DOCKET FILE COPY ORIGINAL

PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

RECEIVED

AUG 26 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 26, 2004

Paul C. Besozzi
(202) 457-5292
pbesozzi@pattonboggs.com

VIA COURIER

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street S.W.
Washington, D.C. 20554

Re: In the Matter of The Illinois Public Telecommunications Association's Petition for A Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphones Orders - CC Docket No. 96-128

Dear Secretary Dortch:

In accordance the Commission's Public Notice DA 04-2487, dated August 6, 2004, enclosed are an original and four (4) copies of the "Comments of the New England Public Communications Council, Inc." in the referenced matter. Copies will also be served as otherwise required by the Public Notice.

Please date stamp the "stamp-in" copy as received and return it to me via the courier.

Sincerely,

Paul C. Besozzi

No. of Copies rec'd 0+4
List ABCDE

RECEIVED
AUG 2 6 2004
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions Of the Telecommunications Act of 1996 The Illinois Public Telecommunications Association's, Petition for A Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders	CC Docket No. 96-128

COMMENTS OF THE NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.

The New England Public Communications Council, Inc. ("NEPCC"), on behalf of its members and in accordance with the Commission's Public Notice, DA 04-2487, released August 6, 2004, hereby files initial comments in support of the Petition For Declaratory Ruling ("Petition") filed by the Illinois Public Telecommunications Association ("IPTA").

I. Summary of Comments

1. The Commission should grant the IPTA Petition. The Petition lays out a detailed, well-reasoned legal road map from the FCC's own orders that fully supports the declaratory relief being requested. The Commission needs to act to uphold the requirements of its own rules.

2. Moreover, the Commission should be aware that the Illinois situation is not alone. The Massachusetts Department of Energy & Telecommunications ("DTE") in a proceeding, begun in December of 1997, recently rendered a similar flawed decision.

3. As the IPTA points out, in 1996 the Commission set a series of explicit prerequisites for the RBOC compliance with the requirements of Section 276 of the Communications Act ("Act"), including the effectiveness of cost-based intrastate payphone access rates complying with the new services test. Indeed, this was a requirement for the RBOCs to receive dial-around compensation on their own payphones. The Commission cannot permit state decisions to countermand, in effect, the clear prerequisites of FCC orders designed to balance the competitive playing field in the provision of payphone service as required by Section 276.

II. <u>Background</u>

1. The NEPCC is a not-for-profit trade association whose membership, like the IPTA's, is made up largely of independent payphone service providers ("PSPs") that compete with the RBOCs and other ILECs in the provision of pay telephone services. The NEPCC's members are concentrated particularly in Massachusetts, although a number provide payphone services in Vermont, New Hampshire, Rhode Island or Maine. So the issues raised by the IPTA are of general interest and concern to the NEPCC.

2. In addition, however, the NEPCC has, since March of 1997, been seeking the adoption of payphone access rates in the State of Massachusetts which comply with Section 276 as implemented by the Commission in its *Payphone Orders*.[1] In that DTE proceeding, it has taken *over six and one half*

[1] As used herein the term "*Payphone Orders*" shall mean *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, *First Report and Order*, 11 FCC Rcd. 20541 (1996); *Order On Reconsideration*, 11 FCC Rcd. 21233 (1996), *aff'd in part and remanded in part sub nom., Ill. Public Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C.Cir. 1997); *First Clarification Order*, 12 FCC Rcd. 20997 (Com. Car Bur. 1997); *Second Clarification Order*, 12 FCC Rcd. 21370 (Comm. Car. Bur. 1997); *Second Report and Order*, 13 FCC Rcd. 1778 (1997), *aff'd in part and remanded in part sub nom., MCI Telecomms. Corp v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); *Third Report and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd. 2545 (1999), *aff'd, American Public Communications Council, Inc. v FCC*, 215 F.3d 51 (D.C. Cir. 2000); *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, 15 FCC Rcd. 9978 (Com. Car. Bur. 2000) ("*Wisconsin I*"), *aff'd in part, Memorandum Opinion and Order*, 17 FCC Rcd. 2051 (2002) ("*Wisconsin II*"), *aff'd, New England Public Communications Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003)(unless individually referred to, hereinafter referred to collectively as the "*Payphone Orders*").

(6 ½) years for the agency to decide that adjustments were required to bring Verizon Massachusetts ("Verizon") payphone access rates into compliance with the *Payphone Orders*[2] Yet despite that conclusion, after ordering these adjustments, the DTE, just as did the Illinois Commerce Commission, decided that refunds of the overcharges should not be ordered. Therefore, it is clear that the NEPCC has a common interest with the IPTA and the issues raised by the IPTA Petition.

III. The *DTE Order*

3. The *DTE Order* speaks for itself, but the essence of the decision was that Verizon's intrastate access rates for payphone access lines and usage should be based on a TELRIC costing methodology and that the existing rates, for payphone access lines and usage, which, with modest adjustment on the usage side, had been the business exchange rates in existence at the time of the *Payphone Orders*, must be adjusted. The resulting reduction ordered in the per minute usage rate alone was from approximately $0.02 per minute to $0.002 per minute.

