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March 30, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 96-128 – *Ex Parte* Filing Of The New England Public Communications Council, Inc. ("NEPCC") Relating To Order By The Supreme Judicial Court Of Massachusetts In *New England Public Communications Council, Inc. v. Department of Telecommunications and Energy*, No. SJ-2004-0327

Dear Ms. Dortch:

By this *ex parte* filing, the NEPCC, a trade association of independent providers of payphone services, formally submits for Commission consideration in the referenced Docket the attached Order and accompanying letter to Chairman Kevin Martin from the Supreme Judicial Court of Massachusetts ("SJCM" or "Court").[1] Therein, the SJCM seeks guidance from the Commission on the requirements of the various orders issued by the Commission in this Docket to implement Section 276 of the Communications Act of 1934, as amended (collectively, the *Payphone Orders*) with respect to refund of excessive intrastate payphone access rates. The SJCM is considering the NEPCC's appeal of a decision by the Massachusetts Department of Telecommunications and Energy ("MDTE" or "Department") denying any such refunds to the NEPCC's members.

On August 26, 2004, the NEPCC filed in this docket a copy of the MDTE decision that is the subject of the SJCM case, urging the Commission to find that the Department's actions were inconsistent with the requirements of the *Payphone Orders*. The NEPCC's filing was made in response to a petition filed by the Illinois Public Telecommunications Association ("IPTA").[2] Before the Commission sought comment on the IPTA petition, the NEPCC had already filed an appeal of the MDTE decision with the SJCM. Thereafter, the Commission sought comments on similar petitions filed by payphone associations in New York and Mississippi, all of which were

[1]The NEPCC notes that the SJCM Order and letter already were posted in the Commission's web-accessible Docket 96-128 on March 6, 2006.

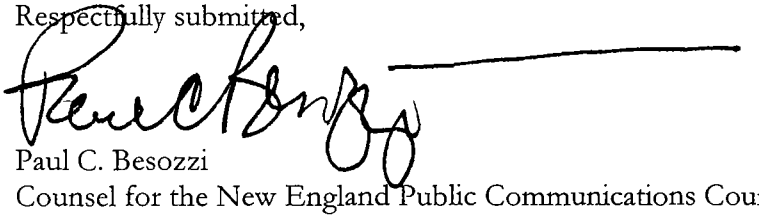
[2]FCC Public Notice, DA 04-2487, released August 6, 2004.

consolidated for consideration in this Docket[3] In light of the Commission's consideration of the very issues raised in the NEPCC appeal at the SJCM, the NEPCC then asked the Court to seek guidance from the Commission. The SJCM Order and letter attached hereto reflect the Court's decision to do so.

The NEPCC respectfully submits that the extensive comments previously submitted over the last twenty months in connection with the four petitions already being considered by the Commission have given parties ample opportunity to address, and in fact the parties have addressed completely, the questions posed by the Court. Indeed, the NEPCC would point to the IPANY petition in particular, which involved the same Bell Operating Company. Therefore, the NEPCC respectfully submits that there is no need for the Commission formally to now request yet an additional round of specific comments on the Court's questions. Interested parties would be free of course to make further *ex parte* submissions if they think it necessary.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter and its attachments are being electronically filed through the ECFS.

Respectfully submitted,



Paul C. Besozzi
Counsel for the New England Public Communications Council, Inc.

cc: Tamara Preiss

[3]FCC Public Notice, DA 04-3653, released November 19, 2004 (Petition of the Southern Public Communication Association; FCC Public Notice DA 05-49, released January 7, 2005 (Petition of the Independent Payphone Association of New York ("IPANY")) More recently, the Commission sought comment on a similar petition filed by the Florida Public Telecommunications Association, Inc. and directed that comments thereon be filed in this Docket. FCC Public Notice, DA 06-310, released February 8, 2006.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2004-0327

No. DTE 97-88/97-18

NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC.

vs.

