

DENIAL OF LOCAL TELEPHONE SERVICE
FOR
NONPAYMENT OF TOLL BILLS:
A Review and Assessment of Regulatory Litigation
(Second Edition)

Prepared By:

John Rao
Roger D. Colton
National Consumer Law Center
Eleven Beacon Street
Boston, Massachusetts 02108
617-523-8010

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IMPORTANT ACRONYMS AND ABBREVIATIONS

ANI:Automatic Number Identification

BCS:Billing and Collection Service

BOC:Bell Operating Company

CRIS:Customer Records Information System

DNP:Denial for Nonpayment (denial of local service for nonpayment of toll bill to another company)

ESS:Electronic Switching Systems

FCC:Federal Communications Commission

IXC:Interexchange carrier

LEC:Local exchange company

NCD:Network Call Denial

SBB:Single Balance Billing

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TABLE OF DNP DECISIONS

Decisions Prohibiting DNP:

IdahoRe Equal Access Restriction Service, 92 P.U.R.4th 446 (1988).

North DakotaRe Northwestern Bell Telephone Company, 91 P.U.R.4th 320 (1988).

NevadaSection 40, Nevada Administrative Code, Section 704.210

WyomingRe Intrastate Access Charges for Wyoming Telephone Utilities, 81 P.U.R.4th 524 (1987).

ColoradoRe Rule 13(b) Relating To Discontinuance Of Service, Case No. 5323, Decision No. C86-575 (May 13, 1986).

KentuckyRe Access Charge Pricing For Telephone Utilities, 64 P.U.R.4th 96 (1984).

PennsylvaniaStandards and Billing Practices for Residential Telephone Service, Order No. 1-80090338 (August 27, 1984).

Decisions Permitting DNP:

VirginiaRe Deregulation of Telephone Company Billing and Collection Services, 89 P.U.R.4th 539 (1988).

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MarylandRe Disconnection of Local Telephone Service, 77 Md PSC 253, Case No. 7904, Order No. 67494 (October 8, 1986).

VermontRe New England Telephone & Telegraph Co., 78 P.U.R.4th 392 (1986).

UtahRe Access Charges for Intrastate InterLATA and IntraLATA Telephone Services, 70 P.U.R.4th 292 (1985).

CaliforniaRe Pacific Telephone and Telegraph Company, 64 P.U.R.4th 665 (1985).

West VirginiaLawrence v. C & P Telephone Co. of West Virginia, 69 P.U.R.4th 654 (1985).

New York Re New York Telephone Company, 64 P.U.R.4th 515 (1984).

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**FEDERAL COMMUNICATIONS COMMISSION AND OTHER FEDERAL
DECISIONS REGARDING
BILLING AND COLLECTION SERVICES AND DENIAL FOR NONPAYMENT**

1. Re MTC and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 F.C.C.2d 241
(1983).

2. Re MTS and WATS Market Structure, 97 F.C.C.2d 682, 741 (1983).

3. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97

F.C.C.2d 1082, 1283 (Feb. 17, 1984).

4.Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, slip op. (April 27, 1984).

5.Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Mimeo No. 4246 (May 16, 1984) (Waiver Order).

6.In the Matter of Billing and Collection Services, CC Docket No. 85-88, 100 F.C.C.2d 607 (1985) (Notice of Proposed Rulemaking).

7.In the Matter of Billing and Collection Services, CC Docket No. 85-88, 102 F.C.C.2d 1150 (1986)) (Order Adopting Rules).

8.AT&T Communications of the Mountain States v. Public Service Commission of Wyoming, 625 F.Supp. 1204 (D.Wyo. 1985).

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INTRODUCTION

A new threat to the health and security of low-income households is the inability to keep telephone service. Consumer advocates are noting that what had been isolated instances of clients without telephone service are becoming more common.

The telephone industry and others are quick to argue that the goal of achieving "universal telephone service" is close to being realized today. Based on an analysis of data from the last national Census, for example, the National Telecommunications and Information Administration of the U.S. Department of Commerce (NTIA) found that 91.8 percent of all households in the United States had telephones.¹ Moreover, NTIA concluded that despite the five billion dollar hike in basic local telephone rates between 1983 and 1985, "the data show

that nationwide, U.S. telephone penetration has remained constant since divestiture."²

The National Consumer Law Center (NCLC), however, has found that conclusion to be misleading. In October 1986,³ NCLC economist George Sterzinger criticized NTIA's telephone ownership analysis, stating:

¹ "Telephone Subscribership in the United States: A Post-Divestiture Analysis," Office of Policy Analysis, NTIA (December 10, 1985).

² Id.

³ Sterzinger, "Telephone Ownership Since Divestiture," Public Utilities Fortnightly, at 25 (October 2, 1986).

Being a national figure, the NTIA statistics can be criticized for suppressing divergent extremes. In this case, the July 1985, average of 91.8 percent covered a range from 70 percent for the lowest-income group to a high of 99.3 percent for a high income group.⁴

Sterzinger concluded that "while fewer than one out of 100 upper-income families did not have a telephone, roughly 30 out of 100 low-income families did not. A differential of 30 to one in telephone ownership should raise a concern about telephone penetration."⁵

Unfortunately, the adverse impact of lacking telephone service ramifies through the entire spectrum of low-income social and financial affairs and can potentially lead to life-threatening situations. For example, in a 1988 study of winter heating disconnections in Maine, for the state public utility commission, NCLC found that 70 percent of the households for whom a winter disconnection was sought,⁶ and

⁴ Id.

⁵ Id.

⁶ In Maine, no absolute winter disconnection moratorium exists. Instead, a utility is prohibited from disconnecting service during the winter unless prior permission has been obtained from the state Public Utilities Commission.

80 percent of the households for whom a winter disconnection was granted, lacked telephone service.⁷

The findings in Maine are more significant than the simple conclusion that any household which loses its heating service during the winter due to an inability to pay would lose its telephone service as well. NCLC found that households without telephone service were also statistically less likely to have applied for federal Low-Income Home Energy Assistance Program (LIHEAP) assistance, statistically less likely to have entered into payment plans to retire arrears, and statistically less likely to have responded to attempts by state officials to contact the household prior to disconnection. According to the study, households lacking telephone service were in no "worse shape" financially, (and indeed owed fewer arrears toward their energy bills on average), than the corresponding households with telephone service. Instead of being further behind on their heating bills, households without telephone service were simply less able to respond to their inability-to-pay situations, either by making arrangements or by obtaining public assistance.

In light of these serious effects of being without phone service, it is important for local public utility commissions to consider ways to minimize the disconnection of local

⁷ National Consumer Law Center, Low-Income Energy Protections for Maine's Electric Utility Customers: Winter Requests for Disconnect Permission, prepared for Maine Public Utilities Commission (July 1988).

telephone service. One way this issue is presented to regulators is in proceedings regarding whether local exchange companies may decline to furnish, or indeed even terminate, local exchange service because of a customer's failure to pay a long-distance bill incurred to another company. Subsidiary issues include under what circumstances, if any, may such a service deprivation occur; what debt collection regulations, if any, may be applicable under these circumstances; and what deposits may be required in a nonpayment situation.

State utility commissions which have addressed the issue have split. Pennsylvania, Kentucky, Wyoming, Idaho, North Dakota, Nevada and Colorado prohibit local terminations for nonpayment of toll bills. New York, Maine, Missouri, Texas, West Virginia, Maryland, Utah, California, Vermont and Virginia permit it.⁸ Of the most recent decisions on the subject (since 1987), four out of five have prohibited local terminations for nonpayment of toll bills.

⁸ Several states have been said to have addressed the issue but do not have reported decisions. According to the Federal Communications Commission, in addition to the states addressed herein, the following states have made decisions: California, Florida, Michigan and Wisconsin. Re. Billing and Collection Services, CC Docket No. 85-88, 102 F.C.C.2d 1150, 1165 (1986). Moreover, according to Southern New England Telephone Company, the following further states have made decisions: Illinois, Kansas, Minnesota, Mississippi and Oklahoma. Southern New England Telephone Company Responses to Data Request 19, by Department of Public Utility Control, Rates Division, Re Declaratory Ruling Regarding Prohibition on Termination of Intra-state Telephone Service for Non-Payment of Inter-state Telephone Charges (hereafter Connecticut Declaratory Ruling), Connecticut Department of Public Utilities, Docket No. 86-10-11 (1987). The Petition for Declaratory Ruling was subsequently withdrawn.

The purpose of this paper is to look at the local termination issue. The paper will review the administrative litigation devoted to the issue, assess the validity of arguments for and against prohibiting the disconnection of local service for nonpayment of toll bills, and make recommendations as to litigation strategy. The paper will also evaluate local deposit requirements in light of divestiture.

I. ARGUMENTS FOR A BAN ON DISCONNECTIONS.

For many, the issue of whether a telephone company should be permitted to disconnect basic local service for failure to pay a toll bill⁹ resolves itself into one simple question: what is the primary purpose of state regulation? If one answers that question in a manner similar to the Pennsylvania public utility commission, the debate is over. According to that commission, "access to the local network should be afforded the highest degree of protection."¹⁰ Accordingly, Pennsylvania said: "partial payments should be applied first to local exchange service, then to interexchange service, and finally to non-basic service."

