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

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In The Matter of	)	
IMPLEMENTATION OF THE PAY TELEPHONE RECLASSIFICATION AND COMPENSATION PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996	)	**CC Docket No. 96-128**

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, offers the following recommendations in the captioned rulemaking proceeding:

- TRA urges the Commission, in structuring the Congressionally mandated per-call payphone compensation mechanism, to be cognizant of the impact of its actions on, and to exercise care to avoid adopting rules and policies that would adversely effect, smaller interexchange carriers ("IXCs") and their primarily small business and residential customers. TRA urges the Commission to be particularly sensitive to the impact of the payphone compensation scheme adopted here on the fledgling debit (or prepaid calling) card industry.

- As it did in structuring the current compensation arrangement for private payphone operators, the Commission should "minimize the administrative burdens . . . present[ed]" by the per-call payphone compensation scheme adopted here by limiting the entities required to make such payments, at least for some interim period, to the largest IXCs. While the Commission currently applies a floor of $100 million, TRA submits that a one billion dollar threshold would be more appropriate here given the increased administrative burdens associated with complying with a per-call compensation mechanism.

- If the Commission declines to exempt, on an interim basis, smaller IXCs from payment of per-call charges to payphone operators (or even it such an exemption is implemented), TRA strongly urges the Commission to allow a transition period of up to a year before imposing such fees or to "grandfather" all debit cards already in circulation or contractually required to be issued.

- TRA recommends that a call should not be compensable to the payphone operator unless it is completed to the intended recipient of that call. In other words, noncompensable calls to one entity should be noncompensable calls to all entities in the delivery chain.

- TRA submits that "an appropriate cost-based surrogate" should reflect the long-run incremental cost of carrying the call, as increased to reflect a reasonable profit for the payphone operator. TRA wholeheartedly agrees with the Commission that compensation values should not be based on some claimed "opportunity costs" associated with the initiation of subscriber "800" or access code calls in lieu of "0+" calls.

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COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.1415, hereby submits its Comments in response to the Notice of Proposed Rulemaking, FCC 96-254, released by the Commission in the captioned docket on June 6, 1996 (the "Notice"). In this proceeding, the Commission will promulgate regulations implementing the payphone provisions of the Telecommunications Act of 1996 ("1996 Act"), as set forth in Section 276 thereof.[1] Of particular importance to TRA and its interexchange resale carrier members, the Commission, in so doing, will "prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . [and] discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment and

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[1] Pub. L. No. 104-104. 110 Stat. 56, § 276 (1996).

all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues . . ."[2] For the reasons set forth below, TRA urges the Commission, in structuring the Congressionally mandated per-call payphone compensation mechanism, to be cognizant of the impact of its actions on, and to exercise care to avoid adopting rules and policies that would adversely effect, smaller interexchange carriers ("IXCs") and their primarily small business and residential customers. TRA urges the Commission to be particularly sensitive to the impact of the payphone compensation scheme adopted here on the fledgling debit (or prepaid calling) card industry.

I.

INTRODUCTION

TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect the interests of entities engaged in the resale of telecommunications services. TRA's more than 450 members are all engaged in the resale of interexchange, international, local exchange, wireless and/or other services and/or in the provision of products and services associated with such resale. Employing the transmission. and often the switching and other, capabilities of underlying facilities-based carriers, TRA's resale carrier members create "virtual networks" to serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added

[2] 47 U.S.C. §§ 276(b)(1)(A) and 276(b)(1)(B).

products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users. A large percentage of TRA's resale carrier members make available to consumers "1-800" access travel cards and/or debit cards, in the case of the former, in conjunction with their interexchange offerings or in the case of the latter, as stand-alone products.

