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April 15, 2002

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APR 16 2002

William F. Caton, Acting Secretary
Federal Communications Commission
The Portals
445 12 th Street, S.W., TW-A325
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Early Period (1992-96) Compensation: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; Colorado Payphone Association Petition for Reconsideration re Retroactive Adjustment of Intermediate Period Compensation

Dear Mr. Caton:

This letter amplifies the American Public Communications Council's ("APCC") earlier *ex parte* submission¹ showing that interexchange carriers ("IXCs") avoided millions of dollars in dial-around compensation payments to independent payphone service providers ("PSPs") between June 1, 1992 and November 6, 1996 ("Early Period") due to the Commission's erroneous determination that it lacked statutory authority to prescribe compensation for subscriber 800 calls.² In deciding what, if any, retroactive compensation adjustments are warranted by equitable considerations for the Intermediate Period (October 7, 1997 – April 21, 1999), the Commission must consider the revenue shortfall experienced by independent PSPs in the Early Period.³ In the Early Period, as a result of the Commission's erroneous

¹ See letter from Robert F. Aldrich to Magalie Roman Salas, December 13, 2001 ("December 13, 2001 Ex Parte")(attached as Attachment 1 to this letter).

² *Florida Public Telecommunications Association, Inc. v. FCC*, 54 F.3d 857 (D.C. Cir. 1995)("FPTA"). Subscriber 800 calls are calls to an 800 number assigned to a particular subscriber. The subscriber pays the IXC that it preselects to carry the call.

³ See Colorado Payphone Association's pending Petition for Reconsideration, filed April 21, 1999, seeking reconsideration of *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration of the Second Report and

interpretation of Section 226(e)(2), IXCs were able to avoid payment for all subscriber 800 calls, the majority of dial around calls. *FPTA*. To award retroactive refunds to IXCs for the Intermediate Period despite their massive avoided payments in the Early Period would unjustly enrich IXCs, who benefited from subscriber 800 calls originating from payphones in the Early Period but who did not compensate independent PSPs for the cost of originating such calls. Moreover, failure of the Commission to consider the Early Period would unfairly penalize independent PSPs who have been significantly undercompensated when considering all time periods together.⁴

Based on conservative estimates of the amount of compensation that would have been due for subscriber 800 calls during the Early Period if the Commission had correctly interpreted Section 226(e)(2) of the Act, 47 U.S.C. § 226(e)(2), independent PSPs who were clients of APCC's payphone compensation clearinghouse were undercompensated for subscriber 800 calls by approximately \$82 million in the Early Period. By contrast, if (despite APCC's showing that PSPs were undercompensated in the Intermediate Period as well) the Commission were to conclude that independent PSPs should retroactively refund compensation to IXCs for the Intermediate Period, APCC's independent PSP clients would owe IXCs a total of approximately \$33 million.⁵ Neither of these estimates includes an estimate of interest on under- and over-payments. As a group, IXCs have underpaid independent PSPs by some \$49 million, at least, when the Early and Intermediate

Order, 14 FCC Rcd 2545 (1999) (“*Third Payphone Order*”), *aff'd*, *American Pub. Com. Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000).

⁴ Independent PSPs have been undercompensated for dial-around calls in every time period under consideration in this proceeding, including the Intermediate Period. As APCC has explained in previous submissions, in the Intermediate Period independent PSPs failed to recover the cost of a marginal payphone even at the per call compensation rate of \$.284 per call. *See, e.g.*, letter of March 26, 2001, from Albert H. Kramer to Dorothy Attwood (“March 26, 2001 Ex Parte”). *See also* letter of April 15, 2002, to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich re Standard for Granting Retroactive True-ups.

⁵ This calculation is based on the difference between the per call compensation rate of \$.284 prescribed in the *Second Payphone Order* and the current rate of \$.238. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778 (1997) (“*Second Payphone Order*”), *remanded*, *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998).

Periods are considered together.⁶ Accordingly, as a matter of basic equity independent PSPs should not be required to pay refunds to IXC's for the Intermediate Period.

I. Background

While APCC is not requesting the Commission to order IXC's to pay additional compensation to compensate PSPs for the calls that were uncompensated during the Early Period, those uncompensated calls must be considered when deciding whether to order refunds for the Intermediate Period, and when deciding the amount of any refunds for the Intermediate Period.

Prior to 1992, independent PSPs only received revenue from coin payments for local calls and toll calls and from commissions paid by presubscribed operator service providers ("OSPs") for "0+" calls. Independent PSPs were not compensated for any dial-around calls. However, in the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), Congress directed the Commission to:

. . . consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.

47 U.S.C. § 226(e)(2). In its 1991 order implementing Section 226, the Commission concluded that IXC's who are operator service providers ("OSPs") should pay compensation to independent PSPs for originating interstate access code calls.⁷ See *Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991). The Commission, however, did not require IXC's/OSPs to pay any compensation to PSPs for the origination of subscriber 800 calls, even though these calls are also dial around calls and independent PSPs have no alternative means of recovering the cost of originating such calls. *Id.* at 4745-46. The Commission reasoned that it had no authority under TOCSIA to prescribe compensation for subscriber 800 calls. APCC sought court review of the Commission's determination and the Court concluded

⁶ For the Interim Period, independent PSPs as a group were also undercompensated on balance. See Attachment 2, "Independent PSP Compensation 1992-1999."

