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FEDERAL COMMUNICATIONS COMMISSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

FCC 96-34

In the Matter of)
)
Petition for Declaratory Ruling by) RM-8181
the Inmate Calling Services)
Providers Task Force)

DECLARATORY RULING

Adopted: January 30, 1996 Released: February 20, 1996

By the Commission:

I. INTRODUCTION

1. In this order, we address a petition for declaratory ruling ("petition") filed by the Inmate Calling Services Providers Task Force of the American Public Communications Council (PTF).¹ The petition requests that the Commission distinguish pay telephone service offered for inmate use in correctional facilities from pay telephone service offered for use by the general public. Specifically, PTF asks the Commission to rule that: (1) specialized pay telephones for inmate-only services are unregulated customer premises equipment (CPE); (2) certain of the specialized inmate-only services offered by local exchange carriers (LECs) are enhanced services and must be provided on an unregulated basis; and (3) LECs may not cross-subsidize inmate-only services with other basic local telephone services.² Ten parties filed comments and four parties filed reply comments in response to the petition.³ For the reasons stated below, we grant PTF's request for a declaratory ruling that inmate-only payphone instruments are CPE that must be provided on an unregulated basis and deny PTF's request for a ruling that certain inmate-only services constitute enhanced services. Therefore, we direct carriers to amend their Cost Allocation Manuals to the extent necessary to comply with this ruling, and to notify their customers of the change in status of inmate-only CPE. Further, we find that our accounting safeguards will sufficiently protect against improper cross-subsidization between inmate-only payphone service and basic local telephone service.

II. BACKGROUND

¹ Deadlines for Comments and Reply Comments were established in *Public Notice*, DA 93-137, Mimeo No. 31707 (released February 9, 1993).

² Petition at i, ii, 17.

³ A list of commenters and their abbreviations appear at Appendix A.

2. In its *Computer II* decisions, the Commission determined that CPE and enhanced services should be provided by common carriers on a nontariffed basis to encourage competition among providers of such services and equipment and to expand consumer choices.⁴ Section 64.702(a) of the Commission's rules defines an enhanced service as one that "employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide[s] the subscriber additional, different, or restructured information; or involve[s] subscriber interaction with stored information."⁵ Examples of enhanced services include voice mail service, electronic mail, electronic data interchange, and voice store-and-forward.⁶ *Computer II* defined CPE as "terminal equipment ... which is connected with the termination of a carrier's communication channel(s) at the network interface at that subscriber's premises."⁷ *Computer II* specifically excluded coin-operated or pay telephones from its deregulation of CPE, and, consequently, those devices remain part of regulated basic transmission service.⁸ The exclusion recognized that, at the time, coin-operated payphones and central office facilities were technically integrated, a factor that distinguished the former from the general class of CPE that was detariffed by *Computer II*.

3. The Commission subsequently issued a declaratory ruling that both coin-operated and coinless pay telephones offered by AT&T and the regional Bell Operating Companies (BOCs) were excluded from the *Computer II* definition of CPE.⁹ In *Tonka Tools, Inc.*, the Commission found that even where the payphone and the central office are technically severable, the instrument and the service are not logically severable because the transient, mobile public

⁴ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384, 428-30, paras. 114-118 (1980) (*Final Decision*), modified on recon., 84 FCC 2d 50 (1981) (*Reconsideration Order*) modified on further recon., 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

⁵ See 47 C.F.R. § 64.702(a); see also *Final Decision*, 77 FCC 2d at 420-21.

⁶ *Computer II Remand: BOC Safeguards and Tier 1 LEC Safeguards*, 6 FCC Rcd 7571, 7575 (1991).

⁷ *Final Decision*, 77 FCC 2d at 398 n.10.

⁸ *Id.* at 447 n.57; see also *Registration of Coin-Operated Telephones*, 57 RR 2d 133, 134-35 (1984).

⁹ *Tonka Tools, Inc.*, 50 F 24694, 58 RR 2d 903, 910 (1985) (*Tonka*).

cannot separately select the instrument and the service.¹⁰ *Tonka* also noted that pay telephones provided by regulated carriers have historically been given special regulatory status because they serve a critical role in ensuring that pay telephone service is available to the transient, mobile public, *i.e.*, the general public.¹¹ Thus, the pay telephone service and instrument were found to form an integrated basic communications service to the public. Accordingly, LECs (pursuant to *Computer II* and *Tonka*) continue to provide pay telephones as part of a regulated basic transmission service.