While TRA's resale carrier members range from emerging, high-growth companies to well-established, publicly-traded corporations, the bulk of these entities are not yet a decade old. Nonetheless, TRA's resale carrier members collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars. The emergence and dramatic growth of TRA's resale carrier members over the past five to ten years have produced thousands of new jobs and new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

As noted above, TRA's primary interest in this proceeding is in minimizing, to the maximum extent possible, the adverse impact of the Congressionally-mandated per-call payphone compensation arrangement on smaller IXCs and their small business and residential customers. Obviously, the higher the compensation amount and the greater the cost and administrative burdens associated with tracking payphone-originated calls and fulfilling payment obligations to payphone operators, the more significant will be the adverse impact of per-call payphone compensation these parties. Fortunately, the Congress has only voiced a general directive in Section 276, leaving to the Commission broad discretion in establishing the actual per-call payphone compensation mechanism. As the Notice has correctly recognized, the Commission, in promulgating implementing rules, must determine such critical details as levels of per-call compensation and how these values should be determined, who should pay the per-call compensation and on what calls it should be paid, and how overall compensation amounts should be computed, verified and collected.[3] The manner in which each of these questions is answered will either increase or reduce the adverse impact of the resultant per-call payphone compensation scheme on smaller IXCs and their small business and residential customers.

In answering these question, TRA once again urges the Commission to remain cognizant of the likely impact of its determinations on smaller IXCs and their small business and residential customers. TRA also, however, believes that the Commission should bear in mind that the Congress only sought to ensure that payphone operators are "fairly compensated." It did not direct the Commission to ensure high levels of profitability for payphone providers without consideration of countervailing adverse impacts on other industry segments and consumers.

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[3] Notice, FCC 96-128 at ¶¶ 14 - 40.

II

ARGUMENT

A. A Per-Call Payphone Compensation Scheme Will Adversely Impact Smaller IXCs, Particularly Prepaid Calling Card Providers, And Their Small Business And Residential Customers (¶¶ 15 - 40)

Small interexchange resale carriers occupy the final rung in the long distance service distribution chain. They, accordingly, are the least able, yet more often than not, the most likely, to ultimately bear the burden of additional regulatory-driven costs and hence, the most vulnerable to cost-generating regulatory actions. Additional costs incurred by a resale carrier's underlying network provider are invariably passed through to the resale carrier. Because resale carriers' customer relationships tend to be more price sensitive than those of their far larger, more established network providers, resale carriers tend to have far less flexibility to simply pass through to their customers the costs passed through to them by their network providers.[4] Moreover, because resale carriers' operations are smaller, the impact of the large dollar outlays associated with complying with new regulatory requirements is generally more dramatic for resale

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[4] The Commission acknowledged this phenomenon in computing regulatory fees for IXCs in Assessment and Collection of Regulatory Fees for Fiscal Year 1995, 10 FCC Rcd. 13512, ¶¶ 118-137 (1995). There, the Commission, recognizing that resale carriers' underlying network providers would pass through regulatory fees assessed on them to their resale carrier customers and that the resale carrier customers were less able to pass through these charges to their customers, permitted resale carriers and other IXCs to "subtract from their gross interstate revenues . . . any payments made to underlying common carriers for telecommunications facilities or services, including payments for interstate access service, that are resold in the form of interstate service." The Commission took this action specifically to "avoid imposing a double payment burden on resellers."

carriers; simply put, resale carriers have less volume over which to distribute the additional costs.[5]

In other words, whatever per-call payphone compensation scheme the Commission adopts will squeeze the margins of smaller IXCs; obviously, the higher the per-call compensation values and the more costly the administrative burdens associated with compliance, the harsher will be the impact. The small business and residential customers of smaller IXCs will share the pain either directly to the extent that smaller IXCs are able to pass through some portion of the additional cost burden and/or indirectly to the extent that the additional cost burdens undermine the carriers' operational capability or viability.

The adverse impact of a per-call payphone compensation scheme will be magnified, and hence will be significantly more injurious, in the emerging prepaid calling card industry. First, the prepaid calling card industry is in its infancy, debit cards having only been made commercially available on any significant scale in the United States within the last five years. Moreover, as with any new market segment, most of the industry participants are relatively small and are still growing and developing. In other like contexts, the Commission has recognized the disruptive impact on a new industry of substantial cost increases resulting from regulatory fiat.

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[5] The Commission limited responsibility under its current competitive payphone compensation scheme to those IXCs with annual toll revenues in excess of $100 million in order to "substantially ease the administrative burdens of billing and collection" associated with the compensation mechanism. Policy and Rules Concerning Operator Service Access and Pay Telephone Compensation, 7 FCC Rcd. 3251, ¶ 51 (1992).

