

Before the

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-128
Pay Telephone Reclassification	)	
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
Policies and Rules Concerning	)	CC Docket. No. 91-35
Operator Service Access and	)	
Pay Telephone Compensation	)	
	)	
Petition of the Public Telephone	)	
Council to Treat Bell Operating Company	)	
Payphones as Customer Premises	)	
Equipment	)	
	)	
Petition of Oncor Communications	)	
Requesting Compensation for	)	
Competitive Payphone Premises	)	
Owners and Presubscribed Operator	)	
Services Providers	)	
	)	
Petition of the California Payphone	)	
Association to Amend and Clarify	)	
Section 68.2(a) of the	)	
Commission's Rules	)	
	)	
Amendment of Section 69.2(m)	)	
and (ee) of the Commission's Rules	)	
to Include Independent Public	)	
Payphones Within the "Public	)	
Telephone" Exemption from End User	)	
Common Line Access Charges	)	

**REPORT AND ORDER**

**Adopted: September 20, 1996 Released: September 20, 1996**

By the Commission: Commissioner Chong issuing a statement.

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**I. INTRODUCTION**

1. On June 4, 1996, the Commission adopted a Notice of Proposed Rulemaking ("Notice") to implement Section 276 of the Communications Act of 1934, as amended by the

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Telecommunications Act of 1996 ("1996 Act").<sup>1</sup> In this Report and Order, the Commission adopts new rules and policies governing the payphone industry that: (1) establish a plan to ensure fair compensation for "each and every completed intrastate and interstate call using [a] payphone[.]"<sup>2</sup> (2) discontinue intrastate and interstate carrier access charge payphone service elements and payments and intrastate and interstate payphone subsidies from basic exchange services;<sup>3</sup> (3) prescribe nonstructural safeguards for Bell Operating Company ("BOC") payphones;<sup>4</sup> (4) permit the BOCs to negotiate with payphone location providers on the interLATA carrier presubscribed to their payphones;<sup>5</sup> (5) permit all payphone service providers to negotiate with location providers on the intraLATA carrier presubscribed to their payphones;<sup>6</sup> and (6) adopt guidelines for use by the states in establishing public interest payphones to be located "where there would otherwise not be a payphone[.]"<sup>7</sup>

2.

3. The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. The 1996 Act erects a "pro-competitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>8</sup> In this proceeding we advance the twin goals of Section 276 the Act of "promot[ing] competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public..."<sup>9</sup> To this end, we seek to eliminate those regulatory constraints that inhibit the ability both to enter and exit the payphone marketplace, and to compete for the right to provide services to customers through payphones. At the same time, we recognize that a transition period is necessary to eliminate the effects of some long-standing barriers to full competition in the payphone market. For this reason, we will continue for a limited time to regulate certain aspects of the payphone market, but only until such time as the market evolves to erase these sources of market distortions.

4.

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<sup>1</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Notice of Proposed Rulemaking, 11 FCC Rcd 6716 (1996) ("Notice"). The complete text of Section 276 is attached as Appendix A.

<sup>2</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>3</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>4</sup> 47 U.S.C. § 276(b)(1)(C).

<sup>5</sup> 47 U.S.C. § 276(b)(1)(D).

<sup>6</sup> 47 U.S.C. § 276(b)(1)(E).

<sup>7</sup> 47 U.S.C. § 276(b)(2).

<sup>8</sup> S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

<sup>9</sup> 47 U.S.C. § 276(b)(1).

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5. Congress has directed us to take certain actions to effectuate its goals in the payphone area including the removal of subsidy schemes, providing for nondiscriminatory access to bottleneck facilities, ensuring fair compensation for all calls from payphones, and allowing all competitors equal opportunity to compete for essential aspects of the payphone business. In general, we believe that vigorous and unfettered competition is the best way of achieving Congress' dual objectives. Unfortunately, various barriers -- regulatory, structural, economic, and technological -- stand in the way of having a fully competitive market providing payphone services. For example, the lack of an effective per-call tracking mechanism is a technological barrier that prevents market forces from readily achieving Congress' goal of ensuring fair compensation to payphone services providers ("PSPs"). Regulatory restrictions on the placement of payphones, and existing subsidies from other telecommunication services available to certain competitors but not others are also examples of regulatory inefficiencies affecting competition and the widespread deployment of payphones.

6.

7. In this Report and Order, we take the critical steps necessary to remove these barriers. Some barriers are removed right away. For example, we establish an immediate plan to ensure that PSPs receive fair compensation, especially for those calls for which PSPs have not been compensated in the past. We also order that subsidies from basic telecommunications services paid to some carriers for providing payphone services be terminated as soon as it is practicable. We condition the competitive entry of these carriers into the nonregulated activity of providing payphone services on their termination of these subsidies. Similarly, we allow the BOCs to negotiate with the payphone location providers in selecting and contracting with the telecommunications carriers that provide interLATA service from their payphones, but only after they have put in place nonstructural safeguards necessary to protect against a BOC from unlawfully subsidizing its payphone operations from its local exchange services or otherwise engaging in anti-competitive behavior.

8.

9. Removing other types of barriers to full competition will take more time. For example, the ability to track toll-free calls has not been developed fully. Until that functionality is available, as we have specified in this Report and Order, our plan for ensuring fair compensation will be a proxy that closely resembles the behavior of the marketplace as demonstrated by the record of this proceeding. To the extent that they exist, removing entry and exit restrictions placed upon the provisioning of payphone services will also take time because it requires action by the states. During the interim period before subsidies for LEC payphones are terminated and per-call compensation becomes effective, the states should examine and remove those regulations that affect the ability of PSPs to freely enter and exit this business.

