DOCKET FILE COPY ORIGINAL

RECEIVED
JUL 15 1996
Federal Communications Commission
Office of Secretary

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

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

REPLY COMMENTS

BellSouth Corporation on behalf of its affiliated companies ("BellSouth"), hereby files its reply to the comments filed in response to the Notice of Proposed Rulemaking.[1] BellSouth (1) proposes that the Commission adopt a specific interim compensation rate for uncompensated calls and that regional Bell operating company ("RBOC") payphone service providers ("PSPs") be eligible to receive such compensation on the same terms and conditions as independent PSPs as soon as subsidies are removed from RBOC payphones; (2) refutes factual and legal characterizations of the state of competition in the payphone services market made by those commenters who oppose pro-competitive RBOC PSP participation with location providers in the contracting with and selecting of interexchange carriers ("IXCs") for RBOC payphones; and (3) urges the Commission to accelerate the benefits of true market parity intended by Congress by

[1] In the Matter of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Notice of Proposed Rulemaking, FCC 96-254, released June 6, 1996 ("NPRM"). By subsequent Order, the Commission modified the comment and reply comment dates. See Order, DA 96-983 (rel. Jun. 20, 1996).

No. of Copies rec'd 0+9
List ABCDE

permitting RBOC PSPs to proceed with establishing and conducting deregulated operations, in full compliance with Commission rules, immediately on the release of its Order in this proceeding.

I. THE COMMISSION SHOULD ADOPT AN AGGREGATE INTERIM COMPENSATION RATE OF $58.05; RBOC PSPs SHOULD RECEIVE THE SAME COMPENSATION AS SOON AS SUBSIDIES ARE REMOVED. (¶ 40).

True market parity, and its resultant public benefits, will only be achieved in the payphone industry when independent and RBOC PSPs alike are able to participate with location providers in the selection of the interLATA and intraLATA carriers who serve their payphones, and are fairly compensated for the use of their payphones. Accordingly, BellSouth continues to strongly support interim compensation, as it did in its initial separate comments. BellSouth supports the aggregate interim compensation rate of $58.05 per month per payphone advocated by Peoples Telephone Company, at page 11, calculated as follows:

> . . .[A] flat-rate, monthly amount of $38.70 per payphone (86 calls per payphone per month x $ 0.45 per call) for interim subscriber 800 call compensation" plus "a flat rate or $19.35 per month, per payphone (43 calls x $0.45 per call) for carrier access code calls.

After comments were filed in this proceeding, the Commission issued an order in which it denied various requests to stay or waive the requirement that local exchange carriers ("LECs") reclassify any inmate-only pay telephone investment from regulated to unregulated activities by September 2, 1996.[2] Regulatory parity and fundamental fairness demand that RBOC PSPs should receive, on the same terms and conditions as independent PSPs, interim compensation for

---

[2] In the Matter of Petitions for Waiver and Partial Reconsideration or Stay of Inmate-Only Payphones Declaratory Ruling, RM-8181, Order, released July 3, 1996 (but waiving cost allocation manual revision deadline and network disclosure time requirement).

any deregulated, reclassified payphone from the point in time at which subsidies are removed until the end of the interim compensation period adopted by the Commission.

II. THE PAYPHONE SERVICES MARKET IS MUCH MORE COMPETITIVE THAN OPPONENTS OF A LEVEL PLAYING FIELD WOULD LEAD THE COMMISSION TO BELIEVE. (¶ ¶ 67-73).

The reply comments of the RBOC Payphone Coalition (27-35) conclusively demonstrate that opposition to full RBOC PSP participation with location providers in the selection of and contracting with operator service providers ("OSPs") and IXCs in the same manner as independent PSPs do today is rooted in special and private interest protectionism rather than any legitimate public interest concern. For example, initially the APCC earnestly supported and advocated true market parity for all PSPs on the issue of carrier selection when it sought passage of Section 276 in 1995. Now after passage of Section 276, which contains interdependent elements which together create a level playing field, APCC is apparently trying to slant the field in their favor. The APCC opposition to equal business opportunities for RBOC PSPs means that the APCC is essentially advocating regulatory welfare for independent PSPs in this proceeding. This self-serving reversal is made apparent when APCC's comments at 41-45 are compared with the attached letters from APCC to U.S. Senator Larry Pressler as well as APCC statements given to Congress. The Commission must, there discount and discredit APCC's anti-RBOC PSP rhetoric.

