: whether the declaration relates solely to the issue of NY Tel's liability to the IP's's under the tariff for harm suffered from the call count errors and, if so, whether the PSC has the authority to issue a declaration on tariff-based liability (i.e. finding NY Tel was grossly negligent and engaged in willful misconduct) even though the PSC is not authorized to award monetary damages which the IP's must pursue in a court action. The second issue appears to be a novel one in this State as the parties have not cited (and the court has not discovered) any case in which a court has spoken to the PSC's jurisdiction to issue such a declaration. To clarify, the parties concede the PSC's lack of power to award monetary damages or even refunds in this case.

The PSC, it is well established, possesses only those powers expressly delegated to it by the Legislature, or incidental to its expressed powers, together with those required by necessary implication to enable it to fulfill its statutory mandate (Matter of Niagara Mohawk, 69 NY2d 365, 368-9). Aside from its mandate to assure just and reasonable rates and adequate service (Public Service Law §91), the PSC also has general supervisory power over telephone lines and corporations within its jurisdiction (PSL §94) and has broad investigative and oversight authority to do so (PSL §§95-98). In determining whether the PSC has acted outside the scope of its legislatively conferred power, the courts of this State have engaged in "a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment" (Matter Consolidated Edison v. PSC, 47 NY2d 94, 102; Matter of Niagara Mohawk, *supra*, at 372).

As this court reads the PSC Opinion 97-7 and the Administrative Law Judge's Recommended Decision, the findings of NY Tel's gross negligence and willful misconduct do not relate solely to the issue of NY Tel's liability for damages to the IP's. A "realistic appraisal" of PSC's declaration is that it was properly made in the context of its power to review and investigate complaints regarding a regulated utility's service, conduct and tariff-based charges, as well as its general oversight and regulation of this telephone "976" service sub-industry. The declaration is inseparable from numerous

prospective and remedial measures related to "976" service which the PSC adopted, not the least of which are (1) foremost, the determination that the Ericsson Switch is not viable and requires switching to an alternative counting system and notification to IP's of each system failure until then (PSC Opn. NO. 97-7 at 12-14, 15 at §3); and (2) by way of example, the unbundling and unfair competition declarations (id. at 12-13, 15 at §4).

Further, the declaration explicitly concerns the responsibility for post-cutover operating problems suffered by the IP's" (emphasis added) (id. at p. 10, note 10). The findings resolved the IP complaints levied against NY Tel at which the hearings were directed and channeled the agency's oversight and prospective regulation of this entire "976" service industry (see, SAPA §204). It was also relevant to the issue of NY Tel's credibility.

Thus, the court concludes that the PSC's gross negligence/willful misconduct declaration challenged by NY Tel (PSC Opn. No. 97-7 at p. 15 §1) does not, in fact, relate solely to NY Tel's liability to the IP's for damages due to the cutover problems and call count inaccuracies or coverup. Accordingly, the request to annul that declaration as in excess of the PSC's jurisdiction and authority is denied and NY Tel's first cause of action is dismissed.

Having concluded that the PSC has authority to issue the declaration -- and in fact issued the declaration -- on an issue other than NY Tel's liability for damages, this court has no

then proceeded to detail NY Tel's inadequate planning for the cutover, the mistakes made in executing the cutover, NY Tel's failure to respond adequately to the service problems or to notify the IP's; and NY Tel's disregard for the consequences of its handling of the cutover. NY Tel did not possess "any concern" for the consequences of its conduct and engaged in willful misconduct in endeavoring to cover up the problems and avoid responsibility.

Read as a whole, the Administrative Law Judge's decision properly employed the governing legal standard for gross negligence/willful misconduct, i.e. "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (Colnaghi, USA Ltd. v. Jewelers Prot. Servs., Ltd., 81 NY2d 821,823-824; Sommer v. Federal Sign Corp., 79 NY2d 540, 554-555). The PSC's finding did not improperly rest on a mere series of mistakes by NY Tel or on its simple negligence (cf. AT & T v. City of NY, 83 F3d 549, 556 [2d Cir. 1996]), and did not focus on the harm to the IP's, although this was considered. While the Administrative Law Judge found that NY Tel had engaged in "some" planning and corrective action -- although wholly inadequate and with "disregard for the consequences of its errors"-- this did not compel a finding that NY Tel engaged in "slight care" or "slight diligence" (see, Food Pageant v. Consolidated Edison, 54 NY2d 167, 172).

The Administrative Law Judge noted the unique problems and potential for harm inherent in the "976" service industry was not

tantamount to imposing a "heightened standard of care" on NY Tel, but rather must be read in the context of the evaluation of the adequacy of NY Tel's planning and the reasonableness of its response. Finally, the court has no difficulty in concluding, upon a review of the pertinent portions of the hearing record and the Administrative Law Judge's detailed and extensive factual findings as adopted by the PSC, that the finding of gross negligence/willful misconduct had an ample factual basis, is supported by the record and should be confirmed.