Thus, when the Commission adopted its access charge regime in the early 1980s, it granted temporary exemptions from payment of interstate switched access charges to certain classes of exchange access users, including, among others, enhanced service providers ("ESPs").[6] Recognizing that the "severe rate impacts" attendant to immediate imposition of interstate switched access charges would have a disruptive impact on the fledgling enhanced services industry, producing market displacement and resulting in adverse customer impacts, the Commission concluded that "special treatment" was appropriate and necessary to avoid the detrimental effects of "rate shock."[7] As later described by the Commission:

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[6] MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶¶ 83-85 (1983), *modified on recon.* 97 F.C.C.2d 834 (1984), *aff'd in principal part and remanded in part sub nom.* National Association of Regulatory Utilities Commissioners v. FCC, 737 F.2d 1085 (D.C.Cir. 1984), *cert. denied* 469 U.S. 1227 (1985), *modified on further recon.* 99 F.C.C.2d 708 (1984), *aff'd sub nom.* American Tel. & Tel. Co. v. FCC, 832 f.2d 1285 (D.C. Cir. 1987), *modified on recon.* 101 F.C.C.2d 1222 (1985), *aff'd on further recon.* 102 F.C.C.2d 849 (1985)

[7] Id.; Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd. 2631, ¶ 2 (1988); *see also* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd. 4524, ¶¶ 54-65 (1991). Indeed, the United States Court of Appeals upheld the exemption as required "to avoid unnecessary customer impact or market displacement." National Association of Regulatory Utilities Commissioners v. FCC, 737 F.2d 1085 (D.C.Cir. 1984), *cert. denied* 469 U.S. 1227 (1985).

> Despite our resolve to distribute the costs of exchange access among all users of access service, we recognized that the immediate imposition of interstate access charges on all users of exchange access would have some undesirable consequences. For example, we said that because WATS resellers and enhanced service providers were currently paying local business rates for their interstate access, the immediate imposition of interstate access charges would have a substantial impact on their costs, which could undermine their ability to continue to provide service while they were adjusting their operations in response to the new access charge rules.[8]

And while the Commission initially adopted the "ESP exemption" to permit the enhanced services industry to "avoid service-disrupting 'rateshock,'" it has since "refrained from applying full access charges to ESPs out of a concern that the industry has continued to be affected by a number of significant, potentially disruptive, and rapidly changing circumstances."[9]

Second, the tiered manner in which business relationships are structured in the prepaid calling card industry amplify the impact of any significant regulatory-driven cost increase. For example, a typical debit card distribution chain involves an underlying carrier, a "platform provider," at least one distributor and a retailer. Thus, a $10.00 debit card which provides for nearly 30 minutes of calling time at a per-minute rate of $0.35[10] will likely reflect at least a $0.10

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[8] Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers (Notice of Proposed Rulemaking), 2 FCC Rcd. 4305, ¶ 3 (1987).

[9] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd. 4524, ¶ 54 (1991), *modified on recon.* 7 FCC Rcd. 5235 (1992), *further recon. denied* 10 FCC Rcd. 1570 (1994).

[10] Per-minute charges for prepaid calling card use generally range between $0.25 and $0.50. Rates tend to decrease as the face value of the card increases. Pre-set debit card values generally range between $5.00 and $50.00. *See* Patrick, M.Y., "Long Distance Goes Every Which Way," Intele-Card News, Vol. 2, No. 5, p. 50 (June 1996); Common Carrier Bureau, "Common Carrier Competition" (Fall 1995).

to $0.15 per-minute charge payable to the underlying carrier and be sold by the platform provider, who will bear these network, as well as associated processing and administrative, costs, to the distributor for $7.00; the distributor may sell the card to the retailer for $8.00, while the retailer will sell it to the public for $10.00. Hence, the platform provider's margin is substantially thinner than a $10.00/$0.35 a minute debit card might otherwise suggest. It is the platform provider, however, that will bear the cost burden of a per-call payphone compensation scheme, because, as noted above, it is the platform provider that must pay the underlying carrier for network usage. Given that the average debit card call is roughly five minutes in duration and that a significant percentage of debit card calls are made from payphones, if one assumes a $0.25 per-call charge, the platform provider's margin would be reduced to a bare minimum by a per-call payphone compensation scheme if it were unable to pass through the charge to consumers directly or by increasing the per-minute rate of usage.[11]

