ORIGINAL

EX PARTE OR LATE FILED

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

2101 L Street NW • Washington, DC 20037-1526
Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: 202-828-2236
A5691.0542

RECEIVED

MAR 26 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 26, 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-128; Retroactive Adjustment of Interim Compensation

Dear Ms. Salas:

Enclosed for filing with the Federal Communications Commission is a copy of an Ex Parte Presentation in CC Docket No. 96-128.

If you have any questions about this matter, please contact the undersigned.

Sincerely,

Robert F. Aldrich

Albert H. Kramer
Robert F. Aldrich

Enclosure
cc: Dorothy Attwood
Jared Carlson
Jane Jackson
Lenworth Smith

No. of Copies rec'd 1+1
List ABCDE

1272096 v1; R9K001!.DOC

1177 Avenue of the Americas • 41st Floor • New York, New York 10036-2714
Tel (212) 835-1400 • Fax (212) 997-9880
http://www.dsmo.com

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street NW • Washington, DC 20037-1526
Tel (202) 785-9700 • Fax (202) 887-0689

RECEIVED

MAR 26 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Writer's Direct Dial: 202-828-2236
A5691.0542

March 26, 2001

Ms. Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C345
Washington, D.C. 20554

Re: **CC Docket No. 96-128; Retroactive Adjustment of Interim Compensation**

Dear Ms. Attwood:

This letter submits, on behalf of the American Public Communications Council ("APCC"), additional information that is relevant to two pending matters: (1) the Regional Bell Operating Companies' ("RBOCs") proposal (filed August 8, 2000) to use the current $.24 dial-around compensation rate and 1998 call counts of actually compensated calls to retroactively adjust the compensation paid to all payphone service providers ("PSPs"), independent PSPs and local exchange carrier ("LEC") PSPs alike, during the period from November 6, 1996 to October 6, 1997 (the "Interim Period");[1] and (2) the Colorado Payphone Association's pending Petition for Partial Reconsideration (filed April 21, 1999) of the Commission's *Third Report and Order* [2] decision to apply the $.24 rate retroactively to the period from October 7, 1997 to April 21, 1999 (the "Second Report and Order Period").[3]

Information recently compiled by APCC shows that the volume of *actually* compensated calls from the *average independent* payphone in 1998 was approximately 109 calls per payphone per month. However, the current $.24 (or, for retroactivity purposes,

[1] During the Interim Period, flat-rate compensation totaling $45.85 per payphone per month, based on the Commission's initially prescribed rate of $.35 per call, was initially in effect but was interrupted when the court of appeals vacated the $.35 rate.

[2] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order, and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 2545 (1999).

[3] During the Second Report and Order Period, the rate of $.284 per call, prescribed in the *Second Report and Order*, was in effect. After a court remand of that rate, the Commission prescribed a new rate of $.24 per call.

1177 Avenue of the Americas • 41st Floor • New York, New York 10036-2714
Tel (212) 835-1400 • Fax (212) 997-9880
http://www.dsmo.com

$.238) compensation rate was set based on call volume at a ***marginal*** payphone of 142 calls per payphone per month. Therefore, it would be clearly inequitable and would grossly undercompensate independent PSPs for the Commission to retroactively adjust compensation payments based on the current $.238 rate and the actual volume of calls in 1998.

Background

As explained in APCC's October 20, 2000 comments on the RBOC proposal, the Commission cannot simply order retroactive compensation adjustments as a matter of course. Retroactive rate adjustments may be ordered after a court remand only if the equities so require. *Towns of Concord v. FERC*, 955 F.2d 67, 75-76 (D.C. Cir. 1991). The Commission has not yet made a final ruling on *whether* to order retroactive adjustments for the Interim Period. Comments of APCC, filed October 20, 2000, at 5.