II. Elimination of Contribution from NY Tel's "976" Service Charges to IP's

Historically, the tariff-based pricing structure for "976" calls included a "contribution" component, i.e. a charge above costs and profit to help subsidize NY Tel's basic local telephone service. Thus, a portion of the fixed per-call price paid by the caller for each "976" call to an IP's recorded message (40 cents at the time of the proceeding) was a "contribution" to basic local telephone service unrelated to the cost of the "976" call or to a rate of return to the IP's (currently 20 cents per call) or to NY Tel. NY Tel's second cause of action claims that it did not have notice or an opportunity to be heard prior to the PSC's direction to NY Tel that contribution be eliminated from the tariff rates for "976" service, and that the PSC's determination on this issue was arbitrary and capricious and without record

Date of Request: October 19, 1998

<u>IP-BA-NY-34</u>	For each year since 1988, specify total BA-NY expenditures for advertising for any or all InfoFone services. Annex all documents relevant to this request for information.
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RESPONSE:

BA-NY objects to this interrogatory on the grounds that it is argumentative, neither relevant nor reasonably calculated to seek information likely to lead to the discovery of admissible evidence, and is not "tailored to the particular proceedings and commensurate with the importance of the issues to which they relate" 16 N.Y.C.R.R. § 5.8(a). BA-NY also objects on the grounds that this interrogatory is overly broad and burdensome. BA-NY further objects to this interrogatory on the grounds that it is not required to develop information or prepare a study.

Notwithstanding these objections, the following are the expenditures on advertising for InfoFone services between 1995-1997:

1995 - \$211,103
1996 - \$140,480
1997 - \$10,574

BA-NY does not have a record of its advertising expenditures for InfoFone services from earlier years. The company will supplement this response to the extent that any further information is located.

EXHIBIT E
RATES AND CHARGES

New York

NYT's rates and charges for Billing and Collection Services are as follows:

- (1) Price per Bill \$01
- (2) Price per Message Billed \$0.30 for each message
- (3) Manual Adjustment Charge \$10.00
- (4) Marketing Message \$0.045
- (5) Pay-Per-Call Advisory Message \$0.03
- (6) Minimum Charges:

<u>Annual Minimum</u>	<u>Monthly Minimum</u>
\$55,994.40	\$4,666.20
- (7) Start Up Fee \$25,000

Each of these charges are explained in further detail below.

A. Application of Rates to Intrastate and Interstate Services

Provided that interstate messages comprise at least 75% of Client's message volume, the rates and charges set forth above will be used to determine the total amount due for both Intrastate and Interstate Billing and Collection Services. The intrastate portion of this total will be determined by applying the rates and charges contained in the applicable NYT tariff(s) to the intrastate bill and message volumes.¹ The interstate portion is the remainder after subtracting the intrastate portion from the total. If the number of interstate messages is less than 75% of Client's message volume, then the above rates and charges (excluding the Minimum Charges) shall only apply to Interstate Billing and Collection Services and Intrastate Billing and Collection Services shall be provided to Client in accordance with the rates and charges set forth in the applicable NYT tariff(s), unless otherwise agreed to by NYT.

B. Adjustments to Rates and Charges

In the event that, during the term of this Agreement, the costs assigned to Billing and Collection Services under Part 69 of the Federal Communication Commission's Rules are changed as a result of: (1) a change in the FCC's accounting, separations or access charge rules; (2) a change in federal, state or local tax laws; or (3) any order or change in a rule or regulation of any Court or federal, state, or local governmental agency having jurisdiction, and the increase or decrease is more than \$500,000, determined cumulatively on an annual basis for both NYT and New England Telephone and Telegraph Company combined (the "NYNEX Telephone Companies" or "NTCs"), a surcharge or surcredit may be applied by NYT to the rates set forth herein. The surcharge or surcredit which may be applied to Client: (1) shall not exceed Client's proportionate share among customers of NYT's Billing and Collection Services of the

¹ For purposes of this Agreement, intrastate messages are messages associated with Client End User Customer.

assigned costs; and (2) will be effective with the date that Client would cease to pay for reassigned costs under the procedure in effect prior to the reassignment of costs (e.g., the date on which the NYNEX Telephone Companies would no longer be permitted to charge such costs under access). In any event the NYNEX Telephone Companies shall be permitted to recover Client's proportionate share of costs reassigned to the billing and collection category from the date such costs are reassigned to the billing and collection category. If it is later determined that such costs should not have been billed to Client because those costs have been recovered elsewhere, Client shall be entitled to a credit plus interest. Interest shall be calculated by using the prime rate, as reported in the *Wall Street Journal* the first business day of January and July of every year, plus two percentage points. Such credit shall be reflected on the next billing and collection charges bill issued after it is determined that Client is entitled to a credit. NYT shall notify Client, in writing, of the effective date of any proposed surcharge or surcredit and, upon request, provide Client with the calculations used to determine the surcharge or surcredit which shall be auditable under the provisions of Section 12 of the Agreement.

