ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

OCT 20 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMENTS OF
THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL

Albert H. Kramer
Robert F. Aldrich

2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for the American Public
Communications Council

Dated: October 20, 2000

No. of Copies rec'd 0+5
List ABCDE

TABLE OF CONTENTS

I. THE RBOCS' PROPOSAL IS PROCEDURALLY PREMATURE 4

A. Procedural Background 5

B. The Commission Must First Decide Whether Equitable Considerations Warrant Retroactive Adjustments of All PSPs' Compensation for the Second R&O Period and the Interim Period 6

C. Equitable Consideration Do Not Support Retroactive Application of the Current $.24 Rate to the Second R&O Period 8

D. The Commission's Decisions Regarding Retroactive Adjustment of Compensation for the Interim Period and the Second R&O Period Must Be Made Together 10

E. When the Interim Period and the Second R&O Period Are Considered Together, the Equitable Decision Is To Make No Retroactive Adjustments of Payments to Independent PSPs for Either the Second R&O Period or the Interim Period 11

II. THE RBOC PROPOSAL IS SUBSTANTIVELY FLAWED 13

A. Problems with Flex ANI 14

B. Other Problems 17

C. Any True-Up for the Interim Period with respect to Independent Providers' Payphones Should Be Based on Record Estimates of 1996 Call Volumes for Independent Payphones 18

D. There Are a Number of Possible Methods for Allocating Carriers' Shares of the Total Interim Period Payment for Estimated Call Volumes at Independent PSPs' Payphones 19

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF
THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL

Pursuant to the Commission's Public Notice, DA 00-2189, released September 26, 2000, the American Public Communications Council ("APCC") submits the following comments on the Regional Bell Operating Companies' ("RBOCs") proposal for retroactively adjusting the compensation paid to payphone service providers ("PSPs") during the period from November 6, 1996 to October 6, 1997 (the "Interim Period").[1]

[1] In the first *Report and Order* in this proceeding, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd 20541, *recon.* 11 FCC Rcd 21233 (1996), the Commission determined that compensation should be paid at the rate of $.35 per call. Since, at the time, there was no mechanism in place for per-call tracking of payphone calls, the Commission ruled that compensation should be paid on a flat rate basis per payphone per month, for the "interim period" while the technology for per call tracking was to be implemented by local exchange carriers. The Commission found that during the Interim Period each PSP was entitled to receive $45.85 per payphone per month, and that interexchange carriers ("IXCs") with more than $100 million toll revenues should each pay a share of this amount based on their relative shares of the toll service market. On July 1, 1997, the court of appeals reversed, and subsequently vacated, the order, including the $.35 per call rate. *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997). Subsequent to the court decision, some IXCs, acting on their own, reduced (footnote continued on next page)

In a letter to Chairman Kennard dated August 8, 2000, the RBOCs have proposed an isolated resolution of only one aspect of the related pending issues concerning whether and how to adjust carriers' prior payments of payphone compensation to payphone service providers ("PSPs") pursuant to Section 276 of the Act. Assuming that the Commission has already determined whether to require such retroactive adjustments for the compensation of all PSPs, the RBOCs propose a method for computing such adjustments. Under the RBOCs' proposal, the payments for the Interim Period would be determined based on the payments of per-call compensation made during 1998, by which time the per call compensation system was supposed to be in place for all PSPs but, as explained below, was in fact in place for only the RBOCs. Each interexchange carrier ("IXC") would pay each PSP for 1997 based on an assumed number of calls that would be the same number of calls for which that IXC paid that PSP during 1998.

SUMMARY

The RBOCs' proposal should not be adopted – or if adopted, should be applied only to ILEC payphones. First, the RBOCs' proposal is premature. It remains to be determined whether retroactive adjustments are even appropriate, under the applicable equitable standards. The issue of whether to order retroactive adjustments for the Interim Period is intertwined with the related issue of whether to order retroactive adjustments for the subsequent period from October 7, 1997 to April 21, 1999, the period during which the Second R&O was in effect (the "Second R&O Period"). The Commission has linked compensation adjustments for the Interim Period to compensation adjustments for the

---

and other IXCs, also acting on their own, suspended entirely the payment of dial-around compensation to PSPs during the Interim Period.

Second R&O Period by ruling, in the *Third Report and Order*, that any adjustments to the compensation paid during these periods should be made simultaneously. *Third Report and Order, and Order on Reconsideration of the Second Report and Order ("Third Report and Order")*, 14 FCC Rcd 2545, 2636 (1999). Therefore, the Commission cannot address the RBOCs' proposal in isolation from the Colorado Payphone Association's pending petition for reconsideration of the Commission's *Third Report and Order* decision to order refunds of compensation collected during the Second R&O Period.

