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December 5, 2008

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

Re: **Notice of Ex Parte Communication – CC Docket No. 96-128**

Dear Ms. Dortch:

The New England Public Communications Council, Inc. ("NEPCC"), a participant in the above-referenced proceeding, in accordance with Section 1.1206(a) of the Commission's rules hereby notifies the Commission that on December 5, 2008, the NEPCC's undersigned counsel met with Mr. Greg Orlando, Legal Advisor to Commissioner Deborah Taylor Tate, to discuss the Commission's potential responses to the March 6, 2006 letter from the Supreme Judicial Court of Massachusetts filed in this Docket and the chronology and status of the related Massachusetts proceedings. The NEPCC provided copies of the attached materials.

The NEPCC is electronically filing this notice with the Commission using the Electronic Comment Filing System for inclusion in CC Docket No. 96-128.

Sincerely,

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

CC: Greg Orlando

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CHRONOLOGY OF MASSACHUSETTS NEW SERVICES TEST CASE

- In the fall of 1996, the FCC issues the Payphone Orders to implement Section 276 of the Telecommunications Act of 1996.

- In response thereto, in late December 1996 and January 1997, NYNEX makes tariff filings in response to the requirements of the Payphone Orders. The December 1996 filing tariffs coin line service. The January 1997 filing detariffs the local coin rate. In making the January filing, NYNEX notes that together these filings make it eligible for dial around compensation.

- On January 29, 1997, the Massachusetts Department of Public Utilities ("Department") opens a Docket to receive those filings (Docket No, 97-18) and suspends the tariff filings until July 20, 1997.

- On March 14, 1997, the Department seeks comment on the NYNEX filings.

- On March 27, 1997, the NEPCC files comments urging that the tariffs be rejected as failing to comply with Section 276 and the Payphone Orders.

- On March 31, 1997, the Department vacates the suspension order and allows the tariffs to go into effect, subject to a subsequent order explaining its decision.

- On April 8, 1997, the NEPCC files with the Department a copy of the Common Carrier Bureau's ("CCB") April 4, 1997 Order clarifying the Payphone Orders and granting a waiver of 45 days to file tariffs for unbundled features and functions. The NEPCC reiterates that the NYNEX tariff filings do not comply with Section 276 and the Payphone Orders.

- On April 14, 1997, the Department releases its order explaining its March 31, 1997 decision to allow the NYNEX tariff filings to take effect. The Department opens an investigation (Docket 97-18) of the NYNEX coin line service offering, entry and exit barriers in the payphone market and public interest payphones.

- On April 16, 1997, the NEPCC files with the Department a copy of the CCB's April 15, 1997 Order granting a waiver until May 19, 1997 for NYNEX and other LECS to file tariffs for intrastate payphone rates complying with the new services test. The NEPCC reiterates that the previous NYNEX tariff filings do not meet these requirements.

- On May 16, 1997, NYNEX files with the Department a letter, citing the CCB's April 4, 1997 waiver order, providing the Department with cost support, to establish that NYNEX's existing intrastate payphone access line rates and the newly tariffed coin line rates satisfied the new services test. See attached.

- On May 19, 1997, NYNEX files a tariff for rates for screening and calling features to bring those rates into compliance with the new services test. Subsequently, on June 25, 1997, NYNEX corrects the TELRIC cost of terminating number screening to "$0.00."

- On September 2, 1997, the Department consolidates the issue of OSP rates with Docket 97-18. On September 11, 1997, the Department seeks comment on barrier to entry, public

interest payphone and OSP rate issues. The NEPCC files comments on September 11, 1997 and September 25, 1997.

- On December 12, 1997, the Department solicits comments on "whether Bell Atlantic's PAL and PASL services (and their respective tariffs) comply with FCC requirements, as set forth in the Payphone Orders (Payphone Order and Reconsideration Order), and the Clarification Order." The Clarification Order is the CCB's April 4, 1997 Order. The Department indicates that it intends to conduct this phase as a "paper proceeding." Only the NEPCC and Bell Atlantic submit comments, in January 1998. The NEPCC states that the record is insufficient to determine that the NYNEX rates comply.

- On December 7, 1998, when there had been no action by the Department, the NEPCC moves to reopen the record, to take evidence and hold a hearing on the FCC compliance issue on which the Department had sought comment the previous December. The presiding Hearing Officer grants that motion on May 14, 1999. Discovery follows and a one day hearing is held on September 13, 1999. Briefing was completed by November 1, 1999.

- On November 28, 2000, the Department orders Verizon to conduct a comprehensive TSLRIC study complete with supporting documentation for basic payphone access liens within 60 days of the date of the Order. On January 29, 2001, Verizon files the study and discovery and comments thereon follow.

- On March 5, 2001, the Department's then Chairman Connelly by letter asks the FCC for action on the question of the application of a "new services test" to setting rates for payphone network services in Docket 97-18

- On August 8, 2001, the Department orders Verizon to revise its TSLRIC study to include rates for local usage, within one month of that order. On August 9, 2001, the presiding Hearing Officer rules that there should be hearings on the revised TSLRIC study. A one day hearing takes place on November 14, 2001 and briefing ensues, with all briefs submitted by December 31, 2002.