The ability of a platform provider to pass through such substantial new regulatory-driven costs, however, is limited by the nature of the customer universe for prepaid calling cards. The core consumer population for debit cards are individuals occupying the lowest socio/economic strata -- people who either do not have phones or lack the credit to obtain

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[11] Assuming a $10.00/$0.35 a minute debit card which the platform provider sells for $7.00, a per-minute payment of $0.125 to the platform provider's network provider, and an average debit card call length of five minutes, the per-card margin from which the platform provider must fund its operations, including customer service, marketing, and administrative overhead, and from which it must derive its profit margin would be reduced by more than 35 percent by imposition of a $0.25 per-call payphone charge. If the per-call payphone charge were set at $0.50, the reduction would be in excess of 70 percent.

traditional calling cards.[12] Thus among the overall universe of consumers of telecommunications service, the principal consumers of debit cards are likely the least capable of absorbing substantial price increases. And lest there be any doubt, the price increases necessitated by a per-call payphone compensation scheme would be substantial; assuming a $0.25 per-call assessment, if a platform provider were to pass through the associated charges, the result would be nearly a 50 percent increase in the per-minute cost of debit card airtime to a consumer utilizing what today is a $10.00/$0.35 a minute card.[13] And this increase does not take into account the associated administrative and other compliance expenses occasioned by the new per-call payphone compensation scheme.

As is apparent, a per-call payphone compensation scheme will adversely impact smaller IXCs and their small business and residential customers, with the emerging prepaid calling card industry experiencing a particularly painful blow. The question that will be answered in this proceeding is how bad will be the damage so inflicted. The Congress has made clear its desire to foster greater participation by small business in the telecommunications industry. Certainly, the Congress has demonstrated its antipathy towards "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications

[12] The Commission has characterized "prepaid long-distance cards (debit cards)" as "[l]ow-cost services targeted to meet the needs of those with low incomes or non-permanent living arrangements." The Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network (Notice of Proposed Rulemaking), 10 FCC Rcd. 13003, ¶ 38 (1996).

[13] A $10.00/$0.35 a minute debit card provides roughly 28.5 minutes of use. Assuming that the platform provider sells the card for $7.00 and pays a per-minute charge of $0.125 to the network provider, that the average debit card call length is five minutes, and that the per-call payphone charge is set at $0.25, the platform provider, in order to maintain its margin while absorbing the new per-call payphone assessment, must reduce the number of minutes from 28.5 to less than 20 minutes, which produces a per-minute rate of more than $0.50.

services and information services," directing the Commission to periodically conduct proceedings for the purpose of identifying and eliminating such barriers.[14] Pursuant to this Congressional mandate, the Commission has recently issued a Notice of Inquiry ("NOI") seeking comment on "regulatory incentives for eliminating barriers to entry for small telecommunications businesses."[15]

In its NOI, the Commission acknowledges the "significant role in the U.S. economy" played by small business."[16] Among other things, the NOI notes that small businesses "constituted the vast majority of all employers, employed 53% of the private work force, and provided 50% of all receipts," "innovate at a per person rate twice that of large firms, spend more money on research and development (R&D), and more efficiently convert R&D efforts to new products then large firms," and "are able to serve narrower niche markets that may not be easily or profitably served by large corporations."[17] The NOI, however, bemoans the fact the "[d]espite the role of small businesses in the economy, and the growth of the telecommunications market, small businesses currently constitute only a small portion of telecommunications companies."[18] In light of the clear Congressional directive to facilitate greater participation by small business in telecommunications, TRA submits that it would make little sense to adopt rules and policies

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[14] 47 U.S.C. § 257; *see also* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., p. 136 (1996) ("Joint Explanatory Statement").

[15] <u>Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses</u> (Notice of Inquiry), GN Docket No. 96-113 (1996).

[16] <u>Id.</u>, at ¶ 6.

