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October 1, 1996
EX PARTE OR LATE FILED

BY MESSENGER

Mr. Michael Carowitz
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Suite 6008
Washington, D.C. 20554

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Dear Michael:

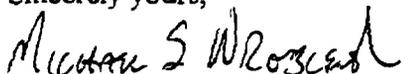
Re: Payphone Interim Compensation Should Take Effect Immediately;
CC Docket No. 96-128

Enclosed for your information is a position paper describing why the interim compensation that the Commission ordered in the September 20, 1996 *Report and Order* should be payable by carriers from September 20, not 30 days after the *Report and Order* is published in the Federal Register. We believe that such a result is consistent with the *Report and Order*, whereas further delay will continue to impose a severe financial hardship on PSPs.

We will be in touch with you later today to discuss these issues.

Thank you for your consideration.

Sincerely yours,



Nicholas W. Allard
Michael S. Wroblewski

Enclosure

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**THE COMMISSION HAS AUTHORITY TO ORDER PSP
INTERIM COMPENSATION TO BE EFFECTIVE IMMEDIATELY**
CC Docket No. 96-128

OCT 4 '96

I. The Commission should, *sua sponte*, clarify that the interim compensation that it ordered to compensate PSPs for access code and subscriber 800 calls was effective on the release date of the *Report and Order*, September 20, 1996, not 30 days after the rules are published in the Federal Register.

- Delay of interim compensation to PSPs for access code and subscriber 800 calls, described in ¶¶ 125-126 of the Commission's September 20, 1996 *Order* (FCC 96-388), would work a hardship on PSPs and would not be in the public interest.
- In light of the Commission's consideration of issuing an erratum to clarify and/or correct certain issues in the *Order*, this issue should be included in that erratum.

II. The Commission has authority to waive the APA's 30-day notice period and to order interim compensation to be effective immediately.

- Because the Commission had the authority to order interim compensation effective from the release date of the *Notice*, it certainly has the authority to make the compensation effective since the release of the *Order*.

A. The Commission has the authority to order interim measures.

- In *United States v. Southwestern Cable Co.*, 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), the Court explicitly held that orders granting interim relief "do not exceed the Commission's authority. 392 U.S. 157 (1968).
- Further, the D.C. Circuit has, on numerous occasions, upheld interim measures ordered by the Commission.¹ For example, in *MCI Telecommunications Corp. v. FCC*, the D.C. Circuit upheld the Commission's interim measures for regulating customer premises equipment, 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. 750 F.2d 135, 142 (D.C. Cir. 1984).

B. Good cause exists for waiver of the 30-day period between a rule's publication in the Federal Register and its effective date.

- Section 553(d) of the Administrative Procedure Act states that the required publication or service of a substantive rule shall be made not less than 30 days before its effective except, *inter alia*, as otherwise provided by the agency for good cause found and published with the rule.

¹ See, e.g., *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)

- Inquiry as to whether agency has good cause proceeds on a case-by-case basis and should be sensitive to the totality of the factors at play. Petry v. Block, 737 F.2d 1193, 1200 (D.C. Cir. 1984).
- To avail itself of the "good cause" exception, the agency must determine that compliance with the 30-day requirement is either impracticable, unnecessary or contrary to the public interest. Buschman v. Schweiker, 676 F.2d 352, 356 (9th Cir. 1982). The use of "good cause" exception is limited to emergency situations. Thrift Depositors of America v. Office of Thrift Supervision, 862 F.Supp 586 (D.DC 1994). The necessity for immediate implementation must outweigh any hardship which affected persons might experience because of the reduced time to adjust to the new rule. Nance v. E.P.A., 645 F.2d 701 (9th Cir., 1981), *cert. denied*, 102 S.Ct. 635.
- Indeed, under 47 U.S.C. §1.427(b), the Commission may, for good cause found and published with the rule, make any rule effective within less than 30 days from the time when published in the Federal Register, where rule grants or recognizes an exemption or relieves a restriction. Here such a situation exists.

C. Compliance with the 30-day requirement is unnecessary and not in the public interest.

- In order to expedite the wide deployment of payphone services as directed by Congress, it is in the public interest to compensate PSPs for calls that originate from their payphones that should have been compensated for over 4 years ago.
 - Congress enacted the Telephone Operators Consumer Services Improvement Act of 1990 ("TOSCLA"), which mandated the provision of open 1-800 and other code calling methodologies.
 - In 1992, the Commission only ordered compensation for access code calls, not for 1-800 subscriber calls.
 - In May 1995, the D.C. Court of Appeals reversed the Commission's determination that 1-800 subscriber calls are not compensable and order the Commission to consider prescribing compensation for these calls as originally contemplated by TOSCLA.
- There is no rational basis for any other result because the need for interim compensation is necessary to achieve Congress' goals of the wide deployment of payphone service.

III. Clarifying the effective date of interim compensation will place no undue burden on the Commission or the carriers.

- Interim compensation can simply be modeled after the existing flat-rate/per call carrier access code compensation system and can be collected and disbursed using the same methodologies with little or no difficulties.
- The Commission merely has to amend Section 64.1301(a) of its rules to state that interim compensation is payable to PSPs from the release date of the *Order*.