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against 6 of those defendants were dismissed on joint motion of the parties after those defendants agreed to be bound by the final determination in the remaining cases.⁵ After the filing of the initial 13 complaints, CFC and several other IPPs filed 52 additional formal complaints raising the same allegations raised by CFC in its initial complaints. The Commission did not consolidate the additional 52 formal complaints with the initial complaints.

3. In the *Bureau Order*, addressing the initial seven formal complaints filed by CFC, the Commission's Common Carrier Bureau (Bureau) found that the defendants had properly assessed the EUCL charge on CFC's payphone lines.⁶ In arriving at that decision, the Bureau concluded that CFC did not provide "public telephone" service under section 69.2(ee) of the Commission's rules and, thus, was not exempt from the EUCL charge as other public payphones. Rather, the Bureau found that CFC was providing "semi-public" telephone service as described in Part 69 of the Commission's rules and, therefore, the LECs were allowed to assess EUCL charges to CFC's payphones.⁷ In addition, the Bureau determined that CFC was also subject to the EUCL charge because it was an "end user" under section 69.2(m) of the Commission's rules. CFC's application for review of the *Bureau Order* was denied by the Commission, applying the same reasoning as the *Bureau Order*.⁸

4. As detailed below, CFC appealed the Commission's decision to the U. S. Court of Appeals for the District of Columbia Circuit. Subsequent to the filing of CFC's appeal, the Commission denied the 52 additional formal complaints that had been filed after the initial complaints.⁹ The Commission's *CFC II* order relied upon its analysis in *CFC I*. The IPPs also appealed to the D.C. Circuit a number of the formal complaints denied in the Commission's *CFC II* decision.

5. In an order directly resolving only the *CFC I* appeals, the court ruled that the Commission had misapplied the section 69.2(ee) definition of "public telephone,"¹⁰ as well as the term "semi-public" payphone.¹¹ The court found that the Commission had incorrectly categorized all IPP payphones as semi-public, thereby subjecting the IPPs to the EUCL charge.¹² The court

⁵ *C.F. Communications Co. v. Central St. Tel. Co., et. al.*, 5 FCC Rcd 177 (1990).

⁶ *C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc. et. al.*, 8 FCC Rcd 7334, 7335-36 (1993) (*Bureau Order*).

⁷ *Bureau Order*, 8 FCC Rcd at 7336.

⁸ *C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc., et. al.*, 10 FCC Rcd 9775 (1995) (*CFC I*).

⁹ *C.F. Communications Corp., et. al. v. Michigan Bell Telephone Co., et. al.*, 12 FCC Rcd 2134 (1997) (*CFC II*).

¹⁰ *Appeals Court Decision*, 128 F.3d at 740-741.

¹¹ *Id.* at 741-742.

¹² *Id.*

also concluded that the Commission's basis for distinguishing between IPP and LEC payphones was not consistent with the Commission's prior orders and rules, and that "[t]he Commission has not adequately justified the distinction it has drawn between CFC's payphones and LEC-owned payphones."¹³ The court stated that the Commission had "improperly discriminated between similarly situated phone services without a rational basis."¹⁴

6. In addition, the court ruled that, in concluding that CFC was an "end user" subject to the EUCL charge, the Commission had misconstrued certain terms contained in the section 69.2(m) definition of "end user."¹⁵ The court held that the Commission's interpretation of certain terms contained in that definition was "plainly erroneous."¹⁶ Accordingly, the court vacated and remanded *CFC I* to the Commission for further proceedings consistent with the court's order. In light of the Court of Appeals' decision, the Commission requested and was granted voluntary remand of the then pending appeal of its *CFC II* order.¹⁷ In this proceeding, the Commission will address all of the cases appealed in the *CFC I* and *CFC II* orders.

7. In a related matter, approximately 3,000 informal complaints from IPPs raising the same issues involved in the instant complaints are pending. Specifically, the complainants allege that the defendant LECs have illegally assessed EUCL charges upon complainants. In connection with these informal complaints, the complainants have filed a motion to consolidate the informal and formal complaints into one proceeding.¹⁸

8. We note that the amendments made to the Commission's rules following passage of the Telecommunications Act of 1996 mandate that both the IPPs and the LECs pay the EUCL charge for all of their payphones.¹⁹ Consequently, the issues addressed in this order will only have retrospective application.

III. DISCUSSION

A. Access Reform Proceeding

¹³ *Id.* at 741.

¹⁴ *Id.* 128 F.3d at 740.

¹⁵ *Id.* at 739.

¹⁶ *Id.*

¹⁷ *C.F. Communications Corporation v. FCC*, No. 97-1202, slip op. (D.C. Cir. 1997).

