EX PARTE OR LATE FILED

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street NW • Washington, DC 20037-1526
Tel (202) 785-9700 • Fax (202) 887-0689
Writer's Direct Dial: 202-828-2236
A5691.482

RECEIVED
AUG - 2 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

August 2, 1996

BY COURIER

ORAL EX PARTE PRESENTATION

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: **Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128**

Dear Mr. Caton:

Pursuant to the Commission's rules on ex parte presentations, 47 CFR §1.1206(a), we hereby submit information on behalf of the American Public Communications Council ("APCC") in the above-referenced docket.

On July 11, 1996, Albert Kramer and Robert Aldrich of this law firm met with Dan Gonzalez and Kasia Biernacki, assistants to Commission Rachelle Chong. We discussed various issues raised in the Notice of Proposed Rulemaking in these proceedings, FCC 96-254, released June 6, 1996, including issues relating to payphone compensation and reclassification of local exchange carrier ("LEC") payphones. The enclosed material was provided the day before the meeting as background on one of the issues discussed.

0+1

598 Madison Avenue • New York, New York 10022-1614
Tel (212) 832-1900 • Fax (212) 832-0341
http://www.dsmo.com

All of the views presented on the other issues discussed are fully detailed in the comments and reply comments filed by APCC and the Georgia Public Communications Association.

Sincerely,

Robert F. Aldrich

RFA/nw
Enclosure
cc: Mr. Dan Gonzalez
Ms. Kasia Biernacki

INTERIM COMPENSATION FOR INDEPENDENT PUBLIC PAYPHONE ("IPP") PROVIDERS

In the NPRM, FCC 96-254, ¶¶ 39-40, the Commission requested comment on whether to prescribe interim compensation of IPP providers. The Commission's consideration of interim compensation is based on two factors. First, the Commission has been under a court mandate since May 1995 to redress the Commission's failure, five years ago, to "consider the need to prescribe compensation" for IPP providers for subscriber 800 calls, as required by Section 226 of the Act. NPRM, ¶¶ 11-12. As a result of this error, for five years IPP providers have received no compensation for subscriber 800 calls.

Second, the Commission already had a record indicating dramatic growth in subscriber 800 and access code calling. NPRM, ¶¶ 39-40. Additional data now shows that subscriber 800 calling has risen to roughly 100 calls per payphone per month -- about 50% of all coinless payphone calls, and more than six times the volume of access code calls originally estimated by the Commission in 1992. Access code calls also have increased, while revenue-producing 0+ calls have dramatically declined.

Interim compensation would ensure immediate compensation relief for IPP providers pending the implementation of a permanent compensation system and restructuring of the industry as required by Section 276. (The Bell companies have requested that implementation of a permanent system be delayed for as much as a year while the Commission's Section 276 rules are implemented. During this period the Bells would continue to be guaranteed recovery of the costs of their payphone operations.)

APCC has requested that the Commission prescribe interim compensation for subscriber 800 calls at 40 cents per call (the same rate that was the basis of the compensation prescribed for access code calls in 1992), to be paid on a flat-rate basis totaling $40.00 per payphone per month (100 calls x 40 cents). The payment mechanism would simply utilize the existing system for paying access code compensation, with virtually no changes other than the level of compensation.

In addition, APCC urged the Commission to require major carriers to pay interim access code compensation on a per-call basis. Per-call payment mechanisms already have been implemented by AT&T and Sprint on a nationwide basis and by MCI in Illinois.

Attached is a one-page summary of the primary arguments for and against interim compensation. Copies of the NPRM and excerpts from various comments for and against interim compensation are also attached.

Arguments for and Against Interim IPP Compensation

Interim IPP compensation is supported by APCC and other IPP providers. It is generally opposed by IXCs (who would pay interim compensation) and some LECs (who compete with IPP providers). However, BellSouth supports interim IPP compensation. And AT&T supports interim IPP compensation (at 25 cents per call) for intrastate access code calls. Parties supporting interim IPP compensation contend:

- Compensation for subscriber 800 calls is long overdue -- it should have been, but wasn't, considered in 1991 pursuant to Section 226 of the Act.

- Section 276 clearly entitles IPP providers to be compensated for "each and every"subscriber 800 call and access code call.

- Permanent compensation may be delayed as much as one year. Meanwhile, many IPPs are losing more money each day as uncompensated calls grow dramatically while revenue-producing calls continue to decline.

