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April 24, 2006

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Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association, Petition for Declaratory Ruling

Dear Ms. Dortch:

On April 24, 2006, Albert H. Kramer and Robert F. Aldrich of Dickstein Shapiro Morin & Oshinsky, on behalf of the American Public Communications Council ("APCC"), met with Tamara Preiss, Chief of the Pricing Policy Division, Wireline Competition Bureau, and Pamela Arluk and Lynne Engledow of the Division staff. We discussed the matters summarized in the attached document which was previously submitted in this docket.

Sincerely,

Robert F. Aldrich

Enclosure
cc: Tamara Preiss
Pamela Arluk
Lynne Engledow

AMERICAN PUBLIC COMMUNICATIONS COUNCIL

WHY THE COMMISSION SHOULD ISSUE A RULING ON WHETHER PSPs ARE ENTITLED TO REFUNDS OF PAYPHONE LINE CHARGES PAID IN EXCESS OF LEVELS THAT COMPLY WITH THE NEW SERVICES TEST

- Beginning in August 2004, four state payphone associations filed petitions requesting the Commission to issue a ruling that the Bell Operating Companies ("BOCs") must refund intrastate payphone line charges collected in excess of the levels found to comply with the Commission's "new services test" ("NST") ratemaking standard. The Commission should resolve this matter promptly.

I. BACKGROUND

- In the 1996 Payphone Orders, the Commission implemented the mandate of 47 U.S.C. § 276 to promote payphone competition and prevent the BOCs from discriminating in favor of their own payphone services. Among other things, the Commission required BOCs' state-tariffed charges for payphone lines to comply with the NST. While it left implementation of the NST to state commissions, the Commission made it clear that failure to comply with the NST would violate federal law. As a further incentive, the Commission made compliance with the NST a condition precedent to the BOCs becoming eligible to receive dial-around compensation for their own payphones.

- In April 1997, only days before the April 15, 1997, deadline, the BOCs informed the Commission that they did not initially understand that intrastate payphone line charges had to comply with the NST in order for BOC payphones to become eligible for payphone compensation. To allow them to collect payphone compensation pending compliance with the NST, the BOCs requested and the Commission granted a temporary waiver of the NST condition. As a condition of the waiver, the BOCs pledged and the Commission required that, once NST-compliant rates took effect, the BOCs would refund to PSPs all charges back to April 15, 1997, in excess of NST-compliant levels. *See* the "*Second Waiver Order*," released April 15, 1997, attached as Tab 1.

- Subsequently, despite what APCC believes to be the clear language of the FCC's *Second Waiver Order*, the BOCs resisted providing refunds. State public service commissions have issued divergent decisions on whether BOCs must refund payphone line charges applied in excess of NST compliant rates. *See* Tab 2.

II. WHY THE COMMISSION SHOULD RULE ON THE PETITIONS NOW

- *There are currently pending refund proceedings affecting at least 19 states.* Currently, courts in five states and public service commissions in three states are considering the refund issue. The Supreme Judicial Court of Massachusetts and the Oregon Public Service Commission are holding proceedings in abeyance and have written the Chairman to request Commission guidance on the correct interpretation of the Commission's rulings. In addition, the refund issue is pending in a case before the U.S. Ninth Circuit court of appeals involving 11 states in Qwest's service territory. See Tab 2. A timely Commission ruling issued before final rulings in those cases would ensure that the pending cases are resolved consistently and correctly.

- *The refund issue is a matter of federal law.* The state proceedings raise common issues of federal law that should be resolved by the Commission. To date, at least six state commissions and two state courts have ruled in favor of refunds, while at least seven state commissions and two state courts have ruled against refunds. Most of the state rulings have been issued in the last few years. With the states about evenly split on the refund issue, it is clear that some states have interpreted the *Payphone Orders* incorrectly. Federal agencies need not defer to erroneous state agency or court decisions on matters of federal law. Without a federal ruling, the states will continue to inconsistently interpret and apply the FCC's rules and orders.

- *Clarifying the Commission's Payphone Orders will promote uniform application of the orders and help resolve pending state proceedings.* For example, in 2002, after state commissions had adopted disparate interpretations of the NST, the Commission issued a ruling that clarified the meaning and application of the NST in order to "assist states in applying the [NST] to BOCs' intrastate payphone line rates." After the Commission issued the 2002 order, many states ordered (or approved settlements for) major reductions in the BOCs' payphone line rates.

- *APCC believes it is necessary for the Commission to defend the integrity of its processes.* To secure a waiver enabling them to collect lucrative dial-around compensation revenue, the BOCs pledged to refund payphone line charges in excess of NST-compliant rates. The Commission should make clear that carriers must deliver when they make promises to the Commission in exchange for regulatory benefits.

- *Millions of dollars are at stake.* A ruling on refunds could result in a major infusion of revenue needed to maintain payphones as a critical piece of the national communications infrastructure.

* * *

Tab 3 provides a summary of APCC's views on the merits of the refund issue.

TAB 1

Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order, 12 FCC Rcd 21370 (CCB 1997) ("*Second Waiver Order*")

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 97-805

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-128
Pay Telephone Reclassification	)	
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

ORDER

Adopted: April 15, 1997 Released: April 15, 1997

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, the Common Carrier Bureau ("Bureau") grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the "new services" test, as set forth in the Payphone Reclassification Proceeding, CC Docket No. 96-128.[1] Local exchange carriers ("LECs") must comply with this requirement, among others, before they are eligible to receive the compensation from interexchange carriers ("IXCs") that is mandated in that proceeding.[2]

2. Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines,[3] we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test,

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[1] For purposes of this Order, the term "intrastate tariff" refers to a tariff filed in the state jurisdiction and the term "interstate tariff" refers to a tariff filed in the federal jurisdiction. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, FCC 96-388 (rel. Sept. 20, 1996) ("Payphone Order"); Order on Reconsideration, FCC 96-439 (rel. Nov. 8, 1996) ("Order on Reconsideration"), appeal docketed sub nom. Illinois Public Telecommunications Assn. v. FCC and United States, Case No. 96-1394 (D.C. Cir., filed Oct. 17, 1996) (both orders together "Payphone Reclassification Proceeding").