⁷ The major IXC's, such as AT&T, MCI, and Sprint, were all operator service providers and were thus subject to the Section 226(e)(2) compensation provision.

that the compensation provision of Section 226(e)(2) of the Act clearly encompassed subscriber 800 calls. *FPTA*, 54 F.3d 857. Thus, independent PSPs were improperly denied compensation for subscriber 800 calls for a total of approximately 53 months, from June 1, 1992 through November 6, 1996.

In initiating Docket No. 96-128, the Commission found that “the rules adopted in this proceeding will address the *Florida Payphone* remand.” *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, 11 FCC Rcd 6716, n. 42, ¶88 (1996). However, the retroactive aspect of the remand was never addressed. In the *First Payphone Order*, the Commission declined to apply Interim Compensation retroactively to the date of the *Notice of Proposed Rulemaking*, as APCC had proposed as a partial remedy for the compensation lost during the Early Period. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order*, 11 FCC Rcd 20541, ¶¶ 118, 126 (1996) (“*First Payphone Order*”), *recon.* 11 FCC Rcd 21233 (1996) (“*First Reconsideration Order*”), *vacated in part, Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998). *See also* Comments of American Public Communications Council, July 1, 1996, at 39.

In summary, even though subscriber 800 calls were subject to compensation under TOCSIA, independent PSPs did not begin to receive compensation for such calls until November 7, 1996, when the compensation prescribed under Section 276(b)(1)(A) of the Act, 47 U.S.C. § 276(b)(1)(A), took effect.⁸

In order to estimate the total amount of compensation lost by independent PSPs and avoided by IXC's, the following discussion uses a very conservative

⁸ Section 226(e)(2) directed the Commission to “consider” requiring compensation for dial around calls, and thus arguably left it to the Commission’s discretion whether to prescribe compensation for subscriber 800 calls. However, Section 276 of the Act has established that federal policy is for PSPs to be fairly compensated for every dial-around call, including subscriber 800 calls. This federal policy must guide the Commission’s equitable analysis. Thus, in considering the consequences of the Commission’s error in interpreting Section 226(e)(2) during the Early Period, for purposes of the Commission’s equitable analysis of whether independent PSPs should pay IXC's a refund for the Intermediate Period, it is appropriate for the Commission to presume that independent PSPs would have been fairly compensated for subscriber 800 calls in the Early Period if the Commission had correctly interpreted Section 226(e)(2).

In order to estimate the total amount of compensation lost by independent PSPs and avoided by IXCs, the following discussion uses a very conservative approach to estimating what is, by any measure, a massive amount of unpaid compensation.

II. Independent PSPs Were Undercompensated by Roughly \$80 Million, Without Even Taking Account of Interest, for Subscriber 800 Calls Between June 1992 and November 1996

APCC estimates that, if independent PSPs had been fairly compensated for subscriber 800 calls in the Early Period pursuant to Section 226(e)(2) of the Act, independent PSPs should have received approximately \$82 million in additional compensation during the Early Period. *See* Attachment 3, "Estimate of Early Period Underpayment of Independent PSP Clients of APCC Services, Inc."

A. Average Compensable Call Volume

In order to determine the amount of compensation that IXCs should have paid independent PSPs in the Early Period, APCC begins by estimating the average volume of compensable access code and subscriber 800 calls that originated from payphones during that period. Because the end of the Early Period is also the beginning of the Interim Period, an estimate of the volume of compensable calls at the end of the Early Period can be developed from the average number of access code and subscriber 800 calls originating from payphones during the Interim Period. That number is 148 calls per payphone per month. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, FCC 02-22, released January 31, 2002, ¶ 12.

The average call volume of 148 calls per month in the Interim Period must be adjusted to reflect that Section 226, which governed compensation in the Early Period, applies only to *interstate* calls. It is reasonable to assume that at least half of the dial-around calls were interstate calls compensable under Section 226(e)(2) of TOCSIA. Attachment 4, "Notes on Estimate of Early Period Underpayment of Independent PSP Clients of APCC Services, Inc.," ¶ 1. Thus, a reasonable estimate of the average number of compensable dial-around calls – including both the access code calls for which independent PSPs *were* compensated and the subscriber 800 calls for which independent PSPs erroneously were *not* compensated – originating from payphones at the end of the Early Period (in 1996) is 74 calls per payphone per month.

The next step is to estimate the average volume of compensable calls at the beginning of the Early Period. It would be reasonable to apply the Early Period estimate of 74 calls as the monthly volume of interstate access code and subscriber 800 calls throughout the Early Period. However, it also could be argued that toll-free calling and the use of access codes were not as prevalent at the beginning of the Early Period as they were at the end of the period. In order to be conservative and to err on the side of underestimating the total volume of dial-around calls, APCC has developed an estimate of total interstate access code and subscriber 800 calls for the beginning of the Early Period, based on the number of interstate access code calls estimated by the FCC in its *1992 Compensation Order*, multiplied by the estimated average ratio of subscriber 800 calls to access code calls. *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, 7 FCC Rcd 3251 (1992) (the "1992 Compensation Order").

According to the *1992 Compensation Order*, the average number of interstate access code calls originating from payphones was 15 calls per payphone per month. *1992 Compensation Order* at 3257, ¶ 36. In APCC's December 13, 2001 Ex Parte, the APCC produced results of three surveys which demonstrated that the ratio of subscriber 800 calls to access code calls ranged from 2:1 to 3:1. See Attachment 1. Once again being conservative and assuming that the ratio of interstate subscriber 800 calls to interstate access code calls at the beginning of the Early Period was only 2:1, it is estimated that the average number of interstate subscriber 800 calls originating from payphones in 1992 was roughly 30. Therefore, it is reasonable to estimate that total interstate dial-around calling in the first quarter of the early period was approximately 45 calls per payphone per month. Attachment 4, ¶ 2.