In other words, the Commission must make an overall decision whether retroactive adjustments are appropriate for these periods, and determine the scope of any such adjustments, in light of the equitable principles governing retroactive adjustments. Applying the relevant equitable considerations to independent PSPs, there is no justification for adjustments that require independent PSPs to make net refunds of compensation to IXCs. PSPs were improperly denied compensation for the bulk of their calls for four years prior to the Interim Period. Further, IXCs have already recorded their compensation payments from subscribers and would gain an undeserved windfall from adjustments that net out in their favor. Therefore, it would be arbitrary and capricious for the Commission to require adjustments resulting in "net" refunds of compensation collected by independent PSPs during the Interim Period and Second R&O Period.

In the event that the Commission decides to require retroactive adjustments for independent PSPs' Interim Period compensation, the RBOCs' proposal for computing such adjustments is fatally flawed as applied to independent PSPs. Tying compensation payments for the Interim Period to the payments received during the initial phase of per-call compensation, which covered most of the Second R&O Period, would grossly distort interim compensation for independent PSPs. In the initial phase of per-call compensation –

due to the ILECs' failure to comply with FCC orders to implement per call tracking for *all* PSPs, not just the ILECs' own payphones – the per-call tracking system was not functioning for independent PSPs' payphones, and independent PSPs received far less than the compensation due. Applying the results of the initial phase of per-call implementation to the Interim Period would merely ensure that independent PSPs are undercompensated for the Interim Period as well as for the Second R&O Period. Therefore, it would be arbitrary and capricious for the Commission to adopt the RBOCs' proposal as the basis for retroactive adjustment of independent PSPs' Interim Period compensation.

I. THE RBOCS' PROPOSAL IS PROCEDURALLY PREMATURE

In their ex parte letter, the RBOCs state that there is "no procedural obstacle to immediate resolution" of the details of compensation adjustments for the Interim Period. APCC disagrees. Consideration of the RBOCs' proposal is premature until the Commission has made a final determination as to (1) whether any retroactive adjustment of payments for the Interim Period and the subsequent Second R&O Period is warranted by equitable considerations,[2] and (2) the scope of any retroactive adjustment that is warranted, as well as the applicable rate. These issues, which must be decided prior to the details of the particular scheme adopted, have never been decided by the Commission. The Commission cannot evaluate a particular retroactive payment adjustment scheme, such as the one proposed by the RBOCs, until it has determined the overall equities for and against making a retroactive adjustment, the scope of any adjustment that is warranted, and the applicable rate(s). Until these fundamental questions have been addressed, all other

---

[2] *Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1991) *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047-48 (D.C. Cir. 1981); *In the Matter of Investigation of Special Access Tariffs of Local Exch. Carriers*, 6 Comm. Reg. 555, 607 (1997).

questions concerning the details of adjustment of payments for the Interim Period are premature.

A. Procedural Background

As to the Interim Period, the Commission initially considered retroactive adjustment of Interim Period compensation in the *Second Report and Order,* 13 FCC Rcd 1778, 1781 (1997). In that order, the Commission "tentatively conclude[d]" that PSPs should be retroactively compensated for this period, and that the rate of $.284 per call prescribed in that order for prospective application should apply retroactively to the Interim Period.[3] Subsequently, in the *Third Report and Order,* the Commission appeared to revise its tentative conclusion, stating that "[I]n establishing a compensation amount for the [Interim] Period, we anticipate using *as a starting point* the [$.238 per call] default compensation amount established herein." 14 FCC Rcd at 2636 (emphasis added). The Commission indicated it would "address the compensation amount" for the Interim Period "in an upcoming order." To date, however, the Commission has never made a final determination as to either the need for retroactive compensation for the Interim Period or the applicable rate.

As to the Second R&O Period, the Commission ruled in the *Third Report and Order* that the new, prospectively applicable rate of $.24 per call established in that order should also apply retroactively to the Second R&O Period (subject to a $.002 adjustment). *Id.* at 2635. However, the Commission did not provide any equitable rationale for its decision to apply the new rate retroactively, and there is still pending a petition for

---

[3] Although the order establishing the $.284 rate was subsequently remanded by the court of appeals, the court did not vacate that rate. Thus, it remained applicable to compensation payments from October 7, 1997 until April 21, 1999 (the "Second R&O Period"), when it was superseded by the $.24 rate.

reconsideration by the Colorado Payphone Association ("CPA Petition") explaining why it would be inequitable to apply the $.24 rate retroactively to independent PSPs during the Interim Period.[4]

To date, therefore, the Commission has never addressed whether equitable considerations justify requiring retroactive adjustment of compensation for either the Interim Period or the Second R&O Period. Resolving these issues is logically prior to any decision as to the details of such adjustments.