10.

11. Although we embark in this Report and Order on a new deregulatory structure for the payphone industry, we take a number of steps to facilitate use of payphones by consumers. First, we require that each payphone clearly indicate the local coin rate within the informational placard on each payphone. Pursuant to existing requirements,<sup>10</sup> this placard must provide information on the operator service provider presubscribed to the payphone and the address of the Commission, to which the consumer may direct complaints regarding operator services.

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<sup>10</sup> 47 CFR § 64.703.

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Second, we require that each payphone provide access, free of charge to the caller, to emergency calling, telecommunications relay service calls for the hearing disabled, and dialtone generally.

12.

13. In addition, payphones unquestionably serve critical public interests in health, safety and welfare. It is possible, however, that reliance on the market may fail to provide adequately for payphones in locations serving important public needs, because some payphones providing these benefits may not be economically self-supporting. For example, payphones in neighborhoods with low residential phone penetration, or along deserted stretches of highway, can be essential for public safety but fail to be revenue-generating for various reasons, including lack of sufficient traffic, damage from extreme weather conditions, or high maintenance costs. For these reasons, we establish criteria by which the states may maintain and fund public interest payphones in locations serving health, safety, and welfare goals, where they would not otherwise exist as a result of the operation of the market. Public interest payphones will also further our policies on emergency access<sup>11</sup> and telecommunications relay service calls for the hearing disabled.<sup>12</sup> But while we grant the states broad discretion in administering and funding public interest payphone programs, we also require that they do so in a manner which does not upset the competitive balance of the payphone market (*i.e.*, competitively neutral), and that fairly and equitably compensates those entities providing public interest payphones.

14.

15. Our ultimate goal is to have a competitive payphone industry that meets the needs of the public by a wide deployment of payphones. In our view, we can best facilitate this by putting in place rules and regulations that provide incentives to all the players in the industry to eliminate, as soon as possible, all of the market distorting factors that exist today.

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## II. BACKGROUND

1. As the Commission discussed in the Notice, payphone services have historically been regulated by the states and the Commission.<sup>13</sup> To date, the states have regulated payphones as part of the LEC's network-based service. Some states have also imposed regulation on the operator service rates charged at payphones maintained by non-LEC, independent payphone providers. The Commission has focused on payphones primarily in the context of our regulation of carriers that provide operator-assisted long-distance service, known

<sup>11</sup> Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Notice of Proposed Rulemaking, 9 Fcc Rcd 6170 (1994) ("911 Notice").

<sup>12</sup> Telecommunications Relay Services and the Americans with Disabilities Act, CC Docket No. 90-571, Memorandum Opinion and Order, 10 FCC Rcd 10927 (Com. Car. Bur. 1995).

<sup>13</sup> For a brief history of the payphone industry, see Notice at paras. 2-12.

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as operator service providers ("OSPs"), and in particular, our implementation of the Telephone Operator Consumer Services Improvement Act ("TOCSIA").<sup>14</sup> Among other things, TOCSIA directed the Commission to determine whether independent payphone providers should receive compensation for originating interstate calls to non-presubscribed OSPs from their payphones.<sup>15</sup> The Commission's consideration of compensation issues under TOCSIA led to the creation of a compensation mechanism that is an antecedent to the one adopted in the instant proceeding.<sup>16</sup> Currently, there are approximately 1.5 million incumbent local exchange carrier ("LEC") payphones<sup>17</sup> and approximately 350,000 competitively provided payphones.<sup>18</sup>

2.

3. As stated in the Notice, Section 276(b)(1)(A) directs the Commission to establish a compensation plan to ensure "that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call" from their payphones.<sup>19</sup> Section 276(b)(1)(B) mandates that the Commission "discontinue the intrastate and interstate carrier access charge payphone service elements and payments ... and all intrastate and interstate subsidies from basic exchange and exchange access revenues."<sup>20</sup> In addition, Section 276(b)(1)(D) directs the Commission to consider whether BOCs should be granted certain rights already available to all other PSPs to participate in the location provider's selection of presubscribed interLATA carrier, while Section 276(b)(1)(E) grants certain rights to all PSPs to participate in the selection of presubscribed intraLATA carriers.<sup>21</sup> Together with the other subsections of Section 276, these three provisions help to establish regulatory parity for all PSPs, whether independent payphone providers or incumbent LECs (both independent LECs and BOCs).<sup>22</sup>

<sup>14</sup> Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

<sup>15</sup> 47 U.S.C. § 226(e)(2).

<sup>16</sup> Policies and Rules Concerning 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"); Order on Reconsideration, 7 FCC Rcd 4355 (1992) ("Subscriber 800 Reconsideration Order"); Second Report and Order, 7 FCC Rcd 3251, 3252-53 (1992) ("Second Report and Order"); Order on Reconsideration, 8 FCC Rcd 7151 (1993) ("Reconsideration Order"); remanded for further proceedings, Florida Public Telecommunications Association v. FCC, 54 F.3d 857, 860 (D.C.Cir. 1995) ("Florida Payphone"); Memorandum Opinion and Order on Further Reconsideration and Second Further Notice of Proposed Rulemaking, 10 FCC Rcd 11457 (1995) ("Second Further Notice"). Because the compensation issues raised in the Second Further Notice have been subsumed into this proceeding, we terminate that proceeding. See para. 374, below.

<sup>17</sup> Statistics of Communications Common Carriers, 1994/1995 edition, Common Carrier Bureau, FCC at 159, Table 2.10 (1995) ("Common Carrier Statistics").

