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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 10, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: Different Treatment of LEC and Independent PSPs, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128

Dear Ms. Dortch:

In this letter, the American Public Communications Council ("APCC") summarizes the reasons that justify treating incumbent local exchange carrier ("ILEC") payphone service providers ("PSPs") and independent PSPs differently with respect to retroactive adjustments of compensation for the Intermediate Period (October 1997 – April 1999) and Interim Period (November 1996 – October 1997).

I. ONLY INDEPENDENT PSPS WERE UNDERCOMPENSATED DURING THE EARLY PERIOD

As APCC's ex parte submissions establish, independent PSPs were massively undercompensated during the Early Period (June 1992 – November 1996)[1] because the Commission erroneously did not provide for any compensation to independent PSPs for subscriber 800 calls. *Florida Public Telecommunications Association v. FCC*, 54 F.3d 857

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[1] Early Period Compensation, Ex Parte Letter to William F. Caton from Albert H. Kramer and Robert F. Aldrich, CC Docket No. 96-128 (April 15, 2002) ("Early Period Ex Parte"). APCC has estimated that independent PSPs represented by APCC Services, Inc. (a compensation clearinghouse for PSPs) were undercompensated by a total amount, including interest, of more than $135 million. *See* Allocation of Payments to IXCs, Ex Parte Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer, Robert F. Aldrich and Robert N. Felgar, CC Docket No. 96-128, at 9 (May 23, 2002) ("IXC Allocation Ex Parte").

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(D.C. Cir. 1995). The amount of this undercompensation far outweighs the total amount of the maximum refund due from independent PSPs for the Intermediate Period.[2] Further, every major IXC undercompensated independent PSPs during the Early Period by an amount that exceeds the maximum amount of any refund that that IXC could expect for the combined Interim and Intermediate Periods. *See* IXC Allocation Ex Parte.[3]

ILECs, on the other hand, were *fully* compensated, *not* undercompensated, during the Early Period, because ILECs' payphone costs remained in the rate base. Thus, ILECs recovered their payphone costs from revenue generated by regulated ILEC services. Therefore, it is both appropriate and necessary to treat independent PSPs and ILEC PSPs differently in order to account for this major factor affecting the equity of requiring a true-up of past compensation periods.

An additional equitable factor that may further support differential treatment of independent PSPs and LEC PSPs is that independent PSPs were severely undercompensated in the Intermediate Period. The Commission has made it clear that the $.238 rate was set to enable PSPs to recover costs of "marginal payphones". *See Implementation of the Pay Telephone Reclassification and Compensation provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 FCC Rcd 2545, 2552, ¶¶ 13-14 (1999). For a number of reasons beyond their control, independent PSPs did not recover the costs of "marginal payphones" in the Intermediate Period, *even at the $.284 rate*. *See* Ex Parte Letter to Dorothy Attwood from Albert H. Kramer and Robert F. Aldrich (March 26, 2001). Independent PSPs' underrecovery of costs would be exacerbated if they were required to refund the difference between the $.238 and $.284 rates. By contrast, the record does not indicate whether ILECs were unable to recover the costs of their marginal payphones during the Intermediate Period.[4]

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[2] This is true for the IXCs collectively and for individual IXCs. *See* Early Period Ex Parte; IXC Allocation Ex Parte.

[3] Therefore, the Commission should exclude independent PSPs completely from the combined true-up planned for the Interim and Intermediate Periods. In general, if the Commission fails to consider the Early Period it will have failed to properly consider the equities of ordering a refund and its decision will be an abuse of its discretion. *See* Standards for Granting Retroactive True-Up, Ex Parte Letter to William F. Caton, Acting Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, (April 15, 2002).

[4] A major factor contributing to the underrecovery of costs by independent PSPs was the ILECs failure to timely implement Flex ANI which was needed to enable IXCs to track calls from independent payphones. By contrast, the lines connecting ILEC payphones to the network generally transmitted hard coded payphone identifiers (as part of the legacy of past discrimination against independent PSPs) and thus did not require Flex ANI in order to identify payphone calls to IXCs. Therefore, the ILECs' failure to timely implement Flex (footnote continued on next page)

II. THE ADMINISTRATIVE BURDEN OF A TRUE-UP AFFECTS INDEPENDENT PSPs DIFFERENTLY FROM ILEC PSPs

Another reason for treating ILEC PSPs differently from independent PSPs is that the administrative burden of a true-up would affect the two groups in dramatically different ways.

For independent PSPs, if a true-up is implemented as planned, the costs and risks involved will likely outweigh the net benefits. Under the true-up as currently planned, when projected refunds are balanced against additional payments, the true-up for the Interim and Intermediate Periods combined would yield *on paper*, a net gain of more than $2.5 million for independent PSPs represented by APCC Services.[5]

But this result assumes that independent PSPs actually *collect* all that they are owed. In fact, there is a great risk that independent PSPs will be unable to collect a large portion of the additional compensation awarded them in a true-up.

