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

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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

File No. NSD-L-99-34

MOTION FOR LEAVE TO FILE LATE

Albert H. Kramer  
Robert F. Aldrich  
Jeffrey H. Tignor  
Gregory Kwan  
2101 L Street, N.W.  
Washington, DC 20037-1526  
(202) 828-2226

Attorneys for the American Public  
Communications Council

June 4, 2001

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**FEDERAL COMMUNICATIONS COMMISSION**  
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CC Docket No. 96-128

**MOTION FOR LEAVE TO FILE LATE**

The American Public Communications Council (“APCC”) hereby requests leave to file the associated Opposition of the American Public Communications Council to Sprint Corporation’s Request for Stay (“Opposition”) one day late. Sprint filed its “Request of Sprint Corporation for a Stay of the Second Order on Reconsideration and Revised Final Rules Pending Judicial Review” (“Request for Stay”) on May 25, 2001, the day before a three-day holiday weekend. APCC was due to file its Opposition seven days later, on Friday, June 1, 2001. However, as Monday, May 28, 2001 was a federal holiday, counsel for APCC did not receive service of Sprint’s Opposition until Tuesday, May 29, 2001. Counsel for APCC was not able to adequately address the issues raised in Sprint’s 32-page Request for Stay in only three days. Counsel is filing its Opposition on the earliest practicable date-the following business day. APCC regrets any inconvenience this may cause the Commission.

APCC respectfully requests that this Opposition be accepted for filing.

Dated: June 4, 2001

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Albert H. Kramer", is written over a horizontal line.

Albert H. Kramer  
Robert F. Aldrich  
Jeffrey H. Tignor  
Gregory Kwan

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

Attorneys for the American Public  
Communications Council

**Before the  
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**OPPOSITION OF THE  
AMERICAN PUBLIC COMMUNICATIONS COUNCIL  
TO SPRINT CORPORATION'S REQUEST FOR STAY**

Albert H. Kramer  
Robert F. Aldrich  
Gregory Kwan  
Jeffrey Tignor  
2101 L Street, N.W.  
Washington, DC 20037-1526  
(202) 828-2226

Attorneys for the American Public  
Communications Council

June 4, 2001

## SUMMARY

Under the four part test of *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), Sprint has utterly failed to justify a stay of the Commission's Second Order on Reconsideration in this proceeding. The Commission's modified rule will remedy at long last a pernicious flaw in the payphone compensation system that has threatened the very viability of the payphone industry. The rule is clearly justified and must not be stayed.

On the merits of its arguments, Sprint will not prevail, because the Commission did not need to issue any new notice of proposed rulemaking prior to its order. The Commission was lawfully reconsidering its 1996 Order on Reconsideration in this proceeding. The timely filing of two petitions for further reconsideration of that order – petitions that remain pending, tolled the time period in which the Commission is allowed to reconsider an order on its own motion. Accordingly, under *Central Florida Enterprises v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), the Commission retained authority to reconsider *sua sponte* other issues addressed in the Order of Reconsideration, such as the assignment of responsibility for compensation payment for calls routed to resellers.

For the reasons stated above, no additional formal or actual notice was required prior to the Second Reconsideration Order, beyond the original notice of proposed rulemaking issued at the outset of this proceeding. But even if any further actual notice to the parties were required, such notice was provided by the RBOC/GTE/SNET Coalition's 1999 Petition for Clarification, which squarely raised the issue of which carrier pays dial-around compensation when payphone calls are routed to resellers.

Further, there is no basis for Sprint's claim that the FCC lacked a reasoned basis for modifying its rules. The record is replete with evidence of the extreme difficulties

encountered by PSPs in attempting to collect compensation from resellers, and of the inability of PSPs to audit IXCs' payments due to the IXCs' refusal to disclose basic call detail information.

The objections proffered by Sprint go primarily to the feasibility of carrier compliance within the eight-month transition period set by the FCC. These objections lack merit. Contrary to Sprint's contentions, IXCs have numerous options for recovering compensation costs and, as the record shows, for addressing the issue of tracking completed calls. Sprint has failed to show why it would be unable to comply with the call detail requirement. Finally, the rule will improve rather than degrade carriers' ability to satisfy reseller monitoring obligations that already exist and that carriers have been avoiding for years.

Sprint has not shown that it would suffer any irreparable harm. By contrast, PSPs have demonstrated, and Sprint's own data confirm, that PSPs are now suffering, and will continue to suffer severe and irreparable economic harm until the Commission's modified rule is implemented. To prevent such harm and to serve the public interest in widespread deployment of payphones, 47 U.S.C. § 276(b), the Commission must deny Sprint's request for stay.

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CC Docket No. 96-128

**OPPOSITION OF THE  
AMERICAN PUBLIC COMMUNICATIONS COUNCIL  
TO SPRINT CORPORATION'S  
REQUEST FOR STAY**

The American Public Communications Council ("APCC") hereby opposes Sprint Corporation's request for stay<sup>1</sup> ("Request") of the Commission's Second Order on Reconsideration in the above-captioned docket. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 2001 FCC LEXIS 1917 (rel. April 5, 2001)("Order").<sup>2</sup>

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<sup>1</sup> Request of Sprint Corporation for a Stay of the Second Order on Reconsideration and Revised Final Rules Pending Judicial Review, CC Docket No. 96-128 at 24 (May 25, 2001).

<sup>2</sup> See also *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996) ("Report and Order"), *recon.*, 11 FCC Rcd at 21233 (1996) ("First Reconsideration Order"), *affirmed in part and vacated in part Illinois Public Telecom. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997). See also Memorandum Opinion and Order, DA 98-642, released April 3, 1998 ("April 3 Order").