With 45 calls per payphone per month in the first full quarter of the Early Period, and 74 calls per payphone per month at the end of the period, the next step is to estimate the average number of compensable calls during the intervening quarters. It is reasonable to plot the call volumes for the intervening quarters as increasing at a constant rate of growth from 45 to 74 calls per payphone per month. *Id.*, ¶ 3. The resulting estimated call volumes for each quarter, increasing at a constant growth rate of approximately 3% per quarter, are shown in Attachment 3. The median call volume for the period as a whole, estimated by this method, is about 57 calls per payphone per month.

B. Applicable Rate

It is then necessary to assign a per call rate for purposes of estimating total compensation for this period. One possible approach is to assign the same rate that the Commission assigned to access code calls. In the *1992 Compensation Order* the

Commission determined that a compensation rate of \$.40 per access code call was reasonable. *1992 Compensation Order* at 3257, ¶¶ 40-41.

Another, more conservative, approach is to assign a per-call rate to subscriber 800 calls equal to the current per call compensation rate of \$.238. This rate is designed to “ensure that each call at a marginal payphone location recovers the marginal cost of that call plus a proportionate share of the joint and common costs of providing the payphone.” *Third Payphone Order*, 14 FCC Rcd at 2571 (1999).

Again erring on the side of the more conservative assumptions, APCC assigns the lower rate of \$.238 per call as the rate that should have applied to the compensation of interstate subscriber 800 calls. APCC further assumes that interstate access code calls also would have been compensated at the \$.238 rate, rather than the \$.40 rate actually applied, if the Commission had prescribed compensation for all interstate dial-around calls during the Early Period. Attachment 4, ¶ 4.

C. Underpayment

Using the method described above, APCC has estimated the total monthly per-phone compensation that independent PSPs should have received in each quarter of the Early Period, which ranges from \$10.71 at the beginning of the period to \$17.61 at the end. See Attachment 3. To determine the monthly underpayment per phone, it is necessary to subtract from these amounts the actual prescribed rate, which for most of the Early Period was \$6.00 per payphone per month.⁹

The underpayment for each quarter of the Early Period, calculated by this method, is shown on Attachment 3. The median underpayment of independent PSPs during the Early Period is approximately \$7.50 per payphone per month. The total per-phone underpayment for the Early Period is about \$408. The total

⁹ Beginning in late 1994, AT&T and Sprint were granted waivers to switch from paying per-phone compensation to paying per-call compensation, at the rate of \$.25 per call. APCC’s payment records indicate that, as a result, the amounts collected by PSPs during the period when these waivers were in effect averaged less than the \$6.00 per payphone per month originally prescribed by the Commission. To simplify the calculation, and again erring on the side of underestimating total undercompensation, APCC is not including this reduction in the total compensation, and is assuming that the \$6.00 per month payment was collected throughout the Early Period. The result is to underestimate the amount of undercompensation.

amount by which APCC-represented independent PSPs were undercompensated in the Early Period, without even taking account of interest, is approximately \$82 million. To this amount, interest must be added for the average seven-year period for which independent PSPs have been deprived of these funds.

III. The Unpaid Compensation for the Early Period Exceeds the Maximum Possible Refund for the Intermediate Period by a Factor of Two

The \$82 million underpayment for the Early Period greatly exceeds any refund that independent could conceivably "owe" IXC's for the Intermediate Period. Accordingly, the equities dictate that independent PSPs not be forced to refund IXC's any compensation.

APCC has previously demonstrated that even without taking into account the compensation that IXC's should have paid independent PSPs for subscriber 800 calls during the Early Period, no refund is warranted for the Intermediate Period. *See* March 26, 2001 Ex Parte. Among other reasons why this is the case, even at the \$.284 rate in effect during the Intermediate Period, independent PSPs did not recover their costs in the Intermediate Period. Based on actual compensation data, APCC showed that only about 69% of the compensation that the Commission found necessary to recover marginal payphone costs was already paid. Compensation was paid, APCC estimated, on average for only about 109 out of 142 monthly calls at a marginal payphone, and the average monthly payment for a marginal phone was only \$27.55 instead of the \$33.80 necessary to recover marginal payphone costs under the cost analysis adopted in the *Third Payphone Order*. If PSPs were required to refund \$.046 per call, cost recovery would drop even lower, to \$23.09 per month. *Id.* Therefore, independent PSPs should not be forced to incur further losses by refunding compensation to IXC's.

As shown below, however, even if the Commission disregards independent PSPs' inability to recover their costs during the Intermediate Period, the maximum amount of the refund to which IXC's would be entitled for the Intermediate Period is approximately \$33 million. This "overpayment" is dwarfed by the \$82 million that IXC's should have paid independent PSPs for subscriber 800 calls during the Early Period.¹⁰

¹⁰ This amount does not take into account interest that IXC's should pay independent PSPs to compensate independent PSPs' for their loss of the use of the money that should have been paid. Interest would be significant since the time period in question dates back six to ten years.

The amount of per phone compensation that APCC-represented independent PSPs would have to refund to IXC's for the Intermediate Period – assuming that independent PSPs must refund the difference between the \$.284 and \$.238 rates (or \$.046) – can be estimated by multiplying APCC's total receipts from IXC's for that period – about \$205 million – by $.046/.284$. The result is about \$33.2 million. This is far less than the \$82 million by which IXC's undercompensated APCC-represented independent PSPs in the Early Period. The addition of interest payments would widen the gap even more, as the Early Period is about four years earlier, on average, than the Intermediate Period.

