

JUN 13

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

In the Matter of )  
 )  
Implementation of the ) CC Docket No. 96-128  
Pay Telephone Reclassification )  
and Compensation Provisions of the )  
Telecommunications Act of 1996 )

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Hundt issuing a statement.

Table of Contents

Topic	Paragraph No.
I. Introduction	1
II. Background	2
III. Issues	14
A. Compensation for Each and Every Completed Intrastate and Interstate Call Originated by Payphones	14
1. The Act	14
2. Discussion	15
a. Scope of Payphone Calls Covered by this Rulemaking	15
b. Entities Required to Pay Compensation	24
c. Ability of Carriers to Track Calls from Payphones	29
d. Administration of Per-Call Compensation	32
e. Per-Call Compensation Amount	35
B. Reclassification of LEC-Owned Payphones	41
1. The Act	41
2. Discussion	42
a. Classification of LEC Payphones as CPE	42
b. Transfer of Payphone Equipment to an Unregulated Status	49
c. Termination of Access Charge Compensation	

and Other Subsidies	50
d. Deregulation of AT&T Payphones	55
C. Nonstructural Safeguards for BOC Provision of Payphone Service	57
1. The Act	57
2. Discussion	58
a. Background	58
b. BOC CEI Plans	60
D. Ability of BOCs to Negotiate with Location Providers on the Presubscribed InterLATA Carrier	67
1. The Act	67
2. Discussion	69
E. Ability of Payphone Service Providers to Negotiate with Location Providers on the Presubscribed IntraLATA Carrier	74
1. The Act	74
2. Discussion	75
F. Establishment of Public Interest Payphones	76
1. The Act	76
2. Discussion	77
G. Other Issues	83
1. Dialing Parity	84
2. Letterless Keypads on Payphones	85
3. Other Pending Payphone Proceedings	88
4. Comments and <u>Ex Parte</u> Presentations	89
5. Initial Paperwork Reduction Act Analysis	93
6. Initial Regulatory Flexibility Act Analysis	95
IV. Conclusion	103
V. Ordering Clauses	104

## I. INTRODUCTION

1. The Telecommunications Act of 1996 directs the Commission to promulgate new rules governing the payphone industry.<sup>1</sup> Section 276 of the 1996 Act directs the Commission, among other things, to ensure that all payphone owners are compensated for calls originated on their payphones, and to "discontinue ... all intrastate and interstate" subsidies for payphones owned by incumbent local exchange carriers ("LECs"). In this Notice, the Commission proposes rules that would accomplish the following objectives set forth by Congress in Section 276: (1) compensation for "each and every completed intrastate and interstate call

<sup>1</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 276) (the "1996 Act").

using [a] payphone[;]"<sup>2</sup> (2) termination of all subsidies for LEC payphones, including "access charge payphone service elements[;]"<sup>3</sup> (3) prescription of nonstructural safeguards for Bell Operating Company ("BOC") payphones;<sup>4</sup> (4) promulgation of rules permitting the BOCs to negotiate with the payphone location provider about a payphone's presubscribed interLATA carrier, unless the Commission finds that such negotiations are "not in the public interest;"<sup>5</sup> (5) promulgation of rules permitting all payphone providers to negotiate with the location provider about a payphone's presubscribed intraLATA carrier;<sup>6</sup> and (6) establishment of a class of public interest payphones to be located "where there would otherwise not be a payphone[.]"<sup>7</sup> We also note that in a separate proceeding on operator service provider issues, the Commission tentatively concludes that it should: (1) establish benchmarks for rates charged by operator service providers ("OSPs") that reflect consumers' expectations; and (2) require OSPs whose charges, and related aggregator surcharges or premises-owner fees, exceed such benchmarks to disclose orally to consumers, before connecting a call, the total charges for which consumers would be liable.<sup>8</sup>

## II. BACKGROUND

2. Payphone service has been regulated primarily by the states as part of the LECs' basic service. For example, states have set the rates for local payphone usage. While some of the costs of payphones owned by LECs have been recovered through charges to payphone users, other components of those costs have been recovered through intrastate and interstate rates that are unrelated to payphone usage. Like LEC payphones, AT&T payphones are classified as network equipment and, therefore, may recover their costs in a similar manner.<sup>9</sup>

3. In 1980, in its Computer Inquiry II, the Commission concluded that customer premises equipment ("CPE"), such as the telephone sets used by end users, should be

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<sup>2</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>3</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>4</sup> 47 U.S.C. § 276(b)(1)(C).

<sup>5</sup> 47 U.S.C. § 276(b)(1)(D).

<sup>6</sup> 47 U.S.C. § 276(b)(1)(E).

<sup>7</sup> 47 U.S.C. § 276(b)(2).

<sup>8</sup> See Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92-77, Second Further Notice of Proposed Rulemaking, FCC 96-253 (rel. June 6, 1995) ("OSP Reform").

<sup>9</sup> Memorandum Opinion and Order Petition for Declaratory Ruling of Tonka Tools, Inc., 58 Rad. Reg. 2d (P&F) 903, 910-11 (1985) ("Tonka").

competitively provided and that it should not be offered as part of a carrier's regulated transmission service.<sup>10</sup> The Commission determined that, if carriers bundled CPE with tariffed basic service, both a consumer's freedom of choice and marketplace competition in a developing industry would be hampered.<sup>11</sup> The Commission recognized the potential for carriers to engage in anti-competitive activities. For example, carriers could potentially subsidize services facing competition with revenues from regulated, monopolistic services or shift costs from a service in a competitive industry to a service that the carrier operates as a regulated monopolist.<sup>12</sup> In an effort to prevent cost misallocations, the Commission concluded that BOC provision of CPE (as well as enhanced services) should be offered through a separate subsidiary.<sup>13</sup> The Commission specifically excluded coin-operated payphones from the definition of CPE.<sup>14</sup> The Commission found that, unlike other CPE, which could be "unbundled" from basic exchange service, coin-operated payphones were still integrated with the LECs' network facilities and it concluded that payphones should remain part of regulated basic communications service.<sup>15</sup> The Commission later extended this determination to coinless payphones.<sup>16</sup>

4. At the time of the break-up of the Bell System, payphones were regarded as a part of basic local service. The Bell System payphones were classified as exchange facilities installed by the BOCs for the provision of local service to the public. Thus, the Modification of

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<sup>10</sup> Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) ("Computer II"), modified on recon., 84 FCC 2d 50 (1981), modified on further recon., 88 FCC 2d 512 (1981), 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). The Commission defined CPE as "terminal equipment, located at a subscriber's premises which is connected with the termination of a carrier's communication channel(s)...." Computer II, 77 FCC 2d at 398, n.10.

<sup>11</sup> Id. at 446.

<sup>12</sup> Id. at 443.

<sup>13</sup> Subsequent Commission orders removed the separate subsidiary requirement, replacing it with a system of nonstructural safeguards designed to deter anti-competitive behavior. See, e.g., Separation of Costs of Regulated Telephone Service for Costs on Nonregulated Activities., 2 FCC Rcd 1298 (1987) ("Joint Cost Order"), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

<sup>14</sup> Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 447 n. 57 (1980) ("Computer II"), modified on recon., 84 FCC 2d 50 (1981), modified on further recon., 88 FCC 2d 512 (1981), 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).

<sup>15</sup> Id. at 447.

<sup>16</sup> Tonka, 58 Rad. Reg. 2d (P&F) 903, 910.