In order to justify a stay, the movants must show that (1) they are likely to prevail on the merits; (2) they will be irreparably harmed absent a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest.<sup>3</sup>

## **I. SPRINT IS UNLIKELY TO PREVAIL ON THE MERITS**

Sprint does not and cannot show any substantial likelihood of success on the merits. APCC notes that Sprint has not petitioned for reconsideration of the *Order*. Rather, it has threatened to file a petition for review. Therefore, the relevant standard for assessing likelihood of success is whether Sprint is likely to prevail on the merits of a petition for review, in light of the deferential standard of court review accorded to agency decisions. For the reasons stated below, the answer is clearly “no”.

### **A. The Commission’s Decision Is Procedurally Proper**

Sprint argues that the FCC promulgated “New Rules” without issuing a notice of proposed rulemaking, in violation of the Administrative Procedure Act’s notice and comment requirements. This position is fundamentally flawed.

The Commission is not issuing “New Rules” in a procedural vacuum.<sup>4</sup> The FCC clearly stated that it is reconsidering the November 8, 1996 *Order on Reconsideration*. Prior to that order, the Commission published a Notice of Proposed Rulemaking

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<sup>3</sup> *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

<sup>4</sup> Although Sprint labels them “New Rules,” the rules adopted in the *Order* are not really “new.” The Commission has essentially reinstated the rules that were adopted in the Commission’s original September 20, 1996 *Report and Order*.

(“NPRM”).<sup>5</sup> Obviously, the Commission is not required to publish a second NPRM when it is reconsidering a prior rulemaking order. Therefore, there was no violation of notice requirements, as argued by Sprint.

Sprint argues that the Commission may not reconsider the *First Reconsideration Order* because no party sought reconsideration of that order, and the time for the Commission to reconsider the order on its own motion has expired. Sprint is incorrect. Two parties filed petitions for further reconsideration of the *First Reconsideration Order*.<sup>6</sup> These petitions remain pending.<sup>7</sup> Under *Central Florida Enterprises, Inc. v. FCC* (“*Central Florida*”)<sup>8</sup> and several FCC cases, the filing of a petition for reconsideration tolls the time period in which the Commission is allowed to reconsider an order *sua sponte*,<sup>9</sup> permitting the Commission to reconsider issues other than those specifically raised in the pending petition for reconsideration. The Commission has the authority to reconsider on its own

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<sup>5</sup> Notice of Proposed Rulemaking, 11 FCC Rcd 6716 (1996).

<sup>6</sup> Petition for Further Reconsideration of Invision Telecom, Inc., CC-Docket No. 96-128 (filed January 13, 1997); Petition for Reconsideration of the California Payphone Association, CC-Docket No. 96-128 (filed January 13, 1997)(copies attached).

<sup>7</sup> Although the California Payphone Association moved to withdraw its petition on April 14, 1998, that motion was never granted. Invision has never sought to withdraw its petition.

<sup>8</sup> *Central Florida Enterprises, Inc. v. Federal Communications Commission*, 598 F.2d 37 (D.C. Cir. 1978)

<sup>9</sup> The fact that Commission reconsideration occurs four years after the order does not alter the fact that the pending petitions for reconsideration tolled the thirty-day period.

motion issues not raised in a pending petition for reconsideration as long as those issues were addressed in the original *Order* and there is a *Petition for Reconsideration* pending.

In *Central Florida* the court reviewed whether the Commission had the jurisdiction to reconsider *sua sponte* its earlier disposition.<sup>10</sup> The court stated:

Commission rules permit it to set aside on its own motion any action within 30 days after release of the order. It is the Commission practice that the filing of a petition for reconsideration tolls the running of the thirty day period.<sup>11</sup>

The court further emphasized that:

. . . it is not unreasonable that where, as here, several petitions are consolidated for hearing and decision, a petition for reconsideration of any of the ensuing orders tolls the thirty day period as to *all* orders in the case. To find otherwise would often result in anomaly and unfairness. Thus, the *sua sponte* reconsiderations were timely in this case. The fact that appeal from the original order had already been brought in this court does not independently preclude reconsideration. (emphasis added)<sup>12</sup>

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<sup>10</sup> See also *In the Matters of Changes to the Board of Directors of the National Exchange Carrier Association; Federal – State Joint Board on Universal Service, Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45 and Fourth Notice of Proposed Rulemaking, CC Docket No. 97-21; CC Docket No. 96-45, 16 Comm. Reg. 47 (1999); In the Matter of Federal – State Joint Board on Universal Service, Tenth Order on Reconsideration, CC Docket No. 96-45, 14 FCC Rcd 5983 (1999); and In the Matter of Transport Rate Structure and Pricing, Fourth Memorandum Opinion and Order and Order on Reconsideration, CC Docket No. 91-213, 78 Rad. Reg. 2d 1682 (1995). (Note: similar to the instant case, each of these cases are FCC rulemaking cases). See also *Old Belt Broadcasting Corp., et al., Memorandum Opinion and Order*, 44 FCC 1826, 1830, n. 3 (1959).*

<sup>11</sup> *Central Florida*, 598 F.2d at 48, n. 51 (citing *Radio Americana, Inc., Memorandum Opinion and Order*, Docket No. 13245, 44 FCC 2506, 2510-2511 (1961)).

<sup>12</sup> *Central Florida*, 598 F.2d at 48, n. 51. It is equally irrelevant here that the *First Reconsideration Order* has been reviewed and affirmed in relevant part by the court of appeals.