The Commission's analysis of the equities of ordering independent PSPs to refund IXC's must be guided by Congress's directive in Section 276 of the Act that PSPs be fairly compensated for each and every call originating from their payphones. 47 U.S.C. § 276(b)(1)(A). As noted, independent PSPs have been grossly undercompensated for dial around calls in every compensation period, and thus should not be required to pay refunds to IXC's for any period. But even if the Commission were to find that independent PSPs were overcompensated for the Intermediate Period, the amount of such overcompensation must be offset by the amount of the total underpayments to independent PSPs during the Early Period. The total underpayments for that period are so much larger that it is difficult to imagine what equitable purpose could be served by requiring independent PSPs to pay refunds for the Intermediate Period.

Sincerely,


Albert H. Kramer
Robert F. Aldrich

ATTACHMENT 1

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U.S. DEPARTMENT OF JUSTICE
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**NOTICE OF ORAL EX PARTE
COMMUNICATION**

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; Colorado Payphone Association Petition for Reconsideration re Retroactive Adjustment of Second Report and Order Period Compensation; Retroactive Adjustment of Interim Compensation

Dear Ms. Salas:

On December 13, 2001, Albert H. Kramer and Robert F. Aldrich of this law firm, on behalf of the American Public Communications Council ("APCC"), had a meeting with Jon Stover and Craig Stroup of the Common Carrier Bureau's Competitive Pricing Division, and Calvin Howell of the Consumer Information Bureau. We discussed APCC's views of record on the matters pending in the above-referenced dockets.

In particular, we discussed APCC's position that the Commission's determination whether retroactive compensation adjustments with respect to independent payphone service providers ("PSPs") are warranted for the Interim Period (November 1996 - October 1997) and the Intermediate Period (October 1997 - April 1999) must take account equitable factors such as whether adjustments based on the current \$.238 rate would bring independent PSPs closer or farther from recovery of the costs on which the \$.238 rate is based. We reviewed the information previously submitted by APCC to show that such a retroactive adjustment would exacerbate the existing shortfall in independent PSPs' actual recovery for the 1998 period of the costs underlying the \$.238 rate.

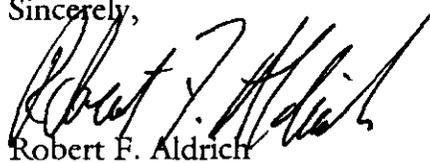
As discussed in the Colorado Payphone Association's pending petition for reconsideration of the Third Report and Order in this proceeding, we urged the Commission to take into account that, due to the FCC's erroneous determination that it

Magalie Roman Salas
December 13, 2001
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lacked statutory authority to prescribe compensation for subscriber 800 calls, interexchange carriers ("IXCs") did not pay independent PSPs any compensation for subscriber 800 calls for a period of more than four years (May 1992 – November 1996) immediately prior to the compensation periods under review. We submitted the enclosed documents which show that during this period the average number of subscriber 800 calls ranged from 72 to more than 100 calls per payphone per month, and the ratio of subscriber 800 calls to access code calls from payphones ranged from 2:1 to 3:1. These data provide the basis for the Commission to calculate a rough estimate of the number of uncompensated subscriber 800 calls and the amount of compensation payments avoided by interexchange carriers and uncollected by PSPs during the 1992-96 period.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Robert F. Aldrich

Enclosures

cc: Jon Stover
Craig Stroup
Calvin Howell

ACCESS CODE CALLS AND SUBSCRIBER 800 CALLS RECORDED BY APCC MEMBERS IN 1993, 1996 AND 1997

1993 SURVEY (1 PROVIDER)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	avg
Number of payphones						506	577	619	668	725	834	911	691
Access Code						19,283	24,108	29,819	28,427	24,179	24,084	22,294	
Subscriber 800						37,271	46,639	55,012	55,367	48,470	49,878	45,534	
Total dial around						56,554	70,747	84,831	83,794	72,649	73,962	67,828	
Per-Phone Results:													
All access / ph						38.1	41.8	48.2	42.6	33.4	28.9	24.5	36.8
Subscriber / ph						73.7	80.8	88.9	82.9	66.9	59.8	50.0	71.8
Total da / phone						111.8	122.6	137.0	125.4	100.2	88.7	74.5	108.6
% ACCESS						34%	34%	35%	34%	33%	33%	33%	34%
% SUBSCRIBER						66%	66%	65%	66%	67%	67%	67%	66%

1996 Survey (23 Providers)

Per-Phone Results:

Number of Payphones	2,383	2,347	3,367	4,000	4,439	3,439	2,610	1,983	1,502	1,390	1,615	2,643
1996 subscriber	75	98	96	102	107	111	122	103	130	126	119	108
1996 total da	109	141	137	149	150	164	178	148	175	169	155	152
% ACCESS	31%	30%	30%	32%	29%	32%	31%	30%	26%	25%	23%	29%
% SUBSCRIBER	69%	70%	70%	68%	71%	68%	69%	70%	74%	75%	77%	71%

1997 Survey (21 Providers)

Per-Phone Results:

Number of Payphones	544	511	571	582	646	643	650	652	612	623	509	507	588
1997 subscriber	105	95	108	117	127	133	138	136	137	142	112	116	122
1997 total da	138	126	143	153	168	176	181	180	176	180	142	146	159
% ACCESS	24%	25%	25%	24%	24%	24%	24%	24%	22%	21%	21%	21%	23%
% SUBSCRIBER	76%	75%	75%	76%	76%	76%	76%	76%	78%	79%	79%	79%	77%

