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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 27, 1998

EX PARTE OR LATE FILED

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

WRITTEN EX PARTE PRESENTATION

Re: **CC Docket No. 96-128**

Dear Ms. Salas:

On Friday, February 27, 1998, Albert Kramer, on behalf of American Public Communications Council, submitted the attached letter to Mary Beth Richards, Deputy Managing Director of the FCC.

Please contact the undersigned if you have any questions.

Sincerely,

Robert F. Aldrich

Robert F. Aldrich

RFA/nw
cc: Mary Beth Richards
Glenn Reynolds
Rose Crellin
Greg Lipscomb
Jennifer Myers
Craig Stroup

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FEDERAL COMMUNICATIONS COMMISSION
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February 27, 1998

Mary Beth Richards
Deputy Managing Director
Federal Communications Commission
1919 M Street, N.W.
Room 852
Washington, DC 20554

Re: **CC Docket No. 96-128**

Dear Mary Beth:

On behalf of the American Public Communications Council ("APCC"), we are writing to urge the Commission to address, as soon as possible, the continued delays by local exchange carriers ("LECs") in providing payphone-specific automatic number identification ("ANI") digits from "dumb" lines serving "smart" payphones.[1] In addressing this problem, the Commission must provide some certainty regarding when and how payphone service providers ("PSPs") will be compensated for the fourth quarter of 1997 -- for which compensation payments are due in April 1998 -- by carriers that are unable to track calls in the absence of payphone-specific ANI coding digits.

APCC urges the Commission to address these issues as follows:

- The LEC waiver for non-compliance with the ANI digits requirement should not be extended past April 30, 1998. The Commission should make clear that this deadline will be rigorously enforced, including in proceedings on complaints for damages.

1 Lines serving "smart" payphones do not provide any network intelligence to operate the payphone. Accordingly, such lines are referred to herein as "dumb" payphone lines. Conversely, lines serving "dumb" payphones do provide network intelligence to operate the payphone. Therefore, such lines are referred to herein as "smart" payphone lines.

- The Commission[2] should immediately require provisional compensation for the fourth quarter of 1997 for independent PSPs with smart payphones connected to dumb lines. Carriers (including LECs) that are not able to compensate on a per-call basis should pay independent PSPs at a flat rate based on the current record level of 152 calls per payphone per month, or $43.17 per payphone per month at the current compensation rate of 28.4 cents per call. Compensation should be *provisionally* allocated among carriers based on their proportionate shares of toll revenues, as in the first Report and Order. Because the initial allocation of payments would be *provisional*, this approach is consistent with the court of appeals ruling in Illinois Public Telecommunications Ass'n v. FCC.

- These provisional allocations would be subject to true-up among the carriers based on their *actual* percentage shares of total compensable calls in 1997, according to carriers' March 31, 1998 reports pursuant to Section 64.1320 of the Commission's rules. The details of the true-up are discussed below.[3]

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[2] On these waiver-related matters, the Common Carrier Bureau may act for the Commission pursuant to delegated authority. Thus, references to the Commission herein can include the Bureau acting for the Commission.

[3] As discussed below, the true-up would require minimal Commission involvement beyond a simple arithmetical calculation of carriers' percentage shares of the total compensation payment, based on call-volume data reported by carriers under the Commission's existing compensation rules.

Background

In the first Report and Order in this proceeding,[4] the Commission required interexchange carriers ("IXCs")[5] to deploy systems for tracking payphone calls in order to compensate PSPs on a per-call basis, beginning October 7, 1997, for each access code and subscriber 800 call[6] completed through carriers' networks. In order to assist carriers in tracking payphone calls, the Commission required that, by October 7, 1997, LECs must transmit, with each call from a payphone, coding digits that identify the call to the IXC as originating on a payphone line. Reconsideration Order, ¶ 64.

Implementation of these requirements is relatively straightforward in the case of the "smart lines" or "coin lines" that are used to connect the "dumb" payphones traditionally used by LEC PSPs. In addition to transmitting the ANI of a payphone to the IXC, smart payphone lines transmit two coding digits, known as the ANI II digits. In the case of LEC payphones on smart lines, the ANI II digits are "27" -- a code that is used only for payphone lines. Therefore, an IXC receiving these digits receives an immediate, unequivocal signal that the associated call is a payphone call.