[2] Order on Reconsideration at paras. 131-132.

[3] Id. at para. 163.

pursuant to the federal guidelines established in the Order on Reconsideration, subject to the terms discussed herein.[4] This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order,[5] including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration.[6] Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.

3. The Bureau takes this action, in response to a request by the RBOC Coalition[7] and Ameritech, pursuant to the authority delegated to it by the Commission in the Order on Reconsideration to determine whether a LEC has met the requirements of the Payphone Reclassification Proceeding prior to receiving compensation.[8] The instant Order advances the twin goals of Section 276 of the Act by promoting both competition among payphone service providers ("PSPs") and the widespread deployment of payphone services to the benefit of the general public.[9]

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[4] Id. This Order does not waive any of the other federal guidelines for intrastate payphone service tariffs. See para. 10, below.

[5] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order, DA 97-678 (Com. Car. Bur., rel. Apr. 4, 1997) ("Bureau Waiver Order").

[6] Order on Reconsideration at paras. 131-132. The Bureau Waiver Order modified these requirements slightly by granting all LECs a limited waiver of the deadline for filing the federal tariffs for unbundled features and functions, to the extent necessary, to enable LECs to file the required federal tariffs within 45 days after the April 4, 1997 release date of that order, with a scheduled effective date no later than 15 days after the date of filing. The Bureau also waived the requirement, for a period of 60 days from the release date of Bureau Waiver Order, that these interstate tariffs for unbundled features and functions be effective before the LECs are eligible to receive payphone compensation. Bureau Waiver Order at paras. 20-23.

[7] The RBOC Coalition consists of all of the Bell Operating Companies ("BOCs") except Ameritech. This Order uses the term "RBOC Coalition" to refer to the petitioners requesting the waiver, which includes Ameritech.

[8] Order on Reconsideration at para. 132. See also id. at para. 163. These delegations of authority to the Bureau are consistent with Section 0.91 of the Commission's rules, 47 C.F.R. § 0.91.

[9] 47 U.S.C. § 276(b)(1).

II. BACKGROUND

4. In the Payphone Reclassification Proceeding, the Commission noted that Telecommunications Act of 1996 fundamentally changed telecommunications regulation. It stated that the 1996 Act erects a "pro-competitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[10] To that end, the Commission advanced the twin goals of Section 276 of the Act of "promot[ing] competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public. . .".[11] It sought to eliminate those regulatory constraints that inhibit the ability both to enter and exit the payphone marketplace, and to compete for the right to provide services to customers through payphones. At the same time, the Commission recognized that a transition period is necessary to eliminate the effects of some long-standing barriers to full competition in the payphone market. For this reason, it concluded that it would continue, for a limited time, to regulate certain aspects of the payphone market, but only until such time as the market evolves to erase these sources of market distortions.[12]

5. In the Payphone Order, the Commission concluded that, consistent with Section 276 of the Act, PSPs are to be compensated for "each and every completed intrastate and interstate call" originated by their payphones.[13] For the first year of the compensation provided by the Payphone Order, the Commission required those IXCs with annual toll revenues in excess of $100 million to pay PSPs proportionate shares, based on their respective market shares, of interim, flat-rated compensation in the amount of $45.85 per payphone per month.[14] This monthly amount is to compensate each payphone for an average of 131 access code calls and subscriber 800 calls. The Commission concluded that LEC PSPs would be eligible to receive this compensation by April 15, 1997, once the LEC, among other things, terminated certain subsidies flowing to its payphone operations.[15]

6. In the Order on Reconsideration, the Commission concluded that to be eligible to receive compensation, a LEC must be able to certify the following:

1) it has an effective cost accounting manual ("CAM") filing; 2) it has an effective

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[10] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[11] 47 U.S.C. § 276(b)(1).

[12] Payphone Order at paras. 11-19.

[13] Id. at paras. 48-76.

[14] Id. at paras. 119-126.

[15] Order on Reconsideration at para. 131.

> interstate CCL tariff reflecting a reduction for deregulated payphone costs and reflecting additional multiline subscriber line charge ("SLC") revenue; 3) it has effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate subsidies; 4) it has deregulated and reclassified or transferred the value of payphone customer premises equipment ("CPE") and related costs as required in the Report and Order; 5) it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphones); and 6) it has in effect intrastate and interstate tariffs for unbundled functionalities associated with those lines.[16]

In addition, the Commission clarified "that the requirements of the Report and Order apply to inmate payphones that were deregulated in an earlier order."[17]

7. The Commission also applied additional requirements to those LECs that are BOCs:

> In addition to the requirements for all other LECs, BOCs must also have approved [comparably efficient interconnection ("CEI")] plans for basic payphone services and unbundled functionalities prior to receiving compensation. Similarly, prior to the approval of its [CEI] plan, a BOC may not negotiate with location providers on the location provider's selecting and contracting with the carriers that carry interLATA calls from their payphones.[18]

8. In the Order on Reconsideration, the Commission concluded that where LECs have already filed intrastate tariffs for payphone services, states may, after considering the requirements of the Order on Reconsideration, the Payphone Order, and Section 276, conclude: (1) that existing tariffs are consistent with the requirements of the Payphone Order, as revised in the Order on Reconsideration, and (2) that in such case no further filings are required.[19]

III. LIMITED WAIVER PERTAINING TO STATE TARIFFING REQUIREMENTS

A. Background

9. The Commission concluded in the Order on Reconsideration that LECs are

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[16] Id.

