

DT 02-050

PETITION FOR DESIGNATION OF ACWORTH PAYPHONE AS  
A PUBLIC INTEREST PAYPHONE (PIP)

Order Nisi Approving Interim Funding Mechanism  
for Acworth Public Interest Payphone

O R D E R N O. 24,191

July 10, 2003

**APPEARANCES:** Alan Linder, Esq., New Hampshire Legal Assistance on behalf of Heidi Simoneau and Joan Guerrlick; Hanford Auten on behalf of the Acworth Historical Society, Inc. and Acworth Community Project, Inc.; Victor Del Vecchio, Esq, on behalf of Verizon New Hampshire; Deborah Mozden, Director of Women's Supportive Services; Laurie Jewett, on behalf of Southwestern Community Services; Linda Griebisch, Director of the New Hampshire Coalition Against Domestic and Sexual Violence; Anne Ross, Esq. of the Office of the Consumer Advocate on behalf of New Hampshire residential ratepayers; Patrick C. McHugh, Esq. on behalf of Granite State Telephone, Inc., Dunbarton Telephone, Inc., Bretton Woods Telephone Company, Inc., Northland Telephone of Maine, Inc., and Dixville Telephone Company, and E. Barclay Jackson, Esq., on behalf of the Commission Staff.

**I. BACKGROUND**

On March 27, 2002, the Acworth Historical Society, Inc., the Acworth Community Project, Inc., Women's Supportive Services, Southwestern Community Services, and two individual residents of Acworth, New Hampshire (Petitioners) filed a Petition for Designation of a Payphone in Acworth, New Hampshire as a Public Interest Payphone (PIP), alleging that Verizon New Hampshire (Verizon) had advised the location provider, Acworth Village Store, of its intention to remove the payphone within 30 days of March 1, 2002, unless the location provider agreed to retain the phone as a "Customer Payphone Service," and incur the

associated charges. After receiving written comments and oral comments at a pre-hearing conference held May 13, 2002, and upon the recommendation of the Staff in its report filed June 17, 2002, the New Hampshire Public Utilities Commission (Commission) determined on July 9, 2002 that the payphone located in Acworth, New Hampshire is a Public Interest Payphone, pursuant to the criteria set out in Order No. 23,077 (December 7, 1998). Order No. 24,008 (July 9, 2002). The Commission solicited comment from parties and interested persons regarding the funding mechanism that should be used to support retention of the Acworth payphone at its location, and approved a schedule of technical sessions, leading to an anticipated Joint Proposal to be filed September 24, 2002, and hearing before the Commission on October 24, 2002.

Comments on funding for public-interest payphones were filed in August and September, 2002, by Granite State Telephone, Inc., Dunbarton Telephone, Inc., Bretton Woods Telephone Company, Inc., Northland Telephone of Maine, Inc., and Dixville Telephone Company (together, the Independent Telcos); the Office of Consumer Advocate (OCA); NH Legal Assistance clients Joan Guerrlich and Heidi Simoneau (Acworth residents); State Representative Jay Phinizy; Verizon New England d/b/a Verizon New Hampshire (Verizon); and Staff. During this period, the Commission permitted discovery on certain issues in the docket.

On September 13, 2002, Staff filed a memorandum reporting on the progress of discussions among the parties concerning funding of the PIP. At that time, Staff reported, the parties recommended that an attempt be made to include provisioning of the Acworth payphone, and perhaps other PIPs, in the State of New Hampshire's contract with its payphone service provider, and proposed to explore that option and report further by October 1, 2002. Staff also stated that in the event the linkage proposal could not be implemented, the parties desired to continue discussions regarding alternative options. Staff accordingly requested on behalf of all the parties that the parties be given further time to present a Joint Proposal for funding. This request was granted by Secretarial Letter dated September 27, 2002.

On October 14, 2002, Staff filed a memorandum from the parties and staff regarding the funding mechanism for the Acworth Public Interest Payphone, together with a request for a change in the procedural schedule, to provide for written submissions on November 19, 2002 in lieu of proceeding with the hearing scheduled for October 24, 2002. The Commission approved this revised schedule, and additional comments on the funding question were received from the Independent Telcos, Verizon, Carl and Barbara Henninger, the New Hampshire Coalition Against Domestic and Sexual Violence, the Acworth residents, and the Staff.

On March 11, 2003, the Commission issued a Secretarial Letter scheduling a further technical session on March 27, 2003, to discuss the option of instituting a voluntary donation program, similar to the "Neighbor Helping Neighbor" campaign. By memorandum dated April 28, 2003 and filed with the Commission July 1, 2003, Staff reported that the technical discussion and further inquiries were unsuccessful in producing an agreement on a funding mechanism for the Acworth payphone.

The Commission has reviewed several proposed funding mechanisms, and has determined that the most appropriate long term funding mechanisms cannot be implemented soon enough to preserve the Acworth payphone. Accordingly, in this Order *Nisi*, we set out an interim mechanism for providing funding for the continuation of the Acworth payphone. This interim mechanism will become effective unless the Commission determines to hold a hearing based on a sufficient request filed prior to the expiration of the 45-day *nisi* period. The interim funding mechanism will be in place for two years, during which time further efforts to develop and implement a more permanent mechanism for this and all other PIPs will be pursued.

