

D.T.E. 98-34

Investigation by the Department of Telecommunications and Energy on its own motion to determine whether policies should be implemented to ensure the maintenance and funding of public interest payphones.

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I. INTRODUCTION

Section 276 of the Telecommunications Act of 1996 ("Act") requires the Federal Communications Commission ("FCC") to take all actions necessary to determine, "whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would not otherwise be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably." In its Report and Order released on September 20, 1996, the FCC required that "each state . . . evaluate whether it needs to take any measures to ensure that payphones serving important public interests will continue to exist in light of the elimination of subsidies and other competitive provisions established pursuant to Section 276 of the [Act]." Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order at ¶ 285, FCC 96-388 (rel. sept. 20, 1996) ("Report and Order"). On May 28, 1998, the Department of Telecommunications and Energy ("Department") issued an Order of Notice in this matter to investigate, pursuant to the Act, whether public interest payphones¹ ("PIPs") should be maintained in Massachusetts, and, if so, to ensure that such public interest payphones are funded fairly and equitably. The matter was docketed as D.T.E. 98-34.

Pursuant to notice duly issued, public hearings were held on June 15, 1998, in

¹A public interest payphone is a payphone which: (1) fulfills a public policy objective in health, safety, or public welfare, (2) is not currently deployed pursuant to a contract between a location provider and a payphone provider, and (3) would not otherwise exist as a result of the operation of the competitive marketplace. Report and Order at ¶ 282.

Worcester; June 22, 1998, in Great Barrington; and on June 24, 1998, in Boston.² A procedural conference was also conducted on June 24, 1998. On June 24, 1998, the Attorney General of the Commonwealth ("Attorney General") intervened as of right pursuant to G.L. c. 12, § 11E. The following persons or entities were granted full participation in this proceeding: The New England Public Communications Council ("NEPCC"), New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic"), Action, Inc.³ ("Action"), AT&T Communications of New England, Inc., and Sprint Communications Company L.P. (collectively the "Intervenors"). Charles Gamer was allowed to participate as a limited participant (Tr. 3, at 15-17). Also at the procedural conference, all participants agreed upon an initial procedural schedule that included a technical session/workshop on July 17, 1998, two rounds of discovery, and an opportunity to file briefs and reply briefs (id. at 23-24).

At the technical session/workshop, the Department and Intervenors discussed narrowing the scope of this proceeding or otherwise phasing this matter. (Tr. 3, at 20-21 and 24; Tr. 4, at 74). On July 22, 1998, the Department bifurcated this proceeding, separating questions concerning the administration and funding of a PIP program from the initial issue of whether such a PIP program is necessary Massachusetts. The Department issued briefing questions

²The transcripts of these hearings and of the technical session/workshop later held on July 17, 1998, are hereby designated as follows: Tr. 1, the public hearing on June 15, 1998; Tr. 2, the public hearing on June 22, 1998; Tr. 3, the public hearing and procedural conference on June 24, 1998; Tr. 4, the technical session/workshop on July 17, 1998.

³Action, Inc. filed an untimely petition to intervene. The Hearing Officer granted its petition after finding good cause for its tardy filing. (Tr. 4, at 5-7).

focused on resolving this initial issue.⁴ The evidentiary record consists of 58 exhibits.⁵ Initial briefs were submitted by the Attorney General, Bell Atlantic, and NEPCC. Action filed a reply brief.

II. COMMENTS OF THE PARTIES

A. Attorney General

The Attorney General argues that the Department should suspend its investigation until additional evidence warrants further investigation. In support of his position, the Attorney

⁴Specifically, the Department directed the participants to limit their initial and reply briefs to a discussion of the following four questions:

- (1) Whether sufficient evidence of market failure and/or market deficiencies have been demonstrated to warrant development and implementation of a public interest payphone funding support program;
- (2) Whether, given changing market economic conditions such as the recent elimination of subsidies, the increase in the initial coin rate, and new compensation from inter-exchange carriers, it is possible for the Department to meaningfully evaluate the need for public interest payphones within the Commonwealth of Massachusetts at this time;
- (3) Whether the Department should consider holding a decision on the need for a public interest payphone program in abeyance for a period of time until the ongoing changes in applicable regulations and market forces have had an opportunity to work their way through the industry, and the Department has an opportunity to conduct a full evaluation of their impact on the provision of payphones in the public interest. Comments to this question should include a recommendation regarding how much time the Department should wait before commencing a further investigation in this matter; and
- (4) Whether a Departmental decision that no need for a public interest payphone program has been demonstrated at this time due to changing market conditions complies with the FCC's Report and Order "evaluat[ion]" requirement.