[17] <u>Id.</u> (footnote omitted).

[18] <u>Id.</u> (footnote omitted).

which would have a material adverse impact on the small and mid-sized companies that currently populate the resale and prepaid calling card industries.

B. In Structuring Its Per-Call Payphone Compensation Mechanism, The Commission Should Take All Necessary And Appropriate Steps To Minimize The Adverse Impact On Smaller IXCs, Particularly Prepaid Calling Card Providers, And Their Small Business and Residential Customers (¶¶ 15 - 40)

Just as it did with the "fledgling" enhanced services industry when it introduced its access charge regime, the Commission should here identify as "[o]ne of [its] paramount concerns . . . the customer impact or market displacement" its actions might entail.[19] The Commission certainly should be cognizant of the "severe rate impacts" attendant to a per-call payphone compensation scheme.[20] TRA will suggest below a number of ways in which the per-call payphone compensation mechanism mandated by the Congress could be structured in order to minimize adverse impacts on smaller IXCs and their small business and residential customers.

1. The Per-Call Payphone Compensation Assessment Should Be Levied Only On IXCs With Annual Toll Revenues In Excess of One Billion Dollars (¶¶ 24 - 28)

As it did in structuring the current compensation arrangement for private payphone operators ("PPO"), the Commission should "minimize the administrative burdens . . . present[ed]" by the per-call payphone compensation scheme adopted here by limiting the entities required to

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[19] MTS and WATS Market Structure, 97 F.C.C.2d 682 at ¶ 84.

[20] Id.

make such payments, at least for some interim period, to the largest IXCs.[21] While the Commission currently applies a floor of $100 million, TRA submits that a one billion dollar threshold would be more appropriate here given the increased administrative burdens associated with complyin with a per-call compensation mechanism. As the Commission noted in adopting the current PPO compensation mechanism, "[t]o extend compensation obligations to all of [the hundreds of smaller IXCs] would have significantly increased the administrative costs of a compensation mechanism."[22] Moreover, as the Commission further noted, given their limited aggregate market share, excluding small to mid-sized carriers would not significantly reduce the total payments flowing to payphone operators.[23]

The rationale for affording smaller IXCs at least a temporary exemption from per-call payphone payment obligations is virtually identical to that which led the Commission to grant ESPs an interim exemption from payment of interstate switched access charges. As with the immediate imposition of access charges on ESPs, immediate assessment of per-call payphone fees on smaller IXCs "would have a substantial impact on their costs, which could undermine their ability to continue to provide service while they were adjusting."[24] Like the enhanced services industry, the prepaid calling card industry, as noted above, is in its infancy and,

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21 Policy and Rules Concerning Operator Service Access and Pay Telephone Compensation, 7 FCC Rcd. 3251 at ¶ 51.

22 Id.

23 Id. The combined market share of IXCs with interstate toll revenues in excess of $1 billion is approximately 85 percent. Industry Analysis Division, Common Carrier Bureau, Long Distance Market Shares: Fourth Quarter 1995 (March 1996).

24 Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers (Notice of Proposed Rulemaking), 2 FCC Rcd. 4305 at ¶ 3.

therefore, particularly vulnerable to intense "rate shocks." Also like the enhanced services industry, smaller IXCs are currently confronting "a number of significant, potentially disruptive, and rapidly changing circumstances," primarily resulting from the passage of the 1996 Act and the entry of the Regional Bell Operating Companies ("RBOCs") into the long distance industry.[25]

And as with the enhanced services industry, strong public policy reasons argue for at least an interim exemption from per-call payphone fees for smaller IXCs. Smaller IXCs are the small businesses with which the Congress and the Commission are looking to further populate the telecommunications industry.[26] Moreover, as noted above, smaller IXCs generally serve small to mid-sized business customers, thereby furthering the general Congressional goal of facilitating the further growth of the small business community. Moreover, prepaid calling card providers offer a valuable service to low-income populations, thereby enhancing the Congress' and the Commission's goal of increasing telephone subscribership.[27]

An interim exemption would mitigate the service disruptions, market displacements and customer impacts that would otherwise result from an immediate assessment of per-call

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[25] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd. 4524, at ¶ 54; *see also* Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd. 2631, ¶ 17 (1988) ("We believe that given the combined effects of the impending ONA implementation and the entry of the BOCs into certain aspects of information services, the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired.").