The approach approved in *Central Florida* has been followed by the FCC in several FCC rulemaking proceedings. In a 1997 *Order on Reconsideration*, the Commission specifically concluded that it could reconsider issues on its own motion as long as there were petitions for reconsideration pending in the proceeding, *regardless* of whether the issues it reconsidered were raised in the pending petitions for reconsideration.<sup>13</sup> The Commission, relying on the court's comments in footnote 51 of *Central Florida*, stated that it could:

reconsider here, on its own motion, issues that were not raised in petitions for reconsideration once the 30 days provided for in 47 C.F.R. §1.108 for *sua sponte* reconsideration have passed. Commission jurisdiction on reconsideration is broad. The D.C. Circuit has held that as long as reconsideration petitions were pending in a case, the Commission could reconsider *sua sponte* other issues in that case (including issues decided in previous orders for which no petitions for reconsideration petition was pending).<sup>14</sup>

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<sup>13</sup> *Petition to Amend Part 68 of the Commission's Rules to Include Terminal Equipment Connected to Basic Rate Access Service Provided Via Integrated Services Digital Network Access Technology and Petition to Amend Part 68 of the Commission's Rules to Include Terminal Equipment Connected to Public Switched Digital Service, Order on Reconsideration*, CC Docket No. 93-268, 7 Comm. Reg. 951 (1997). The Commission does not need to address the specific issues raised in the pending petitions for reconsideration. The Commission stated that a pending petition for reconsideration in this docket will be addressed in a separate order. *Id.* at n.3. See also *Amendment of the Commission Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, First Order on Reconsideration, IB Docket No. 96-111, 18 Comm. Reg. 471 (1999), where the Commission, citing *Central Florida and Radio Americana, Inc.*, stated that it had authority to reconsider aspects of a former order it adopted two years earlier, on its own motion, rather than as part of a rulemaking proceeding, because there were petitions for reconsideration of the former Order still pending.

<sup>14</sup> *Id.* at 951, n. 3.

Moreover, in a 1998 *Order on Reconsideration*, the Commission, citing the fact that there were petitions for reconsideration of the former Order pending, raised on its own motion three additional issues for reconsideration.<sup>15</sup> Relying on *Central Florida*, the Commission stated that it had jurisdiction to modify its rules on its own motion in light of pending petitions for reconsideration in the proceeding.<sup>16</sup>

The FCC is particularly justified in modifying its former rules, on its own motion under *Central Florida*, when the Commission receives new evidence that the original rule has unforeseeable results and is not working as intended. In modifying the universal service rules on its own motion in a 1999 *Order on Reconsideration*, the Commission stated that existing rule might have “unintended results” which actually undermined the function of the rule.<sup>17</sup> Similarly, in another 1999 *Order on Reconsideration* in the universal service fund

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<sup>15</sup> *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, Order on Reconsideration, CC Docket No. 96-83, 13 Comm. Reg. 732 (1998). The Order on Reconsideration addressed three additional issues on reconsideration two years after the original Order.

<sup>16</sup> *Id.* at 737.

<sup>17</sup> *In the Matters of Changes to the Board of Directors of the National Exchange Carrier Association; Federal – State Joint Board on Universal Service, Fifth Order on Reconsideration in CC Docket No. 97-21, Eleventh Order on Reconsideration in CC Docket No. 96-45 and Fourth Notice of Proposed Rulemaking*, CC Docket No. 97-21; CC Docket No. 96-45, 16 Comm. Reg. 47 (1999). The Commission reasoned that withholding support during certain pending appeals would reduce the likelihood that Universal Service support would be disbursed in error. However, the Commission subsequently recognized that withholding the funds under such circumstances might have the unintended result of discouraging applicants from filing legitimate appeals, thereby undermining a function of the appeal procedures (namely, to ensure that universal service support mechanisms are operating consistent with Commission rules and policies). Accordingly, the Commission amended its rules. The Commission based its authority to reconsider its previous orders on

rulemaking, the Commission modified its previous orders after a party filed with the Commission new information showing that the existing rules on the extension of contracts for discounted services would impose unequal treatment on applicants depending on the expiration date of their contracts did not take into account certain situations.<sup>18</sup> The Commission, in revising its rules, stated it did not foresee the unintended consequences of the former Orders.<sup>19</sup>

Likewise, in the instant case, the enormous difficulty PSPs have with collecting compensation from resellers and the severe shortfall in PSP collection was not a foreseen or intended consequence of the original *Order*. After the FCC was provided this new information (*see* Part I-C *infra*), it reasonably reconsidered the rule on its own motion in the *Second Order on Reconsideration*.

In summary, the still pending petitions for reconsideration of the *First Reconsideration Order* have tolled the 30-day time limitation on *sua sponte* reconsideration. Accordingly, under *Central Florida* and the FCC cases discussed above, the Commission has the authority to reconsider *sua sponte* other issues addressed in the *First Reconsideration*

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its own motion on the fact that there were pending petitions for reconsideration of the proceeding, citing *Central Florida*.

<sup>18</sup> *In the Matter of Federal – State Joint Board on Universal Service, Tenth Order on Reconsideration*, CC Docket No. 96-45, 14 FCC Rcd 5983 (1999). Again, the Commission based its authority to reconsider its previous orders on its own motion on the fact that there were pending petitions for reconsideration of the proceeding, citing *Central Florida*.

*Order*, even though they were not raised in the pending petitions for reconsideration. In amending its rules in the instant *Order*, the Commission has expressly conducted such a sua sponte reconsideration of an issue addressed in the *First Reconsideration Order*. Indeed, the Commission has reversed itself on the issue, returning to the approach followed in its original *Report and Order*. Such a procedure is clearly proper.

**B. The FCC’s Rule Is A “Logical Outgrowth” Of The RBOC Petition**

Sprint also contends that the “New Rules” are not a logical outgrowth of the RBOC petition. As argued above, the “New Rules” at issue here were adopted as a reconsideration of the FCC’s first *Order on Reconsideration* in this proceeding. Thus, the relevant notice was provided in the original *NPRM*, which was clearly broad enough to encompass the rule reached in the *Second Report and Order*. *AT&T v. FCC*, 113 F.3d 225, 229 (1997) (where a party challenges the FCC’s ability to modify a rule on a petition for reconsideration, the reviewing court must consider the entire rulemaking record from the commencement of the proceeding). There is no need to show that the “New Rules” are a logical outgrowth of the RBOC Petition.