III. PETITION

4. *PTF Petition.* PTF asks the Commission to rule on the applicability of its *Computer II* and *Tonka* rulings to pay telephones provided to inmates in correctional facilities. The phone services at issue here are provided only to inmates; visitors and other correctional personnel do not use the phone services that are the subject of PTF's petition. PTF requests that the LECs provide prison payphones as CPE because its members compete with the LECs in providing prison payphone services, specifically equipment, services, and commission fees to the entity administering the correctional facilities. LECs and independent payphone providers (IPPs) bid competitively for contracts to provide inmate-only payphone service. Petitioners allege that these contracts often require payphone providers to pay commissions to corrections facilities based on payphone use and toll traffic. PTF believes that as long as the LECs are able to provide prison payphone services on a regulated basis, LECs will be able to offer higher commissions to correctional facilities than competing providers of payphone services because LECs are able to use other regulated services to subsidize their prison payphone equipment and services.¹²

5. PTF contends that several features distinguish inmate-only payphones from payphones used by the public. In general, these distinctions reflect the fact that corrections officials control the circumstances and conditions under which inmates have access to payphone service. For example, the petition states that many inmate-only payphones are programmed to permit only collect calls. Inmate-only payphone service may permit corrections officials to limit call duration or calling hours. Such limitations may be determined by the amount of calling time

¹⁰ *Id.* In this *Order*, we use the term "transient, mobile public" to mean the general public. The terms "public" and "transient users" are included in the definition of "aggregator" in the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), Public Law 101-435, 47 U.S.C. § 226 and 47 C.F.R. § 64.708(b). Generally, an aggregator is defined 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." See 47 C.F.R. § 64.708(b).

¹¹ *Tonka*, 58 RR 2d at 910, para. 12.

¹² *Petition* at 17.

allotted a particular inmate, or by security demands within the facility. The service may permit corrections officers to monitor or record inmate telephone conversations selectively, or to create a record of calls placed and numbers dialed by an individual inmate or the inmate population in general. Because corrections officials may need to restrict inmate contact with judges, witnesses, or other members of the public, inmate-only services are often equipped to block calls to specific numbers. Such blocking capabilities may also be employed to prevent fraud or abuse on the network. Some inmate-only payphone services may require personal identification numbers (PINs) to tailor call restrictions to individual inmates, or as part of a debit account system for permitting inmate calls.

6. PTF requests that the Commission order the LECs to provide pay telephone service to inmates as an unregulated enhanced service and to provide inmate-only payphone equipment as unregulated CPE.¹³ PTF makes three arguments as to why prison payphones are CPE. First, PTF argues that inmate-only payphone service cannot be considered public pay telephone service because it is not available to or used by the general public. This phone service is not for use by visitors. PTF relies on *Tonka* and states that:

"'Public' telephone service is provided when a general need for the service exists in a public location such as an airport or street corner and the telephone is placed at the option of the telephone company with the agreement of the owner (or agent or lessee) of the property. 'Semi-public' telephone service is provided when there is a combination of transient public and specific customer use for the service on the customer's privately owned premises such as a gasoline station or restaurant."¹⁴

Additionally, PTF argues that the Commission exempted inmate payphone services from coverage under the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA").¹⁵ Thus, unlike "public" or "semi-public" pay telephone service, PTF asserts that inmate-only payphone service is offered to meet the specialized needs of correctional facilities.¹⁶

7. Second, PTF further argues that inmate-only payphones are not limited to the

¹³ Petition at 1.

¹⁴ *Tonka*, 58 RR 2d at 910 n.31.

¹⁵ See *Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, 2752 (1991), recon. denied in part and clarified in part, 7 FCC Rcd 3882 (1992) (*Implementation of TOCSIA*) (inmate payphone service represents an exceptional set of circumstances that warrants their exclusion from TOCSIA regulation. The Commission has sought comment on whether this decision should be changed). See *Policies and Rules Concerning Operator Service Providers and Call Aggregators*, Notice of Proposed Rulemaking and Notice of Inquiry, 10 FCC Rcd 1533 (1995).

¹⁶ Public Law 101-435, 47 U.S.C. § 226. Petition at 3-8.

"provision of basic calling services such as those in question in *Tonka*." Petitioner's reading of *Computer II* leads it to conclude that LECs cannot provide additional functionality to prison payphones absent such phones becoming CPE. PTF believes that as long as LECs can provide these services on a regulated basis, LECs will have an unfair advantage. Moreover, PTF states that the inmate-only telephone should be classified as CPE because this equipment offers the following specialized features or services: (1) restriction of an inmate's calls to pre-screened numbers, or call blocking for certain numbers; (2) limits on call duration; (3) call restriction or monitoring for specific hours or days; and (4) use of inmate PINs to track calling patterns, or to restrict calls.¹⁷ PTF maintains that these features are completely unrelated to the concerns expressed in *Tonka* for ensuring the availability of a payphone to the transient mobile public.¹⁸ Finally, PTF further contends that in some instances LECs have not only added functionality, but actual hardware and other "premises-based adjuncts." PTF argues that 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."¹⁹ To PTF, citing a Commission decision for support, simply because *Computer II* allows non-prison payphones to escape being classified as CPE does not mean that LECs should be permitted to add increased functionality to prison payphones without those phones being re-classified as CPE.²⁰