¹⁸ Motion to Consolidate Complaint Proceedings and Establish Binding Procedures to Resolve all Outstanding Legal Issues and Request for Rule Waiver, File E- 89-170 (filed June 15, 1998).

¹⁹ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 20541, ¶ 187 (1996) (*First Payphone Order*); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order on Reconsideration, 11 FCC Rcd 21233, ¶ 207 (1996).

9. To place its decision in the proper context, the D.C. Circuit reviewed in its order certain aspects of the Commission's access reform proceeding. As the D.C. Circuit laid out in its opinion, the Commission in 1983 released rules governing the charges through which LECs would be compensated for providing IXCs with access to the LECs' local exchange facilities.²⁰ The Commission decided that, as a general matter, "end users" placing calls should bear the cost of the access charges.²¹ The Commission's rules required that most subscribers be assessed a monthly, flat-rate charge for the "end user common line" element, permitting LECs to recover a significant amount of the non-traffic sensitive (NTS) costs associated with the subscribers' loops.

10. At that time, the Commission had to determine how to enable LECs to recover their investment in payphone lines that they owned and operated. Payphones required special treatment because the end users of payphones consisted of the "transient general public," rather than the subscribers, as in the case of private business or residential telephones. At first, the Commission determined that LECs would recover their payphone investments solely through coin calls placed by end users. Under this scheme, however, LECs were not able to recover their investment from the many end users who used their payphones to make non-coin calls, such as collect, credit card or third-party calls, causing either an inadequate recovery for the LECs or a disproportionate burden on end users paying by coin.

11. On reconsideration, the Commission decided not to assess any charge on end users of public payphones. Rather, for the reasons identified above, the Commission decided that LECs would recover the NTS costs of operating their payphone lines from a carrier common line (CCL) element, which in turn was recovered from the switched access charges imposed on IXCs and interstate calls in general. Thus, the Commission decided that public payphone users would no longer pay for the NTS costs of operating public payphones, but that those costs would in effect be subsidized by all interstate callers.

12. The Commission, however, did not exempt all payphones from EUCL charges.

²⁰ See *Appeals Court Decision*, 128 F.3d at 736-37; see also *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 242-243 (1983) (*Access Charge Order*), modified on recon., 97 FCC 2d 682 (1983) (*First Reconsideration Order*) modified on further recon., 97 FCC 2d 834 (1984), aff'd and remanded in part sub nom., *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

²¹ Under section 69.2(m), an "end user" is:

any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller.

47 C.F.R. § 69.2(m). See 47 C.F.R. § 69.5(a) (stating that "[e]nd user charges shall be computed and assessed upon public end users"); see also section 69.104(a) ("A charge . . . shall be assessed upon end users that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to the extent that they do not pay carrier common line charges.").

Although it excused "public" payphones from the charge, it determined that "semi-public" payphones would be subject to the charge. When it originally announced the public/semi-public distinction, the Commission explained 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."²² 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 option of the telephone company and with the agreement of the owner of the property on which the phone is placed."²³ The Commission determined that NTS costs associated with semi-public payphones should be "recovered from subscribers to that service in the same manner that costs associated with an ordinary business subscriber line are recovered" because "[t]hose fixed costs can be recovered from an identifiable business end user through flat charges."²⁴

13. At the time the Commission developed this scheme for payphone access charges, the only existing payphones were owned by LECs. LEC-owned payphones are connected by special "coin lines" to an LEC central office. A processor located at the central office then does most of the work: determining the cost of the call, timing the call, telling the user how much money to deposit, and performing additional tasks. Because they are not capable of processing and supervising calls on their own, LEC-owned payphones are considered to be "dumb."

14. In 1984, the Commission permitted payphones not owned by LECs to enter the market. Unlike LEC-owned payphones, the new independent payphones were "smart," capable of processing and supervising calls by means of a microprocessor located inside the phone. Therefore, and again distinct from the LEC-owned payphones, these "smart" payphones were attached to ordinary telephone lines. Callers encounter independent payphones in the same places where they would find LEC-owned payphones, such as street corners, airports, shopping malls, and rural "mom and pop" stores.²⁵

B. IPP Payphones Should Not Automatically Be Treated As "Semi-Public Payphones"

15. In the *CFC I Order*, the Commission determined that CFC's payphones were not "public telephones" as that term is defined in section 69.2(ee), and thus did not qualify for the exemption from the EUCL charge that was accorded to public telephones by the Commission's rules.²⁶ Rather, the Commission concluded that CFC's payphones were "semi-public"

²² *Appeals Court Decision*, 128 F.3d at 737 (quoting *First Reconsideration Order* at 704 n.40).

