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January 19, 1996

EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: In the Matter of the Petition of the Inmate Calling Services
Providers Task Force for Declaratory Ruling/ RM 8181

Dear Mr. Caton:

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, Pacific Bell and Nevada Bell (the "Pacific Companies") hereby submit two copies of this letter and its attachment on Docket No. RM 8181.

The Commission is currently considering action on the above-referenced petition, in which the Inmate Calling Services Providers Task Force of the American Public Communications Council ("APCC") seeks a ruling carving out inmate public telephone services from the part 68 exemption for public telephones, and treating BOC-provided inmate public telephones as unregulated customer premises equipment.

This letter is intended to provide additional input that may be helpful to the Commission in considering the important procedural, factual and legal issues raised in the petition. This letter specifically addresses the continuing applicability of the Commission's analysis in Tonka Tools¹ to inmate public telephones.

¹ Petition for Declaratory Ruling of Tonka Tools, Inc. And Southern Merchandise Corp.,
Memorandum Opinion and Order, 58 RR 2d 903 (1985).

I. APCC's Petition in Effect Seeks A Reversal of Commission Decisions in Effect for the last Fifteen Years. The Policies on Which Those Decisions Were Founded Apply Today With Equal Force to the Inmate Market.

In its 1980 Second Computer Inquiry² decision, this Commission ruled that LEC public telephones should be excluded from the definition of CPE. In the fifteen years since its initial ruling, the Commission has repeatedly reaffirmed this decision.³ During that fifteen years, LECs have offered inmate payphone services as regulated services subject to the Part 68 exemption. Under these circumstances, APCC's argument in its discussion of the Tonka Tools decision that the Commission "did not intend to include inmate calling services as part of the LECs' pay telephone service" (APCC Petition at p.12) is disingenuous. What APCC seeks is in a effect a reversal of a long line of well-founded precedent.

The Tonka decision was founded on two primary points, both of which remain true today and apply to inmate services as well as public payphones in general. First, the Commission recognized in Tonka that the user of a payphone cannot separately select or pay for the equipment used to make a call. From the actual end user's perspective, the equipment and the line are an integrated service:

"[T]he primary customer of . . . pay telephone equipment . . . is . . . the general public or some segment thereof. As to these customers or users the telephone instrument and line are necessarily integrated. The user of these devices pays a single charge in order to place a call from a pay telephone at a public or semi-public location. The instrument and the pay telephone service are not severable from that customer's perspective. Although free to choose another location from which to place his call, the customer cannot separately select, combine or pay for the terminal device and transmission line which are used to make the call." 58 RR 2d at 910, para. 12.

Like other users of pay telephones, inmates cannot separately select and pay for telephone equipment. To them, as to other users of payphones, the line and the

² In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), CC Docket No. 20828, Final Decision, 77 FCC 2d 384, 447 n. 57 (1980), recon., 84 FCC 2d 50, further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer & Communications Industry v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

³ See, e.g., Tonka, supra at n. 1; In the Matter of Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, CC Docket No. 81-893, Eighth Report Order, 3 FCC Rcd 477, 479 (1988).

equipment are functionally integrated. Moreover, inmates do not lose their status as a segment of the public simply because of incarceration, any more than soldiers on a military base, employees in a factory, or students at a school should lose their status as members of the public because they may be required to remain at that location for some period of time. The Tonka analysis simply does not support the distinction the APCC attempts to make.⁴

APCC's reliance on the Commission's decision implementing the consumer protection provisions of TOCSIA is also unfounded. TOCSIA was intended to "ensure that consumers are protected from unfair and deceptive practices relating to their use of operator services to place interstate long distance calls and, second to ensure that consumers have the opportunity to make informed choices in making such calls." Report and Order in CC Docket No. 90-313, Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744, para. 4 (1991), recon. denied in part and clarified in part, 7 FCC Rcd 3882 (1992). In the inmate context, TOCSIA's consumer protections are not necessary to protect inmates from unfair and deceptive practices because inmates ordinarily are not the billed party for calls they originate. The Commission's decision excluding correctional institutions from the definition of aggregators for inmate-only pay telephones simply recognized that the safeguards instituted by TOCSIA were not meaningful to this segment of the pay telephone-using public.

The second principal point made in Tonka was its recognition of the irrelevance of the location of functionality in the equipment or the network. In fact, the Commission's analysis in Tonka specifically rejected an artificial distinction based upon the location of the intelligence for the functionalities and features:

"[O]ur analysis of the proper regulatory treatment for the non-coin pay telephone devices of the BOCs obtains whether the intelligence for this service is located in the instrument, the central office or both, and whether or not these devices are registered." Id. at 909 n. 28.

