

EX PARTE OR LATE FILED

RECEIVED

AUG 29 1996

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.

SUITE 1000 WEST

WASHINGTON, D.C. 20005-3317

(202) 326-7900

Federal Communications Commission
Office of Secretary

FACSIMILE

(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

August 29, 1996

DOCKET FILE COPY ORIGINAL

Ex Parte Filing

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

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

Dear Mr. Caton:

Enclosed for filing in this docket are the original and one copy of a letter to Mary Beth Richards, along with an attached white paper on carrier selection. I would ask that you include these materials in the record of this proceeding.

If you have any questions concerning this matter, please contact me at (202) 326-7902.

Thank you for your consideration.

Yours sincerely,

Michael K. Kellogg

Michael K. Kellogg

Enclosures

cc: M. Richards	J. Muleta	R. Baca
M. Carowitz	G. Reynolds	D. Gonzalez
R. Crellin	G. Rosston	K. Gulick
P. DeGraba	R. Spangler	J. Nakahata
E. Maxwell	T. Zagorsky	

No. of Copies rec'd
LHM/BCDE

0+1

EX PARTE OR LATE FILED

RECEIVED

AUG 29 1996

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.

SUITE 1000 WEST

WASHINGTON, D.C. 20005-3317

(202) 326-7900

Federal Communications Commission
Office of Secretary

FACSIMILE

(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

August 29, 1996

Ex Parte Filing

Mary Beth Richards
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

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

Dear Ms. Richards:

In our recent meeting you asked me to provide a brief white paper summarizing the reasons why permitting RBOC PSPs to negotiate with interLATA carriers is in the public interest. With apologies for the delay occasioned by my vacation, I enclose the attached.

I hope this is helpful. If you have any questions concerning this matter, please contact me at (202) 326-7902.

Yours sincerely,

Michael K. Kellogg/jel

Michael K. Kellogg

Enclosures

cc: M. Carowitz G. Reynolds R. Baca
R. Crellin G. Rosston D. Gonzalez
P. DeGraba R. Spangler K. Gulick
E. Maxwell T. Zagorsky J. Nakahata
J. Muleta

RECEIVED

AUG 29 1996

**The Public Interest Benefits of Permitting RBOC
PSPs to Negotiate with InterLATA Carriers**

Federal Communications Commission
Office of Secretary

Section 276 provides a balanced approach to carrier selection by RBOC and non-RBOC PSPs. RBOC PSPs are to be given "the same right that independent payphone providers have to negotiate with the location provider" with respect to the choice of the interLATA carrier and, "subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones" 47 U.S.C. § 276(b)(1)(D). Non-RBOC PSPs are to be given an identical right to negotiate with the location provider over the choice of the intraLATA carrier. The Commission should, as the statute intends, recognize both these rights at the same time. Only if the Commission affirmatively finds that permitting RBOC PSPs to participate in choosing the interLATA carrier is contrary to the public interest can it disregard Congress's sound judgment to the contrary. No such showing can be made. To the contrary, it is clear that market parity is very much in the public interest.

1. As an initial matter, RBOC participation in the selection of the interLATA carrier is critical to the Commission's per-call compensation scheme. As the Commission explained in its NPRM, ¶ 16, IXCs currently compete for 0+ and 1+ calls from independent payphones. This competition "ensures 'fair compensation' for PSPs." Thus, the Commission "need not prescribe per-call compensation" for these calls. If RBOC PSPs are forbidden to negotiate with IXCs, however, this market-based scheme of per-call compensation cannot work.

2. The ability to select the IXC is also critical to establishing market parity and increasing competition between RBOC and non-RBOC PSPs. Currently, consumers are denied the benefits of true competition in one-stop shopping, since one group of competitors (independent PSPs) can offer it while another group (RBOC PSPs) cannot. Many requests for proposals require selection of a single prime contractor who arranges for equipment, local service, and toll service. Because the RBOCs were barred from offering interLATA service, they were unable even to bid on the many contracts where such one-stop shopping was a requirement.