B. The Commission Must First Decide Whether Equitable Considerations Warrant Retroactive Adjustments of All PSPs' Compensation for the Second R&O Period and the Interim Period

It is well established that the Commission's power to order retroactive adjustment of rates is an equitable power to be exercised based on whether retroactive relief is equitable under the particular circumstances. *Towns of Concord, 955 F.2d at 76.* The D.C. Circuit has "refused to constrain agency discretion by imposing a presumption in favor of refunds." *Id.*

> Customer refunds are a form of equitable relief, akin to restitution , and the general rule is that agencies should order restitution only when "money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."

Towns of Concord at 75, *quoting Atlantic Coast Line R.R. v. Florida,* 295 U.S. 301, 309 (1935). In determining whether to order retroactive adjustment of rates, the Commission must consider potential harm to consumers and the comparative benefits and losses that

---

[4] There are also pending, on reconsideration, issues affecting the rate of compensation, which could affect the need for retroactive adjustments. *See* Petition of Colorado Payphone Association for Partial Reconsideration, filed April 21, 1999, at 5-16.

would result from ordering adjustments or maintaining the status quo. *Las Cruces TV Cable,* 645 F.2d at 1047.

In remanding the *Second Report and Order* in this docket, the court of appeals expressly recognized that a refund of the difference between current and prior rates is not legally required after a remand, but is a form of equitable relief that is subject to the Commission's discretion. The court stated, "the Commission itself has acknowledged that it has the authority to adjust the compensation rate retroactively, '*should the equities so dictate.*'" *MCI v. FCC,* 143 F.3d 606, 609 (D.C. Cir. 1998)(emphasis added)(citations omitted).

In this case, as the FCC has expressly acknowledged, the equitable issue of whether and how to order retroactive adjustment of Interim Period compensation is intertwined with the issue of whether to order retroactive application of the current $.24 rate to the Second R&O Period, in which the rate of compensation was $.284.

The issues of retroactive adjustment of compensation payments for the Interim Period and the Second R&O Period are closely related for several reasons. First, the same categories of parties are involved – payphone service providers as recipients, and carriers as payers, of compensation. Second, the two periods, although both long past, are close together in time. Third, in both cases the Commission is faced with an equitable decision whether to order retroactive application of a rate established on remand.

The Commission has acknowledged the close relationship of these issues. Noting that retroactive application of the $.24 rate to the Second R&O Period would require substantial refunds by PSPs to carriers, while retroactive application of a rate to the Interim Period may require net payments by carriers to some PSPs, the Commission ruled that any adjustments to the compensation paid in the two periods should be made simultaneously.

Because the amounts at stake are very large in both periods, the equities involved in determining whether and how to adjust payments for the Interim Period will be different depending on the outcome of the Commission's reconsideration of retroactive application of the $.24 rate to the Second R&O Period.

Accordingly, the Commission's first order of business should be to reach a final decision (1) whether equitable considerations justify retroactive adjustment of compensation payments for the Second R&O Period and the Interim Period, and (2) if so, the scope of such adjustments and the applicable rate(s). Only then should the Commission attempt to flesh out the details of implementing such adjustments.

C. Equitable Consideration Do Not Support Retroactive Application of the Current $.24 Rate to the Second R&O Period

As noted above, the Commission's prior decision to order retroactive application of the $.24 rate to the Second R&O Period was made without addressing the equities involved. In its petition for reconsideration of the *Third Report and Order*, the Colorado Payphone Association advances several arguments that equitable considerations *do not* support retroactive application of the $.24 rate to the Second R&O Period, at least with respect to independent PSPs.

First, from June 1992 to November 1996, independent PSPs had been compelled to deliver dial-around calls to IXCs while receiving compensation for only a tiny percentage of those calls. During that entire period, independent PSPs received no compensation for delivering subscriber 800 calls to IXCs, because the FCC had erroneously ruled it lacked authority to prescribe such compensation. That determination was reversed by the U.S. Court of Appeals, which specifically directed the FCC to consider compensation for such calls. *Florida Public Telecommunications Ass'n v. FCC, 54 F.3d 857, 860 (D.C.Cir. 1995).* Before the Commission acted in response to the remand, Congress enacted Section 276,

which mandated compensation for *all* payphone calls, including subscriber 800 calls, thus validating the independent PSPs' contention that they should have been receiving compensation for these calls during the entire period. But given that PSPs were deprived of *any compensation* for these calls for the previous four years, it would be patently unjust and inequitable to require PSPs to give back a single penny of compensation collected during the Second R&O Period. The IXCs' payment of 4.6 cents per call in excess of the current rate, during the 18 months of the Second R&O Period, pales in comparison with the IXCs' avoidance of *any* payment for the vast bulk of dial-around calls for *53 months* prior to November 1996. *See* Attachment 1.