Nevertheless, it is clear that the FCC’s request for comments on the *RBOC Petition* did independently provide actual notice to the parties that the FCC might reassess its rule on which party is responsible for paying payphone compensation. *Common Carrier Bureau Seeks Comment on the RBOC/GTE/SNET Payphone Coalition Petition for Clarification*

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<sup>19</sup> *Id.* at 18.

*Regarding Carrier Responsibility for Payphone Compensation Payment, Public Notice*, 14 FCC Rcd 6476 (1999). In this regard, the FCC's decision to require the first facilities-based IXC to which a LEC delivers a dial-around call to compensate the PSP for such a completed call is a "logical outgrowth" of the *RBOC Petition*. *National Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F.Supp.2d 33, 39 ("*Shalala*") ("A final rule is considered the 'logical outgrowth' of the proposed rule if at least the 'germ' of the outcome is found in the original proposal."). In the *RBOC Petition*, the Coalition stated that a serious shortfall in per-call compensation payments has resulted from the FCC's former rule assigning payment responsibilities based on whether an IXC is "facilities-based" or owns or leases "switching capability." As a method to reduce the shortfall, the Coalition suggested that the obligation for payment of per-call compensation be placed on the entity identified by the Carrier Identification Code ("CIC") as the party responsible for compensation. In most cases, as the Petition pointed out, the CIC assignee is the same as the first facilities-based carrier. *RBOC Petition* at 5. Clearly, the Coalition's proposal to require payment of dial-around compensation obligations for the carrier to whose CIC code the call is routed provided much more than a "germ" for the FCC's ultimate decision to require compensation by the first facilities-based IXC.

The connection between the RBOC Coalition's CIC-carrier-pays proposal and a first-facilities-based-carrier-pays rule was apparent to other parties to the proceeding. In Reply Comments of the American Public Communications Council on the RBOC/GTE/SNET Payphone Coalition's Petition for Clarification, CC Docket 96-128 at 7 (June 1, 1999), APCC stated, "[a]nother alternative that should be considered is to

assign payment responsibility to the IXC that controls the first switch to which a call is routed after leaving the network of the originating LEC(s).” Additionally, in Reply Comments of the RBOC/GTE/SNET Payphone Coalition on its Petition for Clarification, CC Docket 96-128 at 7 (June 1, 1999), the Coalition asked the Commission to clarify whether the owner of the “first switch” to which a compensable call is routed is liable for per call compensation unless some other carrier expressly identifies itself to the PSP as having the obligation to make such per-call compensation.

In short, Sprint had ample notice that the Commission might reconsider its prior decision and return the liability for payment of per-call compensation to the first facilities-based IXC. Sprint cannot now complain because it misread the regulatory waters, incorrectly anticipated how the FCC would act, and consequently submitted comments that did not address issues that it believes to now be significant. *Shalala*, 120 F.Supp.2d 33 at 41.

### **C. The FCC Had a Record Basis for Its Decision**

Sprint also contends that the Commission’s “New Rules” lack a reasoned basis in the record. In fact, there is ample record support for the “New Rules.” Numerous submissions attest to the enormous difficulties involved in the current practice of allowing responsibility for payment to be assumed by the reseller that ultimately completes a payphone call to its final destination. *See, e.g.*, RBOC Petition at 2 (compensation from major carriers is 20-50+% less than expected); Comments of APCC, May 17, 1999, at 3 (IXCs generally have provided no information to PSPs about calls routed to resellers), 4

(IXCs classify customers as resellers without actual inquiry to the customer), 5 (73 of 1,200 carriers invoiced by APCC Services paid any compensation; IXCs acknowledge they do not pay for 20-25% of payphone calls because the calls are routed to “switch-based” resellers); RBOC Reply Comments of the RBOC/GTE/SNET Payphone Coalition, June 1, 1999, at 5-6 (compensation shortfall is 22-30% of expected revenue; less than 10% of carriers invoiced for compensation make any payment); Letter from Robert F. Aldrich to Magalie Roman Salas, July 28, 2000, at 5 (Large PSP has collected compensation on only 52% of completed calls routed to AT&T, MCI Worldcom, and Sprint; “Narrative to Accompany ‘Call and Dollar Flow in Dial Around Calls from Payphones’” (“APCC Narrative”), ex parte presentation submitted by APCC November 15, 2000, at 5 (“The PSP is not provided by any IXC with a list of calls the IXC is paying for”).<sup>20</sup>

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<sup>20</sup> See also Comments of APCC on the Flying J Petition for Declaratory Ruling, May 1, 2000, CCB/CPD No. 00-04, at 6-9. While MCI and Sprint recently have begun to provide information to APCC Services identifying their switch-based reseller customers, they have declined to provide the number of calls handed off to the switch-based resellers. Without this information, which only the underlying IXC can provide, APCC Services cannot estimate the amounts of unpaid dial-around compensation owned by each switch-based reseller. As discussed in Reply Comments of APCC on the Flying Petition for Declaratory Ruling, May 22, 2000, CCB/CPD No. 00-04, at 5, APCC Services has had a long-running dispute with several IXCs concerning their resistance to providing sufficient information to enable IXCs to identify calls handled by switch-based resellers. After finally receiving from certain IXCs lists of their alleged switch-based reseller customers, APCC Services found that many companies on those lists were not FBR’s at all and claimed that the IXC should have been paying compensation for those calls. In other cases, APCC found that the switch-based reseller had paid payphone surcharges to the IXC and the IXC had failed to remit the payments to the PSPs. Also, the lists from the IXCs have named hundreds of alleged switch-based resellers but without the volume of calls passed on to each reseller each quarter by the IXC, so APCC Services had been left to guess at which of the resellers owes the most dial-around compensation and should be the primary targets for demand letters to legal action to collect the compensation rightfully owed to the PSPs.

