

DOCKET FILE COPY ORIGINAL

8209

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RM 8181

In the Matter of the Petition)
of the Inmate Calling)
Services Providers Task Force)
for Declaratory Ruling)

RECEIVED

FEB 2 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR DECLARATORY RULING

Albert H. Kramer
Helen M. Hall

KECK, MAHIN & CATE
1201 New York Avenue N.W.
Washington, D.C. 20005-3919
(202) 789-3400

Attorneys for the Inmate Calling
Services Providers Task Force

February 2, 1993

SUMMARY

ICSPTF requests a declaratory ruling from the Commission that telephones and systems provided by local exchange carriers ("LECs") for the use of inmates in correctional institutions are customer premises equipment ("CPE"), and should be provided on an unregulated basis, subject to the safeguards in the Commission's Rules and Orders governing provision of CPE. Currently, such "inmate-only" telephones are being offered by LECs as part of regulated services. Under Computer II, if equipment is located on a customer's premises, the equipment is CPE. This general rule is applied in all but a few narrow exceptions not applicable to inmate-only telephones. The Commission should therefore declare the LEC practice of offering inmate-only phones and phone systems unlawful.

The Commission has previously decided that public payphones are a limited exception to the unregulated treatment of CPE because of a concern for meeting the calling needs of transient, mobile callers. Under this exception, public payphones are treated as part of network services. Inmate-only phones, however, are not available to the general public, and, therefore, cannot be treated like public payphones for regulatory purposes. The Commission has previously ruled that inmate-only phones and phone systems are not available to the general public. Inmate-only phones and systems are further distinguished from public payphones because of the highly specialized functions and features required by correctional facilities. The LECs should not be permitted to erode the

regulatory regime created for CPE by extending the public payphone exception through adding to public payphones the specialized functionality required for inmate-only phones and systems. In addition, the configuration of many inmate-only phones and systems requires that they be treated as CPE; the placement of additional hardware between the phones and the network clearly separates inmate-only phones and systems from network services.

Further, ICSPTF requests a declaratory ruling that certain of the features and services provided by LECs in conjunction with inmate-only phones and systems are enhanced services. These enhanced services must also be provided on an unregulated basis, subject to the safeguards in the Commission's Rules and Orders governing provision of enhanced services. LECs are providing inmate-only phones and systems with voice storage and answering capabilities, and that allow subscriber interaction with information; these types of features and functions have previously been determined by the Commission to be enhanced services. LEC provision of enhanced services through inmate-only phones and systems must, therefore, be treated as enhanced for regulatory purposes.

For the foregoing reasons, the Commission should grant this Petition and rule that inmate-only phones and systems are CPE and that certain features and functions are enhanced services. The Commission should rule that inmate-only phones and systems must be provided on an unregulated basis, subject to the Commission's safeguards for LEC offering of unregulated CPE and enhanced

services, and that the LEC offering of inmate-only phones and phone systems as part of regulated accounts is unlawful.

TABLE OF CONTENTS

I. BACKGROUND 3

 A. General 3

 B. Description of Inmate-Only Phones and Phone Systems 4

II. The Computer II Framework 8

III. INMATE-ONLY TELEPHONES ARE CPE AND SHOULD BE PROVIDED PURSUANT TO COMPUTER II GUIDELINES 10

 A. The Definition of CPE 10

 B. Inmate-only Phones Do Not Come Within the Computer II Exception for LEC Public Payphones 12

 1. Inmate-only Phones Are Not Available to the Public 12

 2. The Specialized Functionality Associated with Inmate-Only Phones Makes Them CPE 14

 3. Once a Processor is Put Between LEC Telephones Used for Inmate-only Services and the Network, the Inmate-only Phone is CPE 16

 C. LECs Must Provide Inmate Calling Systems Pursuant to the Computer II Safeguards 17

IV. INMATE-ONLY SERVICES ARE ENHANCED, NOT BASIC SERVICES . 18

V. THE ISSUES RAISED ARE RIPE FOR DECLARATORY RULING . . . 22

RECEIVED

FEB - 2 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of the Petition)
of the Inmate Calling)
Services Providers Task Force)
for Declaratory Ruling)