## **II. PARTIES' POSITIONS**

### **A. Petitioning Residents**

Petitioning Residents of Acworth argue that under the Telecommunications Act of 1996 (TAct), Pub. L. No. 104-104, 110

Stat. 56 (1996), codified at 47 U.S.C. § 151 et. seq., once the state has determined that a need exists for public interest payphones, the state must ensure a fair and equitable method to support and fund such phones, citing 47 USC Section 276(b)(2). The rules of the Federal Communications Commission (FCC), the Petitioning Residents assert, make clear that the states are required to administer and fund PIPs in a competitively neutral manner, fairly and equitably, compensating the entity providing the PIP without using subsidies of the kind prohibited by the TAct.

Petitioning Residents cite the list of long term funding solutions set forth in Staff's Reports dated September 13, 2002 and October 10, 2002, including (1) statutory establishment of a PIP fund, either as a stand-alone permanent fund or until such time as a State Universal Service Fund is activated pursuant to RSA 374:22-p, (2) using state communications tax monies to fund PIPs, either on a temporary or long-term basis, (3) statutory establishment of a tax credit for carriers that provide PIPs, and (4) amendment to the Commission's regulatory cost assessment statute, RSA 363-A:1, to include authority to assess all regulated carriers for funding of PIPs. Petitioning Residents also note that the statutory provisions for a Universal Service Fund could be amended or activated to authorize funding for PIPs.

Petitioning Residents note that Staff has offered the suggestion that the Commission could order all carriers to impose for one month a one cent surcharge per access line, which would generate approximately \$9,000. Petitioning Residents argue that the proposed one-time surcharge is not barred by the TAct, and that the legislative authorization of use of a Universal Service Fund under RSA 374:22-p and implementing legislation does not indicate a legislative determination that no other means may be used to fund public interest payphones. Petitioning Residents argue further that the Commission has authority pursuant to RSA 378:7 to determine that the rates, fares or charges of any public utility are "insufficient," and to fix the just and reasonable rates that must be charged. Petitioning Residents note that Verizon has indicated it will remove the Acworth payphone after March 31, 2003, and that the imminence of removal of the payphone may constitute an emergency justifying use of the power under RSA 378:9 to impose temporary rates. Petitioning Residents cite the testimony of the Acworth Police Chief, members of the Acworth volunteer Fire Department, emergency service providers, the local domestic violence shelter and mental health center in support of the need for the Commission to exercise its authority to promote the public interest until there is time for the legislature to enact a long-term solution to this public health, safety and emergency situation.

Petitioning Residents further argue that, pursuant to RSA 374:28, and notwithstanding the deregulation and detariffing of payphone rates by the FCC under the TAct, the Commission may bar Verizon from removing the Acworth payphone, on the grounds that removal would create unreasonable inconvenience to consumers and that permanent removal of the payphone would be contrary to the public good.

Petitioning Residents also argue that the choice of whether to fund a Public Interest Payphone and the burden of such funding should not fall on the local municipality. Petitioning Residents note that Acworth is a small, poor community, with a per capita income of \$11,700, whose residents are not able to afford this essential service. They further argue that the State of New Hampshire has determined that Public Interest Payphones are needed, and that this is particularly so in isolated and rural areas of the state. They urge that emergency communications cannot be left to the whim of local officials, whose communities are often the ones that are the least able to afford it.

**B. New Hampshire Coalition Against  
Domestic and Sexual Violence**

The New Hampshire Coalition Against Domestic and Sexual Violence states that it is committed to a Public Interest Payphone Program in New Hampshire. It notes that cell phones do not operate in some areas of the state, that many survivors of

rape and domestic violence require confidentiality not afforded by wireless service, and that abusers often control access to telephones in the home. For all these reasons, the Coalition states, it is essential that payphones exist and are located where they may be needed for safety, regardless of the commercial value of that site. To give a sense of the scope of the problem, the Coalition notes that in Docket DT 98-048, it developed a list of 37 needed payphone locations in New Hampshire, not all of which necessarily qualify under the Commission's guidelines for designation as a PIP.

The Coalition states that it supports any one of five plans for funding PIPs in New Hampshire, and strongly opposes a sixth. The Coalition supports: (1) activation of the Universal Service Fund pursuant to RSA 374:22-p, or a tax credit for carriers who would fund a PIP; (2) designation of a portion of the state communications tax receipts to fund PIPs; (3) inclusion of PIPs as part of the bidding for the state contract to acquire payphone services; (4) the institution of a one-time surcharge on all carriers to build a fund of up to \$10,000; and (5) designation of monies from the General Fund. The Coalition notes that a fund of under \$30,000 would be sufficient to cover all the needed PIPs in New Hampshire, and also provide monies for evaluating the PIP effort.

The Coalition opposes the proposal to pass the cost on to the municipality where the public interest payphone is located, arguing that such municipalities are most likely to be unable to afford payment for a PIP, and that the requirement to get two approvals for a PIP, including one before a town governing body lacking information and fiscal means, would effectively render the funding mechanism useless for its intended purpose. Among other things, the Coalition points out that the benefits of a PIP extend beyond the municipal boundaries.

#### **C. Independent Telcos**

The Independent Telcos support the state-procurement requirement, as well. They also argue that a state universal service fund would be a logical source of support for public interest payphones, but support the search for interim solutions given the length of time required to establish such a universal service fund. Finally, the Independent Telcos state that they are not aware of any authority by which the Commission could impose a one-time surcharge on all providers of intrastate service, and reserve the right to comment further should the Commission adopt this approach.

