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APR 03 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 3, 2002

By Hand

William F. Caton, Acting Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

Re: *In the Matter of Pay Telephone Reclassification and Compensation Provisions of
the Telecommunications Act of 1996, CC Docket 96-128*

Dear Mr. Caton:

Please find enclosed for filing the original and four copies of the RBOC Payphone Coalition's Petition for Reconsideration of the Fourth Order on Reconsideration and Order on Remand. Also enclosed is one extra copy of the motion. Please date-stamp and return the extra copy.

Thank you for your assistance. If you have any questions, please call me at 202-326-7921.

Sincerely,



Aaron M. Panner

Enclosure

No. of Copies rec'd 0+4
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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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APR 03 2002

In the Matter of)
)
Implementation of the Pay Telephone)
Reclassification and Compensation Provisions)
of the Telecommunications Act of 1996)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-128

**RBOC PAYPHONE COALITION'S PETITION FOR RECONSIDERATION
AND CLARIFICATION OF THE
FOURTH ORDER ON RECONSIDERATION AND ORDER ON REMAND**

INTRODUCTION AND SUMMARY

In its *Fourth Order on Reconsideration and Order on Remand*, CC Docket No. 96-128, FCC 02-22 (rel. Jan. 31, 2002) (the "*Fourth Recon. Order*"), the Commission purported to resolve some of the outstanding issues concerning the compensation to be paid to payphone service providers ("PSPs") for the use of payphones during the "interim period" from November 7, 1996, to October 6, 1997. In fact, the *Fourth Recon. Order* resolved little, because it does not address the most significant interim compensation issue – that is, the allocation of interim compensation obligations among interexchange carriers ("IXCs"). Until the FCC has resolved that issue, its orders on this subject are little better than academic exercises.

There is at least a possibility that the Commission will be forced to revisit the proper interim compensation amount when it finally resolves the allocation issue. One purpose of this reconsideration petition is to urge the Commission to adopt the most appropriate compensation method for the interim period, even if that method requires revisiting the per-payphone amount established in the *Fourth Recon. Order*.

To the extent that the FCC is able to resolve the allocation problem while maintaining the compensation calculation in the *Fourth Recon. Order*, this petition also seeks reconsideration on

two more specific points. First, the Commission erred in setting the interest rate to compensate PSPs for the delay in payment of compensation for the interim period at the IRS rate, rather than at a rate that reflects Local Exchange Carriers' ("LECs'") cost of capital. Using the IRS rate to calculate refund liability for any overpayments by IXC's at the \$.284 rate makes sense, because the overpayments were pursuant to the Commission's orders. But it makes no sense to deprive PSPs of reasonable compensation for payments withheld for the interim period.

Second, in its Federal Register summary of the *Fourth Recon. Order*, the Commission stated that the order would be effective on January 1, 2003. The reason for the delay is unclear, but the Commission should make clear, once it resolves the allocation issue, that payments are due within 30 days from publication in the Federal Register and no later.

Finally, the Commission should clarify that IXC's must compensate PSPs for 1+ calls made from their payphones during the interim period for which no other compensation was paid.

DISCUSSION

In its *Fourth Recon. Order*, the Commission established a per-payphone compensation amount for the interim compensation period of \$33.892 per payphone, based on an average of 148 calls per payphone per month. In addition, the Commission provided that LEC PSPs that were not otherwise compensated for such calls should receive \$4.2747 per payphone per month for 0+ calls, as well as compensation for inmate calls.

This petition does not challenge those basic determinations. At the same time, the Commission's calculation of the per-payphone compensation *amount* provides little idea of how PSPs will actually be compensated in the absence of a resolution of the *allocation* of interim period payment obligations. Once the allocation issue is resolved, the RBOC Payphone

Coalition reserves the right to seek review of other aspects of the *Fourth Recon. Order* that currently appear unobjectionable.

The purpose of this petition is to raise four issues. First, the FCC has stated its intention to allocate the per-payphone amount among facilities-based IXCs; to the extent that the FCC chooses to employ a different method, this petition will leave the Commission free to reconsider its decision without further notice. Second, the FCC's decision to use the IRS rate, rather than LECs' cost of capital, to calculate interest on interim period compensation obligations is inconsistent with the statute and Commission precedent. Third, the FCC's apparent decision to delay the effective date of its interim compensation regime is unjustifiable and should be modified. Finally, the Commission should clarify that IXCs who carried 1+ calls originated on payphones during the interim period must compensate PSPs for those calls if no other compensation has been paid.