4. However, the DTE, having cited the *Payphone Orders* throughout its analysis, rejected any requirement for refunds, on flimsy and self-serving grounds. For example, although the DTE, throughout the entire proceeding had made clear that its purpose was to determine whether Verizon's payphone access rates complied with the *Payphone Orders*, it refused to direct refunds when it found those rates wanting because the agency had never previously said it would conduct this analysis subject to any refund requirement. In addition, the DTE concluded that merely because Verizon had made a tariff filing in January of 1997 to cover payphone access services previously restricted to its own payphone services, the FCC had, in effect, *exempted* Verizon from any

[2] *Investigation by the Department of Telecommunications and Energy on its own Motion regarding (1) implementation of Section 276 of the Telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smartpay Line Service and (4) the rate policy for operator services providers*, D.P.U./D.T.E. C17-88/97-18 (Phase II-A), Order, June 23, 2004 ("*DTE Order*") attached as Exhibit 1.

obligation to provide refunds if its payphone access rates for PSPs were subsequently found to require adjustment to comply with the FCC's standards.[3] Much like the Illinois decision that is the focus of the IPTA Petition, this tortuous reading of the FCC's requirements cannot be allowed to stand.

IV. <u>The Commission Must Grant The IPTA Petition To Uphold The Payphone Orders</u>

5. The Commission well knows the *quid pro quo* that was struck with the RBOCs in 1997. The IPTA Petition outlines it in detail. If the RBOCs wanted to start collecting dial-around compensation on their payphones by April 15, 1997, the RBOCs (indeed then all LECs) had to have in place cost-based state payphone service access rates that complied with the FCC's requirements (i.e., the new services test). The Commission extended that deadline until May 19, 1997, with the understanding, expressly agreed to by the RBOCs, that should those state payphone access rates be found by a state regulatory commission to not be in compliance and reduced, refunds were to be given.[4]

6. As the IPTA points out, a number of states clearly understood the terms of this *quid pro quo* and ordered refunds. However, decisions like those in Illinois and Massachusetts thumb their nose at the clear requirements of the Commission's rules. The RBOCs are allowed to benefit from years and millions of dollars in dial-around compensation, while their PSP competitors, like the members of the NEPCC and IPTA, are left with at best prospective relief, usually won only after

[3] The only showing that Verizon made prior to the deadline was to "certify" in May of 1997 that its existing rates for intrastate payphone access lines used by PSPs like the NEPCC's members complied with the FCC standard. See Exhibit 2. The *DTE Order* totally ignored that fact in rejecting any refund requirement. This simple certification is no way exempted Verizon from the requirement that the rates comply with the *Payphone Order* and that overcharges be refunded. *See Second Clarification Order, supra,* at ¶8.

[4] *See Second Clarification Order, supra.*

costly and hard fought litigation extending over a number of years. Something is wrong with this picture! It is not what the Commission intended or what its *Payphone Orders* say.

V. <u>Conclusion</u>

7. The Commission made clear that state commissions were to have the first shot at implementing the requirements of the *Payphone Orders* with respect to intrastate payphone access rates. However, the Commission explicitly retained jurisdiction to oversee the state actions.

8. To prevent those requirements from being rendered meaningless by decisions like those in Illinois and Massachusetts, the Commission must grant the relief requested by the IPTA Petition. More specifically, the Commission should declare that in circumstances such as those reflected in the Illinois decision and the *DTE Order*, the PSPs are entitled to refunds for network services to the extent that the rate and charges were in excess of the cost-based rates required by the *Payphone Orders*. Otherwise, the RBOCs will have received the benefits of the *quid pro quo*, without having met one of the principal preconditions for receiving them.

Respectfully submitted,

NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.

By its attorney,

Paul C. Besozzi
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037
(202) 457-5292

Dated: August 26, 2004

Exhibit 1

June 23, 2004

D.P.U./D.T.E. 97-88/97-18 (Phase II)

Investigation by the Department of Telecommunications and Energy on its own motion regarding (1) implementation of Section 276 of the Telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-Pay Line Service, and (4) the rate policy for operator service providers.

APPEARANCES: Paul C. Besozzi, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
FOR: NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.
Intervenor

Barbara Anne Sousa, Esq.
Verizon - Massachusetts
185 Franklin Street
Boston, MA 02110
FOR: VERIZON - MASSACHUSETTS
Intervenor

TABLE OF CONTENTS

I. INTRODUCTION

This Order concerns the requirements for pricing wholesale payphone access services under the Telecommunications Act of 1996 ("the Act" or "the 1996 Act")[1] and the applicable rules of the Federal Communications Commission ("FCC"). At issue are whether the existing tariffed rates for Verizon-Massachusetts' ("Verizon") Public Access Line ("PAL") and Public Access Smart-Pay Line ("PASL") services, which are services that Verizon provides to independent payphone providers ("IPPs"), as well as to Verizon's own retail payphone business, should be allowed to remain in effect given the FCC's clarifications and directives regarding requirements for payphone access line rates and the Department's directives with regard to the appropriate cost methodology to be applied in Massachusetts. The Department allowed the existing rates for PASL services to take effect on April 1, 1997 (the PAL rates were already in effect); these rates have been in effect throughout the pendency of this proceeding.

II. BACKGROUND AND PROCEDURAL HISTORY

To promote competition in the payphone industry, Section 276 of the Act prohibits Bell Operating Companies ("BOCs"), such as Verizon, from discriminating in favor of their own payphone services.[2] In a series of orders beginning in 1996 implementing Section 276, the

---

1 Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. §§ 151 et seq.

