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

In the Matter of	)	
	)	
Implementation of the	)	
Pay Telephone Reclassification	)	**CC Docket No. 96-128**
and Compensation Provisions of	)	
The Telecommunications Act of 1996	)	

WORLDCOM, INC.
PETITION FOR RECONSIDERATION OR IN THE ALTERNATIVE, FOR RESCISSION

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I. EXECUTIVE SUMMARY

WorldCom, Inc. ("WorldCom") respectfully petitions the Commission to reconsider the revised per-payphone compensation scheme for the Intermediate period (October 7, 1997 through April 20, 1999) and for subsequent periods. As explained below, reconsideration is warranted because the decision to alter the scheme was arrived at without adequate notice, constitutes retroactive ratemaking, and imposes unexpected and unjustified hardship on WorldCom and other carriers. If the Commission declines to reconsider the compensation scheme imposed for the Intermediate and subsequent periods, WorldCom formally petitions the Commission to rescind its decision and re-adopt its prior rule, which was lawfully promulgated, and on which the industry has relied for the past five years.[1] WorldCom urges the Commission to promptly respond to this petition. Carriers and PSPs are just beginning the process of settling accounts on the basis of the Commission's recent Payphone Orders. It is likely to take six months or more before payments begin. A prompt response will involve minimal disruption and uncertainty to this complicated settelement process.

II. BACKGROUND

In a series of orders released beginning in 1996, the Commission promulgated rules implementing Section 276 of the 1996 Act and, in particular, setting compensation rates for coinless payphone calls. Because tracking mechanisms that would allow carriers to track individual coinless payphone calls were not in place when the Commission began implementing its Orders, the Commission initially adopted a compensation mechanism pursuant to which compensation would be paid per-payphone (rather than per-call) for an "Interim Period"

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[1] This Petition focuses on the legal infirmities and problems created by the Commission's unexplained disavowal of a prior per-payphone compensation methodology. WorldCom reserves the right to challenge other problematic features of the Fifth Order on Reconsideration.

beginning November 7, 1996 and ending October 6, 1997, and ordered that tracking capabilities be established by October 7, 1997. *Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996, First Report and Order,* CC Docket No. 96-128*,* 11 FCC Rcd 20541 (1966) at &99. The Commission's First Report and Order established a rate of $45.85 per-payphone for the Interim Period, based on an average number of compensable calls adopted by the FCC, multiplied by a per-call rate of $0.35. *Id.*, at &125.

The First Report and Order was reversed by the U.S. Court of Appeals for the D.C. Circuit. *Illinois Pub Telecom. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), clarified on reh'g, 123 F. 3d 693 (D.C. Cir. 1997), cert. denied sub nom. *Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998) (*Illinois*). On remand, the Commission adopted the Second Report and Order, in which it expressly deferred the question of the appropriate "Interim Period" rate. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order,* CC Docket No. 96-128, FCC 97-371 (1997) (*Second Report and Order*) at &4. Instead, in the Second Report and Order, the Commission established a per-call rate of $0.284 beginning October 7, 1997. *Id*., at &41.

In 1998, the Common Carrier Bureau issued two relevant orders. First, the Bureau extended a previously granted waiver of the requirement that payphone-specific coding digits be provided to interexchange carriers. *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; TDS Telecommunications Corporation Petition for Waiver of Coding Digit Requirement,* CC Docket No. 96-128, 13 FCC Rcd 4998 (1998) (*Coding Digit Waiver Order*). The Bureau also recognized that, without receipt of such data, interexchange carriers could not provide the per-

call compensation otherwise required. Accordingly, the Bureau issued a related waiver – one that allowed interexchange carriers to satisfy their per-call compensation duty by paying per-payphone compensation for all phones that did not transmit the data required to compensate for individual calls. Such compensation was to be calculated by multiplying the per-call rate established in the Second Report and Order by an average number of calls. *Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-168, 13 FCC Rcd 10893 (1998) (*Per-Call Waiver Order*), at &&26, 28, 30, 32.

In the wake of the issuance of these waiver orders, the Second Report and Order was itself appealed, and was also overturned by the D.C. Circuit Court of Appeals. *MCI Telecommunications Corporation, et. al., Petitioners v. Federal Communications Commission,* 330 U.S. App. D.C. 92, 143 F.3d 606, (1998) (*MCI*). In response, the Commission issued the Third Report and Order, in which it established a new default compensation rate (this time of $0.24) and again deferred to another order the compensation mechanism for the "Interim Period." *In the Matter 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 Order*, CC Docket No. 96-128, 14 FCC Rcd 2545 (1999) (*Third Report and Order*). In doing so, the Commission did not purport to disturb the previously issued methodology for calculating per-payphone compensation established in the Per-Call Waiver Order. Accordingly, for each of those phones that did not transmit relevant coding digits, carriers continued to satisfy their per-call compensation obligations by paying the new rate of $0.24 multiplied by the average number of calls as set out in the Per-Call Waiver Order.

