D.P.U./D.T.E. 97-88/97-18 (Phase II)

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 services providers.

APPEARANCES: L. Scott Harshbarger, Attorney General
By: Daniel Mitchell
Assistant Attorney General
Regulated Industries Division
Office of the Attorney General
200 Portland Street, 4th Floor
Boston, Massachusetts 02114
Intervenor

Barbara Anne Sousa, Esq.
185 Franklin Street, Room 1403
Boston, Massachusetts 02110
FOR: NEW ENGLAND TELEPHONE
AND TELEGRAPH COMPANY D/B/A
BELL ATLANTIC-MASSACHUSETTS
Intervenor

Jerrold Oppenheim, Esq.
National Consumer Law Center
18 Tremont Street
Boston, MA 02108
FOR: ACTION, INC.
Intervenor

Jay E. Gruber, Esq.
Palmer & Dodge LLP
One Beacon Street
Boston, Massachusetts 02108
FOR: AT&T COMMUNICATIONS
OF NEW ENGLAND, INC.
Intervenor

Alan D. Mandl, Esq.
Ottenberg, Dunkless, Mandl & Mandl
260 Franklin Street-Suite 1880
Boston, Massachusetts 02110
FOR: MCI TELECOMMUNICATIONS CORPORATION
Intervenor

Paul C. Besozzi, Esq.
Patton Boggs, LLP
2550 M Street, N.W.
4th Floor
Washington, D.C. 20037
FOR: INVISION TELECOM, INC. and
NEW ENGLAND PUBLIC COMMUNICATIONS
COUNCIL, INC.
Intervenors

ORDER ON PAYPHONE BARRIERS TO ENTRY AND EXIT, AND OSP RATE CAP

I. INTRODUCTION

On September 2, 1997, pursuant to Section 276 of the Telecommunications Act of 1996 (the "Act") and the Federal Communications Commission's ("FCC") decisions implementing Section 276, the Department of Telecommunications and Energy ("Department") (formerly Department of Public Utilities) on its own motion opened an investigation to examine potential barriers to entry and exit in the pay telephone market.[1]

See Order Vacating Suspension, D.P.U. 97-18 (March 31, 1997); see also 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, released September 20, 1996 ("Payphone Order"), and Order on Reconsideration, FCC 96-439, released November 8, 1996 ("Reconsideration Order") (collectively "Payphone Orders"). The matter was docketed as D.P.U. 97-88/97-18 (Phase II).

---

[1] On April 14, 1997, the Department allowed Bell Atlantic to detariff its local coin payphone rate. NYNEX Payphone Coin Rate, D.P.U. 97-18 (1997). In that Order, the Department stated that to comply with FCC directives, it would investigate further Bell Atlantic's Public Access Smartline service (now referred to as Public Access Smart-pay Line ("PASL") service) and begin examining barriers to entry and exit in the payphone marketplace and public interest payphones. Id. at 11-13. On September 2, 1997, the Department, on its own motion, voted to open an investigation into the Department's Operator Services Providers rate cap and to consolidate that investigation with the examination of Bell Atlantic's PASL service, entry and exit barriers, and public interest payphones. D.P.U. 97-88/97-18 (Phase II) (Order Opening Investigation) (1997). The Department has since determined that it would be more appropriate to separate out this issue and designate a separate docket number -- D.T.E. 98-134 -- for the investigation of public interest payphones.

The Attorney General of the Commonwealth ("Attorney General") intervened as a matter of right, pursuant to G.L. c. 12, § 11E. The Department granted intervenor status to New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic"); Action, Inc.; AT&T Communications of New England, Inc. ("AT&T"); MCI Telecommunications Corporation ("MCI"); the New England Public Communications Council, Inc. ("NEPCC"); and InVision Telecom, Inc. ("InVision"). On September 11, 1997, the Department issued a notice seeking comments on whether Massachusetts laws or the Department's existing policies for payphone providers constitute barriers to entry or exit, or conflict with Section 276 of the Act or the FCC's Payphone Orders. In addition, the Department asked for comments on whether the operator services providers ("OSP") rate cap constitutes a barrier to entry or exit or conflicts with Section 276 and the requirement that payphone providers receive "fair compensation" for all calls.

The Department received comments by September 24, 1997, from Bell Atlantic, AT&T, MCI, InVision, and the NEPCC, and reply comments by October 3, 1997, from Bell Atlantic, InVision, the NEPCC, and the Attorney General.[2]

II. BACKGROUND

Pursuant to its authority under Section 276(c) of the Act, the FCC directed states to

---

[2] On December 2, 1997, InVision sought to file supplemental comments concerning a billing issue between independent payphone providers and Bell Atlantic, which InVision claims is a barrier to entry. Because those comments were submitted long after the close of the October 3, 1997, deadline for reply comments in this proceeding, we hereby deny InVision's motion to submit those comments.

examine and modify any regulations applicable to payphones that impose market entry or exit requirements.[3] Payphone Order at ¶¶49, 51, 60. The FCC also requires payphone consumers to have complete information concerning the choices available to them, including prices for payphone services. Id. at ¶16. To that end, the FCC directed states to review and modify their regulations to ensure disclosure of local coin rates. Id. Finally, the FCC required that access to dialtone, emergency calls, and telecommunications relay service ("TRS") calls for the hearing disabled be available from all payphones at no charge to the caller. Id. at ¶60.