Others would decide the issue on an equally fundamental, but nevertheless separate, policy ground. The argument was succinctly put by the Federal Communications Commission, who said the local telephone companies':

use of their leverage over a monopoly communications service to coerce payment represents an abuse of their power to control access to such monopoly service.¹¹

⁹ Hereafter, disconnecting local service for nonpayment of a toll bill to another company will be referred to simply as disconnection for nonpayment or DNP.

¹⁰ Standards and Billing Practices for Residential Telephone Service, Order No. I-80090338, at p. 5 (Penn. PUC August 27, 1984).

¹¹ In the Matter of Detariffing of Billing and Collection Services, 100 F.C.C.2d 607, 611 (1985).

Local telephone companies continue to provide monopoly service.¹² There is no inherent right to this monopoly status, however. A public bargain has been made. As monopolies, the local exchange companies are granted certain rights and other public perquisites. Among these rights, for example, are the right to invoke the power of eminent domain and the right to have statutory protection of its opportunity to earn a reasonable rate of return on investment.

By accepting this privileged status, however, the companies give something up in exchange. In consideration of the public status of telephone companies, for example, the common law imposes upon them a responsibility to serve all who come. Moreover, service must be provided at reasonable rates.¹³ As these duties make clear, the monopoly status of a local utility is a government granted privilege to be strictly construed for the benefit of the public.

In short, the monopoly status of the local telephone company is not an attribute of the business that can be loaned, sold or bargained away. The monopoly status was granted, in

¹² See, e.g., Laber and Zamore, "Competition in Intrastate Telephone Service," *Public Utilities Fortnightly*, at 27 (July 5, 1984); Bolter, "Restructuring in Telecommunications and Regulatory Adjustment," *Public Utilities Fortnightly*, at 21 (July 5, 1985).

¹³ See, generally, Wyman, "The Law of the Public Calling as a Solution to the Trust Problem," 17 *Harvard L.Rev.* 156 (1904); Burdick, "The Origin of the Peculiar Duties of Public Service Companies," 11 *Columbia Law Review* 514 (1911); Robinson, "The Public Utility Concept in American Law," 41 *Harvard L.Rev.* 277 (1928).

the first instance, to further a public use. Its powers and benefits cannot be sold for strictly private gain. As the Public Utility Law Project of New York correctly noted: "it would violate the basic concept of monopoly regulation were the commission to allow (New York Telephone) to sell in the competitive marketplace this denial power which it enjoys solely as a result of being a regulated monopoly." Indeed, in general, DNP opponents have sought a prohibition of DNP first and foremost on the grounds that it constitutes an attempt by the local phone company to exercise its market power to coerce payment for other services. (New York, North Dakota, Maryland, Vermont).¹⁴

Moreover, as recently as 1987, Judge Greene, in denying a request to lift line-of-business restrictions, stated that the primary purpose of the 1982 Modified Final Judgment was to have AT&T (and, by implication, other long-distance carriers) "stand or fall on their own." U.S. v. Western Electric Company, 673 F.Supp. 525, 600 (D.D.C. 1987).

Other reasons, as well, have been introduced in opposition to DNP. They are discussed briefly below.

A. Disconnections for Ancillary Reasons.

A long and well-established corollary to the limitations on

¹⁴ The states referenced in parentheses throughout this paper are those states in which the argument was expressly argued by proponents or opponents of the respective positions.

the use of monopoly power is that a utility may not require a customer to give up service for some ancillary reason. (Maryland, Colorado, Kentucky, New York, Pennsylvania, West Virginia, Ohio).¹⁵ State courts, generally, (in addition to regulatory bodies) recognize this principle. The Colorado supreme court, for example, has recognized the right of utility consumers to continued service for which they have paid. Denver Welfare Rights Organization v. Public Utilities Commission, 190 Colo. 329, 547 P.2d 239 (1976). Moreover, in Josephson v. Mountain Bell, 576 P.2d 850 (Utah 1978), Mountain Bell was denied the authority to terminate a personal residence phone for failure to pay charges associated with a business. The Utah supreme court held that Mountain Bell "as a public utility, has a higher obligation to render service to the public than does an ordinary business.* * *it must render service to all members of the public who so request and pay for it." 576 P.2d at 852.¹⁶

This principle has been applied to deny the right of a local exchange carrier (LEC) to disconnect local service for nonpayment of a toll bill. The Kentucky public service commission has expressly held:

¹⁵ See, generally, Public Utility-Refusal of Service, 55 A.L.R. 771; Municipalities--Refusal of Services, 60 A.L.R.3d 714, 715-16, n. 1; see also, A.G. Priest, Principles of Public Utility Regulation, Vol. I, p. 257 (1969).

¹⁶ Accord, Miller v. Rosswell Gas & Electric Co., 166 P. 1177 (N.Mex. 1917); Komisarek v. New England Telephone and Telegraph Co., 282 A.2d 671 (N.Hamp. 1971).

Termination of service is a right of a utility to discontinue service for nonpayment of service it provides to that customer* * *.

Particularly in a post-divestiture environment, where provision of local exchange services are separated from the competitive, interexchange functions and these services are provided by separate entities, each firm should stand on its own. Thus, an LEC customer should not obtain or continue service contingent on paying both charges owed the LEC and a separate competitive firm providing interLATA toll services. If an LEC were permitted to discontinue local exchange service for nonpayment of charges owed another firm for its services there would be an improper intertwining of the two firms.

Re Access Charge Pricing for Telephone Utilities, 64 P.U.R.4th 96, 128 - 129 (Ky. PSC 1984).
(emphasis added).

The principle articulated above has been applied in a variety of contexts. Included are:

- 1.A refusal to permit disconnection for failure to pay for a different utility service (e.g., gas and electric);
- 2.A refusal to permit disconnection for failure to pay for a different type of service (i.e., residence and business telephone);
- 3.A refusal to permit disconnection for failure to pay for service at different locations,

even if of the same type and utility;

4.A refusal to permit disconnection for failure to pay for unregulated services (e.g., appliance sales, phone rental from ATTIS); and

5.A refusal to permit disconnection for failure to pay for service obtained under a contract different from that contract under which disconnection is sought.

The essential fact is that an interexchange carrier (IXC) is a separate business from the LEC; it has no relationship to the LEC. Flowing from that fact is the conclusion that a customer's payment status with regard to the IXC charges should not be permitted to affect the local exchange service provided by the LEC.

If the issue is held not to have been preempted by prior FCC determinations, whether there is in fact a "separateness" between the local exchange and interexchange carriers is a fact to be determined in litigation. This issue presents whether the Billing and Collection Service (BCS) offered by an LEC is a telecommunication service at all. Is an LEC, in other words, acting in its capacity as a telephone company when it collects for an IXC, or is it rather serving as a billing and collecting agent (with the fact that the company also provides telephone service being incidental). Again, however, this inquiry must be made in light of prior FCC decisions. The FCC has found that a billing and collection service is "not inherently a telecommunication service."¹⁷ Instead, the FCC said, "billing and collection is essentially a financial and administrative service* * *."¹⁸

Such a finding should come as no surprise. The Bell Operating Companies (BOCs) are increasingly entering non-telecommunication markets. In many prior discussions of entry into

the competitive world, the BOCs have discussed their break-up or disaggregation into distinct profit centers.¹⁹ The offer of a "collection" service is entirely consistent with this industry trend.

Not all states, however, have agreed with this basic approach. In states where the general regulatory principle of banning shutoffs for ancillary reasons has been considered and rejected in DNP proceedings, the principle has been reaffirmed but held to be inapplicable. In West Virginia, for example, the public service commission held that "although, now, in the post-divestiture environment, we are dealing with different corporate entities providing local and long distance services,

¹⁷ In the Matter of Detariffing of Billing and Collection Services, 100 F.C.C.2d 607, 611 (1985).

¹⁸ *Id.*, at 609.

¹⁹ See, generally, "Telephone Communications: Bell Operating Company Entry into New Lines of Business," General Accounting Office, RCED-86-138 (April 1986).

there is still a physical unity in the provision of telecommunications services." Lawrence v. C & P Telephone Co. of West Virginia, 69 P.U.R.4th 665, 677 (W.Va. PUC 1985). The West Virginia commission continued: "there is still a sufficient nexus between local and long distance service to distinguish the provision of telecommunications service from other utility services with regard to termination." Similarly, in refusing to ban DNP, a New York Administrative Law Judge held that local and toll service were not "sufficiently independent" to warrant application of the general regulatory principle. Re. New York Telephone Co., 64 P.U.R.4th 515, 523 (NY PSC 1984).

The lack of "separateness" is not a barrier to barring shutoffs in all cases. Several other utility commissions have applied the general regulatory principle of prohibiting the disconnection of utility service for ancillary reasons to ban local service shutoffs for the nonpayment of other concededly telephone services. For example, the District of Columbia commission has ruled that an LEC cannot disconnect a customer's local telephone service for failure to pay "976" audiotex charges. Re Chesapeake and Potomac Tel. Co., 87 P.U.R.4th 1 (DC PUC 1987). Similarly, nonpayment of alternative operator service charges cannot be the basis for a local service disconnection in Idaho. Re Alternative Operator Service, 95 P.U.R.4th 411 (Id. PUC 1988).