Opponents argue:

- IPP providers are fairly compensated already

- Interim compensation for IPPs would be unfair to LECs

- The record is insufficient to prescribe interim compensation

- It is wasteful to establish an interim system which will have to be replaced in a few months by a permanent system

Supporters reply:

- IPP providers obviously are not fairly compensated since they receive nothing for subscriber 800 calls

- LECs continue to receive compensation in the form of access charges and other regulated payphone subsidies.

- The record supports prescribing interim compensation at the same 40 cents per call level previously used in the Commission's compensation orders.

- The mechanism for allocating and collecting interim compensation on a flat-rate basis already exists in the previously established access code compensation system.

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

Adopted: June 4, 1996 **Released: June 6, 1996**

Comments Due: June 27, 1996
Replies Due: July 8, 1996

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	

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.[35]

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"[36] 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.[37] The Commission, therefore, limited compensation to interstate "access code calls."[38] 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.[39]

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,[40] 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

---

[35] 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.

[36] 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

[37] 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.

[38] Id.

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

[40] 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.'"[41] The Commission's action on the remand is pending.[42]

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.[43] 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."[44] 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.[45] Together with the other subsections of Section 276, these three provisions help to establish regulatory parity for all payphone service providers ("PSPs"),[46] 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,[47] be "fairly compensated for each and every completed intrastate

---

[41] Id.

[42] 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.

[43] 47 U.S.C. § 276(b)(1)(A)

[44] 47 U.S.C. § 276(b)(1)(B)

[45] 47 U.S.C. § 276(b)(1)(B)

[46] 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

[47] 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

cap index to eliminate the payphone element.[105] 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.[106] APCC proposed a flexible rate that would be equal to the maximum rate for a local coin call in each area,[107] 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.[108]

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"[109] 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,[110] 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.[111] 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

---

[105] Pacific Bell Reply at 2.

[106] IPTA Comments at 4-7.

[107] APCC Comments at 2, 10.

[108] AT&T Reply at 4; Sprint Reply at 3; MCI Reply at 5.

[109] Second Report and Order, 7 FCC Rcd at 3256-57.

[110] Id.

[111] See paras. 16-22, above.

the Commission will complete the instant proceeding within the nine months mandated by Section 276,[112] 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.[113] 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."[114] 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."[115] APCC cites news stories suggesting that on a typical business day, 30 to 40 percent of all long distance calls involve 800 numbers.[116] 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."[117] 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.[118]

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.[119] APCC

---

[112] 47 U.S.C. § 276(b)(1).

[113] 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").

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

[115] Id.

[116] Id. at 7 (emphasis in the original).

[117] Id. at 8.

[118] AT&T pamphlet entitled "800 * 888 = TOLL FREE."

[119] 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.[120] 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.[121] 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[.]"[122]

---

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

[120] APCC Petition at 2-4

[121] See Ex Parte Letter of Robert Aldrich, Counsel, APCC to William Caton, Acting Secretary, FCC (Oct. 20, 1995).

[122] 47 U.S.C. § 276(b)(1)(B).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C

RECEIVED
JUL 1 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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 AMERICAN PUBLIC COMMUNICATIONS COUNCIL

Albert H Kramer
Robert F Aldrich
DICKSTEIN, SHAPIRO, MORIN &
OSHINSKY, L.L.P
2101 L Street, N.W
Washington, D C 20037-1526
(202) 828-2226

Attorneys for American Public
Communications Council

July 1, 1996

548675

Commission could lawfully decline to prescribe fair compensation for local coin calls, it would be a legal error for the Commission to refuse to take account of its failure to address fair compensation for local coin calls when prescribing compensation for other classes of calls. If the FCC's prescribed compensation does not apply to the local coin rate, the compensation rate must be set at the higher end of the range, i.e., at least 80 cents per call.

Finally, in order to minimize the need to revisit the compensation rate in the future, whatever rate is prescribed should be "indexed" so that, as the Consumer Price Index changes, the local coin rate changes at the same rate (rounded to the nearest nickel).