[17] Id. citing Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, Declaratory Ruling, 11 FCC Rcd 7362 (1996) ("Inmate Services Order"); Petitions for Waiver and Partial Reconsideration or Stay of Inmate-Only Payphones Declaratory Ruling, Order, 11 FCC Rcd 8013 (Com. Car. Bur. 1996) ("Inmate Services Waiver Order").

[18] Order on Reconsideration at para. 132.

[19] Id. at para. 163.

required to tariff basic payphone lines (smart, dumb, and inmate) at the state level only.[20] Unbundled features and functions provided to others and taken by a LEC's payphone operations, however, must be tariffed in both the intrastate and interstate jurisdictions.[21] In addition, in the Payphone Order, the Commission required that, pursuant to the mandate of Section 276(b)(1)(B), incumbent LECs must remove from their intrastate rates any charges that recover the costs of payphones. The Payphone Order required that states determine the intrastate rate elements that must be removed to eliminate any intrastate subsidies. These revised rates must be effective no later than April 15, 1997.[22]

10. In the recent Bureau Waiver Order, we emphasized that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines;[23] and (2) that the states ensure that payphone costs for unregulated equipment and subsidies be removed from the intrastate local exchange service and exchange access service rates.[24] We stated in the Bureau Waiver Order that LEC intrastate tariffs must comply with these requirements by April 15, 1997 in order for the payphone operations of the LECs to be eligible to receive payphone compensation. The Bureau Waiver Order also clarified the unbundled features and functions subject to the requirements of the Payphone Proceeding.[25]

11. We noted in the Bureau Waiver Order that the guidelines for state review of intrastate tariffs are essentially the same as those included in the Payphone Order for federal tariffs.[26] On reconsideration, the Commission stated that although it had the authority under Section 276 to require federal tariffs for payphone services, it delegated some of the tariffing requirements to the state jurisdiction. The Order on Reconsideration required that state tariffs for payphone services meet the requirements outlined above.[27] The Order on Reconsideration

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[20] Id. at paras. 162-165. The Commission provided guidelines pursuant to which the states are to review the state tariffs subject to the Payphone Reclassification Proceeding. Id. at para. 163.

[21] Id. at paras. 162-165.

[22] Payphone Order at para. 186.

[23] Order on Reconsideration at para. 163. As stated in the Order on Reconsideration, the intrastate tariffs are subject to the new services test. Order on Reconsideration at para. 163, n. 492.

[24] Payphone Order at para. 186.

[25] Bureau Waiver Order at paras. 15-19.

[26] Id. at para. 32.

[27] See para. 6, above.

provides that states that are unable to review these tariffs may require the LECs to file the tariffs with the Commission.[28]

12. The Bureau Waiver Order also clarified that, for purposes of meeting all of the requirements necessary to receive payphone compensation, the question of whether a LEC has effective intrastate tariffs is to be considered on a state-by-state basis. Under this approach, assuming the LEC has complied with all of the other compliance list requirements,[29] if a LEC has effective intrastate tariffs in State X and has filed tariffs in State Y that are not yet in effect, then the LEC PSP will be able to receive payphone compensation for its payphones in State X but not in State Y. The intrastate tariffs for payphone services, including unbundled features, and the state tariffs removing payphone equipment costs and subsidies must be in effect for a LEC to receive compensation in a particular state.

B. Request for Waiver and Comments

13. On April 10, 1997, the RBOC Coalition, joined by Ameritech, requested that the Commission grant a limited waiver to extend for 45 days the requirement that a LEC's intrastate tariffs for payphone services comply with the federal guidelines set forth in paragraph 163 of the Order on Reconsideration, specifically that those tariffs satisfy the "new services"[30] test.[31] It requests that this 45-day period correspond to the same period of time that the Commission granted in its April 4, 1997 Bureau Waiver Order for limited waiver of the LECs' federal tariffs.[32] The RBOC Coalition states that it is not seeking a waiver of the requirement that all of the BOCs have effective intrastate tariffs by April 15, 1997 for basic payphone lines and unbundled features and functions.[33]

14. In support of its request, the RBOC Coalition argues that none of the BOCs "understood the payphone orders to require existing, previously-tariffed intrastate payphone

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[28] Order on Reconsideration at para. 163.

[29] See id. at paras. 131-132.

[30] The Order on Reconsideration states that "[t]he new services test required in the Report and Order is described at 47 C.F.R. Section 61.49(g)(2). See also Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, 6 FCC Rcd 4524, 4531(1991) at paras. 38-44." Order on Reconsideration at para. 163, n. 492.

[31] Ex Parte Letter of Michael Kellogg, Counsel, RBOC Coalition to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 10, 1997) ("RBOC Request"); Ex Parte Letter of Michael Kellogg, Counsel, RBOC Coalition to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("RBOC Clarification Letter").

[32] RBOC Request at 1.