In sum, the general rule of law is that the service of a public utility may not be discontinued for some reason ancillary to the service. It can be argued that, subsequent to divestiture, interexchange toll service is no longer part of the provision of regulated state jurisdictional service. Indeed, the FCC has expressly found that billing and collection services

are "financial and administrative services" which are incidentally related, if at all, to the provision of telephone service. The argument that DNP should be denied for this reason is on sound footing.

B. Specific State Authority.

In April 1984, the Federal Communications Commission (FCC) issued an order generally prohibiting the termination of local service for nonpayment of interstate interexchange carrier charges.²⁰ The FCC directed that all provisions for local service cut-offs be deleted from tariffs. One month later, however, the FCC temporarily waived its prohibition. It said:

* * *all exchange carriers will be required to remove from their interstate access tariffs any language permitting termination of local service for nonpayment of interstate toll charges. For the period of this waiver, we will not bar exchange carriers from terminating local service for

²⁰ In the Matter of Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, slip op. (April 27, 1984).

nonpayment of a bill for interstate toll services where such terminations are permitted by state authority.²¹

It is clear from this language that DNP is not permitted unless tariffs exist specifically setting forth that practice. Accordingly, DNP tariffs must be submitted to the state utility commission and approved. If, for example, the disconnection of local service is simply set forth in a Billing and Collection Service contract with an IXC --the contract, for example, may include language stating that "the same collection procedures will be provided as are used for all other services"-- there is likely no state review (no "permission by state authority") and, therefore, any disconnection taken thereunder would be unlawful. In short, the use of DNP, under the FCC decision, must be submitted to the state utility commission for approval or disapproval.

In subsequent action, the FCC backed away from any decision either to approve or to disapprove DNP within the context of its decisions regarding Billing and Collection Services. In its order to detariff interstate BCS, the FCC announced its policy to defer to state decisionmakers on the issue. It said:

²¹ Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Mimeo No. 4246, ?? 4-5 (May 16, 1984). (Waiver Order).

We shall continue to defer to state regulatory authorities with respect to the practice of local cut-offs. While we do not intend, by this action, to give tacit approval to this activity, we are inclined to agree with commenters that the practicalities weigh in favor of state resolution.* * *we believe that the state commissions should determine whether LECs will be permitted to discontinue local services for nonpayment of interstate toll services that are not offered by the LEC.²²

Notwithstanding this action, the FCC has hardly been neutral with regard to whether DNP is a "just and reasonable" practice. The FCC has declared:

(W)e question whether it is reasonable to allow denial of local service for failure to pay (IXC) service charges. The telco's (LEC's) relationship to the customer with respect to the service provided by the (IXC) is that of billing agent or purchaser of

²² In the Matter of Billing and Collection Services, CC Docket No. 85-88, 102 F.C.C.2d 1150, 1176 (1986) (Order Adopting Rules).

receivables. A serious question of fairness to customers is raised where a subscriber's local telephone service is placed in jeopardy by a telco in its capacity as collection agent or holder of (IXC) receivables.²³

The FCC, in that same order, held that it is the IXC which "should be the one to determine when to stop providing service to one of its customers."

One year later, the FCC was even stronger in its condemnation of the DNP practice. In its Notice of Proposed Rulemaking in Re Detariffing of Billing and Collection Services, it stated:

* * *we do believe that use of (the LECs') leverage over a monopoly communication service to coerce payment represents an abuse of their power to control access to such monopoly service. In as much as billing and collection service is not inherently a communications service, the system set up by the carriers for the purpose of billing telephone calls can be used to bill other products and services as

²³ In the Matter of Investigation of Access and Divestiture Related Tariffs, 97 F.C.C.2d 1082, 1289 (1984).

well. Thus, for example, a consumer's local telephone service could be discontinued for nonpayment of a department store bill. In our view, it is unfair for a person's local telephone service to be terminated for nonpayment of an unregulated service when in fact he is paying his local service bill.²⁴

The collection efforts need not even be as egregious as the "department store" example. According to the Connecticut Division of Consumer Counsel, for example, because of the LEC's Single Balance Billing (SBB), nonpayment of Western Union telegram costs billed to a home telephone would result in the disconnection of local exchange service in that state. This Western Union example lends even greater credence to the federal determinations: (1) that "the telco's (LEC's) relationship to the customer with respect to the service provided by the (IXC) is that of billing agent or purchaser of receivables," and not of the provider of telecommunication services, and (2) that "billing and collection is not inherently a communications service."²⁵

[Given these federal determinations, it is possible that a decision as to whether or not the LEC and IXC are providing

²⁴ In the Matter of Detariffing of Billing and Collection Services, 100 F.C.C.2d 607, 611 (1985).

²⁵ According to the FCC, "billing and collection is essentially a financial and administrative service* * *. 100 F.C.C.2d at 609.

services which are a "physical unity" (as decided in West Virginia) or whether there is a "sufficient independence" (as decided in New York) may well have been preempted by federal authority.²⁶ Particularly with regard to the Billing and Collection Services provided to IXC's, which are under the jurisdiction of the FCC, a state decision may not contravene the federal determination that the relationship between the LEC and the IXC is "that of a billing agent or purchaser of receivables" and that the type of LEC service at issue is "not inherently a communications service."^{27]}

Finally, in making a determination of whether DNP is "permitted by state authority," one might note that the shutoff requirements of many states would effectively prohibit DNP in any circumstances. The Maryland administrative code, for example, states that disconnections may occur only for failure to pay a "bill rendered pursuant to tariffs and requirements, orders, and regulations of the Commission* * *."²⁸ A bill rendered by an IXC, of course, is not a bill rendered "pursuant

²⁶ This analysis does not undertake to examine the law of federal preemption. For a discussion of preemption within the context of public utility regulation, see, Colton and Sheehan, "Regulatory Control of Natural Gas Procurement Practices in Illinois: Permissible Regulation or Preempted Activity?", 35 DePaul Law Review 317 (1986).

²⁷ While the state would have authority to make its own different determination for Billing and Collection Services not under the jurisdiction of the FCC, the FCC decision should have some persuasive effect.

²⁸ Code of Maryland Regulations, title 20, subtitle 45, chapter 4.01D.

to tariffs etc. of the Commission." An IXC charge is instead rendered pursuant to federal tariffs. A contract between the LEC and the IXC granting the right to the LEC to collect the toll charges does not convert those toll charges into bills rendered pursuant to tariffs of the state regulatory body.²⁹

C. Uncertain Cost Consequences.

Aside from whether it is lawful for a state utility commission to permit DNP lies the question of whether permitting or banning DNP is desirable from a policy perspective. Proponents of permitting DNP argue that the sale of billing and collection services to interexchange carriers depends upon DNP. (Maryland, Ohio, Texas, Colorado, West Virginia, Vermont). Moreover, those proponents say, the loss of BCS sales revenue would harm local exchange ratepayers. As a result, these proponents conclude, local exchange ratepayers are better off with the sale of BCS which includes DNP.

An initial fallacy in this argument is that DNP is not crucial to the sale of BCS. Three lines of analysis support this conclusion:

²⁹ Neither does the fact that the Billing and Collection Service may be sold pursuant to state tariff convert the interexchange bills into bills rendered pursuant to tariffs of the state commission. It is, of course, the charge for the long-distance service, not the charge for the BCS, to which the statute refers. Moreover, pursuant to FCC decision, the interstate BCS has been detariffed entirely.

oFirst, frequently, the existence of DNP has not induced IXCs other than AT&T

Communications (ATTCOMM) to purchase Billing and Collection Services. Indeed, in many states, ATTCOMM is the only IXC to use BCS. In these states, IXCs other than ATTCOMM have not even sought to intervene in proceedings considering whether or not to ban DNP, nor have they filed comments on such prohibitions. The conclusion to be drawn is that ATTCOMM's use of BCS does not flow from the tying to DNP but rather from the historical relationship between the BOCs and AT&T.

oSecond, it is likely that ATTCOMM is not "choosing" to use the BCS of local phone companies because of the presence of DNP at all. In most, if not all cases, ATTCOMM is purchasing BCS from the LEC for one reason only: it has no choice because it is not currently able to provide its own BCS.³⁰ As a result, even without DNP, ATTCOMM would continue to use the BCS of the local carrier, at least until it develops its own billing capability.

oFinally, even ATTCOMM has acknowledged that it is in the process of developing its own billing and

³⁰ See, e.g., New England Telephone and Telegraph Co., 78 P.U.R.4th 392, 394 (Vt. PSB 1986). ("until AT&T is able to develop and implement its own billing system, it is wholly reliant on (New England Telephone) and on other Local Exchange Carriers (LECs) in Vermont to perform its billing services.")

collection system and that it will discontinue use of BCS (even with DNP) upon its successful transition to internal systems.³¹ However, the timing for ATTCOMM to move to its own BCS is not at all clear.³² In any event, even with DNP, the LEC's will eventually lose this source of revenue, and a prohibition of DNP will not be the cause of such a loss.

In sum, the availability of DNP has little to do with the IXC's decision whether or not to use the LEC's billing and collection service. Most clearly, it is apparent that DNP is not the linchpin of the BCS contract which proponents of DNP assert.