Rather, the Commission based its analysis on the fact that the LECs offer public telephone service as part of their basic exchange telecommunications and exchange access service. This remains true today. In recognizing this distinction, the Commission noted:

⁴ In its Reply Comments, APCC argues that both non-LEC inmate payphones and LEC inmate payphones are integrated with the services available from the phones and that therefore both should be treated as CPE for regulatory purposes. APCC Reply Comments at pp. 10-11. However, as explained herein, treating LEC and non-LEC payphones as CPE will have a disparate effect.

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“The original Computer II policy excluding pay telephones from ‘CPE’ reflected a determination that the pay telephone devices then being provided by telephone companies formed an integral part of a communications transmission service, i.e. pay telephone service, [which] should remain subject to regulation under Title II of the Communications Act. As originally conceived, the pay telephone exclusion recognized that the technical integration of the pay terminal and central office facilities characteristic of the coin service then being provided distinguished these types of devices from the general class of CPE being detariffed by Computer II. While it is true that the pay telephone exclusion was formulated at a time when the only type of coin telephones available were those activated and controlled through the telephone company’s central office and used to provide coin service which was the exclusive province of the telephone companies, we do not agree with petitioners that the CPE pay telephone exclusion is therefore limited to those types of devices.” *Id.* at 910, para. 11.

This analysis is appropriate in today’s markets for inmate payphone services. As a factual matter, there are any number of different configurations of instrument-implemented and central office implemented inmate payphone services, depending on who is offering the service and the requirements of the institutional authority. As *Tonka* recognized, the location of the intelligence is not the basis for any meaningful distinction for characterization of inmate pay telephones as CPE.

APCC argues that inmate public telephones contain “specialized functionality.” According to the APCC, this “specialized functionality” resides in the telephone set or in equipment owned by the LECs on the premises of correctional facilities, and the existence of this functionality compels a conclusion that LEC telephone sets for inmate public telephone service are CPE. However, the “special functionalities” that APCC ascribes to inmate payphones exist in markets other than the inmate market. Pacific Bell restricts the type and length of calls that can be made from certain public telephones, including phones used by inmates and by non-inmate segments of the public. Pacific Bell also maintains “Charge-a-Call public telephones in locations other than correctional institutions that do not accept coin payments.

In addition, the features and functionality offered in connection with the Pacific Companies’ inmate public telephones generally reside in the network. Thus, the “set-based intelligence” arguments of the APCC would not apply to the typical inmate service offered by the Pacific Companies. For example, for inmate public telephone service offered by Pacific Bell, the specialized functionality is generally

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provided through Pacific Bell's Inmate Call Control Unit ("ICCU"), which resides in the central office. Except in those limited cases where a specific facility's public telephone needs do not warrant the expense of size-sensitive network functionality, most functionalities offered by Pacific Bell in connection with inmate public telephone service reside in the central office.

To accept APCC's argument that "specialized functionalities" located in inmate telephone sets compel a finding that inmate payphones are CPE, the Commission would have to overrule Tonka and all the other cases sharing its analysis. The Pacific Companies submit that APCC has made no argument warranting such a radical departure from a long-standing, well-founded line of cases.

II. If the Commission is Inclined to Overrule Existing Precedents on this Issue, It Should Do So Only After A Determination Of the Effect Such a Decision Will Have on the Market for Inmate Payphone Services.

In its petition, APCC argues that the members of its Inmate Calling Services Providers Task Force are at a competitive disadvantage and "never had a chance." APCC Petition at p. 18. In a letter filed months later, APCC admitted that competition in the inmate services market is "vigorous and fierce" and characterized the inmate payphone market as intensely competitive: "In addition to the already intense competition between these independent providers, the large interexchange carriers . . . are aggressively pursuing and obtaining inmate services contracts at a rapid pace." (APCC letter to Olga Madruga Forti dated August 19, 1993 at pp. 3-4). This admission belies APCC's claims of being disadvantaged. Moreover, competition in the inmate market continues to thrive to this day. See "Mom, It's Mugsy: Phone Firms Wrestle For Prisoners' Business in Hot Growth Market," Wall Street Journal, Feb. 15, 1995, p. A1⁵ (copy attached). As the Commission predicted in Tonka (58 RR 2d at 911 n.32), declining to characterize LEC public payphones as CPE has not thwarted competition. The Commission should not readily depart from a decision that has had exactly its originally intended effect, and has led to thriving competition.

