

January 14, 2008

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Mr. Matthew Berry  
Deputy General Counsel  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: **Docket No. CC 96-128 – Questions From The Supreme Judicial Court Of  
Massachusetts Regarding**

Dear Mr. Berry:

I am writing this letter, on behalf of the New England Public Communications Council, Inc. (“NEPCC”) in view of a hearing before the Supreme Judicial Court of Massachusetts (“Court”) now set for February 5, 2008. This hearing is about the NEPCC’s appeal of an order of the Massachusetts Department of Telecommunications & Energy that denied refunds to NEPCC payphone service provider members even though Verizon’s rates for payphone lines did not comply with the New Services Test and the hearing bears directly on an inquiry made by the Court to the Commission in this Docket nearly two (2) years ago.

Specifically, on March 6, 2006, the Court wrote the Chairman of the Commission posing certain questions regarding the Commission’s implementation of 47 U.S.C. §276 and the rights of independent payphone service providers, under that law and the Commission’s implementation thereof, to receive certain refunds. A copy of that letter is Attachment 1 hereto. The inquiry was made in connection with an appeal filed with the Court by the NEPCC which appeal raised, among others, the very issues embodied in the Court’s inquiry. In conjunction with the Court’s inquiry to the Commission, the Court stayed the NEPCC’s appeal for six months, in anticipation of the Commission’s responses.

The NEPCC filed a copy of the Court’s letter in this Docket on March 30, 2006. Shortly thereafter, on April 3, 2006, the Commission issued a Public Notice formally announcing its receipt and its intent to address the Court’s request.

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In August of 2006, the Court extended its initial stay of the appeal case for another six months. In connection with the NEPCC's further request for an extension of the stay in early 2007, the Commission's General Counsel, on February 9, 2007, then informed the Court that the Commission was "working to resolve the pending petitions and to respond to the Court's questions" and hoped "to issue an order responsive to your request within the next six months."<sup>1</sup> Almost a year has passed since that communication, now almost two years since the Court's original letter. The Court, in response to the Commission's letter and further NEPCC stay requests, extended the stay through February 5, 2008, when the Court has set the matter for hearing. However, the Commission has yet to provide any substantive response to the Court.

The NEPCC is well aware that in the period since the Court's letter was first submitted to the Commission that there have been other filings in, and decisions relevant to, this Docket and the issues raised by the Court, including two Federal appellate court decisions asking the FCC to address essentially the same issues.<sup>2</sup> No doubt the Commission must give careful consideration to such rulings. And there have been other filings in the Docket addressing these issues.

But presumably such detailed interest in these issues at high levels of the Federal and State judiciary should lead the Commission to focus on responding and answering these essential inquiries, rather than leaving the Court and other interested parties to wonder when the Commission, to which the Congress gave ultimate responsibility for implementing Section 276, might act. Even some Members of Congress are apparently wondering that as well.<sup>3</sup>

The NEPCC respectfully submits that two years should be sufficient time for the Commission to thoroughly consider the issues raised by the Court in this Docket and to respond in substance to an inquiry of the highest Court of a State.

The NEPCC further respectfully submits that at a very minimum the Commission, as a matter of courtesy and comity, owes the Court an updated explanation of the status of its deliberations and within what time frame the Court might reasonably expect an answer. The NEPCC fully expects that the Court, in the normal course, would inquire at the February 5 hearing what is the status of

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<sup>1</sup> Letter from Samuel L. Feder, General Counsel, Federal Communications Commission, to Maura S. Doyle, Clerk, Supreme Judicial Court for Suffolk County, Commonwealth of Massachusetts. See Attachment 2 hereto.

<sup>2</sup> See *Ton Services, Inc. et al v. Qwest Corp.*, 493 F3d 1225 (10<sup>th</sup> Cir. 2007); *Davel Communications, Inc. v. Qwest Corp.*, 451 F3d 1037 (9<sup>th</sup> Cir. 2006), *withdrawn and superceded*, *Davel Communications, Inc. v. Qwest Corp.*, 460 F3d 1075 (9<sup>th</sup> Cir. 2006).

<sup>3</sup> See Letter, dated December 12, 2007, from Congressman Rodney Alexander to Chairman Kevin Martin attached as Attachment 3.

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the Court's inquiry to the Commission and when the Court can expect such an answer. Therefore, NEPCC requests, as the Commission did a year ago, that the Commission's General Counsel formally communicate to the Court the status of the Commission's deliberations and intended timing of disposing of this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Paul C. Besozzi", is written over a horizontal line. The signature is written in black ink.

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

cc: Daniel Gonzalez  
George Niden



MAURA S. DOYLE  
CLERK

The Commonwealth of Massachusetts  
SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
JOHN ADAMS COURTHOUSE  
ONE PEMBERTON SQUARE, 1ST FLOOR  
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March 6, 2006

Honorable Kevin J. Martin  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> 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*")<sup>1</sup> 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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<sup>1</sup> 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,

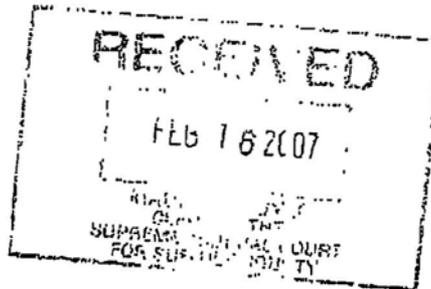


Maura S. Doyle, Clerk



Federal Communications Commission  
Washington, D.C. 20554

February 9, 2007



Maura S. Doyle  
Clerk  
Supreme Judicial Court for Suffolk County  
Commonwealth of Massachusetts  
John Adams Courthouse  
One Pemberton Square, 1<sup>st</sup> Floor  
Boston, MA 02108-1707