Moreover, the Commission must not treat retroactive adjustment of the Interim Period compensation in isolation from the closely related issue of retroactive adjustments of the Second Report and Order Period compensation. The Commission has already linked the *implementation* of retroactive compensation adjustments for these two periods, stating that they would occur simultaneously. *Third Report and Order*, 14 FCC Rcd at 2636. There are other obvious linkages, as well. The Commission must make consistent decisions on (1) whether the equities warrant retroactive adjustments for the two periods and (2) the methodologies to be used for determining the amount of any adjustments.

For both periods, the issue of whether and how to make retroactive adjustments remains open. As to the Interim Period, as noted above, no final decision has been made. As to the Second Report and Order Period, while the Commission did order retroactive application of the $.24 rate to that period, it failed to explain its ruling, and did not evaluate the equities prior to the ruling. Still pending is the Colorado Payphone Association's Petition for Partial Reconsideration of the *Third Report and Order*, filed April 21, 1999, which requests the Commission to reconsider, in light of the equities, its unexplained decision to require retroactive adjustments for independent PSPs for the Second Report and Order Period.[4]

Accordingly, the questions of whether, and if so, on what basis, to order retroactive compensation adjustments for the Interim Period and the Second Report and Order Period remain to be addressed. The Commission must address these questions together, in a consistent and equitable fashion. Therefore, prior to deciding whether to adopt the RBOCs' specific implementation proposal for the Interim Period, the Commission must decide the prior question whether retroactive application of the current

[4] The Colorado Payphone Association's petition also requests reconsideration of the $.24 per call rate set in the *Third Report and Order*, on the grounds that the FCC made several mistakes in analyzing PSPs' costs. For purposes of this letter, we assume that the Commission denies reconsideration of the $.24 rate.

$.24 per call rate to prior compensation periods (*i.e.*, the Interim Period *and* the Second Report and Order Period) is even warranted, as a matter of equity.

In its comments and reply comments on the RBOC proposal, APCC showed that, at least for independent PSPs, it would not be equitable to apply the $.24 rate retroactively to 1998 call volumes, for purposes of either Interim Period or Second Report and Order Period compensation.[5] APCC argued that, at least with respect to the compensation received by independent PSPs, the equitable solution -- one that will also avoid imposing huge administrative burdens on the parties and the Commission -- is to rule that there will be no compensation adjustments for *either* the Interim Period *or* the Second Report and Order Period. The additional information submitted herewith further confirms the validity of APCC's position.

Discussion

In its comments on the RBOC proposal, APCC explained that utilizing actual 1998 compensation payments as the basis for 1996-97 Interim Period adjustments would be patently inequitable because independent PSPs were uncompensated in 1998 for a huge volume of compensable dial-around calls. First, LECs and interexchange carriers ("IXCs") spent the Interim Period – during which LECs and IXCs were supposed to implement the system for call tracking – bickering over how to implement the Commission's call tracking requirement. The Commission ultimately ruled that LECs must implement FLEX ANI, but not before the Commission had to waive the October 7, 1997 implementation deadline. There were then massive problems experienced by independent PSPs with (1) LEC implementation, and IXC processing, of FLEX ANI codes that are supposed to "tag" payphone calls so that IXCs can track and pay for the calls.[6] Second, PSPs experienced massive problems identifying and collecting compensation from "switch-based" resellers who are supposed to be responsible for paying compensation under the FCC rules.

Since filing its comments on the RBOC proposal, APCC has compiled more complete information on the average volume of *actually compensated calls*, per payphone per month, for independent PSPs. For 1998, payphones for whom APCC's compensation clearinghouse affiliate collects compensation, representing close to three quarters of all independent payphones, have been paid dial-around compensation for an average of 109 calls per month. As discussed below, that number is far below the call volume that the Commission assumed was necessary in order to recover the costs allocated to dial-around calls. Accordingly, APCC's payment data confirms that applying the current $.24 rate to 1998 call volumes, so as to retroactively adjust the compensation received for the Interim

---

[5] The equities may differ between ILEC PSPs and independent PSPs. But independent PSPs have many equities in their favor. *See*, e.g., note 9 below.

[6] The LEC PSPs did not experience the same problems because most of their payphone lines transmitted hard coded payphone identifiers as part of the legacy of past discrimination against independent PSPs.