Second, the IXCs had an opportunity to recover, and generally did recover, much more than the full amount of the prescribed $.284 rate from their own customers during the Second R&O Period. As explained in the Colorado Payphone Association's petition for reconsideration (*see* Attachment 1), the IXCs not only passed on to consumers, through direct surcharges, the full cost (and often more than their cost) of paying dial-around compensation, but they also used a variety of other means to recover costs that, in the aggregate, resulted in a massive *over*-recovery for the IXCs. In addition to their payphone surcharges, the IXCs raised their overall rates for subscriber 800 and certain interstate and international services in response to the original order prescribing interim compensation. Concurrently, the IXCs reaped major cost savings from (1) the removal in 1997 of more than $250 million annually in payphone-specific elements of interstate access charges, and (2) the continuing shift in consumer dialing patterns away from commission-paying 0+ calls. These cost savings were not passed on to consumers. *Id.*

Given that the IXCs have already recovered from their end users amounts well in excess of their $.284 dial-around payments during the Second R&O Period,[5] if the IXCs are now awarded a refund of the difference between the then-prescribed $.284 rate and the new $.24 rate, they will reap a huge windfall. Such a windfall, which will not be passed through to the customers from whom it was initially recovered, would unjustly enrich IXCs at the expense of PSPs, contrary to the equitable principles of restitution that govern agency refund determinations. *See Towns of Concord*, 955 F.2d at 75.

D. The Commission's Decisions Regarding Retroactive Adjustment of Compensation for the Interim Period and the Second R&O Period Must Be Made Together

As noted above, the Commission has never made a final decision as to whether equitable considerations require retroactive adjustment of compensation for the Interim Period. In making such a decision, the Commission must factor into its consideration the arguments outlined above as to compensation for the Second R&O Period.

For example, if the Commission decides, as discussed above, upon reconsideration, that the equities do *not* require retroactive adjustment of compensation for the Second R&O Period, the Commission might well conclude that it is less important, from an equitable perspective, to ensure full adjustment of compensation paid during the Interim Period. Such a determination would enable the Commission to avoid the intractable problems involved in implementing compensation adjustments. There are monumental administrative problems involved in implementing retroactive adjustments for payphone compensation, and there are flaws associated with any method selected for allocating

---

[5] Carriers frequently described their pass-through charges to end users in terms suggesting they were federally mandated, a practice that is inconsistent with the Commission's ruling in *Truth-in-Billing and Billing Format, First Report and Order*, 14 FCC Rcd 7492, 7522-33 (1999).

retroactive adjustments among carriers. These problems are particularly difficult with respect to independent PSPs, for a number of reasons – none of which apply to the RBOCs: the large number of independent PSPs, the frequent changes in ownership of companies and of payphones, the entry and (mostly) exit of many companies during this period, and the unreliability of actual per-call payments made to date as a basis for computing retroactive adjustments for either the Interim Period *or* the Second R&O Period (see Section II). In the absence of strong equitable reasons for ordering retroactive adjustments, such adjustments cannot be justified with respect to independent PSPs for *either the Second Report and Order Period or the Interim Period.*

E. When the Interim Period and the Second R&O Period Are Considered Together, the Equitable Decision Is To Make No Retroactive Adjustments of Payments to Independent PSPs for Either the Second R&O Period or the Interim Period

From the foregoing it is clear that the decisions whether to require retroactive adjustments of independent PSPs' compensation for the Interim Period and the Second R&O Period must be made together, in light of the overall equities. As explained in Section I.C. above, and in the prior filings of APCC[6] and the Colorado Payphone Association,[7] the equitable considerations that govern the Commission's decisions on retroactive adjustment of independent PSPs' compensation dictate that independent PSPs should not be required to refund compensation payments collected during the Second R&O Period and the Interim Period.

As discussed above, the Commission may not equitably require independent PSPs to make "net" refunds of compensation for these periods because (1) independent PSPs were

---

6 *See* Comments of APCC, filed August 26, 1997.

7 *See* Attachment 1.

denied any compensation for subscriber 800 calls for four years prior to the Interim Period, and (2) IXCs have already recovered amounts greatly exceeding their payments to PSPs during the periods in question through the assessment of rate increases and payphone surcharges on their end user customers. *See* Attachment 1. As a further consideration, as discussed in Section II. below, carriers' failure to implement Flex ANI properly during the Second R&O Period and beyond has resulted in major underpyaments of PSPs, which likely more than outweigh any "overpayments" attributed to the difference between the new and old compensation rates. In light of all these circumstances, it would be clearly improper for the Commission to conclude that equitable considerations justify a retroactive adjustment requiring independent PSPs to provide major net refunds of compensation payments legally collected from IXCs.

