

2. Complainant Is Not A "Reseller"
Under Section 69.2(m) Of The Rules
Because The Telecommunications
Services That Complainant Does
Resell Do Not Originate From
Complainant's "Premises"

The exception to the non-"end user" rule for "resellers" of telecommunications service is inapplicable for the additional and independent reason that whatever services Complainant does resell do not originate on its "premises." As Defendant acknowledges (see Answer at 6), IPP providers do not own the property on which their public payphones are installed, but typically lease the space from the owner. See Petition at 8 n.6; Reply at 7-9. Accordingly, the services which they resell do not originate from their "premises" for the purposes of Section 69.

III. THE COMPLAINT STATES A CAUSE OF ACTION BECAUSE THE
COLLECTION OF EUCL CHARGES FROM IPP PROVIDERS IS
DISCRIMINATORY

Defendant is illegally discriminating against Complainant under Section 202 of the Communications Act by assessing EUCL charges against Complainant's IPPs for the purpose of recovering the costs associated with the EUCL instead of recovering those costs through the CCL charge, as it does with its own phones. The net result is that the Defendant recovers the LECPP costs generally associated with the EUCL charge from interexchange carriers, and recovers those same costs for Complainant's IPPs from Complainant itself, rather than through the interexchange carriers.

IV. DEFENDANT'S MOTION FOR STAY SHOULD BE DENIED

Defendants have not attempted to, and cannot, satisfy the applicable standard for a stay. See Washington Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958). In particular, Defendants will not be irreparably harmed absent entry of a stay. The need to defend oneself in a legal proceeding does not constitute irreparable harm. Nor is irreparable harm established in a case, such as this, in which the relief sought is principally monetary in nature. The Defendants' allegation that APCC's pending petition for declaratory relief and Complainant's formal complaint raise "identical questions of law" is misleading and, in any event, immaterial. The issues of law raised by the petition and complaint may overlap, but they are not "identical." The question posed by APCC's petition is: "Is the EUCL charge, which is not assessed on LEC-provided public payphones, inapplicable to competitively provided public payphones?" See Petition at 5-6. The Complaint, by contrast, alleges that by applying the EUCL charge to IPPs, Defendants have violated Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201, 202. Nor do the complaint and the petition for declaratory relief seek "identical" relief; the complaint seeks damages, and the petition obviously does not. Even if the issues presented by, and relief requested by, the complaint and the petition, were "identical," a stay would not be justified. Complainant is

entitled to pursue its formal complaint under the Commission's rules without consideration of another party's declaratory judgment proceeding. Indeed, the two-year limitations period of 47 U.S.C. § 415 requires that Complainant vigilantly prosecute its complaint or risk compromising its rights.

WHEREFORE, Complainant Millicom Services Company respectfully requests that Defendant's Motion to Dismiss or in the Alternative to Stay Proceedings be denied.

Respectfully submitted,

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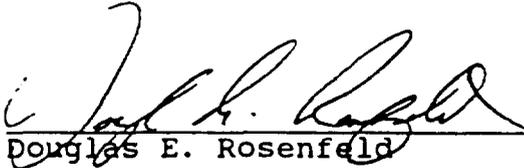
CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 5th day of April 1993, that I have caused a copy of the foregoing pleading to be sent via first-class mail, postage prepaid, to the following:

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FILE COPY

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

In the Matter of)
THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL)
Petition for Declaratory Ruling)
That End User Common Line Access Charges)
May Not Be Assessed on Competitive Public)
Pay Telephones)

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JUL - 6 1989
Federal Communications Commission
Washington, D.C.

REPLY OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL
TO COMMENTS ON APCC'S PETITION FOR DECLARATORY RULING

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July 6, 1989

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competitively provided public payphones^{1/} do not fit the criteria of the Commission's rules for the imposition of EUCL charges. In addition, the reasons given by the Commission in its access charge rulemaking^{2/} for deciding that EUCL charges should not apply to public payphones apply with equal force to LEC and non-LEC public payphones.