In the event NYT imposes a surcharge upon Client, Client shall have the right to terminate this Agreement, without penalty, provided Client notifies NYT in writing within ninety (90) days from the date of NYT's written notification to Client of the surcharge. If Client elects to terminate, said termination shall become effective no later than six (6) months from the date of NYT's written notification or such longer period as designated by Client and Client shall be responsible for payment of the surcharge if such increase becomes effective prior to termination of service. In the event that the longer period designated by Client extends beyond the term of this Agreement, NYT agrees to continue providing Billing and Collection Services to Client for such period under the same terms and conditions and rates and charges, including the surcharge. NYT agrees to cooperate fully with Client in the planning and implementation of any transition from NYT to Client billing as a result of Client election to terminate this Agreement under this paragraph. If Client does not elect to terminate as provided herein, then the surcharge shall become effective in accordance with the above provisions.

C. Client Right to Renegotiate

If, at any time during the term of this Agreement, NYT offers interLATA telecommunication services beyond those which on the effective date it is able to offer in any local exchange serving area in which NYT provides local exchange service, and Client is unable to meet its Minimum Charges obligations substantially due to those new interLATA services, Client shall have the right to renegotiate those obligations for any affected year.

If, at any time during the term of this Agreement, Client is otherwise unable to meet its Minimum Charges obligations due to NYT acts or omissions, Client shall have the right to renegotiate those obligations for any affected year.

D. Price per Bill

For the purpose of applying this charge, a bill will consist of all pages bearing the same company logo. If NYT agrees to bill some of Client's charges under an additional Carrier Identification Code, then Client will pay the rates and charges for those bills issued under the additional Carrier Identification Code. The provision of Billing and

Collection Services for Client's additional Carrier Identification Code shall begin on such date as is mutually agreed to by the Parties in writing and may be cancelled by Client at any time without penalty.

E. Price per Message

The per message charge of \$.30 applies to each message billed.

F. Manual Adjustment Charge

Client will pay NYT \$10.00 for each Client initiated paper IC/LEC Memo processed by NYT for rebilling of Client charges in accordance with Section 8(B).

G. Marketing Message

When utilized, Client shall pay NYT \$.045 per Marketing Message per Bill. There will be no charge for messages required by regulatory or legal authorities.

H. Pay-Per-Call Advisory Message

When Pay-Per-Call messages are billed, the FCC/FTC required advisory statement will be displayed on the Client bill page within the Pay-Per-Call Services section. Client shall pay NYT \$.03 per advisory statement.

I. Minimum Charges

Client shall pay NYT a guaranteed Minimum charge in accordance with the rate schedule listed above. The amounts billed by NYT for Billing and Collection Service will be applied towards the Minimum Charges. The amount billed to Client each month will be determined using the terms and formula outlined below. Client will be responsible for the Minimum Charges beginning at the time of the Effective Date. In the event NYT agrees to provide Billing and Collection Services to Client under an additional CIC(ABEC)/ACNA an additional Minimum charge in an amount equal to the monthly minimum charge stated above will apply. The Client will be responsible for this amount only during the length of time that NYT provides Billing and Collection for Client.

Defined Terms

1. Monthly Minimums - The Monthly Minimum charges set forth above.
2. Cumulative Minimums - Sum of the Monthly Minimum charges from the beginning of contract up to and including the current month's Monthly Minimum charge.
3. Monthly Actuals - Billing and Collection charges calculated by applying the above per bill and per message charges to the current month's bill and message volumes.
4. Cumulative Actuals - Sum of the Monthly Actuals from the beginning of the contract up to and including the current month's Monthly Actual.
5. Cumulative Billed Amount - The sum of the Billed Amounts from the beginning of the contract up to and including the current month's Billed Amount.

6. Billed Amount - The amount billed by NYT to Client in a given month for Billing and Collection Services.

Formula

The Billed Amount in each month shall be the greater of (1) Cumulative Actuals less the previous month's Cumulative Billed Amount, or (2) Cumulative Minimums less the previous month's Cumulative Billed Amount. The following example demonstrates the application of the above formula.

Example

<u>Month</u>	<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>	<u>5</u>	<u>6</u>
Minimums (1)	10	10	10	10	10	10
Cumulative Minimums (2)	10	20	30	40	50	60
Actual (3)	5	8	12	18	5	15
Cumulative Actuals (4)	5	13	25	43	48	63
Cumulative Billed (5)	10	20	30	43	50	63
Billed (6)	10	10	10	13	7	13

In the event NYT provides Billing and Collection Services to Client under an additional CIC(ABEC)/ACNA, the Billed Amount will be determined separately for those bills issued under each CIC(ABEC)/ACNA. The amounts billed by NYT for Bill Message Service will not be included in the application of the above formula used to determine Client's Billed Amount in each month.

J. Start Up Fee

Client shall pay NYT a \$25,000 start up fee which covers the cost of activities needed to initiate Billing and Collection Services to new customers. Such activities include but are not limited to: testing; tape/transmission set-up; programming costs; digitization of Client's logo; formatting of Client specific end user bill page, set-up of NYNEX reports provided to Client and methods/procedures implementation. This is a one time non-refundable charge payable immediately upon Client's signing of the Agreement.

K. Postage Escalator

In the event that, during the term of this Agreement, the U.S. Postal Service increases the rate for one ounce first class zip sort postage, Client shall pay NYT one third of such increase on a per bill basis. NYT shall notify Client in writing of the effective date of any postage increase.