<sup>18</sup> Notice at para. 6, n.22.

<sup>19</sup> 47 U.S.C. § 276(b)(1)(A). The provision exempts from compensation emergency calls and telecommunications relay service ("TRS") calls for hearing disabled individuals. Id.

<sup>20</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>21</sup> 47 U.S.C. §§ 276(b)(1)(B) & (E).

<sup>22</sup> In response to the Notice, the Commission received 87 initial comments and 47 replies. Appendix B lists

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4.

**III. ISSUES****THE PAYPHONE MARKETPLACE**

1. According to the record in this proceeding, the payphone industry has the potential to be very competitive.<sup>23</sup> Entry into the payphone business appears to be easy. The ability to purchase a payphone, secure a location contract, obtain a payphone line from the LEC, and maintain the payphone are, together, the minimal technical requirements to enter into the payphone business.<sup>24</sup> In addition, payphone lines are part of the tariffed offerings of local exchange carriers and, in some jurisdictions, only a simple business line is required to the payphone service. As contracts come up for renewal, or as location providers find it economical to put in new payphones, PSPs and interexchange carriers ("IXCs") routinely make themselves available to negotiate new agreements among themselves and the location provider.

2.

3. A payphone can be removed and used at another location, which facilitates entry and exit. If a PSP can easily redeploy its assets, it will be more willing to place a payphone in response to a small increase in price, because the risk of such placement is lower.<sup>25</sup> In addition, there appear to be no significant scale or scope economies or network externalities that would impede entry of new firms.<sup>26</sup> As a result, barriers to entry appear to be very low.<sup>27</sup> In fact a large number of firms, both large and small, have entered the industry since it was initially opened to competition in 1984, and those firms have provided competition in at least some segments of the payphone market.<sup>28</sup>

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the parties filing comments and the abbreviated names this Order uses to refer to them. Similarly, Appendix C lists replies.

<sup>23</sup> An industry's competitive structure is generally determined by five factors. These are: (1) level of rivalry between existing firms; (2) potential new entrants; (3) bargaining power of suppliers; (4) bargaining power of buyers; and (5) availability of substitutes. See generally M. Porter, Competitive Advantage and Competitive Strategy.

<sup>24</sup> According to the RBOCs, there are over 15,000 PSPs. Ex Parte Letter of Ben Almond, Executive Director of Federal Regulatory, to William Caton, Secretary, FCC (August 15, 1996). APCC has stated that fewer than 25 independent payphone providers have more than 1500 payphones. Ex Parte letter from Albert Kramer, Counsel, APCC, to William Caton, Secretary, FCC (September 6, 1996).

<sup>25</sup> See Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) 13, 104 at para. 1.3 (1992) ("1992 Merger Guidelines") ("A firm viewed as a [market] participant if, in response to a small but significant and nontransitory price increase, it likely would enter rapidly into production or sale of a market product in the market's area, without incurring significant sunk costs of entry and exit.").

<sup>26</sup> Id. at para. 33.

<sup>27</sup> The ability to enter and exit easily is generally thought to be evidence of a competitive industry. See Baumol, Panzar, and Willig, Contestible Market Theory at 466.

<sup>28</sup> The record indicates that the average BOC payphone originates about 500 calls per month while the average independent payphone originates about 700 calls per month. APCC Comments at 5. This suggests that independent PSPs have entered markets in which there is higher than average payphone traffic.

4.

5. The competition we observe today, however, has been significantly distorted by government regulation of prices, regulatory barriers to entry and exit, as well as by significant subsidies from other telecommunications services. Regulated prices prevent the market from operating efficiently to deploy payphone facilities. Moreover, some states currently prohibit the provision of payphone service by any entity other than the incumbent LEC. Removing these types of entry and exit restrictions is a necessary step toward allowing competitive forces to guide both the deployment of payphones and the setting of prices for payphone services.<sup>29</sup>

6.

7. Even after such regulatory barriers are removed, there are three structural reasons why, at least initially, the full benefits of competition may not be realized by all segments of the payphone market. First, independent PSPs currently rely on LECs for basic payphone services. LEC participation both in providing payphones to the public and also providing the underlying tariffed payphone services to independent PSPs may give LECs the incentive and the potential ability to unfairly act to the detriment of their PSP competitors and to act in other anti-competitive ways against PSPs. However, by implementing safeguards, we intend to ensure that LECs cooperate fully in the provision of any necessary payphone services and do not otherwise restrain competition, as long as LECs remain the monopoly providers of these services.<sup>30</sup>

8.

9. Second, there are certain locations where, because of the size of the location or the caller's lack of time to identify potential substitute payphones, no "off premises" payphone serves as an adequate substitute for an "on premises" payphone. In such locations, the location provider can contract exclusively with one PSP to establish that PSP as the monopoly provider of payphone service. Absent any regulation, this could allow the PSP to charge supra-competitive prices. The location provider would share in the resulting "locational rents" through commissions paid by the PSPs. To the extent that market forces cannot ensure competitive prices at such locations, continued regulation may be necessary.<sup>31</sup> Payphones in many locations are likely to face a sufficient level of competition from payphones at nearby locations to ensure that prices are at the competitive level. As a result, we believe that payphones at such locations are unlikely to need additional scrutiny.

10.

11. Third, for competitive markets to work properly, it is essential that consumers have full information concerning the choices available to them. Information on prices for payphone service is of primary importance.<sup>32</sup> The instant Report and Order concerns two

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<sup>29</sup> See para. 49, below. For example, there are large variations in the number of independent payphone providers in the various states. In BellSouth's nine-state region, there are the following number of certifications: Alabama 110; Florida 1016; Georgia 505; Kentucky 293; Louisiana 243; Mississippi 107; North Carolina 491; South Carolina 1102; Tennessee 387. Ex Parte Letter of Ben Almond, Executive Director of Federal Regulatory, BellSouth, to William Caton, Secretary, FCC (August 15, 1996).