- On January 31, 2002, the FCC releases its Order *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, providing additional guidance on the application of the "new services test" to intrastate payphone line rates, citing the March 5, 2001 letter from Chairman Connelly. On July 11, 2003, the United State Court of Appeals for the District of Columbia Circuit affirms the FCC's ruling.

- On February 23, 2003, the presiding Hearing Officer directs Verizon to file TELRIC-based intrastate payphone access and usage rates by March 3, 2003 and seeks comment on those rates. After Verizon amends its March 3 filing (on April 15, 2003), a comment cycle follows.

- On November 3, 2003, the presiding Hearing Officer directs Verizon to update its last previous TELRIC-based rates consistent with the Department's final unbundled network element rates approved (in Docket 01-20) on July 16, 2003, with the revision to be filed by November 17, 2003. That filing is made by Verizon.

CHRONOLOGY OF MASSACHUSETTS NEW SERVICES TEST CASE

- On June 23, 2004, the Department issues its Order directing that Verizon's intrastate payphone access and usage rates be adjusted to reflect the TELRIC-based rates so that they then would be in compliance with "FCC requirements for payphone access line rates." However, the Department refuses to require refunds.

- On July 14, 2004, the NEPCC files an appeal of the Department's Order relating to the denial of refunds with the Supreme Judicial Court of Massachusetts ("SJCM").

- On August 26, 2004, the NEPCC files a copy of the Department's June 2004 Order with the Commission in Docket No. CC 96-128 in comments filed in connection with the petition filed by the Illinois Public Telecommunications Association. The NEPCC files reply comments on September 8, 2004.

- On April 22, 2005, the NEPCC moves to stay the SJCM appeal for 6 months and refer certain issues to the FCC based on the doctrine of primary jurisdiction.

- On February 16, 2006, the SJCM grants the motion to stay the appeal.

- On March 6, 2006, the SJCM refers certain questions to the FCC by letter addressed to the Chairman.

- On April 3, 2006, the Commission releases a Public Notice announcing the receipt of the Court's letter.

- On August 18, 2006, the SJCM extends the stay of the appeal for an additional 6 months.

- On February 9, 2007, the Commission's General Counsel writes to the SJCM regarding the status of the Court's request.

- On March 2, 2007, the SJCM extends the stay for another 6 months and resets the matter for a hearing on September 19, 2007.

- On September 14, 2007, the SJCM extends the stay for another 6 months and resets the matter for a hearing on February 5, 2008.

- On January 28, 2008, the SJCM extends the stay for another 6 months and resets the matter for a hearing on July 22, 2008.

- On July 21, 2008, the SJCM extends the stay for another 6 months and resets the matter for a hearing on February 4, 2009.

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.

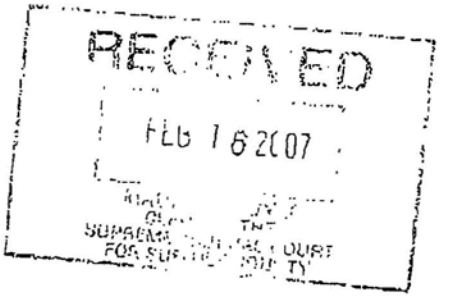
Please address any questions on this request to Assistant Clerk Eric Wetzel at 617-557-1186.

Sincerely,

Maura S. Doyle, Clerk

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, 1st 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

THE FCC MUST ORDER THE BELL COMPANIES TO REFUND PAYPHONE LINE CHARGES IN EXCESS OF NEW SERVICES TEST COMPLIANT RATES

New England Public Communications
Council
November 20, 2008

BACKGROUND

- Section 276(a)(1) prohibits Bell Operating Companies ("BOCs") from discriminating between their payphone operations and independent payphone service providers ("PSPs").
  - To prevent such discrimination, Section 276(b)(1)(C) required FCC to impose *Computer III* safeguards on the BOCs – including cost-based payphone line rates complying with the "New Services Test" ("NST").
  - Section 276(a) required compliance as of the effective date of the new payphone compensation rules – set for April 15, 1997.
    - The FCC made NST compliance a condition of the BOCs' eligibility to begin receiving dial-around compensation for their own payphones.

- To implement the federal NST requirement, the Commission directed that state regulators determine if specific BOC line rates complied with the federal NST.
  - The Commission let the BOCs continue filing payphone line rates with state commissions.
  - But the Commission noted that inconsistent state requirements are preempted (47 U.S.C. § 276(c)) and explicitly preserved its jurisdiction to determine BOC compliance.
  - Massachusetts began a proceeding in 1997 to determine whether the existing rates complied with the FCC's orders implementing Section 276.

BACKGROUND (cont'd)

- Just before the 4/15/97 compliance deadline, the BOCs asked the Commission for a waiver to let them begin collecting dial-around compensation without first complying with the NST.