The Commission also should carefully consider the effect that the application of Part 64 requirements would have in a market that all parties agree is tremendously competitive. A decision that inmate public telephones are CPE will impose substantial administrative burdens on the LECs of tracking, monitoring and reporting costs in accordance with Part 64. Part 64 was designed to protect ratepayers, not competitors. See In the Matter of Separation of Costs of Regulated

⁵ In that article, an MCI Senior Vice President estimated that MCI had increased its share of the market from 10% to 30% in the last three years.

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Telephone Service from Costs of Nonregulated Activities; 2 FCC Rcd 1298, para. 115. Imposing the costly administrative burdens of Part 64 on the LECs will not necessarily enhance competition and may even impede it.

III. The Pacific Companies Are Not Offering Enhanced Services.

APCC also argues that the LECs are improperly offering enhanced services. In fact, the Pacific Companies are not offering enhanced services. Services such as speed dialing, call forwarding and the like clearly are adjunct to basic service. North American Telecommunications Association, 101 FCC 2d 349, 359, 360 (1985). Moreover, if the Pacific Companies or any other LEC chose to offer an enhanced service to inmates, such a service would be permissible so long as applicable regulatory rules were observed.

IV. This Is Not An Appropriate Case for A Declaratory Ruling.

A declaratory ruling is not the appropriate vehicle for the radical departure from established precedent that APCC proposes. The purpose of a declaratory ruling is to "terminate a controversy or remove uncertainty;" that is, to clarify an unclear or ambiguous rule or ruling. 47 C.F.R. Section 1.2, In re Bellsouth Petition, 6 FCC Rcd 3336, 3342 (Com. Car. Bur. 1991). Inmate telephone services have been offered as part of the LECs' regulated services since the 1980 Computer II decision, which was reaffirmed in Tonka. Moreover, as explained above, the Tonka analysis applies to inmate telephone service. A declaratory ruling is not the appropriate means to review a settled decision. See Bellsouth, 6 FCC Rcd at 3342.

If the Commission wishes to reconsider Tonka, it should do so through a rulemaking, which would enable a full factual inquiry into the effect on the inmate public telephone market of a change in the policy instituted in Computer II. An omnibus proceeding would allow the Commission to consider fully what effect imposing Part 64 administrative costs upon the LECs would have on the competitive marketplace. Such a proceeding would also allow the Commission to address the effect of deregulating inmate public telephones upon revenue streams available to the LECs and non-LECs. For example, non-LECs would continue to enjoy a revenue stream -- commissions on interLATA usage from IECs -- which, due to the MFJ, is unavailable to LECs. Finally, given the variation among LECs in the location of functionalities and intelligence, a rulemaking would allow the Commission to carefully review where the demarcation should lie between network and CPE, should the Commission decide inmate public telephones should be declared CPE.

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Conclusion

The Tonka decision's analysis was appropriate when the decision was issued and remains so today. A distinction based upon the location of the set functionalities is simply unwarranted. Moreover, LECs offer inmate public telephone service to a segment of the general public--inmates--who cannot separately select or pay for the equipment and transmission line which are used to make the call. The undersigned strongly support this Commission's reaffirmation of Tonka in the context of public telephone service to inmates.

Sincerely,



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Wednesday, February 15, 1995

'Mom, It's Mugsy': Phone Firms Wrestle For Prisoners' Business In Hot Growth Market

Big Companies Dangle Cash, Add Antifraud Devices To Entice Jail Officials

Callers Who Hate to Wait

By Alix M. Freedman

Staff Reporter of The Wall Street Journal

NEW YORK -- In an airless cubicle, inmate Hugo Rivera intently cradles the telephone he describes as "the sunshine in this place." After 15 minutes, his call is automatically disconnected. Reluctantly ceding his spot to another prisoner, Mr. Rivera plants himself outside the phone room to wait for another turn.

"We're phone Joneses" -- addicts -- the burly 22-year-old explains. "This is our little bit of freedom, our step back into the street." Mr. Rivera, who has racked up \$60 phone bills each week since coming to the tough Rikers Island jail on a drug charge two months ago, adds a business note: "For phone companies, prisons are a sure score."

As Mr. Rivera has figured out, few have reaped richer rewards from the nation's tough stance on crime than telephone companies. Calls from most prisons must be made collect, one of the most expensive services. On top of that, the companies impose hefty surcharges on the recipients of prisoners' calls. Further, inmates' conversations tend to last longer than those of people on the outside. The upshot: A single prison phone can gross as much as \$15,000 a year -- fully five times more than a pay phone on a street corner.

