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April 3, 1997

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APR 3 1997

Federal Communications Commission  
Office of Secretary

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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**

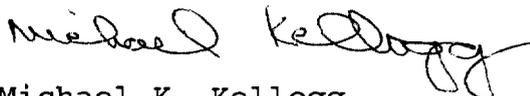
Dear Mr. Caton:

Enclosed for filing in this docket are the original and one copy of a letter to Mary Beth Richards and Kathy Franco, addressing the federal tariffing requirements under the Commission's payphone orders. I sent this letter to Ms. Richards and Ms. Franco today on behalf of the RBOC Payphone Coalition. I would ask that you include the letter in the record of this proceeding in compliance with 47 C.F.R. § 1.1206(a)(2).

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

cc: Mary Beth Richards  
Kathy Franco

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Deputy Bureau Chief  
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Washington, D.C. 20554

Kathy Franco  
Legal Counsel to Bureau Chief  
Common Carrier Bureau  
Federal Communications Comm'n  
1919 M Street, N.W., Room 500  
Washington, D.C. 20554

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

Dear Mary Beth and Kathy:

On behalf of the RBOC Payphone Coalition, I write to respond to the two March 28, 1997, ex parte letters submitted by the American Public Communications Council.

In those letters, the APCC asserts that each RBOC must file state tariff revisions for its "existing 'COCOT' service" consistent with "the new services test." APCC ex parte of March 28, 1997 at 2 (2 page letter). According to the APCC, "[i]t is indisputable that existing as well as new services provided to PSPs under state tariffs must be provided at cost-based rates under the 'new services' test." Id. at 1.

The Coalition was surprised to see these assertions, because every Coalition member has read the Report and Order and Reconsideration Order as saying precisely the opposite. Those orders specify that the new services test applies only to unbundled elements of the "smart lines" (for "dumb" payphones)

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which provide "central-office coin services," and which have not been provided to independent PSPs in the past. "Dumb" COCOT lines (for "smart" payphones), which do not provide "central-office coin services," and which long have been provided to independent PSPs, need not meet this test:

Because the incumbent LECs have used central office coin services in the past, but have not made these services available to independent payphone providers . . . we require that incumbent LEC provision of coin transmission services on an unbundled basis be treated as a new service under the Commission's price cap rules. [W]e conclude that the new services test is necessary to ensure that central office coin services are priced reasonably. Incumbent LECs not currently subject to price cap regulation must submit cost support for their central office coin services . . .

Report and Order ¶ 146 (emphasis added). The Report and Order thus limits application of the "new services test" to services that in fact are "new," i.e., any unbundled "central office coin services" that previously were not offered to independent PSPs. Moreover, the Report and Order limits application of this requirement to tariffs filed "with the Commission"; it does not apply federal pricing rules to state tariffing procedures. Report and Order ¶¶ 146, 147.

APCC does not quote any language from any order that extends the "new services" test to services that are not new, that are not unbundled, and that do not provide "central office coin services." Nor does it quote language indicating that the payphone orders preempted state pricing rules for intrastate services that traditionally have been tariffed by the States under state pricing rules. It is the Coalition's understanding, however, that the APCC is relying on paragraph 163 of the Order on Reconsideration, which states:

The tariffs for these LEC payphone services must be:  
(1) cost-based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) non-discriminatory. States must apply these requirements and the Computer III guidelines for tariffing such intrastate services.

Recon. Order ¶ 163 (footnote omitted). Just after the words "intrastate services," there is a footnote which states that the

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"new services test required in the Report and Order is described at 47 C.F.R. Section 61.49(g) (2)." Id. n.492.

From this text and footnote, the APCC appears to infer that the Order on Reconsideration -- at the same time it eliminated the federal tariffing requirement for bundled lines -- expanded the applicability of the "new services test" beyond new, interstate unbundled services and required its application to existing, state-tariffed services like COCOT lines. But it is hard to discern any support for that reading. Nothing in the Order on Reconsideration suggests that the Commission intended to alter its original Report and Order, which clearly and unambiguously limited application of the new services test to services that are "new," i.e., to unbundled "central office coin services" that LECs previously had "not made . . . available to independent payphone providers." Report and Order ¶ 146. Nor is there an express statement that state pricing rules were being preempted. To the contrary, the footnote on which the APCC relies by its terms merely provides a citation for the "new services test" that the Report and Order required to be applied -- sensibly enough -- to "new services" that are federally tariffed.

This is consistent not only with the text of the Report and Order, which limits the new services test to unbundled "central office coin services" that in fact are newly provided, but also with the text of the Order on Reconsideration, which restates that limit in no uncertain terms. Describing what the Commission did in the Report and Order, it states:

We also required that incumbent LEC provision of coin transmission services on an unbundled basis be treated as a new service under the Commission's price cap rules. The Report and Order required that incumbent LECs not currently subject to price cap regulation must submit cost support for their central office coin services, pursuant to Section 61.38, 61.39, or 61.50(i) of the Commission's rules.