F. Interim Compensation (¶¶ 39-40)

The Commission should provide interim compensation to independent public payphone ("IPP") providers for currently uncompensated calls, pending implementation of the comprehensive scheme mandated by Section 276. Under the current system of regulation, LEC payphone operations are able to receive full compensation for their payphones from regulated interstate or intrastate exchange or exchange access revenue. By contrast, the existing IPP compensation provides compensation for only a small percentage of the calls for which compensation is needed and mandated by Section 276. Currently, IPP providers are totally uncompensated for the majority of coinless calls made from their payphones. For access code calls, IPP providers are currently compensated for only a portion of the calls pursuant to the interstate access code compensation scheme, and intrastate compensation regulations adopted in a very few states. In most states, no compensation at all has been prescribed for intrastate access code calls. Moreover, for subscriber 800 calls, which data indicate currently accounts for roughly half of coinless calls, IPP providers

receive no compensation at all, at the interstate level or, in virtually all cases, at the intrastate level.

The Commission was originally asked to consider prescribing compensation for IPP providers for subscriber 800 calls in the TOCSIA compensation proceeding in 1991, but concluded that it lacked authority to prescribe such compensation. The Court of Appeals reversed that decision, finding that compensation for subscriber 800 calls was within the scope of the compensation proceeding the Commission was required to conduct under TOCSIA in 1991.[29] Therefore, the court remanded the issue with instructions to consider the need to prescribe compensation for IPP providers for such calls. While Congress has now enacted a broader requirement for all payphone service providers to be fairly compensated on all calls, such compensation is not yet in place. Meanwhile, it has now been more than one year since the Court of Appeals directed the Commission to reconsider this issue, and more than five-and-a-half years since Congress originally directed the Commission to consider the need for payphone compensation.

During this period when IPP providers have not been compensated, the volume of calling to subscriber 800 numbers has rapidly increased, as the Commission noted in the Notice and in last year's Notice of Proposed Rulemaking to consider to address the depletion in the supply of 800 numbers.[30] This extraordinary growth in usage of 800 numbers has caused IPP providers to incur more and more uncompensated use of their payphones, and has allowed interexchange

---

[29] See Florida Public Telecommunications Association v. FCC, 54 F.3d 857 (D.C. Cir. 1995) ("FPTA")

[30] See In the Matter of Toll Free Service Access Codes, Notice of Proposed Rulemaking, CC Docket No. 95-155, FCC No. 95-419 (released October 6, 1995) at ¶¶ 1-3.

carriers ("IXCs") to benefit from receiving more and more traffic from IPPs without payment for such use of payphones.

IPP providers should not continue to go uncompensated for the use of their payphones to originate subscriber 800 calls and other currently uncompensated calls. While the Act requires the Commission to establish a permanent compensation scheme that ensures that all payphone service providers are compensated for all calls, that compensation scheme is unlikely to be implemented for at least four months. 47 U.S.C. § 276(b)(1) (providing for regulations to be finalized by early November). Moreover, unforeseen difficulties in implementation could prevent a permanent, comprehensive compensation scheme from taking effect immediately upon adoption.

Therefore, the Commission should prescribe interim compensation for IPP providers for currently uncompensated calls originating from their payphones. Such interim compensation will ensure immediate compliance with the court of appeals mandate in FPTA, so as to implement as quickly as possible the long deferred mandate of Congress under TOCSIA. In addition, such compensation will expedite implementation of Congress' Telecommunications Act mandate "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . " as well as implementation of the Congressional intent underlying Section 276 that all discrimination between LEC payphones and IPPs be eliminated.[31]

Interim subscriber 800 compensation should be prescribed on the basis of 40 cents per call. If carriers cannot immediately pay such compensation on a per-call basis (although they are

---

[31] S. Rep. No. 104-458, 104th Cong., 2d Sess. 158 (1996).

doing so in Illinois), APCC proposes that interim compensation be based on a flat rate similar to flat-rate access code compensation.

Under this approach, each IPP provider would receive equal flat-rate per phone per month payments, based on 40 cents per call times the average number of subscriber 800 calls. Attachment 1 shows the average numbers of subscriber 800 calls per phone per month placed from samples comprising 2,000 - 4,000 payphones during the months of March - May 1996. These data show an average of about 100 subscriber 800 ("unmatched") calls per phone per month. Therefore, interim subscriber 800 compensation should be prescribed at a level of $40 per payphone per month.

Each carrier's share of this total would be based on its share of toll revenues (or its share of 800 revenues, if a reliable source of such data exists).[32] For purposes of determining which carriers should be subject to interim compensation obligations, the Commission should use the same $100 million cut-off that currently applies to flat-rate access code compensation. The only difference is that, in the case of subscriber 800 calls, Bell companies and other large LECs are substantial participants in the market. Therefore, the obligation to pay interim subscriber 800 compensation should not be limited to interLATA carriers.