Final Judgment ("MFJ") Court's plan of reorganization assigned all Bell System payphones to the BOCs rather than to AT&T.<sup>17</sup>

5. Soon after divestiture, several manufacturers developed a "smart" payphone -- payphones with sufficient computer intelligence to perform most of the control and supervision functions previously performed by a LEC's network. Because smart payphones could be separated from local exchange service, the Commission revisited its determination to exclude all payphone service from Part 68 rules governing the connection of terminal equipment to the network.<sup>18</sup> In the Coin Registration Order, the Commission reaffirmed that LEC payphones would continue to be classified as network elements rather than CPE. The Commission concluded, however, that Part 68 should apply to smart payphones and recognized the right of non-LEC providers to interconnect these payphones to the interstate public switched network. As with LEC payphones, the Commission concluded in a later proceeding that the states should retain the authority to regulate the rates and other terms of payphone interconnection.<sup>19</sup> The FCC also recognized that state commissions had the authority to regulate the charges, terms, and conditions of local and intrastate payphone service.<sup>20</sup>

6. Since the development of smart payphones, a number of independent or "competitive" payphone owners (referred to in previous Commission orders as "private payphone owners" or "PPOs") have begun to compete with the LECs for the provision of payphone service. Currently, there are approximately 1.5 million LEC payphones<sup>21</sup> and approximately 350,000 competitively provided payphones.<sup>22</sup> As a general matter, neither PPOs nor the LECs own the premises where a particular payphone is located. Instead, location providers select the payphone service provider who will provide payphone services on their premises.

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<sup>17</sup> See United States v. Western Elec. Co., 569 F. Supp. 1057, 1102 n.195 (D.D.C. 1983), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983).

<sup>18</sup> See Memorandum Opinion and Order, Registration of Coin Operated Telephones, 49 Fed. Reg. 27763 (1984) ("Coin Registration Order").

<sup>19</sup> See Memorandum Opinion and Order, Universal Payphone Corp., 58 Rad. Reg. 2d (P&F) 76 (1988) ("Universal").

<sup>20</sup> Id. at 80.

<sup>21</sup> Statistics of Communications Common Carriers, 1994/1995 edition, Common Carrier Bureau, FCC at 159, Table 2.10 (1995) ("Common Carrier Statistics").

<sup>22</sup> See Ex Parte Letter of Michael Benson, Senior Product Manager, PPO Compensation Clearinghouse, Cincinnati Bell to Michael Carowitz, Attorney, Common Carrier Bureau, FCC (April 24, 1996). Cincinnati Bell, as the payphone compensation paying agent for three interexchange carriers, states that it receives quarterly bills from PPOs for more than 350,000 competitively provided payphones. Id.

7. While both PPOs and incumbent LECs receive coins as compensation for most local calls placed on their payphones, there are important differences in how PPOs and LECs are compensated. PPOs generally presubscribe their payphones to an interexchange carrier ("IXC") of their own choice. That IXC provides operator services to the payphone for collect calls and calls billed to a calling card or a third party. The PPO negotiates an agreement with the presubscribed IXC, pursuant to which the IXC pays a percentage of its revenues from the payphone to the PPO. The PPO, in turn, pays a commission to the location provider based on the revenues generated by the payphone.

8. Pursuant to the MFJ, BOCs were required to permit location providers to select the IXC to which the payphone would be presubscribed for interstate, interLATA traffic.<sup>23</sup> With this requirement, the location provider makes its own contract with an IXC to share in the interLATA revenues generated by the phone, usually through a commission arrangement for each operator-service call generated by the payphone at a particular location. Therefore, while the non-BOC LECs, like the PPOs, may receive a portion of the commissions from IXCs on interLATA operator-service calls using the presubscribed carrier, the BOCs do not receive any revenue directly from these calls. On the other hand, unlike the PPOs, all LECs, including the BOCs, receive, as a part of the carrier common line ("CCL") charges paid by IXCs, compensation for LEC provision of the facilities necessary to deliver interexchange traffic to the IXCs. The payphone element of the CCL is charged to all interexchange customers, not just to traffic originating or terminating at a payphone, and it provides compensation to the LEC for making available the payphone through which calls are routed to the IXC.

9. To date, the Commission has focused on payphones primarily in the context of its regulation of carriers that provide operator-assisted long-distance service, known as operator service providers ("OSPs"), and in particular, its implementation of the Telephone Operator Consumer Services Improvement Act ("TOCSIA").<sup>24</sup> Because operator services prior to divestiture were provided exclusively by the Bell System at tariffed rates that were familiar to callers, there was widespread consumer dissatisfaction with the varying rates and practices of many OSPs after divestiture.<sup>25</sup> The Commission responded to this dissatisfaction both through the formal complaints process<sup>26</sup> and through a rulemaking proceeding.<sup>27</sup> In 1990, Congress

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<sup>23</sup> United States v. Western Elec. Co., 698 F. Supp. 348, 365 (D.D.C. 1988). The 1996 Act continues these BOC obligations. See 1996 Act, sec. 601(a)(1). See also 47 U.S.C. § 251(g).

<sup>24</sup> Pub.L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

<sup>25</sup> Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Report and Order, 6 FCC Rcd 4736, 4737 (1991) ("First Report and Order").

<sup>26</sup> See Telecommunications Research & Action Center v. Central Corp., 4 FCC Rcd 2157 (Com.Car.Bur. 1989).

enacted TOCSIA, which required all OSPs to identify themselves to consumers and quote their rates upon request.<sup>28</sup> TOCSIA also required aggregators to unblock access to other carriers and post certain disclosures on or near each telephone.<sup>29</sup>

10. TOCSIA directed the Commission to determine whether PPOs should receive compensation for originating interstate calls to non-presubscribed OSPs from their payphones.<sup>30</sup> The Commission concluded in the Second Report and Order that a per-call compensation mechanism was preferable because it would create greater incentives for PPOs to place their payphones in locations that generate the most traffic. The Commission concluded, however, that it was not technically feasible to implement such a mechanism at that time.<sup>31</sup> Instead, the Commission adopted flat-rate compensation, in the amount of \$6 per phone per month, on an interim basis. Subsequently, two IXCs, AT&T and Sprint, certified to the Commission that they were able to pay compensation on a per-call basis and petitioned the Commission for approval to pay compensation on that basis.<sup>32</sup> They argued that a per-call compensation mechanism would better serve the Commission's objective to implement a more cost-based approach to compensation for calls to non-presubscribed OSPs. The Common Carrier Bureau agreed and granted AT&T and Sprint the right to pay compensation in the amount of \$.25 per call in lieu of paying per-phone compensation to PPOs.<sup>33</sup> The Commission later adopted a notice of proposed rulemaking, which tentatively concluded that other large IXCs should be required to pay compensation on a per-call basis.<sup>34</sup> The Common Carrier Bureau also granted

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<sup>27</sup> Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Notice of Proposed Rulemaking, 5 FCC Rcd 4630 (1990); Further Notice of Proposed Rulemaking, 6 FCC Rcd 120 (1990); Report and Order, 6 FCC Rcd 2744 (1991).

<sup>28</sup> See, generally, 47 U.S.C. § 226.

<sup>29</sup> Id. An "aggregator" is any entity 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).

<sup>30</sup> 47 U.S.C. § 226(e)(2).

<sup>31</sup> Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 FCC Rcd 3251-3252-53 (1992) ("Second Report and Order").

<sup>32</sup> See Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Memorandum Opinion and Order, 10 FCC Rcd 1590 (Com. Car. Bur. 1994) ("AT&T Waiver"); Memorandum Opinion and Order, 10 FCC Rcd 5490 (Com. Car. Bur. 1995) ("Sprint Waiver").

<sup>33</sup> Id.