Further supporting the changes adopted by the Commission was a wealth of evidence showing the harmful impact that uncollected compensation is having on the ability of PSPs to maintain wide deployment of payphones pursuant to Section 276, and on the ability of people in need to find and use payphones. “Supporting Public Access For Everyone: Finishing Implementation of Section 276 of the Telecommunications Act,” ex parte presentation submitted by APCC, December 13, 2000.

Thus, the record is replete with evidence showing that the Commission’s decision, in the *First Reconsideration Order*, to shift responsibility to resellers identified as “switch-based” was a major policy mistake, and that the best course is for the Commission to return responsibility to the first facilities-based carrier.

In its Request, Sprint makes no real effort to dispute that there was ample support for the Commission’s conclusion that the compensation system should be modified. Instead, Sprint argues that the Commission did not adequately consider the ability of carriers to recover their compliance costs and implement the “New Rules” within the six month transition period provided by the “New Rules”. Specifically, Sprint contends that the FCC failed to consider information that Sprint has withheld until now (but that it allegedly would have presented had it been adequately notified of the Commission’s intent), which allegedly shows that the decision cannot be cost effectively implemented

within the six months' transition period. Thus, Sprint's primary concern appears to be the length of the transition period.<sup>21</sup> Sprint has four contentions in this regard.

### 1. Contracts with Resellers

Sprint contends that the rules would require Sprint to revise its tariffs or renegotiate its contracts with resellers regarding payment for payphone calls, and that the rules "do not address how these contractual or tariff changes are to be accomplished within the six-month transition period or what remedies are available to Sprint in the event a FBR refuses to alter an existing contract that extends beyond the six-month period." Request for Stay at 16.

The *Order* addressed this issue by expressly providing that IXCs "may recover from their reseller customers the expense of payphone per-call compensation and the cost of tracking compensable calls by negotiating reimbursement terms in future contract provisions. *Order*, ¶18. Of course, carriers are also free to recover their compensation payments in other ways, e.g., by means of general rate increases. Given that IXCs have

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<sup>21</sup> In fact, the time available to Sprint to restructure cost recovery arrangements is in excess of six months. The *Order* is to be implemented November, 27, 2001. APCC agrees with Sprint that the Federal Register publication inaccurately states the effective date of the *Order*. The *Order* was to take effect on May 29, 2001 and not on April 27, 2001 as the Federal Register publication states. Under the terms of the *Order*, the implementation date is six months after the effective date, or November 29, 2001, almost eight months after the *Order* was released. While Sprint contrasts the six-month (actually eight months, as explained above) period for implementing the rule with the one-year (actually, 11 months from the *First Reconsideration Order*) period, for implementation of the original call tracking period. Sprint offers no plausible reason why it should take IXCs as long to adapt their existing call tracking system as to build a payphone call tracking system from scratch.

been almost completely deregulated by the FCC, six or eight months offer ample opportunity for IXCs to implement cost recovery plans in the manner they deem most appropriate. Further, the information that allegedly supports Sprint's concerns regarding cost recovery (see Declaration of Philip D. Bryde, attached to Sprint's *Request*) was not raised with the FCC prior to decision. Thus, if Sprint believes that the transition period is inadequate to permit it to develop appropriate cost recovery arrangements by revising its contracts with resellers or otherwise, the appropriate procedure is for Sprint to raise such issues in the form of a petition for reconsideration or petition for waiver.<sup>22</sup>

## 2. Call Completion Tracking

Sprint also contends that the Commission assumed, without record support, that IXCs could modify their networks within six months to conform to the requirements of the New Rules. Of course, Sprint cannot contend that it has no ability to track payphone calls reaching its network, because it has been required to track calls since the implementation of per-call compensation. Sprint argues, however, that it is not currently able to determine which of the calls sent to resellers are completed, that it must make arrangements to do so in order to comply with the Commission's rules, and that it cannot complete such arrangements prior to the end of the transition period. *Request* at 18.

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<sup>22</sup> As a general rule, claims not presented to the agency may not be made for the first time to a reviewing court. *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 680 (D.C. Cir. 1983); *United Transp. Union v. ICC*, 43 F.3d 697, 701 (D.C. Cir. 1995); *PUC of Cal. v. FERC*, 236 F.3d 708, 716 (D.C. Cir. 2001).

Further, Sprint itself recognizes that there are a number of alternative options for addressing the completed calls issue, short of the costly network and contractual changes that Sprint alleges would be required to make a particularized determination of completion for each payphone call routed to a reseller. Several of these alternatives have been discussed by other IXCs in their petitions for reconsideration of the Order. There are at least four options that may be considered by IXCs: (1) treat all calls as completed when they are “answered” by an end user or a reseller switch; (2) treat calls answered by an end user or reseller switch as completed unless the reseller specifically contracts with the PSP to directly compensate the PSP; (3) estimate completed calls based on a proxy such as duration; and (4) utilize sampling techniques to establish call completion ratios to be applied to calls for purposes of payphone compensation. Without commenting specifically on the appropriateness of any particular option, APCC notes that, contrary to Sprint’s claims, the existence of these options clearly leaves IXCs ample opportunities to work with their reseller customers and PSPs to develop arrangements that ensure compliance with the Commission’s order, well within the prescribed transition period.

### **3. Call Detail Requirement**

Sprint alleges that there is no record support for the requirement that IXCs report call detail to PSPs on the number of calls completed from each payphone to each toll-free or access number, and that compliance with this requirement would be too costly and burdensome. In fact, carriers currently must compile all of this information in order to comply with their obligations under the existing rules to track and pay for all completed calls from payphones. The only new requirements are for facilities carriers to (1) compile

such information on calls routed to resellers as well as other calls, and (2) to provide to PSPs the information that they already compile.