<sup>30</sup> See generally Section C, below.

<sup>31</sup> See para. 51, below.

<sup>32</sup> See e.g., Billed Party Preference for InterLATA 0+ Calls, CC Docket No. 92-77, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 7274 (1996) ("OSP Reform"). In the OSP Reform proceeding, we have



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different types of consumers who need to be informed of the charges they will face: (1) consumers who choose to use a payphone for local, 0+,<sup>33</sup> or access code calls,<sup>34</sup> and (2) consumers who contract with an IXC for the ability to receive subscriber 800 calls.<sup>35</sup> Although we have no evidence in the record that the current disclosure of local coin rates are inadequate, our past experience requires us to ensure that such disclosures, including, at a minimum, the posting of the local coin rate, are effective in communicating necessary cost information to consumers. We look to the states to review their regulations and modify them to ensure the adequacy of the disclosure.<sup>36</sup> Consumers thus will have the information available to them at the time they decide to make a call from a payphone.

12.

13. As discussed more fully below,<sup>37</sup> the PSP will be permitted to levy a charge each time a caller dials a subscriber 800 number. We conclude that the charge must be paid directly by the IXC, although the carrier may pass it through to the 800 subscriber, either on a per-call basis, or in the form of higher per-minute rates. Once it is possible to track subscriber 800 calls, a competitive market may pass these costs along in the same manner as they are incurred -- on a per-call basis -- to the called customer. If charges are not passed on in this manner, the called party's incentives for accepting or declining a particular call will be distorted. IXCs also have the option of blocking subscriber 800 calls from payphones, if they do not want to pay the per-call payphone compensation charge.<sup>38</sup>

14.

15. Aside from these three structural concerns, we recognize that the payphone industry has not operated without the entry and exit restrictions and subsidies that currently exist.

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proposed rules to ensure that operator service providers ("OSPs") inform consumers of their price, or if their price will be higher than that charged by the largest OSPs. While OSP Reform is separate from the instant proceeding, the OSP rules we ultimately adopt will benefit those who make calls from payphones.

<sup>33</sup> A 0+ call occurs when the caller dials "0" plus the called telephone number. 0+ calls include credit card, collect, and third number billing calls. Second Report and Order, 7 FCC Rcd at 3251, n.4. 0- call transfer service is a service offered by LECs to OSPs under which LECs transfer a 0- call (when a caller dials only the digit "0" and then waits for operator intervention) to the OSP requested by the calling party. Id. at 3255, n.44.

<sup>34</sup> The Second Report and Order defines an "access code" as a "sequence of numbers that, when dialed, connects the caller to the OSP associated with that sequence, as opposed to the OSP presubscribed to the originating line. Access codes include 10XXX in equal access areas and "950" Feature Group B dialing (950-0XXX or 950-1XXX) anywhere, where the three-digit XXX denotes a particular IXC. Some OSPs use an 800 number as an access code." Id. at 3251, n.1.

<sup>35</sup> "Subscriber 800 calls" consist of calls to an 800 number assigned to a particular subscriber. Notice at para. 11, n.37. In the Notice, we stated that, for purposes of this proceeding, "the term 'subscriber 800 calls' includes other sequences of numbers that the FCC deems, or may deem in the future, the equivalent of subscriber 800 numbers, such as numbers with an '888' code." Notice at para. 15, n.49.

<sup>36</sup> See paras. 49-50, below.

<sup>37</sup> See para. 52, below.

<sup>38</sup> See para. 49, below.

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When these subsidies are terminated and barriers are removed, other structural problems or market imperfections may develop that would mitigate the benefits of a competitive market. However, our continued monitoring of the marketplace will ensure that the rules we adopt will lead to both competitive prices for payphone service and an efficient supply of payphones.

16.

17. One of the goals of Section 276 is the deployment of payphones to benefit the "public health, safety and welfare."<sup>39</sup> The competitive marketplace, however, will not always lead to an adequate supply of payphones in areas where they are not economically viable. For this reason, we conclude that public interest payphones should be maintained, although we define the term narrowly to exclude those payphones that would be provided through the normal workings of the marketplace.<sup>40</sup> Our conclusions regarding public interest payphones will ensure that there will be an efficient supply of payphones, although we recognize that the states are better equipped to determine where these public interest payphones should be placed. In addition, by ensuring that PSPs receive the benefits of their payphone investments, these PSPs will compete to place additional payphones in a variety of geographic areas.<sup>41</sup> Therefore, public safety will be enhanced because of requirements that emergency access be available from all payphones at no cost the caller. This increased emergency access from payphones is consistent with the Commission's proposals to ensure telephone compatibility with enhanced emergency calling systems.<sup>42</sup> In sum, we believe that the increased access, free of charge to the caller, to emergency calling, telecommunications relay service calls for the hearing disabled, and dialtone generally, may be one of the most significant benefits of the compensation approach we adopt in this Report and Order .

18.

19.

#### **20.A. COMPENSATION FOR EACH AND EVERY COMPLETED INTRASTATE AND INTERSTATE CALL ORIGINATED BY PAYPHONES**

21.

22. Section 276 requires that we establish a plan to ensure fair compensation for all calls. As discussed below, fair compensation can be ensured best when the PSP can track the calls made from the payphone on a call-by-call basis and be assured efficient payment for those calls; when the market can set a fair rate for the call; and when the caller has the information necessary to make an informed choice as to whether to make the call and incur the compensation charge.