Therefore, the Commission should require retroactive adjustment of independent PSPs' compensation for these periods only if the net result will increase independent PSPs' compensation. If the net result will reduce independent PSPs' compensation (because refunds exceed additional payments), the Commission should not order retroactive adjustments for the purpose of applying the $.24 rate to these periods.

All the analyses APCC has performed indicate that retroactive adjustment of compensation for the Second R&O Period and for the Interim Period (computed under the RBOCs' proposal) would result in a very large "net" refund of compensation from independent PSPs to IXCs.[8] Therefore, the Commission should make a determination that

---

[8] For the Second R&O Period, adjustments based on the change in rate obviously would flow in only one direction: to the IXCs. For the Interim Period, adjustments would be more or less a "wash" for independent PSPs. For the initial portion of the Interim Period, independent PSPs as a group were effectively paid close to the initially established rate of $.35 per call (while ILECs were not entitled to any dial-around compensation due to the deferred (April 15, 1997) deadline for removal of their payphones from the rate (footnote continued on next page)

no retroactive adjustments are warranted with respect to compensation paid to independent PSPs.[9]

But in any event, until the Commission resolves whether equitable considerations justify retroactive payments for the Interim Period and the Second R&O Period (including deciding the CPA petition for reconsideration regarding retroactive application of the $.24 rate to the Second R&O period), it is premature for the Commission to make a final decision regarding the assumed call volumes for purposes of adjusting compensation payments for the Interim Period.

II. THE RBOC PROPOSAL IS SUBSTANTIVELY FLAWED

In the previous section, APCC has argued that equitable considerations do not justify the retroactive adjustment of independent PSPs' compensation payments for the Second R&O Period and the Interim Period, taken as a whole. In the event that the Commission does decide to order retroactive adjustment of independent PSPs' compensation payments for these periods, the Commission must carefully consider the nature and scope of those adjustments. As a method of determining Interim Period

---

base. Subsequently, after the court of appeals vacated the $.35 rate, carriers revised their payments dramatically downwards, paying on the order of $.10 per call or less during the latter portion of the Interim Period. (Of course, the major IXCs continued to apply and collect from end users of payphones the rate increases and surcharges established to recover the $.35 rate.)

[9] If the Commission rejects the RBOCs' flawed proposal and employs a realistic estimate of independent PSPs' actual average call volume as the basis for adjusting Interim Period compensation (*see* Section II.), the equitable issues would be alleviated. However, it would still be necessary to face the issues of allocation of payments and the difficulties of administering retroactive adjustments. Indeed, there are a host of administrative issues that would need to be addressed, including, *e.g.*, whether adjustments should be made directly between overpaying and underpaying carriers, as opposed to between carriers and PSPs. The Commission should require carriers to settle among themselves whenever feasible, to avoid unnecessary burdens on PSPs.

compensation for independent PSPs, the RBOC plan has major substantive flaws that preclude its application to independent PSPs.

Foremost among the flaws of the RBOC plan is the proposed use of 1998 call volumes as the basis for estimating compensation during the Interim Period. 1998 was the year that the ILECs and IXCs, by bickering among themselves, effectively frustrated the implementation of a per-call tracking system for independent PSPs. Because the ILECs thoroughly botched the implementation of payphone coding digits for "smart" payphones (while continuing to use existing "hard-wired" payphone specific coding digits for their own predominantly "dumb" payphones so that only the ILEC payphones received proper per call counts), independent PSPs were left without a properly functioning per-call compensation system in 1998.[10] (Indeed, the problems with erratic implementation and use of Flex ANI have persisted in subsequent years.) Accordingly, the RBOC's proposed reliance on 1998 call volumes is utterly unsuitable as a basis for determining Interim Period compensation for independent payphones.

A. Problems with Flex ANI

The period that the RBOCs propose as a model for interim compensation – 1998 – is the period when the RBOCs and other ILECs failed to implement the fundamental requirement for independent PSPs to receive per-call compensation – Flex ANI. The Commission ordered per-call payphone compensation to begin on October 7, 1997. In order to meet that deadline, ILECs were required to deploy, during the Interim Period, a service that would transmit payphone-specific coding digits on all payphone calls. Instead of doing so, the ILECs spent the entire Interim Period arguing with the ILECs over the

---

[10] Although BellSouth apparently used "smart" payphones in 1998, ILEC payphones as a group were and continue to be overwhelmingly "dumb" phones.

interpretation of the Commission's orders. The ILECs insisted that it was sufficient for them to merely provide a LIDB based system,[11] an interpretation ultimately rejected by the Commission. As a result of the ILEC's position, instead of deploying the necessary coding digit technology (known as "Flex ANI") by October 7, 1997, the ILECs requested and were granted waivers of their coding digit obligation until March 9, 1998. *Order,* 12 FCC Rcd 16387 (Com. Car. Bur. 1997). Subsequently, the ILECs acknowledged that they could not meet this deadline either, and were given additional waivers, in some cases lasting until December 31, 1998, to implement Flex ANI. *Memorandum Opinion and Order,* 13 FCC Rcd 4998 (Com. Car. Bur. 1998).