8. In addition to the above arguments, PTF contends that a number of the inmate-only services are enhanced services as opposed to basic offerings, *e.g.*, provision of PIN numbers and, thus, these services should be unregulated because they involve interaction with customer-supplied information or other computer processing services.²¹ PTF contends that "the recording capabilities provided by the LECs clearly involve voice storage."²²

9. Further, PTF alleges that the provision of inmate-only payphones as a regulated service enables the LECs to cross-subsidize that service. PTF does not describe in detail the method of this cross-subsidization, but contends that by allowing LECs to keep prison payphones in their ratebase they are in a position to cross-subsidize inmate-only services with other basic services. As a result, PTF argues that LECs are able to offer correctional facilities significantly greater commissions than PTF members can afford, to the detriment of telephone ratepayers and to the disadvantage of unregulated competitors. PTF maintains that granting its request will

¹⁷ *Id.* at 14-16.

¹⁸ *Id.*

¹⁹ Petition at 16.

²⁰ *International Business Machines Corp.*, 58 RR 2d 374, 379 (1985).

²¹ Petition at 19.

²² *Id.* at 21.

simply remove inmate-only equipment and enhanced services from the rate base and require that LECs recover the costs of unregulated inmate-only phones from unregulated operations.²³ Accordingly, PTF asks the Commission to rule that the LECs' current provision of inmate-only payphone services as a regulated service is inconsistent with its *Computer II* and *Tonka* decisions. PTF also urges us to order LECs to provide inmate-only payphone services and equipment only on an unregulated basis pursuant to the nonstructural safeguards of the *BOC CPE Relief Order* and the *Cost Allocation Order*.²⁴

IV. COMMENTS

10. ATCT, CNS, and MCI concur with PTF that inmate-only payphones are neither public nor semi-public payphones under the *Computer II* exception, and thus are not excluded from the definition of CPE under *Computer II*.²⁵ These commenters further argue that inmate-only payphone service represents an exceptional set of circumstances (*i.e.*, incarceration) and, as such, cannot be considered public or semi-public payphone service. These commenters agree with PTF that prison payphones must be classified as unregulated CPE.²⁶

11. ATCT and CNS concur with the Petition in stating that inmate-only payphone service includes features that go beyond basic transmission services under *Computer II*, such as call storage, retrieval of information through call recording, and call blocking, and that such services must be classified as enhanced.²⁷ CNS and MCI support PTF's contention by alleging that LECs cross-subsidize inmate-only services with revenues from other regulated offerings.²⁸

12. LECs generally oppose the PTF petition and dispute its interpretation of *Tonka*.

²³ Petition at 17-18.

²⁴ Petition at 1-2, citing: *Furnishing of Customer Premises Equipment by the Bell Operating Companies*, CC Docket No. 86-76, 2 FCC Rcd 143 (1987), *modified on recon.*, 3 FCC Rcd 22, (1987); *Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991), *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*Computer III Remand*); *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities (Joint Cost Order)*, CC Docket No. 86-111, (*Report and Order*), 2 FCC Rcd 1298 (1987), *modified on recon.*, 2 FCC Rcd 6283 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

²⁵ ATCT at 5-6; CNS at 4; MCI Reply at 1-3.

²⁶ CNS at 4; MCI Reply at 1-2.

²⁷ ATCT at 2.

²⁸ CNS at 1-3; MCI Reply at 2.

Several commenters emphasize that *Tonka* classifies LEC public payphones as a regulated network service based on a finding that payphone equipment and transmission capacity are not logically severable.²⁹ They contend that resolution of whether prison payphones should be exempt from the Commission's CPE rules should not turn on whether the payphone instrument is available to a mobile general public, but rather that on the fact that inmates, like the general public, do not own the payphone instrument and cannot separately select and pay for use of the equipment.³⁰ Additionally, SWBT rejects PTF's claim that because inmate-phones are used under controlled conditions they are CPE. SWBT argues that it is the user's ability to exclude use of the phone by others that helps determine whether the phone is CPE, *e.g.*, contrast between a phone in a guest's room and a phone in the hallway of a hotel.³¹ Even if the Commission decides to look at the question of a transient, mobile public, SNET argues that the primary customer for the inmate-only telephone equipment is still a member of the general public or some segment thereof.³² NYNEX notes that many public telephones are not available to the transient mobile public, and thus it is irrelevant that phones in hospital rooms and college dorms are treated as CPE because public phones in hospitals are not CPE.³³

13. LECs also challenge PTF's reliance on TOCSIA's exclusion of prisons from the definition of "aggregator" as proof that prison payphones are properly classified as CPE. BellSouth, for example, notes that the definition of aggregator includes service providers that do not qualify for CPE payphone exclusion; thus, according to BellSouth, whether a service provider is an aggregator is irrelevant to the question of whether the instrument is CPE.³⁴

14. In addition, BellSouth contends that granting the petition would put it and other BOCs at an unfair competitive disadvantage because BOCs recover expenses associated with providing access to interstate carriers via inmate-only phones through federal access charges.³⁵ Private payphone providers, according to BellSouth, receive access charges directly from the interexchange carrier ("IXC") that pays them a commission or charges the private payphone provider a reduced rate in return for using IXC services for interexchange calls placed from

²⁹ See *Tonka*, 58 RR 2d at 910; BellSouth at 2-3; Southern New England Telephone ("SNET") at 3.