[33] RBOC Clarification Letter at 1.

services, such as the COCOT line, to meet the Commission's new services test."[34] It further argues that, in some states, there may be a discrepancy between the existing state tariff rates and state tariffs that comply with the new services test, which would require the LEC to file new tariff rates.[35] In most states, however, the RBOC Coalition states, "ensuring that previously tariffed payphone services meet the new services test . . . should not be too problematic."[36] The RBOC Coalition argues that this 45-day period would allow the LECs to file new intrastate tariffs in the states where it is necessary without delaying its eligibility to receive compensation.[37] It also states that special circumstances exist for a waiver in that the federal new services test had not previously been applied to existing state services, and that the LECs did not understand until the release of the Bureau Waiver Order that the Commission meant to require application of this test to those services.[38] The RBOC Coalition also states that "[e]ach LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised."[39] In addition, the RBOCs state that they voluntarily commit "to reimburse or provide credit to those purchasing the services back to April 15, 1997". . . "to the extent that the new tariff rates are lower than the existing ones."[40]

15. In ex parte documents filed in response to the submission of the RBOC Coalition, AT&T and MCI each argue that there is no basis for the BOCs' claim that they did not understand that basic intrastate payphone tariffs had to comply with the Commission's "new services" test.[41] In addition, Sprint filed an ex parte document stating that "[w]hether or not the RBOCs exercised good faith in ignoring the plain language of paragraph 163 of the Reconsideration Order . . . is beside the point[,]" because the RBOCs should not be entitled to receive compensation unless they are in compliance with all of the requirements of Section 276 and the Commission's rules.[42] Both MCI and Sprint oppose the RBOC Coalition's request for

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[34] Id. at 1.

[35] Id.

[36] Id.

[37] Id. at 2.

[38] Id. at 3.

[39] Id.

[40] Id.

[41] Ex Parte Letter of E.E. Estey, Government Affairs Vice President, AT&T to William Caton, Acting Secretary, FCC (April 11, 1997) ("AT&T Letter"); Ex Parte Letter of Mary Sisak, Senior Counsel, MCI to Mary Beth Richards, Deputy Chief Common Carrier Bureau, FCC (April 11, 1997) ("MCI Letter").

[42] Ex Parte Letter of Richard Juhnke, General Attorney, Sprint to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("Sprint Letter").

a waiver.[43] AT&T states, however, that it takes no position on the merits of the RBOC Coalition's request for a waiver, "provided that all necessary cost-based tariffs are in place within the waiver period established by the Bureau's April 4, 1997 Order."[44]

16. More specifically, AT&T contends that the Commission should reiterate that a LEC is not eligible for payphone compensation "until it has provided proof of state action verifying the LEC's compliance with Section 276[,]" particularly with regard to the elimination of intrastate payphone subsidies.[45] AT&T states that the available evidence, namely the "wide and unexplained gap between the reasonably expected rate impacts of the removal of LEC payphone equipment from their regulated accounts and recent actual intrastate rate reductions," suggest that LECs have not removed intrastate payphone subsidies.[46] MCI argues that while there will be no harm to the BOCs if they are required to have effective intrastate tariffs before they receive compensation, the IXCs that are required to pay the compensation will be harmed because the BOCs will be receiving the compensation provided by the Payphone Reclassification Proceeding while they are still recovering payphone costs through tariffed services.[47] MCI also argues that the request of the RBOC Coalition would be properly treated as an untimely petition for reconsideration of the Commission's payphone orders.[48] Sprint contends that the practical effect of granting the relief requested by the RBOC Coalition would be to allow the BOCs to receive compensation before they have in effect cost-based rates at the state level for their payphone services.[49] Sprint contends further that it is inconceivable that this "premature imposition of [the compensation] burden on IXCs and their customers could be squared with the public interest . . .".[50] On the other hand, Sprint states that it would not object to allowing the LECs to defer the effective date of the reductions in their interstate common carrier line reductions in those states where they have yet to fulfill all of the requirements for compensation.[51]

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[43] MCI Letter at 1; Sprint Letter at 1.

[44] AT&T Letter at 1.

[45] Id. at 3. AT&T further contends that "[s]pecifically, the Commission should make it clear that no LEC is entitled to receive payphone compensation in any state until (1) it provides evidence that its state commission has actually considered these matters and (2) the state has affirmatively determined that all payphone subsidies have been eliminated from intrastate rates." Id. (emphasis in the original).

[46] Id.

[47] MCI Letter at 1.

[48] Id. at 2.

[49] Sprint Letter at 2.

[50] Id.

[51] Id. at 3.

17. The American Public Communications Council ("APCC"), a trade association of independent PSPs, contends in an ex parte filing that there was no ambiguity in the Payphone Reclassification Proceeding that existing payphone service tariffs are subject to the "new services" test.[52] APCC further contends that allowing the LECs to collect compensation before "complying with a key condition for any competitive telecommunications market -- cost-based interconnection with bottleneck facilities -- would be contrary to the basic purposes of the Act and the [Payphone Reclassification Proceeding]."[53] APCC proposes, instead, that the LECs should be allowed "to defer the effective date of . . . detariffing requirements for a 90-day period to allow them to bring their state payphone services tariffs into compliance with the [Payphone Reclassification Proceeding], provided that the LEC refiles all its state-tariffed services offered to PSPs, so as to ensure state commissions an opportunity to review all payphone interconnection services under the required uniform pricing standard."[54] APCC argues that the Commission "must simply order all tariffs to be refiled."[55]

C. Waiver

18. Upon reviewing the contentions of the RBOC Coalition and the language it cites from the two orders in the Payphone Reclassification Proceeding, we conclude that while the individual BOCs may not be in full compliance with the intrastate tariffing requirements of the Payphone Reclassification Proceeding, they have made a good faith effort to comply with the requirements. The RBOC Coalition concedes that the Commission's payphone orders, as clarified by the Bureau Waiver Order, mandate that the payphone services a LEC tariffs at the state level are subject to the new services test and that the requisite cost-support data must be submitted to the individual states.[56] In addition, the RBOC Coalition states that it will take whatever action is necessary to comply with the Commission's orders in order to be eligible to receive payphone compensation at the earliest possible date.[57] Therefore, we adopt this Order, which contains a limited waiver of the federal guidelines for intrastate tariffs, specifically the requirement that LECs have filed intrastate payphone service tariffs as required by the Order on Reconsideration and the Bureau Waiver Order that satisfy the new services test, and that effective intrastate payphone service tariffs comply with the "new services" test of the federal guidelines for the purpose of allowing a LEC to be eligible to receive payphone compensation, as discussed below. The existing intrastate tariffs for payphone services will continue in effect until the intrastate

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[52] Ex Parte Letter of Albert Kramer, Counsel, APCC to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("APCC Letter").