First, there is a real risk that one or more large IXCs could file for bankruptcy in the near future. Global Crossing is already in bankruptcy, and other large IXC bankruptcies could easily follow. It is unclear whether any recovery (and certainly not full recovery) could be had from bankrupt IXCs. This represents a huge risk of loss for independent PSPs.[6]

Second, there are likely to be disputes that delay or frustrate the collection of compensation for past periods.[7] IXCs may dispute the identity of successor PSPs seeking to assert the rights of PSPs who have sold out or gone out of business. Or IXCs – especially those who have not previously paid any Interim Period compensation – may dispute the

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ANI did not affect the vast majority of ILEC payphones. In its reply comments in this docket regarding its Interim Period proposal, the RBOC Payphone Coalition acknowledged that FLEX ANI implementation issues had a different impact on independent PSPs than on LEC PSPs. Reply Comments of the RBOC Payphone Coalition at 3 (October 31, 2000).

[5] *See* IXC Allocation Ex Parte at 7. Because most smaller IXCs paid no Interim Period compensation at all, APCC believes that, when smaller IXCs are included, the net payment to independent PSPs for the two periods would be greater than $2.5 million.

[6] The amounts at stake, which can be calculated from APCC's IXC Allocation Ex Parte, are in the tens of millions of dollars.

[7] For example, it is not clear that after so many years either PSPs or the LECs that serve them still have adequate records to authenticate payphones in service for the Interim Period.

verification of many payphones for which retroactive payments are claimed. Given that litigation is likely to be necessary to collect what is owed, for many independent PSPs the cost involved in collecting compensation for past periods may not be worth the relatively small expected net gain.[8]

By contrast, IXCs that are owed refunds are likely to be able to collect substantially all the refunds owed them. Unless the FCC prohibits the practice, the IXCs will be able to collect refunds from most PSPs by simply deducting the amount paid from future compensation payments.

For all these reasons, despite their entitlement to a net increase in compensation, independent PSPs are unlikely even to break even in the planned compensation true-up. Indeed, if one or more major IXCs that owes compensation files for bankruptcy, independent PSPs will incur huge losses– losses that will drive independent PSPs far below the compensation level that the Commission has determined is necessary to recover the costs of marginal payphones. There is no valid reason for requiring independent PSPs to risk incurring such losses, as well as the expense and administrative nightmare of a true-up, especially as independent PSPs have not been unjustly enriched at the expense of any IXC.

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[8] *See* Petition for Reconsideration, APCC, filed in CC Docket No. 96-128 (March 31, 2002) at 13 (calculating that if 2,000 PSPs had to recover $40.5 million from 300 IXCs, the average recovery per transaction would be $67.50). Note that even collections from larger IXCs will not necessarily be worth the cost. If 2,000 PSPs seek to collect about $30 million from the five largest IXCs, the average amount to be collected by each PSP from each large IXC would be only $3,000, with smaller PSPs averaging far less. Collection costs loom especially large with respect to the hundreds of small IXCs to which small shares of Interim Period compensation payments apparently will be allocated. *See* Letters to Magalie Roman Salas, Secretary, FCC, from Marie T. Breslin, Director, Federal Regulatory, Verizon, January 22, 2002, and March 12, 2002, James T. Hannon, Senior Attorney, Qwest, January 22, 2002, and March 14, 2002, D. Michael Yoest, Manager, Federal Regulatory, SBC, January 22, 2002, and W.W. Jordan, March 19, 2002, and March 29, 2002 (identifying several hundred IXCs to which dial-around calls are routed). Aggregation of claims is of uncertain and limited efficacy in reducing the costs of collection and litigation.

The ILEC PSPs appear to be in a completely different position. ILEC PSPs are pressing for a true-up, presumably because they would be owed, on balance, many millions of dollars for past compensation periods, which will bring them substantially closer to full cost recovery. In the case of the ILECs, therefore, the administrative difficulties and uncertainties involved in a true-up may be justified by the net result, especially as the entities involved and their individual claims are generally much larger. In short, the administrative burden of a true-up on independent PSPs and ILEC PSPs would affect ILEC and independent PSPs in vastly different ways.

* * *

In summary, because independent PSPs and ILECs are so differently situated with respect to past compensation for dial-around calls, the equities analysis applicable to the decision on whether to require PSPs to participate in a true-up is dramatically different for independent PSPs and ILEC PSPs. These differences justify different treatment of the two groups.

Sincerely,

Albert H. Kramer
Robert F. Aldrich