2 Section 276 of the Act directed the FCC to prescribe new rules governing the payphone industry which would promote competition among payphone providers and promote the widespread deployment of payphone service to the benefit of the general public. In (continued...)

FCC unbundled local exchange carrier ("LEC") payphone services from payphone equipment and required that LECs provide payphone service providers ("PSPs") unbundled wholesale payphone access lines that can be used with "smart" or "dumb" payphones.[3] In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (1996) ("First Payphone Order"); Order on Reconsideration, 11 FCC Rcd 21233 (1996) ("Payphone Reconsideration Order"), aff'd in part and remanded in part, Illinois Pub.

---

[2](...continued)

addition, Section 276 states that any BOC that provides payphone service "shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and . . . shall not prefer or discriminate in favor of its payphone service." 47 U.S.C. § 276(a).

In addition, Section 276 does the following: (1) establishes a per call compensation plan to ensure that all payphone service providers are fairly compensated for all completed intrastate and interstate calls using their payphones; (2) discontinues the intrastate and interstate carrier access charge payphone service elements and payments and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues; and (3) prescribes a set of nonstructural safeguards for BOCs' payphone services. See id. at § 276(b)(1)(A)-(C).

[3] Verizon's PAL service is purchased by PSPs that have "smart" payphones (i.e., payphones with coin functionality built into the payphone) and consists of a basic access line. Verizon's PASL service is purchased by Verizon's own retail payphone business and by PSPs that have "dumb" payphones (i.e., payphones without coin functionality built into the payphone). Verizon offers PAL service on both a retail and resale basis for both unlimited and measured service. See Tariff M.D.T.E. No. 10, Part A, § 8.1.6; Tariff M.D.T.E. No. 14, § 5.1.2. Verizon offers three types of PASL service: Basic Coin Access Line ("BCAL"), Charge-A-Call, and Inmate service. See Tariff M.D.T.E. No. 10, Part A, § 8.1.4. Verizon's BCAL service consists of the access line, central-office based coin functionality, and blocking features. Id. Verizon's Inmate service allows only coinless, collect calls, and contains other restrictions required by correctional facilities. Id. Verizon's Charge-A-Call service allows credit card calls only. Id.

Telecomms. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (1997) ("Second Payphone Order"), vacated and remanded, MCI Telecomms. Corp. v. FCC, 143 F.3d 606 (D.C. Cir. 1998), Third Report and Order, 14 FCC Rcd 2545 (1999) ("Third Payphone Order"), aff'd, American Pub. Comm. Council v. FCC, 215 F.3d 51 (D.C. Cir. 2000).[4] In the First Payphone Order at ¶¶ 146-149, the FCC required that LECs provide under tariff the same payphone service to competing PSPs that they provide to their own retail payphone business. Thus, LECs were required to offer individual central office coin transmission services to payphone providers under nondiscriminatory, public tariffs, if the LECs provided those services for their own retail payphone operations. Id. The FCC required LECs to file tariffs with rates, terms, and conditions for these services for effect by April 15, 1997. Second Payphone Order at ¶ 8 n.22. The FCC required that rates for LECs' wholesale payphone services be: (1) cost-based; (2) consistent with the requirements of Section 276 (e.g., subsidies from exchange and exchange access services must be removed); (3) non-discriminatory; and (4) consistent with the FCC's Computer III tariffing guidelines, including the FCC's "new services test." See Payphone Reconsideration Order at ¶ 163, citing In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (1991) ("Computer III").[5]

---

4 For ease of reference, these cases are collectively referred to throughout this Order as the "Payphone Orders."

5 The FCC's new services test requires that the rates for LEC payphone services be based on the direct cost of the service and recover a reasonable portion of overhead (continued...)

On December 31, 1996, Verizon (then New England Telephone and Telegraph Company d/b/a NYNEX) filed with the Department proposed changes to its tariffs, M.D.P.U. Nos. 10 and 15, to comply with these FCC requirements by implementing a PASL service offering that would be available to retail payphone providers along with Verizon's existing PAL service.[6] On January 29, 1997, the Department suspended the tariff filing until July 30, 1997, to allow for further investigation. The Department docketed the matter as D.P.U. 97-18.[7] On March 14, 1997, the Department issued notice of Verizon's filing, stating that the Department intended to allow the proposed tariff changes to go into effect, and invited interested persons to comment.[8] On March 31, 1997, the Department vacated the January 29, 1997 Suspension Order, thereby allowing Verizon's PASL tariff to take effect on April 1, 1997. See D.P.U. 97-18, Order Vacating Suspension (March 31, 1997). In a later Order, the Department stated its reasons for allowing Verizon's tariff to take effect, noting the

---

[5](...continued)
costs. See Computer III at ¶ 64 n.108; see also Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Sub-Elements for Open Network Architecture, CC Docket No. 89-79, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, at ¶¶ 38-41 (1991).

6 Verizon initially named the service Public Access Smartline but later changed it to Public Access Smart-Pay Line.

7 The suspension order also addressed a January 24, 1997 Verizon tariff filing to eliminate the tariff rate for local coin payphone calls, also made in compliance with the FCC's First Payphone Order. See D.P.U. 97-18, Order on Suspension (January 29, 1997).