³¹ The FCC noted in its Notice of Proposed Rulemaking to detariff BCS that: "AT&T had stated that it planned to initiate its own billing inquiry service in 22 states by January 1, 1985 and to complete the transition to use of its own billing inquiry centers for the areas served by the BOCs by August 1985." In the Matter of Billing and Collection Services, CC Docket No. 85-88, 100 F.C.C.2d 607, 610, n.15 (1985). This transition is the first step toward implementing its own billing and collection system.

³² Recent reports indicate that ATTCOMM is still working on its own BCS and that it will probably continue to rely upon LECs for this service in the immediate future. For example, the North Dakota commission found that the recording component of BCS is the major barrier, as this function still cannot effectively be handled by most IXCs. Re Northwestern Bell Tel. Co., 91 P.U.R.4th 320, 323 (ND PUC 1988). It was reported that ATTCOMM and the LEC had entered into an agreement relating to the recording function which will extend over the next five years. In contrast, ATTCOMM stated in Connecticut that it would begin implementation of its own BCS in 1987 with full implementation to be complete by 1990. Southern New England Telephone Company Responses to Data Request 5 and 14, by Division of Consumer Council, Connecticut Declaratory Ruling, supra note 8 (1987). Similar representations have been made in Ohio and Maryland.

D. Adverse Effects on Local Rates.

Opponents of DNP have argued in several states that certain revenue impacts of exercising DNP have been ignored. (Texas, Ohio). Refusing to initiate or to continue local exchange service in order to allegedly protect the revenue stability of an IXC, for example, in turn adversely affects the revenue stability of the LEC. Not only are revenues affected, by limiting the number of customers, but uncollectible arrears are increased as well.

Today, the LEC premises disconnection of service on a failure to pay some threshold amount of a total bill, including IXC charges. In many cases, the minimum thresholds may exceed the customer's total local exchange charges. The customer's failure to pay the threshold amount could result in the customer losing all service even though local service was fully covered by the partial payment.³³ Allowing partial payments to be credited to local service would thus preserve that revenue source for the LEC. Rather than losing their service entirely, customers would remain connected to the local telephone network by keeping current on their local service.

Moreover, once disconnected, a policy of requiring the customer to pay the entire bill, including IXC charges, (and in

³³ In Ohio, three of four households were found to have made sufficient payments to retain their local service if Single Balance Billing had not been in place. Re Investigation into the Disconnection of Local Exchange Service for Failure to Pay Message Toll Charges, Public Utility Commission of Ohio, Case No. 5-1930-TP-COI, Reply Comments of the Office of the Consumers' Counsel, at 5 - 6 (1986).

some cases a security deposit), in a lump sum represents a formidable barrier to customers curing a default and regaining access to the system. This barrier then results in higher uncollectibles and lowered revenues, both of which inure to the detriment of local ratepayers.

Finally, the actual act of disconnection causes costs for the system. According to the Southern New England Telephone Company, for example, the administrative costs alone fall in a range of from \$20 - \$25 per disconnection. According to that company, also, "other disconnect costs, such as physical activities in the central office required to effect the actual disconnect would be in addition to the administrative expenses."³⁴ In some states, that cost could aggregate into something significant. In Michigan, for example, Michigan Bell disconnects roughly 80,000 households per quarter.³⁵

In the event that state regulators authorize DNP, those regulators should require the IXC to hold the local ratepayers harmless. For every customer who remains off the system, but who would have remained on the local system but for the use of DNP, remaining local customers lose the revenue contribution that local customer would have provided. If DNP is to be

³⁴ Southern New England Telephone Company Response to Data Request 15, by Department of Public Utility Control, Rates Division, Connecticut Declaratory Ruling, supra note 8 (1987).

³⁵ National Consumer Law Center, Telephone Customer Service Regulations in the Post-Divestiture Environment: A Study of Michigan Bell Telephone Company, prepared under contract to the Michigan Divestiture Research Fund (July 1988).

maintained to reduce the uncollectibles of participating IXCs, those carriers should be required to make the local system whole for the local revenue loss sustained as a result. In addition, the IXC should be required to hold local ratepayers harmless for the costs of the act of disconnection in those instances where partial payments sufficient to cover local bills would have kept the customer on the system but for the sale of billing and collection services (including DNP) to the IXC.

E. Discrimination Against Some Customers.

Discrimination problems arise because the loss of local exchange service often only occurs to customers who use ATTCOMM as their long-distance carrier. Customers of other IXCs, which do not purchase BCS, are not threatened by the collection tool of DNP. The reliance of ATTCOMM upon DNP is particularly troublesome because the contracts by which ATTCOMM sells its accounts receivables to the LEC are not made pursuant to tariff and are subject to no regulatory control.³⁶ There is no reason why ATTCOMM customers must place their local service in

³⁶ The FCC has provided that billing and collection services were to be detariffed entirely as of January 1, 1987. In the Matter of Billing and Collection Services, CC Docket No. 85-88, 102 F.C.C.2d 1150 (1986) (Order Adopting Rules). As a result, state public utility commissions are precluded from imposing a charge on IXCs related to the value of this service. AT&T Communications of the Mountain States v. Public Service Commission of Wyoming, 625 F.Supp. 1204 (D.Wyo. 1985).

jeopardy each time they place a long-distance call while those customers of other IXC's do not face a similar threat.

This situation is even more untenable for customers who do not choose an IXC but rather are assigned one. As a result of FCC actions, customers who do not choose a long distance carrier are randomly assigned to ATTCOMM or another IXC in proportion to the carrier's relative market share. For those customers, one household may be subject to DNP while an identically situated household across the street is not, depending quite literally upon the "luck of the draw."

Moreover, a rate discrimination issue exists, as well, against those customers using an IXC other than ATTCOMM. It is important to note the distinction between IXC customers in this regard. DNP proponents argue that use of DNP benefits all customers by reducing IXC uncollectibles. (Vermont, New York). The body of customers for ATTCOMM and that for the LECs, however, are not co-extensive. Cost savings which are realized for ATTCOMM are passed directly on only to its ratepayers. In contrast, the costs of decreasing local revenues and increasing local uncollectibles, as discussed above, will be passed on to all LEC ratepayers, whether they use ATTCOMM, MCI, GTE-Sprint or some other IXC. As a result, there is a direct financial subsidy flowing from LEC customers who use other than ATTCOMM to customers who use ATTCOMM as their IXC.

F. Anti-Competitive Implications.

Permitting DNP to be exercised on behalf of ATTCOMM likely has a variety of

anti-competitive implications. (Maryland, Ohio, Pennsylvania, New York, North Dakota). To raise the anti-competitive issues, however, an initial showing of standing must be made. In the event that IXCs other than ATTCOMM do not participate in a DNP proceeding to argue the anti-competitive impacts --the absence of these carriers is foreseeable-- it is possible that a commission may hold that parties do not exist which have the requisite direct personal interest to raise the anti-competitive arguments.

Competition, however, is for the benefit of the consumer in addition to being for the benefit of the competitor. The presence of competitors, at least in theory, will tend to force ATTCOMM to keep its rates at reasonable levels. As a result, both the users of ATTCOMM and the users of ATTCOMM's competitors have a direct financial stake in eliminating anti-competitive behavior redounding to the detriment of the competitors.³⁷

Today, ATTCOMM is one of several companies providing long distance telephone service on a greater or lesser basis. In that role, the problem of ATTCOMM controlling its uncollectibles absent DNP is not a concern to a state utility

³⁷ Setting that aside, a state consumer advocate office should have no problem arguing the anti-competitive impacts; its interest in representing all customers should be sufficient.

commission. Indeed, MCI, GTE-Sprint and the other IXCs competing with ATTCOMM, carriers that have not historically had DNP through the LEC, have had to address the problem of controlling uncollectibles without DNP for years. As a result, permitting the LEC to disconnect local service for nonpayment of toll charges to IXCs buying BCS distorts the "level playing field," a concept of which ATTCOMM has been particularly fond in recent times.

The benefits to ATTCOMM, and the competitive distortions of relying on DNP, are thus readily apparent. ATTCOMM controls its uncollectible expense relying on LEC investment; in contrast, ATTCOMM's competitors have made substantial investments to enable them to block access to their networks. Through permitting DNP, ATTCOMM is given a substantial advantage over its competitors, and that gift is provided only because of its historical relationship before divestiture. The Pennsylvania commission has expressly held that use of DNP provides an unlawful competitive advantage over those who do not use it.

In contrast, the New York commission held that the Modified Final Judgment expressly approved of DNP. Appendix B of the MFJ states in relevant part:

Nothing in this Modification of Final Judgment shall either require a BOC to bill customers for the interexchange services of any interexchange carrier or preclude a BOC from billing its customers for the interexchange services of any interexchange carrier it designates, provided that when a BOC does provide billing services to an interexchange carrier, the BOC may not discontinue local exchange service to any customer because of nonpayment of interexchange charges

unless it offers to provide billing services to all interexchange carriers, and provided further that the BOC's cost of any such billing shall be included in its tariffed access charges to that interexchange carrier.³⁸

The New York commission said that because of this approval, which came in a "broad antitrust case resolved in the consent decree," the practice of DNP "must be presumed to be consonant with the antitrust laws."³⁹

It can also be argued that LECs obtain a strong competitive edge over other providers of BCS if they are permitted to offer DNP as part of their BCS. The North Dakota commission recognized this factor in its decision banning DNP. The commission concluded that if an LEC, as a deregulated provider of BCS, "disconnects or offers to disconnect local service as a means of collection, [the LEC] will have an unfair competitive

³⁸ U.S. v. AT&T, 552 F.Supp. 131, 234 (D.D.C. 1982).

