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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

August 20, 1996

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-128 Ex Parte Presentation

Dear Mr. Caton:

This letter is to advise you that Nicholas W. Allard, Michael S. Wroblewski and Bruce Renard on behalf of Peoples Telephone Company, Inc. ("Peoples") met with Daniel Gonzalez, Legal Assistant to Commissioner Rachelle B. Chong to discuss matters involved in Peoples' comments and reply comments in the above-captioned proceeding. The attached handout was also discussed. Pursuant to Section 1.1206(a)(2) of the Commission's Rules, two copies of this letter have been filed with the Secretary. Please contact the undersigned if there are any questions regarding this matter.

Respectfully submitted,

Michael S. Wroblewski

Michael S. Wroblewski

cc: Daniel Gonzalez (w/o attachment)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

INTERIM COMPENSATION

A. INTRODUCTION

1. In the Notice,[1] we sought comment on whether we should provide independent or "competitive" payphone service providers (referred to herein as "non-LEC PSPs") some measure of interim compensation for the growing volume of dial-around calls originated from their payphones for which they currently receive no compensation.[2] In particular, we sought comment on whether to order interim compensation for "1-800 subscriber" calls (e.g., 1-800-FLOWERS or 1-800-USA-RAIL) and to increase the flat-rate or per call compensation for "carrier access" calls (e.g., 1-800/950/10XXX/etc.) dialed to reach a carrier's network. We also sought comment on whether this interim compensation should be effective from the release date of the Notice (June 6, 1996) and ending on the effective date of the final rules adopted in this proceeding.[3]

2. We conclude that interim compensation is consistent with the 1996 Act and is necessary to promote the widespread deployment of payphone services to the benefit of the general public. Moreover, we believe that interim compensation is necessary to provide financial certainty to non-LEC PSPs, pending implementation of the comprehensive compensation system mandated by Section 276. We believe that this interim period should begin on the date when the *Notice* was released, June 6, 1996, and end when the BOCs have eliminated

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1 *See In the Matter of Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket 96-128 (FCC 96-254) (rel. June 6, 1996) ("*Notice*").

2 *See Id.* at ¶¶ 39-40.

3 *Id.*

all subsidies from their payphone operations and the Commission's new per call compensation regime established in this proceeding is implemented.

3. Consistent with our *Per Phone Compensation Order*, we order interexchange carriers ("IXCs") and LECs to participate, proportionately, in a flat-rate (per-payphone, per-month) 800-subscriber call compensation system to be administered in essentially the same manner as our existing rules for carrier access code compensation. We find that the $0.40 per call compensation rate level (which we determined was reasonable to compensate non-LEC PSPs for carrier access code calls in the *Per Payphone Compensation Order*) and which we have, as discussed above, determined to be the appropriate call rate, provides a reasonable surrogate rate for 800 subscriber compensation during this interim period.[4] Applying this rate to the estimated average non-LEC PSP 800 subscriber call volume of 90 calls per month yields a monthly rate of $36.00. In addition, we are increasing the carrier access code compensation flat-rate amount to reflect the increase in the carrier access code call volumes made from non-LEC PSP payphones also using the $0.40 per call rate as the basis for this amount. We increase this rate from $6.00 per month to $16.00 per month to reflect an average of 40 completed carrier access code calls per hour per month. We also order AT&T and Sprint to continue to pay per call compensation for carrier access code calls, but at a rate of $0.40 per completed call rather than the $0.25 per call currently paid, to be consistent with this interim regime.

B. DISCUSSION

4. We do not believe it is in the public interest for non-LEC PSPs to continue to be uncompensated during the interim period for the use of their payphones to originate (1) 1-

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[4] *See Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, 7 FCC Rcd 3251 (1992) ("*Per Phone Compensation Order*").

800 subscriber calls and (2) over 50 percent of carrier access code calls. Interim compensation will promote the continued deployment of payphone services to the benefit of the general public and will limit the burden of cost recovery and fair compensation that is currently, disproportionately, borne by 0+ interstate calls. We note that by ordering interim compensation for currently uncompensated calls and breaking the link between compensation and OSP rates, we will enhance our flexibility to take the necessary measures to take in the separate operator services *Notice* that we have initiated to ensure the rates charges by OSPs reflect consumers' expectations.[5]

5. As we observed in the *Notice*, and the record now confirms, uncompensated call volumes have exploded while 0+ call volumes have steadily declined.[6] Non-LEC PSPs report that this changing volume has forced them to remove many payphones.[7] In light of this, we believe 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."[8] Moreover, interim compensation will begin to put in place a solid, rational compensation mechanism

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5 *See Billed Party Preference for InterLATA 0+ Calls, Second Further Notice of Proposed Rulemaking*, CC Docket No. 92-77 (FCC 96-253) (rel. June 6, 1996).