[26] Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), GN Docket No. 96-113 (1996).

[27] The Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network (Notice of Proposed Rulemaking), 10 FCC Rcd. 13003 at ¶ 38 (1996); 47 U.S.C. § 254; Joint Explanatory Statement at 128 - 34.

payphone fees on smaller IXCs. Just as these adverse impacts were avoided with respect to ESPs by delaying the imposition of interstate switched access charges, so too could they be avoided here. An interim exemption would allow smaller IXCs the time necessary to prepare for the upcoming cost increase. Time is critical not only because smaller IXCs must be concerned about customer reactions, but because many of these carriers will have to acquire the necessary call-tracking software to comply with any per-call payphone compensation requirement imposed on them. As the Commission noted with respect to the temporary access charge exemption afforded ESPs, "[o]ne of our paramount concerns in fashioning a transition plan is the customer impact or market displacement that any proposed remedy might cause."[28]

Because many smaller IXCs are "switchless" in whole or in part and, therefore, do not have carrier identification codes ("CIC"), the Commission, in order to render an exemption of smaller IXCs effective, should include within the exemption all payphone-originated calls attributable to smaller IXCs even though such calls are carried by underlying facilities-based carriers. Thus, for example, a payphone-originated call which is transported on the AT&T Corp. ("AT&T") network would nonetheless be exempted if the carrier of the customer initiating the call is a smaller resale IXC.

2 At A Minimum, The Commission Should Allow A Transition Period And/Or "Grandfather" Prepaid Calling Cards Already In Circulation (¶¶ 24 - 28)

If theCommission declines to exempt, on an interim basis, smaller IXCs from payment of per-call charges to payphone operators (or even it such an exemption is

[28] MTS and WATS Market Structure, 97 F.C.C.2d 682 at ¶ 84.

implemented), TRA strongly urges the Commission to allow a transition period of up to a year before imposing such fees. Such a transition period is required for two principal reasons, wholly apart from the rationale for a small carrier exemption articulated above. First, there are literally millions of prepaid calling cards currently in circulation which specify either or both a price per minute and a precise number of units. There are further in existence thousands of contracts which provide for delivery of debit cards providing for a given per-minute price. Unless a prepaid calling card provider has reserved to itself the right to unilaterally alter the per-minute price of debit cards it has issued or is under contract to issue, and even if it has reserved such a right, unless it is willing to suffer the adverse customer reaction that a unilateral change in price would produce, the prepaid calling card provider will by regulatory fiat be denied anticipated profits and perhaps worse if a per-call payphone compensation mechanism is introduced without a transition period or a "grandfathering" of debit cards already in circulation or contractually required to be issued.

Second, many smaller IXCs simply do not currently possess the same technological capability as their far larger rivals to accurately track payphone-originated calls. In 1992, the Commission concluded that "no entity currently has the ability to determine accurately the number of access code calls that originate from each competitive payphone" and that "[no] reliable surrogates have been identified that satisfactorily address all the tracking requirements."[29] Two years later, AT&T advised the Commission that it was only then "currently upgrading its systems to enable it to pay compensation on individual 10XXX and 1-800 access code calls from

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[29] Policy and Rules Concerning Operator Service Access and Pay Telephone Compensation, 7 FCC Rcd. 3251 at ¶ 13.

competitive payphones not presubscribed to AT&T in equal access areas."[30] And a year later, Sprint Communications Co. ("Sprint") reported that it was finally "in a position to track and compensate individual 10XXX and 1-800 access code calls from competitive payphones in equal access areas."[31] Later that year, the Commission found that "tracking 1-800 and 10XXX access code calls through the use of ANIs and the special billing treatment '07' code would provide OSPs with a means of paying compensation to PPOs on a per-call basis," but acknowledged that this solution would only be "relatively easy and inexpensive to administer for those OSPs that receive a large number of access code calls."[32] Indeed, in response to a request by the American Public Communications Counsel ("APCC") that the Commission require "IXCs that have annual toll revenues exceeding $1 billion to track access code calls and pay per-call compensation," the Commission tentatively concluded that only "the largest OSPs should be required to pay compensation to PPOs on a per-call basis."[33] The Commission identified only two IXCs other than AT&T and Sprint that it believed "should be able to pay compensation on a per-call basis without incurring significantly different administrative costs than those associated with the current per-phone mechanism."[34] Although the Notice is correct that "tracking mechanisms and

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[30] Policy and Rules Concerning Operator Service Access and Pay Telephone Compensation, 10 FCC Rcd. 1590, ¶ 4 (1994).