³⁹ Re New York Telephone Co., 64 P.U.R.4th 515, 531 (NY PSC 1984).

advantage." Re Northwestern Bell Telephone Company, 91 P.U.R.4th 320, 323 (ND PUC 1988). According to Southern New England Telephone Company, potential competitors currently seeking to enter the BCS market include such entities as VISA and American Express.⁴⁰

Permitting DNP finally results in anti-competitive impacts because of the LEC's refusal to deal with alternate IXCs in the event of nonpayment of ATTCOMM toll charges. An unlawful refusal to deal occurs when the termination of local service for nonpayment of an ATTCOMM bill totally blocks access to the telephone customer by all other IXCs. Such a result is inconsistent with the original intent of AT&T divestiture, which sought to open the relevant telecommunications markets to competition. An LEC should not be permitted to control the IXC marketplace by selling its termination power to prevent free customer access to competing interexchange carriers.⁴¹

⁴⁰ Southern New England Telephone Company Response to Data Request 20, by Department of Public Utility Control, Rates Division, Connecticut Declaratory Ruling, supra note 8, (1987); see also, New York Telephone Company Response to Data Request 47, by Department of Public Utility Control, Rates Division, Connecticut Declaratory Ruling, supra note 8 (1987); see also, In the Matter of Billing and Collection Services, CC Docket No. 85-88, 102 F.C.C.2d 1150, 1158 (1986) (Order Adopting Rules).

⁴¹ That the bills to one interexchange carrier are unpaid should not ipso facto deny the right of a customer to obtain credit from other carriers. The right to determine their own risk aversity should remain with each carrier. There is an entire sector of the small consumer loan industry, for example, that serves only the "high risk" customer. The increased risk is simply reflected in the rates charged.

II. ARGUMENTS AGAINST A BAN ON DISCONNECTIONS.

The arguments posited against banning the disconnection of local telephone service for failure to pay a toll bill have centered on the cost and technological aspects of the issue. Generally, proponents of the use of DNP argue that because it is not possible to deny interexchange service without also denying local service, DNP should be permitted. Moreover, the proponents of DNP assert, a ban on the use of DNP will have adverse cost consequences to local ratepayers.

A. The Ability to Block IXC Phone Calls.

The technology necessary to implement a prohibition of DNP is not currently in place by either LECs or IXCs according to the proponents of DNP.⁴² The technology would be required to selectively block access to the telephone network. To "selectively block" means to allow the denial of access to the telephone network differentiated by IXC. The technology would need to be able to block operator-assisted calls as well as 1+ dialing. Finally, an LEC would need to be able to block interLATA calls without blocking intraLATA calls.

⁴² One disturbing trend in a review of the argument in various states is the willingness of DNP opponents to concede the definition of the "technology argument" to DNP proponents by default. If, in other words, the local BOC asserted that it did not have call-blocking capabilities, too often, the question was not raised whether the IXC had that ability and vice versa. Of course, both the LEC's ability and the IXC's ability must be considered.

In banning DNP, the Colorado utility commission recognized what several other commissions, which refused to ban the practice, did not: that network call blocking can be accomplished by either the LEC or the IXC. The Colorado commission permits DNP only when "neither the local carrier nor the long distance carrier serving the particular customer currently is able to block the delinquent customer's access to toll service without simultaneously denying local exchange service." (emphasis in original). Similar recognition of the distinction is necessary elsewhere. The abilities of both types of carriers will be examined herein.

1. Blocking by ATTCOMM.

In order for ATTCOMM to block access to its network, the company must be able to identify the calling party's telephone number at the time the call enters ATTCOMM's network, as well as to obtain the account status of the calling party.⁴³ To meet the first requirement, ATTCOMM must have access to Automatic Number Identification (ANI). To meet the second, ATTCOMM must deploy a Network Call Denial (NCD) data base.

ANI can, without question, be provided through equal access offices. The penetration of equal access offices in the various states differs. ATTCOMM and the LECs have testified

⁴³ In addition, relevant hardware and software must be installed at Traffic Service Position System and switching locations.

that ANI capability ranges from roughly 60 to 90 percent of offices depending upon the state. Moreover, the penetration of equal access offices is dramatically increasing. This trend is one reason why, as discussed above, four of the five states to most recently consider the issue have banned the practice of DNP.

In contrast, there is a great deal of confusion as to the precise status of ATTCOMM's ability to deploy an NCD data base. On the one hand, ATTCOMM has testified in some states that it has available for current deployment an NCD data base. This NCD data base will give ATTCOMM the capability, where ANI is available, to control customer access to its interexchange network for both direct-dialed and operator-assisted calls. Both the hardware and the software necessary to allow ATTCOMM to engage in selective call denial were apparently available in 1986.⁴⁴ The West Virginia public service commission cited AT&T witness John Morrison, in 1985, finding that "AT&T is currently developing a Network Call Denial data base which is scheduled to be available by the end of 1986. The software needed to block calls is also scheduled to be available in late 1986."⁴⁵ Similar representations were made even more

⁴⁴ The status of the NCD data base and software package was perhaps best explained in ATTCOMM witness John Morrison's West Virginia testimony, Docket No. 84-426-T-C (November 19, 1984).

⁴⁵ Lawrence v. C&P Telephone Co. of West Virginia, 69 P.U.R.4th 665, 672 (WVa PUC 1985); but see, note 32, supra, and accompanying text.

recently by AT&T. According to AT&T Communications of New England in a recent Connecticut proceeding, while the company had its Network Call Denial data base available in 1987, "effective deployment" of that data base depended upon the ability "to populate the data base with delinquent account information." The identification of customers accounts that are delinquent in paying their AT&T charges can be done by AT&T when it deploys its own billing system. AT&T told the Connecticut Department: "MTS billing and collection services will begin in May of 1987 and is scheduled to be completed 1990."⁴⁶

Despite these statements by ATTCOMM in West Virginia and Connecticut, ATTCOMM has testified in recent cases that NCD is "not yet available for deployment and may not be for some time."⁴⁷ Based on testimony given by ATTCOMM at hearings conducted in 1986 that NCD hardware and software were not completed, the Wyoming commission was not able to determine "with any exactitude when and how AT&T will be in a position to provide its own service denial function in Wyoming."⁴⁸ In the most recent DNP decision, issued in May, 1988, ATTCOMM

⁴⁶ AT&T Responses to Division of Consumer Council's Data Requests 5 and 14, Connecticut Declaratory Ruling, supra note 8, (1987).

⁴⁷ Re New England Telephone and Telegraph Co., 78 P.U.R.4th 392, 394 (Vt. PSB 1986).

⁴⁸ Re Intrastate Access Charges for Wyoming Telephone Utilities, 81 P.U.R.4th 524, 531 (Wy. PSC 1987).

advised the Idaho commission that it is still developing its own call denial system.⁴⁹

There is no readily apparent way to resolve this conflict in the ATTCOMM testimony in differing states.

2. Blocking by the LEC.

Whatever the capability of ATTCOMM, LEC testimony to other state commissions has conceded that even the older electro-mechanical switches can be programmed to provide selective denial. For example, in a step-by-step system, in order to provide selective denial, an Automatic Intercept System must be installed in each step-by-step office. Crossbar offices would need to be substantially rewired.⁵⁰ In addition, an LEC's stored program control switches (No. 1/1A ESS, 2/2B ESS, 3 ESS and 5 ESS), with minor modifications to its software, can provide selective call denial.⁵¹

Other methods of implementing selective call denial have been detailed in the various states. Ohio Bell, for example, stated that in central offices equipped with ESS and cross-bar

⁴⁹ Re Equal Access Restriction Service, 92 P.U.R.4th 446, 447 (Id. PUC 1988).

⁵⁰ In Maryland, the LEC testified that the cross-bar switches would be most difficult to modify, while in Ohio, the LEC testimony was that the step-by-step offices would pose the greatest difficulties.

⁵¹ The Pennsylvania commission made this express finding of fact. Standards and Billing Practices for Residential Telephone Service, Order No. 1-80090338, at 7 (August 27, 1984).

switches in its service territory, selective disconnections could be provided through the inputting of a teletype message at a cost of approximately \$2.50 per line.⁵² The teletype message which Ohio Bell outlined need only be inputted for those customers who are about to be disconnected for nonpayment of toll charges.

Similarly, Mountain Bell witnesses testified in Colorado that in that state's non-conforming offices (i.e., offices which do not provide equal access), Mountain Bell can terminate all toll service while maintaining local service.⁵³ This is accomplished by a "toll restrictor" which is a piece of hardware that restricts the dialing of 1-plus numbers and which is wired directly into the line. According to Mountain Bell, the installation of a "toll restrictor" would take approximately five minutes. In addition, even in the non-conforming offices, Mountain Bell said, technology is available to distinguish intraLATA service. This is accomplished by placing an adjunct black box smart switch between the central office and the subscriber lines to

⁵² See, Re Commission Investigation into the Disconnection of Local Exchange Service for Failure to Pay Message Toll Charges, Case No. 85-1930-TP-COI, Reply Comments of City of Cleveland, at 5 - 6 (March 26, 1986).