²³ *Id.* (quoting *First Reconsideration Order* at 704 n.41).

²⁴ *Id.* (quoting *First Reconsideration Order* at 706).

²⁵ *Id.* (citations to the relevant Commission orders can be found in the *Appeals Court Decision*).

²⁶ A "[p]ublic telephone is a telephone provided by a telephone company through which an end user may originate interstate or foreign telecommunications for which he pays with coins or by credit card, collect or third number billing procedures." 47 C.F.R. § 69.2(ee); see also 47 C.F.R. § 69.2(hh) (1993) ("telephone company" was defined as "a carrier that provides telephone exchange service as defined in section 3(r) of the Communications Act of 1934."). At the time of issuing the *CFC I Order*, "public" telephones were not subject to EUCL charges. 47 C.F.R. § 69.104(a)

payphones, and therefore were subject to the EUCL charge. The court concluded that the Commission incorrectly applied both the "public" and "semi-public" definitions.

16. Because the *First Reconsideration Order* created a distinction between "public" and "semi-public" payphones in deciding whether a payphone should be assessed a EUCL charge, the Commission had to determine whether CFC's payphones were "public" to determine whether they qualified for the exception created for such payphones.²⁷ To make this determination, the Commission applied the definition of "public telephone" contained in Part 69 of the Commission's rules, which sets forth rules for computation, assessment, and collection of charges for interstate access services. Section 69.2(ee) defines a "public telephone" as a "telephone provided by a telephone company through which an end user may originate interstate or foreign telecommunications for which he pays with coins or by credit card, collect or third number billing procedures."²⁸ At the time of the *CFC I Order*, a "telephone company" was defined in Part 69 of the Commission's rules as "a carrier that provides telephone exchange service as defined in section 3(r) of the Communications Act of 1934."²⁹ In the *CFC I Order*, the Commission found that CFC's payphones were not "public" because CFC was not a "telephone company."³⁰

17. The court rejected the Commission's analysis. The court found that the "public telephone" definition of section 69.2(ee) was established for different purposes than how the term was used in the *First Reconsideration Order*. The court also noted that the definition was promulgated several years after the Commission adopted its access charge rules. The court found that the section 69.2(ee) definition of "public telephone" was intended to clarify what types of payphone investments LECs could recover. As the court held, the "public telephone" definition of section 69.2(ee) was designed to clarify that LECs were not entitled to include independent payphone costs when calculating their investment in payphone equipment. Specifically, section 69.2(ee) mandated that LECs could only recover their investment in "public telephones" that they owned and controlled, not the investment associated with independent telephones that were owned by others. Thus, the court found that the "public telephone" definition of section 69.2(ee) was not designed to address the same concerns as the "public/semi-public" distinction established in the *First Reconsideration Order*; namely, what types of payphones should be exempted from assessment of EUCL charges. Consequently, the court stated that, if the Commission was going to use the section 69.2(ee) definition in this context, the Commission should have shown some "rational connection" between section 69.2(ee) and the public/semi-public telephone distinction in

(1993); see also *MTS and WATS Market Structure*, 97 FCC 2d 682, 703-06 (1983) ("public" payphones exempted from EUCL charges).

²⁷ Under the *First Reconsideration Order*, the key criteria for determining whether a payphone is subject to the EUCL charge is whether the phone is a "public" or "semi-public" payphone. *First Reconsideration Order*, 97 FCC 2d at 704-706.

²⁸ 47 C.F.R. § 69.2(ee) (emphasis added).

²⁹ 47 C.F.R. § 69.2(hh) (1993). The Bureau in this proceeding found that CFC was a reseller. *Bureau Order*, 8 FCC Rcd at 7336.

³⁰ *CFC I*, 10 FCC Rcd at 9779.

the *First Reconsideration Order*. The court concluded that the Commission had "not shown any legally significant difference between 'public' payphones owned by an LEC and those of the independent payphone providers."³¹

18. In addition, the court concluded that the Commission misapplied the definition of "semi-public" payphone set forth in the *First Reconsideration Order*. The court stated that the Commission erred in classifying the IPP payphones as "semi-public" solely because the payphone lines associated with those phones *could be* used for private use.³² Instead, the court stated that the Commission should have focused on how the payphone lines were *actually* used.³³ According to the court, the *First Reconsideration Order*, "which introduced the distinction between 'public' and 'semi-public' for purposes of the EUCL charge, does not mention this 'capability of use' distinction, and further suggests that the key distinction was meant to be actual use."³⁴ The court stated that the Commission had not provided a sufficient basis for distinguishing between LEC payphones and IPP payphones, or the lines associated with the respective payphones, to justify classifying all IPP payphones as semi-public.³⁵