However, in the case of the "dumb" lines connecting "smart" payphones -- a configuration used by the overwhelming majority of independent PSPs -- the LECs have not transmitted a code that is unique to payphones. Instead, the LECs have transmitted the ANI digits "07," which are used with a variety of "restricted" lines. Therefore, IXCs claim they are unable to adequately track calls from "dumb" payphone lines until LEC switches are modified to transmit a unique, or "payphone specific," ANI code from dumb lines.

For a year after the Payphone Orders were released, IXCs and LECs argued over whether (1) LECs could continue to deliver the non-specific "07" ANI code with calls

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[4] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 20,541 (1996) ("Payphone Order); Order on Reconsideration, 11 FCC Rcd 21,233 (1996) ("Reconsideration Order") (together "Payphone Orders").

[5] In fact, the compensation obligation applies to LECs as well as IXCs, to the extent that LECs carry dial-around calls. In addition, LECs have a specific obligation to transmit payphone-specific ANI codes to other carriers. APCC uses the term "IXC" to refer to carriers subject to compensation obligations in order to avoid confusion.

[6] The compensation requirement also applies to certain other coinless calls, such as 0- calls transferred to IXCs by LEC operators.

from dumb payphone lines, while providing a second, payphone-specific code in response to carriers' queries, or (2) LECs must always deliver a payphone-specific code. Beginning in late 1997, LECs began to implicitly or expressly concede that they were required to deliver a payphone-specific ANI code with every call. Having acknowledged that they were out of compliance with the ANI code requirement, the LECs requested temporary waivers of the requirement to give them time to come into compliance, by implementing an access service known as "Flex ANI." The Commission granted a temporary waiver until March 9, 1998. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order, DA 97-2162, released October 7, 1997 (CCB) ("Waiver Order").

Meanwhile, as a result of the court of appeals' decision vacating the Commission's initial interim per-phone compensation system,[7] there is currently no mechanism in place for compensating PSPs subscribed to dumb payphone lines. The payphones currently subscribed to such lines are estimated to comprise roughly 40% of all payphones, and are owned primarily by independent PSPs. Until the Commission reestablishes a compensation scheme applicable when carriers are unable to track calls, these PSPs will be unable to collect more than a fraction, if any, of the payphone compensation to which they are entitled.[8]

Payphone-Specific ANIs Must Be Implemented As Soon As Possible

Recent ex parte submissions indicate that even the major LECs will *not* meet the Commission's March 9 deadline for compliance with the ANI code requirement. During the long dispute over the legal requirements, there was apparently little or no testing of Flex ANI by the LECs and IXCs. The belated testing of Flex ANI has uncovered major "glitches" that render Flex ANI virtually useless, at present, as a call-tracking device for roughly half the dumb payphone lines. As of March 9, less than half of major LECs' dumb payphone lines will be capable of transmitting payphone-specific coding digits.

Specifically, on February 5, the RBOC/GTE/SNET Coalition submitted an ex parte letter in which they claimed that 86.3% of all the Coalition's payphone lines will be capable of passing payphone-specific digits on March 9. These numbers reflected that three major LECs -- Ameritech, Bell Atlantic, and BellSouth -- claimed they will have 100%

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7 Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997) ("IPTA").

8 Since the court of appeals' decision last July, PSPs have been able to collect only the compensation that IXCs have volunteered to pay based on their own very low estimates of what is "fair" compensation.

of payphone lines in compliance by March 9, while a fourth, SBC Communications, claimed about 75% compliance by that date. However, the letter contained a caveat that:

> this estimate applies only to payphone lines in the Coalition members' service areas. As individual members of the Coalition have already noted in filings with this Commission, specific types of calls on specific types of switches may not properly pass payphone-specific digits. See, e.g., Letter from Jeffrey B. Thomas, SBC Communications, to Rose Crellin, Common Carrier Bureau, FCC (Jan. 23, 1998).

Letter from Michael K. Kellogg to Rose Crellin, February 5, 1998, at 2.

Review of the referenced SBC letter discloses that Nortel switches are currently incapable of transmitting payphone-specific digits from dumb payphone lines on *any* 800-number calls. SBC describes this problem as affecting only about 12% of calls. In fact, it affects virtually *all* compensable calls from the affected dumb payphone lines.[9] As a result of this problem, about 50% of all payphones connected to dumb lines in SBC's territory, the vast majority of which are independent PSP payphones, will not have payphone-specific coding digits transmitted with their calls. Further, SBC estimates that it will not be able to implement a solution to this problem until October 15, 1999.