APCC's petition is supported by the Public Telephone Council, Inc. ("PTC"), the Florida Pay Telephone Association, Inc. ("FPTA"), the Operator Service Providers of America ("OSPA"), and C.F. Communications Corp. It is opposed by LECs^{3/} and by the National Exchange Carrier Association ("NECA"), an association of LECs.

^{1/} The term "competitively provided public payphone" is used to refer to public payphones which are not provided by the LEC. Payphones which are offered solely for the use of the general public, rather than on a "semi-public" basis (*i.e.*, partly for public use and partly for the private use of the premises owner), are appropriately described as "public" whether they are provided by LECs or by others. Petition at 4, n.4.

^{2/} MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983) ("Access Charge Order"), recon., 97 FCC 2d 682 (1983) ("First Reconsideration Order"), further recon., 97 FCC 2d 834 (1984), aff'd in principal part and remanded in part, NARUC v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984, cert denied, 105 S. Ct. 1224 (1985)).

^{3/} Nine oppositions to APCC's petition were filed by the following LECs: Ameritech Operating Companies ("Ameritech"); BellSouth Telephone Companies ("BellSouth"); Central Telephone Company ("Centel"); GTE Telephone Operating Companies ("GTE"); New York Telephone Company and New England Telephone Company ("NYNEX"); Pacific Bell and Nevada
(Footnote Continued)

SUMMARY

The LECs opposing APCC's petition are arguing from the premise that competitive payphone providers ("CPPs") must be either "end users" subject to EUCL charges, or "interexchange carriers" subject to carrier access charges. The premise is wrong. The Commission's access charge rules recognize a third category, "exchange carriers." This category includes entities such as radio common carriers which are not traditional telephone companies and which do not pay EUCL charges or carrier access charges.

CPPs also function as non-traditional "exchange carriers." Once this is recognized, there is no reason to strain to fit them into the definition of "end user" as the LECs have done. Moreover, to recognize that CPPs are not "end users" will not result in any special access charge exemption for one class of public payphone. CPP payphones are appropriately treated exactly like LEC payphones for access charge purposes.

The LECs also cannot seriously dispute that the Commission's policy justification for exempting public payphones from EUCL charges applies with the same force to CPP and LEC payphones. In both cases, there may be a

(Footnote Continued)

Bell ("PBNB"); Rochester Telephone Corporation ("RTC"); Southwestern Bell Telephone Company ("SBTC"); and United Telephone System Companies ("United").

"subscriber," but there is no equitable means of assessing charges on actual end users.

Finally, the comments of the Public Telephone Council and other parties make clear that the ruling requested by APCC is necessary to resolve ambiguities in the rules in a way that eliminates unintended discriminatory and anti-competitive effects. It is essential that the Commission correct the LECs' erroneous interpretation of the rules in order to ensure that access charges are applied in accordance with the Commission's objectives and the Communications Act.

I. COMPETITIVE PAYPHONE PROVIDERS ARE
APPROPRIATELY TREATED AS EXCHANGE
CARRIERS UNDER THE ACCESS CHARGE RULES

APCC's petition requests a ruling regarding competitive payphone providers ("CPPs") who offer payphones solely for the use of the public. As discussed in APCC's petition, providers of such payphones, whether or not they are traditional LECs, are performing the functions of a "carrier" and should be classified as such for access charge purposes. Petition at 7-8. The petition also explained that CPPs do not fall within the limited class of carriers which are defined as "end users," because CPPs do not "offe[r]

telecommunications services exclusively as a reseller." 47
CFR § 69.2(m).^{4/}

The LECs opposing APCC's petition take the position that CPPs must be "end users" subject to the EUCL charge because there is no other access charge category in which they could fit. Thus, NECA states that:

As set forth in part 69 of the rules, . . . "common line" costs are to be recovered, in part, from end users and in part from interexchange carriers (IXCs). The Commission access charge plan is comprehensive, in that all users (whether end users or carriers) must contribute towards the recovery of NTS costs associated with their use of the local exchange network.