8 Several parties submitted comments, including Verizon and the New England Public Communications Council, Inc. ("NEPCC").

FCC's deadline for LECs to have nondiscriminatory, public tariffed payphone service offerings in effect by April 15, 1997. See D.P.U. 97-18, at 12 (April 14, 1997). However, in that Order, the Department also determined that further investigation of Verizon's PASL filing was necessary and voted to open an investigation on its own motion, stating that "[g]iven the competitive implications of [Verizon's] PASL service, it is particularly important that the Department ensure that the PASL service is not discriminatory and fully complies with the FCC's requirements." Id. at 11-12.[9] In December 1997, the Department issued a Procedural Notice, requesting comments on whether Verizon's PAL and PASL tariffs complied with FCC requirements. See D.P.U./D.T.E. 97-88/98-18 (Phase II), Procedural Notice (December 12, 1997). NEPCC and Verizon filed comments on January 16, 1998, and January 26, 1998, respectively, which the Department took under advisement.

On December 7, 1998, NEPCC filed a motion to reopen the record for the purpose of permitting the development and consideration of additional evidence on the compliance of Verizon's tariffed rates for PAL and PASL services with the FCC requirements for state payphone tariffs, including the FCC's new services test. NEPCC argued that recent decisions from other states addressing the new services test were relevant to the issues before the Department. On May 14, 1999, the Hearing Officer granted NEPCC's motion to reopen the

[9] The D.P.U. 97-18 (Phase II) investigation, which included examination of Verizon's PAL and PASL services as well as barriers to entry and exit in the payphone marketplace and public interest payphones, was consolidated with a subsequent investigation of the Department's operator services providers' rate cap. See D.P.U. 97-88/97-18 (Phase II), Order Opening Investigation (1997). The Department later severed the issue of public interest payphones from that docket and opened a new docket, D.T.E. 98-134.

record and conduct evidentiary hearings. See D.P.U./D.T.E. 97-88/97-18 (Phase II), Hearing Officer Ruling on NEPCC Motion to Reopen the Record (May 14, 1999). The Department held an evidentiary hearing on September 13, 1999. The evidentiary record consisted of 139 NEPCC exhibits, 43 Verizon exhibits, and eight responses to record requests. Verizon and NEPCC filed briefs on October 12, 1999, and reply briefs on October 29, 1999.

On November 28, 2000, the Department issued an Order finding that Verizon's existing PAL and PASL rates were "not payphone-specific," and required that Verizon file a total service long-run incremental cost ("TSLRIC") study to be used to determine the reasonableness of the existing rates within 60 days of the Order. See D.P.U./D.T.E. 97-88/97-18 (Phase II) at 14-15 (2000) ("DTE November 2000 Order"). In addition, the Department ordered Verizon to provide a cost-to-rate ratio analysis of its overhead costs. Id. The Department also found that local usage was not subject to the new services test and that primary interexchange carrier charge ("PICC") revenue should not be taken into account in setting payphone line rates. Id. at 17.

On December 14, 2000, NEPCC filed a motion for reconsideration of the DTE November 2000 Order, requesting that the Department reconsider a number of findings. Prior to issuance of the Department's Order addressing NEPCC's motion for reconsideration, Verizon filed its payphone-specific, TSLRIC study on January 29, 2001, in compliance with the DTE November 2000 Order. The Department requested comments on both NEPCC's motion for reconsideration and Verizon's TSLRIC study.

On March 2, 2000, the FCC Common Carrier Bureau issued its decision in In the Matter of Wisconsin Public Service Commission: Order Directing Filings, DA No. 00-347, Order, 15 FCC Rcd 9978 (Com. Car. Bur. 2000) ("Bureau Wisconsin Order"), which provided state commissions with additional guidance on the FCC's new services test. In the Bureau Wisconsin Order, the FCC found that the new services test requires an incumbent LEC to demonstrate that its proposed payphone line rates do not recover more than the direct costs of the service, plus "a just and reasonable portion of the carrier's overhead costs." Bureau Wisconsin Order at ¶ 9. The FCC stated that costs must be determined by an appropriate forward-looking, economic cost methodology that is consistent with the principles articulated in the FCC's Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("Local Competition Order"). Id. In the Bureau Wisconsin Order at ¶ 11, the FCC also stated that overhead allocations must be based on cost and may not be set artificially high in order to subsidize or contribute to other services.

On August 8, 2001, relying on this additional guidance from the FCC's Bureau Wisconsin Order, the Department partially granted NEPCC's motion for reconsideration. See D.P.U./D.T.E. 97-88/97-18-A (Phase II) at 5-6, Order on Motion for Reconsideration of NEPCC (2001) ("DTE Order on Reconsideration"). In the DTE Order on Reconsideration at 6, the Department found that local usage is subject to the FCC's new services test and that Verizon must take into account PICC revenues when setting payphone line rates. In addition, the Department ruled that because it had not made a determination that Verizon's existing rates did not comply with the new services test, NEPCC's request for interim rates was inappropriate. Id. The Department also directed Verizon to recalculate its TSLRIC cost study to include local usage. Id.