<sup>34</sup> See Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Memorandum Opinion and Order on Further Reconsideration and Second Further Notice of Proposed Rulemaking, 10 FCC Rcd 11457, 11464-67 (1995) ("Second Further Notice").

waivers to two incumbent LECs, Ameritech and Southwestern Bell, that claimed the ability to track payphone calls on a per-call basis and proposed to remove payphone-related costs from their CCL charges and, instead, to impose a per-call charge on IXCs for interstate calls originated from those LECs' payphones.<sup>35</sup>

11. When it adopted a compensation mechanism for interstate access code calls, the Commission concluded that, because they did not involve use of a "carrier-specific access code"<sup>36</sup> and were routed directly to an end user, subscriber 800 calls were not within the class of calls for which Congress in TOCSIA directed the Commission to consider compensation.<sup>37</sup> The Commission, therefore, limited compensation to interstate "access code calls."<sup>38</sup> In July 1992, in response to a petition for reconsideration by the American Public Communications Council ("APCC"), the Commission affirmed its conclusion that subscriber 800 calls were not within the Commission's definition of interstate "access code calls" for which compensation should be paid.<sup>39</sup>

12. In 1992, after the Commission affirmed its exclusion of subscriber 800 calls from the class of compensable access code calls, the Florida Pay Telephone Association ("FPTA") sought judicial review in the United States Court of Appeals for the District of Columbia Circuit of this aspect of the First Report and Order and the Subscriber 800 Reconsideration Order. In its Florida Payphone decision,<sup>40</sup> the Court found no reason to distinguish between the routing of access code calls and subscriber 800 calls. Therefore, it reversed and remanded the case to the Commission to "consider the need to prescribe compensation for subscriber 800 calls 'routed to

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<sup>35</sup> In the Matter of Ameritech Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Restructure Its Rates to Establish a Pay Telephone Use Fee Rate Element; Southwestern Bell Telephone Company Petition for Waiver of Part 69 of the Commission's Rules to Restructure Its Rates to Establish a Pay Telephone Use Fee Rate Element, Order, DA 96-268 (released March 1 1996) at para. 27 ("Ameritech/SW Bell Waiver"), application for review and motion for stay pending.

<sup>36</sup> The Second Report and Order defines an "access code" as a "sequence of numbers that, when dialed, connects the caller to the OSP associated with that sequence, as opposed to the OSP presubscribed to the originating line. Access codes include 10XXX in equal access areas and "950" Feature Group B dialing (950-0XXX or 950-1XXX) anywhere, where the three-digit XXX denotes a particular IXC. Some OSPs use an 800 number as an access code." Id. at 3251 n.1.

<sup>37</sup> First Report and Order, 6 FCC Rcd at 4746 (citing S. Rep. No. 439, 101st Cong., 2d Sess. 19 (1990), reprinted in 1990 U.S. Code Cong. & Ad. News 1577, 1582). "Subscriber 800 calls" consist of calls to an 800 number assigned to a particular subscriber. See Florida Payphone, 54 F 3d at 859.

<sup>38</sup> Id.

<sup>39</sup> Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Order on Reconsideration, 7 FCC Rcd 4355, 4367 (1992) ("Subscriber 800 Reconsideration Order").

<sup>40</sup> Florida Public Telecommunications Ass'n. v. FCC, 54 F 3d 857 (D.C. Cir. 1995) ("Florida Payphone").

providers of operator services that are other than the presubscribed provider of operator services."<sup>41</sup> The Commission's action on the remand is pending.<sup>42</sup>

13. Section 276(b)(1)(A) directs the Commission to establish a compensation mechanism to ensure "that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call" from their payphones.<sup>43</sup> Section 276(b)(1)(B) mandates that the Commission "discontinue the intrastate and interstate carrier access charge payphone service elements and payments ... and all intrastate and interstate subsidies from basic exchange and exchange access revenues."<sup>44</sup> In addition, Section 276(b)(1)(D) directs the Commission to consider whether BOCs should be permitted to be involved with the location provider's selection of the payphone's presubscribed carrier.<sup>45</sup> Together with the other subsections of Section 276, these three provisions help to establish regulatory parity for all payphone service providers ("PSPs"),<sup>46</sup> whether competitive payphone owners or incumbent LECs (both independents and BOCs).

### III. ISSUES

#### A. COMPENSATION FOR EACH AND EVERY COMPLETED INTRASTATE AND INTERSTATE CALL ORIGINATED BY PAYPHONES

##### 1. The 1996 Act

14. As stated above, Section 276(b)(1)(A) mandates that all payphone providers, whether independents or LECs,<sup>47</sup> be "fairly compensated for each and every completed intrastate

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<sup>41</sup> Id.

<sup>42</sup> Because the 1996 Act mandates that payphone providers be compensated for all intrastate and interstate calls, including subscriber 800 calls, the rules adopted in this proceeding will address the Florida Payphone remand. Therefore, we conclude in para. 88, below, that the Commission need not address this remand in a separate proceeding.

<sup>43</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>44</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>45</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>46</sup> We adopt the term "payphone service provider," as used throughout Section 276, to refer prospectively to all payphone providers -- whether PPOs or LECs. 47 U.S.C. § 276.

<sup>47</sup> As discussed in greater length in paras. 14-55, the compensation and reclassification provisions of Section 276 apply to all LECs, whether or not they are BOCs. 47 U.S.C. § 276(b)(1)(A)-(B). Other provisions, such as Section 276(b)(1)(C), which mandates nonstructural safeguards for the provision of payphone service, apply only

and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation[.]"

## 2. Discussion

### a. Scope of Payphone Calls Covered by this Rulemaking

15. Currently, most calls originated on payphones are within one of the following categories: (1) coin calls; (2) directory assistance calls; (3) operator service ("0+" and "0-")<sup>48</sup> calls; (4) access code calls (using e.g., "10XXX" codes and "1-800" or "950" carrier access numbers); and (5) subscriber 800 calls.<sup>49</sup> Each of these categories can be further subdivided between local, intraLATA toll, intrastate interLATA, interstate interLATA and international. Each type of call is a potential source of revenue for the payphone owner, whether the revenue is derived from coins deposited into the payphone, through commission payments on operator service calls, or from compensation mandated by the FCC or the states.

16. The 1996 Act requires the Commission to ensure that PSPs are fairly compensated for all calls originated by their payphones.<sup>50</sup> In light of the multiple sources of revenue for payphones, we seek comment on what constitutes "fair" compensation and how we should "ensure" that each PSP receives it for calls for originated by its payphones. We tentatively conclude that our mandate under Section 276(b)(1)(A) is to ensure that PSPs are "fairly compensated" for "each and every completed intrastate and interstate call" regardless of whether the PSP currently receives compensation for the particular call originated by its payphone.<sup>51</sup> We tentatively conclude, however, that we should use this mandate to prescribe compensation only when payphone providers are not already "fairly compensated."<sup>52</sup> Currently, PPOs and non-BOC LECs receive compensation, pursuant to individual contracts, from the

to the BOCs. See paras. 57-66, below

<sup>48</sup> A 0+ call occurs when the caller dials "0" plus the called telephone number. 0+ calls include credit card, collect, and third number billing calls. Second Report and Order, 7 FCC Rcd at 3251, n.4. 0- call transfer service is a service offered by LECs to OSPs under which LECs transfer a 0- call (when a caller dials only the digit "0" and then waits for operator intervention) to the OSP requested by the calling party. Id. at 3255, n.44.

<sup>49</sup> For purposes of this proceeding, the term "subscriber 800 calls" includes other sequences of numbers that the FCC deems, or may deem in the future, the equivalent of subscriber 800 numbers, such as numbers with an "888" code

<sup>50</sup> 47 U.S.C. § 276(b)(1)(A)

<sup>51</sup> Id. Section 276(b)(1)(A) exempts from the Commission's mandate only "emergency calls and telecommunications relay service calls for hearing disabled individuals" and states that such calls "shall not be subject to such compensation[.]" Id.

<sup>52</sup> Id.

payphone's presubscribed IXC for all "0+" calls.<sup>53</sup> IXCs have long competed for this type of business. Therefore, we tentatively conclude that we need not prescribe per-call compensation for 0+ calls because competition in this area ensures "fair" compensation for PSPs.<sup>54</sup> We seek comment on these tentative conclusions.