Comments of NECA at 3 (footnote omitted). According to the LECs, if CPPs were not "end users," subject to EUCL charges, they would have to be "interexchange carriers," subject to carrier access charges. Comments of NECA at 4-5; BellSouth at 5, n.7; GTE at 9.

At bottom, the LECs' argument is that there is no way for an entity other than a traditional telephone company

^{4/} The CPPs described in the petition may resell "1+" interstate service at their payphones. However, they cannot be viewed as "reselling" 0+ service where the charge for a 0+ call is set by the interexchange carrier or operator service provider to whom the call is delivered. Moreover, even to the extent that CPPs engage in resale of interstate calls, the resale transmissions do not "originate on the premises" (47 CFR § 69.2(m)) of the CPP, but at the locations where the payphones are installed. Thus, even if a CPP were "exclusively" a reseller, its payphones would not be subject to EUCL charges.

to be anything but an "end user" unless it is an interexchange carrier or "reseller." In the LECs' view, the access charge world is divided into "end users" and "interexchange carriers," and every entity must be one or the other. This picture of the world, however, is incomplete. It is true that the Commission's rules provide for assessment of EUCL charges on "end users" and assessment of "carrier's carrier charges" on "interexchange carriers." 47 CFR § 69.5. However, it does not follow that all entities, including CPPs, must be one or the other. Some entities will fit neither category. In particular, an entity is not an "end user" or "interexchange carrier" if it is an "exchange carrier."

Specifically, the Commission has recognized that radio common carriers ("RCCs") provide "exchange service," not "interexchange service," because RCCs "provide interstate services only to the extent that their facilities may be used to originate or terminate toll calls." MTS/WATS Market Structure, Further Reconsideration Order, 97 FCC 2d 834, 882-3 (1984). RCCs thus provide "access service" and are appropriately classified as "exchange carriers" even though they are not traditional "telephone companies". Id. The fact that RCCs generally must pay for their connections to landline telephone companies does not make them either "end users" or "interexchange carriers" subject to access charges. When a CPP delivers interstate "0+" calls in

return for compensation from interexchange carriers, the CPP also is providing only "access service," or "services and facilities . . . for the origination or termination of any interstate or foreign telecommunication." 47 CFR § 69.2(b). Accordingly, the CPP also is not subject to EUCL charges.

The fallacy in the LECs' other arguments also becomes clear once it is recognized that the access charge world is not limited to "end users," "interexchange carrier," and "telephone companies," but also includes non-telco exchange carriers. For example, the LECs contend that, even if CPPs are carriers, they must still be treated as end users because "the only manner in which private payphone providers offer telecommunications services is as a reseller." Comments of SBTC at 4. The LECs reason that the CPP "must be" reselling all the services it provides, including O+ service. Comments of Ameritech at 4. See also Comments of NECA at 6, n. 11; United at 2; GTE at 5. Alternatively, NECA argues that if CPPs are not reselling "O+" service, then they must be offering it only as "an accommodation to payphone customers, not a telecommunications service." Comments of NECA at 6.

The argument that a CPP "must be" reselling something, such as exchange access, when it offers "O+" service from its payphones is based on a refusal to acknowledge that the CPP provider is itself providing "exchange access" through its public telephone facilities. Such public access

service also requires the participation of an exchange "telephone company" and an interexchange carrier, but this does not mean that any "resale" necessarily occurs.^{5/} Moreover, "resale" of exchange access cannot be inferred from the fact that CPPs currently are assessed EUCL charges. Such an argument would be circular, because it is the legality of such charges which is at issue here.^{6/}

It is also apparent that when a CPP delivers O+ calls to interexchange carriers on a non-resale basis, it is providing an exchange access service, not a mere "accommodation" to customers without any expectation of compensation. Cf. Comments of NECA at 6.^{7/} CPPs do not have to "resell"

^{5/} When an exchange carrier (whether a "telephone company," RCC, or other entity) must "hand off" a call to a second exchange carrier in order to deliver the call to an IXC, the first exchange carrier is not thereby rendered a "reseller" of the second carrier's services.