[53] Id. at 2.

[54] Id. at 3 (emphasis in the original).

[55] Id. (emphasis in the original).

[56] RBOC Request at 1-3.

[57] Id.

tariffs filed pursuant to the Order on Reconsideration, the Bureau Waiver Order and this Order become effective. Because other LECs may also have failed to file the intrastate tariffs for payphone services that comply with the "new services" test of the federal guidelines, we apply this limited waiver to all LECs, with the limitations set forth herein.

19. Consistent with our conclusions above and in the interests of bringing LECs into compliance with the requirements of the Payphone Reclassification Proceeding, we waive for 45 days from the April 4, 1997 release date of the Bureau Waiver Order the requirement that LEC intrastate tariffs for payphone services comply with the "new services" test of the federal guidelines, as set forth in paragraph 163 of the Order on Reconsideration and clarified in the Bureau Waiver Order. Pursuant to the instant Order, LECs must file intrastate tariffs for payphone services, as required by the Payphone Reclassification Proceeding consistent with all the requirements set forth in the Order on Reconsideration, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order. Any LEC that files these intrastate tariffs for payphone services within 45 days of the release date of the Bureau Waiver Order will be eligible to receive the payphone compensation provided by the Payphone Reclassification Proceeding as of April 15, 1997, as long as that LEC has complied with all of the other requirements set forth in paragraph 131 (and paragraph 132 for the BOCs) of the Order on Reconsideration, subject to the clarifications and limited waiver in the Bureau Waiver Order.[58] Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. This waiver permits the LEC to file intrastate tariffs that are consistent with the "new services" test of the federal guidelines set forth in the Order on Reconsideration, as clarified by the Bureau Waiver Order.[59] The existing intrastate payphone service tariffs will continue in effect until the intrastate tariffs filed pursuant to this Order become effective.[60]

20. The RBOC Coalition and Ameritech have committed, once the new intrastate tariffs are effective, to reimburse or provide credit to its customers for these payphone services from April 15, 1997, if newly tariffed rates, when effective, are lower than the existing rates. This action will help to mitigate any delay in having in effect intrastate tariffs that comply with the guidelines required by the Order on Reconsideration, including the concern raised by MCI that the subsidies from payphone services will not have been removed before the LECs receive payphone compensation.[61] A LEC who seeks to rely on the waiver granted in the instant

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[58] Because the industry has elected to bill for and pay out compensation on a quarterly basis, the actual payment for compensation that begins to accrue on April 15, 1997 will not be made until after the requisite intrastate tariffs are filed.

[59] Bureau Waiver Order at paras. 29-33.

[60] The states must act on the tariffs filed pursuant to this Order within a reasonable period of time. The Commission retains jurisdiction under Section 276 to ensure that all requirements of that statutory provision and the Payphone Reclassification Proceeding, including the intrastate tariffing of payphone services, have been met. 47 U.S.C. § 276.

[61] Order on Reconsideration at para. 163.

Order must also reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates. We note, in response to the arguments raised by the IXCs, that because this Order does not waive the requirement that subsidies be removed from local exchange service and exchange access services, the "harm" to the IXCs resulting from the delayed removal of subsidies from some intrastate payphone service tariffs will be limited.

21. We conclude that the waiver we grant here, which is for a limited duration to address a specific compliance issue, is consistent with, and does not undermine, the rules adopted by the Commission in the Payphone Reclassification Proceeding. Therefore, we reject the various alternatives to granting a waiver that were suggested by APCC and the IXCs. More specifically, we conclude that APCC's proposal to require the refiling of all intrastate payphone service tariffs would unduly delay, and possibly undermine, the Commission's efforts to implement Section 276 and the congressional goals of "promot[ing] competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public. . .".[62] In response to Sprint's proposal that we delay the effective date of the LECs' interstate carrier common line reductions, we conclude that the better approach would be to evaluate requests for such treatment by individual LECs on a case-by-case basis. In addition, we decline to treat the request of the RBOC Coalition as an untimely petition for reconsideration of the Commission's rules, because the RBOC Coalition does not seek reconsideration of the rules adopted in the Payphone Reclassification Proceeding, but instead seeks additional time, in a specific, limited circumstance, to comply with those rules.

22. In response to AT&T's arguments that a LEC must show proof that its intrastate tariffs have removed payphone subsidies consistent with Section 276, we note the Commission concluded that "[t]o receive compensation a LEC must be able to certify"[63] that it has satisfied each of the individual prerequisites to receiving the compensation mandated by the Payphone Reclassification Proceeding.[64] The Commission did not require that the LECs file such a certification with it. Nothing in the Commission's orders, however, prohibits the IXCs obligated to pay compensation from requiring that their LEC payees provide such a certification for each prerequisite. Such an approach is consistent with the Commission's statement that "we leave the details associated with the administration of this compensation mechanism to the parties to determine for themselves through mutual agreement."[65]

23. Waiver of Commission rules is appropriate only if special circumstances

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[62] 47 U.S.C. § 276(b)(1).