In short, the RBOCs' own delay in implementing a tracking system and their subsequent waiver requests, and the Common Carrier Bureau's orders granting those requests, acknowledged that there was no properly functioning per-call compensation system for independent PSPs in 1998. In an April 3, 1998 order, the Bureau itself recognized that PSPs would not receive the per-call compensation payments to which they were entitled until Flex ANI was fully implemented. Recognizing the ILECs' utter failure to implement Flex ANI, the Bureau permitted IXCs to choose to pay PSPs a "surrogate" payment equal to the average per call compensation payments *received by the RBOCs,* not based on call volumes per call from independent payphones, during the same period. *Memorandum Opinion and Order,* 13 FCC Rcd 10893 (1998). Thus, the Bureau recognized that the RBOCs had, in contravention of the original *Payphone Orders,*

---

[11] Under a LIDB based system, the IXC would receive a "07" code indicating a restricted-billing line that may or not be a payphone line. The IXC would then send a query to the line information database ("LIDB") to find out if the "07" line is a payphone line.

provided a per-call system that works only for themselves – a problem which persists even today.

Even the additional year granted by the FCC did not suffice to enable the ILECs to implement a fully functioning Flex ANI system. Many ILECs continued to request and receive waivers reflecting particular problems with Flex ANI implementation through the end of 1998. *Memorandum Opinion and Order*, 13 FCC Rcd 11210 (1998). In the second half of 1998, when some of the RBOCs' waivers had expired and those RBOCs were supposedly providing Flex ANI throughout their regions, there were massive failures of implementation – including, in all likelihood, *both* failures of ILECs to properly deploy and transmit Flex ANI *and* failures of IXCs to subscribe, test, and/or prepare to receive Flex ANI. Due in large part to the massive problems with Flex ANI, a number of carriers showed very erratic payment patterns. For example, during the second quarter of 1998, one of the three largest IXCs suddenly began paying per-call compensation on more than five times as many smart payphones as in the previous quarter. At the same time, its recorded call counts for that quarter were at the lowest level ever reported by that carrier – about 33% below the level reported in the corresponding 1999 period. There is little doubt that as result of all these problems, many of which are the subject of separate litigation,[12] PSPs received only a portion of the compensation to which they were entitled in 1998.

The problems with implementation of Flex ANI have persisted in subsequent years. Even in 2000, according to information developed by an industry committee, well over

---

[12] For example, in *Phone-Tel Communications, Inc. v. AT&T*, No. 98-6486, the court recently referred to the FCC the question of who bears the loss when calls are uncompensated due the Flex ANI failure. *Id.*, Memorandum, June 12, 2000.

100,000 lines connecting "smart" payphones still were not providing Flex ANI digits consistently.

B. Other Problems

In addition to the Flex ANI fiasco, there have been a variety of other problems with the initial implementation of per-call compensation that make it unsuitable to base interim compensation payments on call volumes incurred during the initial period. For example, there were major disputes and uncertainties over facilities-based carriers' identification of calls allegedly routed to "switch based resellers," with one carrier "taking back" several million dollars in compensation on the basis that payments were erroneously made by the carrier in lieu of the "switch-based reseller." That same carrier recently (in Spring 2000) made a payment for several back quarters for thousands of payphones because it realized that the payphones, while showing no dial-around calls on the per-call tracking system, were in fact carrying traffic but there was some sort of ANI failure.[13]

As a result of these major problems with the implementation of per-call compensation, PSPs are still collecting only a fraction of the compensation that is due. For example, one PSP has estimated, based on LEC call records, that it has received compensation for only about 50% of calls routed to the three major carriers. Letter from Robert F. Aldrich to Magalie Roman Salas, dated July 28, 2000, at 5. *See* Attachment 2. More recently, APCC has conducted further comparisons between dial-around payments and ILEC switch call records for some 17,500 payphones operated by independent PSPs in California, payphones for which the carrier was purportedly paying compensation based on

---

[13] Of course, the carrier made the payment using a surrogate based on its average payment to RBOC payphones, *not* on the basis of its average payment to independent providers' payphones.

actual call counts. Initial analysis of these records indicates that during the third quarter of 1999, one of the three major carriers underpaid compensation on 78% of the payphones. The payphones in the total sample were underpaid, on average, by about 15 calls per payphone per month for calls to that carrier alone, based on conservative assumptions about call completion and other factors. If this experience with one carrier is assumed to be representative of the industry as a whole, the average undercount would be approximately 40 calls per payphone per month.