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 Ms. Doyle:

We have received your letter of March 6, 2006 to Chairman Kevin Martin, pursuant to which the Court seeks guidance on the circumstances under which FCC orders might require refund of payphone intrastate line rate charges. On April 3, 2006, the FCC issued a public notice stating that it had received the letter and would consider the Court's request in conjunction with its consideration of a number of petitions for declaratory ruling that raised the same issue. *See 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, Public Notice, 21 FCC Rcd 3519 (2006). The FCC is working to resolve the pending petitions and to respond to the Court's questions, and we hope to issue an order responsive to your request within the next six months.

Please do not hesitate to contact me should you need further assistance.

Sincerely yours,

Samuel L. Feder  
General Counsel

**RODNEY ALEXANDER**  
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COMMITTEE ON APPROPRIATIONS  
SUBCOMMITTEES:  
AGRICULTURE  
FINANCIAL SERVICES  
COMMITTEE ON THE BUDGET

**Congress of the United States**  
**House of Representatives**

December 12, 2007

The Honorable Kevin Martin  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D C. 20554

Dear Chairman Martin:

In 1996, with our adoption of amendments to the Communications Act, Congress made a legislative finding that continuation of the widest deployment of payphones for use by the American public was an important national policy. In addition, Congress made a finding that it was necessary to eliminate any discrimination and anti-competitive conduct by the Bell Operating Companies and an industry structure that seriously infirmed the ability of the independent payphone operators, the Bell Companies' competitors, to maintain the deployment of payphones for the American public

A primary device in this anti-competitive behavior was overcharging the independent operators for line connections for their phones. As a specific provision of the revised Communications Act, the congress mandated that the FCC adopt regulations that would put an end to this overcharging and discrimination.

The FCC responded to the congressional direction by adopting new rules that specifically required the Bell companies to charge line rates that were cost based under the existing and well understood "New Services Test" of the Commission's *Computer III* safeguards. These new rates were required to be in place no later than the end of April 1997.

Because these local line rates were to some extent covered by state regulatory processes, the FCC determined to use those processes as the most efficient way to get the new cost based rates in place. Unfortunately, these processes and the complexity attendant to them resulted in significant delay, in some cases lasting over five years, before the new congressionally mandated rates actually were put into effect

In those states which moved swiftly to comply with the FCC requirements, there was little reason for concern. And in a large number of states where there was considerable delay, the state authorities required the Bell Companies to refund any overcharges when those charges occurred after the April 15 deadline as a result of Bell Company challenges to the imposition of lower rates. However, in a number of states, notwithstanding the clear requirement for cost based rates to be in place by April 15, 1997, no refunds were required even in the face of findings that the charges were excessive and violative of the FCC's requirements.

Today, I understand that the agency has pending before it petitions from several payphone association asking the FCC to declare that its requirements for cost based rates to be in

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place by the deadline set in 1997, as required by the congressional action in adopting the new Communications Act, be affirmed by declaring that any state decisions not to provide refunds are inconsistent with national policy and with the need for a uniform national application of the mandate given by Congress. The vehicle for such a declaration of policy that has been proposed by the independent payphone operators is a finding by the agency that any state decisions that have rejected requiring refunds for overcharging past the April, 1997 deadline be preempted under federal law. In addition, several courts at both the state and federal levels have deferred their decisions regarding refunds awaiting guidance from the FCC

I understand that there have been complexities in the very nature of the proceedings, which have been exacerbated by the extraordinary length of time that has passed since the FCC initially mandated and required the Bell Companies to provide cost based services. I also recognize that any federal preemption of state regulatory actions often raise significant and complex issues by the very nature of the differing but appropriate regulatory structures and requirements at the state and federal level. And, I appreciate any possible concerns you may have about preempting state decisions. However, in this case, which does not have any forward looking policy implications and which does not affect the ability of the states to continue to regulate as they see fit, I believe anything short of preemption does not bring about the results originally intended by Congress. I also understand that at least two federal courts of appeals have recently reached decisions that further support the basis for an FCC decision which would ensure refunds were granted

The number of payphones deployed today is about half of what were available in 1996 when congress adopted its mandate supporting the continued wide deployment of payphones for the benefit of the American public. While much of the reduction in available phones is the result of the increasing availability of cellular telephones, data show that there has been a significant increase in the overall number of American household with no phone service at all – no cellular or home phone. Today, according to FCC statistics, about 6 ½% of American households are reported not have a phone, in Louisiana that increases to 9%, the fifth highest rate of households without a phone in the nation, and I feel sure in my district where the income is lower than in other areas of the state, that number is even higher. In fact, for minority Americans, poorer families and those living in rural areas in our country, these numbers are often twice as high

From 1996 to 2007, the percentage of households without a phone in Louisiana has remained virtually the same, yet the number of payphones available for those individuals has shrunk by more than 50 percent. The availability of payphones for those without any phone of their own is a lifeline.

I urge you to resolve the issues before you with careful consideration, consistent with the agency's responsibilities to fully effect the congressional mandates, and in a manner that helps ensure that the number of payphones deployed in my district does not further decline.

Sincerely,



Rodney Alexander  
Member of Congress

RA/jt