I. THE COMMISSION SHOULD NOT ALLOW ITS DETERMINATION CONCERNING IXCS' PER-PAYPHONE OBLIGATIONS TO DELAY RESOLUTION OF THE INTERIM COMPENSATION ISSUE

In its *Fourth Recon. Order*, the Commission maintained the same basic approach to interim compensation that it adopted in the *First Payphone Order* almost six years ago: the Commission estimated a per-payphone compensation obligation based on typical payphone call volumes and then sought to allocate that obligation among IXCs. In this case, however, the Commission is apparently at a loss, at least temporarily, as to how to allocate the compensation obligation among IXCs.

In light of this, the Commission should consider whether a different approach to these issues is appropriate. The Commission may determine that it makes more sense to impose an obligation for the interim period based on compensation obligations actually incurred for a

subsequent “corresponding” period. The RBOC Payphone Coalition has outlined this proposal in the past, and the Commission has sought comment on it. At the same time, the Coalition does not necessarily advocate its adoption; if the Commission can establish a defensible method for allocation of an appropriate per-payphone obligation, such a method may be easier to administer and to enforce than a compensation scheme based on obligations incurred under the Commission’s subsequent per-call regime. But, if the Commission is unable to resolve the allocation issue to its satisfaction, it should not be bound by the determination in the *Fourth Recon. Order* but should instead adopt whatever approach to the interim compensation issue will guarantee the fastest possible equitable resolution to this long-standing problem.

II. THE COMMISSION’S DETERMINATION TO USE THE IRS RATE, RATHER THAN LECS’ COST OF CAPITAL, TO CALCULATE INTEREST ON INTERIM PERIOD COMPENSATION OBLIGATIONS IS IMPROPER

In its *Second Report and Order*, the Commission determined that, because “11.25% is the appropriate cost of capital for payphone providers,” “the delayed receipt of compensation for access code and subscriber 800 calls justifies an upward adjustment” at that 11.25% rate. 13 FCC Rcd 1778, 1806, ¶ 60 (1997). The Commission reaffirmed this reasoning in its *Third Report and Order* in a determination that was not challenged on review.

The Commission’s decision to abandon that consistent approach in the *Fourth Recon. Order* is unjustified. The Commission stated that use of the IRS rate would be fair because that rate “was designed as an accurate way to assess appropriate interest on delayed payments [and] reflects generally prevailing rates in the market.” *Fourth Order on Recon.* ¶ 32. But, in calculating IXCs’ interim compensation obligations, the Commission’s statutory responsibility is to ensure that PSPs are fairly compensated for the use of their payphones. 47 U.S.C.

§ 276(b)(1)(A).¹ Because most IXCs have failed to make payments to LEC PSPs for calls made during the interim period, LEC PSPs have been forced to incur increased capital costs; the interim compensation rate must be set at a level to compensate PSPs for those costs, not merely for the time value of money.² The FCC has previously determined that the proper interest rate to measure that cost is 11.25%, not the lower IRS rate. *See also* Memorandum Opinion and Order, *Illinois Bell Tel. Co. v. One Call Communications, Inc.*, 16 FCC Rcd 16697, 16703, ¶ 13 n.43 (2001) (“The Commission has previously determined that an 11.25% interest rate is appropriate when IXCs are late in making payments to PSPs.”). Using the IRS rate therefore deprives LEC PSPs of fair compensation in violation of the statute and prior Commission orders.

The Commission’s error apparently reflects a basic confusion between the proper rate to compensate PSPs for the use of their payphones during the interim period, on the one hand, and the proper rate to apply to any IXC overpayments at the prior \$.284 rate, on the other. As noted, in determining the interim period compensation rate, the Commission must establish a rate that compensates PSPs for their costs, including the cost of additional capital needed to compensate PSPs for delayed payment. In the case of IXC overpayments, by contrast, any such payments were made pursuant to the FCC’s rate prescription; the application of the statutory interest rate in such circumstances is appropriate, because the purpose of such refunds is not to compensate IXCs for the use of their assets but rather, as the Commission put it, “to avoid unjust enrichment to the party holding money owed to another carrier.” *Fourth Recon. Order* ¶ 33. It is thus

¹ The Commission improperly focused on the lowest possible rate to prevent IXCs from being unjustly enriched, and ignored the question of fair compensation entirely.