19. As noted by the court, the Commission previously misapplied the definition of "public telephone" in the context of NTS cost recovery for IPP payphones. When considered in its intended context, section 69.2(ee) is logical because it clarifies that LECs may recover only their investment in "public telephones" that they own and control, and not independent telephones that are owned by others. This distinction, however, bears no logical nexus to the reason the Commission established an exemption from assessment of EUCL charges for "public payphones," but left "semi-public payphones" subject to the charges. As explained above, "public payphones" were exempted because the Commission found there was no readily identifiable end user for most calls from such payphones, and, therefore, there was no practical way to assess fairly EUCL charges on all end users from public payphones.³⁶ "Semi-public payphones," on the other hand, did have a readily identifiable end user: the business on whose premises the payphone was located and which used the payphone, at least partially, for business purposes.³⁷ Thus, the distinction set forth in the *First Reconsideration Order* had nothing to do with whether the payphone was owned by a "telephone company," as required by the definition in section 69.2(ee), rather than by an independent payphone provider. Indeed, at the time that order was issued, only LECs were allowed to provide payphone service.

³¹ *Appeals Court Decision*, 128 F3d at 740.

³² *Id.* at 740-741. The Court found that the Commission erroneously focused on the "technical point" of whether CFC's payphones were connected to regular subscriber business lines rather than the coin lines attached to LEC-owned payphones. *Id.* at 740.

³³ *Appeals Court Decision*, 128 F.3d at 740-41.

³⁴ *Id.* at 741 (citing *First Reconsideration Order*, 97 FCC 2d at 704 n.40).

³⁵ *Id.* at 740-41.

³⁶ *First Reconsideration Order*, 97 FCC 2d at 704-06.

³⁷ *Id.* at 706.

20. Similarly, as noted by the court, the Commission's previous order was erroneous in basing its evaluation that CFC's payphones were "semi-public" on the way in which payphone lines could be used, rather than an evaluation of how the payphones themselves were used.³⁸ That independent payphones were capable of being connected to regular subscriber lines, while LEC payphones were typically connected to coin lines, has no bearing on the rationale set forth by the Commission for the establishment of the EUCL exception for "public payphones."³⁹ As we have emphasized previously, that exception recognized that, due to the transient nature of payphone users, there was typically no identifiable end user from whom the charge could be recovered equitably. On the other hand, the Commission allowed the assessment on "semi-public" payphones because there was an identifiable end user.⁴⁰ Accordingly, it is clear that the dichotomy set forth in the *First Reconsideration Order* required us to evaluate the manner in which the payphone was used -- e.g., whether it was predominantly used in a manner that allowed for identification of an end user. Applying the test set forth by the D.C. Circuit, viz, the manner in which the payphone is actually used, the record is clear that LEC and independent payphones are indistinguishable in the manner in which they are held out for public use.⁴¹ Accordingly, we find that the LECs imposed an unreasonable charge in violation of section 201(b) by classifying all IPP payphones as semi-public and assessing EUCL charges against IPP payphones that were deployed in the same manner as LEC-owned "public payphones."

C. CFC Is Not An "End User" For Purposes of Section 69.2(m)

21. As noted above, the Commission previously determined that CFC's payphones also were subject to the EUCL because CFC was an "end user" pursuant to section 69.2(m) of the Commission's rules. The court, however, rejected the reasoning behind the Commission's determination and concluded that the Commission's determination was clearly erroneous. Because the Commission previously addressed the issue of whether CFC was an "end user" and because the court considered this issue in its order, we will review this issue. Nevertheless, we note that, based on the reasoning outlined in section III.B. above, we now find that irrespective of whether CFC were an "end user" the appropriate distinction to apply to determine whether the EUCL would apply to CFC's payphones was the "public/semi-public" distinction.

22. Section 69.2(m) provides that "a carrier other than a telephone company" is an end

³⁸ *CFC I*, 10 FCC Rcd at 9780.

³⁹ Thus, we find to be irrelevant Ameritech's claim that the services and lines provided to the IPPs were different from those provided to the LECs. *Ameritech Ex Parte* at 6. As noted above, the Court has stated that the key distinction was not the type of line provided but how the phones were actually used.

⁴⁰ In fact, the *First Reconsideration Order* notes that a "semi-public" payphone would typically have an end user identified in the directory listings. *First Reconsideration Order* at 704 n.40.