Moreover, APCC, and the entities filing comments supporting APCC, are wrong to suggest, both legally and factually, that the payphone market is characterized by anything other than competition and low entry barriers. APCC argues at 41 that RBOC PSPs retain more than 85% of the installed base, that independent PSPs, after eight years of competition, have gained a

mere 13.5% share of the market, and that each RBOC PSP is overwhelmingly dominant in its own region. APCC fails to mention that a substantial portion of the RBOC PSP installed base is devoted to non-competitive semi-public phones. In BellSouth's region, about 36,000 of its approximately 172,500 installed payphones are semi-public phones, reducing the actual number of BOC "competitive" payphones to about 136,500.[3]

It is misleading to characterize, as APCC does, the RBOC PSP installed base as the relevant payphone market. Independent PSPs target only those competitive locations within the most competitive market segments for deployment. Within those market segments, the numbers actually indicate competitive parity, especially when one considers that independent PSP stations tend to enjoy a higher daily average revenue than BellSouth stations. (Exhibit A). The broadly competitive nature of the payphone market, and the lack of any significant barrier to entry in the market, are keenly reflected by the numbers of certificated independent PSPs operating within the BellSouth region. (Exhibit B). With steadily increasing market share, competitive parity and low barriers to entry, APCC's superficial antitrust analysis (41, n.34) should be disregarded as a blatant distortion of the facts in an attempt to deny RBOC PSPs the level playing field that Section 276 requires and that the market warrants.

In any event, antitrust law and policy make clear that using market share alone as a proxy for market power is incomplete and may often lead to the wrong conclusions regarding market power. APCC's faulty market share calculations and conclusions illustrate this. First, in basing its market share calculations on a now-outdated snapshot of the installed base of RBOC

---

[3] It has been BellSouth's experience that independent PSPs generally do not compete for semi-public telephone locations, due to the historically low usage levels as such payphones. Under Section 276, semi-public payphones will be reclassified as CPE and will require a tariffed line from the LEC just like any other payphone.

payphones, APCC does not properly report the current state of competition in the market as discussed above. The 1992 Joint Department of Justice and Federal Trade Commission Horizontal Merger Guidelines point out that:

> Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.

Guidelines at section 1.521. The Guidelines note that the agencies "may conclude that the historical market share of [a] firm overstates its future competitive significance." Id. Thus, in United States v. General Dynamics Corp., 415 U.S. 486, 501-04 (1974), the U.S. Supreme Court allowed a merger involving firms with large shares of the relevant market based on total sales because those sales did not reflect the likely state of future competition in the market.

Second, focusing on market share alone can be extremely misleading in assessing the state of competition in a market. Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980)("blind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition"), cert. denied, 450 U.S. 421 (1981). The courts and the Merger Guidelines look to a variety of other commercial and other factors in assessing competitiveness, the most important being ease of entry. Where entry into a market can be accomplished quickly and without large sunk costs, high market shares do not suggest that market power exists. See, e.g. United States v. Syufy Enterprises, 903 F.2d 659, 671-72 (9th Cir. 1990) ("because others easily could (and did) enter the market successfully, [Defendant] lacked the ability to maintain share, the power to control prices, [and] the capability of excluding competitors"); Oahu Gas Service v. Pacific Resources, Inc., 838 F.2d 360, 366 (9th Cir.), cert. denied, 488 U.S. 870 (1988) (high market share does not

imply monopoly power "in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors"); United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir.1984); Ball Memorial Hospital, Inc. v. Mutual Hospitals Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986) ("the lower the barriers to entry, and the shorter the lags of new entry, the less power existing firms have. When the supply is highly elastic, existing market share does not signify power"); 2 P. Areeda & D. Turner, Antitrust Law Para. 505 at p. 328 ("Substantial market power can persist only if there are significant and continuing barriers to entry").[4]

The principal motivation for opposition to rules that ensure equality in the ability to participate with location providers in the selection of an IXC appears to be a fear that RBOC PSPs will be able to obtain commissions from IXCs and pass them on to location providers and consumers in the form of higher commission levels, forcing independent PSPs to pass on the same benefits. CTIA at 20 (RBOC PSPs could demand terms and commissions from IXCs seeking to serve the payphones); APCC at 42 (with funds obtained from IXC negotiations, RBOC PSPs could bid up commission levels). Due to the large number of independent PSPs (Exhibit B), their growth over time and the absence of entry barriers, there is no real possibility that an RBOC PSP could monopolize any payphone market. Thus, opposition to parity in carrier selection is really based on opposition to price competition, and anticompetitive self-interest.

---

[4] Not one commenter has contradicted the economic analysis that the payphone market is characterized by low barriers to entry. See John Haring, Charles L. Jackson & Calvin S. Monson, Economic Report on FCC Resolution of Payphone Regulatory Issues, Strategic Policy Research Institute (Jul. 1, 1996)(attached to BellSouth Comments) at 1, 9-12. Moreover, as Haring & Jackson note in their critique of the MCI/Hatfield "cost study," "[g]iven the manifest freedom of resources to migrate into this business activity, the result of compensation that produced high levels of profitability would be rapid expansion of payphone capacity." John Haring & Charles L. Jackson, Comments on Hatfield Cost Analysis, Strategic Policy Research Institute (Jul. 15, 1996, attached hereto) at 10.