Period and for the Second Report and Order period – would result in systematic undercompensation of independent PSPs.

The significance of this shortfall is easily demonstrated. The Commission set the $.24 rate in the *Third Report and Order* based on its analysis of the per-call cost of maintaining a payphone in a "marginal location." The Commission sought to "ensure that the current number of payphones is maintained," and concluded that "the default per-call compensation amount we establish should ensure that each call at a marginal payphone location recovers the marginal cost of that call plus a proportionate share of the joint and common costs of providing the payphone." *Third Report and Order* at 2571. The Commission determined that "establishing a compensation amount that allows a PSP to recover its costs will promote the continued existence of the vast majority of payphones presently deployed, thereby satisfying what we consider to be Congress's primary directive that we ensure the widespread deployment of payphones." *Id.* at 2579.

The Commission found that the joint and common costs of a payphone at a marginal location totaled $101.29, and that an average of 439 calls (of all types) per phone per month are made from payphones at marginal locations. Dividing $101.29 by 439 yielded per call joint and common costs of $.231. Adding $.009 per call of costs specific to dial-around calls yielded a total of $.24 per call – adjusted to $.238 for purposes of retroactive compensation. *Third Report and Order* at 2632.[7]

The Commission's determination that a $.24 (or $.238) rate would ensure recovery of the costs of a marginal payphone was thus based on its determination that marginal payphones have 439 calls per payphone per month. *Third Report and Order* at 2612. Of these 439 calls, the Commission found that an average of 142 calls were dial-around calls (the rest are primarily coin calls). Id. at 2614, n. 302. The Commission thus expected that, to enable a payphone in a marginal payphone location to recoup its monthly joint and common costs, the payphone would generate an average of 142 dial-around calls, producing dial-around revenues of 142 x $.238, or $33.80 per month in dial-around compensation. The Commission reasoned that if PSPs operating payphones in marginal locations were compensated for all 142 of the dial around calls at a rate of $.238, then they would be able to recover their monthly costs, thereby ensuring "that the current number of payphones is maintained."

As the attached information on compensation payments makes clear, however, payphones at marginal locations have actually received compensation on far fewer than 142 calls per month. As noted above, the actual dial-around compensation payments in 1998

---

[7] For purposes of retroactive application, however, the Commission stated that the rate would be $.238, because $.002, representing Flex ANI costs, would only be incurred for a three year period, on average, and therefore would only be recoverable prospectively, for three years beginning on the effective date of the order. *Third Report and Order* at 2635.

to the *average* APCC client payphone compensated the PSP for only about 115 calls per payphone per month.

Determining the impact of this shortfall on retroactive compensation adjustments is a matter of simple arithmetic. APCC's data on actually compensated calls relates to the *average independent payphone, not marginal payphones*; therefore, the proper comparison is between the 109 *compensated* calls at the *average* payphone and the number of *compensable* calls at an *average* payphone. The Commission found that *average* RBOC payphones generated 155 compensable calls per month (*id.* at 2614), which confirms APCC's survey-based estimate that the *average* independent payphone had 159 compensable dial-around calls per month. Thus, it is reasonable to conclude that in 1998 independent PSPs were compensated, on average, for only 109 out of 159 compensable calls per month, or 68.6% of compensable calls.

To translate this shortfall into the terms of the Commission's marginal payphone policy is also a simple matter. Given that the *average* independent payphone was paid on only 68.6% of compensable calls per payphone per month, it is reasonable to infer that a *marginal payphone* was paid on a comparable percentage of calls. Applying this percentage to the monthly call volume of 142 calls for marginal payphones yields a paid call volume for marginal payphones of about 97 calls per payphone per month, for total compensation of $27.55 per payphone per month (at the 1998 rate of $.284 per call). This is substantially lower than the $33.80 per month required by the Commission's analysis in the *Third Report and Order*. If the current $.238 rate is applied retroactively to 1998 call volumes, as proposed, the undercompensation of PSPs would become even worse (97 x $.238 = $23.09 per payphone per month).