#### **D. Verizon**

Verizon states that the goal of fair and equitable support for PIPs is best accomplished in one of two ways. The most appropriate method, in Verizon's view, is for the

governmental entity making the request for such a payphone to contract with a payphone service provider and to pay for the payphone out of its budget. The alternative, asserts Verizon, is for the legislature to determine that a state-administered telecommunications fund should be adopted, under provisions consistent with the requirements of Section 276(b)(2) of the TAct and RSA 374:22. However, Verizon states, such a funding mechanism is not administratively efficient, necessary, or warranted.

Verizon further argues that all of the proposals submitted by the petitioning Acworth Residents require legislative action, and therefore require a lengthy start-up unlikely to meet the needs of the Acworth PIP. Verizon also argues that regulatory assessments under RSA 363-A:1 cannot be used to fund PIPs, as PIP funding is not an expense incurred by the Commission "in the performance of its duties."

Verizon also argues that the Commission lacks the authority to impose for one month a one cent surcharge per access line in New Hampshire, likening the surcharge to a tax. Verizon further argues that the Commission should not impose such a surcharge even if it were authorized to do so, because the surcharge would only fall on local exchange customers, rather than include other carriers such as intrastate toll carriers, radio paging and mobile communications providers. Such a

limitation would, in Verizon's view, violate RSA 374:22-p, VII, which requires that funding of PIPs be "fair and equitable" and "competitively neutral," and RSA 374:22-p, IV(a), which requires contributions to a state universal service fund from every "provider of intrastate telephone service." With respect to this requirement, Verizon cites RSA 374:22-p, IV(c), which defines providers of intrastate services as including radio paging and mobile telecommunications services. Finally, Verizon asserts that for a small fund such as the one in question here, it would be administratively inefficient to adopt a funding mechanism that would require billing systems changes by Verizon NH and others, the costs of which would need to be included in the surcharge.

**E. Office of Consumer Advocate**

The Office of Consumer Advocate (OCA) argues that it is not necessary to establish an administratively expensive or substantial funding mechanism for the initial stages of the new PIP program, given the small number of likely applications for PIP status. OCA notes that the current rate for a non-PIP payphone charged by Verizon to a location provider is approximately \$75, but that the costs of such payphone provision cannot be estimated since Verizon did not answer data requests on that topic propounded by the Petitioning Residents. OCA notes that Verizon had identified 15 additional payphones for removal in the six months from September, 2002, and OCA suggests that

Verizon provides the bulk of the payphones in New Hampshire. OCA avers that, given the deregulation of ordinary payphone rates by the TAct and the FCC in 1996, the monthly charge of \$75 per phone plus \$30 or more in usage revenue is more than sufficient to cover Verizon's costs.

In light of this relatively small cost, OCA argues that the local town or municipality where the PIP is located should bear the cost of a PIP. OCA argues that the residents of the town or municipality where the payphone is located are the primary beneficiaries of the PIP, and therefore they should bear its costs.

OCA argues that municipal funding would meet the requirements for PIP funding set out by the FCC. OCA states that it would be competitively neutral because it only compensates the non-regulated payphone provider for its actual costs, and therefore does not provide any additional benefit to that provider. It fairly compensates PIP providers for their costs, and it fairly and equitably distributes the costs of the program without cross-subsidies from regulated to non-regulated operations, according to the OCA, because the payment is cost-based and provides no additional profits to the competitive payphone provider. In the view of the OCA, it fairly allocates the costs of the PIP to the primary beneficiaries.

OCA also supports the concept of provisioning PIPs by tying the implementation of PIPs to the state's procurement of payphone services for public areas.

**F. Commission Staff**

Staff argues that long-term funding proposals identified in this docket, other than leveraging the state payphone contract, require legislative action. Staff notes that efforts to pursue such leveraging in time to fund the Acworth payphone were unavailing. Staff avers that municipal funding of the Acworth payphone is unlikely, given the lack of resources within the town. Staff reviews several alternative proposals that surfaced during the technical session, including General Fund revenues, a universal service fund, and assessments pursuant to RSA 363-A:1, and concludes that they are either unworkable or inappropriate. Staff concludes that the Commission must choose one of two short-term funding methods, while proceeding with a legislative initiative to create a PIP fund.

One such short-term mechanism proposed by Staff is a one-month, one-cent surcharge per access line on all customer bills. Staff suggests that some carriers might oppose this as not being competitively neutral, in violation of RSA 374:22-p, as it will only attach to regulated carriers, and therefore not apply to wireless carriers. Staff also notes that some carriers may claim that the surcharge is an unauthorized tax.

In light of these likely objections, Staff noted that a possible variation might be to apply the surcharge to Acworth customers only. Staff notes implementation problems with the latter approach, in light of the fact that Acworth is served out of three exchanges (Alstead, Charlestown and Newport), and that the Alstead exchange, which serves most Acworth customers, also serves residents in Langdon and Alstead. Staff argues that it would be unreasonably complicated, if not impossible, to impose a surcharge on the town of Acworth customers alone.

Staff argues that the second short term option, municipal funding, is apparently impossible given the characteristics of the municipality. However, Staff considers that the Commission is without authority to fund the Acworth PIP at this time, and accordingly recommends that the Commission issue an order concluding that the only option at this time is for the municipality, or some civic minded entity, to voluntarily fund the PIP until such time as a PIP fund is authorized by the legislature. Staff notes that Representative Phinizy has drafted legislation that would establish such a fund.