Verizon filed its recalculated TSLRIC cost study on September 7, 2001. The Department held a further evidentiary hearing at the Department's offices on November 14, 2001. Verizon sponsored two witnesses: Peter Shepherd, director of regulatory policy and planning for Verizon; and Fredrick K. Miller, a senior specialist in Verizon's service-cost department. NEPCC sponsored Don J. Wood, an economic and regulatory consultant, as its witness. The evidentiary record for this portion of the case consists of 80 NEPCC exhibits, six Verizon exhibits, and nine responses to record requests. NEPCC and Verizon filed further initial briefs on December 12, 2001, and further reply briefs on December 31, 2001.

On January 31, 2002, the full FCC affirmed the Bureau Wisconsin Order, further clarifying the requirements of the new services test. In the Matter of Wisconsin Public Service Commission, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051 ("Wisconsin Order"). The FCC stated that "[S]ection 276 requires that payphone service rates comply with the flexible, cost-based, forward-looking new services test." Wisconsin Order at ¶ 43. The FCC reiterated that "the new services test is necessary to ensure that central office coin services are priced reasonably because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services and that "because [the FCC] required 'dumb' lines to be re-priced on the same basis as 'smart' lines, existing dumb lines would also have to meet the new services test." Id. at ¶ 47. In addition, the FCC stated that a forward-looking cost methodology is required for setting payphone line rates. Id. at ¶ 49.

On May 8, 2002, the Department issued an Order in D.T.E. 01-31, the Department's investigation into an alternative regulatory plan for Verizon. See Verizon Alternative Regulation, D.T.E. 01-31-Phase I (2002) ("Phase I Order").[10] In a finding relevant to this docket, the Department determined that PAL and PASL services (as well as certain other Verizon retail services) are "wholesale-like" services that should be priced at unbundled network element ("UNE") levels. Phase I Order at 36. The Department stated that while these services have historically been tariffed as retail services, they are "exclusively intended for purchase by other carriers as wholesale services rather than by end-users as retail services," and, thus, the Department reclassified them as wholesale services. Id. The Department directed Verizon to submit UNE-based rates for its PAL and PASL services as part of its Phase I compliance filing. In Phase II of the Department's Alternative Regulation investigation, the Department found that Verizon had complied with that directive, although the Department deferred to this docket – D.P.U./D.T.E. 97-88/97-18 (Phase II) – consideration of whether Verizon's proposed rates for PAL and PASL services comply with

---

[10] In D.T.E. 01-31-Phase I (2002) and Phase II (2003), as part of a long-term effort to evolve regulatory requirements and oversight to match the evolution of market forces, the Department implemented a comprehensive alternative regulation plan for regulatory treatment of Verizon's rates.

the FCC's Payphone Orders. Verizon Alternative Regulation, D.T.E. 01-31-Phase II, at 42-43 (2003) ("Phase II Order").

On February 21, 2003, the Hearing Officer issued a notice requiring Verizon to file revised PAL and PASL rates based on the February 13, 2003 UNE rates from the Department's UNE Rates Proceeding, D.T.E. 01-20.[11] See D.P.U./D.T.E. 97-88/97-18 (Phase II) at 2, Hearing Officer Notice (February 21, 2003). The Hearing Officer Notice also sought comment on two questions: (1) whether Verizon's UNE-based PAL and PASL rates are consistent with the Telecommunications Act of 1996 and the Federal Communications Commission's Payphone Orders, including the Wisconsin Order; and (2) what, if any, issues are rendered moot by the filing of UNE-based rates. Id. In compliance with the Hearing Officer Notice, Verizon filed proposed UNE-based PAL and PASL rates on March 3, 2003, based on the February 13, 2003 rates under consideration in the Department's UNE Rates Proceeding, D.T.E. 01-20.

On April 15, 2003, Verizon filed revisions to its March 3, 2003 filing in this docket to "update TELRIC-based rates" and to "conform to the [FCC] requirements as set forth in the

---

[11] Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a/ Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts, D.T.E. 01-20 ("UNE Rates Proceeding"). In the UNE Rates Proceeding, the Department investigated proposed total element long-run incremental cost ("TELRIC") models for calculating UNE rates and proposed avoided cost studies for calculating the avoided cost wholesale discount. See UNE Rates Proceeding, Order Opening Investigation, D.T.E. 01-20, at 6-7 (2001).

Wisconsin Order . . . ." NEPCC and Verizon filed initial comments on April 24, 2003, and April 25, 2003, respectively, and reply comments on May 16, 2003, and May 19, 2003, respectively, that addressed both Verizon's March 3, 2003, and April 15, 2003 filings.

On July 11, 2003, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit Court") affirmed the FCC's Wisconsin Order. New England Public Communications Council, Inc. v. FCC, 334 F.3d 69 (D.C. Cir. 2003). Although the D.C. Circuit Court did not directly address the reasonableness of the FCC's Wisconsin Order findings on the new services test (as those individual findings were not appealed), the D.C. Circuit ruled that the FCC has authority under Section 276 to regulate BOC intrastate payphone line rates. Id. at 75.

On July 17, 2003, NEPCC filed a motion requesting that the Department take administrative notice of the D.C. Circuit Court's decision affirming the FCC's Wisconsin Order; and on July 18, 2003, NEPCC filed a request for the Department to incorporate the final UNE rates from the UNE Rates Proceeding into this docket. Both NEPCC's request and motion were granted by the Hearing Officer on July 23, 2003. On November 17, 2003, Verizon updated its PAL and PASL rates to reflect the final UNE rates approved in the UNE Rates Proceeding on July 16, 2003. On December 2, 2003, NEPCC submitted a letter to the Department indicating that it had "no detailed comments" on Verizon's proposed rates as revised on November 17, 2003.[12]

---

12 On March 29, 2004, Verizon filed a one-sentence request that the Department take administrative notice of a recent New York Appellate Court decision, In the Matter of (continued...)