17. Although the 1996 Act directs us to prescribe compensation for all calls, Congress specifically expressed its concern in the legislative history about access code calls and subscriber 800 calls, whether the calls are intrastate or interstate in destination.<sup>55</sup> We tentatively conclude that, because the 1996 Act requires us to ensure fair compensation for all calls, we must at least prescribe standards for determining fair compensation for all access code calls, subscriber 800 and other toll-free number calls, and debit card calls. The compensation we prescribe in this rulemaking will extend to all such calls, whether they are intrastate or interstate in destination. We seek comment on this tentative conclusion.

18. The 1996 Act does not expressly state that compensation should extend to international calls. We find no evidence, however, of congressional intent to leave these calls uncompensated. As discussed below,<sup>56</sup> we tentatively conclude that PSPs should be compensated for their costs in originating calls from their payphones. Compensating international calls would be consistent with this approach, because the costs of originating these calls are similar to the costs of originating "each and every completed intrastate and interstate call."<sup>57</sup> Therefore, despite the lack of reference to international calls in Section 276(b)(1)(A), we tentatively conclude that we should exercise our general jurisdiction under Sections 4(i) and 201(b) of the Communications Act of 1934, as amended, to ensure that PSPs are compensated for international as well as interstate and intrastate calls originating from their payphones in the United States. We seek comment on this tentative conclusion.

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<sup>53</sup> In Section 276(b)(1)(D), Congress directed the Commission to consider whether such a compensation arrangement should be extended to BOC payphones. 47 U.S.C. § 276(b)(1)(D).

<sup>54</sup> Pursuant to contracts between either PPOs or non-BOC LECs and presubscribed IXCs, the payphone provider likely recovers the marginal cost of the 0+ calls from its payphones. PPOs, in particular, because they do not receive noncompetitive revenues to use as a basis for subsidies, would not enter into a contract that would not compensate them fairly for use of their payphone equipment. Therefore, the payphone provider is "fairly compensated" for these calls. The issue of fair compensation arises only in cases where a caller uses a PSP's equipment to dial around the payphone's presubscribed IXC, because the PSP does not receive any revenue to cover its marginal cost in originating the call, or where a government-mandated rate, such as for local coin calls, may not be high enough to be "fairly" compensatory.

<sup>55</sup> Jt. Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) ("Conference Report") (emphasis added).

<sup>56</sup> See para. 38, below.

<sup>57</sup> 47 U.S.C. § 276(b)(1)(A).

19. The rate for the most common type of call, the local coin call,<sup>58</sup> is set by state commissions.<sup>59</sup> Typically, the rate set for local coin services provided by the incumbent LECs also applies to the PPOs. In addition, for operator services rates, the rates for intrastate coin-paid toll services from competitive payphones are frequently capped by the states at the dominant carrier rate or some increment over that rate.<sup>60</sup> In many jurisdictions, incumbent LECs currently do not charge the payphone caller for "411" directory-assistance calls made from their own phones. PPOs, however, often pay a charge to the incumbent LEC for directory-assistance calls made from their competitive payphones, and are not always allowed by the state to pass those charges on to callers.

20. Section 276 of the Act requires the Commission to ensure that the payphone provider receives fair compensation for each interstate and intrastate call, including local coin sent-paid calls.<sup>61</sup> Section 276 also expressly preempts state regulations that are inconsistent with our regulations.<sup>62</sup> We seek comment, however, on how we should exercise our jurisdiction under Section 276. We have a range of options for ensuring fair compensation for these calls, and we seek comment on which option will ensure fair compensation for PSPs with respect to local coin sent-paid calls.

21. More specifically, one option would be to set a nationwide local coin rate for all calls originated by payphones. We seek comment on whether the Commission should take such action and request that commenters identify the specific public interest benefits they believe

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<sup>58</sup> We estimate, based on extrapolating various industry data, that local calls from payphones comprise about 80 percent of the total call volume, while generating only about one sixth of the revenues (including calls made to local operator services). On the other hand, these same data show that approximately 80 percent of the industry's revenues are generated by calls other than local calls (i.e., access code and 1-800 calls). See FCC Industry Analysis Div., Statistics of Common Carriers, 1994/1995, Table 2.9 (1995) (showing annual local calling revenues from LEC and independent payphones of 2.3 billion dollars); FCC Industry Analysis Div., Trends in Telephone Service, Table 31 (rel. May 1996) (showing annual operator services telecommunications revenues of 10.655 billion dollars). Cf. FCC Industry Analysis Div., Report on Operator Services, Table 2 (rel. Nov. 13, 1992) (coin revenue as a percent of total payphone toll revenue was approximately 10 percent in 1987, the most recent year surveyed within the report).

<sup>59</sup> We note that a number of states have recently examined the basis for the local coin call rate. As a result a higher local calling rate was recently approved in the following states: Illinois, Iowa, Michigan, Wisconsin, Wyoming. At least four states have approved a maximum rate of \$.35 per call: Illinois, Iowa, Wisconsin, and Wyoming. Two states, New Hampshire and Vermont, maintain a maximum rate of \$.10 per call. Most other states maintain a maximum rate of \$.25 per call. See S. Alexander, "Coin Rate Update," Perspectives on Public Communication, December 1995, at 34.

<sup>60</sup> The Commission has recently proposed rules concerning interstate operator service rates. OSP Reform at para. 53.

<sup>61</sup> 47 U.S.C. § 276 b(1)(A).

<sup>62</sup> 47 U.S.C. § 276(c).

would result from a nationwide rate, why local rates are inadequate to ensure fair compensation, the impacts of variations among the states in the local coin sent-paid rate on PSPs and the public, and whether those impacts are predominantly local, statewide, regional or national. Another option would be for the Commission to prescribe specific national guidelines that states would use to establish a local rate that would ensure that all PSPs are fairly compensated. We seek comment on whether the Commission should take such action and request that commenters identify specific public interest benefits they believe would result from us prescribing such guidelines, what factors such guidelines should consider, how the guidelines would ensure fair compensation for local coin calls, the impacts of variations among the states in local coin rates, and whether those impacts are predominantly local, statewide, regional or national.

22. A third option for ensuring fair compensation for PSPs would be for the states, in the first instance, to continue to set the coin rates for local payphone calls according to factors within their discretion. The Commission has long recognized the interest of the states in setting end-user rates for local calls, including rates for 411 calls. Indeed, as discussed above, the states have long had a traditional and primary role in regulating payphones.<sup>63</sup> The states have a significant interest in setting local call rates paid by end users, because payphones are used by some residents as a substitute for local telephone service, in addition to being used by visitors and retail customers. However, because Section 276 of the 1996 Act requires the Commission to ensure that PSPs are fairly compensated for "each and every completed intrastate and interstate call," we seek comment on what further procedures, such as a complaint or petition process, we should establish, should we ultimately determine to defer to the states in setting payphone rates.<sup>64</sup> We also seek comment on what standards we could use to adjudicate any complaints or petitions that challenge a particular rate. We further ask whether the states' setting of the rates for local coin calls subject to complaint or petition would be consistent with Section 276's mandate that the Commission ensure fair compensation for "each and every completed intrastate and interstate call."<sup>65</sup> We seek comment on whether the Commission should take such action and request that commenters identify specific public interest benefits they believe would result from having coin rates for local payphone calls set by the states. In addition, we seek comment on whether we should treat intraLATA 0+ toll calls carried by the presubscribed intraLATA carrier differently from local coin calls, or treat them like local coin calls.

23. With regard to per-call compensation for subscriber 800 calls, the Commission has previously expressed its concern about the improper use of subscriber 800

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<sup>63</sup> See para. 2, above.