[31] Policy and Rules Concerning Operator Service Access and Pay Telephone Compensation, 10 FCC Rcd. 5490, ¶ 4 (1995).

[32] Policy and Rules Concerning Operator Service Access and Pay Telephone Compensation, 10 FCC Rcd. 11457, ¶ 50 (1995).

[33] Id. at ¶ 54.

[34] Id.

surrogates exist,"[35] the capability must be acquired through facilities upgrades -- upgrades that will both take time and impose a significant cost burden on smaller IXCs.

In short, absent an exemption for smaller IXCs from payment of per-call payphone charges, it is imperative that a transition period be allowed so that the time and the costs that must be dedicated to compliance activities can be expended in a manner that will do the least harm to smaller IXCs and so that business arrangements entered into prior to the implementation of the new payphone compensation mechanism will not be jeopardized.

3. The Commission Should Precisely Define The Payphone Originated Calls On Which The Per-Call Charge May Be Assessed (¶¶ 15 - 23)

While the Notice tentatively concludes that payphone operators should be compensated for all calls originating on their facilities, it neglects to precisely define what constitutes a "call" for purposes of such compensation.[36] The impact of a per-call payphone compensation mechanism on smaller IXCs, including prepaid calling card providers, will vary dramatically depending on the manner in which the Commission defines a "call." If, for example, a call were deemed to be a completed call if it reached an IXC's switch or a prepaid calling card provider's platform, the adverse impact of the per-call payphone compensation rules established here would be increased sharply because carriers would be compelled to pay compensation to payphone operators on calls for which they themselves receive no compensation. For this reason, and consistent with Commission precedent, a call should not be compensable to

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35 Notice, FCC 96-128 at ¶ 30.

36 Id. at ¶ 16.

the payphone operator unless it is completed to the intended recipient of that call. In other words, noncompensable calls to one entity should be noncompensable calls to all entities in the delivery chain.

Such an approach is consistent with the manner in which the Commission has defined "calls" for jurisdictional purposes. Thus, the Commission has held that "calls involving 800 switching should be treated for jurisdictional purposes as single, end-to-end communications."[37] "800" calling card traffic, the Commission has held, does not terminate at an IXC's switch; "switching at the credit card switch is an intermediate step in a single end-to-end communications."[38] As the Commission recently explained in greater detail:

> both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications for defining the nature of the communications. According to these precedents, we regulate an interstate wire communication under the Communications Act from its inception to its completion. Such an interstate communication does not end at an intermediate switch. As the Bureau correctly noted, this view of our jurisdiction under the Act gives rise to an assumption that the interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities. Applying this principle to the case before us, we conclude that the configuration is a single interstate communication that does not become two communications because it passes through intermediate switching facilities.[39]

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[37] The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services, 11 FCC Rcd. 1186, ¶ 30 (1995).

[38] Southwestern Bell Telephone Company, Transmittal Nos. 1537 and 1560, Revisions to Tariff F.C.C. No. 68, 11 FCC Rcd. 1186, ¶ 28 (1988).

[39] Long Distance/USA, Inc. v. The Bell Tel. Co. of Penn., 10 FCC Rcd. 1626, ¶ 13 (1995).

Applying the principle articulated in the above block quote to the matter at issue here, the inescapable conclusion is that a call cannot be deemed to be completed simply because it reaches an "intermediate switch." Given that there is only one "end-to-end communication," a call can only be completed to the "called number," not to any point in transit thereto. And, of course, it goes without saying that payphone operator, like all other telecommunications providers, should only be compensated for completed calls.