³⁰ *Id.*; see Ameritech Comments at 3; BellSouth at 2-4; NYNEX at 4; Pacific Bell Reply at 4-5; SWBT Comments at 4-5, 6-8; USTA at 1-2.

³¹ SWBT at 8-9.

³² SNET at 3-4.

³³ NYNEX at 2-3.

³⁴ BellSouth at 4-5.

³⁵ *Id.* at 10.

inmate-only phones.³⁶ BellSouth urges the Commission not to act until a mechanism is in place that will allow BOCs to recover these expenses. Similarly, SWBT, in its reply, states that "the MFJ restricts a BOC's ability to share revenues with an interexchange carrier, or even to select the interexchange carrier."³⁷ Thus, according to SWBT, this allows prison payphone providers to command reduced rates or commissions from IXCs and thus offer higher commissions to correctional facilities.³⁸ Several commenters dispute PTF's claim that LECs enjoy a competitive advantage in the provision of inmate-only services and that LECs cross-subsidize such services with other basic regulated service offerings. NYNEX argues that there is already vigorous competition in the payphone industry; NYNEX and SWBT both report losing inmate-only payphone service bids to independent payphone providers.³⁹

15. PTF replies that the prohibition on sharing revenues applies regardless of whether inmate-phones are considered CPE; thus, in its opinion, the total commissions paid to correctional facilities will not change.⁴⁰ In a January 11, 1996, *ex parte*, PTF further argued that the unfair advantage that the RBOCs claim would result from the Commission's granting PTF's petition is proof that the RBOCs cross-subsidize.⁴¹ PTF's cross subsidization argument is based on the fact that the Commission has never ruled that inmate-only phones are exempt from *Computer II* rules. PTF also contends that the ability of its members to negotiate directly with interexchange carriers should not be a reason to "allow continuing distortion of competition

³⁶ *Id.* 9-10.

³⁷ SWBT at 4-5.

³⁸ *Id.* Similarly, Pacific Bell and BellSouth in a November 29, 1995 *ex parte* to the Commission argued that to declare RBOC payphones CPE "would remove the current contribution to payphone costs without allowing RBOCs the ability to recoup those costs from payphone services. RBOC payphone service providers must have the same ability and opportunities as IPPs to recover costs before RBOC payphones are declared CPE." Specifically, Pacific and BellSouth requested "fair and equitable compensation for all calls completed" and "the same right as independent payphone providers have today, to negotiate with the location provider on selecting and contracting with, the carriers that carry interLATA calls from their payphones." Without these provisions, they contend, they would be faced with an uneven playing field. *See* Letter from PTF to William Caton dated January 11, 1996 (PTF Ex Parte I).

³⁹ NYNEX at 7-8; SWBT Reply at 14.

⁴⁰ PTF reply at 6.

⁴¹ *See* Letter from PTF to William F. Caton dated January 11, 1996 (PTF Ex Parte I).

merely because one competitor is subject to restrictions outside the Commission's control."⁴² PTF adds that LECs would not suffer from significant disadvantage if inmate-only payphones were classified as CPE.

16. Further, the RBOCs generally challenge the petition's characterization of specific inmate-only features as enhanced services. US West, for example, agrees that voice storage and retrieval are enhanced services but not in the context of inmate-only payphones.⁴³ SWBT, however, argues that the use of PIN numbers is not an enhanced service because the primary purpose is neither recording nor billing, but rather blocking or permitting specific inmate calls. It claims that a PIN number provides no additional or different information.⁴⁴

17. Other commenters, regardless of their position on the appropriate regulatory treatment of payphones, rebut PTF's enhanced services argument. BellSouth and MCI argue that the services PTF labels as enhanced services are merely basic services related to establishing a transmission path. BellSouth, citing the *NATA/Centrex* order, maintains that inmate-only functions such as call blocking, call detail, timing, and PIN codes are "clearly" adjunct to basic network functions, designed to prevent network service fraud and abuse.⁴⁵ MCI notes that several phones on the market will limit the dialing of toll calls, display the time of the call, and record call duration within the CPE.⁴⁶ MCI asserts that if offered in the network, these features would be adjunct to basic services rather than enhanced services.⁴⁷ Ameritech contends that merely interpositioning equipment between the central office and the inmate-only payphone does not change the regulated nature of BOC-provided payphone service.