<sup>64</sup> Current local rates may not always "fairly" compensate the PSP for use of its payphone. For example, while a local call provides some revenue to the PSP, local coin rates in some jurisdictions may not cover the marginal cost of the service. In these situations, if a caller uses a payphone at a subsidized local coin rate, the PSP is not being fairly compensated. For a further discussion of the effect on local rates of reclassifying and terminating all subsidies for LEC payphones, see para. 51, below.

<sup>65</sup> 47 U.S.C. § 276(b)(1)(A).

numbers to increase compensation.<sup>66</sup> The Commission noted in the First Report and Order that "a payphone owner could attach an autodialer to a payphone and have it place repeated 800 calls, which are free to the caller, in order to increase the amount of compensation that the payphone owner receives."<sup>67</sup> We seek comment on what rules, if any, the Commission should adopt to prevent this and other types of fraud. We also seek comment on whether the autodialer problem would extend to other types of compensable calls.

**b. Entities Required to Pay Compensation**

24. Because the 1996 Act directs the Commission to ensure that all PSPs are compensated, with limited exception, for "each and every intrastate and interstate call" using their payphones,<sup>68</sup> we must also address who pays that compensation. The possible payors include: the caller using the payphone; the carrier over whose network the call is placed; or, in the case of subscriber 800 calls, the entity being called (who may or may not directly pass all the charges on to the caller using the payphone). Industry participants have made two compensation proposals that might satisfy the per-call compensation requirement.<sup>69</sup>

25. The first proposal builds on the per-call compensation mechanism proposed for interstate access code calls in CC Docket No. 91-35.<sup>70</sup> If this "carrier-pays" mechanism were extended to all dial-around calls, the IXC who receives such a call from a payphone would be required to pay a per-call charge to the provider of the payphone. Each IXC would decide independently how to recover this cost.

26. Another approach would be to rely on a "set use fee." The "set use fee" is a fee that the IXC would bill and collect from the end user. The fee would then be remitted to the PSP. In the case of the subscriber 800 and other toll-free number calls, the set use fee could be collected from the subscriber. For access code calls and operator-assisted calls, the set use fee would be collected from the end user that is billed for the call. Set use fees currently are

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<sup>66</sup> First Report and Order, 6 FCC Rcd at 4746.

<sup>67</sup> Id. at n.135.

<sup>68</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>69</sup> See Second Further Notice, 10 FCC Rcd at 11464-67; Ameritech/SW Bell Waiver at para. 27.

<sup>70</sup> Second Report and Order, 7 FCC Rcd at 3259.

applied to local and intraLATA 0+ and 0- calls in the state of Florida,<sup>71</sup> and to intraLATA 0+, 0-, and access code calls in the state of California.<sup>72</sup>

27. The Commission has previously rejected the "set use" payphone fee because such a fee could produce "unequal treatment among interstate payphone callers[.]"<sup>73</sup> Because the 1996 Act requires the Commission to prescribe compensation for both intrastate and interstate dial-around calls, there may be sufficient cause to reexamine a "set use" fee for payphone end users. We have considered a proposal under which payphone callers, including calling card users, were required to deposit coins into the payphone before placing a call.<sup>74</sup> As we found before, we tentatively conclude that we should reject that coin-deposit approach here. In addition, we note that TOCSIA expressly prohibits the Commission from adopting compensation rules for interstate access code calls that require "advance payment by consumers."<sup>75</sup> We find here that a coin-deposit approach would appear to unduly burden many transient payphone callers by requiring them to deposit coins in addition to providing call-billing information.

28. We tentatively conclude that, for non-coin payphone calls, either a "carrier-pays" system or a "set use fee" system where the end user pays would satisfy the requirements of the 1996 Act. As a general principle, however, we tend to favor an approach that minimizes transaction costs on the caller and on the industry. We believe that the carrier-pays mechanism is preferable because it would result in less transaction costs because the IXC could aggregate its payments to payphone providers. Under a set-use fee, these payments would be spread among a vast number of payphone callers through their individual telephone bills. Therefore, we

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<sup>71</sup> Florida Public Service Commission, In re Petition for Review of Rates and Charges Paid by PATS Providers to LECs, Docket No. 860723-TP et al., Order No. 24101 rel. Feb. 14, 1991

<sup>72</sup> Public Utilities Commission of California, Resolution T-15782, Concerning Request of Pacific Bell (U-1001-C) to Clarify the Types of Calls to which the \$0.25 Pay Station Service Charge Applies, rel. March 13, 1996. In California, the screening codes associated with payphone lines are used to identify calls subject to a set use fee when they arrive at a carrier's network. The carrier keeps track of these calls and the line numbers from which they originate. The carrier then remits the set use fee to the payphone provider for each call completed during the billing period. Meanwhile, the carrier bills the end user for the set use fee at the same time as the end user is billed for the call. Payment to the payphone provider is made either as a direct payment, or as a credit on the payphone provider's bill. In addition, the carrier is allowed to deduct a reasonable billing and collection charge from the set use fee. Id.

<sup>73</sup> MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 705 (1983), aff'd in principal part, National Assn. of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985), modified on further recon., 99 FCC 2d 708 (1984), aff'd, American Tel. and Tel. Co. v. FCC, 832 F.2d 1285 (D.C. Cir. 1987), modified on further recon., 101 FCC 2d 1222 (1985), recon. denied, 102 FCC 2d 849 (1985). See also Ameritech/SW Bell Waiver at para. 27.

<sup>74</sup> MTS and WATS Market Structure, 97 FCC 2d at 705

<sup>75</sup> 47 U.S.C. § 226(e)(2)

tentatively conclude that we should adopt a "carrier-pays" compensation mechanism that builds on existing procedures. We seek comment on these tentative conclusions. Commenters are encouraged to include data on the transaction costs that would likely be imposed by either the "carrier-pays" or "set use fee" compensation mechanisms. We also seek comment on whether we should adopt one method of compensation that can apply to all dial-around calls.

**c. Ability of Carriers to Track Calls From Payphones**

29. The next issue for our consideration is how calls are to be tracked, so that actual compensation amounts can be determined by the carriers and PSPs. In both the Second Report and Order and the Reconsideration Order in CC Docket No. 91-35, the Commission found that no entity was capable of tracking accurately the number of interstate access code calls originated by each competitive payphone.<sup>76</sup> Because of this technical barrier, the Commission adopted a flat rate per phone, as opposed to a per-call, compensation mechanism.<sup>77</sup> Later, as noted above, AT&T and Sprint were permitted to pay compensation in the amount of \$.25 per call in lieu of paying per-phone compensation.<sup>78</sup> Last year, in the Second Further Notice, the Commission found that IXCs are now able to track 1-800 and 10XXX access code calls through automatic number identification ("ANI") and other coding digits that appear on payphone-originated calls (e.g., the "07" code on calls from competitive payphones).<sup>79</sup> Although IXCs do not receive ANI for 1-950 access code calls, the Commission tentatively concluded that the volume of 1-950 calls did not appear to be so significant as to justify rejection of a per-call compensation mechanism.<sup>80</sup> The Commission stated that it would be reasonable to require OSPs that employ 1-950 access codes to rely upon a usage-based surrogate, such as the ratio of 1-950 access code calls to total access code calls received by OSPs, to calculate their compensation obligations to PPOs.<sup>81</sup>

30. Based on our prior proceedings, we tentatively conclude that tracking mechanisms and surrogates exist, or might readily be made available, to support the complete per-call compensation plan mandated by Section 276(b)(1)(A). We seek comment on what tracking options are currently, or may soon be, available. We seek further comment on the ability of existing IXC-based tracking mechanisms to accommodate all payphone providers and IXCs. In the event that there is no standard technology or mechanism available for tracking, we

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<sup>76</sup> Second Report and Order, 7 FCC Rcd at 3253; Reconsideration Order, 8 FCC Rcd at 7157.

