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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable Arthur I. Steinberg
 Administrative Law Judge
 Federal Communications Commission
 445 12th Street, S.W.
 Washington, DC 20554

Re: C.F. Communications Corp., et al., v. Century Telephone of Wisconsin, Inc., et al., EB Docket No. 01-99

Dear Judge Steinberg:

By Order released on April 30, 2001, Judge Richard L. Sippel, Acting Chief Administrative Law Judge, ordered a prehearing conference be held on May 24, 2001, in the above referenced proceeding. Complainants¹ believe a number of issues should be raised and resolved at this prehearing conference, particularly what evidence Complainants may present to prove "how many payphones each Complainant owned . . . were public." *C.F. Communications Corp., et al. v. Century Telephone of Wisconsin, Inc.*, Hearing Designation Order, EB Docket No. 01-99, ¶ 25 (2001) ("HDO").

Complainants believe that these issues should be resolved at the prehearing conference to insure that the hearing proceeds as quickly and smoothly as possible. A quick resolution of these complaints is especially appropriate in this instance due to the fact that Complainants have been seeking to recover damages for unlawfully assessed EUCL charges for approximately ten years. Some of the Complainants filed informal complaints in 1990 and all filed formal complaints in 1993 and all have yet to see a dime.

A quick resolution for these complaints is possible given the fact that this proceeding should have the essential attributes of a collections case. The Commission has already determined in *C.F. Communications Corp., et al. v. Century Telephone of Wisconsin, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 8759 (2000) ("Liability Order") that the LECs violated Section 201(b) of the Communications Act of 1934, as amended, by improperly assessing EUCL charges upon the PSP Complainants. Accordingly, the only task left is to determine the amount of the LECs' monetary liability. Complainants believe

¹ The term "Complainant" refers to the eight formal Complainants for which we filed written notices of appearance.

that this hearing should be governed in a streamlined fashion so that liability can be determined quickly and these matters can, at long last, be brought to resolution.

Complainants request that their counsel and counsel for defendants be directed to argue orally the issues set forth in this letter, and any other relevant legal issues, at the prehearing conference. Moreover, Complainants request that the issues argued at the prehearing conference be ruled upon and resolved as soon as possible, as quick resolution of these issues is necessary to allow Complainants to get on with the task of organizing the evidence in support of their claims and drafting their supplemental complaints. Resolving these issues now will also ensure that the hearing will proceed with minimal disruption from the disagreements and arguments that are certain to arise if these issues remain in dispute.

I. Complainants Should Be Permitted To Prove That Their Payphones Were Public In Alternative Ways

A. Affidavits, Rather than Line-by-Line Proof, Should be Sufficient to Prove the Number of Complainants' Payphones that were Public

The *HDO* states that Complainants must prove the number of their payphones that were public. *HDO* at ¶ 25. To prove that their payphones were public, Complainants should be allowed to attach an affidavit to their supplemental complaints attesting to the fact that all of the payphones for which they seek recovery of EUCL charges were public.

Requiring Complainants to proffer line-by-line proof, rather than an affidavit, to prove that their payphones are public is inconsistent with the court's decision in *C.F. Communications Corp., et al. v. Century Telephone of Wisconsin, Inc.*, 128 F.3d 735 (“*C.F. Communications*”). In that case, the court provided two *alternative* grounds for reversing the Commission. First, the court held that independent payphone service providers (“independent PSPs”) were not end users under the Commission's rules or the LECs' tariffs and therefore not subject to EUCL charges. Second, the court concluded that even if independent PSPs were end users (and therefore potentially subject to EUCL), they were still exempt from EUCL charges because their payphones were “public” as that term is defined by the Commission's rules. Under the Commission's access charge regime in place during the time period in which Complainants are seeking damages, “public” phones are not assessed EUCL charges.