### **III. COMMISSION ANALYSIS**

#### **A. Statutory Framework**

Payphone providers in New Hampshire are public utilities: they own, operate or manage plant or equipment for the conveyance of telephone messages. RSA 362:2; Puc 408.01(c).

While the Commission has chosen to rely on competition as the primary source of discipline on payphone service and prices, payphone providers remain subject to the Commission's jurisdiction. See Puc 408.02. Pursuant to RSA 374:1, every public utility is required to furnish reasonably safe and adequate service that is in all other respects just and reasonable. The Commission has the power to investigate and ascertain the quality of the methods employed by payphone providers in transmitting telephone messages, and to order all reasonable and just improvements and extensions in service or methods. RSA 374:7. Similarly, the Commission is authorized and directed to ensure that public utility rates are just and reasonable. RSA 378:7.

The legislature has expressly recognized the importance of payphones and identified the need for designation of public interest payphones where the market does not fulfill the need.

In RSA 374:22-p, VI, the legislature describes PIPs as:

pay telephones, as defined by the commission, that are provided in the interest of public health, safety and welfare in locations where there otherwise would not be a payphone.

RSA 374:22-p, VI deals with one method of funding PIPs (a universal service fund) that requires further legislative action to be effective. However, in RSA 374:22-p, VII, the legislature set out more general requirements that would apply to other PIP funding mechanisms within the jurisdiction of the

## Commission:

Funding of public interest payphones shall be fair and equitable, shall be competitively neutral, and shall not involve the use of subsidies prohibited by the [TAct] or rely on federal universal service support.

The general rule for the setting of utility rates recognizes the right of the utility for a reasonable opportunity to recover its costs, together with a reasonable return of and on its capital used and useful in the public service. See, e.g., *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 606 (1986); *New England Telephone and Telegraph Co. v. State*, 113 N.H. 92 (1973). Thus, to the extent adequate service requires the maintenance of public interest payphones, those payphone providers who install and maintain the PIPs are entitled to a fair opportunity to recover their costs, including a reasonable return. This policy is consistent with the federal and state legislative requirement that public interest payphone providers receive fair compensation. See, Section 276(b)(1)(A) of the TAct and RSA 374:22-p, VI.

The statutory authority of the Commission over payphones is circumscribed to some extent by the federal legislation to which the New Hampshire legislature refers in RSA 374:22-p. Section 276(b)(1)(B) of the TAct directed the FCC to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments...and all intrastate and interstate payphone subsidies from basic exchange and exchange

access revenues." The FCC promulgated rules to give effect to Section 276(b) (1) (B) in an order in CC Docket No. 96-128. See, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order (FCC Payphone Order)*, 11 FCC Rcd. 20,541, *Order on Reconsideration (FCC Payphone Recon Order)*, 11 FCC Rcd. 21,233 (1996). Under this order, states were given up to two years to oversee the elimination of cross-subsidies of incumbent payphone operations by basic exchange and exchange access rates. Section 276(b) (1) (C) further directed the FCC to prescribe a set of nonstructural accounting safeguards for Bell operating company payphone services to implement the provisions of Section 276(a).

As referred to in Section 276(b) (1) (C), Section 276(a) of the TAct provides that a BOC "(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and (2) shall not prefer or discriminate in favor of its payphone service." The Commission eliminated incumbent payphone cross-subsidies in New Hampshire in 1997, when it approved a settlement whereby Verizon's predecessor, NYNEX, agreed to "reduce its basic exchange, exchange access and MTS rates, for a total annual revenue reduction of approximately \$3,700,000 which amount offsets and slightly exceeds the anticipated revenue increase from the coin rate increase to 25 cents." See, *NYNEX Coin Phone*

*Calling Rates*, Order No. 22,691 (August 25, 1997).

As Congress, the FCC and the New Hampshire Legislature have recognized, the elimination of the historic support for incumbent payphones, and the move to rely to the maximum extent possible on competitive forces to attract payphone providers, created the risk that market forces would not result in the provision of payphones in certain locations where payphones are important to the public safety and welfare. By Section 276(b)(2) of the TAct, Congress required the Federal Communications Commission (FCC) to determine whether public interest payphones should be maintained and, if so, ensure that PIPs are funded fairly and equitably. The FCC promulgated the applicable rules in the *FCC Payphone Order*. Relying heavily on the states to implement public interest payphone policy, the FCC in its Order carved out PIPs as an area where state law enjoys greater freedom from federal preemption with respect to payphone rates and policy.

The FCC defined a public interest payphone as "a payphone that: (1) fulfills a public policy objective in health, safety, or public welfare, (2) is not provided for a location provider with an existing contract for the provision of a payphone, and (3) would not otherwise exist as a result of the operation of the competitive marketplace." *FCC Payphone Order*, ¶ 282.

In that Order, the FCC also determined not to prescribe a single nationwide PIP funding mechanism. Citing the differing circumstances of the various states, the variety of successful approaches taken by states to promote availability of PIPs, and the difficulty of implementing a national program, the FCC determined to allow states to use their discretion in choosing a funding method for PIP programs, subject to the following guidelines: A funding mechanism shall (1) operate in a competitively neutral fashion; (2) compensate payphone providers fairly for providing PIPs; and (3) fairly and equitably distribute the costs of the program without cross-subsidies from regulated to non-regulated operations. *See, FCC Payphone Order*, ¶¶ 264, 283. These federal standards are similar to the New Hampshire standards set out in RSA 374:22-p, VI and VII.