⁴¹ See *Appeals Court Decision*, 128 F.3d at 741 (Court noted that "the record reflects that CFC's payphones are indistinguishable from LEC's payphones from a consumer's point of view" . . . and that "at oral argument, counsel for the Commission conceded that a consumer making a call from a bank of payphones would have no idea whether that phone was independently owned or owned by an LEC."); see also *CFC I*, 10 FCC Rcd at 9780 (stating that "we recognize that it is not CFC's intent to provide private service via its payphones.").

user when it "offers telecommunications services exclusively as a reseller" and all of its "resale transmissions ... originate on the premises of such reseller."⁴² In the previous order, the Commission found that, in the context of section 69.2(m), the payphone itself constituted the "premises."⁴³ Alternatively, the Commission stated that once CFC had placed a payphone in a particular location, it had "limited legal control" over that location so that it became CFC's premises for purposes of section 69.2(m).⁴⁴ Based on the determination that CFC's transmissions did originate on its premises, the Commission concluded that CFC was an end user for purposes of section 69.2(m).⁴⁵

23. With regard to the Commission's determination that the payphones themselves could constitute "premises" for purposes of section 69.2(m), the court stated that "[t]he term 'premises,' as used in this context, traditionally refers to real property and its appurtenances."⁴⁶ The court emphasized that the agreements CFC typically had with various location owners specifically designated the telephones, booths, and equipment associated with the payphones as "personal property."⁴⁷ The court stated that the Commission had not provided a rationale under which personal property located on real property owned by another could be considered "premises." The court also rejected the Commission's conclusion about how CFC's limited legal control over the area in which its payphones are located made CFC a premises owner under section 69.2(m). The court said that "[i]f any location in which a 'reseller' has the capacity to originate a call becomes the premises, that requirement of the rule excludes nothing."⁴⁸ The court stated that such an interpretation violated the principle of statutory construction that requires construction "so that no provision is rendered inoperative or superfluous, void or insignificant."⁴⁹

24. In light of the court's ruling, we now find that CFC and the other IPPs cannot be considered "end users" under section 69.2(m), because they do not own the premises where their payphones are located. Pursuant to the court's determination, we find that the word "premises" in the context of section 69.2(m) requires that there be some type of ownership or tenancy of the physical space in which the payphone is situated, before an IPP can be considered a premises owner. Given the court's finding that CFC's agreements specifically designated its payphones as personal property, it appears that CFC never intended to acquire an interest in the premises where its payphones were located. Because CFC was not a premises owner, we conclude that it was not

⁴² 47 C.F.R. § 69.2(m).

⁴³ *CFC I*, 10 FCC Rcd at 9778.

⁴⁴ *Id.*

⁴⁵ *Id.* at 9779.

⁴⁶ *Appeals Court Decision*, 128 F.3d at 739.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, quoting *Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993).

an "end user" within the meaning of section 69.2(m).

25. Nevertheless, irrespective of whether CFC was an "end user," we now find that the primary determination the Commission should have made was whether CFC's payphones were "public" or "semi-public." As outlined in Sections III.A.-B. above, the Commission had established specific requirements with regard to collection of EUCL from payphone owners. Consequently, the Commission should have focused on these payphone specific requirements, rather than reviewing the more general requirements for determining who qualified as an "end user" for purposes of assessing the EUCL.

D. Damages

26. Having decided that the LECs' practice of assessing EUCL charges on all CFC payphones violated section 201(b) and the Commission's access charge requirements, we reject defendants' arguments asserting that they should not have to pay damages even if they previously assessed EUCL charges improperly. We note that some of these claims have been asserted by defendants with little or no legal support, and we respond to such claims accordingly.

1. Defendants Cannot Evade the Payment of Damages by Arguing that the Commission's Rules Required them to Impose the EUCL on all IPP Payphones

27. As an initial matter, we reject defendants' arguments that an award of damages here would be inappropriate because they were acting in accordance with Commission rules. As the D.C. Circuit has ruled, the Commission's access charge orders did not, in fact, require carriers to assess the EUCL charge indiscriminately on all IPP-owned payphones. Although only LEC-owned payphones were allowed at the time, the D.C. Circuit has found that the *First Reconsideration Order* set forth standards by which LECs were to evaluate whether individual IPP payphones should be classified as "public" or "semi-public." The record indicates that the defendants chose to assess EUCL charges on all IPP payphones without regard to where they were located or the manner in which they were used. In light of the D.C. Circuit's opinion and the record evidence that there was no significant distinction in the manner in which LEC and IPP payphones were deployed, we have found the LECs' practice by the LECs to be unreasonable. The complainants are, accordingly, entitled to damages.