As with the FCC's prior two orders, the Third Report and Order was also appealed. The D.C. Circuit upheld this order. *American Pub. Communications Council v. FCC*, 215 F./3d 51 (D.C. Cir. 2000) (*American*). The per-payphone compensation regime was again left undisturbed, and what remained was for the Commission to adopt a compensation regime for the "Interim Period." *Third Report and Order*, at &198.[2]

On September 26, 2000, the FCC issued a public notice seeking comment on a mechanism for compensation for this Interim Period. *Public Notice, RBOC/GTE Payphone Coalition Files Proposal for Setting Payphone Compensation for Interim Period in Pay Telephone Reclassification and Compensation Proceeding*, DA 00-2189, rel. September, 26, 2000. In the Notice, the Commission noted that the interim compensation period was that period beginning November 7, 1996 and running through October 6, 1997. It further noted that the RBOC/GTE Payphone Coalition had submitted a proposal to resolve outstanding issues related to payphone compensation for this Interim Period, and sought comment on that particular proposal.

Based on the comments received in response to the Public Notice, the Commission issued the Fourth Order on Reconsideration. *Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996, Fourth Order On Reconsideration And Order On Remand,* CC Docket No. 96-168, 17 FCC Rcd 2020 (2002) (*Fourth Order on Reconsideration*). As the Public Notice had indicated, the Commission resolved the issue of the appropriate compensation to be paid during the Interim Period. The Order specifically notes the existence of the Per-Call Waiver Order, and indicates that per-payphone compensation is due

[2] The Commission was also required to true-up payments on the basis of the new Interim Period compensation methodology and finalized rates for payments that had already been made for the

according to the methodology established in the Per-Call Waiver Order. *Id*., & 35 and footnote 98. In the next paragraph, however, the Commission also purported to prescribe another methodology for determining per-payphone compensation, *Id*., &36, although the Order appears to indicate that it applies only to those calls not already covered by the Per-Call Waiver Order. For this reason, neither WorldCom nor any other carrier sought reconsideration of this portion of the Fourth Order on Reconsideration.

In the Fifth Payphone Order on Reconsideration, however, the Commission indicated that it was overturning the per-payphone methodology established in the Per-Call Waiver Order. *Implementation of the Pay Telephone and Compensation Provisions of the Telecommunications Act of 1996, Fifth Order On Reconsideration And Order On Remand,* CC Docket No. 96-168, (2002), (*Fifth Order on Reconsideration*), rel. October 23, 2002. In particular, the Commission established the actual amounts each carrier was required to compensate PSPs for each phone that did not transmit payphone-specific coding digits for the Intermediate Period and for subsequent periods. The figures the Commission published made clear for the first time that, despite the fact that it had indicated in the Public Notice that it was only revisiting the Interim Period compensation scheme, and despite the fact that in the Fourth Order on Reconsideration it had expressly indicated that the Per-Call Waiver Order governed per-payphone compensation subsequent to the Interim Period, the Commission was now purporting to revamp the per-payphone compensation mechanism for both the Intermediate and subsequent time periods.

As set forth below, WorldCom urges the Commission to reconsider its decision to overturn the per-payphone methodology established in the Per-Call Waiver Order or, in the alternative, to rescind the new rule. The decision, which may impose tens of millions of dollars

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Intermediate Period..

of costs on WorldCom and other carriers, was adopted without proper notice in violation of the Administrative Procedures Act (APA). It is also fundamentally at odds with the ban on retroactive ratemaking. And because it is unsupported by the record, it violates the APA's requirement that the Commission act in a manner that is not arbitrary and capricious.

III. THE COMMISSION SHOULD RECONSIDER ITS ADOPTION OF A NEW PER-PAYPHONE COMPENSATION MECHANISM FOLLOWING THE INTERIM PERIOD

A. The Commission's Decision To Order Retroactive Refunds On The Basis Of Its Decision To Overturn Its Per-Call Waiver Order Is Unlawful

In the Per-Call Waiver Order, the Bureau adopted the per-payphone compensation mechanism that would apply during the Intermediate and subsequent periods. In the Fifth Order on Reconsideration, however, the Commission has adopted a different per-payphone compensation scheme, and has purported to apply it retroactively back to October 7, 1997. This violates the fundamental premise that agencies may not engage in retroactive ratemaking.

The Administrative Procedures Act requires that "legislative rules [i.e., rules adopted pursuant to the notice and comment procedures of the APA, 5 U.S.C. § 553] be given future effect only." *Id.*, *Chadmoore v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997), *quoting Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff'd on other grounds Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1998). In short, "retroactive application is foreclosed by the express terms of the APA." *See also Bowen*, 488 U.S. at 216 (Scalia, J., concurring) (APA forecloses retroactivity effect of legislative rules).