We conclude that the Commission has the statutory authority to require the establishment and funding of PIPs, so long as such funding is consistent with the limitations prescribed by the law, including without limitation the TAct, the *FCC Payphone Order*, RSA 378, and RSA 374:22-p.

#### **B. Emergent Need for Acworth Payphone**

In our order declaring the Acworth payphone a public interest payphone, we summarized the evidence that led to our conclusion that this payphone plays a crucial role in the public health, safety and welfare of the residents of Acworth. *See,*

Order No. 24,008, at 5 *ff.* Here, we recite the evidence more fully, as it describes the factual basis of our determination that the Acworth payphone requires support.

One letter in our public comment file describes how a family relied on the payphone during an 18-month period when they had no phone in the house, and when the resident needed to call for help freeing her car during a snowstorm. Another letter notes that Acworth is hilly, and has spotty cell phone coverage. That same resident noted the use of the payphone for communications when she first moved to town. Another resident who lacked a home phone for a time described using the Acworth payphone not only for personal calls, but as an essential part of her job search.

A number of commenters observed that snowmobilers and tourists are among the non-residents who rely on the Acworth payphone. Numerous residents signed in support of a letter making similar points, and also calling attention to the emergency need for a payphone by those in need of support, rescue or other forms of help due to an abusive situation. Another letter noted that the writer had twice experienced a family crisis in which the availability of the payphone was an essential communications link. While the family now has a landline phone at home, they have experienced numerous outages on account of severe weather in their remote rural area. This correspondent

noted that the Acworth payphone is located near a school bus stop and recreational facilities, and provides a crucial link for children to their parents. The writer also recounted an incident as recent as Easter 2002 during which a domestic violence victim's phone lines were ripped out, and she had to make use of the payphone. Numerous correspondents advised the Commission of the distance (and time) for travel to the nearest alternative public communications facilities.

Acworth is a small community in an economically stressed region of the state. Representative Phinizy, a long time member of the Acworth Volunteer Fire and Rescue Company advised the Commission that even with two adults working, the average family income is only \$23,000, below even the Sullivan County median income of \$26,000 for the typical family. Median income in New Hampshire for a family of four in 2001 was \$72,606, according to the New Hampshire Office of State Planning, versus \$46,875 for a similar family in Acworth based on 2000 census data. Acworth is 20<sup>th</sup> from the bottom of New Hampshire towns in terms of income based on 2000 census data. Accordingly, even if cell phones worked throughout Acworth, and the record establishes that they do not, it appears that many Acworth residents likely could not afford them as an alternative to the payphone.

Thus, as we determined in Order No. 24,008, a need exists for the Acworth payphone. We find that such service is

required in order to provide residents and visitors to the Acworth area with safe and adequate service. RSA 374:1. We further reiterate our finding that competition will not bring forth support for the Acworth payphone. In the absence of a competitive motivation for a telephone utility to provide a payphone, the Commission cannot rely solely on market forces to induce pay telephone utilities to maintain service in Acworth. The Commission must instead rely on its authority under 374:3 and RSA 374:7, to ensure that payphone service remains in Acworth.

The Commission is also advised that Verizon, having failed to secure agreement from the location-provider for compensation for the payphone, intends to remove it shortly. There is thus a potential emergency confronting those who rely on the Acworth payphone, which requires immediate action to ensure that service for users of the Acworth payphone is safe and adequate. The only question that remains, then, is how to fund this payphone.

### **C. Long-term Funding Mechanisms Considered**

Various funding mechanisms were proposed by parties to this docket, or cited with approval by the FCC in the *FCC Payphone Order*. Some, however, are not suitable to respond to the emergent need for funding the Acworth payphone, even if they satisfy the other criteria set out in federal and state law. With one exception, municipal funding, these approaches bear

consideration as possible long term and generic solutions to the PIP funding question.

A number of the commenters propose that we rely on voluntary municipal funding to support the Acworth PIP. There is no dispute on this record that a payment to Verizon of no more than \$75 per month would be sufficient to cover the costs of the Acworth payphone. The resulting amount, \$900 per year, would ordinarily be seen as a modest amount for a town budget. However, increasing strains on already stressed municipal budgets, and the transaction costs and difficulty in achieving a majority to fund a service not used by all local residents, make this approach impractical in a town such as Acworth. Furthermore, we do not have the statutory authority to mandate that municipalities support PIPs within their boundaries. Legislation granting such authority would raise constitutional questions. See Part I, Article 28-a of the New Hampshire Constitution. Accordingly, municipal funding is impractical, and we do not adopt such an approach for public interest payphones, including the Acworth PIP.

Other funding proposals that merit longer-term consideration include use of General Fund monies, the dedication of portions of the communications tax to PIPs, the authorization of a state Universal Service Fund, and the offer of a tax credit to PIP providers. These solutions, however, require further

legislation. The emergent problem in Acworth does not allow for the time pursuing such legislation would require, although such a longer term mechanism could in the future replace any near-term mechanism we establish for Acworth in this docket. The state payphone contract process is similarly at a stage where the linkage concept would likely require time to explore and implement. Thus, linkage of payphone provision to the award of the state contract for payphone provision on state property cannot be relied on to address the emergency nature of the Acworth PIP need.