TO: The Commission

PETITION FOR DECLARATORY RULING

The Inmate Calling Services Providers Task Force ("ICSPTF") of the American Public Communications Council ("APCC") hereby petitions the Federal Communications Commission for a declaratory ruling that specialized phones for inmate-only services are customer premises equipment ("CPE"), and that certain of the specialized inmate-only services offered by LECs are enhanced within the meaning of Computer II¹ and its progeny. Inmate calling services offered by the local exchange carriers ("LECs") must therefore, be provided and accounted for as a unregulated activity of LECs pursuant to the Commission's nonstructural safeguards (see Furnishing of Customer Premises Equipment by the Bell Operating Companies, CC Docket No. 86-79, 2 FCC Rcd 143 (1987) ("BOC CPE Relief Order") (subsequent history omitted); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991), pets. for

¹ Amendment of Section 64.702, 77 FCC 2d 384, (1980), recon., 84 FCC 2d 50, further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer & Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) ("Computer II").

recon. pending, pets. for review pending, California v. FCC, No. 92-70083 (and consolidated cases) (9th Cir., filed Feb. 14, 1992) ("Computer III Remand") and the Commission's accounting and allocation guidelines. (See Separation of Costs of Regulated Telephone service from Costs of Nonregulated Activities, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) ("Cost Allocation") (subsequent history omitted)). Further, APCC requests that the Commission find that the LECs' current practice is unlawful under Computer II and its progeny.

ICSPTF's members are providers of specialized telephone equipments and services to prisons and other correctional facilities. ICSPTF is a task force of APCC.² The specialized telephones provided by ICSPTF members are commonly referred to as "inmate-only phones."³ ICSPTF members compete with local exchange carriers and each other (and others, including interexchange carriers) to provide inmate-only services to correctional facilities. The competition generally takes the form of competing to provide a combination of equipment and services along with the payment of commissions to the relevant correctional, local or state entity based on the calling traffic volume from the facility or facilities involved.

² APCC is a national trade association comprised of independent public payphone ("IPP") providers. These IPP providers are operators/distributors who are involved in the sale, lease and installation/maintenance of pay telephone equipment.

³ Inmate-only phones refer to those phones limited to use by inmates.

I. BACKGROUND

A. General

Inmate-only phones, as the term indicates, are provided only for inmates (and are not used by the general public). Inmate-only telephone systems have a number of specialized functionalities not needed or used in payphones or aggregator phones made available to the public in general. Inmate-only phone system providers have developed specialized telecommunications services which efficiently and effectively serve the particular environment of correctional facilities. These specialized services have been developed to meet the calling needs of inmates and are also directly responsive to the specialized requirements of correctional officers and administrators.

We describe below some of the specialized functionalities found in inmate-only phones and systems. To avoid burdening the record, ICSPTF has chosen only a sampling of the documents showing these services as offered by LECs.⁴

⁴ ICSPTF will refer to the following documents, which are attached and marked as indicated. Exhibit A consists of relevant pages from the transcript of the testimony of a Southwestern Bell witness at a hearing on February 19, 1991 in Docket No. 90-209-U, Coinless Service by Means of Customer-Provided Coinless Telephones, before the Arkansas Public Service Commission ("Arkansas Transcript"). Exhibit B is a copy of the Request for Proposals ("RFP") for inmate-only telephone service for Maricopa County, Arizona ("Maricopa County RFP") and US West Communications' response to the RFP ("US West Maricopa Response"). A copy of Pacific Bell's response to an RFP from the Department of Corrections for Santa Clara County, California ("Santa Clara County Response"), and the contract between the County and Pacific Bell is attached as Exhibit C. Exhibit D is a copy of South Central Bell Telephone Company's ("SCB's") Mississippi tariff page concerning public telephone service ("Mississippi Tariff").
(continued...)

All of the inmate-only phones and systems described below are being provided through LEC regulated operations. See e.g. Mississippi Tariff; North Carolina Tariff; Maricopa County RFP and US West Maricopa Response at ¶¶ 7.1.1.1, 13.6, and US West Maricopa Response at Attachment 2; Utah Contract at ¶ 16. US West specifically provides in its contract for retention of ownership of all "equipment, wiring, hardware, and enclosures..." Utah Contract, ¶ 5; see also US West Maricopa Response at ¶ 18.0.