After APCC raised the issue in comments on BellSouth's petition to establish a compensation rate element, BellSouth disclosed that it too had the same problem with implementing Flex ANI on Nortel switches (an estimated 40% of BellSouth's switches). BellSouth claims, however, that it will have the problem fixed by mid- to late- April. Letter from W.W. Jordan, BellSouth, to Rose M. Crellin, February 10, 1998. BellSouth's more accelerated timetable for fixing the Nortel switch problem undoubtedly reflects the previously disclosed fact that a large percentage of BellSouth's payphones are currently connected to dumb lines, and will therefore, presumably, suffer the negative consequences of the Nortel-switch Flex ANI problem until it is corrected.

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9 In an attempt to minimize the perceived importance of this problem, SBC estimated the affected calls by multiplying the percentage of dumb lines affected (50%) by the estimated percentage of payphone calls that are 800-number calls (25%). Because virtually all *compensable* calls are 800-number calls, the problem described by SBC affects virtually 100% of the compensable calls on the affected lines. In essence, SBC has reported that about 50% of its dumb payphone lines will be out of compliance until October 15, 1999.

Thus, BellSouth's claimed 100% compliance is in reality about 60% compliance for its dumb payphone lines. None of the other LECs, to APCC's knowledge, have said a word about the Nortel-switch problem, how it affects their compliance, and when they will fix it. Based on the foregoing, however, there is every reason to believe that the other major LECs have similar Nortel-switch problems and that Ameritech's and Bell Atlantic's claimed 100% compliance is actually far short of that.

As for U S West and GTE, they only recently acknowledged that they were even legally required to transmit a payphone-specific ANI code with the call. According to their ex partes, these LECs will have virtually none of the dumb payphone lines in their territory converted to Flex ANI by March 9. The apparent reason is that these LECs stonewalled even longer than the other large LECs and, accordingly, did not even begin to attempt compliance until the end of 1997. See Letter from James T. Hannan, U S West, to John Muleta, January 16, 1998, at 2 (U S West "was still in the process of conducting its study [of what was required to implement Flex ANI] on December 23, 1997"); Letter from F. Gordon Maxson, GTE, to John Muleta, January 16, 1998 at 2 (GTE did not even begin testing Flex ANI until January 1998, has no Flex ANI deployment schedule, and estimates it could take 8-18 months).

The Commission should not tolerate any further delays in the implementation of its requirements. The LEC waiver for non-compliance with the ANI digits requirement should not be extended past April 30, 1998. BellSouth has stated it will comply by that date. There is no legitimate reason to allow a longer compliance period for other LECs. Indeed, a further extension of the deadline would improperly reward these LECs' foot-dragging and willingness to continue to disadvantage their payphone competitors.[10] The Commission should make clear that any LEC with equal-access switches that are not in full compliance -- including resolution of the Nortel switch problem -- by the end of the waiver period will be regarded as in violation of Commission rules, with sanctions to follow and appropriate remedies in damages actions by independent PSPs.

Provisional Compensation for Fourth Quarter 1997

The next question is, how to ensure that independent PSPs whose payphones, through no fault of their own, are connected to switches that do not pass payphone-specific codes, receive fair and timely compensation from carriers that have been unable to track

[10] While there is no legitimate excuse for extending the waiver period beyond the April 30 date that BellSouth's submission shows is feasible, at the very latest the LEC waivers should end by June 30, 1998 -- the date by which U S West, one of the slowest complying LECs, currently estimates it will have 90% of "dumb" lines in compliance.

dial-around calls.[11] Clearly, these PSPs are entitled to fair compensation. They also require immediate compensation because they have received nothing close to fair compensation for the last eight months. Under the current compensation schedule, compensation payments for the last quarter of 1997 (October 1 through December 31, 1997) is due April 1, 1998. It is essential that the Commission make an immediate ruling so that PSPs will receive timely compensation for the last quarter of 1997.