^{6/} The LECs also take issue with APCC's position that, even if CPPs were "exclusively" resellers, they could not be "end users" because their resale transmissions do not originate from the CPPs' premises. The LECs argue that CPP providers who provide payphones and order the lines to which the payphones are connected thereby acquire a property right in the premises where their payphones are located and that such premises thereby become "the premises of such reseller" for purposes of the access charge rule. This argument would unnecessarily distort the Commission's definition of "end user." The Commission treats hotels and other "premises-based" resellers as "end users" because the reseller itself owns the premises or uses them for other business purposes. This is not the case with CPPs.

^{7/} AT&T and Ameritech have estimated that less than 10%
(Footnote Continued)

0+ calls in order to be compensated for delivering them. Rather, the CPP typically arranges to receive compensation for 0+ calls from the interexchange carrier or ("IXC") or operator service provider ("OSP") to whom such calls are delivered.^{8/} Like telephone company access charges, this compensation is used to defray the CPP's expenses in providing payphone access service, including the expense of providing the CPP's own public access facilities, (e.g., the payphones, enclosures, signage, and wiring).

The LECs also accuse APCC of seeking a ruling that would permit CPPs to avoid the payment of either end user or carrier access charges for interstate payphone calls. Comments of NYNEX at 4, n. 5; SBTC at 3, n.3. This argument, however, is again premised on the mistaken notion that, unlike their LEC competitors, CPPs must be either "end users" or "interexchange carriers" when they provide public payphone service.

(Footnote Continued)

of interLATA calls made from public payphones are "sent-paid" or "1+" calls, and over 90% are "0+" or "0-minus" calls. RM-6113, Petition of Ameritech at 3 (filed August 7, 1989); Comments of AT&T at 7. The latter can be handled much like "0+" calls unless state regulations require them to be delivered to the LEC. See Comments of GTE, Exhibit A at 2.3.1.

^{8/} Even if the call is delivered at the caller's request to a carrier different from the presubscribed IXC or OSP, the CPP is still offering a service for which compensation is due.

It is important to emphasize that APCC is not seeking any special access charge exemption charges for CPPs alone. Rather, APCC believes that the same access charges should apply in exactly the same way to competitively provided public payphones and payphone traffic as to LEC public payphones and payphone traffic. It is APCC's understanding that carrier access charges currently are assessed on interexchange carriers to which interstate traffic is delivered from LEC public payphones. APCC has no objection to assessment of equivalent carrier access charges on interexchange carriers receiving interstate traffic from CPPs. Such charges currently are assessed, to the best of APCC's knowledge. If APCC's petition is granted, such charges could continue to be assessed and there would be no difference in access charge treatment of public payphones, whether provided by CPPs or LECs.

Numerous LECs also contend that CPPs are appropriately treated as "end users" because they are required to subscribe to intrastate service from the local exchange tariff. Comments of GTE at 8^{9/}. The sample tariff attached

^{9/} The LECs also attempt to rationalize their position on the grounds that CPPs are analogous to "semi-public" LEC payphones rather than "public" LEC payphones. APCC's petition did not rule out the possibility that some non-LEC payphones might be provided for the use of the premises owner as well as the general public and that such payphones
(Footnote Continued)

by GTE to support this argument, however, simply demonstrates APCC's central point: although CPPs may be required to subscribe to LEC services,^{10/} they are treated for regulatory purposes as exchange carriers, not as end users. The tariff attached as Exhibit A to GTE's comments provides, for example, that CPPs:

1. must provide E-911, "0"-minus, and IN-WATS (800) access without charge (Comments of GTE, Exhibit A at 2.3.1);
2. must comply with handicapped-access requirement applicable to all coin stations (id.);
3. must display or announce information explaining how to use the payphone, how to report service problems and how to receive credit for a faulty call (id.);

(Footnote Continued)

might be properly treated as "semi-public" for access charge purposes. The ruling requested by APCC, however, is intended to address the access charge treatment of competitively provided public payphones, i.e., payphones which are offered solely for the use of the public. Petition at 4. In such cases, there simply is no "identifiable business end user" (Cf. Comments of GTE at 8) other than the general public, and thus no subscriber from whom EUCL charges can be appropriately recovered.