B. Description of Inmate-Only Phones and Phone Systems

Inmate-only telephones are installed on the premises of correctional institutions and are used only by inmates to make telephone calls. Correctional officials typically require that inmate-only phones be capable of specialized features. Examples of the specialized features of inmate-only phone systems being offered by LECs are the following. Many correctional facilities limit the type of calls which can be placed from inmate-only phones to collect calls only.⁵ Another common requirement is that the

⁴(...continued)

Exhibit E is a copy of Southern Bell Telephone Company's ("Southern Bell's") North Carolina tariff page concerning public telephone service ("North Carolina Tariff"). Exhibit F is a copy of an amendment to a contract between the State of Oregon and US West Communications ("US West") for the provision of inmate telephone services ("Oregon Contract Amendment"). Exhibit G is a copy of the contract and an amendment to the contract for inmate-only services between the State of Utah and US West ("Utah Contract" and "Utah Contract Amendment").

⁵ See Mississippi Tariff, § A7.1.7.B.5; NC Tariff, § A7.1.2.C.1.d.

system generally must be capable of restricting calls by time of day, or by call duration.⁶ When call duration is restricted, systems must generally be capable of automatically disconnecting the call when the allotted time has expired.⁷ Inmates are often required to use a PIN number in order to place a call.⁸ Inmate-only systems provide for called number restriction so that inmates may call only pre-designated numbers.⁹ Alternatively, numbers must often be restricted so that calls may not be made to specified numbers, such as judges, witnesses, or police.¹⁰ Calls placed by inmates to public defenders may be required to be available at no charge.¹¹ Typically, inmate-only phone systems must include call recording and monitoring capabilities on a selective basis;¹²

⁶ See Arkansas Transcript at 226-28; US West Response § 13.4.2 (call duration) and Attachment 6; Oregon Contract Amendment, § C.4.1 (call duration); Utah Contract Amendment, § 3.10.a (call duration); Santa Clara County Response, § II, page 28 (call duration).

⁷ See Oregon Contract Amendment § C.4.1; Utah Contract Amendment § 3.10.a; Santa Clara County Response at § II, page 28; Mississippi Tariff § A7.1.7.B.2.

⁸ See Santa Clara County Response, § II, page 23.

⁹ See Mississippi Tariff § A7.1.7.B.7; North Carolina Tariff § A7.1.2.C.1.e; Oregon Contract Amendment § C.4.2; Arkansas Transcript at 227.

¹⁰ See Mississippi Tariff § A7.1.7.B.8; North Carolina Tariff § A7.1.2.C.1.e; Arkansas Transcript at 226; Oregon Contract Amendment § C.4.2; Utah Contract Amendment § 3.10.b; Maricopa County RFP and US West Maricopa Response at § 9.2.11.

¹¹ See Mississippi Tariff § A7.1.7.C.

¹² See Oregon Contract Amendment §§ C.4.3 (including capability of disabling recording of calls to an inmate's attorney) and C.4.4; Santa Clara County Response § II, page 24; Utah Contract Amendment § 3.10.a (continued...)

often, systems must permit storage of call information for later use by correctional authorities.¹³ Call detail information is generally required to use in investigations and in preventing abuse or harassment.¹⁴ Specialized reports may be required, such as a listing of excessively called numbers.¹⁵

Inmate-only telephones are not the same as public pay telephones. First, unlike public pay telephones, inmate-only telephones are not available to, or used by the general public. Rather, they are available only for the use of inmates of the correctional institutions.

Second, the specialized features described above sharply distinguish inmate-only phones from public payphone offerings. In contrast to inmate-only phone systems, public payphones do not typically restrict the type of calls which can be placed from the phone to collect calls only. The length of a call placed from a public payphone is not limited. The specific blocking features, i.e. blocking to particular numbers, or allowing calls to particular numbers, are also not offered at public payphones.

¹²(...continued)
Amendment § 3.10.c (including capability of disabling recording of calls to an inmate's attorney); US West Maricopa Response at Attachment 6.

¹³ See Santa Clara County Response § II, page 24; US West Response at Attachment 6.

¹⁴ See Mississippi Tariff § A7.1.7.B.9.

¹⁵ See Maricopa County RFP and US West Maricopa Response § 9.2.10 and Attachment 6.