6 See *Notice* at ¶39; Comments of the American Public Communications Counsel (filed July 1, 1996) at 35-36.

7 See Reply Comments of Peoples Telephone Company, Inc. (filed July 1, 1996) at 6-7.

8 *See Id. at 4..*

pending establishment of the Commission's final regulations under Section 276,[9] and will ensure that non-LEC PSPs are compensated fairly for currently uncompensated non-coin calls.

6. In addition to these public interest benefits, non-LEC PSPs have been waiting for some type of compensation for 800 subscriber calls since Congress enacted the Telephone Operator Services Consumers Services Improvement Act of 1990,[10] mandating the Commission "to consider the need to prescribe compensation" for non-LEC PSPs for use of their payphones to place subscriber 800 calls as well as other calls. Indeed, the District of Columbia Circuit's decision in *Florida Payphone,*[11] which ordered the Commission in May, 1995 to reexamine PSP compensation for originating 800 subscriber calls, requires us to provide non-LEC PSPs compensation for these calls.[12] It has been over 15 months since the Court's remand -- and almost six years since Congress enacted TOCSIA -- and we believe it is thus appropriate to order this interim compensation. Non-LEC PSPs would not be "fairly" compensated during this interim period for most of their non-coin calls if we do not order this compensation.

7. The method of billing for and collecting this interim PSP compensation shall be based on the existing flat-rate, per phone carrier access code compensation system that we initiated in 1992. We believe that this interim compensation can be collected and disbursed

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9 *See* Comments of BellSouth Corporation (filed July 1, 1996) at 7.

10 47 U.S.C. § 226 ("TOCSIA").

11 *Florida Public Telecommunications Ass'n v. FCC. ("Florida Payphone")* 54 F.3d 857 (D.C. Cir. 1995).

12 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*").

using the same methodologies with little or no difficulty.[13] A flat rate interim surrogate for subscriber 800 calls is particularly appropriate because carriers, like AT&T,[14] have stated that it will take time to implement per call tracking mechanisms for interstate subscriber 800 calls.

8. As we discussed above, Section 276(b)(1)(A) requires the Commission to establish a per call compensation scheme that provides PSPs with "fair" compensation for each and every completed interstate and intrastate call originating from a PSPs payphone (except 911/TRS calls). In determining the scope of "fair" compensation, we concluded in the *Notice* that "PSPs should be compensated for their costs in originating the types of calls for which . . . compensation is appropriate" and "that these costs should be measured by appropriate cost-based surrogates."[15] Although the record now contains PSP cost data,[16] we believe that cost-based surrogates are still appropriate measures to determine "fair" compensation rates. In particular, fair compensation requires us to consider, in addition to PSP costs, market-based indicators of the value of each and every call completed call originating from a payphone to determine whether PSPs are being fairly compensated.[17] The cost data submitted, however, does provide the Commission with a base line for testing the reasonableness of cost and market-based surrogates that we have chosen as the basis for compensation. Any compensation that does not

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13 *See* Comments of APCC at 37-38.

14 *See* Comments of AT&T (filed July 1, 1996) at 6.

15 *Notice* at ¶ 38.

16 *See* Comments of Peoples Telephone Company at 21; Comments of Communications Central Inc. (filed July 1, 1996) at Att. A.

17 See Comments of RBOC Coalition (filed July 1, 1996) at 9-12; Comments of APCC at 30-33.

permit PSPs to earn a reasonable return and receive reasonable value for their payphone assets dedicated to the public use cannot be "fair" as required by the plain language of Section 276.

