

D.T.E. 92-59-B

Investigation by the Department of Telecommunications and Energy on the motions of the Attorney General of the Commonwealth regarding the following certified pay-telephone service providers: Cedar Grove Realty Trust d/b/a Grove Group Phone Systems; Central Telecom, Inc.; Coin Communications, Inc.; Cointel, Inc.; Flower Vending; IMR Telecom; Integrated Strategies, Inc.; M.G. Communications, Inc.; U & W Communications; Commonwealth Telephone Co., Inc.; Atlantic Payphone; New England Payphone, Inc.; AAMAX Digital Vending Co.; FirsTel Phone Systems, Inc.; AGI Coin Phone Systems; Pay Phone, Inc.; U.S. Communications of Westchester; and Telephone Systems Service, Inc.

APPEARANCES: Scott Harshbarger, Attorney General

By: George Dean

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FOR: COINTEL, INC.

PAY PHONE, INC.

Respondents

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FOR: IMR CAPITAL CORPORATION

Respondent

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FOR: AGI COIN PHONE SYSTEMS, INC.

COMMONWEALTH TELEPHONE COMPANY, INC.

INTEGRATED STRATEGIES, INC.

d/b/a INDEPENDENT TELECOMMUNICATIONS

SERVICES, INC.

M.G. COMMUNICATIONS, INC.

NEW ENGLAND PAYPHONE, INC.

TELEPHONE SYSTEMS SERVICE, INC.

Respondents

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FOR: U.S. COMMUNICATIONS OF WESTCHESTER

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Respondent

I. INTRODUCTION

On November 27, 1991, and April 8, 1992, the Attorney General of the Commonwealth ("Attorney General") filed with the Department of Public Utilities (now, Department of Telecommunications and Energy) ("Department") motions requesting that because of alleged violations of state laws and regulations governing the provision of payphone service, the Department reopen the investigations into the applications for certificates of public convenience and necessity ("certificates") of 18 independent pay-telephone providers ("IPPs").⁽¹⁾

The Attorney General also requested that the Department direct New England Telephone and Telegraph Company (now doing business as Bell Atlantic-Massachusetts) ("Bell Atlantic") to terminate the public access lines ("PALS") of those IPPs that are found to be in violation of statutory and regulatory requirements.

On April 10, 1992, the Department opened an investigation into the practices of the named IPPs. In the Order opening the investigation, the Department directed the IPPs and the Attorney General to resolve the issues and to file any proposed settlement agreements with the Department for review and approval. Investigation of Pay-telephone Service Providers, D.P.U. 92-59, at 1-2 (1992). The Department also instituted a moratorium on the filing of applications for certificates by IPPs in light of the seriousness of the Attorney General's allegations. Id. at 2.

On May 20, and June 12 and 15, 1992, after due notice, the Department held evidentiary hearings in its Boston offices concerning the Attorney General's complaints against IMR Capital Corporation ("IMR"), Telephone Systems Service, Inc. ("Telephone Systems"), and Grove Group Phone Systems ("Grove Group"). Hearings on complaints concerning 15 IPPs were postponed pending the expected filing of settlement agreements resolving those complaints. The Attorney General, IMR, and Telephone Systems submitted initial briefs.

On July 28, 29, and September 10, 1992, the Attorney General and the remaining 15 IPPs⁽²⁾ filed proposed Settlement Agreements ("Settlements") with the Department for approval.⁽³⁾

The Department addresses the proposed Settlements in Section II, below, and the Attorney General's complaints against IMR, Telephone Systems, and Grove Group in Section III, below.

II. PROPOSED SETTLEMENTS

A. Description of Settlements

Under the Settlements, each IPP would be required to provide the Department and the Attorney General with, inter alia, the addresses of all IPP telephones (Settlements at 3). Further, each IPP would have to provide the Department and the Attorney General with a copy of any permit an IPP obtained, authorizing the placement and maintenance of its public telephones (id.). Each IPP would also be required to affix Department-approved labels to their telephones, and to adhere to Massachusetts and federal laws concerning the provision of pay telephone service (id. at 3-4).

The Settlements also proposed that each and every IPP in the state would be required to contribute to the reasonable cost of an independent investigator, who, under the direction of the Department, would randomly check pay telephones to ensure compliance with Department regulations (id. at 4-5). The Settlements also required IPPs to contribute up to \$1,500 to a "Local Consumer Aid Fund" for use in upgrading the Attorney General's consumer complaint telecommunications equipment (id. at 5). In addition, as part of the Settlements, two of the IPPs agreed to pay \$100 per day between September 8, 1992 and the date those two IPPs certified that all of their pay telephones were modified to provide free access to intrastate, interLATA directory

assistance (id.).⁽⁴⁾ The terms of the Settlements were expressly conditioned upon the Department's approval of all provisions of the Settlement without change (id. at 6).