Third, unlike public payphones, which are linked to the central office directly with no intervening apparatus between the payphone and the network, inmate-only phone systems being offered by LECs have ancillary equipment on the correctional facilities' premises, between the phone and the network to perform some of the specialized functions. In Oregon¹⁶ and Utah,¹⁷ for example, specific provision is made in the contract amendments for the placement of additional, on-premises equipment to perform a number of the required functions. The functions include call timing (limiting call duration), call blocking, call recording, and call monitoring. Pacific Bell's response to Santa Clara County included provision of a facsimile machine, and an answering machine.¹⁸ In addition, Pacific Bell specified that the recording and monitoring equipment would be located on site at one of the facilities.¹⁹

Further, LEC offered inmate-only phone systems offer recording capabilities.²⁰ Typically, the recording capability includes the ability to store call information for later retrieval and use.²¹ Further, the recording capability must allow for disabling the

¹⁶ See Oregon Contract Amendment, §§ C.4.1-C.4.4.

¹⁷ Utah Contract Amendment, §§ 3.10.a-3.10.d.

¹⁸ See Santa Clara County Response, section II, page 24.

¹⁹ Id; see also US West Maricopa Response at Attachment 6.

²⁰ See Oregon Contract Amendment, section C.4.3; Santa Clara County Response, section II, page 24.

²¹ See Santa Clara County Response, section II, page 24.

recording of calls to an attorney.²² Voice mail, storage and retrieval capability is featured in LEC offered inmate-only phone systems.²³ In addition, PIN numbers are being used for purposes of tracking a particular inmate's call activity. As Pacific Bell notes in its response to Santa Clara County, the PIN becomes part of the call record.²⁴

II. The Computer II Framework

In Computer II, the Commission ruled that all CPE is to be provided on an unregulated basis. 77 FCC 2d at 447. Having determined that CPE should be provided on an unregulated basis, the Commission was faced with the ability and incentive of the LECs to cross-subsidize the provision of unregulated services, such as CPE and enhanced services, using ratepayer funds derived from providing basic regulated services. In order to prevent burdening ratepayers with costs of unregulated services, and to prevent stifling competition, the Commission determined that unregulated services must be provided so that the costs of unregulated services are borne by unregulated operations and not by regulated operations. The Commission initially required the LECs comprising the former Bell System to market CPE and enhanced services through a separate subsidiary because they would otherwise have "opportunities to

²² See Oregon Contract Amendment, section C.4.3; Utah Contract Amendment, section 3.10.c.

²³ See Santa Clara County Response, section II, pages 24 and 30 (although Pacific Bell notes that there may be MFJ concerns, it offers to provide voice mail service).

²⁴ See Santa Clara County Response, section II, page 23.

engage in cross-subsidization" to the detriment of ratepayers and competitors. Policy & Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services & Cellular Communications by the Bell Operating Companies, 95 FCC 2d 1117, 1129 (1983) ("Bell Operating Companies") (subsequent history omitted). Although it subsequently rescinded the requirement for a separate subsidiary, the Commission has adhered to its belief that safeguards are necessary to ensure that LECs do not provide competitive enhanced services or CPE as a part of local exchange and other regulated services (see Computer III Remand Proceedings, 6 FCC Rcd 7571 (1991)), and the Commission now requires that the LECs follow accounting regulations to guard against cross-subsidy. See BOC CPE Relief Order; Cost Allocation Order. The purpose of the accounting/cost allocation requirements is to separate activities properly chargeable to regulated accounts from activities properly chargeable to unregulated accounts. Thus, unregulated activities are accounted for "below the line," and cost recovery for these services is not included in the revenue requirement for regulated operations.

III. INMATE-ONLY TELEPHONES ARE CPE AND SHOULD BE PROVIDED PURSUANT TO COMPUTER II GUIDELINES.

A. The Definition of CPE

Computer II defined customer premises equipment ("CPE") as "terminal equipment located at a subscriber's premises which is connected with the termination of a carrier's communication channel(s) at the network interface" at the demarcation point. Computer II, 77 FCC 2d at 398 n.10. This definition encompasses virtually all types of telephone equipment used on a customer's premises. There are only a few narrowly defined classes of premises equipment which the Commission has excluded from the definition of CPE for purposes of Computer II.