^{10/} The intraexchange and intrastate services to which CPPs are required to subscribe are regulated by the states, not by the FCC. In devising its access charge scheme the FCC has not allowed its rules for recovery of interstate costs to be dictated by the schemes of regulation adopted by the various states. Access Charge Reconsideration Order, 97 FCC 2d at 762.

4. must allow local calls of unlimited duration without charging more than the authorized LEC charge; and
5. must provide "equal access" to interexchange carriers, including FGB and FGD access at no charge.

These are the type of requirements typically imposed on carriers, not "end users."^{11/} Moreover, the fact that CPPs are subject to "equal access" requirements further confirms that CPPs are properly treated as exchange carriers for regulatory purposes.^{12/} See also Comments of FPTA at 4-5 (PPs are treated as "telephone companies" under Florida regulation).

II. THE JUSTIFICATION FOR EXCLUDING PAY TELEPHONES FROM EUCL CHARGES APPLIES TO ALL PUBLIC PAYPHONES

In its petition, APCC pointed out that the Commission's policy justification for excluding public payphone lines from assessment of EUCL charges is as valid for CPP

^{11/} The GTE requirements are a typical example of the state COCOT tariffs in APCC's experience. The Commission has recognized that the states can regulate the provision of intrastate service by CPP. Universal Payphone Corp., 58 RR 2d 76 (1985).

^{12/} RTC's contention that CPPs cannot be "carriers" because they do not set the charges for interexchange calls (Comments of RTC at 2-3) is thus inapposite. Exchange carriers would not be expected to set such charges.

payphones as it is for LEC payphones. In both cases, there is no available party that fits into the category of end users on whom such charges are intended to be assessed. The LECs opposing the petition cannot seriously dispute this point.

In claiming that the Commission's rationale for exempting pay telephones from EUCL charges cannot apply to CPPs (See, e.g., Comments of BellSouth at 4-5), the LECs confuse the terms "subscriber" and "end user". With LEC public payphones as well as CPP public payphones there is a "subscriber" in the sense of a party at whose premises the payphone line is connected to a payphone.^{13/} However, the Commission never even considered imposing an EUCL charge on such a "subscriber." Rather, it looked for ways to recover the NTS payphone costs from payphone "end users," i.e., the callers themselves. Access Charge Reconsideration Order, 97 FCC 2d at 704-05. Only after concluding there was no equitable means of recovering NTS costs from such end users did the Commission decide to require recovery of such costs via generally applicable common line charges.

^{13/} As PTC points out, the premises owner for an LEC payphone public has many of the characteristics of a "subscriber." Comments of PTC at 7. These characteristics, however, do not make the premises owner an "end user" under the Commission's rules.

The LECs have not shown why it is any more practicable for such NTS costs to be equitably apportioned and recovered from from end users of CPP payphones than from end users of LEC payphones. Pacific Bell and Nevada Bell ("PBNB") argue at length that CPPs are no different from other providers of telephone access to transient users, such as hotels, motels, and hospitals. However, PBNB neglect to mention that their arguments apply equally to LEC payphones. LECs have "exclusive control" of their payphones until they are made available to the public, and an LEC typically does not make a payphone available where "it would be unprofitable to do so." Comments of PBNB at 2. Moreover, when an LEC payphone is made available, it "contributes to the NTS costs" which are ordinarily recovered in EUCL charges. The NTS costs generated by LEC payphones are recovered in a different manner only because of the payphone exclusion which is at issue here. Applying this exclusion to CPP payphones has no more of an "inequitable effect" (Comments of PBNB at 4) than applying the same type of exclusion to LEC payphones. The "inequitable effect" results from applying the exclusion only to LEC payphones. Thus, it is clearly illogical to argue that applying the same exemption to all public payphones "would not promote full and fair competition." Id. at 5. There can be no equity or competition as long as the EUCL exemption is applied to LEC payphones alone.