Sources:

APCC Ex Parte Filing in CC Dkt. No. 91-35, dated August 17, 1995

APCC Ex Parte Filing in CC Dkt. No. 96-128, dated September 28, 1998

RETROACTIVE COMPENSATION ADJUSTMENTS

Ex Parte Presentation

CC Docket No. 96-128

American Public Communications Council

I. THE AMOUNT OF ANY INTERIM PERIOD COMPENSATION ADJUSTMENTS CANNOT BE DECIDED IN ISOLATION

- ◆ The Commission has linked retroactive compensation adjustments for the Interim Period (November 1996 – October 1997) and the Second Report and Order Period (October 1997 – April 1999).
- ◆ For both periods, retroactive post-remand compensation adjustments are not automatic: they are to be ordered only if the equities so require. *Towns of Concord v. FERC*, 955 F.2d 67, 75-76 (D.C. Cir. 1991).
- ◆ The Commission has made no final ruling to date on retroactive adjustments for the Interim Period *or* the Second Report and Order Period.
 - As to the Interim Period, the FCC has reached only “tentative” conclusions to date.
 - As to the Second Report and Order period, the FCC has yet to decide the Colorado Payphone Association’s Petition for Partial Reconsideration of the *Third Report and Order*, filed April 21, 1999, which requests the Commission to reconsider its decision to require retroactive adjustments for independent PSPs for the Second Report and Order Period.

II. THE EQUITIES DO NOT SUPPORT RETROACTIVE APPLICATION OF THE \$.24 (\$.238) RATE TO INDEPENDENT PSPS

- A. Independent PSPs’ actual compensated call volumes in the Second Report and Order Period averaged far below the level estimated by the Commission as the basis for calculating the \$.238 rate
- ◆ The current compensation rate (\$.238 per call), which would be retroactively applied, is based on the Commission’s finding that a *marginal* payphone has 439 calls per month, of which 142 are compensable dial-around calls. The \$.238 rate was set to recover relevant portions of the fixed cost of a marginal payphone.

- ◆ The Commission found that call volume is higher at *average* payphones than at *marginal* payphones. APCC's survey of actual 1997 (Interim Period) call volumes showed that the *average* independent payphone had 159 compensable dial-around calls per month.
- ◆ Actual compensation payments to independent PSPs in 1998 were made on an *average* of about 109 calls per payphone per month, 68.6% of the 159 compensable calls at an average independent payphone.
- ◆ Reasonably applying the paid-call percentage for *average* independent payphones (68.6%) to *marginal* payphones' call volume of 142 calls per month yields a 1998 paid call volume for marginal payphones of about 97 calls per payphone per month, 45 calls below the level necessary to fully recover marginal payphone costs.

B. Even at the \$.284 rate, independent PSPs were undercompensated in 1998

- ◆ The *Third Report and Order* intended that marginal payphones would recover \$33.80/phone/month dial-around compensation ($$.238/\text{call} \times 142 \text{ calls} = \33.80).
- ◆ As shown above, marginal payphones were actually compensated for only 97 calls per month in 1998, for total compensation of \$27.55 per payphone per month (at the 1998 rate of \$.284) -- \$6.25 short of the \$33.80 contemplated by the *Third Report and Order*.

C. Retroactively applying the \$.238 rate would exacerbate the undercompensation of independent PSPs

- ◆ If the Commission applies the current \$.238 rate retroactively to 1998 call counts, as proposed, marginal payphones' compensation would be reduced to \$23.09 per payphone per month -- \$10.71 short of the \$33.80 contemplated by the *Third Report and Order*.
- ◆ To ensure the amount of cost recovery intended by the *Third Report and Order*, adjusted compensation for the Interim Period and Second Report and Order Period, if based on actual 1998 paid call volumes, would have to be set at \$.348 per call ($\$33.80/97 = \348).

- ◆ Retroactive compensation adjustments are not warranted, with respect to independent payphones, for the Interim Period *or* the Second Report and Order Period.

III. THE RBOCs' INTERIM PERIOD COMPENSATION PROPOSAL IS UNWORKABLE AND UNFAIR TO INDEPENDENT PSPS

- ◆ The RBOCs recommend using actual 1998 per-call compensation payments (recalculated at the \$.24 – actually \$.238 for retroactivity purposes -- rate) as the basis for adjusting PSPs' Interim Period compensation.
- ◆ Most IXCs *as well as* independent PSPs oppose the RBOC proposal.
- ◆ 1998 compensation payments are wholly unreliable as indicators of independents' dial-around call volumes, due to the massive problems with FLEX ANI compensation and resellers.
- ◆ Translating payments from one period to another would generate huge administrative problems.

IV. THE COMMISSION COULD REASONABLY REACH A DIFFERENT RESULT WITH RESPECT TO ILEC PAYPHONES, WHICH APPEAR TO BE DIFFERENTLY SITUATED

- ◆ ILECs were not eligible for, and did not collect, compensation payments during the first five months of 1996.
- ◆ Most ILECs did not experience the same call tracking problems as independent PSPs in 1998, because most lines connected to ILEC payphones did not require FLEX ANI in order to transmit payphone call identifiers to IXCs.
- ◆ Retroactive application of the \$.238 rate would bring the prior-period compensation of ILECs – but not independent PSPs – closer to cost recovery levels.