<sup>77</sup> Id.

<sup>78</sup> See para. 10, above.

<sup>79</sup> Second Further Notice, 10 FCC Rcd at 11466.

<sup>80</sup> Id.

<sup>81</sup> Id.

seek comment on alternative surrogate methodologies that could be devised and by whom. Finally, we seek comment on which party or parties, whether IXC, PSP, or intraLATA carriers, should be required to develop and maintain the tracking or surrogate methodologies.

31. Under the existing per-call compensation waivers AT&T, Sprint, Ameritech and SW Bell are responsible for tracking the calls for which they are obligated to pay compensation. Pursuant to the rules we adopt in this proceeding, all IXCs that carry access code calls and toll-free calls originated from payphones, including the intrastate interexchange operations of LECs, would be required to track payphone calls.<sup>82</sup> We tentatively conclude that IXCs should be required to initiate an annual independent verification of their per-call tracking functions, to be made available for FCC inspection, to ensure that they are tracking all of the calls for which they are obligated to pay compensation.<sup>83</sup> We seek comment on this tentative conclusion. We note that additional forms of tracking may become available to be used as a check on IXC tracking. We understand that some BOCs are able to track, in their network, calls originating from their payphones.<sup>84</sup> As discussed below,<sup>85</sup> we seek comment on whether we should require BOCs and other LECs that provide network tracking for their own payphones to make those tracking services available to PPOs at the same rates, terms, and conditions as they provide themselves.

#### **d. Administration of Per-Call Compensation**

32. Having discussed who should be responsible for paying and who should track the calls, we next turn to who should administer the payment of compensation. In the Second Report and Order, the Commission established a direct-billing arrangement for the payment of compensation from IXCs to PPOs.<sup>86</sup> It was left to the parties to determine the details of the direct-billing arrangement. To assist the IXCs in verifying their compensation obligations, the Commission also required every incumbent LEC on a quarterly basis to provide each IXC responsible for compensation with a list of all lines taking customer-owned, coin-operated

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<sup>82</sup> IXCs would be required to track these payphone calls because they receive the benefit of toll-free calls. For the most part, a LEC (as opposed to a LEC's independent, reclassified payphone operations in the future) that carries a payphone's local coin traffic neither benefits from toll-free calls, nor has revenue diverted because of them. Therefore, LECs should not be required to incur the expense of tracking calls for which they have little economic interest.

<sup>83</sup> This information would be used by the Commission in monitoring the payphone compensation mechanism in its initial two years, particularly to help ensure that all IXCs are paying their respective compensation obligations. We propose to terminate this reporting requirement after IXCs have filed their reports for the 1998 calendar year.

<sup>84</sup> Ameritech/SW Bell Waiver, at para. 24.

<sup>85</sup> See para. 48, below.

<sup>86</sup> Second Report and Order, 7 FCC Rcd at 3259-60.

telephone (COCOT) service in the LEC's region.<sup>87</sup> The existing direct-billing arrangement has the advantage of placing the burden of implementing the compensation mechanism on those parties that receive the benefits of dial-around calls -- IXCs and PPOs.<sup>88</sup>

33. We tentatively conclude that this direct-billing arrangement should be maintained with the simple addition of requiring IXCs, and the intrastate interexchange operations of LECs to send back to each PSP a statement indicating the number of toll-free and access code calls that each carrier has received from each of that PSP's payphones. This is the method used by AT&T and Sprint under waivers that permit them to pay per-call compensation for access code calls. We propose to continue to leave the details of the billing arrangements for the parties to determine. All parties, whether carriers or PSPs, would be free to retain the services of one or more clearinghouses to assist them with billing and collection and/or payment of the compensation.<sup>89</sup> We would require, however, that the carrier responsible for paying compensation file each year a brief report with the Common Carrier Bureau listing the total amount of compensation paid, pursuant to the rules adopted in this proceeding, to PSPs for intrastate, interstate, and international calls; the number of compensable calls received by the carrier; and the number of payees.<sup>90</sup> On the other hand, for a "set use" fee arrangement under which the end user pays the PSP, we tentatively conclude that a compensation mechanism similar to the one in CC Docket No. 91-35 would require substantial modifications to account for the difference in the structuring of compensation obligations. As discussed above,<sup>91</sup> we believe that a set use fee would lead to greater transaction costs. For administration of the compensation mechanism, because it would likely be unduly burdensome to require all PSPs (including single-payphone providers) to collect a set use fee from all those who are required to pay it, an independent entity would be required to bill and collect the set use fee and, in turn, remit it to the individual PSP. We seek comment on these tentative conclusions.

34. Our proposed compensation plan would use the ANI as the basis for tracking calls. We, therefore, also tentatively conclude that we should adopt minimal regulatory guidelines for the industry on the resolution of disputed ANIs in the per-call compensation

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<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Cf. id.

<sup>90</sup> Together with the information discussed in para. 31. above, this information would be used by the Commission in monitoring the payphone compensation mechanism in its initial two years, particularly to help ensure that all IXCs are paying their respective compensation obligations. We propose to terminate this reporting requirement after IXCs have filed their reports for the 1998 calendar year. We note that the Common Carrier Bureau adopted a similar reporting requirement in the AT&T and Sprint per-call compensation waiver orders. See AT&T Waiver, 10 FCC Rcd at 1592; Sprint Waiver, 10 FCC Rcd at 549.

<sup>91</sup> See paragraph 28. above

context. Possible guidelines for which we seek comment are as follows: First, intraLATA carriers could be required to provide a list of payphone ANIs to IXC's within 30 days of the close of each compensation period (i.e., each quarter). Second, intraLATA carriers could be required to provide verification of disputed ANIs on request, in a timely fashion. Data for verification could be required to be maintained and available for at least 18 months after the close of a compensation period. Third, once an intraLATA carrier makes a positive identification of a payphone as having been installed, the IXC could be required to accept claims for that payphone's ANI until such time as the intraLATA carrier provides information that the payphone has been disconnected. If an intraLATA carrier fails to provide either positive or negative verification of a claimed ANI from a PSP, the IXC could be required to pay compensation on that ANI. Fourth, IXC's should be able to refuse payment for compensation claims that are submitted long after they were due. IXC's should not refuse payment on timeliness grounds, however, for ANIs submitted by a PSP up to one year after the end of the period in question. Further, the submission of a claim on a disputed ANI by a PSP to the IXC would toll any limitation period for bringing a complaint to the Commission until such time as the IXC issues a final denial of the claim. We seek comment on these or any alternative guidelines for resolution of disputed ANIs.

**e. Per-Call Compensation Amount**

35. Section 276(b)(1)(A) of the 1996 Act requires the Commission to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call" from their payphones.<sup>92</sup>

36. The Commission has previously examined various compensation methods in the Second Report and Order. In particular, the Commission rejected arguments by PPOs that compensation for interstate access code calls should reflect their "opportunity costs" of initiating these calls in lieu of 0+ calls that produce commissions from a presubscribed carrier.<sup>93</sup> The Commission found that this approach would maintain PPO revenue streams that existed previously when PPOs or premises owners were permitted to direct all operator-assisted traffic (other than 0- traffic) to the presubscribed carrier, whatever the wishes of the caller.<sup>94</sup> The Commission also rejected arguments that it should base compensation on the actual costs of PPOs, because individual cost data was not available for each PPO and such data, if it existed, would likely not be uniform.<sup>95</sup> The Commission opted instead for a compensation approach using cost-based surrogates that it found were reasonable and viable. The Commission identified three

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<sup>92</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>93</sup> Second Report and Order, 7 FCC Rcd at 3255.

<sup>94</sup> Id.

<sup>95</sup> Id. at 3255-56.