All this helps explain why AT&T Corp. and MCI Communications Corp. crave the inmates' business. Although the two biggest carriers aren't eager to publicize their efforts, they have been waging a fierce battle against the Baby Bells and a host of no-name carriers for control of some 50,000 pay phones in the roughly \$1 billion behind-bars business.

"The major players are showing up in force, with all the financial strength they can muster," marvels Sandy Vaello, president of Northern American IntelCom Inc., a phone company owned by Dallas oil concern Diamond Shamrock Corp. "A couple of years ago, you couldn't entice the major carriers into looking at this traffic. It was trash traffic -- and they didn't want it."

Nowadays, with competition intense for residential and commercial customers,
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AT&T and MCI can't afford to be so standoffish. The nation's more than one million inmate callers are already big customers, and their ranks are expected to double by the year 2005 if current trends continue. In fiscal 1995 alone, more than 150 new state and federal prisons are projected to be built, and 117 facilities expanded. In addition, correctional facilities offer a guaranteed lock on the traffic; unlike free citizens, inmates don't get to pick their favorite long-distance carrier. And a new breed of fraud-proof pay phones has reduced the risks of relying on customers who may have larceny in their hearts.

"Prisons have the highest margins around," says John Gamino of John Richard Associates, an industry consulting firm. "It's a golden egg."

John Jacquay, an MCI senior vice president, estimates that his company's aggressive push into the prison market has increased its share of inmates' long-distance calls to about 30% from 10% three years ago. As he delicately puts it: "We want to go after those situations where we know there is a high propensity for people to want to communicate outside of where they're staying." Dana Motyl, an AT&T inmate-calls manager, acknowledges that captive customers represent "one of the only growth spots out there in the declining collect-call market," though she won't divulge specifics on AT&T's market share or profits.

If the phone companies seem a bit shy about admitting their infatuation with criminals, the prison community isn't nearly so reticent about the objects of its affection. Wardens revere telephones as a management tool -- one of the few luxuries they can withhold as punishment. Prisoners extol them as a preserver of family ties. Phones also incite inmates to jealous rages. Two years ago, a Rikers inmate killed another who failed to get off the phone quickly enough.

A new Rutgers University study at Rikers shows that officials managed to cut phone-related violence in half by automatically disconnecting calls to reduce waits. In his latest single, "Behind Bars," incarcerated rapper Slick Rick alludes to a fight triggered by an inmate who hogged the phone "like he didn't know how to hang up." During a recent MTV interview, the star opined that "phones are like diamonds in jail."

Phone firms have learned that, as with most other aspects of prison life, inmates' keepers hold the keys. So valuable is the business that companies now routinely pay prison systems millions of dollars in annual fees, which they call commissions, for the exclusive right to operate the phones. Firms also offer signing bonuses and upfront advances. The money has become a mainstay for strapped state and county corrections bureaucrats. For instance, last year Massachusetts received about \$3 million in commissions from inmate phone calls. In addition, prisons often get free use of phone technicians and pricey equipment to tape inmates' conversations.

In return comes the exclusive right to a given facility's local or long-distance traffic; depending on regulatory constraints, sometimes the same carrier gets both.

With AT&T and MCI salesmen beating down doors, the fight for statewide prison
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systems, which boast the most inmates and the most long-distance traffic, is particularly fierce. In December, MCI captured Kentucky's 7,500 inmates by agreeing to return to the state 55% of its gross on an estimated \$5 million of long-distance and local-phone revenues. This was about double Kentucky's previous take. Ken Dressman, principal assistant to the corrections commissioner, says the munificence left him "flabbergasted."

MCI and AT&T are romancing the local sheriff, too. Late last year, AT&T wrested the three-year long-distance contract for the Los Angeles County jail system, the nation's largest, from LDDS Communications Inc., a Jackson, Miss., firm. Now with a guaranteed \$6 million in commissions under his belt, Terry Carlton, the corrections official who pulled off the deal, is already anticipating the next bidding war. While San Francisco-based Pacific Bell has his jail system's local traffic locked up for the next few years, Mr. Carlton says MCI and AT&T have made no secret of their expansionist intentions. Nor is this official averse to divulging his: "Three years from now, I hope to sit in a big chair and watch them all throw money at me," he says.

The bidding war over commissions has put a temporary damper on profit margins, though not on the phone companies' ardor. MCI's Mr. Jacquay says "very hungry" competitors have eroded profit margins in the niche to "less than 5% compared to 10% to 12% four or five years ago." Another special challenge in this market is controlling bad debt, whether from fraud or unpaid bills.