The court could not have been clearer that these two grounds for reversing the Commission were alternative grounds. The court explained that

“[i]n addition to our conclusion that the Commission erred in determining that CFC was an “end user,” we also hold that petitioners are entitled to the relief sought for the alternate reason that the Commission improperly discriminated between similarly situated phone services without a rational basis.”

C.F. Communications at 740. Because these are alternatives grounds, either one *alone* was sufficient to reverse the Commission’s determination in the *C.F. Communications Orders*² that the LECs’ assessment of EUCL charges on IPSPs was not unlawful. In other words, the court held that independent PSPs do not have prove that their payphones are public because they are not “end users.” The Enforcement Bureau, notwithstanding the court’s ruling, required in the *HDO* that Complainants prove that their payphones are public. It would be inconsistent with the court’s ruling that independent PSPs are not end users if Complainants are inhibited from recovering damages because it is difficult for them to satisfy their evidentiary burden of proving that their payphones are public.

To prevent the court’s ruling from being undermined, Complainants’ evidentiary burden for proving the number of their payphones that are public must be relatively light. Accordingly, Complainants should be permitted to satisfy this burden of proof by attaching affidavits to their supplemental complaints attesting to the fact that their payphones were indeed public.

If a complainant files an affidavit regarding the “public nature” of its payphones, it must be decided whether defendants can then offer evidence to the effect that at least some of the payphones in question were not public. Defendants should not be permitted to offer such evidence since doing so would necessarily mean that the parties would get mired in a line-by-line battle over the public nature of the payphones. Accordingly, defendants should be limited to challenging the *manner* in which the complainant calculated the number of its public payphones.

In addition to being inconsistent with the court’s ruling, a hearing in which Complainants were required to offer individualized proof that each one of the payphones for which they seek the recovery of EUCL charges is public would be lengthy and extremely burdensome on all parties. Combined, Complainants owned approximately

² These orders consist of *C.F. Communications v. Century Telephone of Wisconsin, Inc. et al.*, Memorandum Opinion and Order, 8 FCC Rcd 7334 (1993); *C.F. Communications v. Century Telephone of Wisconsin, Inc. et al.*, Memorandum Opinion and Order, 10 FCC Rcd 9775 (1995). In these orders the Common Carrier Bureau and then the Commission dismissed *C.F. Communications’* formal complaint which alleged that EUCL charges assessed against it were unlawful.

twenty thousand payphones during the relevant time period.³ A payphone-by-payphone approach would mean that the parties involved in the proceeding would spend months examining solely the question of whether the payphones are public. It is an understatement to assert that this type of effort is a waste of resources. Moreover, payphone-by-payphone proof will be difficult to muster because of the passage of time and will result in a long drawn-out proceeding, allowing defendants to hold onto Complainants' money for an even longer time.

In the event that your honor believes that defendants should be afforded the opportunity to contest Complainants' affidavits by proffering line-by-line evidence that some of Complainants' payphones were semi-public, the burden should shift to the defendants to prove which lines were indeed semi-public. Placing the burden on Complainants of proving that a contested payphone is public would be inconsistent with the court's holding in *C.F. Communications* for the reasons explained above.

A prerequisite for allowing Complainants to submit affidavits attesting to the fact that their payphones are public is a determination of the definitions of the terms "public" and "semi-public." These terms should be defined in the manner set forth in the defendants' tariffs. For instance, these tariffs generally provide that the primary distinction between these two types of services is both that in the case of semi-public service the premises owner pays to have the payphone installed and that the premises owner is the subscriber to the service as opposed to the phone being installed at the discretion of the telephone company. Another difference is that semi-public service generally includes directory listings while public service does not. Also, with semi-public service premises owners can answer, on their regular phone, calls incoming to their payphone via an extension provided by the LEC. Extensions are not provided with public service.