Contrary to Sprint's contention, the need for PSPs to obtain detailed information on completed calls is amply supported in the record. As APCC explained in an ex parte submission:

The PSP will have no way of knowing whether [a] particular call was paid for, nor if it was, by which IXC of the 1300 or so IXCs that are billed. The PSP is not provided by any IXC with a list of calls the IXC is paying for. Thus, the PSP cannot compare the SMDR/CDR to a list of calls for which the PSP has been paid to know either the short falls in payment or which calls need to be pursued for collection.

*APCC Narrative* at 5-6.

In short, PSPs are totally dependent on an IXC's self-interested judgment as to which calls are compensable, and there is no meaningful "audit trail" that would enable PSPs to review the accuracy of IXC payments. To address this well-documented problem, the Commission is simply requiring carriers to provide basic information underlying their compensation payments, of the kind that PSPs have requested and that carriers have unreasonably refused to provide since the beginning of the per-call compensation system.<sup>23</sup>

Sprint also contends that the provision to PSPs of basic call detail information that IXCs have already compiled in order to track and pay for compensable calls would be

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<sup>23</sup> Sprint has expressly refused to voluntarily provide such information to PSP collection agents, contending that it is not required by Commission rules. *See* Letter from Richard Juhnke to Edward Modell, December 8, 2000, (Attachment 1 to this Opposition). *See also* Note 16, above.

unduly burdensome, because of the large number of compensation recipients and the need to “sort through all these arrangements and prepare reports that convey the required information to each of the 1,300 or so PSPs.” Sprint does not explain what “arrangements” need to be “sorted through” in order to provide the information. Further, its description of the alleged burden completely disregards the existence of centralized collection clearinghouses, such as APCC Services, Inc., PPON, G-5, and DataNet Services which aggregate compensation collection on behalf of hundreds of individual PSPs and provide a means of greatly reducing any carrier’s “burden” of reporting to PSPs the basic call detail underlying compensation payments.

#### **4. Direct arrangements**

Sprint also complains that, by allowing direct contractual arrangements between switch-based resellers and PSPs, the “New Rules” unreasonably burden Sprint with the responsibility of monitoring such arrangements. But any such monitoring burden under the “New Rules” will be no greater than, and in all likelihood greatly mitigated, under the “Old Rules.” Since the old rules expressly provided for switch-based resellers to pay the compensation directly to PSPs, facilities-based IXCs such as Sprint have claimed that they are monitoring their reseller customers to determine which of them incur direct payment responsibility under the existing rules. Under the new rules, the compensation responsibility is placed squarely on the first facilities-based IXC. Therefore, it will be the exception, not the rule, for any reseller to incur direct payment obligations vis-a-vis PSPs,

and any burden of monitoring and verifying reseller payment status will be far less than under the “Old Rules”.<sup>24</sup>

## II. SPRINT WILL SUFFER NO IRREPARABLE HARM

Sprint claims that compliance with the “New Rules” will require “millions of dollars in new investments and thousands of hours of programming and labor time.” In fact, as shown above, most of the cost identified by Sprint in monitoring completed calls are illusory because they can be avoided by simple alternative arrangements. Costs allegedly involved in tracking and reporting calls are likewise largely illusory because tracking costs must be incurred anyway, and reporting can be efficiently conducted through centralized clearinghouse organizations such as APCC.

Even to the extent that significant costs are incurred, Sprint provides no explanation why it is unable to recover such costs from its customers.

## III. A STAY WILL SEVERELY INJURE PSPS

While Sprint claims that PSPs will not be injured by a stay, in fact the record is replete with evidence of the severe harm sustained by PSPs from their inability to collect

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<sup>24</sup> Sprint also contends that the “New Rules” are contradictory and confusing, because the Commission issued an interpretation of the “Old Rules” simultaneously with its adoption of the “New Rules.” While simultaneous, these two rulings were announced in two separate orders. There is no contradiction between the two orders. To the extent that the instant *Order* addresses the interpretation of the “Old Rules,” it simply affirms the *Bell Atlantic-Frontier Order*. The only confusion is injected by Sprint’s attempt to inappropriately contest the rationale of the *Bell Atlantic Order* in the midst of its request for stay of a different order. If Sprint disagrees with the *Bell Atlantic Order*, it must seek reconsideration or review of that order.

payment from resellers under the “Old Rules”. (Contrary to Sprint’s suggestion, no PSP has sought to delay implementation of the rules.) The relief provided by the “New Rules” is badly needed by PSPs, who are losing compensation for an estimated 65% of compensable calls under the “Old Rules,” and who are suffering severe economic pressure from ever-increasing penetration of wireless services into the “away-from-home” calling market.<sup>25</sup> As it stands, due to the time lag for payment that is currently incorporated in the compensation system PSPs will receive no actual economic benefit from the “New Rules” until April 2002 -- approximately one year after release of the “New Rules.”<sup>26</sup> Any further delay in implementing the “New Rules” will severely compound the acute injury currently being imposed on payphone deployment and PSPs.

Even Sprint’s own data demonstrate the severity of the injury PSPs currently suffer under the “Old Rules.” According to Sprint’s *Request*, out of a total of 108 million payphone calls reaching Sprint’s network per quarter, Sprint transmits about 24%, or an estimated 26 million calls per quarter, to switch-based resellers. Assuming that Sprint has approximately 20% of the dial-around market, it can be inferred that the number of calls sent to resellers by all IXCs is five times as high, or about 130 million per quarter, representing dial-around compensation totaling about \$31 million per quarter. APCC

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<sup>25</sup> “Supporting Public Access” at 11.

<sup>26</sup> As estimated above, the implementation date for IXCs is November 29, 2001, almost eight months after the “New Rules” were released. Under the current practices of IXCs including Sprint, however, payments for calls are not made until 4-6 months after a call is completed. Thus, PSPs will not actually be collecting compensation under the “New Rules” until 12 months or more after the release of the rules.