⁵³ Testimony of Mountain Bell witness Janice G. Reece, Re Rules Regulating the Service of Telephone Utilities Within the State of Colorado, Rule 13(b) Relating to Discontinuance of Service, Docket No. 5323, Hearing Transcript pages 85 - 87 (April 11, 1986).

accomplish the differentiation between interLATA and intraLATA toll blocking.

The Southern New England Telephone Company, in Connecticut, was not as specific, but nevertheless stated that ESS/Digital and crossbar switches have the capability to block access to interstate (1+NPA) calling, while maintaining a customer's access to local exchange service and/or intrastate toll calling. ESS/Digital and crossbar switches have the capability to selectively block Feature Group B access by carrier, but they cannot block all Feature Group A access. According to the Connecticut company, "step-by-step switches do not have the capability to block any interstate calling on a selective denial basis."⁵⁴

As technological improvements have made it increasingly possible to deny toll service without denying local service, more state commissions appear to be willing to prohibit

⁵⁴ Southern New England Telephone Company also stated that ESS/Digital and crossbar switches have the capability to block access to the intrastate toll network (1+NNX), while maintaining a customer's access to local exchange service. Step-by-step switches do not have this capability. The company stated, however, "where Step by Step technology is in place, adjunct technology ("black box") may be developed at some cost to block access to the intrastate toll network." Southern New England Telephone Company Responses to Division of Consumer Council Data Requests 10 and 11, Connecticut Declaratory Ruling, supra note 8 (1987).

DNP.⁵⁵ For example, in 1984, the Idaho commission initially authorized the use of DNP, largely due to a finding that selective denial of toll service did not exist. In subsequent hearings before the Idaho commission, two LECs sought approval to implement their Equal Access Restriction Service (EARS), a "stand-alone network blocking service." Based on the availability of EARS, the Idaho commission, in addition to approving EARS, revisited the "larger" DNP issue:

Circumstances that existed in 1984 have changed. We find that denial of local exchange service for nonpayment of toll charges should not be allowed in those exchanges where EARS is available. A local exchange company may continue to disconnect local service for nonpayment of charges for toll services it provides to customers within those exchanges. However, in

⁵⁵ Of those states which have banned DNP, most expressly limit their disapproval to those offices where the technology exists to implement selective denial. See, e.g., Re Rule 13(b) Relating To Discontinuance Of Service, Case No. 5323, Decision No. C86-575, at 5 (May 13, 1986) (moreover, in Colorado, the selective denial was not found to be available only in Equal Access offices; other means were available. *Id.*, at 4.); see also, Standards and Billing Practices for Residential Telephone Service, Order No. 1-80090338, at 8 (August 27, 1984). Other states, however, have expressly found that the determinative issue is the revenue contribution that BCS makes toward meeting the LEC's revenue requirement and have, accordingly, found that the technological capability to engage in selective denial is not relevant. See, e.g., Re New England Telephone and Telegraph Co., 78 P.U.R.4th 392 (Vt. PSB 1986).

exchanges where EARS is available, local service shall not be disconnected for nonpayment of charges for toll service provided by other entities, even if the local exchange company provides billing and collection service to the toll carrier.

Re Equal Access Restriction Service, 92 P.U.R.4th at 448.

B. The Lost Revenue to LECs.

The prohibition of DNP will result in the loss of revenue to LECs which otherwise would have been collected as part of the billing and collection services, according to the proponents of DNP. The loss of revenue comes in two forms: (1) the foregone contribution which the sale of BCS makes toward meeting local phone revenue requirements,⁵⁶ and (2) the loss of billing and collection revenue requirement which is assigned to interLATA services through the separations process. Each of these losses is substantial, according to DNP proponents.

No pattern appears in the relationship between the lost contribution and the revenue lost through the modification of the allocation of revenue requirement responsibility through the separations process. The claimed lost contribution per

⁵⁶ According to the LECs, the contribution is measured by the extent to which BCS fees exceed the incremental costs of providing BCS.

year ranged from \$2.0 million in West Virginia to \$426 million in New York. The Chesapeake and Potomac Telephone Company (C&P) claimed in Maryland a lost contribution of \$7.5 million while in Maine, New England Telephone claimed a lost contribution of roughly \$6.0 million.

The calculation of a "contribution" is always subject to challenge. The cost-causation responsibility attributed to the IXC is, for the most part, the incremental cost of providing billing service. As a result, all fixed costs are allocated to the local exchange billing and only variable costs are attributed to the IXC billing. Whether this incremental cost analysis is appropriate should be one focus of litigation.⁵⁷

A second loss of revenue can be attributed to the change in revenue requirement responsibility as determined through the separations procedures. Under the post-divestiture separations procedures, a portion of the local exchange company's full embedded cost related to its recording, billing and collection functions are allocated to the interstate jurisdiction. The allocation is based on the relative number of intrastate and interstate message units billed. If, due to a denial of DNP, all IXCs (including ATTCOMM) moved to providing their own billing and collection, the ratio of interstate calls to total

⁵⁷ All of the common cost issues that are so troublesome in rate design cases exist here as well. One way to approach the "contribution" issue is to determine what it would have cost the LEC to develop and implement a stand-alone system for billing strictly LEC customers.

calls would fall to zero producing no separations effect. The LEC's entire embedded billing, recording and collection costs would thus need to be recovered from intrastate (local and intraLATA) ratepayers. While complete figures are not available from each state,⁵⁸ the figures which various utility commissions found compelling enough to refuse to prohibit DNP ranged from a lost separations effect of \$4.0 million in West Virginia, to over \$31 million in Maryland, to nearly \$175 million in New York.

A reliance on these "lost revenue" figures assumes a number of issues the settlement of which is not at all clear. The initial fallacy of these numbers is that they do not necessarily represent "lost" revenue to the LEC at all. As discussed above, at least for the short-term, ATTCOMM uses the billing and collection services of LECs not because it chooses to do so, but rather because it has no choice. If ATTCOMM, in fact, has no current capability to perform its own billing and collection, even if DNP is prohibited, BCS revenues will not be lost at all. In sum, the first inquiry regarding BCS lost revenues should be into whether, in the short term, those revenues will be "lost" to the LEC even if DNP is prohibited.

In the long-term, the opposite inquiry must be made. What the commissions which find these numbers persuasive have failed

⁵⁸ In all states which have considered the issue, increases in these costs were recognized. The quantification of the increase is simply not available at this time.

to consider is the extent to which IXC's (particularly ATTCOMM) will, in the long-term, continue to rely on LEC billing and collection services. As the FCC noted, and as discussed above, ATTCOMM has plans to implement its own BCS and to sever its BCS relationship with the LECs whatever the outcome of DNP litigation. As a result, a current denial of DNP will have no impact, beneficial or adverse, on the retention of the revenue in controversy.

Finally, many LECs have been advocating the deregulation of intrastate billing and collection services, similar to the deregulation that has occurred at the federal level. In the event of such deregulation, just as the interstate revenues are non-jurisdictional (and thus do not redound to the benefit of ratepayers), so, too, would intrastate revenues. Under such circumstances, the argument for approving DNP because of its revenue impact disappears in its entirety.

C. The Cost to Modify LEC Billing Systems

The local exchange companies which provide BCS do not currently have the data processing capability to allocate partial payments between local and toll billings so as to determine whether local service should be maintained in the event the total bill is not paid. The single balance billing method is inherent in the software upon which LECs currently rely, the Customer Records Information System (CRIS). To provide for the allocation of partial payments would require either manual processing of such payments or the modification of CRIS.

The estimated costs of modifying CRIS to allow for the allocation of partial payments,

while significantly varying in absolute terms, were in all cases substantial. Two components of this increased cost exist. First, there will be a one-time transitional cost. In those states where figures are available,⁵⁹ this cost of modification will range from \$500,000 in Maryland, to \$510,000 in West Virginia to \$5.8 million in New York. Second, a recurring annual cost increase will occur which is, according to DNP proponents, a result of the need to make personnel additions and operating changes. These recurring charges range from \$50,000 in West Virginia, to \$125,000 in Maryland to \$5.8 million in New York.

Opponents of DNP argue that the mere quantification of the cost of modifying CRIS to provide the capability to handle partial payments and to allocate those partial payments between local exchange and interexchange service should have no impact at all on local ratepayers. These costs would not be incurred but for the presence of the billing and collection system and the users of that system. Without the decision to collect IXC accounts in addition to local accounts, no allocations would be necessary. As a result, the costs, if any, of modifying CRIS

⁵⁹ Here again, in all states which have considered the issue, increases in these costs were recognized. The quantification of the increase is simply not available at this time.

should, through the proper application of regulatory principles, be passed through to the IXC which purchases the BCS in the first instance, not to local ratepayers.

This passthrough is also mandated by sound economic principles. Only in this fashion can it be determined whether the cost of having the LEC undertake the billing and collection is less than the cost of having the IXC develop its own system.

D. The Increased Uncollectible Expense.

Other than the costs of implementing the technology necessary to implement selective call blocking, perhaps the primary cost of banning DNP, according to DNP proponents, is that of the increased uncollectibles which are projected to occur for the affected IXC.