9. As a result, we believe that the per call market-based surrogates that we relied upon in the *Per Phone Compensation Order* to compensate PSPs for carrier access code calls and the other cost-based market surrogates, either alone or collectively, provide a reasonable basis on which to base this interim compensation. Not only would we have used these same market-based surrogates to prescribe compensation for 800-subscriber calls, as we used for access code calls, had we prescribed compensation for subscriber 800 calls four years ago, but these market-based indicators continue to have applicability to the per phone flat-rate amount for carrier access code compensation amount that currently is in place. We decided four years ago that $0.40 per call is an appropriate per call compensation rate to compensate PSPs for carrier access code calls. The current record and congressional mandate to prescribe "fair compensation" validate that determination. Accordingly, we order the interim compensation prescribed here to also be based on a $0.40 per call rate. Consistent with this flat-rate interim compensation amount, we also increase the per call rate paid by AT&T and Sprint from $0.25 to $0.40 per call. This action is consistent with the statutory mandate to ensure that PSPs receive fair compensation for each and every completed call that originates from their payphones.

10. The existing carrier access code flat-rate "dial-around" compensation rate, which is based on a monthly average of 15 access code calls per payphone, has not been updated since it was set in 1992 and does not reflect current call volumes for access code calls.[18] Further,

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[18] *See Per Phone Compensation Order* at 3257; *see also* CC Docket No. 91-35 (cited by Comments of CCI at 10).

we must now ensure fair compensation for interstate and intrastate calls. In addition, non-LEC PSPs currently receive no compensation at all for subscriber 800 calls, which account for approximately 50% of all non-coin calls.[19] Here too, the Section 276 mandate requires us to provide for fair compensation for interstate and intrastate 800 subscriber calls. We believe that the appropriate call volumes upon which to order interim compensation are 40 access calls per payphone per month and 90 subscriber 800 calls per payphone per month. These volumes are based on a profile of payphone industry traffic patterns, in which APCC collected data from more than 20 diverse payphone companies operating more than 10,000 payphones over a three month period.[20] According to the APCC study, the industry average is approximately 40 access calls per payphone per month.[21] A monthly access call volume of 40 is also supported by the largest IPPs, Peoples Telephone Company (reporting an average of 43 access calls per payphone per month)[22] and CCI (reporting an average of 49.5 access calls per payphone per month),[23] as well as the RBOC Coalition, which used APCC-provided call volume data in the study it

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19 *See* Comments of Peoples Telephone Company at 9 (86 out of 180 non-coin calls); Comments of APCC at Att. A (99 out of 196 non-coin calls).

20 *See* Comments of APCC at 5 (describing survey, conducted during March, April and May of 1996). We also considered call volume estimates supplied by Peoples and CCI, the two largest non-LEC payphone companies in the industry. To be conservative, we used APCC data on access codes where it is the lowest estimate supplied. On subscriber 800 calls, where APCC's estimate was the highest, we combined APCC's estimate with Peoples' and CCI's to arrive at a rough average.

21 *Id.* at 6.

22 *See* Comments of Peoples Telephone Company at 3 (based on a representative sample of over 500 payphones nationwide from November 1995 through April 1996).

23 Comments of Communications Central Inc. at Att. B (based on a statistical sample of 21,400 payphones for the month of May, 1996).

commissioned from Arthur Andersen.[24] Likewise, interim compensation based on a call volume of 90 subscriber 800 calls per payphone per month is supported by the APCC study, which demonstrates an average of approximately 100 subscriber 800 calls per payphone per month.[25] Among Non-LEC PSPs, Peoples Telephone and Communications Central report averages of 86 and 79.7 subscriber 800 calls per payphone per month, respectively.[26] These numbers more than reflect the average non-LEC PSP call volume for these types of calls and, therefore, provide an adequate basis for calculating interim compensation.

11. Given these call volumes and the clear directives of Section 276, we order interexchange carriers ("IXCs") to participate, proportionately, in a flat-rate (per-payphone, per-month) 800-subscriber call compensation amount of $36.00 per month. In addition, we are increasing the carrier access code compensation flat-rate amount to $16.00 per month. During this interim period, we also order AT&T and Sprint to continue to pay per call compensation for

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24 Arthur Andersen Calculation of Per-Call Compensation and Review of Accounting a Regulatory Treatment for Payphone Asset Reclassification , July 1, 1996, *cited in* Comments of RBOC Coalition C (filed July 1, 1996) (using call volumes from APCC to compute per-call compensation rates) ("*Andersen Report*").

25 *See* Comments of APCC at 37.