Equipment located on a customer's premises is generally considered CPE. In Amendment of Part 68, 94 FCC 2d 5, 15 (1983), recon. denied, FCC 84-145, ___ FCC Rcd ___ (1984) ("NCTE Interconnection"), the Commission applied this general principle to carrier provision of network channel terminating equipment ("NCTE"). Further, the Commission noted that a carrier has a "high threshold burden" to show that any equipment located on a customer's premises is a carrier offering and not CPE. Id. at 15. See also IBM at 378. ("It is established policy that equipment on a customer's premises. . . is normally treated as CPE under our Computer II decisions." (citations omitted)).²⁵

²⁵ Clearly the Commission must rule that the on-and-in-premises equipment being provided by LECs for inmate-only service is CPE. See section III (A)(3), infra.

In continuing to offer inmate-only telephones as part of regulated services, the LECs appear to be relying on the FCC's exclusion of LEC provided "coin-operated or pay telephones" from the definition of CPE. Computer II, 77 FCC 2d at 447 n. 57. In Tonka Tools, Inc. and Southern Merchandise Corp. Regarding American Telephone and Telegraph Company Provision of Coinless Pay Telephones, 58 RR2d 903 (1985) ("Tonka"), the Commission explained the scope of the exclusion of LEC payphones from the definition of CPE. The Commission denied a request for a declaratory ruling that AT&T and the RBOCs were required to provide both coin and coinless pay telephones on an unregulated basis rather than as part of any basic transmission service. 58 RR2d at 911. The Commission affirmed the exclusion for carrier-provided coin telephones. In doing so, the Commission articulated a narrow ground for the continuing exclusion from Computer II of carrier-provided payphones. The Commission premised its decision on the importance of assuring the public of the continued availability of telephone service outside the office and home:

Pay telephones provided by carriers subject to regulation have historically been accorded special regulatory status because they serve the public service role of ensuring pay telephone service is available to the transient, mobile public, and they have as their primary customer or user the general public. Even if the telephone company describes the services as "semi public" and collects a charge from a subscriber such as a bar or restaurant, the primary customer of this pay telephone equipment for Computer II regulatory purposes is still the general public or some segment thereof.

58 RR2d at 910.

B. Inmate-only Phones Do Not Come Within the Computer II Exception for LEC Public Payphones.

1. Inmate-only Phones Are Not Available to the Public.

In circumscribing the scope of the exclusion from Computer II for LEC payphones, the logic and language of Tonka focus sharply on the role of public and semi-public payphone service in meeting the basic calling needs of the transient public. Inmate calling services do not, however, involve the "transient, mobile public", whose needs are at the heart of Tonka. Inmate-only phones are not provided for use by the general public. The focus in Tonka on use of payphones by the general public makes it clear that the Commission drew a targeted exemption from Computer II, and did not have inmate-only service in mind. The Commission did not intend to include inmate calling services as part of the LECs' pay telephone service.

This distinction is underscored by the regulatory treatment of other types of telephone equipment provided in analogous contexts. For example, telephones in hotels, hospitals, and universities are treated as CPE. These telephones, like inmate-only phones, are available to users under controlled conditions rather than made generally available as are public payphones.

The distinction between public pay telephones and inmate-only phones has been recognized by the Commission in another context. In its Report and Order in CC Docket No. 90-313, Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744 (1991)

recon. denied in part and clarified in part, 7 FCC Rcd 3882 (1992) ("Implementation of TOCSIA"), the Commission interpreted the scope of the term "aggregator" under the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), P.L. 101-435, 47 U.S.C. § 226. TOCSIA defines "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2). The definition includes owners of public pay telephones. However, the Commission ruled that the term would "not apply to correctional institutions in situations in which they provide inmate-only phones." 6 FCC Rcd at 2752. The Commission further explained that "the carrier providing service to inmate-only phones at correctional institutions would not fall under the definition of 'provider of operator services' as such service is not provided at an 'aggregator' location with the respect to inmate-only phones. . ." 6 FCC Rcd at 2752 n.30. That is to say, inmate-only phones are provided neither to the general public nor to transient users.

The distinction between public payphone service as discussed in Tonka and Implementation of TOCSIA, on the one hand, and inmate-only phones, on the other hand, should be maintained. The Commission should find that the telephones used by the LECs to provide inmate-only services are distinct from the public

treatment is warranted. The Commission should find that the telephones used in provision of inmate-only services are CPE, and, therefore, must be provided on an unregulated basis. Provision of inmate-only phones on an unregulated basis must include separation from regulated operations, and appropriate accounting to ensure that cross-subsidy is not occurring.