18. Finally, there are a number of other issues raised by the LEC commenters. NYNEX and Pacific believe that the petition should not be decided until the issue regarding the

⁴² *Id.* at 3. For example, PTF states that since the vast majority of calls from prisons are intraLATA calls, even if the Bell companies did suffer from a disadvantage vis-a-vis interLATA collect revenue, that disadvantage would not be decisive. *Id.*

⁴³ US West at 2 n.5, 3.

⁴⁴ SWBT Comments at 17.

⁴⁵ BellSouth Comments at 9, quoting *North American Telecommunications Association, Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment (NATA/Centrex Order)*, 101 FCC 2d 349, 361 (adjuncts to basic services "facilitate the use or management of basic network services without changing their fundamental nature.").

⁴⁶ MCI Comments at 2 n.2.

⁴⁷ *Id.* at 3-4.

unbundling of all LEC payphones is decided.⁴⁸ Pacific argues that a declaratory ruling is inappropriate for the issues raised by PTF and should be denied.⁴⁹ Pacific believes a rulemaking would be more appropriate because it could consider issues such as demarcation between the network and CPE, the effect of deregulating inmate phones upon the revenue streams available to LECs and non-LECs, and the effect on the competitive marketplace of imposing Part 64 administrative costs upon the LECs.⁵⁰ On the other hand, PTF argues that the CPE issue is ripe for a declaratory ruling because the LECs dispute its position with regard to *Tonka* and whether the services provided by inmate-only phones are enhanced.⁵¹

V. DISCUSSION

19. PTF's petition presents two basic arguments: (1) the equipment used to provide inmate-only payphone service should be provided as detariffed, unregulated CPE as set forth in *Computer II* and clarified in *Tonka* because prison payphones do not constitute either public or semi-public pay telephone service; and (2) the specialized features offered as part of inmate-only payphone service constitute enhanced services that LECs must provide on an unregulated basis.

20. As an initial matter, we address Pacific's argument that we should not determine that inmate-only payphones are CPE through a declaratory ruling.⁵² The purpose of a declaratory ruling is to terminate a controversy or remove uncertainty.⁵³ After carefully considering the petition for declaratory ruling and the subsequent record, we are convinced that indeed there is uncertainty surrounding the appropriate regulatory treatment of inmate-only payphones.

21. Although we excluded pay telephones from the definition of CPE in *Computer II*,⁵⁴ we later, in *Tonka*, specifically considered the scope of that exclusion. *Tonka*, itself a declaratory ruling, and a ruling on which parties opposing this petition place great reliance as furthering their position that inmate-only payphones are not CPE, explained in great detail the

⁴⁸ NYNEX at 2; Letter from Pacific Telesis to William F. Caton dated January 19, 1996 (Pacific Ex Parte III).

⁴⁹ Pacific Bell at 1-5; Pacific Ex Parte III at 6.

⁵⁰ Pacific Ex Parte III at 6.

⁵¹ Reply Petition at 20-22.

⁵² Pacific at 1-5.

⁵³ 47 C.F.R. § 1.2.

⁵⁴ *Computer II*, 77 FCC 2d at 447, n. 57.

Commission's reasoning for declaring, at that time, payphones to be excluded from the definition of CPE.

22. In *Tonka*, we were presented with new facts to which we were required to apply our *Computer II* decision. Specifically, we were required to determine whether our decision to exclude payphones from the definition of CPE was applicable to coinless-operated payphones. Parties in *Tonka* argued that the Commission's *Computer II* decision was based on the technical integration of the payphone to the central office of the telephone company, thus making the end-to-end service technically inseverable. In *Tonka*, however, we concluded that technical severability was not the sole basis for excluding payphones from the definition of CPE. Rather, we found that the special regulatory status for payphones rested also on our concern of ensuring the availability of pay telephone service to the transient, mobile public.⁵⁵ Thus, in *Tonka*, we interpreted the scope of the payphone exclusion in light of the policy concerns underlying it.

23. With the petition before us, we are again presented with a different set of facts not specifically considered before. As we explained *infra*, our concerns for ensuring the availability of payphone service do not extend to inmate-only payphone service. The unique nature of the service offered and the requirements of corrections authorities to carefully control the conditions under which the service is offered, show that the *Tonka* decision is not applicable here. Thus, as in *Tonka*, it is appropriate to consider the policy concerns underlying the payphone exclusion in assessing the applicability of that exclusion to inmate-only payphones.