Reported uncollectible ratios for ATTCOMM companies participating in DNP litigation have ranged from a low of 1.0 percent in Maine to a high of 1.9 percent in West Virginia (Texas reported uncollectibles of 1.6 percent with New York reporting 1.7 percent). The inability of ATTCOMM to disconnect subscribers from the toll system, this company claims, will result in an unrestrained usage of its interexchange system. Projected increases in uncollectibles ranged from a ten-fold increase in New York to a six-fold increase in Maine and Vermont to a doubling in Maryland and Ohio. (ATTCOMM in Texas projected a five-fold increase in uncollectibles). As a result, the continued use of DNP by the local phone companies, ATTCOMM urges, is necessary to prevent this abuse.

The legitimacy of ATTCOMM's assertion that it is unable to control uncollectibles, of

course, is inextricably tied to the argument that neither it nor the LEC have the technological capability to engage in selective call blocking. If such call blocking can in fact occur, ATTCOMM or other IXC's which do not have DNP do not face the uncollectible problem. Moreover, even in those states where selective call blocking cannot be implemented in central offices which do not provide equal access, the increase in uncollectibles will not likely reach the claimed proportions. With equal access offices reaching a percent of total households ranging from 60 to 90 percent, to assume that all accounts would result in increased uncollectibles is irrational.

Resolution of the issue of what increase in uncollectibles will occur even without selective call blocking is largely empirical in nature. A number of states have now prohibited the use of DNP. Information should be obtained regarding the impact of such a prohibition on the affected IXC's. It is important to distinguish litigation in 1989 from that in 1984. Current litigation is not operating in the data vacuum of previous cases. Data from these non-DNP states should be contrasted with data from states, such as West Virginia and New York, which refused to ban DNP. Other comparisons can be made with IXC's which do not use the LEC as a billing and collection agent to determine whether continuing access to the telephone network results in the postulated unrestrained proliferation of unpaid interexchange calling.

III. DEPOSIT LIMITATIONS.

When looking at disconnect issues associated with divestiture, it is important to remember that many households that lack telephone service are not victimized primarily by the size of monthly charges. For example, nearly two-thirds of low-income households lacking Michigan Bell telephone service cited an inability to pay deposits and other initial hook-up charges as the reason (as opposed to an inability to pay the monthly bills once service is installed). Accordingly, when a state public utility commission considers the issues of DNP, it should also address its attention to these other burdens to low-income households.⁶⁰

Before beginning any discussion of the deposit practices of a public utility -- telephone, electric, natural gas or otherwise -- one must carefully articulate the purpose of a deposit. In Michigan, Michigan Bell, itself, set forth the reasonable role of deposits. According to Bell, a deposit is "appropriate where past credit indicates possible monetary loss to the Company." Michigan Bell stated that all of its collection efforts are directed toward reducing its uncollectible losses to a minimum. While at first glance,

⁶⁰ National Consumer Law Center, Telephone Customer Service Regulations in the Post-Divestiture Environment: A Study of Michigan Bell Telephone Company, prepared under contract to the Michigan Divestiture Research Fund (July 1988). In addition to deposit issues, the Michigan Bell report looks at payment plans, collection procedures, telephone shutoffs, and credit policies.

these statements might seem unremarkable and self-apparent, their significance to a fundamental redefinition of telephone deposit regulations will become apparent below.

Many state public service commissions are in a position where they should substantially revise deposit regulations regarding toll telephone bills.⁶¹ Common regulations state that a deposit required as a condition for continued service due to a discontinuance for nonpayment shall not exceed the lesser of an amount equal to the actual or estimated maximum monthly bill at the customer's premise (or some multiplier thereof) or some maximum amount.⁶² The size of Bell's deposit requirements are an important factor in maintaining universal service. As discussed above, nearly two-thirds of households not having telephone service cite the unaffordability of deposits as a major contributing reason. Accordingly, the size of a telephone company's deposits should be carefully scrutinized in light of their purposes, as well as in light of their rationality vis a vis those purposes.

Given the purpose of collection efforts, and of a deposit, refinements are due for the definition of the "estimated maximum monthly bill for service at the customer's premise." In pre-divestiture days, the customer's combination of

⁶¹ More specifically, the "toll" bills that are at issue are all interstate bills as well as intrastate interLATA bills. Intrastate intraLATA toll bills are not affected.

⁶² See, e.g., Michigan Public Service Commission, Rule 34(b).

long-distance and local charges represented the "monthly bill for service." Due to the affiliated nature of the companies, whether the bill was for service rendered by AT&T, or service rendered by Bell, was largely irrelevant. That situation is different today.

An LEC may well act as billing and collection agent for AT&T's toll charges. The interexchange toll charges are not LEC revenue, however, and the loss of that revenue would not be a loss to the LEC. For example, Michigan Bell sells its billing and collection services to a number of interexchange carriers, including AT&T, MCI, U.S. Sprint and USTS among others.⁶³ In collecting for these companies, Michigan Bell actually purchases the long-distance accounts.

Nevertheless, the revenue collected by Michigan Bell for these carriers is never at risk to Michigan Bell. The accounts are purchased at a price equal to the value of the account minus an uncollectible factor.⁶⁴ If the actual uncollectibles differ from the projected uncollectibles that serve as the basis for the discount, however, there is a periodic "true-up" whereby Bell and the interexchange carrier

⁶³ National Consumer Law Center, Telephone Customer Service Regulations in the Post-Divestiture Environment: A Study of Michigan Bell Telephone Company (July 1988).

⁶⁴ There is a further discount called a "cash lag factor."

remedy the difference.⁶⁵ As a result, since no interexchange revenues are subject to risk of loss, no deposit should be collected based upon those projected interexchange bills.

The denial of a right to collect local deposits for IXC bills need not be placed on such a technical basis, however, In general, even should an LEC be subject to the risk of revenue loss due to its collection of interexchange bills, that risk is not due to the LEC's provision of telephone service. As discussed extensively above, the Federal Communications Commission, in 1984, addressed the type of relationship between a local telephone company and a long-distance telephone company for which the local company acts as billing agent. According to the FCC, a local company in such a relationship acts "as collection agent or holder of* * *receivables."⁶⁶ In a later

⁶⁵ Unlike many situations, therefore, where the entity purchasing the account can increase its profit by having uncollectibles less than that provided for in the discount, Michigan Bell's tariff provides: "to the extent that the (interexchange carrier's) amounts for anticipated uncollectibles exceed its realized uncollectibles, the Telephone Company will remit such amounts to the (carrier). To the extent that the (carrier's) amounts for anticipated uncollectibles are less than its realized uncollectibles, the Telephone Company will bill the (carrier)."

In Connecticut, as well, New York Telephone was asked whether it "retain(s) any collections which exceed the uncollectibles discount." The company responded: "No, there is a true-up procedure on a quarterly basis which adjusts for variation in actual experienced uncollectibles." New York Telephone Company Response to Data Request 36, Division of Consumer Council, Connecticut Declaratory Ruling, supra note 8, (1987).

⁶⁶ In the Matter of the Investigation of Access and Divestiture Related Tariffs, 97 F.C.C.2d 1082, 1289 (1984).

proceeding, the FCC reaffirmed that "billing and collection is not inherently a communications service." As a result, the LEC should not be permitted to protect against that risk by making a demand for security a prerequisite to the receipt of telephone service.

If an LEC wishes to enter into the market of providing billing and collection services, it must maintain a strict separation between that service and the provision of its monopoly local exchange service. It may not use its monopoly local exchange service to enhance its position in the competitive billing and collection service market. Neither may it use its monopoly position vis a vis the local customers to extract what otherwise would not have been available to it.⁶⁷

As a result of these factors, a state public service commission should limit the bills for which an LEC may collect a deposit: if a local customer can pay a deposit not to exceed the estimated maximum monthly bill for service rendered by the local telco, the telco should be prohibited from denying local service for nonpayment of any further deposit. This approach would satisfy the LEC's stated purposes that collection efforts be directed toward reducing uncollectible losses to a minimum, and that deposits be collected where past credit indicates possible monetary loss to the company.

⁶⁷ See, United States v. Western Electric Company, 673 F. Supp. 525, 600 (D.D.C. 1987).

The results of this policy would be to require each interexchange carrier to collect its own security to protect against uncollectibles. In that way, as well, the benefits of competition are obtained in helping to maintain universal service. If, for example, a customer believes AT&T's deposit requirement to be excessive, or if AT&T refuses to enter into a satisfactory payment plan through which the customer can pay the deposit, or if the deposit terms are unacceptable for any conceivable reason, the customer would have the choice of seeking more favorable terms from a different interexchange carrier. In this fashion, AT&T (as well as every other interexchange carrier) would be required to balance the need for security against the possibility of losing business because of unreasonable, oppressive or otherwise unacceptable business practices as defined by the market.