Services currently collects compensation on behalf of some 2,000 PSPs with a total of 475,000 payphones -- roughly one quarter of the total dial-around market. Thus, based on Sprint's data, APCC Services should be collecting on the order of \$8 million per quarter, or \$32 million per year, from switch-based resellers. In fact, the total amount that APCC Services collected from *all IXCs except* the top six was only about \$17 million. An annual shortfall of \$15 million, when extrapolated to the payphone market as a whole, is roughly \$60 million. Yet, Sprint contends that "no party will be injured by the requested stay." Request at 31.

#### **IV. GRANTING A STAY IS NOT IN THE PUBLIC INTEREST**

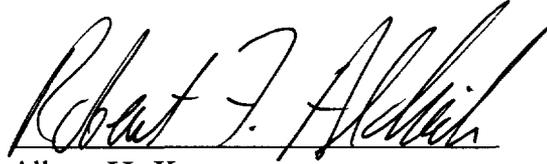
A stay would not serve the public interest, and indeed would greatly harm the public interest. As noted above, the payphone industry is under severe economic pressure as a result of the inexorable rise of wireless usage and corresponding decline in the use of payphones. PSPs inability to fully collect the compensation due them under the current rules is exacerbating that pressure and causing the removal of substantial numbers of payphones, further undermining the viability of the payphone base. Any further delay in implementing rule changes that are necessary to ensure full compensation of PSPs will further compound the cycle of payphone removal that is jeopardizing the Congressional objective of wide deployment of public payphones.

**CONCLUSION**

For the foregoing reasons, Sprint's Request for Stay should be denied.

Dated: June 4, 2001

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

Albert H. Kramer

Robert F. Aldrich

Gregory Kwan

Jeffrey Tignor

2101 L Street, N.W.

Washington, D.C. 20037-1526

(202)828-2226

Attorneys for the American Public  
Communications Council

## CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2001, a copy of the foregoing Opposition of the American Public Communications Council to Sprint Corporation's Request for Stay was delivered by first-class U.S. Mail, postage pre-paid to the following parties:

Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Washington, DC 20554

Lawrence E. Strickling, Chief  
Common Carrier Bureau  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W., Room 5C-450  
Washington, DC 20554

Martin Schwimmer  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W., Room 6-A336  
Washington, DC 20554

Michael J. Shortley III  
Frontier Corporation  
180 S. Clinton Avenue  
Rochester, NY 14646

Mark C. Rosenblum  
Richard H. Rubin  
AT&T Corporation  
295 North Maple Avenue  
Room 3252I3  
Basking Ridge, NJ 07920

Carl W. Northtrop  
Emmett A. Johnston  
Paul, Hastings, Janofsky & Walker  
1299 Pennsylvania Avenue, NW  
10<sup>th</sup> Floor  
Washington, DC 20004-2400

Lawrence Fenster  
MCI WorldCom, Inc.  
1801 Pennsylvania Avenue, NW  
Washington, DC 20006

Rachel J. Rothstein  
Brent Olson  
Cable & Wireless, Inc.  
8219 Leesburg Pike  
Vienna, VA 22182

Glenn B. Manishin  
Stephanie A. Joyce  
Blumenfeld & Cohen  
Technology Law Group  
1615 M Street, NW, Suite 700  
Washington, DC 20036

Michael K. Kellogg  
Aaron Panner  
Kellogg Huber Hansen Todd & Evans  
1301 K Street, NW  
Suite 1000 West  
Washington, DC 20005

Charles C. Hunter  
Catherine M. Hannan  
Hunter Communications Law Group  
1620 I Street, N.W.  
Suite 701  
Washington, DC 20006

Linda L. Oliver  
Yaron Dori  
Hogan & Hartson, L.L.P.  
555 13<sup>th</sup> Street, N.W.  
Washington, DC 20004

ITS  
1231 20<sup>th</sup> Street, NW  
Washington, DC 20036

Michael J. Copps  
Kathleen Q. Abernathy  
Gloria Tristani  
Commissioners  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Audrey Wright  
Cable & Wireless USA Inc.  
1130 Connecticut Ave., NW  
Suite 1200  
Washington, DC 20036

Leon M. Kestenbaum  
Jay C. Keithley  
H. Richard Juhnke  
Sprint Corporation  
1850 M Street, NW, 11<sup>th</sup> Floor  
Washington, DC 20036

Genevieve Morelli  
Senior Vice President  
Quest Communications Group  
4250 North Fairfax Dr.  
Arlington, VA 22203

Yog Varma  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W., Room 5-C352  
Washington, DC 20554

Dorothy Attwood  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W., 5-A848  
Washington, DC 20554

David P. Murray  
Randy J. Branitsky  
Kurt W. Hague  
Willkie Farr & Gallagher  
Three Lafayette Centre  
1155 21<sup>st</sup> St., NW  
Washington, DC 20036



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Robert F. Aldrich

# **ATTACHMENT 1**



Richard Juhnke  
General Attorney

401 9th Street, Northwest, Suite 400  
Washington, D.C. 20004  
Voice 202 585 1912  
Fax 202 585 1897  
richard.juhnke@mail.sprint.com

December 8, 2000

VIA FACSIMILE AND FIRST CLASS MAIL

Edward G. Modell  
Dickstein Shapiro Morin & Oshinsky LLP  
2101 L Street, NW  
Washington, DC 20037-1526

Re: Demand for Information Related to Dial Around Compensation Collections

Dear Mr. Modell:

This is in response to your November 20, 2000 letter to Sprint Communications Company L.P., on behalf of APCC Services, Inc.; Data Net Systems, LLC; Jaroth, Inc.; Intera Communications Corporation; and Davel Communications, Inc., demanding that Sprint provide certain data to them purportedly required by FCC rules and regulations.