Even for other, smaller contracts, the interexchange restriction has hampered competition. Independent providers can aggregate their interLATA and intraLATA traffic from multiple payphone locations in order to obtain the best possible commission rate from potential IXCs.¹ This permits them to outbid the RBOCs, which can offer a commission based only on intraLATA usage. The result is not fair or balanced competition. It is instead a stacked deck that damages not just the RBOC PSPs but consumers as well.

¹Through the automatic dialing capability of their "smart" telephone equipment, independent payphone operators also can route even intraLATA toll traffic to their chosen interexchange carrier (bypassing the LEC) without requiring the caller to dial extra digits.

APCC argues that denying RBOCs the ability to negotiate for selection of the IXC does not affect the commission paid to the location provider and, as a result, does not disadvantage the RBOCs. See APCC at 44. But the APCC itself demonstrates that this argument is wrong. According to the APCC, PSPs that aggregate payphones can negotiate better commissions from IXCs. Id. at 42. Currently, non-RBOC PSPs can aggregate their payphones and obtain those increased commissions for their customers. Competing RBOC PSPs are at a disadvantage because they cannot. Moreover, the APCC refuses to admit that location providers prefer and often require one stop-shopping that, absent competitive parity, RBOCs cannot provide.

Before Congress, when it supported legislation that would benefit its members in many respects, the APCC repeatedly admitted that the inability to negotiate for selection of the IXC put RBOCs at a disadvantage, referred to the restriction as "arbitrary," and repeatedly urged Congress to correct the imbalance. See Letter from Albert H. Kramer, Attorney for the APCC, to the Hon. Larry Pressler, at 1-2 (June 2, 1995) (urging Congress to allow RBOCs to select interLATA carriers on their payphones because it "provide[s] a basis upon which all industry participants compete on equal terms"); Letter from Albert H. Kramer, Attorney for the APCC, to the Hon. Larry Pressler, at 2 (May 16, 1995) (urging the removal of restrictions on RBOC carrier selection because it "provides for a competitive environment in which all competitors compete on equal terms"); Memorandum from Mark Paoletta and Albert H. Kramer to Republican Staff at 2 (Oct. 16, 1995) (urging Congress to adopt the regulatory parity provision despite IXC opposition because the "legislation is intended to make the marketplace competitive by removing arbitrary restrictions, such as this restriction, on the RBOCs, and not to satisfy any one particular industry").²

APCC now contends that RBOC PSPs, if permitted to negotiate for the selection of the IXC, will outbid them and deprive them of locations for their payphones. See, e.g., APCC at 42. In essence, APCC argues that access to large amounts of capital will permit predatory purchasing of payphone sites at supracompetitive prices. But this theory makes no economic sense. Such predation is impossible unless there is a mechanism for recouping the initial losses (in this case, the cost of supposedly excessive commissions paid to location providers). Because the payphone market is competitive and there are low barriers to entry, RBOC PSPs could never reduce commissions below competitive levels so as to recover their losses; new entry would undermine any such attempt.

Moreover, the regulatory "solutions" proposed by APCC (at 43-44) and the California Payphone Association (at 20), which limit either the portion of interLATA traffic an RBOC can deliver to any particular carrier (e.g., 25%) or the number of payphones or calls that must be aggregated to receive an interLATA IXC's highest available 0+ commission level (i.e., a rate cap

²Copies of these letters are attached to this white paper.

on IXC commissions), are blatantly anticompetitive.³ If economies of scope and scale permit RBOCs to negotiate better deals on behalf of location providers, there is no sensible reason to prohibit them from doing so. The Commission has consistently rejected the imposition of such protectionist restrictions in the past.⁴

Those commenters charged with protecting the public weal rather than their own pocketbooks -- state regulators -- overwhelmingly support regulatory parity for RBOC PSPs in the selection of IXCs. They recognize that consumers are best served by a level playing field among all industry participants. Comments of CalPUC at 18; Comments of State of Florida Pub. Serv. Comm'n at 8; Comments of Pennsylvania Pub. Utils. Comm'n at 7; Comments of Texas Pub. Utils. Comm'n at 1. The Commission too has recognized this, explaining that "regulatory parity is an important policy that can yield important pro-competitive and pro-consumer benefits." Report and Order on Reconsideration, Petition of Arizona Corp. Comm'n to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services, 10 FCC Rcd 7824, 7833, ¶ 37 (1995). Even Sprint favors regulatory parity, noting that the RBOCs "will be unduly hampered in their ability to compete with PPOs" if they do not have "the same right that private payphone providers have to select and contract with the presubscribed interLATA carriers for their payphones." Comments of Sprint at 29.