The FCC's alteration of the compensation rules for the intermediate period constitutes an impermissible exercise in retroactive rulemaking. The FCC's compensation rules are unquestionably legislative rules. In the Per-Call Waiver Order, the Commission established the per-payphone methodology that would govern compensation for calls made after October 6,

1997 from payphones that did not transmit coding digits. Interexchange carriers paid amounts due pursuant to the methodology established in that Order, and much time has passed since then. In the Fifth Order on Reconsideration, however, the Commission indicated it intended to apply a *new* per-payphone compensation rule retroactively to October 7, 1997, supplanting the per-payphone compensation regime that had previously been in effect. The result is plainly retroactive ratemaking that unlawfully upsets "the settled expectations of those who had relied on the preexisting rule." *Williams Natural Gas Co. v. FERC*, 303 U.S. App. D.C. 260, 3 F.3d 1544, 1554 (D.C. Cir. 1993).

For this reason, WorldCom respectfully requests the Commission to reaffirm the preexisting policy established in its Per-Call Waiver Order.

B. The Commission Failed To Give Adequate Notice It Was Contemplating A New Per-payphone Method For Post-Interim Period Compensation

The Commission should reconsider its new rule regarding per-payphone compensation for calls made after October 6, 1997 from payphones that did not transmit coding digits for a second, independent reason – it was adopted without adequate notice and comment, in violation of the requirements of the Administrative Procedures Act.

The Administrative Procedures Act, 5 U.S.C. § 553, requires that an agency provide notice and comment whenever it adopts a new rule, or whenever "an agency adopts a new construction of an old rule that repudiates or substantially amends the effect of the previous rule on the public . . ." *National Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992); 5 U.S.C. § 553(b) (public notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved"); *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (APA's notice and comment requirements *must*

be followed whenever agency rules "grant rights, impose obligations, or produce other significant effects on private interests"); *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982) (notice and comment requirements triggered where new agency rules impose significant changes on affected parties). These APA requirements assure "public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," *Schweiker*, 690 F.2d at 949 (quoting *Batterton*, 648 F.2d at 703), and further "assure [] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." *Id.* (quoting *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978)).

In this case, the Commission announced by Public Notice that it would be adopting certain new rules, and sought comment on the substance of those rules. But the Public Notice expressly indicated it was seeking comment only on the *RBOC/GTE Payphone Coalition Proposal* which, by its own terms, involved only the Interim Period, not any date subsequent to the Interim Period. Indeed, in the Public Notice itself the Commission repeatedly referenced the Interim Period, and only the Interim Period. And *nothing* in the Public Notice suggested that the Commission was considering a change in the methodology established in its Per-Call Waiver Order, nor did the Commission seek comments on possible changes to that regime. *Public Notice, RBOC/GTE Payphone Coalition Files Proposal for Setting Payphone Compensation for Interim Period in Pay Telephone Reclassification and Compensation Proceeding*, DA 00-2189, rel. September, 26, 2000 And there is no question that the effect of this rule change is significant; the new, retroactive, scheme could impose tens of millions of dollars of unexpected payphone compensation obligations on WorldCom and other carriers.

Because in making this change the Commission failed to comply with the requirements of the Administrative Procedures Act, WorldCom requests the Commission to reconsider its adoption of the new rule, and reaffirm the preexisting policy established in its Per-Call Waiver Order.

C. The Commission's Decision To Overturn Its Per-payphone Methodology Was Unsupported By Substantial Evidence And Was Arbitrary And Capricious

Agency action must be set aside if found by a reviewing court to be "unsupported by substantial evidence," 5 U.S.C § 706(2)(E), or "arbitrary and capricious." *National Citizens Committee for Broadcasting v. FCC*, 181 U.S.App.D.C. 1, 555 F.2d 938 (1977) (agency action is "'arbitrary and capricious' if the facts on which it is purportedly based are not supported by the record"). It is a fundamental tenet of agency rulemaking that an agency must base its decision "on a consideration of the relevant factors. . . ." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). If an agency failed to consider an important aspect of the problem or failed to offer a rational explanation for its decision, its decision is unlawful. *Id.* The Commission's actions here violate these fundamental precepts of administrative rulemaking.

Unsurprisingly, the record does not support the retroactive shift in policy adopted by the Commission. Because the public notice sought comment on the appropriate compensation regime for an entirely different period of time, the comments submitted focused on that issue. Thus, the Commission cannot demonstrate that its decision rests on substantial evidence. That alone provides reason to reconsider the shift in per-payphone methodology. Equally important, the Commission offered no reasoned explanation whatsoever for its unexpected overturning of its Per-Call Waiver Methodology. The Fifth Order on Reconsideration

provides no explanation whatsoever, nor does the predecessor Fourth Order on Reconsideration, on which the Commission purports to rely.