[63] Order on Reconsideration at para. 131 (emphasis added).

[64] See para. 6, above.

[65] Order on Reconsideration at para. 115.

warrant a deviation from the general rule[66] and such deviation serves the public interest.[67] Because the LECs are required to file, and the states are required to review, intrastate tariffs for payphone services consistent with federal guidelines, which, in some cases, may not have been previously filed in this manner at the intrastate level, we find that special circumstances exist in this case to grant a limited waiver of brief duration to address this responsibility. In addition, for the reasons stated above, our grant of a waiver in this limited circumstance, does not undermine, and is consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated by payphones. Moreover, the states' review of the intrastate tariffs that are the subject of this limited waiver will enable them to determine whether these tariffs have been filed in accordance with the Commission's rules, including the "new services" test. Accordingly, we grant a limited waiver for 45 days from the April 4, 1997 release date of the Bureau Waiver Order the requirement that LEC intrastate tariffs for payphone services comply with the "new services" test of the federal guidelines, as set forth in paragraph 163 of the Order on Reconsideration, subject to the terms discussed herein. This Order does not waive any of the other requirements set forth in paragraphs 131-132 of the Order on Reconsideration.[68]

IV. CONCLUSION

24. In this Order, the Bureau grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the "new services" test, as set forth in the Payphone Reclassification Proceeding. LECs must comply with this requirement, among others, before they are eligible to receive the compensation from IXCs that is mandated in that proceeding.

25. Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines required by the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become

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[66] Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[67] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[68] Id.

effective. A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.

V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Sections 4(i,), 5(c), 201-205, 276 of the Communications Act of 1934, as amended, 47 U.S.C.§§ 154(i), 155(c), 201-205, 276, and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R.§§ 0.91 and 0.291, that limited waiver of the Commission's requirements to be eligible to receive the compensation provided by the Payphone Reclassification Proceeding, CC Docket No. 96-128, IS GRANTED to the extent stated herein.

27. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards for

Regina M. Keeney
Chief, Common Carrier Bureau

TAB 2

PENDING PROCEEDINGS AND PRIOR DECISIONS ON REFUNDING BOC PAYPHONE LINE CHARGES IN EXCESS OF NEW SERVICES TEST-COMPLIANT LEVELS

PENDING PROCEEDINGS AND PRIOR DECISIONS ON REFUNDING BOC PAYPHONE LINE CHARGES IN EXCESS OF NEW SERVICES TEST-COMPLIANT LEVELS

I. PENDING NST REFUND PROCEEDINGS

A. State Commissions

- Public Utility Commission of Oregon, *Northwest Public Communications Council v. Qwest Corporation*, Dkt. No. DR 26/UC 600, Ruling (ALJ March 23, 2005) *aff'd* Order (PUCO May 3, 2005).

- Public Service Commission of Wisconsin, *Investigation of the Access Line Rates of Wisconsin Bell, Inc., d/b/a SBC Wisconsin, that Apply to Private Payphone Providers*, Dkt. No. 6720-TR-108, Interlocutory Order and Amended Notice of Proceeding (June 15, 2005)

- Missouri Public Service Commission, *Tari Christ et al. v. Southwestern Bell Telephone Company*, Case No. TC-2005-0067 (filed September 15, 2004)

B. State Courts

- *Illinois Public Telecommunications Association v. Illinois Commerce Commission*, No. 04-0225 (App. Ct. Ill., 1st Dist., petition for rehearing pending).

- *New England Public Communications Council v. Dept. of Telecommunications and Energy*, No. SJ-2004-0327 (Mass. Sup. Jud. Ct., filed July 23, 2004)

- *Michigan Bell Telephone Company, Inc. d/b/a SBC Michigan, et al. v. Michigan Public Service Commission, et al.*, Case Nos. 254980, 261341 (Mich. Ct. App.)

- *Payphone Association of Ohio v. The Public Utilities Commission of Ohio*, No. 2004-2128 (Sup. Ct. Ohio, filed Dec. 27, 2004)

C. Federal Courts

- *Davel Communications, Inc., et al. v. Qwest Corporation*, No. 04-35677 (9th Cir., filed Aug. 2, 2004) (involving 11 states served by Qwest)

- *Southern Public Communication Association v. Mississippi Public Service Commission and BellSouth Telecommunications, Inc.*, C.A. No. 3:04-cv-881 (S.D. Miss.)

II. PRIOR DECISIONS

A. State Commissions

1. Refunds granted

- Kentucky Public Service Commission, *Deregulation of Local Exchange Companies' Payphone Service*, Case No. 361, Order (January 5, 1999), Order (May 1, 2003)

- Public Service Commission of South Carolina, *Request of BellSouth Telecommunications, Inc. for Approval of Revisions to Its General Subscriber Service Tariff and Access Service to Comply with the FCC's Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Docket No. 97-124-C, Order Setting Rates for Payphone Lines and Associated Features (Order No. 1999-285, April 19, 1999)

- Indiana Utility Regulatory Commission, *Request of the Indiana Payphone Association for the Commission to Conduct an Investigation of Local Exchange Company Pay Telephone Tariffs for Compliance with Federal Regulations, and to Hold Such Tariffs in Abeyance Pending Completion of Such Proceeding*, Cause No. 40830, Final Order (October 6, 1999), Order on Less Than All of the Issues (September 6, 2000)

- Tennessee Regulatory Authority, *All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service As Required by Federal Communications Commission (FCC) Docket 96-128*, Docket No. 97-00409, Interim Order (February 1, 2001)