28. Nor do we find persuasive defendants' reliance on two informal letter rulings of Commission staff supporting their position.⁵⁰ These unpublished letter rulings by a staff analyst are not binding on the Commission. Indeed, our rules specifically establish that general policy statements included in correspondence to individuals need not be published and "may not be relied upon, used, or cited as precedent, except against persons who have actual notice of the document in

⁵⁰ See GTE Reply Brief at 5, n.11; BellSouth Brief at 6, n.17 (both briefs citing Letter from Anita J. Thomas, Informal Complaints and Public Inquiries Branch, Enforcement Division, Common Carrier Bureau, to Lance Norris, Vice President, American Payphones, Inc. (Sept. 14, 1988); Letter from Anita J. Thomas to LeRoy A. Manke, Manager, Coon Valley Farmers Telephone Company (April 4, 1989)); see also Ameritech Ex Parte at 2-3 (characterizing these letters as "Commission decisions").

question"⁵¹ There is no evidence that any of the parties to this matter had actual knowledge of these letters. Moreover, the timing of these letters belie defendants' argument. The record demonstrates that the defendants began the practice in question before either of these letters was issued. Additionally, this complaint was first filed by CFC approximately one month after issuance of the second of these letters, thus putting defendants on notice that the practice was under challenge. For similar reasons, we reject defendants' argument that damages are inappropriate because they relied on the Commission's previous decision in this proceeding.⁵² Complainants timely appealed these decisions, and defendants were on notice of these appeals. Accordingly, complainants are entitled to damages relating back to the filing of their original complaints.⁵³

29. We also reject GTE's, Sprint's, and Ameritech's claim that the EUCL charge was a prescribed rate, thereby prohibiting the award of a retroactive refund pursuant to *Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Railway Co. et al.*⁵⁴ *Arizona Grocery* does not apply to the instant case. The *First Reconsideration Order* did not establish that the EUCL was a prescribed rate with regard to "public telephones." To the extent the LECs were given any directive with regard to these lines it was to recover the NTS costs associated with them through the carrier common line charge. Pursuant to the court's ruling, we find the defendants were not following the Commission's rules, as properly interpreted, when they assessed the EUCL charge on all IPP payphones.

2. Defendants' "Equitable" Arguments are Not Persuasive

30. Defendants' claim that a grant of damages here would effectively allow the IPPs to have used the network without contributing towards its costs reflects a misunderstanding of the Commission's access charge rules.⁵⁵ One of the goals behind these rules was, to the extent possible, to recover costs from the actual cost causer. The Commission made the policy determination that public payphones would not be assessed a EUCL charge because there was no fair and practical mechanism for passing the charge on to the end user callers.⁵⁶ Instead, the Commission opted to "apportion those costs among the interexchange carriers upon whose service these customers rely to make their interstate calls."⁵⁷ The Commission therefore exempted all public payphones from the EUCL charges. As the court stated, "the Commission's express reason for exempting public payphones from EUCL charges applies to CFC's payphones as well as to

⁵¹ 47 C.F.R. § 0.445(e).

⁵² See, e.g., GTE Brief at 6-7, 10.

⁵³ See 47 U.S.C. § 402(h).

⁵⁴ *Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe Railway Co. et al.*, 284 U.S. 371 (1932) (*Arizona Grocery*).

⁵⁵ BellSouth Brief at 7-8; Bell Atlantic Brief at 3-4; Ameritech Ex Parte at 10.

⁵⁶ *First Reconsideration Order*, 97 FCC 2d at 705.

⁵⁷ *Id.*

LEC-owned payphones."⁵⁸

31. In addition, we find unpersuasive the assertion that it would be inequitable to require a refund because the defendants would then have a revenue shortfall.⁵⁹ As the Supreme Court has previously stated: "The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."⁶⁰ Consistent with the Supreme Court's reasoning, we note that defendants chose to assess the EUCL charge on the public payphones of their competitors, without imposing a similar charge on defendant payphones. The Commission's access charge orders provided them with the opportunity to recover the costs associated with these lines through the CCL charge on long distance carriers, as they did for their own payphones.⁶¹

3. Requirement of showing actual injury.

32. We also reject GTE's contention that complainants have failed to show actual injury.⁶² Complainants have been assessed charges contrary to Commission rules. GTE's reliance on an ICC rate case is inapposite. In that case, the Supreme Court held that the plaintiff coal company, which had paid the lawful tariffed rate, was not automatically entitled to a refund simply because others had paid less than the lawful rate.⁶³ Rather, the coal company would have to prove that it had been damaged by the railroad having charged lower rates to competing carriers.⁶⁴ The Court recognized that the amount of damages, if any, could be higher than, lower than, or perhaps even equal to, the difference in the charged rates. The Court, therefore, refused to accept the differential as the measure of damages.⁶⁵ Unlike the ICC case, complainants in this case were not paying a lawful charge. To the contrary, in this case, complainants are entitled to damages because the defendants were prohibited under the Commission's rules from assessing *any* EUCL charges on

⁵⁸ *Appeals Court Decision*, 128 F.3d at 741.