In addition to interim compensation for subscriber 800 calls, the Commission should prescribe an interim revision of the existing compensation for access code calls to reflect the increased number of access code calls and the Commission's expanded jurisdiction over such calls.

---

[32] This scheme may also be an alternative to per-call tracking under the permanent compensation rule.

Since AT&T, MCI and Sprint all acknowledge that they can pay compensation for access code calls on a per-call basis, those companies should all pay access code compensation on a per-call basis for all interstate and intrastate calls, just as AT&T is doing today.[33] However, the rate should be prescribed on an interim basis at 40 cents per call. Other carriers would pay access code compensation on a flat-rate basis based on the current level of access code calling, which is 40 calls per month. Carriers below the top three would pay based on (1) their current percentages of access code calls (see attached data) or (2) their current percentages of toll revenues (as under the current formula for access code compensation)

It is particularly important for MCI to begin paying compensation on a basis that reflects its actual share of access code calling. Until recently, MCI professed an inability (unique among the top 3 carriers) to track access code calls. MCI recently acknowledged that it can track access code calls, but nevertheless has been allowed to continue to pay flat-rate compensation that greatly understates its actual share of access code calling, which APCC's data indicate is about 33%. In addition, by continuing to pay flat-rate compensation MCI is avoiding its obligation to compensate IPP providers for the higher overall volume of access code calls. Therefore, for purposes of interim compensation, MCI should be given a choice. The first alternative is to begin paying per-call compensation on all calls, on the same basis as AT&T and Sprint. The second alternative is to continue paying flat-rate compensation but at a level based on sample data indicating the actual number of access code calls delivered to MCI from sample payphones. According

[33] Sprint is currently paying per-call access code compensation for interstate calls, but is paying such compensation for intrastate calls only in those few states that have ordered per call access code compensation

to APCC's payphone sample data, this level should be 33% of 40 calls, or about 13 calls x 40¢ = $5.20 per month.

APCC urges the Commission to make interim compensation effective as of the date of the Notice. IPP providers have been providing the use of their payphones to make subscriber 800 calls for more than a decade, while receiving no compensation whatsoever. As discussed above, APCC first officially requested such compensation in 1990. In 1991, the Commission ruled that equity requires payment of compensation for the use of IPPs, but believed that it lacked authority under the Telephone Operator Consumer Services Act of 1990 to order subscriber 800 compensation. Subsequently, in FPTA, the Court of Appeals overruled the FCC on this point. Thus, it has been apparent for the last five years that IPP providers were entitled to such compensation, and the only reason they have not received the compensation is because of a legal error of statutory interpretation. Carriers clearly have been on notice that they are not entitled to a free ride.

Further, the Telecommunications Act of 1996 unequivocally mandates the payment of compensation for subscriber 800 calls. In this regard, the federal statute is similar to the Illinois payphone compensation statute, which has been found to apply retroactively to calls that were clearly compensable under the statute. In relevant part, the Illinois statute provided that:

> Any telecommunications carrier using the facilities or services of a payphone provider shall pay the provider just and reasonable compensation for the use of those facilities or services to complete billable operator services calls and for any other use that the Commission determines appropriate consistent with the provisions of this Act. The compensation shall be determined by the Commission subject to the provisions of this Act.

Ill. Public Utilities Act, § 13-510. In 1995 the Illinois Commerce Commission prescribed compensation for access code calls both prospectively and retroactively to May 14, 1992, the date of

enactment of the statute. The ICC reasoned that the carriers "had an obligation as of May 14, 1992, to compensate [IPP providers] for the use of their facilities or services for billable operator services." AAA Coin-Phones & Systems, et al. vs. AT&T Co., Order, Docket No. 92-0400, issued October 5, 1995, at 21. The Commission added

> Each of the Respondents to this proceeding knew or should have known, that as of May 14, 1992, a payphone provider which provided services or facilities to complete a billable operator service call was entitled to compensation from the OSP. Such a requirement was distinctly set forth in Section 13-510.

Id. at 22. The Commission found that subscriber 800 calls were not retroactively compensable because they were not "billable operator services calls" for which compensation was expressly mandated by the statute.