As a condition for waiving the per-call compensation obligations of AT&T and other carriers seeking a waiver, the Commission should require these carriers to immediately pay *provisional* compensation, for the last quarter of 1997, subject to a true-up once reported call volumes are available to provide a basis for determining final compensation. Independent PSPs should be entitled to compensation at a flat rate based on the current record level of 152 calls[12] per payphone per month, or $43.17 per payphone per month at the current compensation rate of 28.4 cents per call. Existing record data is clearly sufficient to support a level of per-phone compensation set as a condition of waiving IXC compliance with the per-call compensation requirement. This overall compensation should be *provisionally* allocated among carriers based on their proportionate shares of toll revenues, as in the initial Payphone Order. Unlike in the initial Payphone Order, however, the allocation would be provisional only, subject to a later true-up. Further, the carriers

11 The proposal below relates to compensation of independent payphones connected to dumb lines by carriers that are unable to track calls in the absence of payphone-specific ANI codes. AT&T requested a waiver from per-call obligations for itself and other carriers who cannot currently track calls from dumb lines. So far, most carriers have remained silent on whether or not they are able to track calls from dumb payphone lines during the waiver period. The Commission should require carriers that are unable to track calls without payphone-specific ANI codes to so notify the Commission immediately. Carriers that *are* able to track calls from dumb lines in the absence of payphone-specific ANI codes should compensate all PSPs on a per-call basis. Further, as Flex ANI becomes available and fully functioning on some dumb payphone lines, carriers should be required to begin paying per-call compensation rather than continuing to pay per-phone compensation.

12 APCC recognizes that the Commission may wish to continue relying on the record data underlying its initial prescription of interim compensation in the First Report and Order, which indicated an average of 131 dial-around calls per payphone per month. However, APCC has since updated the record based on 11 months of call records from more than 4,000 diverse payphones. Comments of APCC, filed August 26, 1997, Attachment 4. APCC's updated data has been cited by numerous parties on all sides of this proceeding. See e.g., Comments of Comptel, filed August 26, 1997, at 12; Reply Comments of Sprint, filed September 7, 1997, at 4.

subject to provisional compensation obligations should include LECs with more than $100 million in toll revenue that are unable to track calls from dumb payphone lines. Each carrier with more than $100 million in toll revenues[13] requiring a waiver should provisionally compensate independent PSPs for a percentage share of the $43.17 per payphone per month that is equal to that carrier's percentage share of toll revenues of carriers with more than $100 million in toll revenues.[14] These provisional allocations would be subject to true-up among all carriers paying compensation, based on their *actual* shares of compensation payments for calls from dumb payphone lines. See below.

The court of appeals' IPTA ruling, which overturned the Commission's earlier prescription of compensation on a similar basis for the "interim" period, is not an obstacle to the prescription of *provisional* compensation subject to true-up. The compensation that was overturned by the court of appeals was to be the final compensation for the interim period. The court concluded that the Commission had failed to establish a sufficient nexus between carriers' shares of toll revenue and their shares of payphone traffic to justify the use of toll revenue shares to prescribe final compensation. However, in this instance, the provisional compensation for the waiver period would be expressly subject to true-up based on a determination of carriers' actual shares of payphone traffic. The only purpose of the toll revenue shares would be to provide a basis for an initial payment by each carrier, pending a final determination of the compensation owed. Such an approach is entirely justified because the alternative -- to allow all carriers to withhold any payment and leave PSPs uncompensated until a final determination is made -- is far more injurious. It is far better that carriers make an initial payment, even though it is subject to later true-up, so that PSPs can begin to collect the fair compensation mandated by the statute. See Lincoln Tel. and Tel. Co. v. FCC, 659 F.2d 1092, 1108 (D.C. Cir. 1980) (provisional compensation calculated on a rough basis is appropriate, pending true-up, to ensure "a continuing source of funds" in return for service provided).

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13 Carriers that *are* able to track calls from dumb lines during the waiver period would be included in the calculation of carrier percentages. However, they would pay compensation based on their actual call volumes and would not be required to make a provisional payment based on their percentage of toll revenues.

14 Although LECs have argued that their percentage of dial-around traffic is much lower than their percentage of toll revenues, this concern is addressed because all carriers payment allocations would be provisional and subject to true-up. To the extent that LECs initially overpay under this system, the subsequent true-up will make them whole. An initial overpayment is acceptable because, in failing to comply with coding digit requirements, LECs have materially contributed to the current problems.