Congress has identified two public interest goals in implementing Section 276: "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. Sec. 276(b)(1). Neither the independent PSPs, nor AT&T or MCI, have explained how allowing market parity in the form of equal carrier selection opportunities will frustrate either of these goals.[5] In fact, not only will such market parity promote competition, APCC itself, in its representations before Congress in 1995, identified a number of additional public interest goals supported by equal carrier selection rights.[6] The same data which the APCC relies on now to frustrate those rights, APCC at 41 (installed base data contained in RBOC Motion to Vacate, filed July 6, 1994) was in existence well before APCC advocated equal carrier selection rights to Congress. Moreover, as BellSouth has demonstrated, APCC's use of this data in no way constitutes an accurate picture of the true competitive state of the payphone market. Indeed, the record in the proceeding demonstrates a number of public interest benefits resulting from true market parity: an increase in competition and the resulting benefits to end users in the form of more choices and lower prices; a reduction in price gouging and slamming at payphones; and location providers' ultimate control over the carrier selection process.

---

[5] See Haring & Jackson, Hatfield Cost Analysis, infra, n. 5 (attached) at 5 (BellSouth's payphone revenue market share within its region is less than AT&T's current share of the long-distance business) and 10 (low entry barriers result in rapid expansion of payphone capacity).

[6] See attached letters dated June 2, 1995 and October 16, 1995 from APCC to U.S. Senator Larry Pressler.

III. THE COMMISSION SHOULD ACCELERATE THE BENEFITS OF TRUE MARKET PARITY BY PERMITTING RBOC PSPs TO PROCEED WITH ESTABLISHING AND CONDUCTING DEREGULATED OPERATIONS IN FULL COMPLIANCE WITH COMMISSION RULES IMMEDIATELY ON RELEASE OF ITS ORDER IN THIS PROCEEDING.

Congress has directed that the Commission prescribe its regulations implementing Section 276 no later than November 8, 1996, including all reconsiderations. 47 U.S.C. § 276(b)(1). In order to compete, RBOC PSPs must be free to restructure their operations and to come into compliance with the new regulatory regime as soon as they are able. To this end, the Commission should frame its Order so as to allow RBOC PSPs the ability to transfer their payphone assets, structure their payphone operations, and begin to negotiate with location providers to the same extent as independent PSPs immediately with the release of the Order in this proceeding.

CONCLUSION

The Commission should adopt the interim compensation rate calculated by Peoples Telephone Company, and determine that RBOC PSPs are eligible for such compensation on the same terms and conditions as independent PSPs as soon as payphone subsidies are removed. The payphone services market is competitive and has no significant barriers to entry; the public interest, therefore, is not served by continuing to deny RBOC PSPs the same ability independent PSPs have to negotiate with location providers on the contracting with and selection of OSPs and IXCs. Finally, the Commission should allow RBOC PSPs to proceed with establishing and

conducting deregulated operations in compliance with the Commission's rules immediately on the release of its Order herein, in order to accelerate the public interest benefits of true market parity, as intended by Congress.