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August 17, 1995

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street; N.W.
Room 222
Washington, D.C. 20554

EX PARTE PRESENTATION

Re: Operator Service Access and Pay Telephone
Compensation/CC Dkt. No. 91-35

Dear Mr. Caton:

The American Public Communications Council ("APCC"), a national trade association of providers of independent public payphones ("IPPs")^{1/} and public communications services, urges the Commission to comply immediately with the remand ordered by the U.S. Court of Appeals for the D.C. Circuit in Florida Public Telecommunications Association, Inc. v. FCC, 54 F.3d 857 (D.C. Cir. 1995) ("FPTA"), remanding Operator Service Access and Pay Telephone Compensation, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991) ("First Report and Order"). The FPTA remand order requires the Commission to consider the need for prescribing compensation for IPP providers for the use of their equipment in originating "subscriber" 800 calls. IPP providers have been waiting over four years for the Commission to take up this issue. They have been subjected to years of unnecessary procedural wrangling and delay. They should be not forced to wait any longer. The Commission should immediately begin a proceeding to address this issue in the manner described below.

^{1/}IPPs are payphones that are not owned by a local exchange carrier ("LEC"). The Commission has referred to IPP providers in past proceedings as "competitive payphone owners" ("PPOs") or "private payphone owners." Other phrases and associated acronyms that have been used to refer to IPP providers include "customer-owned coin-operated telephone" ("COCOT") providers, and "customer-owned pay telephone" ("COPT") providers.

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APCC also urges the Commission to amend its rules to require all interexchange carriers ("IXCs") with revenues above the appropriate threshold to pay dial-around compensation (including subscriber 800 call compensation, once it is prescribed), rather than limiting the obligation to just those that "provide live or automated operator services," as is currently the case. See 47 C.F.R. § 64.1301(b)(2). Although Section 226(e)(2) of the Communications Act (47 U.S.C. § 226(e)(2)) does not explicitly require the Commission to "consider the need for compensation" for calls routed to IXCs that are not "providers of operator services," the Commission is clearly authorized to do so under the Act. The Commission can, and should, propose amending its rules in this manner at the same time it considers the need to prescribe subscriber 800 compensation.

I. BACKGROUND

A. The Current Compensation Rules.

Prior to 1992, IPP providers only received revenue from coin payments for local calls and "1+" toll calls, and commissions paid by presubscribed operator services providers ("OSPs"). When a caller "dialed around" the presubscribed OSP, IPP providers received no compensation. IPP providers were uncompensated for such "dial around" calls regardless of whether the caller dialed an access code, a subscriber 800 number or any other dial-around dialing sequence.

Congress recognized the inequity of IPP providers not being compensated when "dial-around" calls were made using their equipment. Thus, in the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), Pub. L. No. 101-435, 104 Stat. 986 (codified at 47 U.S.C. § 226(e)(2)), Congress directed the Commission to:

. . . consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.

47 U.S.C. § 226(e)(2).

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TOCSIA was enacted into law on October 17, 1990. Congress set a deadline of nine months from that date, or until July 17, 1991, for the Commission to determine whether to prescribe compensation. Id.^{2/} On July 11, 1991, several days short of Congress' deadline, the Commission concluded that IPP providers should be compensated for originating access code calls to IXCs.^{3/} The Commission recognized that IPP providers were benefiting both the public and the IXCs to which access code calls were routed by providing facilities for making access code calls, yet IPP providers were not receiving any revenue for providing this useful service. First Report and Order, 6 FCC Rcd at 4745-46. The Commission said that it is "only fair" that the cost of maintaining IPP equipment used to access IXCs "be shared by the consumers who benefit from the ability to make access code calls and by the [IXCs] who derive revenue from the calls." Id.

Further comment was then requested on the mechanics of ordering compensation, despite the fact that comments on those issues had already been filed. It was not until May of 1992 -- eighteen months after TOCSIA was enacted -- that the rules for access code call compensation were finally released. See Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 FCC Rcd 3251 (1992) ("Second Report and Order").

B. The Commission's Refusal To Consider Subscriber 800 Calls.

During the proceedings leading to the First Report and Order, APCC and others told the Commission that subscriber 800 calls are within the class of calls that are compensable, since subscriber 800 calls, like access code calls, "dial around" IPP providers' presubscribed OSPs, and since IPP providers have no other effective means to earn revenue for originating such calls. However, the

^{2/}APCC argued that the statute required the Commission both to determine whether to order compensation and to set the compensation. The Commission declined to do the latter by the statutory deadline; instead it instituted a further proceeding to set the level of compensation and resolve related issues. See First Report and Order, 6 FCC Rcd at 4747.

^{3/}As discussed herein, the Commission limited responsibility for compensation to those IXCs that both (1) earn annual toll revenues in excess of \$100 million, and (2) provide live or automated operator services. 47 C.F.R. § 64.1301(b).

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Commission ruled that the scope of TOCSIA was confined to access code calling only, and declined even to consider the need to prescribe compensation for IPP providers for originating subscriber 800 calls. First Report and Order, 6 FCC Rcd at 4745-46.

On September 16, 1991, APCC filed a petition for reconsideration of the Commission's decision to exclude subscriber 800 calls from consideration. APCC explained that the plain language of TOCSIA clearly encompassed subscriber 800 calls, that the exclusion of subscriber 800 calls from the compensation scheme was inconsistent with the Commission's existing policies, and that subscriber 800 numbers were widely used at payphones, making it imperative to prescribe compensation for these calls for the same fundamental equity reasons that mandate compensation for access code calls.