B. Standard of Review

In assessing the reasonableness of an offer of settlement, the Department must review the entire record as presented in a company's filing and other record evidence to ensure that the settlement is consistent with Department precedent and public policy.

Massachusetts Electric Company, D.P.U. 96-25 (1997); Western Massachusetts Electric Company, D.P.U. 96-8-CC (1996); Commonwealth Gas Company, D.P.U. 94-128 (1994); Barnstable Water Company, D.P.U. 91-189 (1992).

C. Analysis and Findings

The Department has reviewed the Settlements and finds that many of the terms of the Settlements are consistent with the Department's rules and regulations governing the provision of pay-telephone service.⁽⁵⁾ However, because proper notice was not given of the Settlements' provision that established a mechanism for all IPPs to contribute to the cost of an independent investigator, we find that this requirement is outside the boundaries established in this proceeding. G.L. c. 30A requires that notice of the issues to be investigated by the Department be provided before a hearing takes place.⁽⁶⁾ The Department, therefore, cannot approve the applicability of this portion of the Settlements to all IPPs because the establishment of specific procedures for the enforcement of the Department's pay-telephone regulations was not noticed as an issue under investigation in this proceeding.

The establishment of an enforcement mechanism is a complex issue that could have ramifications for the entire pay telephone industry in Massachusetts.⁽⁷⁾ If a mechanism for enforcement of state and federal regulations is to be developed, any discussion should allow for the participation of all interested IPPs, and not be limited to the Attorney General and the IPPs who negotiated the Settlements. Therefore, since the terms of the Settlements indicate that the Settlements must be approved in whole, and because the Department cannot approve only certain provisions of the Settlements, the Settlements are hereby denied.

III. COMPLAINTS

A. Positions of the Parties

1. Attorney General

The Attorney General presented the testimony of Edward O'Neil and Donna Jordan, investigators with the Attorney General's office. They stated that they determined that twelve payphones owned and operated by IMR, one payphone owned and operated by Telephone Systems, and one payphone owned and operated by Grove Group were not in compliance with Department regulations (Attorney General Brief at 3).

Specifically, the Attorney General alleges that: (1) IMR failed to provide free access to the "950" carrier code, and its ownership label did not meet the Department's requirements; (2) Telephone Systems failed to provide access to the "950" carrier access code and failed to provide free access to all directory assistance numbers; and (3) Grove Group did not provide access to the "950" carrier code and failed to provide free access to directory assistance (id. at 6-9). Accordingly, the Attorney General recommends that the Department direct Bell Atlantic to terminate the PAL service provided to these companies and revoke their certification to provide payphone services in the Commonwealth (id. at 10). Alternatively, the Attorney General urges that the IPPs contribute to the cost of an independent investigator, who, under the direction of the Department, would ensure compliance with Department regulations. The Attorney General cites as precedent, D.P.U. 89-300, wherein the Department directed Bell Atlantic to disconnect the PAL service of payphone providers that did not comply with the Department's rules, including "compliance with certification and tariff requirements" (Attorney General Brief, citing New England Telephone and Telegraph Company, D.P.U. 89-300, at 275 (1990)).

2. IMR

IMR contends that one of the payphones at issue was never owned or operated by IMR (IMR Brief at 3). IMR maintains that the Attorney General was incorrect in stating that the remaining payphones blocked access to the "950" carrier code (id. at 5). IMR argues that Ms. Jordan's notes suggested that she dialed "1" before dialing "950," which IMR's payphones were programmed to invalidate (id. at 2, 6). Thus, IMR contends that Ms. Jordan would have been given free access to the "950" carrier code had she dialed correctly (id.). In addition, IMR asserts that its ownership label is adequate and was approved by the Department on December 10, 1991 (id. at 13-14).

3. Telephone Systems

Telephone Systems also argues that because Ms. Jordan dialed incorrectly, she was unable to access the "950" carrier code or obtain free access to directory assistance (Telephone Systems Brief at 2). Telephone Systems contends that its computer system is designed to ensure that all of its pay telephones are in compliance with state regulations, and indicated that each payphone in question provided access to both the "950" access code and directory assistance free of charge (id. at 3-4). Moreover, Telephone Systems claims that it would not block the "950" access code because its customers need the code to reach its alternative operator service provider (id.). Telephone System argues that, because it has presented "clear and convincing testimony," the Department should dismiss the Attorney General's petition and order the Attorney General to compensate Telephone Systems via "a reasonable fee for defense of a frivolous action" (id. at 6).

4. Grove Group

Arthur Murphy, an investor in Grove Group, testified that he was not familiar with payphone operations, and therefore, could not reply to the complaints by the Attorney

General (Tr. 1, at 11-12). Mr. Murphy also indicated that he was not familiar with the "950" access code, and assumed that Grove Group payphones provided free access to directory assistance (id.).