Respectfully submitted,

BELLSOUTH CORPORATION

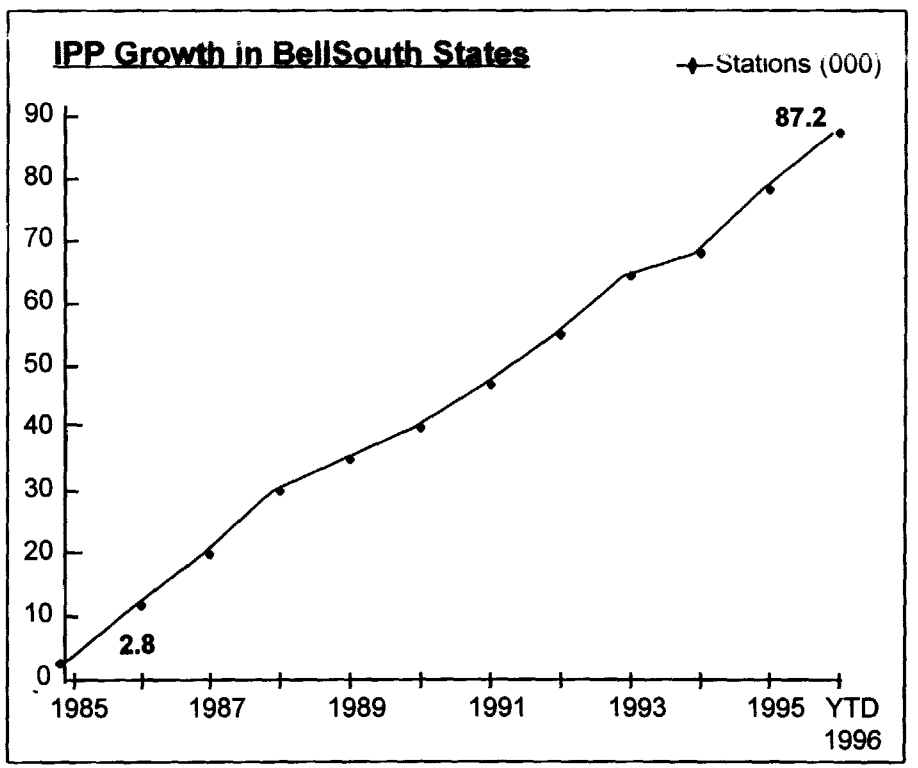
By: Theodore R. Kingsley

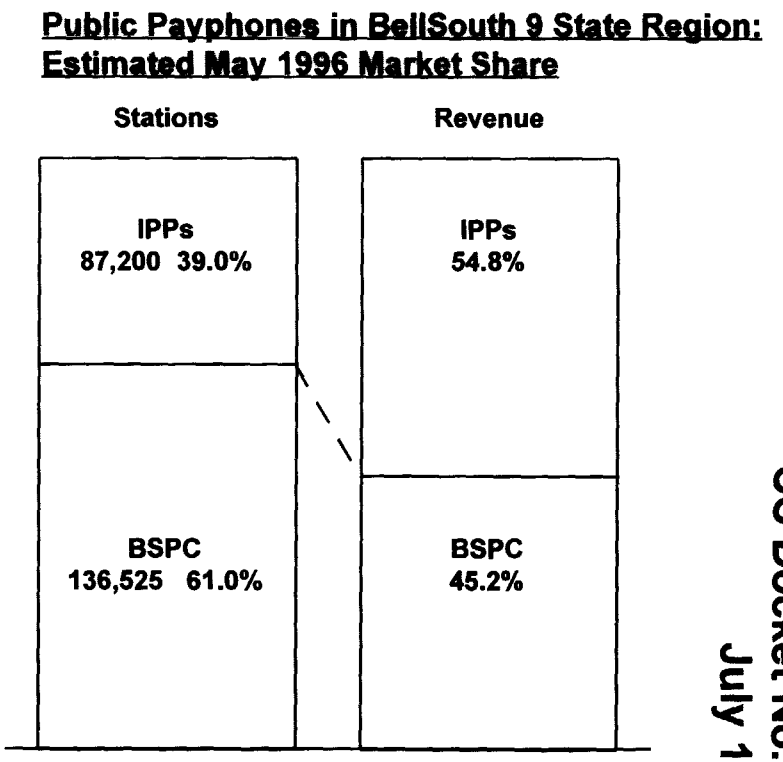
M. Robert Sutherland
Jonathan Banks
Theodore R. Kingsley
Its Attorneys

Suite 1700
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610
(404) 249-3392

DATE: July 15, 1996

Within BellSouth service territory (in the 9 states of AL, FL, GA, KY, LA, MS, NC, SC, TN), independent payphone providers (IPPs) have taken a dominant 54.8 percent market share of public payphone revenue. It is misleading and self-serving for the APCC, interexchange carriers and others to suggest that the RBOCS have monopoly control of the payphone market. In fact, MCI, AT&T, Sprint, and LDDS WorldCom all have active payphone business operations and compete vigorously with BellSouth, as do hundreds of IPPs.





Based on data as of May 1996
Produced by BellSouth Public Communications ("BSPC"), 7-12-96

BellSouth Exhibit A
CC Docket No. 96-128
July 15, 1996

BellSouth Exhibit B
CC Docket No. 96-128
July 15, 1996

Number of Certificated Independent Payphone Providers (IPPs) Operating Within the BellSouth Region

(As of 12/95)

State	Number of Certificated IPPs
Alabama	**110**
Florida	**1,016**
Georgia	**505**
Kentucky	**293**
Louisiana	**243**
Mississippi	**107**
North Carolina	**491**
South Carolina	**1,102**
Tennessee	**387**

1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3919
(202) 789-3400
FAX (202) 789-1158

KECK, MAHIN & CATE

FILE NUMBER 45693-420

DIRECT DIAL (202) 789-3419

June 2, 1995

The Honorable Larry Pressler
Chairman, Commerce Committee
United States Senate
243 Senate Russell Office Building
Washington, D.C. 20510-4101

Dear Chairman Pressler:

On behalf of the American Public Communications Council ("APCC"), we wrote to you on May 16th to inform you that APCC and the seven Regional Bell Operating Companies ("RBOCs") had reached agreement on a proposed amendment to S. 652 regarding payphones (file copy enclosed). We are now writing to inform you that with some clarifying modifications inserted to address carrier concerns, the APCC/RBOC agreement has been adopted in H.R. 1555 by unanimous vote of the House Commerce Committee and to request your support for the amendment, as modified to conform to S. 652 (copy enclosed). This amendment would replace the Kerry amendment in S. 652 with respect to payphones (currently Section 311 of S. 652).* We are working with Senator Kerry to gain consensus on a manner for including this proposed amendment in S. 652.