Approximately ten months after APCC filed its petition for reconsideration, the Commission again refused to consider whether compensation for subscriber 800 calls is needed. The Commission reaffirmed its position that subscriber 800 calls were excluded from the statutory compensation provision, and that it therefore was not necessary to consider the need for compensation for subscriber 800 calls within the context of the TOCSIA implementation proceeding. Operator Service Access and Pay Telephone Compensation, Order on Reconsideration, 7 FCC Rcd 4355, 4367 (1992).

The Commission did not, however, rule that compensation for subscriber 800 calls was unjustified or otherwise inappropriate. Nor did the Commission rule that it lacked authority to prescribe compensation for these calls. The Commission merely stated that APCC's request for subscriber 800 compensation was outside the scope of the TOCSIA implementation proceedings since it did not fit within TOCSIA's mandate requiring the Commission to consider the need for "dial-around" compensation.

C. The FPTA Decision.

APCC and the FPTA sought Court review of the Commission's decision.^{4/} The Court in FPTA found the Commission's narrow

^{4/}Briefing and argument in the case were delayed for two and one-half years because the Commission argued to the Court that briefing should not proceed while the Commission was deliberating
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interpretation of TOCSIA's scope to be "completely unconvincing." FPTA, 54 F.3d at 859. "Subscriber-800 calls," the Court said, "fall undeniably -- plainly and unambiguously -- within the statutory language." Id. The Court, therefore, granted APCC's and FPTA's petitions and remanded to the Commission to consider the need to prescribe compensation for subscriber 800 calls. Id. Thus, this issue now comes back to the Commission for a decision that the Commission could have, and should have, made four years earlier.

D. The Use of Subscriber 800 Numbers at Payphones is Growing at a Rapid Pace.

The four-year delay in considering this issue has been costly to IPP providers. The use of subscriber 800 numbers at IPP locations was already significant when the First Report and Order was adopted in 1991. Since adoption of that order, the market for subscriber 800 services has experienced explosive growth, both in terms of revenues and minutes of use. See generally, 1995 NATA Telecommunications Market Review and Forecast at 69-75 ("NATA Review and Forecast").

The implementation of 800 number portability in 1993 has proven to be a significant factor contributing to this rapid expansion. Id. Portability, which allows subscribers to switch carriers and still retain their 800 numbers, is creating vigorous competition among the IXCs. Id. Increased competition has led to enhanced features, improved service, more efficient billing, and the roll-out of new services and programs targeted to new subscribers. Id. All of these factors have led to millions of new 800 subscribers and users within the last few years.

For example, many IXCs are targeting small and medium-sized businesses with product mixes that include subscriber 800 numbers. Id. The result has been that millions of business that did not previously subscribe to their own 800 number now subscribe to 800

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petitions for reconsideration of the Second Report and Order, supra, in which the Commission determined the level of compensation. After two and one-half years, the Court apparently grew tired of waiting for the Commission to resolve the unrelated issues in the reconsideration proceeding and ordered briefing and argument in FPTA beginning in October of 1994.

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numbers both as a service to their customers and as a means for their traveling employees to reach the company's home office, dispatch center, voice-mail, private branch exchange ("PBX") or similar platform. And IXCs are now aggressively pursuing the mass consumer market in addition to traditional commercial users. For example, several IXCs are offering "personalized" or "follow-me" 800 number services, which allow subscribers to consolidate all of their existing telephone numbers (i.e., home, office, car, etc.) as well as call-forwarding information into a single 800 number.^{2/} Other applications include parents with children away at school who subscribe to 800 numbers as an automated form of collect calling by their children.

In short, the market for subscriber 800 services is larger and more competitive, and it is likely to experience further growth and competition within the next few years. Thousands of new 800 numbers and services are coming on line every week, and millions of customers are now using 800 services on a regular basis.

Indeed, 800 number calling is so popular that the supply of 800 numbers may be exhausted as early as February of 1996, well before the Commission or the industry had previously anticipated.^{3/} To help alleviate the problems of a short supply, the Commission has been conducting a series of meetings with the industry to discuss ways to accelerate deployment of the new toll-free "888" area code.^{4/} Those meetings are designed to help conserve use of

^{2/}MCI, for example, issued a press release on September 7, 1994, announcing its new "Friends & Family Personal Number," which it describes as "the industry's first consumer 800 number service which allows callers to reach you toll-free from any phone. . . ."

^{3/}See "'800' Number Exhaust Still Expected before '888' Availability," Telecommunications Reports, July 3, 1995 at 11. See also "Popularity Takes Toll on 800 Numbers," The Washington Post, July 5, 1995, at A1.

^{4/}See, e.g., Letter from Kathleen Wallman, Chief, Common Carrier Bureau, to Michael Wade, President, Database Service Management, Inc., dated June 13, 1995 ("We are concerned . . . about the recent accelerated depletion of the remaining available 800 numbers.").

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existing 800 numbers and accelerate the availability of the new "888" method of toll-free dialing. Id.^{8/}

As more and more new services such as these continue to take hold, it will not be long before 800 number dialing becomes the predominant form of long distance calling. Indeed, current figures indicate that on a typical business day, 30 percent to 40 percent of all long distance calls involve 800 numbers.^{2/} And in terms of network minutes, analysts predict 50 billion minutes of use by year-end 1995, growing to just under 60 billion by year-end 1997. NATA Review and Forecast at 72.