Recon. Order ¶ 146 (emphasis added).

The APCC's reading of footnote 492 in the Order on Reconsideration as expanding the applicability of the "new services" test does not make sense for two additional reasons. First, it would require the States to apply a federal test to a purely intrastate service even though, in ONA itself, the

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Commission rejected the imposition of such a requirement.<sup>1</sup> This is inconsistent with the Commission's expressed intent not to impose requirements beyond those required by Computer III itself. See Report and Order ¶ 199. Moreover, it represents an unprecedented expansion of federal requirements into an area of intra-state service that traditionally has been governed by the States. The Coalition thinks it unlikely that the Commission would have taken such an enormous step by attaching, to a sentence discussing state tariffing issues, an oblique footnote that purports only to provide a citation to federal requirements.

Second, it would require the States to apply the federal new services test in circumstances where the test does not even apply in the federal arena -- to services that in fact are not new. See 47 C.F.R. 61.3 (defining a "new service offering" as "A tariff filing that provides for a class or sub-class of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers").

The Coalition's reading of this requirement is also consistent with the purpose of the order, which is to ensure non-discriminatory pricing. According to the APCC, unless the new services test is applied to all payphone services -- new, existing, bundled, unbundled, federal, state -- discriminatory pricing will result. APCC ex parte at 3 (4 page letter). This is simply not true. The States are clearly aware of their responsibility to ensure that payphone line pricing is non-discriminatory, as the Order on Reconsideration expressly so advises them. There is no reason to think that States will fail to enforce this non-discrimination requirement unless the FCC forces them to abandon their own pricing rules in favor of a federal formula that, even by its own terms, does not apply. So

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<sup>1</sup>When the Commission promulgated its ONA rules, it expressly disavowed any intent to preempt state regulation, including state pricing of intrastate ONA services. See Memorandum Opinion and Order, Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 163, ¶ 311 (1988) ("[W]e do not take any preemptive actions in this order"); id. at 173, ¶ 330 (state tariffs under ONA subject to "existing tariff review procedures on the state" level). The Commission itself purports to be following both ONA and Computer III rules with respect to the federal tariffing requirement. Recon. Order ¶ 162.

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long as a consistent methodology is used to price COCOT and central office lines, discrimination will not occur.<sup>2</sup>

Thus, the Coalition cannot agree with the APCC's assertion that the Order on Reconsideration requires States to apply the new services test. More importantly, the States themselves (to whom the responsibility for tariffing basic payphone lines has been delegated) do not appear to have read the payphone orders as completely preempting their pricing authority over basic intra-state lines (and most likely would have appealed the orders on that basis if they had understood the orders as so doing). They, like the Coalition, appear to have read the payphone orders as requiring application of the federal new services test only to services that must be filed in the federal tariff and that in fact are new, *i.e.*, to any unbundled "central office coin services" that LECs previously had "not made . . . available to independent payphone providers." Report and Order ¶ 146.

If the Commission is going to preempt state pricing rules, it must provide the States -- and the parties to the proceeding -- with appropriate notice. Cf. Saravia v. 1736 18th St. N.W. Ltd Partnership, 844 F.2d 823, (D.C. Cir. 1988) (state laws addressing matters of traditional state concern not preempted absent an indication that it was "the clear and manifest intent" of Congress). The fact that one payphone order attached a footnote, in which the "new services test" is cited, to a sentence that describes state tariffing issues hardly constitutes "clear" notice that the Commission is preempting State pricing rules for purely intrastate services. And it certainly does not provide notice that the Commission expects States to apply the federal "new services" test to existing, bundled, state-tariffed services where the rest of the language of the orders, and the terms of the "new services test" itself, indicate that the rule simply does not apply.

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<sup>2</sup>In many States, the price of the central office coin line is calculated by starting with the price of the COCOT line, and adding to it the costs of the additional functionality it provides. In other States, both the COCOT line and the coin line are priced by starting with the cost of a basic dial tone line, and then adding in the cost of the additional features each line uses. Thus, the prices of both lines are based on consistent estimates of cost, and the resulting prices are not discriminatory.

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The members of the Payphone Coalition have in good faith done everything they can to comply with the requirements of the payphone orders in a timely fashion, and to work with the States toward that goal. But the payphone orders do not by their terms require that the States apply the federal "new services test" to existing state-tariffed services like COCOT lines.

Sincerely yours,

  
Michael K. Kellogg

cc: Dan Abeyta  
Thomas Boasberg  
Craig Brown  
Michelle Carey  
Michael Carowitz  
James Casserly  
James Coltharp  
Rose M. Crellin  
Dan Gonzalez  
Christopher Heimann  
Radhika Karmarkar  
Regina Keeney  
Linda Kinney  
Carol Matthey  
A. Richard Metzger  
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Christopher Wright