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY and VERIZON COMMUNICATIONS OF NEW ENGLAND, INC.

ORDER

This matter came before the Court, Spina, J, presiding, on a motion to stay the above captioned appeal, and to refer certain issues to the Federal Communications Commission (FCC) under the doctrine of primary jurisdiction.

Per order entered on February 16, 2006, the Court stayed the appeal for six months, and instructed the parties to submit potential questions to be presented to the FCC. The Clerk of the Supreme Judicial Court for Suffolk County is hereby directed to present the questions submitted by petitioner, via letter addressed to the Chairman of the FCC.

By the Court (Spina, J.),

Maura S. Doyle, Clerk

Entered: March 6, 2006

The Commonwealth of Massachusetts
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
JOHN ADAMS COURTHOUSE
ONE PEMBERTON SQUARE, 1ST FLOOR
BOSTON, MASSACHUSETTS 02108-1707

MAURA S. DOYLE
CLERK

TELEPHONE: (617) 557-1180
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March 6, 2006

Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: *New England Public Communications Council, Inc. v. Department of Telecommunications and Energy and Verizon Communications of New England, Inc.*
Docket No. SJ-2004-0327
Federal Communications Commission CC Docket No. 96-128

Dear Chairman Martin:

This Court has before it the referenced appeal by the New England Public Communications Council, Inc. ("NEPCC") from a decision of the Massachusetts Department of Telecommunications and Energy ("Department") interpreting and applying the Federal Communications Commission's ("FCC" or "Commission") orders implementing Section 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 et seq. ("*Payphone Orders*")[1] More specifically, the NEPCC has challenged the Department's interpretation and application of the *Payphone Orders'*, most specifically the *Second Clarification Order*, regarding the circumstances under which those *Orders* require the refund of intrastate payphone network access charges.

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[1] The *Payphone Orders* collectively consist of the following: *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 F.C.C.R. 20541 (1996); *Order On Reconsideration*, 11 F.C.C.R. 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 F.C.C.R. 20997 (Com. Car Bur. 1997); *Second Clarification Order*, 12 F.C.C. R. 21370 (Comm. Car. Bur. 1997); *Second Report and Order*, 13 F.C.C.R. 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 F.C.C.R. 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 F.C.C.R. 9978 (Com. Car. Bur. 2000) ("*Wisconsin I Order*"), *aff'd in part, Memorandum Opinion and Order*, 17 F.C.C.R. 2051 (2002) ("*Wisconsin II Order*"), *aff'd, New England Public Communications Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert. den.*, 125 Sup. Ct 2065 (2004)

To assist the Court in its analysis of the requirements of the *Payphone Orders* regarding refunds, and pursuant to the attached order, the Court seeks the Commission's guidance on the following questions:

1. In establishing new rates for wholesale payphone access services pursuant to the FCC's "new services test", is a state utility commission required under the FCC's Payphone Orders to order a BOC to refund the difference between the new lower rates and the previously existing state-tariffed rates, where (1) the state commission had earlier allowed the existing rates to remain in effect based on the BOC's certification to the commission that the rates were in compliance with the "new services test", without any new tariff filing or commission analysis or findings under the Payphone Order standards, and (2) subsequent to the state commission's complete analysis applying the requirements of the Payphone Orders, the state commission lowered those BOC-certified rates based on a determination that (a) payphone access rates should be priced as a wholesale service and (b) such adjustment was required for the rates to be in compliance with the FCC's "new services test."

2. If such a refund is required under these circumstances, pursuant to the FCC's Payphone Orders, is the refund calculated from April 15, 1997, the date originally set by the FCC for BOC compliance with the Payphone Orders, to the date the new rates took effect?"

The Commission's prompt response to the foregoing questions would be of assistance to this Court in addressing and resolving the pending appeal.

Please address any questions on this request to Assistant Clerk Eric Wetzel at 617-557-1186.

Sincerely,

Maura S. Doyle, Clerk