- Michigan Public Service Commission, *Michigan Pay Telephone Association v. Ameritech Michigan and GTE North Incorporated*, Case No. U-11756 (after remand), Opinion and Order, 2004 Mich. PSC LEXIS 65 (March 16, 2004) (partial grant)

- Alabama Public Service Commission, *Southern Public Communication Association v. BellSouth Telecommunications, Inc.*, Dkt. No. 29172, Order (June 14, 2004)

2. Refunds denied

- Illinois Commerce Commission, *Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket No. 98-1095, Interim Order (November 12, 2003)

- Michigan Public Service Commission, *Michigan Pay Telephone Association v. Ameritech Michigan and GTE North Incorporated*, Case No. U-11756 (after

remand), Opinion and Order 2004 Mich. PSC LEXIS 65 (March 16,2004) (partial denial)

- Massachusetts Department of Telecommunications and Energy, *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,* D.P.U./D.T.E. 97-98/97-18 (Phase II), Order (June 23, 2004)

- Mississippi Public Service Commission, *Complaint of the Southern Public Communications Association for Refund of Excess Charges by BellSouth Telecommunications, Inc. Pursuant to its Rates for Payphone Line Access, Usage, And Features, Docket No. 2003-AD-927,* Order (Sept. 1, 2004)

- Public Utilities Commission of Ohio, *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services,* Case No. 96-1310-TP-COI (Sept. 1, 2004)

- Florida Public Service Commission, *Petition for expedited review of BellSouth Telecommunications, Inc.'s intrastate tariffs for pay telephone access services (PTAS) rate with respect to rates for payphone line access, usage, and features, by Florida Public Telecommunications Association,* Dkt. No. 030300-TP, OrderNo. PSC-04-0974-FOF-TP (Oct. 7, 2004)

- Vermont Public Service Board, *Investigation into Public Access Line Rates of Verizon New England Inc., d/b/a Verizon Vermont,* Dkt. No. 6882, Order (Oct. 21, 2005)

B. State Courts

1. Refunds granted

- *Bell South v. Tennessee Regulatory Authority,* 98 S.W.3d 666, 666-670 (Tenn. Ct. App. 2002)

- *Kentucky Payphone Association, Inc., v. Public Service Commission of Kentucky,* Order, Civ. Act. No. 03-CI-00797 (Ky., Franklin Cir. Ct., Nov. 23, 2004) (refunds ordered back to Jan. 31, 2002).

2. Refunds denied

- *Independent Payphone Association of New York v. Public Service Commission of the State of New York and Verizon New York, Inc.,* 5 A.D.3d. 960, 774 N.Y.S.2d. 197 (2004)

- *Illinois Public Telecommunications Association v. Illinois Commerce Commission,* No. 04-0225, Order (App. Ct. Ill., 1st Dist., November 23, 2005).

TAB 3

APCC'S POSITION ON THE MERITS OF THE NST REFUND ISSUE

APCC'S POSITION ON THE MERITS OF THE NST REFUND ISSUE

I. THE *SECOND WAIVER ORDER* REQUIRED REFUNDS WHEREVER BOCS WERE ALLOWED TO BEGIN COLLECTING PAYPHONE COMPENSATION BEFORE COMPLYING WITH THE NST

- *Was NST compliance a pre-condition to the BOCs collecting dial-around compensation?*
  - *PSP position*: Yes.
  - *BOC position:* No.
  - *Why the PSP position should prevail:* This point was settled long ago by the clear language of the Commission's 1996 and 1997 orders.
- *Which rates are subject to the Second Waiver Order's refund requirement?*
  - *PSP position*: The *Second Waiver Order* applied wherever a BOC made a compliance filing after the waiver was granted.
  - *BOC position*: The *Second Waiver Order* applied only where BOCs specifically proposed new payphone line rates, and only to the rates they proposed to change.
  - *Why the PSP position should prevail:*
    - The BOCs were allowed to begin collecting dial-around compensation and thus received the benefit of the waiver wherever they made a compliance filing by May 19, 1997, regardless of its content. To require BOCs to pay refunds only if they proposed to reduce their rates would unfairly penalize BOCs that sought to comply while rewarding BOCs who did not seriously attempt to comply, but instead left non-compliant rates in effect. The *Second Waiver Order* rationally sought (1) to protect all BOCs whose existing rates might not comply with the NST on the date of the waiver and (2) to protect PSPs and the public from regulatory delays that could prolong inflated payphone line rates in violation of the *Payphone Orders*.
- *To what time periods does the Second Waiver Order refund requirement apply?*
  - *PSP position*: The waiver and refund requirement applies to the period from April 15, 1997 until the date that NST-compliant rates took effect.
  - *BOC position*: The waiver and refund requirement applied only to the period between the original compliance deadline, April 15, 1997, and the post-waiver filing deadline, May 19, 1997.

- *Why the PSP position should prevail:*

  - The *Second Waiver Order* required BOCs to pay refunds "if newly tariffed rates, *when effective,* are lower than the existing rates." Refunds are required if the rate that actually *became effective* after review by the state public service commission in accordance with the correct standard was lower than the existing rate.

  - The rate *filed* on May 19, 1997, was not automatically the NST-compliant rate; it was only the rate the BOC *claimed* to be NST-compliant. Frequently the filed rate was ultimately found to be non-compliant. If the Commission had cut off the refund as of the May 19 filing date and based the refund on the filed rate, PSPs would not be protected from continuing to pay inflated rates.