III. REMAINING ISSUES

A. Introduction

The issues remaining for Department resolution in this proceeding include determination of the appropriate cost methodology for establishing payphone rates and an evaluation of Verizon's November 17, 2003 TELRIC-based proposal. In addition, we will discuss refund issues related to the re-pricing of PAL rates.

B. The Appropriate Cost Methodology

1. Introduction

In this section, we evaluate the appropriate cost methodology for establishing payphone rates in Massachusetts consistent with the FCC's new services test. The parties disagree whether the Department should apply a TELRIC or a TSLRIC cost standard for approving

---

[12](...continued)

Independent Payphone Association of New York, Inc. v. Public Service Commission of the State of New York and Verizon New York, Inc., Case No. 93539 (March 25, 2004). On April 8, 2004, NEPCC filed a similar request for the Department to take administrative notice of the recent decision of the Michigan Public Service Commission in Michigan Pay Telephone Association v. Ameritech Michigan, Case No. U-11756 (March 16, 2004). Neither party filed a response to the other's request. Pursuant to 220 C.M.R. § 1.10(2), the Department may take official notice of such matters as might be judicially noticed by a court. See also, Cella, 39 Administrative Law and Practice § 561, Massachusetts Practice Series (1986). However, our regulations also require that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. § 1.11(8). Because neither request provided any grounds upon which the Department may find that good cause exists to accept this additional evidence so long after the record has been closed in this case, the requests of Verizon and NEPCC are denied.

Verizon's PAL and PASL rates.[13] In addition, the parties disagree whether the Department has correctly classified Verizon's payphone services as wholesale services, or whether these services are more accurately designated as retail services.

2. TELRIC or TSLRIC

a. Verizon

Verizon argues that the Department should use the TSLRIC methodology to establish that Verizon's payphone line, feature, and local usage rates comply with the FCC's new services test (Verizon April 25, 2003 Comments at 3).[14] The TSLRIC methodology, argues Verizon, is consistent with the FCC's classification of payphone services as retail offerings (id. at 4). Verizon further argues that the FCC specifically declined to impose a TELRIC-based, wholesale UNE pricing regime on payphone services in the First Payphone Order at ¶ 147 (id. at 5). Moreover, Verizon argues that, consistent with the FCC's Wisconsin Order, unless PSPs are telecommunications carriers, they are not entitled to TELRIC-based pricing of payphone services under the Act and FCC rules (id. at 6). Verizon points out that several state public utility commissions that have established payphone rates using the FCC's new services test, have rejected applying the TELRIC pricing regime to payphone services (id. at 7, citing

13 TELRIC is a method of determining the cost of network elements based on incremental costs of equipment and labor, not counting embedded costs. The FCC developed the TELRIC methodology to implement 47 U.S.C. §§ 251, 252, which outline obligations for incumbent LECs in opening up local telephone markets to competition.

14 Verizon argues that its current rates for payphone services, which are supported by a TSLRIC study, satisfy the FCC's new services test and comply with all FCC requirements (Verizon May 19, 2003 Reply Comments at 2). Therefore, argues Verizon, the Department does not need to take any action to change the payphone rates that are currently in effect (id. at 4).

Order, NY PSC Case Nos. 99-C-1684, 96-C-1174 (October 12, 2000); Order Denying Petition for Rehearing, NY PSC Case Nos. 99-C-1684, 96-C-1174 (September 21, 2001); Order, MI PSC Case No. U-011756 (March 8, 1999); Order, CO PUC Docket No. 98F-146T, Decision No. C99-497 (May 4, 1999)). Lastly, Verizon argues that, notwithstanding which forward-looking cost methodology the Department adopts for payphone services in this proceeding, the Department should continue to treat Verizon's payphone services as retail offerings for PSPs under Verizon's retail tariff (id. at 8).

b. NEPCC

NEPCC argues that, in the Bureau Wisconsin Order (later affirmed by the full FCC in the Wisconsin Order), the FCC's Common Carrier Bureau indicated that cost-based payphone rates should be determined by a forward-looking, economic cost methodology, and that both TELRIC and TSLRIC are examples of such methodologies (NEPCC April 24, 2003 Comments at 6 n.17). In addition, NEPCC argues that both TELRIC and TSLRIC refer to the same long-run incremental cost methodology, and that in the present context, the Department's application of either TELRIC or TSLRIC will yield the same result (NEPCC May 16, 2003 Reply Comments at 2-3). NEPCC argues that the differences in Verizon's reported results in its earlier TSLRIC study and its recent TELRIC analysis are the result of different inputs and assumptions, and not different methodologies (id. at 4). In actuality, argues NEPCC, Verizon has used the same cost models and the same underlying methodology in both analyses, with the primary difference being the level of the Department's review of the inputs and assumptions used by Verizon in its analyses (id.). Further, NEPCC argues that any "wholesale" or "retail" distinction for Verizon's payphone services is independent of whether the Department denominates the cost methodology it applies as TELRIC or TSLRIC (id.).