This "toll-free" 800 number explosion has generated a huge volume of uncompensated traffic at payphones. Statistics submitted to the Commission by Sprint Corporation show that over one half of coinless interLATA calls made from payphones in Sprint's local exchange territories are subscriber 800 calls.^{10/} Data gathered

^{8/}The Industry Numbering Committee is also exploring the allocation of other new toll-free numbers, such as "300" or "400" numbering series, in anticipation of future demand. NATA Review and Forecast at 75 n.2.

^{2/}See "Hanging Up on Scams," New York Newsday, August 11, 1994, at A47; and "Dialing for Dollars: 1-800 Business Keeps Surging," The Washington Post, May 31, 1994, at C1.

^{10/}Letter from H. Richard Juhnke, General Attorney, Sprint Corporation, to William F. Caton, Acting Secretary, CC Docket No. 92-77 (filed December 23, 1994) ("Sprint ex parte Letter"). Over a 14-day period, Sprint reported that payphones (LEC payphones and IPPs) in its LEC territories generated 2,685,311 interLATA calls that were either 0+ or access code calls. Sprint reported that 55.9%, or about 1.5 million, of these calls were 0+ calls and that 44.1%, or about 1.18 million, were access code calls. In addition, Sprint reported that about 3.29 million calls were made to subscriber 800 numbers. Putting these three categories together, there were a total of about 5.97 million 0+, access code, and subscriber 800 calls. About 25% of this total were 0+, 20% of the total were access code, and about 55% of the total were subscriber 800 calls. See Attachment 1.

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from other payphone providers confirm that subscriber 800 calls represent a huge proportion of dial-around calls.^{11/}

The increased use of 800 number calling is producing enormous revenues for the IXC's. Analysts estimate the 800 market at \$9.5 billion for year-end 1994. NATA Review and Forecast at 72. By year-end 1997, that figure is projected to reach \$11.4 billion, with an average annual growth rate of around 7 percent over the next three years. Id.

Even though IXC's have gained enormous profits from the growth of the subscriber 800 market, they still refuse to provide any payment for the use of independent payphones to originate subscriber 800 calls. IPP providers receive no revenue from the IXC's for the huge volume of subscriber 800 traffic generated at their payphones. As the use of 800 numbers from public phones continues to expand, IPP providers are seeing more and more of their revenue base disappear. At the same time, IXC's are earning substantial windfalls each day that they receive subscriber 800 calls from IPP locations without paying IPP providers for the use of their equipment in originating these calls. Meanwhile, the LEC's -- who are direct competitors of IPP providers -- have been unaffected by these fundamental changes in the marketplace since their ability to obtain full cost recovery for their payphone operations continues to be assured.

II. THE COMMISSION SHOULD CONSIDER THE SUBSCRIBER 800 COMPENSATION ISSUE WITHOUT FURTHER DELAY. THE COMMISSION SHOULD ALSO PROPOSE AMENDING ITS RULES TO REQUIRE ALL IXCs TO PAY DIAL-AROUND COMPENSATION WHETHER OR NOT THEY ARE "PROVIDERS OF OPERATOR SERVICES."

There is no valid reason for the Commission to continue to delay its consideration of subscriber 800 compensation. The court has spoken and the Commission must respond. APCC urges the Commission to promptly initiate a rulemaking to include subscriber 800 calls within the compensation scheme. Some of the issues that should be addressed by the Commission are discussed below. The first of these issues concerns whether compensation obligations for

^{11/}One IPP provider surveyed approximately 500 to 1,000 payphones located in numerous different states over a period of seven months. The data from these payphones consistently showed about twice as many subscriber 800 calls as access code calls. See Attachment 2.

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subscriber 800 calls, as well as other dial-around calls, should apply to IXCs generally and not just to IXCs which are "providers of operator services."

A. All IXCs With Revenues Above The Appropriate Threshold Should Pay Compensation For Dial-Around Calls.

The Commission's current rules limit the class of IXCs obligated to pay compensation to those that provide live or automated operator services. 47 C.F.R. § 64.1301(b)(2). Although consideration of the payment of compensation by IXCs which are not "providers of operator services" is not expressly required by TOCSIA or the FPTA remand, the Commission should take this opportunity to remove this limitation on the entities subject to compensation obligations -- with respect to subscriber 800 calls, access calls,^{12/} and any other category of dial-around calls for which compensation may eventually be prescribed. The compensation obligation should extend to all IXCs which carry dial-around calls, regardless of whether the IXC is a "provider of operator services." 47 U.S.C. § 226(a)(9).^{13/}

^{12/}We use the term "access call" rather than "access code call" in order to encompass calls made by dialing an access number that is technically not an "access code" because the IXC associated with it is not a "provider of operator services." See 47 U.S.C. § 226(a)(1). For example, Allnet Communications Services, Inc. ("Allnet"), which contends it is not an OSP, has an access number -- 1-800-783-1444 -- which is commonly used by Allnet subscribers to reach Allnet's call processing platform in order to make calls from payphones. If Allnet is not a "provider of operator services," then Allnet's access number does not meet the statutory definition of "access code." Yet, this access number is the counterpart of the 800 "access codes" that IXCs such as AT&T, MCI and Sprint, which are "providers of operator services," offer to their subscribers.

^{13/}Of course, to the extent that it is appropriate for other reasons, the Commission may continue to exempt certain IXCs based on revenue thresholds. For example, under the current rules there is a \$100 million threshold for access code call compensation. 47 C.F.R. § 64.1301(b)(1). Once the Commission has examined the structure of the 800 subscriber market, the Commission may determine it is necessary to establish a similar or reduced
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