23.

#### **24. 1. Payphone Calls Subject to this Rulemaking and Compensation Amount**

25.

<sup>39</sup> 47 U.S.C. § 276(b)(1).

<sup>40</sup> See, e.g., Ex Parte Letter of Garry Mendez, Jr., Executive Director, National Trust for the Development of African-American Men to William Caton, Secretary, FCC (September 6, 1996) (market-based rates will help ensure that payphones remain widely available in residential neighborhoods).

<sup>41</sup> See generally Section A, below.

<sup>42</sup> 911 Notice.

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26. **a. The Notice**

27.

28. Most calls originated on payphones are within one of the following categories: (1) coin calls; (2) directory assistance calls; (3) operator service ("0+" and "0-") calls; (4) access code calls (using, e.g., "10XXX" codes and "1-800" or "950" carrier access numbers); and (5) subscriber 800 calls. Each of these categories can be further subdivided between local, intraLATA toll, intrastate interLATA, interstate interLATA, and international. In the Notice, the Commission sought comment on what constitutes "fair" compensation; whether international calls should be included in the compensation plan; and whether calls for which the PSP currently receives compensation should be included in the plan.<sup>43</sup> The Commission tentatively concluded that we must at least prescribe standards for determining fair compensation for all access code calls, subscriber 800 and other toll-free number calls, and debit card calls.<sup>44</sup> The Commission tentatively concluded that it was not necessary to prescribe per-call compensation for 0+ calls originated by payphones, because these calls were compensated pursuant to contracts between the PSP and the presubscribed IXC.<sup>45</sup> The Commission sought comment on whether intraLATA 0+ calls carried by the presubscribed intraLATA carrier should be treated differently than local coin calls.<sup>46</sup>

29.

30. With regard to local rates, the Commission stated that there is some evidence that the rate may not necessarily fairly compensate the PSP.<sup>47</sup> We sought comment on how to fulfill the Act's mandate in this regard. The Commission proposed a range of options for ensuring fair compensation for local coin calls. One was to set a nationwide local coin rate for all calls originated by payphones.<sup>48</sup> Another was for the Commission to prescribe specific national guidelines that states would use to establish a local rate to ensure that all PSPs are fairly compensated.<sup>49</sup> A third was for the states to continue to set the coin rates for local payphone calls according to factors within their discretion.<sup>50</sup> Under each approach, the Commission sought comment on what specific public interest benefits commenters believe would result from adoption of a particular option.<sup>51</sup>

31.

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<sup>43</sup> Notice at paras. 16, 18.

<sup>44</sup> Id. at para. 17.

<sup>45</sup> Id. at para. 16.

<sup>46</sup> Id. at para. 22.

<sup>47</sup> Id. at para. 22, n.64.

<sup>48</sup> Id. at para. 21.

<sup>49</sup> Id.

<sup>50</sup> Id. at para. 22.

<sup>51</sup> Id. at paras. 21-22.

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32. In addition, the Commission tentatively concluded that international calls originated by payphones should be compensated, because we found no evidence of congressional intent to leave these calls uncompensated.<sup>52</sup> The Commission also sought comment on what rules, if any, should be adopted to prevent the improper use of subscriber 800 numbers to increase compensation, as well as other types of fraud.<sup>53</sup>

33.

34. Citing the lack of reliable independent payphone provider specific cost data, the Commission tentatively concluded in the Notice that PSPs should be compensated for their costs in originating the types of calls for which compensation is deemed appropriate, and that these costs should be measured by appropriate cost-based surrogates.<sup>54</sup> For appropriate cost-based surrogates, the Commission sought comment on whether some measure of generic or industry-wide costs is available, whether incumbent LECs' costs would be a reasonable surrogate for independent payphone providers' costs, and whether some other existing set of rates, such as state-established rates for local coin calls, would be a reasonable surrogate.<sup>55</sup> The Commission also sought comment on whether we should prescribe different per-call compensation amounts for the different types of calls originated by payphones. The Commission requested comment on how compensation levels should be permitted to change in the future, and whether some cost index or price cap system would be appropriate to ensure that compensation levels reflect expected changes in unit costs over time.<sup>56</sup>

35.

36. **b. Comments**

37.

38. **i. Compensable Calls**

39.

40. A wide range of commenters, including IXCs, RBOCs,<sup>57</sup> independent LECs, states, and independent payphone providers, support the Commission's tentative conclusion that we must at least prescribe standards for determining fair compensation for all access code calls, subscriber 800 and other toll-free number calls, and debit card calls.<sup>58</sup> Many of these commenters also agree with the Commission's tentative conclusion that it is not necessary to

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<sup>52</sup> Id. at para. 18.

<sup>53</sup> Id. at para. 23.

<sup>54</sup> Id. at para. 38.

<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Use of the term "RBOCs" in this Report and Order refers to the RBOC Payphone Coalition, which includes six of the seven Bell Operating Companies, but does not include Ameritech.