As our letter of May 16th indicated, we were continuing negotiations with the interexchange carriers to gain their support for this amendment. After the House Subcommittee on Telecommunications adopted by voice vote an amendment offered by Congressman Barton (R-TX), which embodied the APCC/RBOC agreement, APCC and the RBOCs reached agreement with AT&T on modified language to address each of the concerns raised by AT&T. The full House Commerce Committee adopted unanimously the changes that were made to address the concerns specifically raised by AT&T and included the payphone amendment in H.R. 1555. We believe this amendment should be adopted in lieu of the current Kerry amendment in S. 652 because it will more effectively address the major structural problems that have existed in the payphone industry since the

---

* This amendment retains intact the Kerry amendment's provisions concerning telemessaging services.

inception of competition and provide a basis upon which all industry participants compete on equal terms.

We also believe this amendment is fair to the carriers. There was concern expressed that a provision of this amendment (Section 265 (b)(1)(D)) that permits the RBOCs to select and contract with interexchange carriers to provide long distance service from their payphones would give the RBOCs the exclusive right to determine the interLATA carrier, regardless of the location provider's wishes. This concern is wholly unfounded. Section 265 (b)(1)(D) merely provides the RBOCs with the same opportunity that independent payphone providers have to negotiate with the location provider regarding the selection of an interexchange carrier. Nevertheless, to alleviate any concerns raised by the carriers about this amendment, language was inserted at AT&T's request to make absolutely clear that location providers of the payphone still retain the power to control the selection of an interexchange carrier as part of their choice of payphone service providers.

The carriers raised an additional concern that in those instances where the location provider consents to the RBOC choosing the interexchange carrier, the RBOC will choose its own long distance service irrespective of what competing long distance providers may be offering. Preliminarily, it is important to observe that nothing in this amendment would allow the RBOCs to operate as interexchange carriers by providing long distance facilities or even reselling long distance telephone service. Entry into those activities would be governed by S. 652's general provisions regarding RBOC entry into long distance.

More importantly, an RBOC payphone division would not automatically presubscribe its payphones to the RBOC's long distance service. Under this payphone amendment, the RBOC payphone division would not have access to cross subsidies from exchange and exchange access revenue, and, therefore, must make prudent business decisions. If AT&T, for example, is offering the best package for long distance service, the RBOC payphone division will, in all likelihood, select AT&T to provide interexchange service.

As previously stated, AT&T agreed to this amendment at the House Commerce Committee level after changes were made to satisfy its concerns. We are continuing our discussions with the major carriers in order to address any residual concerns they may have. Nevertheless, we do not believe that any carrier should have a veto over an amendment which has the support of the two major competitive interests in the payphone industry and which addresses

the major structural problems that have existed in the payphone industry since the inception of competition. Further, to the extent any carrier has residual concerns about this payphone amendment, the FCC proceeding required to implement the terms of the amendment will afford all participants ample opportunity to raise those concerns and have them resolved.

Thank you for your attention to this matter. We will call your office soon to request your support in our efforts to include this amendment in S. 652.

Very truly yours,

Albert H. Kramer

Mark R. Paoletta

Attachments
cc: Donald McClellan
Katie King

1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3919
(202) 789-3400
FAX (202) 789-1158

KECK, MAHIN & CATE

FILE NUMBER 45693-420

FILE COPY

DIRECT DIAL (202)789-3419

May 16, 1995

The Honorable Larry Pressler
Chairman, Commerce Committee
United States Senate
243 Senate Russell Office Building
Washington, D.C. 20510-4101

Dear Senator Pressler,

On behalf of our client, the American Public Communications Council ("APCC"), we are writing to inform you that APCC and the seven Regional Bell Operating Companies ("RBOCs") have resolved our conflicting interests with respect to S. 652 and have reached an agreement on proposed legislation regarding payphones. A proposed amendment is attached hereto.

This provision would replace the Kerry amendment with respect to payphones (currently section 311 of S. 652). We are working with Senator Kerry, the original sponsor of what is now Section 311 of S. 652, to reach consensus on the manner of including this proposed APCC/RBOC amendment in S. 652. We are requesting your support in these efforts.

The proposed APCC/RBOC amendment would provide important changes in the payphone industry to promote a truly competitive environment for RBOCs and independent payphone providers. The RBOCs would be required to terminate any existing subsidies of their payphones by exchange and exchange access revenue, and to cease any discrimination in the treatment of their own and competitive payphone services. Section 265 (a) and (c)(1)(B).