⁵Although the evidentiary hearing was cancelled with the agreement of all the parties, both Bell Atlantic and the Attorney General submitted Motions to Mark and Move Exhibits into Evidence. Without objection, the Hearing Officer granted such Motions on August 17, 1998.

General notes that no consumers at any of the public hearings in this proceeding have identified any specific locations where additional payphones should be installed in order to fulfill a public policy objective (AG Brief at 1-2, citing generally Tr. 1, Tr. 2, and Tr. 3), and that Bell Atlantic has not received any complaints from consumers about their inability to gain access to a payphone in a particular location (AG Brief at 2, citing Exh. PIP-14, at 2). In addition, the Attorney General contends that it would be "premature and inappropriate" for the Department to implement a PIP maintenance program at this time because the payphone market has not had time to absorb fully and react to the removal of payphone subsidies, the increase in Bell Atlantic's initial coin rate, new compensation to payphone providers from interexchange carriers, and the decrease in payphone use due to the use of cellular phones, prepaid phone cards, credit cards, and free access numbers (AG Brief at 3). Finally, the Attorney General asserts that the Department's proceedings in this matter comply with the FCC's directive that Massachusetts "evaluate whether it needs to take any measures to ensure that payphones serving important public interests will continue to exist" (id. at 4).

B. Bell Atlantic

Bell Atlantic argues that the Department wait at least one year before assessing the newly deregulated payphone marketplace and evaluating the need for PIPs (BA Brief at 5 n.5) because "[t]he payphone market is currently adjusting to the recent implementation of the FCC rules designed to promote both competition and the widespread deployment of payphones" (id. at 5). According to Bell Atlantic, only after market forces determine the availability of payphones may the Department validly determine whether having a payphone at locations

currently lacking a payphone nonetheless would serve a strong public interest (id. at 5-6).

Finally, Bell Atlantic points to the lack of consumer complaints as evidence that the market is not failing to provide payphones where needed (id. at 7). Without a demonstration of market failure, Bell Atlantic contends, there is no immediate need for the Department to establish a PIP program in Massachusetts at this time (id. at 10).

C. NEPCC

According to NEPCC, "[a]t this point, the NEPCC does not believe that there is any substantial evidence that the normal operation of the marketplace is failing to meet the need for public pay phone service Indeed, in the NEPCC's experience competition has meant in some cases the deployment of payphones in locations where previously there was no payphone service" (NEPCC Brief at 1-2). Due to the recent changes in the payphone market, such as the recent elimination of subsidies, and the new compensation from interexchange carriers, NEPCC asserts that, "[f]ormulating a public interest payphone plan now . . . runs the risk of producing a mismatch between program requirements and genuine public interest payphone needs" (id. at 2). NEPCC recommends that the Department wait at least until the end of 1999 before determining whether a formal, structured program to fund PIPs is necessary (id. at 3.) Finally, NEPCC states that the Department's actions thus far (i.e., opening a separate docket, taking evidence and comments) comport with the level of evaluation contemplated by the FCC in its Report and Order.

D. Action

Action argues that the Department must continue this proceeding and establish a PIP program because various data in which Bell Atlantic claims a proprietary interest disclose possible shortcomings of the payphone market in low-income areas, which requires the Department to conduct a detailed investigation (Action Brief at 2). In addition, Action contends that "locational monopolies" and other market failings may be providing supracompetitive remuneration for the payphone service providers and location providers. Specifically, Action compares Bell Atlantic's recently increased local-coin rate of 35 cents to Bell Atlantic's costs and declares that "[t]he pay telephone market has failed so massively in Massachusetts since price deregulation that prices exceed the legal standard of unconscionability" (*id.* at 3). Therefore, Action argues, the Department should act without delay to correct the "massive" market failure that exists in the pay telephone market. In conclusion, Action recommends that the Department establish a PIP program to:

- (1) investigate the reasonable cost of a local pay phone call and establish rates at that level;
- (2) investigate in detail the adequacy of placement of pay telephones in low-income neighborhoods; and (3) establish a ten cent rate for pay phones in low-income neighborhoods, financed by all telephone services in the Commonwealth (*id.* at 5).