<sup>58</sup> See, e.g., AT&T Comments at 4-5; GTE Comments at 3; RBOC Comments at 2. MobileMedia argues that the Commission should initiate a separate proceeding to evaluate compensation options for subscriber 800 calls. MobileMedia Reply at 11-12.

prescribe compensation for 0+ calls carried by a payphone's presubscribed carrier.<sup>59</sup> They argue that compensation agreements between the presubscribed carrier and PSP or location provider ensure that the PSP will be fairly compensated for these calls.<sup>60</sup> CompTel further contends that mandating per-call compensation for 0+ calls in addition to that provided by contract would overlap with the Commission's intent to address operator service rates for payphones in the OSP Reform proceeding.<sup>61</sup> The RBOCs argue that the Commission need not prescribe compensation for 0+ calls as a general rule, although the Commission must require OSPs to pay compensation on all presubscribed calls made on BOC payphones to compensate the BOCs for use of their payphones when the BOC does not have a contractual relationship with the presubscribed carrier.<sup>62</sup> The RBOCs contend that because Section 276(b)(3) expressly grandfathers contracts existing before the date of the statute's enactment between the location provider and the presubscribed carrier on many BOC payphones, the BOCs would not otherwise receive any compensation for these 0+ calls.<sup>63</sup> Sprint argues that the Commission should not mandate compensation for any calls that make use of a payphone's presubscribed carrier, because any call using the presubscribed carrier would be compensated under the terms of the contract.<sup>64</sup> The RBOCs contend, however, that the amount of dial-around calls has no relationship to a payphone's presubscribed carrier, and that the PSP has no authority to block these calls to force revenue generating calls.<sup>65</sup> Conquest argues that the Commission should exempt 0+ calls that make use of an 800 number as a presubscription device, which is transparent to the caller.<sup>66</sup>

41.

42. Other commenters, notably USTA and APCC, argue that the statutory duty to mandate compensation for "each and every completed intrastate and interstate call" requires the Commission to mandate a per-call compensation rate for 0+ calls, regardless of any compensation agreements between the presubscribed carrier and the PSP.<sup>67</sup> APCC argues that

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<sup>59</sup> See, e.g., Actel Comments at 4; AT&T Comments at 4; Cable & Wireless Comments at 4; California PUC Comments at 9; CompTel Comments at 4; Florida PSC Comments at 2; GTE Comments at 3; MCI Comments at 2; One Call Comments at 3; Sprint Comments at 4-5; USTA Comments at 3; WorldCom Comments at 8.

<sup>60</sup> Id.

<sup>61</sup> CompTel Reply at 4.

<sup>62</sup> RBOC Comments at 4-5.

<sup>63</sup> Id. Ameritech also contends that, for the RBOCs, two issues are directly linked: (1) compensation for 0+ calls under Section 276(b)(1)(A); and (2) the ability of the RBOCs to participate in negotiation with the location provider on the selection of the presubscribed interLATA carrier under Section 276(b)(1)(D). Ameritech Comments at 4-5.

<sup>64</sup> Sprint Comments at 6. See also AT&T Reply at 16.

<sup>65</sup> RBOC Reply at 2.

<sup>66</sup> Conquest Comments at 12.

<sup>67</sup> APCC Comments at 20-21; Communications Central Comments at 5-6; IPTA Comments at 4; USTA Comments at 1.

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state-imposed rate ceilings on intrastate 0+ calls prevent PSPs from receiving fair compensation.<sup>68</sup> In addition, it contends that 0+ commission payments are for the value to the IXC of receiving the presubscribed traffic and do not address the need for use of the payphone.<sup>69</sup> The RBOCs, Ameritech, and GTE argue that 0+ compensation could be established as a default rate, which could be eliminated or supplanted through negotiations between the requisite parties.<sup>70</sup>

43.

44. The commenters take varying positions on what action the Commission should take to ensure fair compensation for local coin calls from payphones. The independent payphone providers support the Commission's option of a nationwide local coin call rate.<sup>71</sup> They argue that a nationwide rate is necessary to override inconsistent state rules, to ensure predictability of rates for interstate travelers, to break the dependence of PSPs on 0+ commissions, and to establish a single, uniform rate for all local coin calls.<sup>72</sup> APCC contends that this nationwide rate would serve as the maximum rate that PSPs could receive for a local coin call, and PSPs would likely respond to competition in local areas by lowering this per-call rate.<sup>73</sup> Other parties specifically oppose a nationwide local coin rate.<sup>74</sup> They argue that regional differences in handling payphone calls make a single nationwide rate impractical.<sup>75</sup> Several commenters state that the Commission lacks authority to set local coin rates under both Section 276 and the Act.<sup>76</sup> They argue that the ability to ensure compensation is different than jurisdiction over retail rates, and that nothing in Section 276 suggests that Congress intended to remove local coin rates from the jurisdiction of the states.<sup>77</sup> APCC contends, however, that the Commission has the requisite authority to impose a nationwide local coin rate, because Section 276's mandate to ensure fair compensation extends to setting local coin rates.<sup>78</sup>

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<sup>68</sup> APCC Comments at 19.

<sup>69</sup> Id. at 20.

<sup>70</sup> Ameritech Reply at 1-4; RBOC Reply at 10-11; GTE Reply at 4.

<sup>71</sup> See, e.g., Actel Comments at 8; APCC Comments at 13-19; Communications Central Comments at 8; FPTA Comments at 4; NJPA Comments at 5-6; Peoples Comments at 17-19; SCPCA Comments at 3; Telaleasing Reply at 3-4.

<sup>72</sup> APCC Comments at 13-19; Peoples Comments at 17-19.

<sup>73</sup> APCC Reply at 8.

<sup>74</sup> See, e.g., California PUC Comments at 12; Maine Comments at 5-7; SW Bell Reply at 3.

<sup>75</sup> Id.

<sup>76</sup> See, e.g., Bell Atlantic Comments at 1; MPTA Comments at 4-5; Missouri PSC Reply at 3; contra APCC Reply at 4-7.

<sup>77</sup> Id.

<sup>78</sup> APCC Reply at 4-7.