The first set of data you request is a list of toll-free numbers on which Sprint paid per-call dial-around compensation and the volume of calls for each toll-free number. Nothing in the Commission's payphone compensation rules (47 C.F.R., Part 64, Subpart M) imposes any requirements on IXCs regarding the information they must provide to PSPs. Paragraph 110 of the FCC's first Report and Order in CC Docket No. 96-128 (11 FCC Rcd 20541 (1996) (subsequent history omitted)) does require IXCs to provide, along with their per-call compensation, a statement indicating the number of calls that the carrier has received from each of the PSP's payphones, and I am informed that Sprint is fully complying with that requirement. The *Global Crossing* Consent Decree, cited in your letter, arose from complaint and enforcement proceedings against Global Crossing for its failure to pay any compensation to LEC PSPs and by its terms applies only to Global Crossing. If the provisions of Paragraph 17 of that Consent Decree (to which your letter invites our attention) were requirements of general applicability, there would have been no need to include them in the Consent Decree, since every carrier is already obligated to adhere to valid FCC rules and orders of general applicability.

The second element of your request is for a list of toll-free numbers on which Sprint did not pay per-call compensation, the volume of calls for each toll-free number, and the name, address and point of contact of the carrier to which traffic for that toll-free number was routed by Sprint. Again, nothing in the Commission's Rules imposes any such requirement, and the only FCC order that relates to such information is the Common Carrier Bureau's Memorandum Opinion and Order released in CC Docket No. 96-128 on April 3, 1998 (13 FCC Rcd 10893).

Edward G. Modell  
December 8, 2000  
Page 2

Paragraph 38 of that order provides, in relevant part:

When facilities-based IXCs providing 800 service have determined that they are not required to pay compensation on particular 800 number calls ... [they] must cooperate with PSPs seeking to bill for resold services. Thus, a facilities-based carrier must indicate, on request by the billing PSP, whether it is paying per-call compensation for a particular 800 number. If it is not, then it must identify the switch-based reseller responsible for paying compensation for that particular 800 number.

As can be seen, nothing in that order requires Sprint to provide the comprehensive data you request; instead, Sprint is merely obligated to provide the identity of the switch-based carrier responsible for a particular 800 number that is brought to Sprint's attention by the PSP. Again, for the same reasons as discussed above, Paragraph 17 of the *Global Crossing Consent Decree* is inapposite.

Notwithstanding the limited scope of the Bureau's April 3, 1998 order, Sprint has been voluntarily providing, on request, a listing of all toll-free numbers assigned to each switch-based reseller traversing Sprint's network, and the name, address and contact information for each such reseller, beginning with data for the fourth quarter of 1999. If any of your clients have not requested or received such data, I suggest that they contact Ms. Vicky Crone at 816-854-7064. Although Sprint is under no legal obligation to provide such data for periods prior to that date, we are investigating whether we have access to such information, and the processes that would be necessary to compile such information. If it turns out that it is possible to provide such information, Sprint would be willing to do so as long as your clients are willing to compensate Sprint for its costs. Sprint should have an answer to the availability of the information, along with an estimate of the costs involved (assuming the information can be compiled), within the next several days. I suggest that your clients stay in contact with Ms. Crone on that issue as well.

Very truly yours,



Richard Juhnke

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) 828-2214

E-Mail Address: [ModelliE@dsmo.com](mailto:ModelliE@dsmo.com)

November 20, 2000

**VIA FACSIMILE AND CERTIFIED MAIL**

Helene Miller  
Spring Communications  
903 E. 104th St.  
Kansas City, MO 64131

Re: Demand for Information Related to Dial Around Compensation Collections

Dear Ms. Miller:

On behalf of our client dial-around compensation billing and collection agents, APCC Services, Inc. ("APCCS"); Data Net Systems, LLC; Jaroth, Inc., d/b/a Pacific Telemanagement Services; Intera Communications Corporation; and Davel Communications, Inc., and the payphone service providers (PSPs) they represent, we are writing to demand certain information which is required by our clients in order to determine whether they have been paid all per-call dial around compensation which the PSPs are entitled to receive. Pursuant to rules and regulations promulgated by the Federal Communications Commission ("FCC") implementing Section 276 of the Telecommunications Act of 1996, we hereby demand that your company provide the following:

(i) a computer-readable list of the toll-free (e.g., 800) numbers which traversed your company's network upon which you paid per-call dial around compensation, and the volume of calls for each toll-free number, and

(ii) a separate, computer-readable list of the toll-free (e.g., 800) numbers which traversed your company's network upon which your company did not pay per-call dial around compensation, and the volume of calls for each toll-free number. Also, for each of these toll-free numbers upon which your company did not pay per-call dial around compensation, we further demand that your company provide the name, address, contact person and phone number of the carrier to which all traffic for that toll-free number was routed by your company.

We demand that this information, as described in (i) and (ii) above, be provided by your company on a quarter-by-quarter basis for each quarter beginning with the third quarter of 1998 (i.e., 3Q98) and continuing through the second quarter of 2000 (i.e., 2Q00), and for each quarter hereafter beginning with the third quarter of 2000 (i.e., 3Q00). We further demand that this information be provided to us as quickly as possible but no later than December 10, 2000.

598 Madison Avenue • New York, New York 10022-1614

Tel (212) 832-1900 • Fax (212) 832-0341

<http://www.dsmo.com>

November 20, 2000

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With regard to the information hereby demanded, we call your attention to §276 of the Communications Act of 1934, as amended, 47 U.S.C. §276, the related FCC rules, and the Order and Consent Decree released by the FCC on November 2, 2000 In the Matter of Global Crossing Telecommunications, Inc., File No. ENF-00-0003. For your information, we are enclosing a copy of the Order and Consent Decree. We particularly direct your attention to Paragraph 17 of the Consent Decree.

If you have any questions about the information demanded or otherwise wish to discuss this matter, please contact us or have your attorney contact us immediately. If you fail to provide the information demanded, we have been authorized by our clients to seek that information by whatever legal means are available. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward G. Modell". The signature is fluid and cursive, with the first name "Edward" being the most prominent part.

Edward G. Modell

Enclosures