2. The Specialized Functionality
Associated with Inmate-Only Phones
Makes Them CPE.

An inmate calling system reflects a careful balancing of the needs and interests of the correctional officials with meeting the requirements of inmates. For this reason, inmate-only phones are not limited to the provision of basic calling services such as those in question in Tonka and have no relation to meeting the calling needs of mobile, transient end users that were the source of the Commission's concern in Tonka. Rather, inmate calling services are provided to a special group of customers who have needs very different from those of the transient public. As described more fully in section I(B) above, inmate-only systems are required to perform special functions such as restriction of a particular inmate's calling at specified times of day, restriction of calling to particular numbers, allowing calls only to particular numbers, and recording and tracking calls by a number of criteria.²⁶ Public payphones, on the other hand, do not

²⁶ In addition, the specialized features involve subscriber interaction with stored information supplied by the subscriber (correctional facility officials). In order to properly screen, block, monitor and evaluate calls attempted and/or placed by the
(continued...)

involve or require these specialized features and restrictions.

The Computer II exclusion of LEC payphones from the definition of CPE means the LECs cannot provide added functionality and features through those payphones without the payphones losing their excluded status and becoming CPE. In International Business Machines, 58 RR 2d 374 (1984) ("IBM"), the BOCs sought to offer under tariff data subscriber line carriers ("DSL") that multiplexed multiple transmission channels and performed certain signal conversion functions. IBM at 379. The BOCs relied on a Commission ruling excluding from the Computer II definition of CPE multiplexers that deliver multiple channels. See IBM at 378. The Commission ruled that the equipment in question was CPE, and could not be offered under tariff. Id. at 379-80. The Commission stated that "[i]f [a LEC] could redefine these devices [data subscriber line carriers] at will to be part of basic services by associating a multiplexing function with any other function historically treated as a competitive CPE one, it could easily avoid the requirements of Computer II for a wide range of offerings." Id. at 379.

²⁶(...continued)

inmates, correctional officials must supply the information, which is then stored. Inmate-only systems typically store numbers to which a particular inmate cannot place calls (such as judges and witnesses), store limited numbers a particular inmate can call, and block calls from particular inmates (including blocking only at certain times of day). On the basis of the information stored by the subscriber, calls are allowed or disallowed. This specialized functionality which involves subscriber interaction with stored information is not only sufficient to clearly categorize inmate-only phones and phone systems as CPE; it falls under the definition of enhanced services, which should also be provided on an unregulated basis. See section IV, infra.

Just as in IBM, the LECs should not be permitted to add increased functionality to a narrow exception created for specialized purposes. Thus, the LECs should not be allowed to rely on the narrow exception created by Computer II for telephone service to the public to bolster any claim that inmate-only telephones with their specialized functionality can escape being classified as CPE under Computer II. That specialized functionality defeats the continuing availability of the exclusion from the general Computer II rule governing CPE, just as adding functionality to the multiplexer in IBM did. The LECs should not be allowed to "redefine" the exclusion defined by Tonka "to avoid the requirements of Computer II." IBM at 379.

3. Once a Processor is Put Between LEC Telephones Used for Inmate-only Services and the Network, the Inmate-only Phone is CPE.

Not only are the LECs attempting to "redefine" and broaden the Computer II exclusion. In some of the instances at issue in this petition, and in many others, the LECs have not only added functionality; they have added actual hardware. Thus, much of the functionality necessary to offer inmate-only service is performed not by processors in the inmate-only phones, but by processors, recording equipment, and other premises-based adjuncts placed "behind" the payphones on the premises, i.e., in the confinement facilities. This "interpositioning" of processors on or in the confinement facilities' premises between the inmate-only phones and

the usual demarcation point completely defeats any claim that the inmate-only systems are not CPE.

The configuration of inmate-only telephones being provided by the LECs illustrates that these systems should be treated not as network services,²⁷ but as CPE. The placement of equipment between the inmate-only phones and the network clearly separates and distinguishes the phone from network services. The Commission should rule that inmate-only phones and phone systems must, therefore, be provided according to the Commission's general Computer II policy on an unregulated basis, with appropriate accounting safeguards. To allow the LECs to provide this equipment as a regulated offering would allow them to "redefine" the Computer II definition of CPE.