A. The Computer II Payphone Exclusion of CPE.

24. We noted in *Tonka* that our decision to exclude public and semi-public payphones from the definition of CPE rested not on considerations of technical severability alone, but also on the special regulatory status accorded carriers in ensuring the availability of pay telephone service to the mobile, transient public.⁵⁶ These two factors were central to our finding in *Tonka* that public payphones, rather than being CPE, are part of the end-to-end provision of public payphone service by local telephone companies. The parties opposing the petition do not contend that prison payphones are technically inseverable from network services in the same way as public or semi-public pay telephone service. Opponents of the petition contend that both technical severability and service to the public are considerations that apply in the context of prison payphones.

25. We conclude, however, that our concern for ensuring the availability of payphone service to the general public, as expressed in *Computer II* and *Tonka*, should not extend to

⁵⁵ *Tonka*, 58 RR 2d at 910, para. 12.

⁵⁶ *Tonka*, 58 RR 2d at 910, para. 12.

availability of payphone service in correctional facilities.⁵⁷ We reach our conclusion without relying on whether the functionality is located within the equipment or network, nor do we need to interpret the meaning of TOCSIA's exclusion of prisons from its definition of "aggregator." The determining factor in our conclusion is the importance of ensuring that payphones are available to the transient, mobile public. Inmate-only payphone service is not a service that must be offered on a regulated basis to ensure its availability. Availability is determined by the institutional concerns of prison authorities and the record indicates that a highly competitive prison payphone market ensures the availability of prison payphone equipment. The petition indicates, and the commenters do not dispute, that corrections officials permit inmate-only payphone services under carefully controlled conditions;⁵⁸ and the issue of control is relevant to our conclusion to the extent that the control exercised by prison officials over inmate use of inmate-only phone service, were such control applied to the public payphone context, would lessen the availability of payphones. Additionally, the record here demonstrates that while one function of the service is to provide communications service to the inmate population, the concerns and requirements of corrections authorities are different and often in conflict with those associated with the provision of basic public payphone service. These facts distinguish inmates from the "general public."

26. For the foregoing reasons, we conclude that inmate-only payphone service should not be viewed as a communications service furnished to the mobile public, and that our policies applicable to public payphone CPE, designed to ensure access to payphone services, are inapposite in prison settings. Consistent with these conclusions, we find that CPE used in providing inmate-only services must be provided on an unregulated, unbundled basis by those who provide inmate-only services. We believe that competition for inmate services will constrain prices for those services and thus address the concerns raised in the Petition.

27. Although we believe it necessary to make clear the appropriate regulatory treatment of inmate-only payphones, we leave a number of issues unresolved. The record before us is insufficient to make a final determination regarding issues such as call compensation. We

⁵⁷ See PTF Reply Comments at 3, 12-14. We note that the discussion in *Tonka* was reached over ten years ago, and that PTF does not specifically request that we overrule *Tonka*. PTF argues that inmate-calling services are easily distinguished from payphones available to the general public. PTF Petition at 12. PTF states that "Although the Commission can certainly overrule *Tonka* if it so chooses, it is not necessary to do so in order to address the issues raised by [PTF]." PTF Reply at 11. We intend to initiate a proceeding to review the issue of whether all pay telephones should be unbundled and today's decision is not intended to prejudice that review in any way.

⁵⁸ For example, Bureau of Prisons rules govern inmate contact by telephone with persons in the community. See 28 C.F.R. § 540.101. Corrections officials select payphone equipment and transmission capacity to meet their needs for internal security, the security of the premises equipment itself, and prevention of fraud or abuse of transmission services.

are committed to resolving these remaining issues expeditiously and note that we may address them in an upcoming proceeding on generally unbundling payphones. Accordingly, by September 2, 1996 the LECs must reclassify any inmate-only pay telephone investment recorded in Account 32.2351, Public telephone terminal equipment, along with the associated depreciation and tax reserves and any related expenses, from a regulated activity to a nonregulated activity pursuant to our Part 64 rules. We conclude that our accounting safeguards with regard to non-regulated services sufficiently protect against the potential for cross-subsidization.⁵⁹ The LECs should also establish whatever Part 64 cost pools⁶⁰ are needed to accomplish this reclassification and should file revisions to their Cost Allocation Manuals reflecting this reclassification within sixty (60) days prior to the effective date of the change. This will insure that the provision of inmate-only payphone services is separate and distinct from the provision of common carrier services in accordance with our rules.⁶¹ In addition, carriers must also make appropriate tariff changes pursuant to Part 61 of the Commission's Rules. Finally, LECs must notify their customers in writing for prison payphone service of the change in status of inmate-only customer premises equipment by July 1, 1996.

B. Enhanced Services and Prison Payphone Systems.

28. In the *Computer III Phase II Order*, we emphasized that interaction with stored data to establish a transmission path is not an enhanced service.⁶² Thus, enhanced services do not include the functionality between the subscriber and the network for call set-up, routing,

⁵⁹ See 47 C.F.R. § 64.702(e). Each LEC with annual operating revenues of \$100 million or more must file with the Commission a manual containing information regarding its allocation of costs between regulated and nonregulated activities. Those filing cost allocation manuals must amend them within at least 60 days prior to changing CPE from a regulated to a nonregulated activity if such change would alter the LECs cost apportionment tables. See 47 C.F.R. § 64.903(a)-(c).