"reasonable" compensation approaches that established a range of reasonable compensation rates for access code calls. The three approaches were: (1) as a surrogate for PPO costs, access charge compensation that an incumbent LEC receives for its regulated provision of payphones; (2) as a measure of value to OSPs of receiving access code calls, charges for a transfer by a LEC live operator to an OSP of the caller's choice ("O-transfer service charges"); and (3) AT&T's federally regulated operator service rates on calls made from payphones presubscribed to AT&T.<sup>96</sup> The three measures yielded estimated charges in the range of \$.22 to \$.61 per call.<sup>97</sup> In 1992, the Commission based the compensation rate of \$6 per phone on the average 15 access-code calls originated by a competitive payphone each month, or a rate of \$.40 per call, which is at the middle of that range.<sup>98</sup> In the Reconsideration Order, and in the recent Second Further Notice, the Commission reaffirmed the reasonableness of the compensation measures within the range it established in the Second Report and Order.<sup>99</sup> Both AT&T and Sprint pay per-call compensation fall within this range, pursuant to waivers, in the amount of \$.25.<sup>100</sup> Similarly, two BOCs, Ameritech and Southwestern Bell, each charge IXCs a per-call rate for "toll-free" and access code calls originated by their payphones.<sup>101</sup> Ameritech has filed a tariff, which is currently under review, proposing a per-call rate of \$.256 for this service.<sup>102</sup>

37. More recently, in the Second Further Notice, the Commission again sought comment on the appropriate per-call compensation amount. Commenters responding to this notice suggested rates ranging from \$.083 to \$.55 per call.<sup>103</sup> Sprint, MCI, and Frontier argued that \$.25 per call was too high when compared to LEC payphone costs.<sup>104</sup> Pacific and Nevada Bell suggested a company-specific rate of \$.32 to \$.55 -- the result of adjusting the CCL price

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<sup>96</sup> Id. at 3255-57. We note that the Commission no longer regulates these rates because AT&T is not a dominant carrier in its provision of domestic interstate, interexchange services. See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Report and Order, 11 FCC Rcd 3271 (1995) ("AT&T Reclassification Order"). In addition, we recently found AT&T to be non-dominant in the international services market. See Motion of AT&T Corp. to be Declared Non-Dominant for International Service. Order. FCC 96-209 (rel. May 14, 1996).

<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> Reconsideration Order, 8 FCC Rcd at 7153; Second Further Notice, 10 FCC Rcd at 11467.

<sup>100</sup> AT&T Waiver, 10 FCC Rcd at 1592; Sprint Waiver, 10 FCC Rcd at 5491.

<sup>101</sup> Ameritech/SW Bell Waiver at para. 25.

<sup>102</sup> Ameritech Transmittal No. 953, filed March 5, 1996, effective April 19, 1996, 34th Revised Page 70.24.

<sup>103</sup> See, e.g., MCI Comments at 6; IPTA Comments at 13.

<sup>104</sup> Sprint Comments at 2, 6; MCI Comments at 1; Frontier Reply at 1

cap index to eliminate the payphone element.<sup>105</sup> The Illinois Public Telecommunications Association ("IPTA") submitted data showing that PPO costs average between \$.37 and \$.55 per call, and argued that a market-based methodology would justify rates ranging from \$.42 per call to \$.95 per call.<sup>106</sup> APCC proposed a flexible rate that would be equal to the maximum rate for a local coin call in each area,<sup>107</sup> while AT&T, Sprint, and MCI all stated that the cost of a local coin call is irrelevant to the cost of a dial-around call.<sup>108</sup>

38. We believe that the theory of compensation and price surrogates that the Commission has historically relied upon in its determination of the "range of reasonable compensation rates"<sup>109</sup> provide some guidance for our analysis of how to ensure that PSPs are "fairly compensated" and what should be the appropriate per-call compensation amount for all calls within the scope of this rulemaking. As before, while we are still confronted in the instant proceeding by the lack of reliable PPO cost data,<sup>110</sup> we tentatively conclude that PSPs should be compensated for their costs in originating the types of calls for which we have tentatively concluded that compensation is appropriate.<sup>111</sup> We tentatively conclude further that these costs should be measured by appropriate cost-based surrogates. We seek comment on these tentative conclusions. With regard to the appropriate cost-based surrogates, we also seek comment on whether some measure of generic or industry-wide costs is available, whether incumbent LECs' costs would be a reasonable surrogate for PPOs' costs, and whether some other existing set of rates, such as state-established rates for local coin calls, would be a reasonable surrogate. In addition, to ensure that PSPs receive fair compensation, should we prescribe different per-call compensation amounts for the different types of calls originated by payphones? We also seek comment on how compensation levels should be permitted to change in the future, and whether some cost index or price cap system would be appropriate to ensure that compensation levels reflect expected changes in unit costs over time. Commenters should submit a summary of any data that support their arguments.

39. We also seek comment on whether we should provide PPOs some measure of interim compensation, to be paid until the effective date of the final rules we adopt in this proceeding, for the growing volume of dial-around calls originated from their payphones. While

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<sup>105</sup> Pacific Bell Reply at 2.

<sup>106</sup> IPTA Comments at 4-7.

<sup>107</sup> APCC Comments at 2, 10.

<sup>108</sup> AT&T Reply at 4; Sprint Reply at 3; MCI Reply at 5.

<sup>109</sup> Second Report and Order, 7 FCC Rcd at 3256-57.

<sup>110</sup> Id.

<sup>111</sup> See paras. 16-22, above.

the Commission will complete the instant proceeding within the nine months mandated by Section 276,<sup>112</sup> we are aware from data filed in other pending proceedings, most notably in response to the Court's remand of Florida Payphone concerning subscriber 800 compensation, that the number of dial-around calls for which PPOs receive no compensation (e.g., subscriber 800 and debit card calls) or flat-rate, non-traffic sensitive compensation (interstate access code calls) has grown since we first considered the need for compensation in 1991. Subscriber 800 services, in particular, have experienced sustained growth in the past several years.<sup>113</sup> For example, in an ex parte letter filed with the Commission in the proceeding entitled "Operator Service Access and Pay Telephone Compensation," CC Docket No. 91-35, the APCC, a trade association of PPOs, argues that since the adoption of the First Report and Order in 1991, "the market for subscriber 800 services has experienced explosive growth, both in terms of revenues and minutes of use."<sup>114</sup> It further argues that the implementation of 800 number portability has led to "vigorous competition" in this area among the IXCs, which, in turn, has fostered "millions of new 800 subscribers and users in the last few years."<sup>115</sup> APCC cites news stories suggesting that on a typical business day, 30 to 40 percent of all long distance calls involve 800 numbers.<sup>116</sup> It also cites data gathered by one PPO from approximately 500 to 1000 competitive payphones in various states over a period of seven months, which "consistently showed about twice as many subscriber 800 calls as access code calls."<sup>117</sup> According to AT&T, these "subscriber 800" calls currently account for about 40% of all toll calling on AT&T's network on an average business day.<sup>118</sup>

40. In addition, according to APCC, the use of "vanity" access numbers, such as MCI's "1-800-COLLECT" or AT&T's "1-800-CALL-ATT" and "10ATT," which can be easily remembered by callers because they contain words or phrases, has grown dramatically.<sup>119</sup> APCC

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<sup>112</sup> 47 U.S.C. § 276(b)(1).

<sup>113</sup> The Commission has taken steps to facilitate competition in 800 services by requiring 800 number portability. See Provision of Access for 800 Service, Report and Order, 4 FCC Rcd 2824 (1989) ("800 Portability Order").

<sup>114</sup> Ex Parte Letter of Albert Kramer, Counsel, APCC to William Caton, Acting Secretary, FCC (August 17 1995) at 1-5.

<sup>115</sup> Id.

<sup>116</sup> Id. at 7 (emphasis in the original).

<sup>117</sup> Id. at 8.