To achieve the $33.80 per payphone per month cost recovery intended in the *Third Report and Order*, adjusted compensation for the Interim Period and Second Report and Order Period, if based on actual call volumes, would have to *exceed* substantially the *Second Report and Order* rate of $.284 per call ($33.80/97 = $.348).

Under these conditions, a retroactive adjustment based on the current rate of $.238 per call would be grossly inequitable, particularly because the causes of the shortfall in compensated calls are beyond independent PSPs' control. As noted in APCC's comments, the difference between actual and expected compensation payments results largely from massive problems experienced by PSPs with (1) LEC implementation, and IXC processing, of FLEX ANI codes that are supposed to "tag" payphone calls so that IXCs can track and pay for the calls; and (2) identifying and collecting compensation from "switch-based" resellers who are supposed to be responsible for paying compensation under the FCC rules. These problems have been amply documented to the Commission. Indeed, in the *Third Report and Order*, the Commission specifically acknowledged the reseller issue in explaining its decision *not* to include in the compensation rate an allowance for uncollectables, and stated: "It appears that if we were to grant such a petition, uncollectibles would be significantly reduced." *Id.* at 2619. The Commission also recognized that uncollectables are directly relevant to the issue of retroactive compensation:

> We note that, in a forthcoming order, we will determine the amount that IXCs owe PSPs for the period before October 7, 1997 and the way in which IXCs may recover overpayments that result from the default compensation amount established herein. If a petition for clarification is resolved prior to the adoption of our order addressing IXCs payments prior to October, 1997, we may visit the issue of uncollectibles in that order.

Id.[8]

Under the circumstances, the Commission must find that applying the $.238 rate to the Second R&O Period, or to the Interim Period based on Second Report and Order Period call counts, would disserve the paramount Congressional objective of sustaining widespread payphone deployment, because PSPs, who only received compensation for 68.6% of the compensable calls they handled, would ultimately receive on average $23.09 per marginal payphone per month, rather than the $33.80 the Commission determined was necessary for PSPs to satisfy their monthly costs.

Therefore, the Commission must abandon the attempt to make retroactive compensation adjustments, unless it is prepared to utilize a retroactive compensation rate exceeding $.35 per call.

APCC stresses that it is addressing only the issue of retroactive adjustment of independent PSPs' compensation for the Interim Period and the Second Report and Order Period. APCC recognizes that the RBOCs have taken a different position with respect to retroactive compensation. It would be both feasible and reasonable for the Commission to issue separate rulings with respect to independent payphones and ILEC payphones, in the

---

[8] Since issuing the *Third Report and Order*, the Commission has received further evidence that uncollectables are indeed massive. RBOC/GTE/SNET Coalition Petition for Clarification, NSD File No. L-99-34, filed February 26, 1999, at 2-3. RBOC/GTE/SNET Coalition Reply Comments, filed June 1, 1999, at 5-6. Letter to Magalie Roman Salas from Robert F. Aldrich, July 28, 2000.

event that the Commission decides that the equities warrant retroactive adjustment of the compensation received for ILEC payphones.[9]

Sincerely,

Albert H. Kramer
Robert F. Aldrich

---

9 For example, independent PSPs went uncompensated for subscriber 800 calls (the bulk of dial-around calls) for four years, due to the Commission's erroneous interpretation of the prior payphone compensation provision, Section 226(e)(2) of the Act. *See Florida Public Telecommunication Ass'n v. FCC*, 54 F.3d 857 (D.C. Civ. 1995). During that same period, LECs fully recovered their payphone costs because their payphones were part of the regulated rate base.

APCCS 1998 Dial Around Compensation Breakdown

Year	Qtr	Unique Submitted ANIs	Collections Per ANI Per Month	Compen-sated Calls Per ANI Per Month
1998	1	369,854	29	101
1998	2	389,149	33	115
1998	3	394,571	33	115
1998	4	373,135	30	104
1998	All	1,526,709	31	109