One solution recommended by some parties is the imposition of an assessment on carriers to fund PIPs. A number of parties propose that we impose a surcharge on all local exchange customers in New Hampshire. To the extent these mechanisms involve the creation of a pool of funds, they are not practical near-term solutions to the emergent need for funding the Acworth payphone.<sup>1</sup> While we will continue to explore with the interested parties the suitability of each of these proposals to be adopted as a comprehensive and permanent statewide mechanism, we cannot rely on them to address the immediate need in Acworth for a PIP.

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<sup>1</sup> We note that although the Commission lacks statutory authority to assess payphone providers directly for PIP purposes, we could direct such utilities to collect from their customers sufficient funds to defray the cost of public

In the *FCC Payphone Order*, the FCC suggested several methods by which a state could fund PIPs. In addition to the general revenue, universal service fund, and leveraged state payphone contract approaches discussed on this record by the parties, the FCC drew favorable attention to one state's requirement that LECs maintain at least one payphone in each exchange, and to the California plan, whereby the State charges all payphone service providers (including LECs), based on the number of payphones operated by the provider in the state, to fund support for PIPs located in each exchange by the LECs. See, *FCC Payphone Order*, ¶¶ 271, 279, 283. These approaches bear further consideration along with those advanced by parties to this docket, but the record before us does not provide sufficient factual underpinning to understand fully the implications of such proposals. Neither proposal should be adopted until after notice and hearing providing LECs and competitive payphone providers an opportunity to address the specific approach.

Staff discussed the additional concept of imposing a surcharge on those Verizon customers physically located in Acworth. Staff noted however, that Acworth residents take service from one of three exchanges (Alstead, Charleston and Newport), and that each of these three exchanges serves at least some non-Acworth residents. Thus, Verizon would have to identify

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interest payphones.

and segregate the Acworth residents within each of the three exchanges for billing purposes. We find that the cost of identifying only those customers in these three exchanges who reside in Acworth, and separately billing them, as opposed to billing them with the other non-Acworth residents in their exchange, outweighs the precision in cost allocation gained by such a method.

#### **D. Interim Funding Mechanism**

The remaining mechanism that bears consideration for the purpose of interim funding is a customer surcharge on all the customers in one or more of the three exchanges that include residents of Acworth. As discussed further below, this is the only mechanism explored on this record that could be implemented in a timely fashion to provide an interim means to fund the Acworth PIP. We must thus determine whether a surcharge on Verizon customers to fund the Acworth PIP satisfies the federal and state law restrictions on payphone rates and services, including the requirements that the funding mechanism be competitively neutral, that it not constitute a prohibited cross-subsidy from basic exchange or access services, that it not constitute the creation of a Universal Service Fund without legislative authorization, and that it is otherwise just and reasonable.

It has been suggested that it would violate the

requirement of competitive neutrality to mandate a structure for funding the Acworth PIP that would allow Verizon to continue to maintain the payphone, and receive compensation for it, without some means to afford competing payphone providers the chance to have the business. The requirement of competitive neutrality need not imply a requirement to put every PIP out to competitive bid. The California Plan, for example, is explicitly cited with approval by the FCC in its Order, and it does not provide all payphone providers an equal chance to bid on the right to provide all PIPs.

This interpretation of competitive neutrality makes sense, given the narrow definition of qualifying PIPs. See, *FCC Payphone Order* at ¶ 282, and RSA 374:22-p, VI. The FCC characterizes a lack of competitive neutrality as an upset to the "competitive balance of the payphone market." *FCC Payphone Order* at ¶¶ 7, 271. In our own rules for designation of a PIP and in the FCC rules restricting state discretion to designate payphones as PIPs, no payphone can be given that designation without a finding that the market would not otherwise provide the service. *FCC Payphone Order* at ¶ 271. We note that the market may not be attracted to providing a PIP, even if the reasonable cost of such a PIP were covered via a fund. That is, the cost of attracting competitors to providing a PIP may be unreasonable in cases such as the Acworth payphone.

In the Acworth case, we found that absent PIP designation, the Acworth payphone would not otherwise exist as a result of market forces (Item 2 on the PIP checklist), as demonstrated by "Verizon's current plan to remove the phone for lack of income and by the absence of other providers willing to provide the service without public assistance." Order No. 24,008 at 4. Theoretically, reasonable PIP funding could overcome the objections of competitors that the site does not generate enough calls to be commercially viable, and that cell phones are taking away payphone business. However, reasonable cost-based funding of the Acworth payphone will not likely overcome the reluctance of payphone providers to add an additional payphone, especially given the remoteness of the location. See, Staff Report, June 17, 2002, at 4.

Based on the Staff Report and the evidence gathered there concerning repeated efforts by the manager of the location provider to find an alternative payphone provider upon Verizon's termination announcement, we find that even the availability of a PIP fund would likely not attract a competitive payphone provider to this site. By contrast, Verizon, as the incumbent LEC in the area and the existing payphone provider, has expressed a willingness to provide the service if its costs are covered.

If customers in the exchange that primarily services

Acworth residents are charged for the maintenance of a PIP in their location, no pool would have to be constructed to accommodate the funding mechanism. This is so because the payphone in question is operated directly by the LEC, and the LEC has practically all of the landlines in the area. Competitive neutrality does not require creating new administrative structures such as a bidding process, particularly where such a process would be constructed to accommodate a merely theoretical competitive presence. The burden of such a structure could in many cases overwhelm the scope of the funding problem, and render the costs of providing the PIP service in question unreasonable. Instead, in the Acworth situation, given the modest cost to the incumbent of maintaining the existing payphone, the LEC that already provides the payphone can collect the surcharge and simply book the revenues to the appropriate account, to cover its costs of providing this payphone. Neither a funding pool nor an RFP would be necessary if such a mechanism were adopted.