The proposed APCC/RBOC amendment would also require the FCC to establish a per-call compensation plan, uniformly applicable to LEC and non-LEC payphones, to ensure that all payphone providers are fairly compensated for every use of their

payphones. Section 265 (c)(1)(A) and (B). The APCC/RBOC proposed amendment would also direct the FCC to prescribe nonstructural safeguards for RBOC payphones to implement proposed Section 265(a)'s prohibition on cross-subsidies and discrimination. Section 265 (c)(1)(C).

Finally, the proposed APCC/RBOC amendment would remove any existing restrictions, such as the MFJ's prohibitions, with respect to payphone providers' selecting and contracting with the presubscribed interLATA or intraLATA carriers serving their payphones. Section 265(c)(1)(D).

This amendment will benefit consumers because it will promote competition in the payphone industry, promote the deployment of payphones throughout the country, and encourage the development of new and enhanced payphone services. It addresses the fundamental problems in the payphone industry and provides for a competitive environment in which all competitors compete on equal terms. At the same time, the proposed amendment would preserve state public utility commissions' ability to address all major public policy concerns of the states regarding public payphones.

We have been negotiating with the interexchange carriers to gain their support for this amendment because we believe this proposal is fair to the interexchange carriers. Under this amendment, the carriers would be unburdened from the subsidy currently flowing to RBOC and other LEC payphones from access charges levied on long distance calls. The current system would be replaced by a uniform system of compensation for all payphone providers.

Moreover, allowing all payphone owners to freely select the interLATA and intraLATA carriers serving their payphones should not raise competitiveness concerns in long distance markets. Nothing in the APCC/RBOC amendment allows the RBOCs to enter the long distance business from their payphones; entry into the long distance business would be governed by S. 652's general provisions regarding RBOC entry into long distance. Further, given the mandate for the FCC to adopt effective safeguards to eliminate subsidization of the Bell companies payphone operations, the Bell Companies' ability to select the carrier serving their payphones cannot be abused to harm long distance competition.

Any concerns about this proposed amendment not already addressed by the language of the amendment can be resolved in the FCC proceeding required to implement its terms. The FCC proceeding will afford all industry participants ample opportunity to raise any concerns and have them resolved.

If you have any questions, please call one of us (Mark Paoletta at (202) 789-3434 or Al Kramer at (202) 789-3419). Thank you for your attention to this matter. We will call your office very soon to request support for this proposed amendment.

Sincerely,

Albert H. Kramer

Mark R. Paoletta

Attachment

cc: Donald McClellan
Katie King

KECK, MAHIN & CATE

1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3919
(202) 789-3400
FAX (202) 789-1158

FILE NUMBER 46593-420

DIRECT DIAL (202) 789-3434

October 16, 1995

VIA HAND DELIVERY

The Honorable Larry Pressler
SR-243 Russell Senate Office Building
Washington, D.C. 20510

Re: Kerry Payphone Provision in S. 652

Dear Senator Pressler:

We much enjoyed the opportunity to speak with you about S. 652's payphone provision at your fundraiser last Thursday. We very much appreciate your willingness to speak to your staff about this provision.

As we explained, S. 652's payphone provision, which was offered at mark-up by Senator Kerry and four other Democrats, was taken verbatim from last year's telecommunications bill, S. 1822. After this amendment was adopted, we learned that the RBOCs were adamantly opposed to this provision. As a result, the independent payphone providers and the RBOCs negotiated compromise language, and this language was offered as an amendment by Representative Joe Barton at the House Commerce Committee mark-up. As opposed to S. 652, the House payphone provision has the support of all the RBOCs.

Although S. 652's payphone provision addresses some of the structural problems in the payphone industry, H.R. 1555's payphone provision addresses all of the industry's structural problems. More importantly, based on comments by Republican staff members, it accomplishes this in a less regulatory fashion than S. 652 because the Kerry amendment empowers the FCC to consider requiring the RBOCs to provide payphone services through a separate subsidiary. In light of these differences between the provisions, we cannot understand why the Republican staff on the Senate Commerce Committee is opposed to the Republican-sponsored House payphone provision. We have taken the liberty of enclosing a memorandum, setting forth this issue in greater detail, which we have sent today to the Republican staff on the Senate Commerce Committee.

KECK, MAHIN & CATE

Again, we very much enjoyed speaking with you and appreciate your offer to speak to your staff about S. 652's payphone provision.