⁶⁰ "Cost pools" are comprised of logical homogenous groupings of costs that maximize the extent to which cost causative allocation factors can be used to divide costs between regulated and unregulated activities. *Implementation of Further Cost Allocation Uniformity*, Memorandum Order and Opinion, 8 FCC Rcd 4664 (1993).

⁶¹ *Id.*

⁶² Enhanced services are defined as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

cessation, caller or calling party identification, or billing and accounting.⁶³ Rather, enhanced services include services that involve subscriber use or interaction with information in the network not otherwise used in the provision and management of a customer's service.⁶⁴ PTF argues that various specialized features provided with inmate-only payphone service (e.g., call screening and blocking, restricting calls by duration or by time of day) are enhanced services under *Computer II*, and, accordingly, must be provided on an unregulated basis by both IPPs and LECs. Ameritech, BellSouth, and NYNEX argue that, notwithstanding the fact that many of these features may be provided by the CPE's circuitry, nearly all of the features characterized by PTF as enhanced services would be basic or adjuncts to basic services if provided by LECs as a regulated service in the network.

29. *Recording, storage, and retrieval services.* In *Computer II*, we stated that "many enhanced services feature voice or data storage and retrieval applications, such as in an electronic 'mail box.'"⁶⁵ PTF alleged that Pacific Bell included an answering machine and voice mail as part of its services to Santa Clara County.⁶⁶ Pacific Bell denied the allegation and stated that it only provided call detail information under procedures established by state law.⁶⁷ PTF offered an additional argument in its reply, stating that the alleged factual disputes are "irrelevant" and "contrived" because the point is not whether Pacific Bell currently provides such services but whether it can provide such services.⁶⁸ Based on the record before us, we cannot reach any conclusions beyond what we have previously stated in *Computer II* regarding the regulatory status of the services PTF alleges Pacific can provide. Moreover, in the context of this declaratory ruling, we cannot resolve the specific factual issue of whether Pacific Bell provides the above services.

30. *Call duration, time of day and other blocking restrictions.* The call management features cited by PTF, such as limits on calling hours, days, or duration, do not appear to accommodate subscriber requirements beyond the provision of basic transmission capacity.

⁶³ *Amendments to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, 3081, (1987) (*Computer III Phase II Order*), recon., 3 FCC Rcd 1150 (1988); see also *North American Telecommunications Association*, 3 FCC Rcd 4385, 4389 (1988).

⁶⁴ *North American Telecommunications Association*, 3 FCC Rcd at 4385, 4389.

⁶⁵ See *Computer II*, 77 FCC 2d at 421. We note, however, that certain "stored" information may also be considered basic or adjunct to basic depending on how the information is used. See *infra* para. 28.

⁶⁶ Petition at 21.

⁶⁷ Pacific Bell at 12.

⁶⁸ PTF reply at 21-22.

Time of day, day of week, and call duration limitations enable corrections officials to permit, deny, or curtail an inmate's call, *i.e.*, to determine whether a transmission path will be established. Basic transmission service is defined as "pure transmission capability over a communications path that is virtually transparent in terms of interaction with customer-supplied information."⁶⁹ As with speed dialing or call forwarding, these features of inmate-only service merely permit the customer (corrections authorities) to store and update information that facilitates (or blocks) the establishment of a transmission path over which a telephone call may be completed. The service employs information used by the carrier in the provision or management of the customer's telephone service (such as the time, date and duration of calls) to offer the features provided in inmate-only payphone services. Thus, call duration or time of day restriction services are not enhanced services as PTF contends, and may properly be provided as part of regulated network services to the extent that they are not provided through CPE circuitry.⁷⁰ The Commission has found that services such as call blocking, which allow customers to block unwanted calls from designated numbers, and call tracking, which provide the time of the call's arrival, the number called, and the calling party's telephone number, are not enhanced services, in that they do not go beyond providing a basic transmission channel and facilitating the customer's use of that transmission channel.⁷¹

31. *Calling and called party restrictions.* PTF maintains that inmate-only payphone features that block calls to specified numbers or that restrict a specific inmate's calls to pre-screened numbers, constitute enhanced services that the LECs should provide on an unregulated basis. Although the commenters described several methods for providing this functionality, any service of this kind would presumably employ information on inmates and inmate calling patterns that has been stored for use by corrections authorities. As noted above, corrections officials, who have broad discretion in deciding whether to permit inmate calling, may restrict inmate calling for reasons of security, discipline, or fraud prevention. Thus, while call blocking and screening functions may draw upon stored information on individual inmates, the service essentially helps corrections officials to determine whether a transmission path may be established. In the *NATA/Centrex Order*, we concluded that services offered in the network that help customers screen or pre-select callers for acceptance or rejection do not go beyond providing a basic transmission channel and facilitating the customer's use of that transmission channel.⁷² Similarly, screening and blocking features employed by correctional officials to monitor inmate telephone usage involve a determination of whether a transmission path may be established. We therefore reject PTF's claim that such services must be deemed enhanced

⁶⁹ *NATA/Centrex Order*, 101 FCC 2d at 358, citing *Computer II Final Decision* at 420.