<sup>118</sup> AT&T pamphlet entitled "800 \* 888 = TOLL FREE "

<sup>119</sup> See generally Petition for Expedited Relief by the American Public Communications Council, CC Docket No. 91-35, filed September 2, 1993 ("APCC Petition"). The Commission noted in the Second Further Notice that it would not act on this petition "unless it becomes apparent that a per-call compensation mechanism for the entire

argues that these calls represent additional interstate access code calls originated by competitive payphones for which additional compensation is warranted.<sup>120</sup> For both interstate access code calls and subscriber 800 calls, PPOs are not able to collect payment from either the carrier or the end user, in the absence of regulation prescribing such payment. According to APCC, the incumbent LECs, on the other hand, have been relatively unaffected by the increase in dial-around calling because the LECs have had the ability to support their payphone operations with revenue from other regulated services and access charge compensation.<sup>121</sup> Parties are encouraged to comment on whether we should establish an interim compensation plan for PPOs. Those who support such relief should comment on the appropriate interim compensation amount and how such an interim compensation mechanism could be structured. We seek comment on whether we should adopt a system similar to the interim mechanism for interstate access code calls in CC Docket No. 91-35. We also seek comment on the feasibility of implementing an interim plan when final rules are required to be in place in nine months. To this end, we request comment on the legal basis for, and practical consequences of, making such interim compensation effective as of the release date of this Notice.

## **B. RECLASSIFICATION OF INCUMBENT LEC-OWNED PAYPHONES**

### **1. The 1996 Act**

41. The issues we need to address here are (1) the prospective classification of incumbent LEC payphones as CPE; (2) the transfer of incumbent LEC payphone equipment assets from regulated accounts to an unregulated status; (3) the termination of access charge compensation and all other subsidies for incumbent LEC payphones; and (4) the classification of AT&T payphones. Currently, incumbent LEC payphones, classified as part of the network, recover their costs from CCL access charges to those carriers that connect with the incumbent LEC. Section 276(b)(1)(B) directs the Commission to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a [per-call] compensation plan[.]"<sup>122</sup>

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industry is not viable." 10 FCC Red at 11468, n.123.

<sup>120</sup> APCC Petition at 2-4

<sup>121</sup> See Ex Parte Letter of Robert Aldrich, Counsel, APCC to William Caton, Acting Secretary, FCC (Oct. 20, 1995).

<sup>122</sup> 47 U.S.C. § 276(b)(1)(B).

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## 2. Discussion

### a. Classification of LEC Payphones as CPE

42. To effectuate the Act's mandate that access charge payphone service elements and payphone subsidies be discontinued,<sup>123</sup> we tentatively conclude that we should treat incumbent LEC payphones as unregulated, detariffed CPE. We tentatively conclude further that incumbent LECs should be required to provide to PSPs, on a nondiscriminatory tariffed basis, all functionalities used in a LEC's delivery of payphone services.

43. These issues were raised previously in the context of a Petition for Declaratory Rulemaking filed by the Public Telephone Council, a petition which focused on BOC payphones.<sup>124</sup> Some parties who filed comments in response to the PTC petition argue that the BOCs have used their control over the public switched network to disadvantage PPOs because the PPOs are unable to obtain access to the same technologies as those used by the BOCs.<sup>125</sup> As discussed above, incumbent LECs are able to offer payphone services using either instrument-implemented "smart" payphones, or "dumb" payphones that utilize central office coin services, or some combination of the two. Meanwhile, PPOs are limited to instrument-implemented "smart" payphones only. The option of using central office coin services, such as coin recognition, answer detection, and other related services, allows incumbent LECs to use the less expensive "dumb" pay telephones, which gives incumbent LECs a cost advantage over their competitors. We tentatively conclude that requiring that central office coin services be made available to PPOs eliminates this cost advantage and will increase competition in the payphone industry. We recognize that some of the BOCs have begun offering in several states central office coin services as a tariffed service to PPOs.<sup>126</sup>

44. The Commission concluded in Computer II that in order to prevent improper cross-subsidization, CPE should be unbundled from its underlying transmission. Additionally, the Commission determined that CPE should be detariffed to ensure that the costs

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<sup>123</sup> 47 U.S.C. § 276(b)(1)(B)

<sup>124</sup> Public Telephone Council Petition for Declaratory Ruling that Bell Operating Company Pay Telephones are Customer Premises Equipment for Regulatory Purposes, filed July 18, 1988 ("PTC Petition"). The Public Telephone Council ("PTC") is an association comprised of manufacturers and suppliers of telecommunications equipment, including payphones. PTC Petition at 2. Because the issues raised by the PTC petition are addressed in this NPRM, which proposes rules required by the Act, we tentatively conclude, in para. 87, below, that we should dismiss PTC's petition without prejudice.

<sup>125</sup> Louisiana Payphone Association ("LPA") Comments on PTC Petition at 7.

<sup>126</sup> See, e.g., Ex Parte Letter of Ben Almond, Executive Director--Federal Regulatory, BellSouth to William Caton, Acting Secretary, FCC (Dec. 8, 1995). BellSouth states that such services are available on a tariffed basis in the following states within its region: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, and South Carolina.

associated with regulated services are separated from the competitive provision of the equipment used in conjunction with those services.<sup>127</sup> Therefore, as stated above, we tentatively conclude that incumbent LEC payphones should be classified as CPE for Computer II regulatory purposes.<sup>128</sup> Our classification of payphones as CPE, however, is not intended to adopt Computer II's requirement that CPE be provided only through a structurally separated affiliate.<sup>129</sup> We seek comment on this tentative conclusion.

**45.** To unbundle payphones from their underlying transmission, we tentatively conclude that incumbent LECs, whether or not they themselves provide payphone service, must offer individual central office coin transmission services to PSPs under a nondiscriminatory, public, tariffed offering. We seek comment on this tentative conclusion and on which central office coin services must be made available by incumbent LECs to the PSPs to achieve this goal. Commenters who supported this approach in the proceeding initiated by the PTC petition listed a variety of central office coin services, such as answer and coin detection, currently available to the BOCs but not offered to PPOs at any price.<sup>130</sup> In the interest of clarity, we seek comment on both the type of services and the technological requirements necessary to allow PPOs to use payphones that are equivalent to those payphones currently used by LECs. In addition, we seek comment on any industry standards that may need to be developed with respect to potential claims regarding any demonstrable network reliability concerns<sup>131</sup> that may result from PSPs connecting their payphones that make use of central office coin transmission services. Commenters should clearly demonstrate what, if any, specific harm to the network could occur, and if industry standards are necessary. If so, who should develop these standards, and what time frame would be needed to implement such standards?

**46.** We anticipate that incumbent LECs will continue to use central office coin services for their payphones after their payphones are unbundled and detariffed. In the Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge

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<sup>127</sup> See Computer II, 77 FCC 2d at 445.

<sup>128</sup> Section 255 of the 1996 Act requires manufacturers of telecommunications equipment and CPE, and telecommunications service providers, to ensure that their equipment and services are accessible to persons with disabilities, if readily achievable. 47 U.S.C. § 255(b)-(c). If such access is not readily achievable, the manufacturer or service provider must ensure that the equipment or service is compatible with existing peripheral devices or specialized CPE commonly used by persons with disabilities, if readily achievable. 47 U.S.C. § 255(d). The implementation of Section 255 will be addressed in a separate proceeding.

<sup>129</sup> See paras. 57-66, below, for a discussion of the statutory mandate that we "prescribe a set of nonstructural safeguards for [BOC] payphone service ... which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III ... proceeding." 47 U.S.C. § 276(b)(1)(C).

<sup>130</sup> See LPA Comments at 7.

<sup>131</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98. Notice of Proposed Rulemaking, FCC 96-182 (rel. Apr. 19, 1996) at para. 93.