This is particularly troubling, as there are serious substantive defects in the Commission's new regime which carriers would have commented on had they been aware of the Commission's proposed change. In its Per-Call Waiver Order, for example, the Commission relied on concurrent call volume data, specific to each carrier, as a proxy for call volumes associated with payphones that did not transmit coding digits. This is sensible, given that the Commission has consistently argued that proxy measurements should be drawn from the same period of time to which the proxy is to be applied. *Per-Call Waiver Order* at & 35; *Fourth Order on Reconsideration,* at && 11-12; *Fifth Order on Reconsideration,* at & 48. But the Commission has now, without explanation, substituted a methodology which relies on data from 1997 to estimate per-payphone payments for 1998 and subsequent years during the intermediate period. The Commission completely failed to explain what was deficient in its former per-payphone methodology and why its new per-payphone methodology was an improvement.

There are other problems associated with the new compensation regime that carriers would certainly have brought to the Commission's attention had they been aware of the Commission's intent to retroactively alter its compensation scheme. The critical point, however, is that nothing in the current record supports the Commission's decision to overturn its previous per-payphone methodology and adopt a new one, and the Commission makes no effort in its Orders to suggest otherwise. For this reason as well, WorldCom respectfully requests that the Commission reconsider its decision to alter the per-payphone compensation

scheme following the Interim Period, and to reaffirm the preexisting policy established in its Per-Call Waiver Order.

IV. THE COMMISSION SHOULD RESCIND ITS RULE ESTABLISHING A NEW COMPENSATION MECHANISM FOLLOWING THE INTERIM PERIOD

The substantive flaws outlined above not only warrant the Commission's reconsideration of the new per-payphone compensation regime, but also its rescission. Accordingly, if for any reason the Commission declines to reconsider its new rule, it should nonetheless rescind it.

The Commission's rules enable "any aggrieved party to petition for the . . . repeal of a regulation." 47 C.F.R. § 1.401(a) (2002). A rescission petition may be filed at any time. *See* 47 C.F.R. § 1.401. If a petition "disclose[s] sufficient reasons on support of the action requested," *Id.* at § 1.407, the Commission must either (1) institute notice and comment proceedings, *Id.* at § 1.407; *see also Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982) (explaining that mandatory notice and comment requirements apply to rescission as well as issuance of a rule), or, if notice and comment is neither required nor desirable, (2) issue a final order amending the rules, *see* 47 C.F.R. § 1.407. Parties may appeal for a rule's repeal on a wide variety of grounds, whether procedural, *see, e.g., Id.,* or substantive, *see, e.g.*, *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 n.6 (D.C. Cir. 1959).

Each of the grounds for reconsideration articulated above constitutes an independent justification for the Order's rescission. The retroactive application of this legislative rule exceeds the Commission's statutory authority. *See* 5 U.S.C. § 553; *see also Chadmoore,* 113 F.3d 235, 240 (D.C. Cir. 1997) (noting that "a legislative rule may only be applied prospectively"). The Commission's failure to support the order with substantial evidence and its issuance of inadequate public notice also violate the APA's requirements. *See* 5 U.S.C. §§ 553(b), 706(2)(E). Agency action in excess of its statutory authority has provided a common

basis on which parties have successfully brought petitions for rescission. *Cf., e.g.*, *NLRB v. FLRA*, 834 F.2d 191, 194 (D.C. Cir. 1987).

Independently, the Commission's failure to provide Petitioner adequate notice of the revised rate scheme denied Petitioner an opportunity to change its internal operating procedures in a way that would have partially mitigated the adverse financial impact of the Fifth Order on Reconsideration.[3] Accordingly, the Commission should also rescind the rules because changed circumstances warrant the Order's rescission. *See Geller v. FCC*, 610 F.2d 973, 976 (D.C. Cir. 1979) (per curiam) (noting that parties may bring petitions for rescission where changed circumstances undermine a rule's original justification).

V. CONCLUSION

For the reasons stated herein, WorldCom urges the Commission to reconsider its new rule altering the per-payphone compensation mechanism following the Interim Period or, in the alternative, rescind the new rule.

Sincerely,

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[3] For example, WorldCom would have started compensating calls sent from payphones that did not transmit coding digits by matching call detail records against lists of LEC-provided ANIs as contemplated by the Per-Call Waiver Order. *Per-Call Waiver Order,* at & 18. WorldCom also would have been able to begin accruing additional funds to meet the additional, retroactive, compensation payments.

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Statement of Verification

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2003

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Certificate of Service

I, L. Elizabeth Bryant, do hereby certify that copies of the foregoing Petition for Reconsideration of WorldCom Inc. were sent on this 16th day of January , 2003, via first-class mail, postage pre-paid, to the following:

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