Sincerely,

Albert H. Kramer

Mark R. Paoletta

Enclosure

100636D3

KECK, MAHIN & CATE

MEMORANDUM

TO: Republican Staff on Senate Commerce Committee

DATE: October 16, 1995

FROM: Mark Paoletta
Al Kramer

FILE NO.: 45693-420

RE: Barton Payphone Amendment

The Barton Payphone Amendment, contained in H.R. 1555, has three major elements. Like S. 652, the Barton Payphone amendment prohibits the RBOCs from cross-subsidizing their payphone operations and from discriminating in favor of their own payphone operations. It also 1) permits RBOCs to negotiate the selection of interLATA carriers; and 2) provides for implementation of a per call compensation plan. All of these elements should be very acceptable, from a policy perspective, to the Republican staff who are interested in deregulating the telecommunications industry. Set forth below is a brief discussion of why each of the three major elements of the Barton Payphone Amendment should be acceptable to the Senate Republican staff.

1) The Barton Amendment would prohibit the RBOCs from using any local exchange or exchange access revenue to subsidize their payphone operations and from discriminating in favor of their own payphone operations. S. 652 also contains these prohibitions, and these provisions should be unassailable as they merely provide that a monopoly service/bottleneck supplier should not be cross-subsidizing/or discriminating against a competitive operation.

But notably, in banning cross-subsidies, the Barton payphone provision would not allow the FCC to require RBOCs to create a separate subsidiary for their payphone operations. The Senate bill, in contrast, provides that the FCC can find that a separate subsidiary for payphone services may be necessary to prevent the RBOCs from cross-subsidizing. Several Republican staff members have stated their reluctance to creating separate subsidiaries, and, therefore, the Barton Payphone Amendment, as opposed to the provision in S. 652, is consistent with such views.

2) The Barton Payphone Amendment allows the RBOCs to negotiate with location providers for the authority to select the interLATA carriers from their own payphones. This is a narrow provision. It does not allow the RBOCs into interLATA. Whether, how, and when the RBOCs can be the carrier for interLATA traffic from their own payphones will be governed by the general interLATA entry provisions of the legislation.

Rather, this provision overturns a restriction that was imposed by Judge Greene, who ruled in 1988 that any RBOC involvement with choosing the interLATA carrier from a RBOC payphone, including merely negotiating with the premises owner for the right to select the interLATA carrier, constituted interLATA services.

As a result, the large interLATA carriers have had free reign to use their overwhelming market muscle to capture, on their terms, the interLATA payphone traffic from smaller location providers. Further, because the RBOCs do not have any control over who provides interLATA services to their payphones and earn no revenue from the interLATA carrier, "slamming" has become particularly rampant at these telephones, much to the consumers detriment. In contrast, slamming is virtually non-existent at independent payphones because those payphone providers have an interest in who is carrying their interLATA traffic.

Any true deregulator should be encouraged by this provision because it "unshackles" the RBOCs from some of the MFJ restrictions. More importantly, this provision allows for parties of equal negotiating power to square off against one another. Instead of AT&T negotiating with the local convenience store or mall owner, the House provision permits the RBOCs to obtain location providers' authority to aggregate the location providers' RBOC payphones with other payphones to negotiate head-to-head with the large carriers to determine which of those carriers will provide interLATA services from RBOC payphones. At the same time, as we have repeatedly stated, the location provider retains the ultimate choice of interLATA carrier by virtue of controlling the telephone.

Obviously, it would be crazy for the long distance carriers not to resist this amendment. However, this legislation is intended to make the marketplace more competitive by removing arbitrary restrictions, such as this restriction, on the RBOCs, and not to satisfy any one particular industry. If there are any complaints about this provision, they must be assessed with respect to its benefits to the consumers, and not whether a particular industry supports or opposes the provision.

In order to gain the support of the long distance carriers in the Senate, we had agreed to make this provision more regulatory by sending this matter to the FCC to be resolved in yet another rulemaking proceeding. That agreement subsequently fell apart. It would be ironic, to the say the least, if the Republican staff now restored a rulemaking proceeding on a provision that is dismantling a portion of the MFJ that involves one of the more outdated of Judge Greene's MFJ rulings.

KECK, MAHIN & CATE

3) The Barton Payphone Amendment provides that all payphone providers should be compensated for the use of their payphone, namely by way of a per call compensation plan. The best explanation for the need for this provision has been previously supplied by four Senators on the Commerce Committee (Lott, Burns, Breaux and Kerry), who added "Additional Views" to the Senate Committee Report on the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA") (S. Rept. 101-439) (copy attached). In explaining their view that a compensation plan was necessary to address dial-around calls, such as access codes, 1-0-XXX, 950-XXX or an 800 number, the Senators wrote:

> As matters now stand, independent payphone owners will ordinarily receive no compensation for the traffic forwarded to non-affiliated interexchange carriers . . . At the same time, other telephone call handlers earn revenue on routed calls . . . In contrast, the independent payphone owner who invests in payphone equipment, and pays for installation and maintenance as well as on-going central office connection and line charges will receive no compensation for transferring consumer calls, as is required by this bill, to their choice of long-distance carriers. The independent payphone owner may even lose revenue-generating calls as their payphones are made unavailable by non-compensating callers.
>
> * * * *
>
> We support compensation for independent payphone operations. Independent payphone owners alone would be subjected to a legal requirement that they tie up their equipment with free calls. They argue with justification that fair play requires an order to the FCC to institute a system which will assure compensation for such calls.*

S. Rep. 439, 101st Cong., 2d Sess. 26-27 (1990) ("Additional Views" of Senators Lott, Burns, Breaux, and Kerry).

---

* Subsequent to these "Additional Views" to the Senate Committee Report on TOCSIA, rules requiring independent payphone providers to unblock all access codes have been adopted by the FCC but the compensation issue has yet to be fully addressed.