The defendants should not be allowed to argue that whether a payphone is public or semi-public depends on the location of the payphone. While there is language in the Commission's order in the *Liability Order* which arguably suggests that the location of the payphones is dispositive of whether a phone is public, that language is misleading. The *Liability Order* states that

[a] pay telephone is used to provide semi-public telephone service when there is a combination of general public and specific customer need for the service, such as at a gasoline station or pizza parlor.' By contrast, '[a] pay telephone is used to provide public telephone service when a public need exists, such as at an airport lobby, at the

³ Put differently, Complainants had approximately twenty thousand unique ANIs during the relevant time period.

option of the telephone company and with the agreement of the owner of the property on which the phone is placed.

Liability Order at ¶ 12. While it is true that semi-public telephone service can be provided in semi-public locations such as pizza parlors and gasoline stations, public telephone service can also be, and is, provided in such locations by both independent PSPs and the LECs. Accordingly, location cannot be the distinguishing feature of the two types of service. Rather, the only logical way to distinguish public and semi-public service is by using the standards indicated by the LECs' tariffs.

B. Complainants That Wish to Use Proxies, Rather than Affidavits, Should be Permitted to do so

1. Use of proxies is permitted by the HDO

The *HDO* strongly suggests that Complainants should be permitted to use a proxy to calculate the number of its payphones that are public. The *HDO* explains that “[g]iven the passage of time, determining the exact number of public and semi-public payphones may be difficult. We therefore encourage the parties to consider proxies that can be used to obtain a reasonable estimation of that number.” *HDO* at ¶ 21. Complainants seek confirmation at the prehearing conference that they can use a proxy to estimate the number of public payphones – as compared to semi-public payphones -- that they owned in the relevant time period.

The use of proxies is appropriate because, as discussed in section I.A. above, line-by-line proof is simply not practical. In addition, the *HDO* itself declares that the use of proxies in this instance is appropriate and that the vast majority of payphones owned by independent PSPs are public. Finally, the use of proxies is also appropriate because placing a high burden on Complainants of proving that their payphones are public would violate the court's decision in *C.F. Communications* for the reasons explained in section I.A above.

2. What proxy should be used

The next issue is what proxy or proxies are appropriate. One possible proxy suggested by the Commission in the *Liability Order* is the percentage of defendants' phones that are public rather than semi-public.⁴ The Commission explained that “due to

⁴ Some refinement of this suggested proxy may be necessary to reflect the fact that the percentage of payphones that are public rather than semi-public is likely to vary depending on the relevant geographic area. For example, the percentage of public to semi-public payphones in Manhattan is likely to be different than this percentage in upstate New York.

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the manner in which LECs and IPPs deployed payphones prior to the 1996 Act, the ratio of IPP public to semi-public phones should *at a minimum*, be no less than the ratio of LEC public to semi-public phones.” *Id* (emphasis added). The appropriate proxy should be determined at the prehearing conference.

Like the use of affidavits, a prerequisite to using a proxy is a determination as to the definitions of the terms “public” and “semi-public.” These terms should be defined in the manner set forth in the defendants’ tariffs for the reasons explained in Section I.A above.

II. Evidence Complainants Must Produce At The Hearing

Complainants urge you to confirm at the prehearing conference that Complainants do not have to submit at the hearing business records, particularly phone bills, to the Commission and/or defendants. Some Complainants have hundreds of boxes of telephone bills and it would be extremely burdensome and impractical to provide copies of these records to the Commission and defendants.

While Complainants are not opposed to defendants inspecting Complainants’ business records, they should have to do so at Complainants’ storage sites. Such an arrangement would save Complainants a significant amount of time and money; would prevent the Commission from being a repository for hundreds of boxes which the Commission could not possibly inspect; and would not prejudice defendants since they could still inspect the documents at Complainants’ storage sites. Any request for inspection of such records should be made in good faith.

Sincerely,

Albert Kramer RF

Albert H. Kramer

cc: Magalie Roman Salas, Secretary
Attached Service List

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2001, a copy of the foregoing letter was sent via facsimile to the following:

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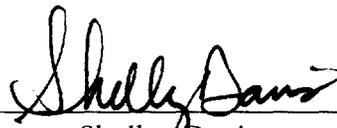
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