3. Granting RBOCs the right to negotiate with IXCs would also give consumers greater protection against gouging, which often occurs in the form of exorbitant end user charges. Because RBOC PSPs have reputations and name-brand recognition to protect, they have a strong incentive to ensure that the customer's payphone experience is satisfactory in every way -- and not a shock when the bill comes.

4. AT&T argues that, if the RBOCs are permitted to negotiate over the choice of the IXC, they will deny location providers commissions altogether. See AT&T at 24-25. But neither AT&T nor the location providers recruited by AT&T to support this argument provide any explanation as to how permitting the RBOCs to negotiate with location providers concerning

³The APCC's suggested approach is the most restrictive of all. It would limit the amount of interLATA traffic that an RBOC could deliver to any one IXC to one-third of the percentage of non-RBOC payphones in the area. Thus, an RBOC with competitors that have 43% of the market would be permitted to deliver only 14% of its traffic to any one IXC, effectively requiring the RBOC to use 7 different IXCs. A higher RBOC share (e.g., 70%) would require 10 different IXCs.

⁴See, e.g., Memorandum Opinion and Order, Applications of Craig O. McCaw and AT&T, 9 FCC Rcd 5836, 5860, ¶ 35 (1994) (refusing to place restrictions on AT&T cellular operations for the sole purpose of subjecting them to the same restrictions as competing RBOC cellular companies). The fact that some competitors (non-RBOC PSPs) have not yet achieved certain efficiencies enjoyed by others (the RBOC PSPs) is no reason to deny those efficiencies to all.

selection of the IXC could hurt the location provider, especially where the location provider retains ultimate control over the selection.⁵

Indeed, it is quite clear that the prohibition against RBOC involvement in the IXC selection process hurts location providers. As the APCC points out, location providers -- who often receive no commissions from IXCs today -- might well receive higher commissions if RBOCs are permitted to negotiate with IXCs on their behalf. See APCC at 42 (arguing that RBOCs might demand higher "commission levels" from carriers which can be used to "bid up location provider commissions"). Clearly, AT&T does not wish to face RBOC PSPs, acting on behalf of location providers, in commission negotiations. But naked protectionism for an industry giant like AT&T simply cannot be justified under the rubric of the public interest.⁶

5. Similarly unsupported is the suggestion that IXCs will somehow be victimized by RBOC PSPs and be forced to raise their rates as a result. For example, AT&T argues that RBOCs will "extract extraordinary commissions from IXCs," thereby "add[ing] to the costs that consumers must bear" AT&T at 25-26; see also Comments of Competitive Telecommunications Ass'n at 20 ("the BOCs could demand terms and commissions from IXCs seeking to serve the payphones"). But this makes no sense whatsoever. The interexchange

⁵The choice of IXC is subject to negotiation between the parties, just like any other term of their agreement. Neither the location provider nor the PSP need enter into the contract if they object to the choice of IXC. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 159 (1996) ("Location providers . . . have control over the ultimate choice of interLATA and intraLATA carriers in connection with their choice of payphone service providers"). Consequently, the argument that RBOC PSPs will threaten to remove payphones if location providers don't choose their preferred IXC, Oncor at 3, is without merit. This is a competitive market; if the RBOC PSPs were to do so, other PSPs will offer better terms and replace them. It therefore comes as no surprise that competing PSPs do not argue that RBOC PSPs will pay too little compensation; they fear that the RBOC PSPs will pay too much. See APCC at 42. Moreover, non-RBOC PSPs could do the same thing, as the one instance of a supposed threat cited by AT&T (on information and belief) -- a threat allegedly issued by the non-RBOC PSP, Citizens Telecom -- demonstrates. See AT&T at 25.