To receive approval to provide payphone service in Massachusetts and to obtain a public access line ("PAL"), applicants are required to: (1) provide regular, timely, and universal maintenance of payphones, and maintain a telephone number that callers can use at no charge to report repair problems; (2) provide end users with free access to long distance carriers by dialing 800, 950, and 10XXX; (3) prohibit simultaneous use of an extension telephone off of a payphone; (4) provide and maintain controls for sound amplifications of incoming transmissions of 25% of payphones owned (for payphone providers that own four or more payphones); (5) provide access to intrastate directory assistance at no charge; (6) provide access to a dial tone after payment; (7) provide access to emergency services at no charge; (8) affix Department-approved payphone ownership and operator service labels on each payphone; and (9) notify the Department and the local exchange company of transfers of

---

[3] Section 276(c) states: "To the extent that any State requirements are inconsistent with the [FCC's] regulations, the [FCC's] regulations on such matters shall preempt such State requirements."

ownership of payphones. M.G. Communications, Inc., D.P.U. 90-143 (1991).

Massachusetts also requires payphone providers that offer their own operator services to maintain intrastate rates on file with the Department, meet general labeling requirements, and provide comprehensive intrastate rate information at payphones. International Telecharge, Inc., D.P.U. 87-72/88-72 (1988); IMR Telecom, D.P.U. 89-212 (1990); M.G. Communications, Inc., D.P.U. 90-143 (1991). The Department allows OSPs to charge rates that are identical to, or lower than Bell Atlantic's or AT&T's OSP rates.[4] International Telecharge, Inc., D.P.U. 87-72/88-72 (1988).

Finally, payphone providers must notify the Department and the servicing exchange company of any transfers concerning the operation of their payphones and certify that the payphone label reflects the change in ownership of the operations. Regulatory Treatment of Common Carriers, D.P.U. 93-98 (1994).

III. SUMMARY OF COMMENTS

[4] OSPs are long distance companies that carry "operator-handled" calls (e.g., collect, third-party, person-to-person, and credit card) from payphones and other traffic aggregator telephones (e.g., hotels, hospitals, prisons, etc.). International Telecharge Inc., D.P.U. 87-72/88-72 (1988).

The commenters agree that, with the exception of four requirements, Massachusetts statutes, regulations, and Department orders do not constitute barriers to entry and exit of the payphone marketplace. The four exceptions concern: (1) DA charges; (2) sound amplification; (3) OSP rate regulation; (4) rate disclosures.

Specifically, Bell Atlantic, MCI, AT&T, and the NEPCC contend that G.L. c. 159, § 19A, which prohibits charging for DA calls from payphones, is inconsistent with Section 276 of the Act and the FCC's Payphone Orders (Bell Atlantic Initial Comments at 2; MCI Comments at 4; AT&T Comments at 1; NEPCC Initial Comments at 7). In contrast, the Attorney General argues that Massachusetts' prohibition on charging for DA from payphones does not conflict with federal law because providers recover the cost of DA calls with income derived from charges for completed payphone calls (Attorney General Comments at 1, 3).

Regarding the sound amplification requirements, AT&T and MCI claim that Massachusetts' requirements, as delineated in G.L. c. 166 § 15E and Department orders, violate the FCC's rule that all payphones provide free access to TRS calls (AT&T Comments at 2; MCI Comments at 6).

Concerning the Department's OSP rate cap requirements, AT&T, NEPCC and InVision argue that payphone companies providing operator services should be reclassified as nondominant carriers because the rate cap acts as a barrier to entry in the payphone market (AT&T Comments at 1; NEPCC Comments at 4, 5-6; InVision Comments at 6-7). InVision contends that the higher cost of providing payphone service at inmate locations and the FCC's "fair compensation" requirements for payphone providers warrant lifting rate caps (InVision

Comments at 5).

MCI asserts that if the Department maintains its rate cap, a generic benchmark other than Bell Atlantic's or AT&T's rates would be appropriate since the presumption that those rates are reasonable has not been tested (MCI Comments at 5). Finally, Bell Atlantic notes that while it does not believe that the rate cap is a barrier to entry or exit in the payphone market, a rate cap is not appropriate in a competitive marketplace (Bell Atlantic Comments at 4).