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45.

46. Other commenters, including USTA, Ameritech, and GTE, argue that the Commission should adopt federal guidelines that the states would use to adopt local coin rates that fairly compensate PSPs for the use of their payphones.<sup>79</sup> They argue that the guidelines must recognize that costs associated with local calls vary and have individual market characteristics, and that the states must be directed to eliminate all subsidies from other local exchange operations and from interexchange carriers.<sup>80</sup> US West argues that the Commission should not require the states to reexamine their respective local coin rates unless the per-call rate is below the nationwide predominant rate of \$.25.<sup>81</sup>

47.

48. Many states argue that the Commission must defer to the states in setting the local coin rates.<sup>82</sup> They argue that the states must maintain their wide discretion in setting the specific local coin rates.<sup>83</sup> Florida PSC, Indiana URC, and Tennessee contend that the Commission should prescribe a nationwide local coin rate or price cap and allow the states to petition for a variance.<sup>84</sup> APCC states that it would support a variance approach.<sup>85</sup> Ohio PUC asserts that it is within its authority to keep local coin rates low by requiring LECs to reduce the costs of various payphone services to PSPs.<sup>86</sup> California PUC argues that the Commission should adopt an approach to local coin rates that is a hybrid of setting federal guidelines and deferring to the states.<sup>87</sup> It argues that federal guidelines should allow states maximum participation in setting rates for payphones generally, and should recognize the interest of states in setting end-user rates for local calls and directory assistance calls.<sup>88</sup>

49.

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<sup>79</sup> See, e.g., Ameritech Comments at 7; Brill Comments at 1-2; GTE Comments at 4; GVNW Comments at 2-3; New Jersey DRA Comments at 2; USTA Comments at 4.

<sup>80</sup> Id.

<sup>81</sup> US West Comments at 4.

<sup>82</sup> See, e.g., Indiana URC Comments at 3-4; Iowa Comments at 2; Maine Comments at 2; Missouri PSC Reply at 3; Montana PSC Reply at 2; New York DPS Comments at 4; New York City Comments at 9; Ohio PUC Comments at 5; Oklahoma CC Comments at 3; Texas PUC Comments at 2; Virginia SCC Comments at 2. See also Cable & Wireless Comments at 5; MCI Comments at 4; MPTA Comments at 12-13.

<sup>83</sup> Id.

<sup>84</sup> Florida PSC Comments at 3; Indiana URC Reply at 3 (only when states do not directly regulate payphone rates); Tennessee Reply at 1.

<sup>85</sup> APCC Reply at 10.

<sup>86</sup> Ohio PUC Reply at 2-4.

<sup>87</sup> California PUC Comments at 12-13.

<sup>88</sup> Id. California PUC also argues that the Commission's proposed petition process for review of state-determined local rates might raise state constitutional issues, because any review process must depend on state constitutions and the procedural safeguards developed by those constitutions. Id. at 10.

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50. The RBOCs argue that the Commission should deregulate local coin rates entirely and allow the market to determine the rate in any particular location.<sup>89</sup> BellSouth, SW Bell, and US West argue that the Commission should deregulate local coin rates immediately.<sup>90</sup> Bell Atlantic, NYNEX, and Pacific Telesis contend that the Commission should deregulate local coin rates pursuant to federal standards after a transition period.<sup>91</sup> GTE argues that deregulation of local coin rates would be appropriate after a two-year transition period.<sup>92</sup> BellSouth contends that the Commission has the requisite authority to review local coin rates during any transition period.<sup>93</sup>

51.

52. USTA, GTE, WorldCom, and Florida PSC argue that, because PSPs receive commissions on 0+ intraLATA calls, these 0+ intraLATA calls should be treated like interLATA 0+ calls for purposes of compensation.<sup>94</sup> On the other hand, Virginia SCC contends that intraLATA 0+ calls should be treated in the same manner as local coin calls.<sup>95</sup> CompTel argues that because intraLATA calls are frequently routed to the LEC, not the presubscribed carrier, for which there may not be a commission paid to the PSP or location provider, treating intraLATA 0+ calls as interLATA 0+ calls would require IXCs to pay compensation on calls for which they receive no benefit.<sup>96</sup>

53.

54. The RBOCs and APCC, among others, contend that the Commission, to ensure compensation for "each and every completed intrastate and interstate call," should mandate that callers make a coin deposit or otherwise provide per-call compensation for "411" directory assistance calls.<sup>97</sup> They argue that such compensation is necessary to recover the costs associated with use of the payphone to make a directory assistance call.<sup>98</sup> SW Bell believes that per-call compensation for directory assistance calls is appropriate, but it specifies that the end user should be required to pay for these calls through a coin deposit.<sup>99</sup> Oklahoma CC argues that if the

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<sup>89</sup> RBOC Comments at 20; Ameritech Reply at 7; BellSouth Comments at 5; SW Bell Comments at 3; US West Reply at 5-6.

<sup>90</sup> RBOC Comments at 21.

<sup>91</sup> Id. at 22-23.

<sup>92</sup> GTE Reply at 5.

<sup>93</sup> BellSouth Comments at 6.

<sup>94</sup> Florida PSC Comments at 4; GTE Comments at 5; USTA Reply at 5; WorldCom Comments at 8.

<sup>95</sup> Virginia SCC Comments at 2.

<sup>96</sup> CompTel Comments at 5.

<sup>97</sup> APCC Comments at 23; Ameritech Comments at 8; RBOC Comments at 5; Telereleasing Reply at 6.

<sup>98</sup> Id.