² As a general matter, independent PSPs have been adequately compensated or overcompensated for the interim period. If independents were underpaid, however, the same analysis would apply.

entirely appropriate to apply the lower IRS rate to IXC overpayments and the higher cost of capital to the calculation of interim period obligations.³

Thus, the Commission's conclusion that applying the same interest rates to calculate the interim compensation obligation and to calculate refunds of IXC overpayments would be "extremely desirable in order to achieve certainty, to reduce disputes, and for reasons of fairness" (*id.*) is incorrect. First, nothing about application of different rates to different obligations reduces "certainty" or "disputes" – so long as the Commission's rules are clear, they will be easily administrable. And there is nothing "fair" about depriving PSPs of the compensation that the Commission has already determined, in an indistinguishable context, is the minimum required to allow PSPs to recover their costs.

The orders that the Commission cited to support its use of the IRS rate are inapposite. Both the Access Charge Reform and the Local Number Portability proceedings involved refunds of charges collected pursuant to Commission order; those holdings therefore support applying the IRS rate to PSPs' refund obligations, but not to IXCs' payment obligations. And the pole attachment penalties applied the IRS rate *on top of* a punitive charge for unauthorized attachments. The Commission cited no proceeding in which the Commission has used the IRS rate to calculate costs incurred in the provision of service. Yet the Commission had a statutory duty here to ensure that its interim compensation plan compensates PSPs for those costs. Its determination to apply the IRS rate in calculating interim period obligations is inconsistent with that congressional mandate.

³ IXCs could have avoided the need to pay interest by voluntarily arranging for payment of interim compensation obligations, subject to true-up. They chose not to do so, despite the Commission's repeated determinations that the appropriate rate to compensate PSPs for delayed payments is LECs' cost of capital.

III. THE COMMISSION SHOULD MAKE ITS INTERIM COMPENSATION RULES EFFECTIVE AS SOON AS POSSIBLE

In the Federal Register notice of the *Fourth Recon. Order*, the Commission stated that the order would be effective January 1, 2003. The Commission gave no reason for this delay, and it had not included any hint of such a delay in the *Fourth Recon. Order* itself.

Whatever the reason for it, such a delay is inappropriate. The interim compensation issue has been pending on remand from the D.C. Circuit for nearly five years. The Commission should move with all possible speed to resolve the remaining issues and to establish carriers' obligations for the interim period.⁴ Once the Commission does resolve those issues, that order should be effective, like other Commission orders, within 30 days of Federal Register publication, and should require immediate payments by carriers. There can be no conceivable justification for imposing further delay on the Coalition's members, who have been deprived of hundreds of millions of dollars in compensation as a result of the Commission's failure to act.

IV. THE COMMISSION SHOULD CLARIFY THAT 1+ CALLS MADE DURING THE INTERIM PERIOD ARE SUBJECT TO COMPENSATION

In *Illinois Bell v. One Call Communications*, the Commission confirmed that 1+ calls for which PSPs are not otherwise compensated are subject to per-call compensation. *See* 16 FCC Rcd at 16700, ¶ 7. The Commission should clarify that IXC's must compensate PSPs for all such 1+ calls made during the interim compensation period. As with inmate calls, IXC's must compensate PSPs for such calls on the basis of actual call volumes. *See Fourth Recon. Order* ¶ 29 & n.79.

⁴ The D.C. Circuit has indicated that the Commission must "act promptly to bring this matter to a conclusion," having denied mandamus without prejudice only because "the FCC has made it clear that final agency action is imminent." Order, *In re SBC Communications Inc.*, No. 01-1431 (D.C. Cir. Feb. 15, 2002).

CONCLUSION

The Commission should grant the petition for reconsideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Aaron M. Panner", is written over a horizontal line.

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