III. THE RULING REQUESTED BY APCC IS NECESSARY
TO ELIMINATE DISCRIMINATORY APPLICATION
OF ACCESS CHARGES

As pointed out by the Public Telephone Council, the LECs' practice of assessing EUCL charges on CPP payphones or "COCOTs" but not LEC payphones "is facially discriminatory against COCOT providers and undeniably harms competition in the pay telephone industry." Comments of PTC at 8. This practice frustrates one of the basic objectives of the access charge rules -- the elimination of "unreasonable discrimination" or "undue preferences." Access Charge Order, 93 FCC 2d at 257, 265. The Commission has recognized its obligation to be guided by this critical objective in resolving ambiguities in its access charge rules. Clarification of Sections 69.5 and 69.115 of the Rules ("Clarification") 57 RR 2d 1630, 1636 (1985). Such guidance is especially appropriate here because of the clearly adverse impact on the current LEC practice on payphone competition.^{14/}

^{14/} Another stated objective of the access rules is to "preserv[e] an opportunity for fair competition during a transition period ". . . . Access Charge Order at 267-68. See also Clarification at 1636 (recognizing goal of avoiding "undue impact . . . on the orderliness of the marketplace"). This objective is also frustrated by access charge practices that grossly discriminate between the public payphones offered by CPPs and LECs.

To eliminate discrimination and the associated distortions to competition, it is essential for the Commission to correct the LECs' erroneous interpretation of the access charge rules and to ensure that access charges are applied in accordance with their objectives and the Communications Act.

CONCLUSION

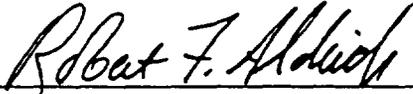
For the foregoing reasons, APCC's petition for declaratory ruling should be GRANTED.

Respectfully submitted,

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July 6, 1989

Tab

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of :)	
)	
C.F. COMMUNICATIONS CORP., et al.,)	File Nos. E-89-170, E-89-171,
Complainants)	E-89-172, E-89-179, E-89-180,
)	E-89-181, E-89-182, E-92-97,
v.)	E-93-34, E-93-35, E-93-36, E-93-37,
)	E-93-38, E-93-39, E-93-40, E-93-41,
)	E-93-42, E-93-43, E-93-44, E-93-45,
CENTURY TELEPHONE OF)	E-93-50, E-93-56, E-93-57, E-93-58,
WISCONSIN, INC., et al.,)	E-93-59, E-93-62, E-93-73, E-93-74,
Defendants.)	and E-93-81

MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: April 7, 2000

Released: April 13, 2000

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order on Remand, we grant 29 formal complaints brought by independent payphone providers (IPPs) alleging that the defendant local exchange carriers (LECs)¹ violated sections 201(b) and 202(a) of the Communications Act of 1934, as amended,² and Part 69 of the Commission's rules,³ by improperly assessing end user common line (EUCL) access charges upon the complainants. The cases are before us as a result of a decision of the U. S. Court of Appeals for the District of Columbia Circuit vacating a previous Commission order denying these complaints and remanding the cases to the Commission for further consideration, consistent with that decision.⁴

II. PROCEDURAL HISTORY

2. CFC originally filed complaints against 13 LEC defendants. The complaints

¹ The parties to this proceeding are listed in Appendix A to this Order.

² 47 U.S.C. §§ 201(b) and 202(a). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. (1996) (the Act).

³ 47 C.F.R. §§ 69.1 *et seq.* Unless otherwise indicated, all C.F.R. references herein are to the 1998 edition. We refer to prior C.F.R. provisions in instances where the prior rules were different than the current rules.

⁴ *C.F. Communications Corp. v. FCC*, 128 F.3d 735 (D.C. Cir. 1997) (*Appeals Court Decision*); *see also C.F. Communications Corp. v. FCC*, No. 97-1202, slip op. (D.C. Cir. 1997).