4. Compensation Should Be Limited To Recovery Of The Long-Run Incremental Cost Of Initiating An Access Code Or Subscriber "800" Call Plus A Reasonable Profit (¶¶ 32 - 40)

Section 276 requires that payphone operators be "fairly compensated" for use of their facilities to complete, among other things, subscriber "800" calls and access code calls. While Section 276 offers no guidance as to what constitutes "fair compensation," elsewhere in the 1996 Act, the Congress expresses a consistent preference for cost-based pricing. Thus in Section 252(c)(1), the Congress provided that charges for interconnection and unbundled network elements must be "based on the cost . . . of providing the interconnection or network element . . . {plus] a reasonable profit."[40] Elsewhere the Congress required that the differential between retail and wholesale rates must reflect "costs that will be avoided by the local exchange carrier."[41]

Consistent with this theme, the Notice tentatively concludes that "PSPs should be compensated for their costs in originating the types of calls for which we have tentatively

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[40] 47 U.S.C. § 252(d)(1)(A).

[41] 47 U.S.C. § 252(d)(3).

concluded that compensation is appropriate."[42] Moreover, the Notice tentatively concludes that "these costs should be measured by appropriate cost-based surrogates."[43] TRA agrees that compensation values should be cost based and that cost-based surrogates should be used to determine such values. Left open is what constitutes an "appropriate cost-based surrogate" and how it should be applied -- *e.g.*, whether it should vary by type of call or over time.

TRA is not in a position to identify particular cost-based surrogates for the Commission or to provide data as to the "cost" incurred by payphone operators in handling subscriber "800" or access code calls. TRA submits, however, that several criteria should be met by any such surrogate. First, TRA wholeheartedly agrees with the Commission that compensation values should not be based on some claimed "opportunity costs" associated with the initiation of subscriber "800" or access code calls in lieu of "0+" calls. As succinctly stated by the Commission several years ago:

> we do not take as our public interest goal the maintenance of the PPO revenue streams that existed while PPOs or premises owners were permitted to funnel all operator-assisted traffic (other than 0- traffic) to the presubscribed OSP, whatever the wishes of the caller. Since we have found that the blocking of access codes is an unreasonable practice, commission payments to PPOs premised on this practice would not be an appropriate basis for compensation.[44]

TRA, however, cannot endorse any of the surrogates identified in the Notice. TRA submits that "an appropriate cost-based surrogate" should reflect the long-run incremental cost

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42 Notice, FCC 96-128 at ¶ 38.

43 Id.

44 Policy and Rules Concerning Operator Service Access and Pay Telephone Compensation, 7 FCC Rcd. 3251 at ¶ 31.

of carrying the call, as increased to reflect a reasonable profit for the payphone operator. As the Commission has recognized, "[e]conomists generally agree that prices based on [long run incremental cost] reflect the true economic cost of a service and give appropriate pricing signals to producers and consumers and ensure efficient entry and utilization of the telecommunications infrastructure."[45]

In TRA's view, a fully-distributed costing scheme would produce windfall profits for payphone operators, earned at the expense of the IXC community and the consuming public. Thus, the cost of the payphone itself and the line serving the facility, as well as administrative overhead, including maintenance and collection, should not be included in the calculation of the per-call charge. Rather, a model predicated on the average additional cost of handling a subscriber "800" or access code calls should serve as center point for a range of reasonable charges. Any such model should also reflect "forward looking costs," assuming the most efficient available facilities -- an approach that should encourage innovation in the payphone industry.

. TRA urges the Commission to bear in mind the consequences on smaller IXCs and their small business and residential customers of any significant per-call payphone charge for subscriber "800" or access card calls. As shown earlier, the imposition of a \$0.25 charge would result in a near fifty percent increase in the per-minute price now associated with a \$10.00/\$0.35 per minute prepaid calling card. Other proposed per-call charges cited in the <u>Notice</u> -- \$0.55, \$0.61, and \$0.95[46] -- would result in increases of hundreds of percent. Certainly, payphone

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[45] <u>Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers</u> (Notice of Proposed Rulemaking), 11 FCC Rcd. 5020, ¶ 47 (1995).

[46] <u>Notice</u>, FCC 96-128 at ¶¶ 36 - 37.