III. ANALYSIS AND FINDINGS

As stated in the Department's Notice in this proceeding, we began this investigation to determine whether policies should be implemented to ensure the maintenance and funding of public interest payphones. We further stated in the notice that "[p]ublic interest payphones are

those pay telephones that are placed in locations in the interest of public health, safety and welfare." Thus, our emphasis in conducting this proceeding was *locational* -- not price-based. Moreover, such an emphasis was required by the FCC, which recognized "the potential that a freely competitive marketplace may not provide for payphones in locations where they serve important public policy objectives, but which, for various reasons, may not be economically self-supporting." Report and Order at ¶ 264. Accordingly, since this proceeding is focused on determining whether market forces have failed to adequately deploy payphones, we find that arguments suggesting that market failure (including locational monopolies) have caused payphone rates to be unaffordable for certain segments of society are simply beyond the scope of this proceeding.⁶

With respect, then, to what is at issue in this docket, we find that there is no credible and substantial record evidence, at this time, of a need for the creation and funding of a program designed to ensure the placement and existence of public interest payphones. Consistent with the Department's earlier findings regarding the superiority of market forces to regulation in achieving our policy goals, see, e.g., IntraLATA Competition, D.P.U. 1731 at 26 (1984) (finding that competition in the provision of intraLATA service would bring economic benefits not otherwise achievable by state regulation of monopolies); New England

⁶In its Report and Order at ¶¶ 49-76, the FCC deregulated payphone rates. Pursuant to the Act, "the [FCC's] regulations on such matters shall preempt such State requirements." 47 U.S.C. § 276(c). However, in implementing this provision the FCC made an exception to the market-based approach for states that are able to demonstrate that there are market failures within the state that would not allow market-based rates. See Report and Order at ¶ 61.

Telephone and Telegraph, D.P.U. 94-50 (1994) (introducing "price cap" regulation), our analysis begins with the presumption that full and free competition will lead to a more efficient allocation of payphone resources than could otherwise be achieved through state and federal regulation. However, at this time, it is simply too early to be able to tell whether the proper operation of market forces in the Commonwealth's payphone industry will provide payphones in locations that serve important public policy interests or not.

Although Action points to Bell Atlantic data tending to show the removal of some payphones from low-income areas (Exh. PIP-6, Att. at 1-7), NEPCC states that it "believes that competition has meant, over time, a net overall increase in the total number of payphone locations, . . . [including] the deployment of payphones in locations where previously there was no payphone" (NEPCC Brief at 1-2). Moreover, no party in this proceeding presented evidence of any person complaining about their inability to access a payphone in a "public interest" location when needed⁷ (see, e.g., Exh. PIP-14 (Bell Atlantic stated that it was "unaware of any complaints"). Finally, the Department conducted three public hearings in different regions of the Commonwealth: no member of the public complained about the unavailability of payphones or identified specific locations that remained without a payphone despite a clear public need for a payphone at that location. (Tr. 1; Tr. 2; Tr. 3). Without substantial evidence of payphone scarcity, we do not conclude, as we must if this proceeding is to continue to its next phase, that a PIP program is needed in Massachusetts. Accordingly, the

⁷The Department itself has no records of consumer complaints concerning the lack of payphone availability.

Department finds that there is no need to develop a program to ensure the maintenance and funding of public interest payphones in the Commonwealth of Massachusetts at this time.

IV. CONCLUSION

We find that there is no need to develop a program to ensure the maintenance and funding of public interest payphone in the Commonwealth of Massachusetts at this time. If, in the future, information is presented that indicates a problem with the availability of payphones in locations that serve public interests in health, safety, and welfare, this issue will be readdressed.

V. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That this docket be, and hereby is, closed.

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).