⁷⁰ Another way of describing CPE with circuitry is to denote such CPE as being "instrument implemented," *i.e.*, all the circuitry required to perform the functions is contained in the telephone instrument itself, without central office involvement.

⁷¹ *NATA/Centrex Order*, 101 FCC 2d at 368-71, paras. 43-53.

⁷² *See Id.*

services.⁷³

32. *Personal Identification Numbers.* The record indicates that PINs may be used to monitor or screen calls, restrict call duration, or for access codes.⁷⁴ The record is unclear how PINs are used in the provision of inmate-only services. The commenters' descriptions of the use of PINs vary considerably, and the PTF petition does not specifically detail those aspects of PIN usage that should be deemed enhanced services. Further, on the record before us, we cannot determine whether LECs are now providing features that utilize PINs as enhanced services, or whether LEC use of PINs incorporates features or functions in CPE, which must be unbundled and provided on an unregulated basis under the terms of this ruling. Absent more specific information regarding the use of PINs for the provision of service to inmates, we cannot on the record developed in this proceeding issue the declaratory ruling requested by PTF that this use of PINs constitutes an enhanced service.

VI. CONCLUSION

33. In this order, we grant in part the petitioner's request for a declaratory ruling by holding that, consistent with our rulings in *Computer II* and *Tonka*, the equipment used to deliver inmate-only payphone services is CPE and must be provided on an unbundled, unregulated basis. Our decision is consistent with Commission policies fostering competition and consumer freedom of choice in the CPE market. Further, we conclude, based on the record developed in this proceeding, that certain inmate-only services, if provided in the network, are adjunct to basic services. We further conclude that the issue of inmate-only phones being CPE may be decided separate and apart from other payphone issues presently before the Commission, e.g., unbundling of all public payphones and IXC/BOC access charge arrangements. Finally, we find that the record developed by the petitioner and commenting parties does not support a declaratory ruling that the use of PINs constitutes an enhanced service. Our ruling in this proceeding does not preclude future determinations, on a more detailed record, regarding the classification of certain inmate-only services as enhanced. Finally, this ruling is without prejudice to any determinations made in our further inquiry regarding aggregator policies in CC Dkt. No. 94-158.

VII. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED, pursuant to Section 4 of the Communications Act of 1934, as amended, 47 U.S.C. § 154, that the petition for declaratory ruling filed by the

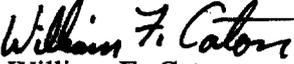
⁷³ If local telephone companies offer inmate-only payphone services to their unregulated affiliated enhanced service providers (ESPs), such services must also be offered to unaffiliated ESPs on a non-discriminatory basis, consistent with our *Computer III* requirements. See *Computer III Remand*, 6 FCC Rcd at 7576-7638.

⁷⁴ See BellSouth Comments at 8-9.

Inmate Calling Services Providers Task Force of the American Public Communications Council IS GRANTED to the extent discussed herein and otherwise IS DENIED.

35. IT IS FURTHER ORDERED that carriers shall notify their customers in writing for prison payphone service of the change in status of inmate-only customer premises equipment from a regulated activity to a nonregulated activity by July 1, 1996. Accordingly, by September 2, 1996, the LECs must reclassify any inmate-only pay telephone investment recorded in Account 32.2351, Public telephone terminal equipment, along with the associated depreciation and tax reserves and any related expenses, from a regulated activity to a nonregulated activity pursuant to our Part 64 rules. The LECs shall also establish whatever Part 64 cost pools are needed to accomplish this reclassification and shall file revisions to their Cost Allocation Manuals reflecting this reclassification within sixty (60) days prior to the effective date of the change. In addition, carriers must also make appropriate tariff changes pursuant to Part 61 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

COMMENTS

Advanced Technologies Cellular Telecommunications, Inc. (ATCT)
Ameritech Operating Companies (Ameritech)
BellSouth
Capital Network System, Inc. (CNS)
MCI Telecommunications Corporation (MCI)
Nynex Telephone Companies (Nynex)
Pacific Bell and Nevada Bell (Pacific Bell)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)
US West Communications, Inc. (US West)

REPLY COMMENTS

Inmate Calling Services Providers Task Force (PTF)
MCI Telecommunications Corporation
Pacific Bell and Nevada Bell
Southwestern Bell Telephone Company
United States Telephone Association (USTA)