C. Any True-Up for the Interim Period with respect to Independent Providers' Payphones Should Be Based on Record Estimates of 1996 Call Volumes for Independent Payphones

For all these reasons, per-call compensation results are not reliable as an indicator of independent PSPs' compensable call volumes during the Interim Period. The most reliable indicator of such call volumes is still the data submitted to the Commission by independent PSPs from call detail records generated at their payphones. In the initial phase of the compensation proceeding, the Commission reviewed call volume data submitted by a variety of PSPs, and concluded that the average payphone yielded 131 compensable payphone calls per payphone per month. *First Report and Order, ¶125.* Subsequently, APCC submitted updated data on call volumes recorded from diverse payphones during the actual Interim Period. These statistics, recorded during the actual time period for which payments are to be adjusted, showed that independent payphones averaged 159 calls per payphone per month. *See* Ex Parte Letter from Albert Kramer to Mary Beth Richards, March 5, 1998, and Attachment 1, "APCC Survey of Dial-Around Calling at Independent Payphones in 1997"; Ex Parte Letter from Robert F. Aldrich to Magalie Roman Salas, March 26, 1998, and enclosure, "APCC's Dial-Around Calling Survey: 1997 Data". (Attached as Attachments 3 and 4).

This survey focused specifically on the year 1997, which includes the bulk of the Interim Period. The survey utilized call records from an average of 5,000 payphones, operated by 23 diverse payphone companies operating throughout the United States. Earlier APCC surveys using the same methods were cited by parties on both sides of the compensation issue and were repeatedly relied upon by the Commission in setting payphone rates in this proceeding. The Commission's findings regarding average numbers of payphone calls that relied in whole or in part on APCC data have not been overturned in any of the numerous appeals of the Commission's orders in this proceeding. The type of data relied upon by the Commission – actual call records from payphones -- remains the most reliable available data for purposes of determining call volumes at independent PSPs payphones during the Interim Period.

D. There Are a Number of Possible Methods for Allocating Carriers' Shares of the Total Interim Period Payment for Estimated Call Volumes at Independent PSPs' Payphones

In order to make retroactive adjustments to independent PSPs' Interim Period compensation payments based on recorded Interim Period volumes, it is necessary for the Commission to determine an appropriate allocation of the average call volume among payers. There are a number of possible ways to allocate the average call volume. For example, the average number of calls could be allocated in proportion to dial-around payments actually received by PSPs from IXCs during the most recent 12-month period. However, a difficulty with this approach, as stated above, is that the per-call compensation system continues to have major problems that have not been fixed. As a result, PSPs are still not being paid for a substantial percentage of payphone calls.

Alternative approaches include allocating payments among carriers based on their relative shares of the total telephone service market, or a segment thereof, such as the toll-

free service market. While the court of appeals rejected the Commission's initial reliance on shares of the toll service market to allocate payphone compensation among IXC payers, the fact that the court disapproved the FCC's initial, gross attempt at an allocation does not mean that a more targeted approach, focusing on the specific markets that make up dial-around calling, would be invalid.

None of the possible approaches is perfect. However, it is clearly better to use the most reliable available estimate of independent PSPs' call volumes, and to allocate those calls among carriers based on one of the methods discussed above, than to follow an approach such as the RBOC proposal, which would systematically undercompensate independent PSPs and is therefore invalid as applied to independent PSPs. But in any event, as explained in Section I, the difficulties of selecting a reasonable allocator can be avoided in the case of compensation for independent PSPs. The most appropriate resolution of the problem with respect to independent PSPs' compensation is to recognize that equitable considerations do not justify undertaking a retroactive adjustment of independent PSPs' compensation for the Second R&O Period and Interim Period.

CONCLUSION

In summary, the Commission should not attempt to resolve the details of any adjustments until it has resolved the logically prior issue of whether retroactive adjustments are warranted for the Interim Period and Second R&O Period. With respect to independent PSPs, equitable considerations do not justify any retroactive adjustments. To the extent adjustments are ordered, adjustments to independent PSPs' payments for the Interim Period should be based on record estimates of 1996 call volumes at independent PSPs' payphones. When and if the Commission does take up the issue of assumed call

volumes, it should begin with the initial call volumes that it found to be accurate in the *First Report and Order* and that were not questioned upon appeal.

Dated: October 20, 2000

Respectfully submitted,

Albert H. Kramer
Robert F. Aldrich

2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for the American Public
Communications Council

ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

PETITION OF THE COLORADO PAYPHONE ASSOCIATION FOR PARTIAL RECONSIDERATION

Special Counsel:
Albert H. Kramer
Robert F. Aldrich
Jacob S. Farber
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

Craig D. Joyce
WALTERS & JOYCE, P.C.
2015 York Street
Denver, CO 80205
(303) 322-1404

Attorney for the Colorado Payphone Association

April 21, 1999

the opportunity to resolve the impediments that currently inhibit the ability of payphone owners and carriers to negotiate fair compensation for dial-around calls." *Id.*, ¶ 18.