Moreover, NEPCC argues that not only has Verizon ignored state commission decisions that have imposed TELRIC-based pricing (such as Payphone Tariffs, MD PSC Case No. 8763, Order No. 76787 (February 27, 2001)), the state commission decisions Verizon does rely on in its comments to support its position regarding TSLRIC pricing are no longer operative (id. at 6-8 and n.12). NEPCC states that the New York, Michigan, and Colorado public utility commission decisions cited by Verizon in its comments have either been overturned by courts or have been revised by the relevant state commission based on later FCC rulings (id. at 7-8).

In addition, NEPCC argues that although the FCC did not require state commissions to impose TELRIC-based pricing for payphone services in the Payphone Orders, the FCC also did not bar state commissions from using this pricing standard (id. at 5). NEPCC argues that the FCC reiterated this conclusion in the Wisconsin Order, in which the FCC again held out the option for states to use TELRIC-based pricing (id. at 6). According to NEPCC, the FCC has never determined that TELRIC and TSLRIC are inconsistent approaches or likely to produce inconsistent results (id.). Therefore, NEPCC argues that, by requiring TELRIC-based rates for Verizon's payphone services in this proceeding, the Department is acting in compliance with FCC directives (id.).

c. Analysis and Findings

We agree with NEPCC that the FCC has not precluded state public utility commissions from using a TELRIC pricing methodology to establish payphone rates consistent with the FCC's new services test. Although Verizon is correct that the FCC did not mandate TELRIC pricing for payphone rates, Verizon errs by insisting that only TSLRIC pricing would be consistent with FCC requirements. In the Wisconsin Order, the FCC stated that:

> The LEC Coalition asserts that the [Bureau Wisconsin Order] mandates the exclusive use of the TELRIC pricing methodology and that this mandate is improper. The [Bureau Wisconsin Order], however, contains no such directive. Indeed, the [Bureau Wisconsin Order] states that LECs should use a forward-looking methodology that is "consistent" with the Local Competition Order. TELRIC is the specific forward-looking methodology described in 47 C.F.R. § 51.505 and required by our rules for use by states in determining UNE prices. States often use . . . TSLRIC . . . methodology in setting rates for intrastate services. It is consistent with the Local Competition Order for a state to use its accustomed TSLRIC methodology *(or another forward-looking methodology)* to develop the direct costs of payphone line service costs.

Wisconsin Order at ¶ 49 (internal footnotes omitted, emphasis added). Therefore, while the FCC does not mandate the use of TELRIC, the FCC has determined that the use of forward-looking methodologies, such as TELRIC, is appropriate when establishing payphone rates, and is consistent with its new services test.

Having determined that the FCC does not preclude the use of TELRIC-based pricing for payphone services, we turn to the question of whether we should require such pricing. For the following reasons, we determine that TELRIC-based pricing for Verizon's payphone services is appropriate. First, as NEPCC points out, the FCC has found that TELRIC-based pricing of discrete network elements or facilities is "likely to be more economically rational than TSLRIC-based pricing of conventional services" (NEPCC May 16, 2003 Reply Comments at 3, citing Local Competition Order at ¶ 678). In other words, for pricing of discrete elements, or as here, a combination of elements, a cost analysis at the level of the network function is preferable to a cost analysis at the level of the complete service (see id.). Second, the use of TELRIC-based pricing, with which the Department has established rates for Verizon's wholesale network elements in our D.T.E. 01-20 proceeding, is consistent with our conclusions, discussed below, regarding the wholesale nature of Verizon's payphone services. Therefore, we conclude that TELRIC is the appropriate cost methodology to establish the payphone rates at issue in this proceeding.

3. Wholesale or Retail

a. Verizon

According to Verizon, the FCC has classified PAL and PASL services as retail, not wholesale, services (Verizon April 25, 2003 Comments at 5, citing Local Competition Order at ¶ 876 ("services that incumbent LECs offer to PSPs are retail services provided to end users, and should be available at wholesale rates to telecommunications carriers and Section 251(c)(4), but need not be made available at wholesale rates to independent PSPs that are not telecommunications carriers"). Verizon asserts that even though the Department determined payphone services to be in the nature of wholesale services in its D.T.E. 01-31 proceeding, "the Department is not at liberty to override the FCC by making payphone services available to all PSPs as a wholesale tariff offering" (id. at 8). Verizon also notes that the Department has historically priced payphone access lines in the same way as business access lines and "[n]othing in the Act nor the FCC's requirements precludes the Department from continuing to apply the same tariffed retail rates to PALs and business lines based on Verizon's previously filed TSLRIC studies" (id. at 8, citing D.P.U. 86-124-D at 19-20 (1986), D.P.U. 89-300, at 79, 166, 272-73 (1990), D.P.U. 91-30, at 84-87 (1991), D.P.U. 92-100, at 53-55 (1992), and D.P.U. 93-125, at 22 (1994)). Verizon also notes that retail treatment for these services reflects Verizon's current rate structure for payphone services, noting that there is no wholesale offering similar to the flat-rated PAL usage component (id.).