⁶As the APCC explained to Congress, AT&T would be "crazy" not to oppose this relief, precisely because it is fair: "[T]his provision allows for parties of equal negotiating power to square off against each other. 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 these carriers will provide interLATA service 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." Memorandum from Mark Paoletta and Albert H. Kramer to Republican Staff at 2 (Oct. 16, 1995).

market is enormous -- over 67 billion dollars -- and RBOC PSP purchasers are just a small part (1.9 billion) of that market. The suggestion that RBOC PSPs might exercise power in this market and force prices upward is thus utterly senseless. See 9 FCC Rcd at 5847, ¶ 14, 5856, ¶ 30 (rejecting market defined as cellular interexchange market, and holding that competitive effect of merger would be negligible because McCaw held only a small portion of total interexchange market).

6. Finally, AT&T attempts to condition relief here on the RBOCs' prior authorization to provide in-region interLATA services. See AT&T at 24 (arguing that parity would be the equivalent of allowing RBOCs "to enter the interLATA market through acquiring an economic interest in . . . the IXCs they designate to serve those payphones," which cannot occur "before the BOCs are permitted to enter the in-region interLATA market pursuant to Sections 271 and 272 of the Act"). But this theory cannot find any support in the statute, which allows for Section 276 relief without prior Section 271 approval. In this sense, the RBOCs' ability to participate in the IXC selection process is no different than their newly granted ability to provide interLATA wireless and information services, neither of which are tied to section 271 relief. Sprint (at 29) agrees.

Alternatively, AT&T urges the Commission not to permit RBOC participation until further proceedings are completed. But this is nothing more than a strategy of delay. Bob Allen has publicly proclaimed: "[I]t could be well into the next century before any of [the BOCs] serve their first long-distance customer in their own territory. . . . We didn't send our lawyers on vacation. . . . We are already bird-dogging the FCC and the state regulatory commissions." John J. Keller, AT&T Challenges the Bell Companies, Wall Street Journal, June 12, 1996, at A3. AT&T is doing just that here -- bird-dogging the Commission in an attempt to forestall competitive entry. Congress set a November deadline for implementation of Section 276. None of AT&T's arguments warrant disregard of this congressional command.

1201 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20003-3919
(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.

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO, ILLINOIS HOUSTON, TEXAS LOS ANGELES, CALIFORNIA SAN FRANCISCO, CALIFORNIA
PEORIA, ILLINOIS OAKBROOK TERRACE, ILLINOIS SCHAUMBURG, ILLINOIS
NEW YORK, NEW YORK FORT LEE, NEW JERSEY

KECK, MAHIN & CATE

The Honorable Larry Pressler

June 2, 1995

Page 2

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

KECK, MAHIN & CATE

The Honorable Larry Pressler
June 2, 1995
Page 3

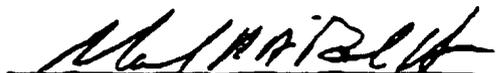
the major structural problems that have existed in the payphone industry since the inception of competition. Further, to the extent any carrier has residual concerns about this payphone amendment, the FCC proceeding required to implement the terms of the amendment will afford all participants ample opportunity 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. 20005-3010
(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 285 (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

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO, ILLINOIS HOUSTON, TEXAS LOS ANGELES, CALIFORNIA SAN FRANCISCO, CALIFORNIA
PEORIA, ILLINOIS OAKBROOK TERRACE, ILLINOIS SCHADSBURG, ILLINOIS

KECK, MAHIN & CATE

The Honorable Larry Pressler

May 16, 1995

Page 2

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.

KECK, MAHIN & CATE

The Honorable Larry Pressler
May 16, 1995
Page 3

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

1101 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005 1919
(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.

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO, ILLINOIS HOUSTON, TEXAS LOS ANGELES, CALIFORNIA SAN FRANCISCO, CALIFORNIA
NEW YORK, NEW YORK PEORIA, ILLINOIS OAKBROOK TERRACE, ILLINOIS SCHMINNER HENDRICK

KECK, MAHIN & CATE

The Honorable Larry Pressler
October 16, 1995
Page 2

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

KECK, MAHIN & CATE

M E M O R A N D U M

TO: Republican Staff on Senate Commerce Committee DATE: October 16, 1995

FROM: Mark Paoletta FILE NO.: 45693-420
 Al Kramer

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.

KECK, MAHIN & CATE

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. <u>Computer III</u> 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