- After obtaining the waiver, the BOCs engaged in vigorous efforts in state commissions and courts (and before the Commission) to avoid, minimize and delay compliance – in most cases for 5-10 years.

- Varying decisions were issued by different states. To address the disparity in the states' application of the NST, in January 2002 the FCC issued additional guidance.
  - *Wisconsin Public Service Commission*, 17 FCC Rcd 2051 (2002).

- Most states ultimately found massive overcharging and ordered rate reductions, often exceeding 50%.
  - *E.g.,* in Massachusetts the state commission ordered a 90% in the usage rate alone, from roughly $0.02 per minute to $0.002 per minute.

- Many states implemented the statute and FCC regulations by ordering refunds back to 4/15/97. Massachusetts did not, despite finally finding in June of 2004 that rates had to be dramatically adjusted to comply with the FCC requirements.

THE CURRENT PROCEEDINGS

- Beginning in July 2004, five state payphone associations (representing PSPs in Illinois, Mississippi, New York, Florida, and Ohio) filed petitions requesting the FCC to order NST refunds.

- In addition, the highest state court in Massachusetts referred issues to the FCC seeking guidance on whether refunds should be required. The Supreme Judicial Court of Massachusetts inquiry has been pending at the Commission since April of 2006.

- The 9th and 10th Circuit Federal courts of appeals also referred such issues to the FCC. So did the Oregon PUC.

- Two legal theories independently require the Commission to order refunds:
  - Refunds are required by the statute, i.e., Section 276.
  - Refunds were expressly required as a condition of the April 1997 waiver.

REFUNDS ARE REQUIRED BY SECTION 276

- The BOCs' noncompliance with the NST violated the Section 276(a)(2) nondiscrimination requirement.
  - Discrimination was prohibited and PSPs were entitled to cost-based payphone line rates as of the effective date (4/15/97) of payphone deregulation.
  - There is no dispute that the BOCs continued to charge grossly excessive rates 5-10 years after the compliance deadline.
  - In challenging BOC rates and claiming refunds in state proceedings, PSPs followed the FCC-prescribed procedure.
  - PSPs injured by NST-non-compliant rates are entitled to reparations.
    - *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1242 (10th Cir. 2007).

- Section 276 directed the **FCC** to carry out the statute's requirements.
  - While the FCC chose to have state commissions review the BOC payphone line rates for compliance with federal law, under *USTA II* the FCC cannot delegate its ultimate statutory responsibilities to the states.
    - *United States Telecomms. Ass'n v. FCC*, 359 F.3d 554, 565-568 (D.C. Cir. 2004).
  - If the FCC uses state procedures as a "shortcut," it must "superintend" the state process "in every respect."
  - To "superintend the process," the FCC must correct states' failure to order refunds.
  - Uniquely, Section 276(c) provides and requires that FCC regulations "shall preempt" any inconsistent state requirements.

THE COMMISSION CAN AND MUST ORDER THE BOCs TO PAY REFUNDS

- Congress mandated that the FCC ensure that payphone line rates were nondiscriminatory effective April 1997.

- Denying refunds "would reward intentional [BOC] non-compliance with FCC orders under the 1996 Act."
  - *Davel Comms., Inc. v. Qwest Corp.,* 460 F.3d 1075, 1089 (9th Cir. 2006).

- Two federal courts of appeals have spoken to the refund issue.
  - The 10th Circuit ruled that PSPs are entitled to reparations for BOC violations of the NST.
    - *TON Services,* 493 F.3d at 1242.
  - The 9th Circuit ruled that filed-rate doctrine cannot justify denial of refunds.
    - *Davel,* 460 F.3d at 1085.

- The only remedy that can undo the BOCs' years of noncompliance is for the FCC to order that the BOCs are obligated to pay refunds.
  - While the petitions were pending at the FCC, most of the state proceedings became final. Massachusetts did not; the appeal currently remains pending before the Supreme Judicial Court while the FCC considers the Court's letter.
  - The Commission should directly order the BOCs to pay refunds to PSPs for the difference between NST-compliant payphone line rates and the rates previously in effect.

THE FCC'S 1997 WAIVER ORDER EXPRESSLY REQUIRES THE BOCS TO PAY REFUNDS

- The BOCs promised to pay refunds if rate reductions were necessary to comply with the NST.
  - The Commission expressly conditioned the waiver on the BOCs filing NST-compliant rates and paying refunds if the rates "when effective, are lower than the existing rates."
  - The NST compliance waiver was of "limited duration."
  - The refund condition and the limited duration of the waiver *had to be imposed* to comply with the statute: The FCC may not waive a statutory requirement.

- To the extent the *Waiver Order* is ambiguous, it should be interpreted in light of the underlying "policy considerations."
  - *Davel*, 460 F.3d at 1089.

- Pursuant to the FCC's waiver, BOCs have collected payphone compensation without complying with the NST as required by statute.
  - Denying refunds deprives PSPs of their right to nondiscriminatory payphone line rates.