The IXCs, however, have no incentive to develop targeted call blocking. Currently, market rates for local coin calls are $.35, or more than 45% higher than the current dial-around compensation rate of $.24. The IXCs thus do not stand to gain from a move to a market-based approach. There is therefore no reason to believe that the carriers will go forward with implementing targeted call blocking absent an express Commission directive to do so.

If the Commission believes that targeted call blocking will open the way to the market-based approach to dial-around compensation that the Commission believes is correct, then the Commission must order the IXCs to implement the necessary technology as soon as possible. As the Commission found, "it will require a significant amount of time for IXCs to fully implement and deploy the necessary technologies." *Id.*, ¶ 18. The IXCs will not even begin the implementation process until they are ordered to do so. Thus, the longer the Commission delays in ordering targeted call blocking, the longer it will be before dial-around compensation can move to the market-based approach that the Commission has identified as the preferred approach.

III. THE COMMISSION ERRED IN REQUIRING PAYPHONE PROVIDERS TO REFUND A PORTION OF THE DIAL-AROUND REVENUE FOR THE PERIOD FROM OCTOBER 7, 1997 TO THE EFFECTIVE DATE OF THE *THIRD R&O*

The Commission should also reconsider its decision to order a true-up of the dial-around compensation amount paid to payphone providers during the period

from October 1, 1997 to the effective date of the *Third R&O*. In cases where retroactive modification of rates is permissible, the Commission must decide whether to impose such retroactive remedies based on the equities underlying each case:

> [T]he [D.C. Circuit has] held that the standard of review of an agency refund order is *whether the agency decision is "equitable in the circumstances of this litigation."* The stress upon "equitable considerations," indicates that, while the agency has a duty to consider the relevant factors in making a refund decision and enjoys a broad discretion in weighing these factors, the precise manner in which these general principles should be applied by a reviewing court depends upon, as is traditional in cases sounding in equity, the facts of the particular case.

Las Cruces TV Cable v. FCC, 645 F.2d 1041, 1047-48 (D.C. Cir. 1981) (quoting *Wisconsin Elec. Power Co. v. FERC*, 602 F.2d 452, 457 (D.C. Cir. 1979)). As the court noted in remanding the proceeding to the Commission, the "Commission itself has acknowledged that it has the authority to adjust the compensation rate retroactively, '*should the equities so dictate*.'" *MCI v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) (emphasis added) (citations omitted).

In *Towns of Concord*, the D.C. Circuit clarified that there is no presumption in favor of retroactive refunds or surcharges and, in fact, that equity generally disfavors the imposition of retroactive refunds:

> Customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution *only when "money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."*

Towns of Concord v. FERC, 955 F.2d 67, 75 (D.C. Cir. 1991) (emphasis added) (quoting *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301, 309 (1935)). The Commission recently adopted the *Towns of Concord* decision, holding that "[j]ust as FERC has discretion to

consider matters of equity in ordering refunds under the Federal Power Act, we have discretion to consider matters of equity under the Communications Act." *In the Matter of Investigation of Special Access Tariffs of Local Exch. Carriers*, 6 Comm. Reg. 555, 607 (1997) (citing *Towns of Concord*, 955 F.2d at 72; *Las Cruces*, 645 F.2d at 1046-48).

Here, however, the Commission ordered the true-up without first engaging in a balancing of the equities. Had the Commission evaluated the equities, it would have concluded that requiring a refund was inappropriate.

The current proceeding is an outgrowth of Docket No. 91-35, in which the Commission erroneously failed to award independent PSPs compensation for subscriber 800 calls. In that initial payphone compensation decision, the Commission erred in interpreting TOCSIA's mandate to "consider the need to prescribe compensation" for independent PSPs as applicable only to access code calls, not to subscriber 800 calls. After several years of delay (granted at the behest of IXCs and the Commission based on allegedly related reconsideration proceedings), the court of appeals finally heard APCC's appeal of the Commission's ruling, and overturned it, holding that Section 226 did in fact authorize the Commission to prescribe subscriber 800 compensation. Congress then confirmed, by enacting Section 276, that PSPs were in fact entitled to compensation for subscriber 800 calls. *Florida Pub. Telecomms. Assoc. v. FCC*, 54 F.3d 857 (D.C. Cir. 1995) ("*FPTA*"). The Commission folded its proceeding on remand of *FPTA* into the present proceeding on Section 276. APCC then requested that the Commission take a modest step to recognize independent PSPs' entitlement to compensation under *FPTA* by making the interim compensation in this