Thus, we find that as a practical matter, in this case it does not violate the competitive neutrality requirement to permit Verizon to maintain its payphone in Acworth and to receive fair compensation for this service. We note that this approach is consistent with the option set out in the *FCC Payphone Order* of requiring LECs to maintain at least one payphone in each exchange. *FCC Payphone Order*, at ¶¶ 270, 279.

We further find that competitive neutrality would not require that a charge to fund the Acworth PIP include wireless carriers or their customers, as suggested by Verizon based on the requirement that wireless carriers contribute to a state Universal Service fund if such is established. The New Hampshire legislature, in adopting the universal service language cited by Verizon, limited the requirement that funds be obtained from "every provider of intrastate services," RSA 374:22-p, IV(a), to the Universal Service Fund defined in subsection IV. The legislature authorizes the Commission to "permit" PIPs to be supported by such a Universal Service Fund, if established, but does not require it. RSA 374:22-p, VI. Since the interim funding mechanism we adopt herein is not a universal service fund within the meaning of RSA 374:22-p, Verizon's arguments are inapposite.

We note also that the FCC's order cites with approval plans that do not include the levy of a surcharge on wireless carriers. See, *FCC Payphone Order*, ¶¶ 270, 271, 279. This fact is instructive, given that the TAct and the FCC rules create a set of allowable funding options parallel to those available in the New Hampshire statutory scheme: funding via some type of PIP-specific mechanism, or inclusion of PIP funding in a universal service charge. The restrictions on such funding options are parallel as well. Under a PIP-specific mechanism, the FCC does

not require that costs be borne by all carriers, regardless of technology. See, e.g., *FCC Payphone Order*, ¶ 279. Similarly, the New Hampshire Legislature's independent set of standards for funding of public interest payphones in RSA 374:22-p, VII is not dependent on implementation of a Universal Service Fund with the funding sources prescribed in RSA 374:22-p, IV(a), and does not require imposition of charges on wireless as well as wireline carriers.

Finally, imposing the surcharge only on Verizon customers in the Acworth area does not violate the requirement of competitive neutrality in this case because Verizon has practically all the lines in the area. Further, the *de minimus* size of the surcharge will not discourage competition in the Alstead exchange.

To determine if a surcharge would produce a subsidy "from basic exchange and exchange access revenues," and thus fall afoul of the TAct, implementing federal regulations and RSA 374:22-p, VII, we must define "basic exchange revenues" and "exchange access revenues." The Uniform System of Accounts defines basic exchange revenues as follows: "revenue derived from the provision of basic area message services such as flat

rate services and measured services.”<sup>2</sup> The USOA further defines exchange access revenues as “all state tariffed charges assessed by local exchange carriers upon interexchange carriers and end users for access to the local exchange network for intrastate telecommunications.”<sup>3</sup> The surcharge would be evaluated under different provisions, then, depending on whether it is imposed on basic exchange services, intrastate access services, or other services not included within the definitions of those two accounts.

For those carriers (like Verizon) subject to Part 32 of the FCC rules, the Uniform System of Accounts, revenues from a customer PIP surcharge would be characterized as properly belonging in a third account, not referenced by the prohibition in Section 276(b) (1) (B) of the TAct. Payphone revenues are

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<sup>2</sup> “§ 32.5001 Basic area revenue.

(a) This account shall include revenue **derived from the provision of basic area message services such as flat rate services and measured services.**

Included is revenue derived from non-optional extended area services. Also included is revenue derived from the billed or guaranteed portion of semi-public services.

(b) Revenue derived from charges for nonpublished number or additional and boldfaced listings in the alphabetical section of the company's telephone directories shall be included in Account 5230, Directory Revenue.” (emphasis supplied).

<sup>3</sup> “§ 32.5084 State access revenue.

(a) This account shall include all state tariffed charges assessed by local exchange carriers upon interexchange carriers and end users **for access to the local exchange network** for intrastate telecommunications. (b) Billing and collections services provided under exchange access tariffs shall be included in Account 5270, Carrier Billing and Collection Revenue.” (emphasis supplied)

booked to account 5280, "regulated and non-regulated."<sup>4</sup> The revenues from a surcharge collected on all lines, e.g., the revenues from which are dedicated to fund public interest payphones, would be derived from tariffed rates for provision of public interest payphones rather than for basic area service. In the Acworth case, the incumbent LEC is well situated to charge an appropriate population of customers, and to handle the funds transfer by booking the surcharge revenues to account 5280. Such a surcharge would not fall afoul of the statutory prescription on basic exchange and access revenue subsidies.

We must also determine whether the allocation of the modest payphone maintenance cost to all Verizon's customers in one or more of the exchanges in which Acworth residents are located is just and reasonable. Perhaps because landline competition in Acworth faces similar impediments as those facing payphone providers, Verizon is the overwhelmingly dominant provider of landline service in the Alstead exchange. Few area

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<sup>4</sup> § 32.5280, Nonregulated operating revenue, reads as follows:

(a) This account shall include revenues derived from a nonregulated activity involving the common or joint use of assets or resources in the provision of regulated and nonregulated products or services.