26 *See* Comments of Peoples Telephone Company at 9 (average of 86 subscriber 800 calls per payphone per month); Comments of CCI at Att. B (average of 79.7 subscriber 800 calls per payphone per month).

carrier access code calls,[27] but at a rate of $0.40 per completed call rather than the $0.25 per call amount currently paid.[28]

12. We have ample legal basis to order the interim compensation outlined here, under our broad Section 4(i) authority which permits us to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[29] The interim compensation rate implemented by this order has two components. First, interim compensation from the date of this order will implement rates to be charged on a prospective basis. The Commission has the authority to order interim measures, as noted in *United States v. Southwestern Cable Co.*,[30] in which the Supreme Court found the Commission had the authority to take interim measures in the regulation of community antenna television systems. Relying on the broad authority granted under Section 4(i) of the Communications Act, the Court explicitly held that orders granting interim relief "do not exceed the Commission's authority."[31]

13. In addition, the D.C. Circuit has on numerous occasions upheld interim measures ordered by the Commission. For example, in *MCI Telecommunications Corp. v.*

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27 As under the current access code compensation system, payment by AT&T and Sprint on a per-call basis means that AT&T's and Sprint's proportionate shares of flat-rate compensation will be deducted from the total flat-rate access code compensation of $18.00 per payphone per month.

28 During this interim period, we do not believe it is necessary to order per call compensation for 0+ calls. See Discussion in section ____ above.

29 47 U.S.C. § 154(i).

30 392 U.S. 157 (1968).

31 *Id.* at 180.

FCC,[32] the D.C. Circuit upheld the Commission's interim measures for regulating customer premises equipment (CPE), holding that the FCC had engaged in "reasoned decisionmaking" and therefore its decision was well within its discretionary powers and subject to deference from the courts. The court noted: "Since the FCC could deregulate all CPE today, it is unreasonable to preclude the agency from avoiding hardships by denying it the power to phase-out regulations."[33] Moreover, the Commission has already developed a substantial record in the *Notice* on which to base an order for interim compensation here.

14. Finally, Section 276 also requires us to order interim compensation. We would ignore the statutory mandate for "fair compensation" if we failed to address interim compensation. The Act contemplates speedy resolution of this issue, as evidenced by the statutory deadline for completing these proceedings.

15. We also find that we have legal authority to order interim compensation that is effective as of the release date of the *Notice*.[34] Although the RBOC Coalition correctly observed that retroactive rate adjustments are unlawful,[35] there is an important and clear distinction between "retroactive" rate adjustments and "interim" rates, as are ordered here. A retroactive rate adjustment would impose a rate increase on calls made prior to issuance of any

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32 750 F.2d 135 (D.C. Cir. 1984).

33 *Id.* at 142. *See also Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996); *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988); *MCI Telecommunications Corp. v. FCC*, 712 F.2d 517 (D.C. Cir. 1983).

34 *Notice* at ¶16.

35 Comments of RBOC Coalition at 20 (citing Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578 n.8 (1981); Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Ry., 284 U.S. 370, 390 (1932); TRT Telecommunications Corp. v. FCC, 857 F.2d 1535, 1547 (D.C. Cir. 1988).

order or notice, and is rightfully prohibited by the "filed rate doctrine," which provides that only rates on file can be given effect and allows parties to make business decisions on the assumption that the rates they pay will not be retroactively increased.[36] The filed rate doctrine is inapplicable here because: (1) the compensation rates are not "tariffs," and (2) the $0.40 per call rate is already in place. We have only applied the $0.40 per call rate to updated call volumes and call categories that should have been included in the compensation system that we established in the *Per Payphone Compensation Order* under our TOCSIA mandate.

16. Moreover, interim compensation, dating from June 6, 1996, is in accord with the Supreme Court's holding in *Bowen v. Georgetown University Hospital.*[37] Section 276 of the 1996 Act and our mandate under *Florida Payphone* provide a strong foundation for our issuance of this interim compensation. All affected parties have been placed on notice that the Commission was considering ordering interim compensation since we were directed by the Court of Appeals in *Florida Payphone* to consider compensation for 800 subscriber calls (May 23, 1995) and, more recently, when we released the *Notice* in this proceeding (June 6, 1996). Because of this notice, interim compensation is plainly within the scope of our authority. This interim compensation will remain in place until the Commission has fully implemented the new comprehensive per call compensation mechanism contemplated by Section 276.

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36 *See* TRT Telecommunications Corp., 857 F.2d at 1547.

37 488 U.S. 204 (1988).