b. NEPCC

NEPCC disputes Verizon's claim that the Department must continue to treat PAL and PASL services as retail offerings. NEPCC argues that the Department has already settled this question in D.T.E. 01-31, in which the Department concluded that PAL and PASL services should be treated as wholesale services for regulatory purposes, and Verizon did not appeal that conclusion (NEPCC April 24, 2003 Comments at 14-15).

c. Analysis and Findings

Historically, the Department has treated Verizon's payphone access services as retail services, tariffed in Verizon's retail tariff, M.D.T.E. No. 10, and priced equivalent to business exchange services. See D.P.U. 86-124-D at 19-20 (1986), D.P.U. 89-300, at 79, 166, 272-73 (1990), D.P.U. 91-30, at 84-87 (1991), D.P.U. 92-100, at 53-55 (1992), D.P.U. 93-125, at 22 (1994).[15] However, in the Department's Phase I Order in D.T.E. 01-31, the Department specifically reclassified payphone access services as wholesale services, finding that they are "exclusively intended for purchase by other carriers as wholesale services rather than by end-users as retail services" and required them to be priced in a "UNE-based manner" (i.e., TELRIC-based pricing). Phase I Order at 36, 95. In reclassifying PAL and PASL services, as well as other "wholesale-like" services, the Department sought to establish regulatory pricing consistency for Verizon's wholesale services on the basis that "lowering all wholesale service rates closer to incremental cost improves efficiency, promotes competition, and creates a consistent framework for all wholesale services." Phase II Order at 42. Verizon did not challenge that finding on reconsideration or on appeal. Verizon complied with the Department's conclusion in D.T.E. 01-31 by submitting TELRIC-based compliance rates in accordance with Department directives in that docket. Although the Department decided to defer approval of those rates to the instant docket, because the "Payphone Docket is specifically addressing, inter alia, the pricing of payphone services, and has a fully developed record already established" (id. at 43), the Department's reclassification of these services from retail to wholesale was settled in the D.T.E. 01-31 case, and the Department gave no indication that it would entertain reconsideration of that decision in this docket.

---

15 The Department based PAL rates on business rates because "the access line used by a[n IPP] is similar to any other business line." D.P.U. 86-124-D at 19 (1986).

Further, the FCC has not precluded states from classifying payphone access services as wholesale services. In the Local Competition Order at ¶ 876, upon which Verizon's relies in its comments, the FCC found that IPPs were not "telecommunications carriers" under the Act because many IPPs were end users. However, in Massachusetts, the Department has determined that IPPs are telecommunications common carriers under G.L. c. 159, § 12, and not end-users.[16] The Department requires IPPs to obtain registrations and to comply with all applicable common carrier requirements.[17]

Finally, we reject Verizon's claim that we should not change the regulatory classification of PAL and PASL services because the retail treatment for these services "reflects Verizon MA's current rate structure for payphone services" (Verizon April 25, 2003 Comments at 8). The TELRIC-based rates that we adopt for these services are based on a wholesale rate structure that differs in some respects from the retail rate structure of the existing rates, including, as Verizon points out, the absence of a flat-rate usage component. As noted above, the Department found in D.T.E. 01-31-Phase I that there were clear benefits to reclassifying PAL and PASL services from retail to wholesale, consistent with other

---

16 Verizon will not provide PAL or PASL service to an IPP that is not registered with the Department. But see D.P.U. 89-20, at 22-23 (1991) (finding that most payphones are public but that there could be some payphone providers that operate private payphones where "access to a pay telephone is limited to those with express specific permission of the location owner or its agent").

17 On October 7, 1997, the FCC preempted the Department's jurisdiction to determine (and tariff) payphone rates pertaining to local services provided to an end user who puts coins into a payphone to connect to service. See First Payphone Order at ¶¶ 60-61. The preemption does not, however, apply to those services provided to an end user of payphone service through the use of an operator. IPPs that provide their own operator services are required to tariff those services at the Department.

"wholesale-like" services, and that those benefits outweighed any changes in rate structure that resulted from the reclassification.[18]

C. Verizon's TELRIC-Based Proposals

1. Introduction

As discussed above, Verizon made a series of filings in this docket (March 3, April 15, and November 17, 2003) to comply with the Department's directives to propose TELRIC-based rates for its PAL and PASL services. Verizon's March 3, 2003 filing proposed PAL and PASL rates based on non-final UNE rates then under review in the Department's UNE Rates Proceeding, D.T.E. 01-20. In its April 15, 2003 filing, Verizon updated the rates proposed in the March 3, 2003 filing (although the rates were still based on non-final UNE rates), and purportedly conformed the rates to meet the requirements of the FCC's Wisconsin Order. According to Verizon, the changes between the April and March filings included the following:

(1) the recalculation of the TELRIC-based loop rate for the unlimited (flat-rated) PAL offering to reflect a weighting by density zone distributions for Massachusetts exchanges where the service is available;

18 While Verizon's proposed UNE-based PAL and PASL rates have been under review in this docket, the Department has allowed Verizon to continue to tariff existing PAL and PASL rates in its retail tariff, Tariff M.D.T.E. No. 10, despite the Department's having reclassified these services as wholesale in the Phase I Order, pending a final Order in this docket. Because we make clear in this Order that PAL and PASL services are reclassified as wholesale services, we now require Verizon to remove those services from its retail tariff, Tariff M.D.T.E. No. 10, and tariff them in an appropriate wholesale tariff (see Section IV, below, for additional discussion).