In order to determine the basis for a true-up, the Commission should remind carriers that they are required to report, by March 31, 1998, the number of compensable calls they received during 1997. 47 CFR § 64.1320. The Commission should clarify that, in order to provide a uniform set of data for determining allocations, carriers should report separately the number of compensable calls they received from smart payphone lines -- i.e., the number of dial-around calls with "27" associated -- from October 7 through December 31. After receiving all carriers' reports, it is a relatively simple task for the Commission to add up all the totals and calculate the percentage of the total volume of compensable calls that was received by each carrier. The Commission would then designate that percentage as the carrier's final share and require the carriers to conduct a true-up between carriers who overpaid and underpaid.[15]

While this approach requires some explanation, it is actually a simple, straight-forward procedure that would involve minimal expenditure of Commission resources and would free the Commission from the need for further oversight of the process. The Commission would simply take the call volume data that is already required to be reported, calculate each carrier's percentage share on a spreadsheet, and publish the results. The payment obligations of each carrier would be objectively and finally determined.[16] After that, it would be up to the carriers to make each other whole.

The Commission should *not* set the overall *level* of compensation for payphones connected to dumb lines based on the level of traffic reported by carriers as originating from smart lines. Smart payphone lines are overwhelmingly LEC lines, and there is no reason to believe that the overall level of dial-around traffic from LEC lines is even approximately equal to the overall level of traffic from independent PSP lines. LECs claim they have large numbers of payphones that generate very little traffic -- the so-called "semi-public" payphones -- with which independent PSPs do not compete. <u>See e.g.</u>, Reply Comments of BellSouth, July 15, 1996, at 4, n.3. LECs also have claimed to be providing numerous "public interest payphones" generating very little traffic. Thus, average levels of dial-around traffic experienced from LEC payphones connected to smart lines are likely to

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15 Carriers that *are* able to track calls from dumb lines during the waiver period would be included in the calculation of carrier percentages. However, their per-call payments would not be subject to the true-up.

16 Further, this simple process, including reliance on data from smart payphones for allocation only, could also be applied to determine carriers' compensation obligations for the "interim" period.

be much lower than the average levels from independent payphones.[17] By contrast, the difference between overall call *volumes* from LEC payphones and independent payphones is unlikely to affect the validity of the *allocation* of call volume *percentages* among carriers.

A much more reliable estimate of average dial-around traffic from independent payphones has been submitted by APCC in this proceeding. APCC's estimate of 152 calls per payphone per month, was based on eleven months of calling data from a large and diverse sample of payphones. See note 12, above. The data has been relied upon by numerous parties on both sides of the compensation proceeding. Because it is based on data from independent payphones, it is the most reliable available basis for estimating the level of dial-around traffic from independent payphones different category of payphones. Independent PSPs should not be forced to accept a compensation level that is based on an entirely different category of payphones maintained almost exclusively by LECS.

Further, the initial data on dial-around traffic reported by carriers as originating from dumb payphone lines is likely to have substantial reliability problems. IXCs are using ANI codes for the first time to track subscriber 800 calls. There are likely to be significant problems associated with the initial efforts at call tracking. Whatever these problems, their effects should not be compounded by making the initial per-call data the basis for estimating flat-rate compensation of other PSPs for their smart payphones connected to dumb payphone lines.

In the event that the Commission disagrees with APCC's position and decides that the final compensation *level* for dumb payphone lines must be set based on experience with per-call compensation, rather than on the current record data showing 152 calls per payphone, it would nonetheless be arbitrary to set the compensation level for independent PSPs based on LEC payphone call volumes from smart payphone lines. Instead, the Commission should still use the provisional compensation plan described in this letter, and should order a later true-up based on actual call volumes from *dumb* payphone lines, once those lines are brought into compliance with the ANI code requirement. Further, the Commission should avoid the effects of seasonal variations in calling volume by requiring final compensation for the fourth quarter of 1997 to be calculated based on reported call volumes from dumb payphone lines for the fourth quarter of 1998. Although this approach involves some delay, it would ensure that compensation of independent PSPs is based on actual call volumes originating from independent payphones, rather than a LEC surrogate. Overall, this approach would yield more objective results than the approach advocated in this letter; however, it would require Commission involvement over a longer period.

[17] There may also be some initial problems associated with underreporting of call volumes due to "glitches" during the initial per-call compensation period.

Conclusion

In summary, the Commission should set and vigorously enforce an April 30, 1998 deadline for full implementation of payphone-specific ANI codes at all LEC equal-access switches, and should prescribe provisional flat-rate compensation for dumb-line payphones for the fourth quarter of 1997 on the basis set forth above.

Sincerely,

Albert Kramer by RJA

Albert H. Kramer

cc: Glenn Reynolds
Rose Crellin
Greg Lipscomb
Jennifer Myers
Craig Stroup