Section 276 similarly places carriers on notice that IPP providers are entitled to fair compensation for calls placed from their payphones. Unlike the Illinois statute, however, Section 276 clearly mandates that IPP providers be compensated for subscriber 800 calls as well as access code calls. The legislative history further clarifies that both subscriber 800 and access code calls are included in the statutory mandate. See S. Rep. No. 458, 104th Cong., 2d Sess. 158 (1996) (compensation to include "for example, 'toll-free' calls to subscribers to 800 and new 888 services"). Even more than Illinois' compensation statute, Section 276 establishes an indisputable right of IPP providers to compensation and warrants the payment of compensation at least as of the date that the FCC's Notice yet again put carriers on notice of their compensation obligations.

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

In the Matter of

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

REPLY COMMENTS OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL

Albert H. Kramer
Robert F. Aldrich
DICKSTEIN, SHAPIRO, MORIN
& OSHINSKY, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2236

Attorneys for the American Public Communications Council

July 15, 1996

556538

relevant marginal cost is the cost of installing and operating an additional payphone. To the extent that the Commission relies on marginal cost analysis, it must ensure that rates for "each and every . . . call" are sufficient so that the total revenues to be obtained from all calls made at such a payphone (which because it is "marginal," will have below-average calling volumes), will be adequate to recover the total marginal costs of installing and operating the payphone.

F. Interim Compensation (¶¶ 39-40)

The parties opposing interim compensation for IPP providers do not present any persuasive arguments why IPP providers should not receive their long-overdue compensation for subscriber 800 calls and other currently uncompensated calls, pending the implementation of a compensation scheme applicable to all PSPs.

The RBOC Coalition's comments on this issue (from which BellSouth commendably dissents) are particularly disingenuous. On the one hand, these Bell companies request that implementation of per call compensation be delayed for one year, and that in the interim, their payphone operations be allowed to continue to receive subsidies from access charges and other local exchange revenues. On the other hand, the same Bell Companies deny that IPP providers should have any right to receive compensation in the interim for their payphones, which never have received any subsidy. See House Report at 88.

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

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

REPLY COMMENTS OF PEOPLES TELEPHONE COMPANY, INC.

Eric L. Bernthal
Michael S. Wroblewski
LATHAM & WATKINS
Suite 1300
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-2200

Bruce W. Renard,
General Counsel
PEOPLES TELEPHONE COMPANY, INC.
2300 N.W. 89th Place
Miami, FL 33172
(305) 593-9667

July 15, 1996

Public Communications Council and it endorses the comments of the Inmate Calling Services Providers Coalition.[1]

II. THE RECORD DEMONSTRATES THE NEED FOR THE COMMISSION TO ORDER IMMEDIATE INTERIM COMPENSATION FOR 800 SUBSCRIBER CALLS AND INCREASE CARRIER ACCESS CODE COMPENSATION TO REFLECT CURRENT CALL VOLUMES.

In its comments, Peoples demonstrated the acute need for interim compensation for "1-800 subscriber" calls (*e.g.*, 1-800-FLOWERS) and increased flat-rate or per call compensation for "carrier access" calls (*e.g.*, 1-800/950/10XXX/etc. dialed to reach a local/intraLATA/interLATA carrier's network).[2] Nothing submitted in the record disputes Peoples' evidence of the extremely high volume of 800 subscriber and carrier access code calls for which PSPs do not receive compensation. Indeed, Peoples provided the Commission with detailed per payphone and per call cost information to demonstrate how the current incomplete system of compensation does not compensate PSPs for more than one-half of its non-coin calls.[3]

Contrary to the assertions of some of the Regional Bell Operating Companies ("RBOCs") and interexchange companies ("IXCs"), interim compensation is wise, administerable and legal.[4] Indeed, Peoples commends BellSouth for its fair stance on this point, strongly supporting interim compensation, effective immediately, to place the payphone

---

1 *See* Comments of the American Public Communications Council, filed July 1, 1996; Comments of the Inmate Calling Services Providers Coalition, filed July 1, 1996.

2 *See* Comments of Peoples Telephone Company, Inc., filed July 1, 1996, at 6-12.