IV. ANALYSIS AND FINDINGS

A. DA Charges and Sound Amplification

Regarding the question of whether the Act and the FCC's rules preempt G.L. c.159, § 19A, which prohibits payphone providers from charging for directory assistance, and G.L. c. 166, § 15E, which requires that any payphone provider owning four or more telephones provide for sound amplification systems on 25 percent of those phones, the Department notes that recognizing a claim of federal preemption would be tantamount to the Department's holding that those statutes are unconstitutional insofar as they apply to payphone providers. We cannot do so. "Agencies, which are creations of the State, may not challenge the constitutionality of State statutes." Spence v. Boston Edison Company, 390 Mass. 604, 610 (1983). The Department must apply the law as determined by the General Court; the power to declare the statutes of the Commonwealth unconstitutional because they are preempted lies with the courts, not with the Department. Further, preemption is not a favored doctrine and the burden of proving it lies with the party seeking to displace a state action. Arthur D. Little

v. Comm'r of Health and Hospitals in Cambridge, 395 Mass. 535, 545 (1985). Unless and until the Legislature amends these provisions, or the provisions are declared unconstitutional by a court of competent jurisdiction, the Department must apply those statutes as they currently exist. Accordingly, the Department's guidelines with respect to sound amplification and the prohibition on charging for directory assistance calls from payphones will remain in force.[5]

B. OSP Rate Cap

Regarding the Department's OSP rate cap policy, we find that regulating payphone service providers' provision of this service is not a barrier to entry or exit in the payphone market. The provisions set forth in Section 276 of the Act and the FCC's Payphone Orders concerning barriers to entry and exit only relate to payphone providers, not OSPs. OSPs are interexchange carriers, notwithstanding the fact that some payphone providers also supply their own operator services. Also, we disagree with InVision that maintaining rate caps for OSPs violates the FCC's "fair compensation" requirements. The Department notes that the requirements for fair compensation only relate to the cost of originating calls from a payphone for which the payphone provider does not receive compensation (e.g., carrier access code calls, subscriber 800 calls, debit card calls, and DA calls), and does not include calls for which payphone providers are fairly compensated by end users.

Notwithstanding this finding, the Department agrees with Bell Atlantic that a rate cap

---

[5] In its Comments, the NEPCC also contends that Bell Atlantic's displacement policy for payphones poses a barrier to entry for independent payphone service providers. The record is not sufficient to made a finding on this issue.

for OSPs is unnecessary in a competitive marketplace. Unlike 1988, when the Department's policy concerning OSPs was implemented, consumers can avoid charges from OSPs by "dialing around" to the carrier of their choice, and educational efforts have made many consumers aware of this option.[6] Therefore, the Department finds that the reasons for the OSP rate cap and continued rate regulation of OSPs no longer exist. Accordingly, the Department will reclassify OSPs as nondominant carriers and authorize them to charge market-based rates, effective July 1, 1998 (see below for discussion of new rate disclosure requirements). However, while we find that market conditions justify lifting the rate cap, consumers must have the ability to obtain OSP rate information so that a comparison of the available rate options can be conducted. Therefore, the Department requires all OSPs to notify callers orally of how to obtain rate information for that OSP call (i.e., the total cost of the call, including any aggregator surcharges), and how consumers may access the long distance carrier of choice, before connecting and billing for the calls.[7] Callers must be orally advised on how to proceed to receive a rate quote, such as by pressing the # key, or by staying on the line. OSPs are

---

[6] For example, long distance carriers advertise access telephone numbers, such as 1-800-COLLECT and 1-800-CALL ATT, that consumers can dial to be connected to their long distance carrier without a charge by either the payphone provider or the OSP.

[7] These new rate disclosure requirements are similar to rules recently adopted by the FCC to provide increased consumer protection for interstate OSP calls, effective July 1, 1998. See Billed Party Preference of 0+ InterLata Calls, Second Report and Order and Order on Reconsideration, CC Docket No. 92-77, CC 98-1, released January 29, 1998.

required to comply with these new requirements by July 1, 1998.[8] Accordingly, OSPs shall file with the Department an affidavit confirming compliance with these new rate disclosure requirements by July 1, 1998.