KECK, MAHIN & CATE

All four Senators (Lott, Burns, Breaux, and Kerry) remain on the Senate Commerce Committee and Senator Burns' aide at the time is now a telecommunications counsel on the Senate Commerce Committee. This provision is even more necessary than at the time of the enactment of TOCSIA as an increasingly high percentage of calls from payphones (close to 50% at some locations) are dial-around calls. Thus, independent payphone providers, as well as RBOC payphone providers, are not being fairly compensated for the use of their payphones.

In conclusion, the Barton Payphone Amendment is consistent, on the merits, with what we understand to be the Committee's goals in deregulating the telecommunications industry and making it more competitive for all parties. More importantly, although S. 652 addresses some of the structural problems in the payphone industry, the Barton Payphone Amendment addresses all the industry's structural problems. (Attached is a chart comparing each bill's respective payphone provision). We understand that all legislation is written in a political context, and the support of differing segments of the telecommunications industry is helpful for passage. Nevertheless, the merits of the legislation need to be addressed, and we believe that the provisions of the Barton Payphone Amendment are compelling and consistent with the Republican staff's goals of deregulating the telecommunications industry.

Attachments

cc: Earl Comstock
Mark Buse
Mark Baker
Jeanne Bumpus
Amy Henderson
Cynthia Dailard
Mike King

Comparison of the Respective Payphone Provisions in H.R. 1555 & S. 652

H.R. 1555 is more comprehensive than S. 652 in addressing the structural problems in the payphone industry and will create an environment in which all competitors compete on equal terms. H.R. 1555's payphone provision should be adopted at conference.

Provision	S. 652	H.R. 1555
RBOCs are prohibited from cross-subsidizing their payphone operations from exchange and exchange access revenue.	X	X
RBOCs may not discriminate in favor of their own payphones.	X	X
RBOC payphone operations must be removed from local exchange rate base.		X
FCC is directed to develop, within 9 months, a per-call compensation plan.		X
RBOCs will be permitted to negotiate selection of interLATA carrier(s) for their payphones, but premises owner retains the final choice of carrier(s). Existing contracts are grandfathered.		X
FCC is directed to implement nonstructural safeguards on RBOC payphone operations to implement provisions banning cross-subsidy and discrimination Computer III safeguards are the minimum standard.		X
FCC is directed to conduct a rulemaking to determine whether it is appropriate, in order to implement prohibitions on cross-subsidy and discrimination, to require RBOCs to provide payphone service through separate subsidiary.	X	
States are preempted from imposing conflicting rules.		X
FCC is directed to conduct a rulemaking on the provision and maintenance of public interest payphones.		X

STRATEGIC
POLICY
RESEARCH

7500 OLD GEORGETOWN ROAD SUITE 810 BETHESDA, MARYLAND 20814 (301) 718-0111 (301) 215-4033 FAX

Critique of Hatfield Cost Analysis

John Haring
Charles L. Jackson[1]

July 15, 1996

Introduction

MCI has attached to its Comments in this proceeding a *Payphone Compensation Cost Analysis* prepared by Hatfield Associates, Inc. (HAI), which it cites to support its contention that call compensation should be established at very low levels.[2] The HAI cost analysis is seriously flawed in both conception and execution. The payphone industry is not a public utility in which recovery of costs on average will suffice to maintain a given population of phones. The HAI analysis fails to address the problem of keeping payphones with below-average usage, *i.e.*, *most* payphones, economically viable. If the HAI approach to compensation were implemented, more than half of all payphones would receive compensation less than even the low-ball cost estimate HAI set out to recover.

HAI's stand-alone cost estimate understates set costs and business line costs, simply excludes many cost items that a genuine stand-alone operation would incur, and relies on a capital expense

---

[1] The authors are principals in Strategic Policy Research, Inc. Dr. Haring formerly served as Chief Economist of the FCC and Chief of the Commission's Office of Plans and Policy. Dr. Jackson formerly served as Chief Engineer on the Staff of the House Telecommunications Subcommittee and Engineering Assistant to FCC Commissioner Glenn O. Robinson.

[2] *See* MCI, *Comments*, *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, July 1, 1996.