3 *Id.*

4 *See* Comments of the RBOC Coalition, filed July 1, 1996, at 19; Comments of Sprint Corp., filed July 1, 1996, at 25; Comments of AT&T, filed July 1, 1996, at 11.

industry on firmer financial ground -- even though this is not a benefit that BellSouth will receive directly.[5]

In the first instance, interim compensation is wise because it will (1) promote the continued deployment of payphone services to the benefit of the general public, and (2) limit PSP incentives to charge excessive rates for 0+ interstate calls or "cream-skim" locations. Indeed, interim compensation will facilitate PSPs' deployment of more advanced payphones with increased functionalities, in clean and working condition, in an increased number of locations -- all to the benefit of the general calling public.

In addition to these public interest benefits, there is no record to dispute that non-LEC PSPs have been waiting for some type of compensation for 800 subscriber calls since the Company began providing service over 10 years ago, and more recently, since Congress enacted the Telephone Operator Services Consumers Services Improvement Act of 1990,[6] mandating the provision of open 1-800 and other code call access methodologies. Requiring PSPs to provide services for which they are not compensated clearly violates the spirit of TOCSIA, as was recognized by the District of Columbia Circuit's decision in *Florida Payphone,* which ordered the Commission in May 1995 to "relook" at PSP compensation for originating 800 subscriber calls. In order to implement the compensation system required by the court, the Commission adopted a *Second Further Notice* in August 1995.[7] Indeed, if it

---

5 *See* Comments of BellSouth Corporation, filed July 1, 1996, at 7

6 47 U.S.C. § 226 ("TOCSIA").

7 Second Further Notice of Proposed Rulemaking, *Policies and Rules Concerning Operator Service and Pay Telephone Compensation*, 10 FCC Rcd 11457, 11464-67 (1995) ("*Second Further Notice*").

were not for the passage of the 1996 Act, which led to the suspension of the proceedings under the *Second Further Notice*, the Commission would more than likely have completed the development of a compensation scheme for 1-800 subscriber calls by this time.

Instead, non-LEC PSPs, such as Peoples, have been experiencing a dramatic depletion of revenue sources related to the dwindling number of compensable non-coin call volumes. As demonstrated in Peoples' comments, nearly 50 percent of all the non-coin calls that are entitled to compensation are 1-800 subscriber calls, totaling nearly 3.5 million uncompensated calls per month across Peoples' base of over 38,000 payphones.[8] Not only does this translate into millions of dollars of lost revenue every month, but it also plays a large role in the average per payphone monthly *loss* of $27.32 that Peoples currently faces.[9]

Peoples and other non-LEC PSPs incur this loss not because they are poor businesspeople, but because they have been waiting for a rational regulatory/economic structure and fair compensation for 1-800 subscriber calls since 1990, when TOCSIA first mandated open access to such calls. Therefore, while GTE and Sprint are correct in their observation that payphone providers "furnish payphone services and equipment as a business operation, placing phones generally at those locations where they are likely to prove commercially viable and profitable,"[10] they are absolutely wrong that "existing mechanisms will adequately compensate payphone providers for their costs" and that interim compensation

---

8 Peoples Telephone at 9

9 *Id.* at 23.

10 *See* Comments of GTE Service Corp., filed July 2, 1996, at 4; Sprint at 18.

is unnecessary.[11] Peoples and other non-LEC PSPs have placed phones with the justified expectation that they would be compensated for services rendered in providing access to subscriber 800 calls. Indeed, according to the court in *Florida Payphone*, Peoples was justified in expecting compensation for these services in 1990. After the remand of *Florida Payphone* and the adoption of the *Second Further Notice* in 1995, Peoples was justified in expecting that compensation for these services would begin by approximately May 1996. The business decision made by Peoples and other non-LEC PSPs to continue to operate at a loss over the short-term while waiting for a permanent system to be implemented does not mean that the current compensation system adequately provides compensation for these services, nor should this be used as an excuse to continue denying reasonable compensation on an interim basis.

Interim compensation is administerable because it can be modeled after the existing flat-rate/per call carrier access code compensation system. The compensation can be collected and disbursed using the same methodologies with little or no difficulties. The Commission simply has to update the subscriber 800 and carrier access code volumes, based on calling data already in the public record, and apply Peoples' proposed $0.45 per call rate, or such other rate it determines is appropriate to implement effective compensation for all relevant calls. In addition, interim compensation should serve to ease the timing and workload pressure facing the Commission in the proper implementation of the comprehensive per call compensation system required by Section 276. Proceeding in this fashion on an interim basis

[11] GTE at 10.