⁵⁹ GTE Brief at 9-10.

⁶⁰ *FPC v. Tennessee Gas Trans. Co.*, 371 U.S. 145, 152-53 (1962); *see also In the Matter of 1997 Annual Access Tariff Filings*, Memorandum Opinion and Order on Reconsideration 13 FCC Rcd 10597, 10601 (1998) (quoting *Tennessee Gas* and stating that "a carrier cannot ultimately recoup its losses from a rate the Commission ultimately determines has been set unjustly or unreasonably low, or offset such losses against refunds owed for rates that were set too high.").

⁶¹ *See* Bell Atlantic Brief at 4; Ameritech Ex Parte at 10-11 (asserting that defendants should be allowed to recover the loss in revenue from other access service customers).

⁶² GTE Brief at 11-14.

⁶³ *Pennsylvania Railroad Co. v. Int'l Coal Mining Co.*, 230 U.S. 184, 202 (1913).

⁶⁴ *Id.* at 203.

⁶⁵ *Id.*

the payphone lines at issue here.

4. Calculus of Damages

33. Based on our section 208 authority, we bifurcate the liability and damages portions of this case.⁶⁶ Given the time lag between the filing of the initial complaints and the filing of this order, we will allow the complainants to file supplemental complaints for damages. In their supplemental complaints, complainants will have to provide evidence sufficient to prove among other things, how many of their payphones were in fact "public payphones," under the definition established in the *First Reconsideration Order*, as clarified here. Based on the current record, it is our belief that the vast majority of IPP payphones were "public" payphones under the *First Reconsideration Order*. In *CFC I*, the Commission recognized that it was "not CFC's intent to provide private service via its payphones."⁶⁷ Similarly, the court found that "CFC's payphones are indistinguishable from LEC's payphones from a consumer's point of view."⁶⁸

34. We recognize that the IPPs may have difficulty, after so many years, in calculating the exact number of public and semi-public payphones they had. Consequently, we encourage the parties to consider proxies that can be used to obtain a reasonable estimation of that number. In this regard, we note that evidence in the Commission's *Payphone Compensation Proceeding* suggests that, due to 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.⁶⁹ Thus, the ratio of their own payphones to which LECs assessed EUCL charges may be an appropriate starting point for the damages inquiry. We direct the parties to address this potential method for calculating damages in their supplemental briefs.

35. To facilitate any settlement discussions that might ensue from this decision, we temporarily waive the requirement that supplemental complaints for damages be filed within 60 days after public notice of this decision.⁷⁰ Instead, we request all parties to attend a status conference to be held at the Commission at 2:00 pm on June 13, 2000.⁷¹ At this status conference, parties should be

⁶⁶ Pursuant to section 208(a) of the Act, the Commission has previously found that it has the discretion to bifurcate liability and damages issue on its own motion. See *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, 12 FCC Rcd 22497, 22575 (1997).

⁶⁷ *CFC I* at 9780.

⁶⁸ *Appeals Court Decision* at 741.

⁶⁹ See, e.g., *First Payphone Order*, 11 FCC Rcd at ¶ 12 n.28 (1996); see also *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 FCC Rcd 2545, n.67 (1999).

⁷⁰ 47 C.F.R. § 1.722 (b)(2)(ii).

⁷¹ We will inform the parties via letter of the exact location of the status conference.

prepared to discuss any progress that has been made with regard to settlement. In addition, to the extent there is no progress on settlement, parties should be prepared to discuss whether the damages portion of this case is suitable for referral to an Administrative Law Judge, pursuant to our rules.⁷² At the status conference, Commission staff will provide a date by which the complainants must file their supplemental complaints for damages.

E. Statute of Limitations

36. Various parties have raised issues relating to the statute of limitations for obtaining damages in this proceeding.⁷³ Pursuant to the Act, complaints for damages are subject to a two year statute of limitations.⁷⁴ Thus, each complainant's damages here are limited to those accruing no more than two years prior to the date on which its complaint was filed with the Commission. Under the Commission's rules, any person wishing to file a section 208 complaint may file either an informal complaint or a formal complaint.⁷⁵ If an informal complainant is not satisfied with the carrier's response, it may file a formal complaint pursuant to section 1.721 of the Commission's rules.⁷⁶ Under section 1.718, the formal complaint is deemed to relate back to the filing of the informal complaint if the formal complaint is: 1) filed within six months from the date of the carrier's response to the informal complaint; 2) makes reference to the date of the informal complaint; and 3) is based on the same cause of action as the informal complaint.⁷⁷ If the unsatisfied informal complainant fails to file a formal complaint within the six month period, the complainant is deemed to have abandoned the unsatisfied informal complaint.⁷⁸