B. Standard of Review

The Department's standard to determine the propriety of the Company's quality of service to customers is set forth in G.L. c. 159, § 16, which states in pertinent part: If the [D]epartment is of opinion, after a hearing ... that the ... practices ... or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the:

[D]epartment shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed ... and services thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby Before making such order, the [D]epartment shall consider the relative importance and necessity of the changes ... proposed to be included therein and of other changes which may be brought to its attention during the course of the hearing, the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance, therewith, upon its financial ability to make such other changes, if any, as may be deemed by the [D]epartment of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public.

Thus, the Department must first determine whether the IPP's regulations, practices, equipment, or service do not meet the statutory requirement, and then consider the cost of the remedy and its impact on the their financial ability to provide service to the public. See D.P.U. 89-300, at 289-290.

C. Analysis and Findings

The record indicates that the Attorney General's investigators likely dialed incorrectly while conducting their payphone investigations, which renders the results of the Attorney General's sample testing unreliable. Therefore, the Department cannot conclusively determine from the evidence presented that the IPPs were in violation of the Department's rules and regulations, and thereby unjust, unreasonable, unsafe, improper or inadequate under § 16.⁽⁸⁾ Accordingly, we find that the Complaints against IMR, Telephone Systems, and the Grove Group should be dismissed.⁽⁹⁾

IV. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the proposed Settlements entered into between the Attorney General of the Commonwealth and Central Telecom, Inc.; Coin Communications, Inc.; Cointel, Inc.; Flower Vending; Integrated Strategies, Inc.; M.G. Communications, Inc.; U & W Communications; Commonwealth Telephone co., Inc.; AAMAX Digital Vending Co.; FirsTel Phone Systems, Inc.; AGI Coin Phone Systems; Pay Phone, Inc.; and U.S. Communications of Westchester be and hereby are DENIED; and it is

FURTHER ORDERED: That the Attorney General's complaints against IMR Capital Corporation, Telephone Systems Service, Inc., and Grove Group Phone Systems are hereby DISMISSED.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. ¹ The named IPPs are: Cedar Grove Realty Trust d/b/a Grove Group Phone Systems; Central Telecom, Inc; Coin Communications, Inc.; Cointel, Inc.; Flower Vending; IMR Telecom; Integrated Strategies, Inc.; M.G. Communications, Inc.; U & W Communications; Commonwealth Telephone Co., Inc; Atlantic Payphone; New England Payphone, Inc.; AAMAX Digital Vending Co.; FirsTel Phone Systems, Inc.; AGI Coin Phone Systems; Pay Phone, Inc.; U.S. Communications of Westchester; and Telephone Systems Service, Inc.

2. ² They are: Central Telecom, Inc.; Coin Communications, Inc.; Cointel, Inc.; Flower Vending; Integrated Strategies, Inc.; M.G. Communications, Inc.; U & W Communications; Commonwealth Telephone Co., Inc.; Atlantic Payphone; New England Payphone, Inc.; AAMAX Digital Vending Co.; Firstel Phone Systems, Inc.; AGI Coin Phone Systems; Pay Phone, Inc.; U.S. Communications of Westchester.

3. ³ On March 22, 1993, after hearings and the submission of Settlements, the Department lifted the moratorium on new applications for certificates. See D.P.U. 92-59-A (1993). Effective February 8, 1996, the date of enactment of the Telecommunications Act of 1996, the Department replaced the certification process with a registration process. See Department Letter to Telecommunications Carriers, dated Feb. 21, 1996.

4. AGI Coin Phone Systems and FirsTel Phone Systems, Inc. agreed to pay the additional \$100 per day.

5. The Department's payphone requirements today are similar to those in effect at the time the Settlements were filed, except for the requirement that IPPs must now display rates on their payphones for local coin calls.

6. ⁶ G.L. c. 30A, §11(1) provides that "parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument."

7. It is important to note that in 1996, long after the Settlements were filed, the Federal Communications Commission ("FCC"), pursuant to authority under the Telecommunications Act of 1996, deregulated the payphone market and preempted state authority in a number of important areas, including local coin rate regulation and market entry and exit regulation. One area in which the FCC did not preempt states was service quality. Implementation of Pay Telephone Reclassification and Compensation

Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-128 and 91-35, Report and Order, FCC 96-388 (rel. Sept. 20, 1996), and Order on Reconsideration, FCC 96-439, (rel. Nov. 8, 1996).

8. As noted above, the Department's payphone requirements today differ slightly from those in place at the time of the testing.

9. As to Telephone System's request that the Department order the Attorney General to compensate Telephone System for legal fees, the Department does not have statutory authority to award reimbursement of legal fees. See e.g., D.P.U. 84-204, at 13-14 (1985).