(b) This account shall be debited and regulated revenue accounts shall be credited at tariffed rates when tariffed services are provided to nonregulated activities that are accounted for as prescribed in § 32.23(c) of this subpart.

(c) Separate subsidiary record categories shall be maintained for two groups of nonregulated revenue as follows: one subsidiary record for all revenues derived from regulated services treated as nonregulated for federal accounting purposes pursuant to Commission order and the second for all other revenues

consumers, particularly in the Alstead exchange, would evade the PIP surcharge by virtue of their status as CLEC customers. Thus, a PIP surcharge on Verizon customers is a reasonably fair apportionment of cost responsibility, as between Verizon customers and those of competitive local exchange carriers. In addition, we note that the precision in cost allocation that would be gained by surcharging lines maintained by facilities-based carriers would be outweighed by the additional administrative burdens of establishing a pool.

With respect to the question of which of Verizon's customers should pay the PIP surcharge for the Acworth payphone, we find that the Verizon Alstead exchange customers most closely approximate the population most in need of access to the Acworth payphone. This is because most of Acworth falls within the boundaries of the Alstead exchange, rather than within the Charlestown or Newport exchanges. Thus we will not direct Verizon to collect support for the Acworth payphone from the customers of all three exchanges which serve at least some Acworth residents. We find it fair and equitable that customers in the Alstead exchange, who are in the closest physical proximity to the PIP (and are therefore most likely to have need for it) should be charged for the PIP. This result is consistent with the FCC's determination that the primary beneficiaries of a

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derived from a nonregulated activity as set forth in paragraph (a) of this

payphone should compensate the payphone service provider. *FCC Payphone Order*, ¶ 83. A surcharge can readily be developed that will cover the reasonable costs of the Acworth payphone for the next 2 years, within which time efforts to secure more comprehensive authority may be pursued.

For example, Verizon states it would maintain the Acworth payphone for \$75 per month. We find that, in the absence of record evidence as to a different cost to Verizon for this payphone, this amount is a reasonable estimate of the funding necessary to fairly compensate Verizon.<sup>5</sup> Over a two-year period, this amounts to \$1800. There are about 2000 lines in the Alstead exchange. If each line were surcharged 4 cents, for 24 months, the necessary funds can be readily secured for the two-year interim period.

Verizon has asserted that, for a small fund of the type involved here, it would be administratively inefficient to adopt a funding mechanism that would require billing system changes. That may be the case, but the fact that we are working within a legal framework that contemplates Commission action, yet limits the tools available to us, does not absolve us of the responsibility to do our best to fashion a workable remedy. The

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section.

<sup>5</sup> The FCC has cautioned that there are likely payphone locations where competition will not discipline prices for payphone service. *See, e.g., FCC Payphone Order*, at 15. The Acworth location would seem to fit the description of such a location. However, on this record, we do not determine that the amount sought by Verizon represents supra-competitive prices.

remedy in this case may not be the most theoretically efficient but it is nevertheless practicable and therefore cannot be eschewed.

Inasmuch as there may be approaches to the collection of this surcharge which may have lesser administrative costs, we believe Verizon should have flexibility in designing the particular surcharge to minimize its costs of collection. Accordingly, we direct that Verizon collect a surcharge for each line it provides in the Alstead exchange, to produce revenues not exceeding the equivalent of 4 cents per line per month for 24 months, and use the funds to cover its costs of maintaining the Acworth payphone for the two years following this order. We will shortly open a generic docket to build on the work done by the parties with respect to the Acworth PIP, in which we ask the parties to continue their efforts to identify and implement a suitable long-term funding mechanism, not only for the Acworth payphone, but for other similarly at-risk PIPs in New Hampshire, including those owned and operated by competitive payphone providers.

Finally, the Commission does not consider it to be in the public interest to allow the Acworth payphone to be removed pending imposition of such a surcharge, or pending development of a more permanent funding mechanism for the Acworth and other PIPs. Cf. RSA 374:28. Accordingly, we direct Verizon to

maintain the Acworth PIP, at least during the interim period established in this Order.

**Based upon the foregoing, it is hereby**

**ORDERED NISI**, that Verizon NH maintain its payphone located in South Acworth for at least two years from the date of this Order or until further order of the Commission; and it is

**FURTHER ORDERED**, that Verizon NH collect a surcharge from its jurisdictional customers for each line it provides in the Alstead exchange, to produce revenues not exceeding the equivalent of 4 cents per line per month for 24 months, and use the funds to cover its costs of maintaining the Acworth payphone until further order of the Commission; and it is

**FURTHER ORDERED**, that the Commission shall send a copy of this Order Nisi by U.S. Mail to the service list in this docket, a letter to registered payphone service providers that the order is available on our website; and it is

**FURTHER ORDERED**, that all persons interested in responding to this Order Nisi shall be notified that they may submit their comments or file a written request for a hearing on this matter before the Commission no later than August 9, 2003; and it is

**FURTHER ORDERED**, that this Order Nisi shall be effective August 25, 2003, unless the Commission provides otherwise in a supplemental order issued prior to the effective

date.

By order of the Public Utilities Commission of New  
Hampshire this tenth day of July, 2003.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

\_\_\_\_\_  
Nancy Brockway  
Commissioner

Attested by:

\_\_\_\_\_  
Michelle A. Caraway  
Assistant Executive Director