C. LECs Must Provide Inmate Calling Systems Pursuant to the Computer II Safeguards.

The LECs have not provided inmate-only phone systems and calling services pursuant to the Commission's cost allocation requirements. By offering inmate phones and calling services through regulated accounts, LECs are able to cross-subsidize their products and services and are able to offer correctional facilities commissions significantly higher than those which ICSPTF members can afford, to the great detriment of ratepayers and the disadvantage of competitors, such as ICSPTF members, who offer only

²⁷ The LECs' treatment of inmate-only services includes treating the wiring as part of network services. Wiring used by competitors, such as ICSPTF members, is treated as inside wire.

unregulated services. But for the LECs' provision of inmate calling services on a regulated basis without regard to the regime developed by this Commission under Computer II and subsequent decisions, ICSPTF members would have been able to compete for contracts such as those described above on a more "level playing field." Instead, ICSPTF members never had a chance.

The various Commission decisions discussed above make clear that in order to preserve the basic integrity of the Computer II regime, and protect ratepayers from having their funds diverted to LEC competitive offerings, as well as to protect competitors, the Commission must narrowly confine exclusions from the definition of CPE. Whatever the validity of the Computer II exclusion of LEC payphones from the definition of CPE, Tonka makes clear that that exclusion cannot be broadened to embrace inmate-only phones. The Commission must order the LECs to provide inmate-only phones pursuant to the nonstructural safeguards of the BOC CPE Relief Order and Cost Allocation.

IV. INMATE-ONLY SERVICES ARE ENHANCED, NOT BASIC SERVICES.

In addition to inmate phones being CPE, a number of the specialized services provided at inmate-only phones are enhanced and must be offered on an unregulated basis.

In Computer II, the Commission decided that it would continue to regulate a common carrier's provision of basic services. Computer II at 423. Basic services would continue to be offered under tariffs. The Commission defined "basic transmission service" as an "offering of transmission capacity for the movement of

information." Computer II, 77 FCC 2d at 419. The Commission emphasized that the provision of "basic transmission service" would only entail delivery of a communication from the subscriber and would not involve any interaction with information supplied by the customer:

In the provision of basic transmission service, memory or storage within the network is used only to facilitate the transmission of the information from the origination to its destination, and the carrier's basic transmission network is not used as an information storage system. Thus, in a basic service, once information is given to the communications facility, its progress towards the destination is subject only to those delays caused by congestion within the network or transmission priorities given by the originator.

In offering a basic transmission service, therefore, a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information. . .

77 FCC 2d at 419-20.

Unlike basic transmission service, enhanced services do involve interaction with customer-supplied information or other computer processing services. The Commission observed the distinction between basic and enhanced services, noting:

. . .An enhanced service is any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information. In these services additional, different, or restructured information may be provided the subscriber through various processing applications performed on the transmitted

information, or other actions can be taken by either the vendor or the subscriber based on the content of the information transmitted through editing, formatting, etc. Moreover, in an enhanced service the content of the information need not be changed and may simply involve subscriber interaction with stored information. . . .

77 FCC 2d at 420-21 (footnote omitted). Enhanced services are not regulated by the Commission, and are offered on an unregulated basis. CFR § 64.702(a); Computer III Remand.

The Commission applied these principles in North American Telecommunications Association ("NATA"), FCC 85-248 (1985). NATA involved the question of whether a number of Centrex features and other services were enhanced, and, therefore, should be provided on an unregulated basis.²⁸ The Commission stated that carriers are not forbidden from using "the processing and storage capabilities within their networks. . . which facilitate use of traditional telephone service." Id. at ¶ 23. The Commission concluded that computer processing would not be classified as enhanced service if its sole purpose was to facilitate transmission of communications from point to point. Thus, the Commission observed that "[i]n the case of speed dialing and call forwarding, the stored telephone numbers specified by the customer and the customer's interaction with that stored information serves but one purpose: facilitating establishment of a transmission path over which a telephone call may be completed." FCC 85-248 at ¶ 26.

²⁸ While the Commission determined in NATA that many of the features at issue were basic, nowhere in that case did the Commission state that basic services provided through on-premises equipment should be treated as anything other than services provided through non-regulated CPE.