The Department will, however, maintain its regulation of inmate calling services rates. Since inmates have no option to access another long distance provider, they must use the presubscribed OSP at a prison payphone. As there are no competitive alternatives for inmates, the Department will continue to regulate inmate calling services providers as dominant carriers and, accordingly, will continue to "cap" their rates. However, we find that it is necessary to modify the existing rate cap mechanism on inmate calling services to provide for rate recovery of legitimate additional costs incurred in providing inmate calling services. Under the existing cap, rates of independent inmate calling services providers are capped at those rates charged by Bell Atlantic or AT&T (depending on whether the call is intraLATA or intrastate), and, therefore, independent inmate calling services providers may be precluded from recovering legitimate additional costs associated with inmate calling services. The record demonstrates that the unique characteristics of inmate calling services produce per-call costs which are higher than costs for conventional OSP calls (InVision Initial Comments at 6-11; InVision Reply Comments at 2). These additional costs include (1) costs associated with call processing systems, automated operators, call recording and monitoring equipment, and fraud control programs, that are required to ensure security and to deter abuses; (2) higher levels of

---

[8] Currently, OSPs are required to post informational labels with instructions on how to obtain rate information.

uncollectibles; and (3) higher personnel costs (InVision Initial Comments at 7-11). The record shows that AT&T, MCI and Sprint Communications Company impose $3.00 per call surcharges in 33 states to cover their additional costs, and that the costs of these providers do not differ significantly from state to state (InVision Initial Comments at 8; InVision Reply Comments at 2). We can reasonably rely on the costs of these carriers as a proxy for the costs of inmate callings services providers in Massachusetts (InVision Reply Comments at 2). Therefore, the Department will allow inmate calling services providers to charge a maximum surcharge of $3.00 for such calls. This surcharge cap will apply to all inmate calling services providers, including Bell Atlantic and AT&T.[9,10] Regarding usage rates for inter- and intraLATA inmate calling services calls, we find that it is reasonable and appropriate to cap carriers' rates at those of Bell Atlantic.[11] The record does not demonstrate a sufficient need among inmate calling services providers for an increase in usage rates. Moreover, capping usage rates at the level of Bell Atlantic's rates provides an administratively efficient way for

---

9 In AT&T, D.P.U. 95-130 at 9-10 (1996), the Department inadvertently deregulated the rates of AT&T's inmate calling services. We hereby reimpose regulation over the rates of AT&T's inmate calling services and require AT&T to comply with all applicable directives contained in this Order.

10 We note that Bell Atlantic's ability to increase its inmate calling services surcharge is constrained by the Bell Atlantic's price cap. See NYNEX, D.P.U. 94-50 (1995).

11 As such, Bell Atlantic's intraLATA inmate calling services usage rates will serve as the cap for both the interLATA and intraLATA usage rates of all other inmate calling services providers.

the Department to ensure that these rates remain reasonable.[12,13]

C. Coin Rate Disclosure

Finally, the FCC directed states to ensure that each payphone service provider disclose local coin rates. Payphone Order at ¶16. Currently, the Department's payphone guidelines do not require payphone providers to display rates for local coin calls, although many providers do voluntarily display such information. To comply with the federal requirements, we find that the Department's policy concerning disclosure of the local coin rate at payphones must be modified. Therefore, pursuant to Section 276(c) of the Act, the Department will require all registered payphone providers to display rates for local coin calls on their payphones, effective within 60 days from the date of this Order. To verify compliance with this new requirement, we direct all registered payphone providers to submit a copy of their ownership label to the Department stating the rates for local coin calls, within 60 days of the date of this Order.

V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That, within 60 days from the date of this Order, registered payphone

---

12 We note that AT&T, like all other inmate calling services providers, must conform its rates to this usage rate cap.

13 In that the Department has addressed in this Order the same issues that are currently pending in D.P.U./D.T.E. 93-118, concerning the June 3, 1993, petition of Value-Added Communications, Inc., we hereby close that proceeding. In addition, for the same reasons, the Department hereby dismisses the undocketed March 21, 1997, Petition for Expedited Rulemaking of InVision Telecom, Inc., which requests that the Department remove the OSP rate cap on inmate calling services providers.

providers disclose rates for local coin calls on their payphone ownership labels, and submit a copy of such labels to the Department to verify compliance with this directive; and it is

FURTHER ORDERED: That operator services providers, with the exception of inmate calling services providers, be reclassified as non-dominant carriers and authorized to charge market-based rates, effective July 1, 1998; and it is

FURTHER ORDERED: That, effective July 1, 1998, operator services providers comply with the Department's directives for providing oral notification to consumers about how to obtain information on rates and accessing other long distance carriers, before connection and billing begins, and operator services providers submit an affidavit demonstrating compliance with these directives by that date; and it is

FURTHER ORDERED: That payphone providers submit a copy of their ownership label displaying the rates for local coin calls to the Department with 60 days of the date of this Order; and it is

FURTHER ORDERED: That D.P.U./D.T.E. 93-118 is hereby closed; and it is

FURTHER ORDERED: That the undocketed March 21, 1997, Petition for Expedited Rulemaking of InVision Telecom, Inc., is hereby dismissed; and it is

FURTHER ORDERED: That operator services providers, including inmate calling services providers, and payphone providers comply with all other directives contained in this Order.

By Order of the Department,

Janet Gail Besser, Chair

John D. Patrone, Commissioner

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, 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).