37. In light of the foregoing, we reject BellSouth's assertion that the Commission's rules prevent a complainant who has filed a formal complaint within six months of the carrier's response to its informal complaint from recovering damages dating back two years from the filing of its informal complaint. Section 1.718 clearly provides for such a "relating back."⁷⁹ Similarly, we reject complainants' argument that this "relating back" provision is dependent upon when the Commission had "disposed" of an informal complaint. Rather, the clear language of section 1.718 of the rules allows for "relating back" of damages only if a complainant files a formal complaint within 6 months "from the date of the carrier's report."⁸⁰

⁷² 47 C.F.R. § 1.722(d)(1).

⁷³ BellSouth Brief at 5; Complainants Brief at 17-19.

⁷⁴ 47 U.S.C. § 415.

⁷⁵ 47 U.S.C. § 208 and 47 C.F.R. § 1.711.

⁷⁶ 47 C.F.R. § 1.718.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

F. Complainants' Motion to Consolidate

38. On June 15, 1998, various informal complainants filed a motion to consolidate all of the formal and informal complaints pending with the Commission regarding improper assessment of EUCLs on the IPPs.⁸¹ We hereby deny this motion for consolidation. The Commission's rules provide for different treatment for formal and informal complaints. We find that granting the motion to consolidate would potentially allow the informal complainants to circumvent the formal complaint filing process.⁸² Petitioners have not demonstrated that waiver of these rules would be in the public interest.

39. In the interests of administrative efficiency, however, the Commission staff previously issued a waiver order tolling the six month relation back requirement contained in section 1.718 of the Commission's rules for a number of informal complaints.⁸³ Pursuant to the waiver order, any formal complaint relating to issues raised in this proceeding that was required under section 1.718 to be filed after June 15, 1998, will be deemed to relate back to the filing date of the relevant informal complaint if it is filed with the Commission no later than 90 days after a final nonappealable order has been entered in this remand proceeding.⁸⁴

IV. CONCLUSION AND ORDERING CLAUSES

40. For the reasons discussed above, we conclude that the LECs' imposition of EUCL charges on the complainants violated section 201(b) of the Act and Part 69 of the Commission's rules.

41. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201(b), and 208, that the formal complaints filed by C.F. Communications Corp. and the other independent payphone providers listed in Appendixes A to this order ARE GRANTED.

42. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208, that C.F. Communications Corp.'s motion to consolidate this proceeding with the informal complaints filed before the Consumer Protection Branch IS DENIED.

43. IT IS FURTHER ORDERED that C.F. Communications Corp. and the other

⁸¹ Motion to Consolidate Complaint Proceedings and Establish Binding Procedures to Resolve all Outstanding Legal Issues and Request for Rule Waiver, File E-89-170 (filed June 15, 1998).

⁸² See, e.g., 47 C.F.R. § 1.1105(1)(c).

⁸³ *Informal Complaints Filed By Independent Payphone Service Providers Against Various Local Exchange Carriers Seeking Refunds of End User Common Line Charges*, File No. 89-170, DA 99-1854, Common Carrier Bureau (rel. Sept. 10, 1999) (*Waiver Order*).

⁸⁴ *Waiver Order* at ¶ 5.

independent payphone providers listed in Appendix A to this order, in accordance with Section

1.722 of the Commission's Rules, 47 C.F.R. § 1.722, MAY FILE supplemental complaints concerning damages at a time to be determined at a status conference to be held at the Commission on June 13, 2000.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Alcazar Ltd.
American Payphone, Inc.
Ascom Communication, Inc
B.D.A. Sales Inc.
Bell Telephone Co. of Pennsylvania
Best Payphones, Inc.
C&P Telephone Co. of Maryland
C&P Telephone Co. of Virginia
C.F. Communications Corp.
Carolina Telephone Co.
Century Telephone of Wisconsin, Inc.
Crescent Communications
GTE Florida, Inc.
GTE North, Inc.
GTE South, Inc.
Just Telephone Inc.
Kayson Communication
Michigan Bell Telephone Co.
Millicom Services Co.
Mosinee Telephone Co.
New Jersey Bell Telephone Co.
NYPAY Communications Co.
New York Pay Phone Systems, Inc.
New York Telephone Co.
North West Telephone Co.
Southern Bell Telephone and Telegraph
Southwestern Bell Telephone Co.
Telebeam Telephone
Turtle Lake Telephone Co.
United Telephone Co. of Florida
United Telephone Co. of Pennsylvania
Utelco, Inc.
Wisconsin Bell, Inc.