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APPENDIX A

Discovery Directed Toward the Local Telephone Company

1. What is the ratemaking treatment for revenues received for the sale of billing and collection services (BCS)? In addition to the answer to this request, provide specifically:
 - a. In determining class rates of return, is revenue received from BCS allocated solely to users of local exchange service, split between intraLATA and local exchange ratepayers, or allocated solely to intraLATA ratepayers?
 - b. Is revenue received from BCS allocated on some consumption unit basis? If so, what (e.g., message unit, usage minute, etc.) is the basis?
 - c. If the response to subsection b is "no", please explain in detail the factors which form the basis of the allocation of BCS revenue.
2. Please provide a single copy of any report, memorandum, or other written document of any nature that analyzes, evaluates or otherwise discusses the feasibility of, or desirability of, deregulating intrastate Billing and Collection Services.
3. Please provide a list of every state in which your company, or any affiliated company, has sought the deregulation of intrastate Billing and Collection Services. Separately provide a single copy of any filing made in any proceeding to consider such a proposal.
4. Which interexchange carriers (IXCs) use billing and collection services provided by your company? For each such user of BCS, please provide the following:
 - a. Copies of each contract and each tariff under which the BCS is provided.
 - b. The date the contract was executed.
 - c. The term of the contract.
5. Regarding the purchase of IXC accounts, please provide the following:
 - a. The periodic basis at which purchases of accounts are made (e.g., accounts are purchased monthly, bi-monthly, etc.).

b.The value at which the account is purchased by the local exchange company (e.g., face value discounted by the IXC uncollectible ratio).

In the event that your company simply bills and collects for the interexchange carrier, without a purchase of the IXC account, please affirmatively indicate that relationship. Explain in detail the nature and the specifics of the billing contract including the basis for remuneration.

6.Please provide the IXC uncollectible ratio which forms the basis of the discount at which IXC accounts are purchased.

7.Separately provide, in both dollar terms and in percent of total dollars, the actual experienced uncollectibles for purchased IXC accounts for each quarter of the contract.

8.Please provide the percent of central offices which have the following types of switches as of December 1, 1986, 1987 and 1988:

a.Electronic - digital

b.Electronic - analog

c.Step-by-step

d.Crossbar

Separately provide the corresponding percents anticipated for July 1, 1989.

9.Please provide the number of partial payments received by month for each of the past 24 months. From among these payments, separately provide the number of times which these payments exceeded the fee for basic local service for each of the following classes of service:

a.One party flat rate service

b.Two party flat rate service

c.One party measured service

d. Two party measured service

10. Please provide a listing of each "profit center" which has been separately identified within the local exchange company. Separately provide any report, memorandum, letter or other written document of any type which discusses the marketing, accounting, financial reporting or other separate administration of each profit center.

11. Please provide a single copy of every report, memorandum, letter or any written document of any type which proposes, evaluates, assesses or otherwise discusses the offer and/or operation of billing and collection services as a separate service or profit center within the local exchange company.

12. Please provide a single copy of any comments filed by your company, or by any affiliated company, or by any industry association of which your company is a member, with the Federal Communications Commission regarding the deregulation of interstate Billing and Collection Services. Separately provide any written documents that your company, or any affiliated company, provided to any industry association regarding the FCC's proposal to deregulate interstate BCS.

13. Please provide by month for each of the past 24 months, the ratio of uncollectibles for local exchange billings. Separately provide the ratio of uncollectibles for intraLATA toll service. Provide this data both in terms of total dollars and in terms of the ratio of uncollectibles to total jurisdictional billed revenues.

14. Please provide a detailed schedule for the replacement, if any, of company crossbar, step-by-step, and electronic analog switches currently on the company system.

15. Please provide a detailed schedule for the upgrade of all company central offices to the status of being able to provide equal access to IXCs.

16. Please outline every feasible means of selective call denial available to your company. Please include each option whether or not it is deemed by your company to be economically prudent. For purposes of this request, the term "feasible" means "technologically available."

17. Please provide a single copy of each and every written document, of any type, which proposes, evaluates or otherwise discusses the marketing and sale of billing and

collection services to telecommunications industries.

18. Please provide a single copy of each and every written document, of any type, which proposes, evaluates or otherwise discusses the marketing and sale of billing and collection services to non-telecommunications industries.
19. Please provide a single copy of each and every written document, of any type, which is part of a marketing of company's billing and collection services.
20. Please provide a list of all IXCs or other commercial entities of any nature to which marketing material for billing and collection services has been provided with the intent to solicit the sales of the billing and collection service.
21. Please provide the projection of revenue which company has made for the receipt of funds from the sale of billing and collection services for each year for the next ten years. Disaggregate these revenue projections by individual purchasers of the billing and collection services by year where available.
22. Please indicate in detail under what circumstances a disconnection of telephone service will be made. Indicate, in particular, under what circumstances, if ever, partial payment of a total bill will be sufficient to avert a termination of service and at what minimum level (in dollar terms or in percent of total bill) the partial payment must be.
23. Please provide, by month for the past 24 months, the number of accounts which have been disconnected and subsequently reconnected. Of those accounts reconnected, separately indicate how many paid their entire arrearage prior to reconnection and how many paid some portion of their arrearage.
24. Separately indicate the actions a household which has been disconnected for nonpayment is required to take in order to be reconnected. Include each option available if options exist other than payment in full of the outstanding bill.
25. Indicate in detail, for selective call denial to be effected, the technological changes, if any, which must be made in each of the following types of central offices:
 - a. Electronic - digital offices
 - b. Electronic - analog offices

c.Crossbar offices

d.Step-by-step offices

Separately indicate the cost, for each type of office, of the changes indicated above. Provide also the number of offices of each type in the company's service territory.

26.Indicate in detail company's ability to place "toll restrictors" on the local phone loop. If company is unable to provide such toll restrictors, explain in detail why it is unable to do so.

27.Provide, on a monthly basis for the past 24 months, the fees received for the sale of billing and collection services to interexchange carriers. Disaggregate these fees by IXC. Separately indicate the contribution made by these fees toward meeting the local exchange company's revenue requirement. Provide all workpapers used in calculating this contribution, including in particular the workpapers used in calculating the incremental cost of providing the billing and collection service to the IXC.

28.Provide the number of residential involuntary disconnections for nonpayment disaggregated by the following levels of the total current bill for the month immediately preceding disconnection:

a.\$0 - \$10

b.\$10.01 - \$20

c.\$20.01 - \$30

d.\$30.01 - \$40

e.\$40.01 - \$50

f.\$50.01 and more

29.Please provide the total number of equal access residence customers on your system. Separately provide:

a. The number of customers for each interexchange carrier who "elected" to have that particular carrier.

b. The number of customers for each interexchange carrier who were assigned to that particular carrier after having failed to affirmatively "elect" a carrier.

30. Please provide a listing of all other commercial entities who are providing Billing and Collection Services to interexchange carriers or who, in your information and belief, are seeking to enter the market of providing Billing and Collection Services to interexchange carriers. Separately provide a list of each IXC served by each of those entities.

APPENDIX B

Discovery Directed Toward the Interexchange Carrier

1. Provide for each month for the past 24 months the extent of company's uncollectibles. Separately provide this data by dollar amount and by ratio of uncollectibles to revenue billed jurisdictional revenue.
2. Separately provide the uncollectible data, both in dollar terms and in terms of the ratio to total billed jurisdictional revenue, of the following two services:
 - a. Third party billings; and
 - b. Credit card calls.
3. Indicate in detail by when company intends to deploy the Network Call Denial (NCD) data base. If no such deployment is planned, explain in detail why it is not.
4. Indicate in detail by when company anticipates being able to receive Automatic Number Identification (ANI) from the local exchange companies providing billing and collection services. If no such receipt is anticipated, indicate in detail why it is not.
5. Provide a single copy of any report, memorandum, letter or other written document of any type which reports, assesses, evaluates or discusses in any manner the ratio and/or dollar magnitude of uncollectible debts experienced by interexchange carriers other than company.
6. Provide a listing of all AT&T Communication companies which do not use the local billing and collection services of the local exchange carrier serving the same area of the respective ATTCOMM carrier.
7. Explain in detail, including detailed schedules, company's current plans to implement its own billing and collection system for MTS. Separately indicate company's current intentions as to whether or not, and if so to what extent, it will continue to use the local exchange carrier's billing and collection services subsequent to implementation of its own system.
8. Provide a listing of all ATTCOMM companies which currently have the capability to provide their own billing and collection systems. Separately indicate which of those companies

continue to rely on the billing and collection of the respective local exchange carrier.

9. Please provide, by month for the past 24 months, the uncollectible debts, both in dollar terms and in ratio of uncollectible to total jurisdictional billed revenue, for the ATTCOMM companies serving the following states:

a. Colorado

b. New York

c. Pennsylvania

d. Kentucky

e. Missouri

f. West Virginia

g. Maryland

h. Connecticut

i. Michigan

j. Idaho

k. North Dakota

l. Wyoming

Separately provide the average annual uncollectible ratio for each of these states for the years ending December 31, 1983; December 31, 1984; and December 31, 1985.

10. Please outline every feasible means of selective call denial available to your company. Please include each option whether or not it is deemed by your company to be economically prudent. The term "feasible" means "technologically available."

11. Please provide a listing of all other commercial entities who are providing Billing and

Collection Services to interexchange carriers or who, in your information and belief, are seeking to enter the market of providing Billing and Collection Services to interexchange carriers. Separately provide a list of each IXC served by each of those entities.

12. Assuming hypothetically that the local telephone company serving your service territory was banned from offering Billing and Collection Services, what options would currently be available to you to replace such service?

13. Assuming hypothetically that the local telephone company serving your service territory was banned from offering the denial of local service for nonpayment of a toll bill incurred to your company as part of its Billing and Collection Services, outline in detail what response, if any, your company would make in terms of seeking other providers of BCS or in seeking to implement your own BCS.

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