  - The 45-day period in the *Second Waiver Order* was a limitation on the BOCs' right to collect dial-around compensation without having non-compliant NST rates; it did not limit the BOCs' obligation to pay refunds. The intent of the 45 days was to ensure that BOCs acted promptly to correct their rates. The purpose of the refund was to ensure that, even after the waiver expired, non-compliant BOCs could avoid losing eligibility for dial-around compensation, by effectively ensuring that they were (retroactively) compliant as of April 15, 1997. Making the 45 days a limitation on refunds would have encouraged the BOCs to delay compliance, the exact opposite of the order's intent. Moreover, it would mean that BOCs with non-NST-compliant rates would not be protected from being subsequently found ineligible for dial-around compensation.

II. EVEN WITHOUT THE *SECOND WAIVER ORDER*, REFUNDS ARE REQUIRED BY FEDERAL LAW

- *Non-compliance with the NST violated Section 276(a) of the Act and the Payphone Orders.* Refunding excessive charges is the normal remedy for unlawful carrier charges. Where a carrier has been found to assess charges in violation of rules issued by the Commission to prevent discrimination, PSPs have a right to claim refunds of the excess charges.

- Requiring the BOCs to refund the excess line charges unlawfully collected is preferable to the alternative remedy – requiring the BOCs to disgorge the compensation that they collected when they were not eligible to do so.

  - Refunding to interexchange carriers ("IXCs") the dial-around compensation collected while a BOC was ineligible would be far more onerous to the BOCs than refunding the excess payphone line charges, and would provide an undeserved windfall for IXCs. By contrast, a

refund of excess line charges would return to PSPs money that they should never have had to pay in the first place.

III. THE FILED RATE DOCTRINE HAS NO IMPACT ON THE REFUND OBLIGATION

- In requesting waivers, the RBOCs expressly waived any filed rate doctrine claims.

- The *Payphone Orders* adopted federal regulations and the *Second Waiver Order* imposed federal conditions for waiver of a federal requirement. The filed rate doctrine that the RBOCs are asserting is founded on state law. Even if otherwise applicable, the state filed rate doctrine cannot block federally mandated refunds.

TAB 4

FCC PUBLIC NOTICE AND LETTER FROM SUPREME JUDICIAL COURT OF MASSACHUSETTS REQUESTING GUIDANCE ON THE NST REFUND ISSUE

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 06-780
Released: April 3, 2006

NEW ENGLAND PUBLIC COMMUNICATIONS COUNCIL, INC. FILING OF LETTER FROM SUPREME JUDICIAL COURT OF MASSACHUSETTS REGARDING IMPLEMENTATION OF THE PAY TELEPHONE COMPENSATION PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996

CC Docket No. 96-128

On March 30, 2006, the New England Public Communications Council, Inc. (NEPCC) filed an *ex parte* letter with the Commission in CC Docket No. 96-128. In the letter, the NEPCC submits for the Commission's consideration an order of the Supreme Judicial Court of Massachusetts and a letter from that court addressed to FCC Chairman Kevin J. Martin requesting Commission guidance in interpreting and applying Commission orders implementing section 276 of the Communications Act of 1934, as amended, and various Commission payphone orders.[1] In particular, the court seeks guidance on the circumstances under which those orders might require refund of payphone intrastate line rate charges.[2] NEPCC observes that the issues raised by the court are pending before the Commission as a result of four petitions for declaratory ruling filed by other parties, all of which were consolidated in this docket.[3] Accordingly, the Commission will consider the court's request in conjunction with its consideration of the petitions for declaratory ruling, all of which seek refunds of payphone line rates. Interested parties are reminded that they may submit *ex parte* presentations regarding the court's request or any other issues in this docket.

This is a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[4] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally

[1] *See* Letter from Paul C. Besozzi, Counsel for NEPCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (filed March 30, 2006).

[2] *Id.* at Attachment.

[3] *Id.* at 2; *see also* Illinois Public Telecommunications Association Petition for a Declaratory Ruling, CC Docket No. 96-128 (filed July 30, 2004); The Southern Public Communication Association Petition for a Declaratory Ruling, CC Docket No. 96-128 (filed Nov. 9, 2004); Petition of the Independent Payphone Association for New York, Inc. for an Order of Pre-Emption and Declaratory Ruling, CC Docket No. 96-128 (filed Dec. 29, 2004); Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and For an Order of Preemption, CC Docket No. 96-128 (filed Jan. 31, 2006).

[4] *See* 47 C.F.R. §§ 1.1200, 1.1206.

is required.[5] Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules.[6]

Persons making written *ex parte* presentations may file them using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[7] Written *ex parte* presentations filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/cgb/ecfs/. Only one copy of an electronic submission must be filed in a single docket. On completing each transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case, **CC Docket No. 96-128**. Parties may also submit an electronic *ex parte* by Internet e-mail. To get filing instructions for e-mail filing, filers should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and instructions will be sent in reply. Parties are strongly encouraged to file their *ex partes* electronically using the Commission's ECFS.

Parties who choose to file by paper must file an original and one copy of each filing. Paper filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners, and any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554. Parties should also send one copy of their filings to the Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, 12th Street, SW, Washington, D.C. 20554. In addition, parties should send one copy to the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via email to fcc@bcpiweb.com.

Documents in CC Docket No. 96-128, including the NEPCC letter, the court order, and the letter to Chairman Martin, are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting the Consumer & Governmental Affairs Bureau, at (202) 418-0531, TTY (202) 418-7365, or at fcc504@fcc.gov.

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[5] *See* 47 C.F.R. § 1.1206(b).

[6] 47 C.F.R. § 1.1206(b).

[7] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

For further information, contact Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, (202) 418-2350.

- FCC -

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
FACSIMILE: (617) 557-1034

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

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