Still, the business is worth pursuing, notes an AT&T spokesman, "because it contributes to the company's overall market share." And it is widely believed in the industry that once the giants push smaller companies out of the niche, commissions will come back to earth. Even now, AT&T is finding ways to cushion its costs. The company recently imposed a special fee of \$3 on interstate collect calls made from the prisons where its antifraud equipment is in use. Now AT&T is seeking regulatory approval to apply the surcharge to in-state long-distance calls as well.

AT&T says it is only trying to recoup the costs of supplying special equipment. But James Burton, president of Telequip Labs Inc., a Richardson, Texas, provider of antifraud devices, says that "the industry knows this is 100% about AT&T defraying the costs of its commissions, but everyone is ecstatic because they can ride the windfall, too."

All this wheeling and dealing was unheard of just a decade ago. Before deregulation, the prisons that provided telephones at all tended to be customers of the local phone company and were usually treated like stepchildren. The big problem from the phone companies' perspective? "Live operators weren't trained to handle corrections traffic so they were highly susceptible to the conning ability of inmates," says Marty Goldman, a market manager at Executone Information Systems Inc., of Milford, Conn.

By the late 1980s, small, independent pay-phone carriers revolutionized the turf. Their innovation: substituting the live operators, who handled collect calls, with automated voices. The ensuing reduction in fraud and labor costs

made the business so lucrative that independents began relying heavily on commissions to nail down the business. This strategy -- often financed by huge increases in the prices paid for prison calls -- turned a number of tiny carriers into instant highfliers.

But competition and closer scrutiny by state officials are eliminating most opportunities for price-gouging. The Louisiana Public Service Commission, for instance, ordered Global Tel-Link, a Mobile, Ala., unit of Schlumberger Technologies Inc., to refund \$1.2 million in alleged overcharges from June 1993 to May 1994. Independents are also finding it difficult to hold their own in an escalating technology war.

Indeed, phone companies are increasingly combining their promises of big commissions with claims of ever-more-sophisticated measures to combat fraud. It's no wonder: Prisons are schools for scam artists. Frederick's of Hollywood, the famed purveyor of frilly lingerie, estimates that 25% of its credit-card fraud emanates from prison. The retailer keeps a list of prison zip codes and subjects prison-bound orders to additional scrutiny.

George Wagner, warden at a county jail in Flemington, N.J., describes the conventional phone system there as a breeding ground for larceny. By posing as a police officer doing a credit-card investigation, one jail inmate recently got people to divulge their credit-card numbers over the phone and then dialed out again for more than \$2,500 of goods.

To deter such shenanigans, even the most bare-bones prison-phone contracts generally provide for systems that announce on the line the identity of both inmate and prison before a collect-call conversation can get under way. Beyond that, the more advanced systems enable corrections officials to block selected numbers, thus preventing inmates from dialing out at random. Toll-free numbers are also off limits. Increasingly, too, state prisoners are confined to a small list of preapproved phone numbers. Phone marketers even have begun to hawk a "voice-verification" feature. This takes a digital print of an inmate's voice to ensure that prisoners aren't calling fellow inmates' approved numbers.

Phone firms are now racing to find a solution to an additional problem: inmates' penchant for dialing friends and family members who, in turn, forward the calls to accomplices, witnesses or mail-order houses.

To deal with this concern, AT&T has been particularly aggressive in touting its device, which it dubs "Strike Three," designed to detect and disconnect such third-party calls. The phone giant claims that Strike Three, which works by listening for clicks and silences on a phone line, is 93% effective in tests conducted by Bell Laboratories, AT&T's in-house testing facility. "No one else comes close," its ads in prison-industry magazines proclaim, though some competitors sharply disagree.

Eavesdropping equipment is another feature that is popular with wardens. Though the phone companies generally don't manufacture such devices, they often provide them to prisons at no charge. In the recording and monitoring room at

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the Massachusetts Correctional Institution in Norfolk, Mass., an alarm goes off intermittently. Stephen Gatewood, a security officer, explains that this alerts officers whenever an inmate under active suspicion dials out. At a visitor's request, Mr. Gatewood monitors one such call, placed by an inmate suspected of drug activity. Not only does Mr. Gatewood get to listen to the conversation as it unfolds but his computer gives him access to all sorts of other crucial data. He can see the number the inmate is calling, which prison phone he is calling from and even how often this number gets called by other inmates.

"Phones have definitely become an investigative tool, like informants and other types of surveillance techniques," Mr. Gatewood says. Just the day before, he adds, the prison recorded an inmate who had been denying suspected drug use behind bars. In the ersatz privacy of the phone room, he confided his heroin use -- to his mother.

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