<sup>99</sup> SW Bell Comments at 9; SW Bell Reply at 6-7.



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incumbent LEC charges independent payphone providers for directory assistance calls, then the LEC should be required to impute this cost to its own payphones for each directory assistance call.<sup>100</sup> Ohio PUC argues that the LEC providing the directory assistance service should not be permitted to charge the PSP for it, and, therefore, per-call compensation would not be necessary.<sup>101</sup>

55.

56. Because Section 276(b)(1)(A) requires a plan to ensure fair compensation for "each and every completed intrastate and interstate call," some commenters argue that the Commission is obligated to determine what constitutes a "completed" call for purposes of per-call compensation. Several of these commenters further argue that the Commission should define a "completed call" as a call that is answered by the called party.<sup>102</sup> They argue that compensating unanswered calls will lead to uneconomic rates for payphone users and will be contrary to a caller's expectations about when a call is billed. On the other hand, some of the independent payphone providers argue that a "completed call" consists of any call that reaches the carrier's platform, regardless of whether the call ultimately reaches the called party.<sup>103</sup> These independent payphone providers argue that per-call compensation is appropriate for these calls, because the payphone is being used for these calls and is, therefore, unable to earn other revenue.<sup>104</sup>

57.

58. Some IXCs provide different definitions of what should be considered a "completed call." Sprint and MCI argue that a call is completed when it earns revenue for the carrier.<sup>105</sup> WorldCom contends that an access code call is completed when it is billed, and a subscriber 800 call is completed when answer supervision is returned.<sup>106</sup> Other parties argue that, because it is often difficult for the parties to know whether a call was answered by the called party, the Commission should use a duration surrogate for completed calls.<sup>107</sup> The debit card providers, in particular, favor a duration surrogate because they estimate that fifty percent of debit card calls are not completed to the called party.<sup>108</sup> Under this approach, they argue, any call placed from a payphone below a certain duration would be excluded because it would be likely

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<sup>100</sup> Oklahoma CC Comments at 2.

<sup>101</sup> Ohio PUC Comments at 6.

<sup>102</sup> See, e.g., American Express Reply at 5; Cable & Wireless Comments at 6-8; CompTel Comments at 11; Excel Comments at 5; GTE Comments at 3; ITA Comments at 17-18; TRA Comments at 19; Voice Reply at 9.

<sup>103</sup> APCC Reply at 24; Brill Comments at 3.

<sup>104</sup> Id.

<sup>105</sup> MCI Comments at 2; Sprint Comments at 13.

<sup>106</sup> WorldCom Comments at 9-10.

<sup>107</sup> See, e.g., Conquest Comments at 11; Intellicall Comments 33-34; ITA Reply at 4; One Call Reply at 4-5.

<sup>108</sup> See, e.g., ITA Reply at 4.

that the call was not completed to the called party within that time period. The threshold duration proposed by these commenters varies from 42 seconds<sup>109</sup> to 60 seconds.<sup>110</sup> The RBOCs argue that a 60-second threshold should be used,<sup>111</sup> while APCC believes that the Commission should not rely on any duration threshold.<sup>112</sup> The RBOCs argue that multiple calls made through use of a payphone's "#" button, even though they require billing information to be dialed only once, should be counted as separate calls for compensation purposes.<sup>113</sup>

59.

60. Several commenters suggest alternative or supplementary approaches to per-call compensation. The RBOCs collectively contend that the Commission should look to compensating incoming calls in the future, because Section 276 does not differentiate between calls originated and received by a payphone.<sup>114</sup> SW Bell and US West, in their individual capacities, argue that the Commission must ensure fair compensation for incoming calls in this proceeding.<sup>115</sup>

61.

62. AT&T, the RBOCs, GTE, USTA, Florida PSC, Indiana URC, and various independent payphone providers agree with the tentative conclusion in the Notice that the Commission should provide compensation for international calls that make use of a payphone.<sup>116</sup> These commenters argue that there is no basis to exclude these calls from a compensation mechanism, and that a payphone performs the same functions for all types of calls.<sup>117</sup> AT&T and APCC argue that the term "interstate," as used in Section 276(b)(1)(A), includes international calls.<sup>118</sup> Sprint, MCI, and other IXC's oppose the Commission's tentative conclusion and argue that compensation for international calls goes beyond the plain language of the Section 276; that Congress would have specified compensation for "international" or "foreign" calls, as it did in other provisions of the 1996 Act, if it intended such compensation; and that the Commission

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<sup>109</sup> One Call Reply 4-5.

<sup>110</sup> Conquest Comments at 11; Intellicall Comments at 33-34. Cf. CompTel Comments at 12 (billing a 25 second call as "completed" is an unreasonable practice).

<sup>111</sup> RBOC Reply at 3.

<sup>112</sup> APCC Reply at 28.

<sup>113</sup> RBOC Comments at 17; accord Sprint Comments at 13.

<sup>114</sup> RBOC Comments at 5-6.

<sup>115</sup> SW Bell Comments at 9; US West Comments at 5.

<sup>116</sup> See, e.g., Actel Comments at 6; Ameritech Comments at 12; AT&T Comments at 5; CPA Comments at 2-3; Florida PSC Comments at 3; GTE Comments at 3; Indiana URC Comments at 3; NJPA Comments at 5; One Call Comments at 4; RBOC Comments at 2; Telaleasing Reply at 6; USTA Comments at 3.

<sup>117</sup> Id.

<sup>118</sup> AT&T Comments at 5; APCC Reply at 12.

does not otherwise have authority to impose this compensation obligation.<sup>119</sup> MCI argues that such compensation for international calls billed to non-U.S. carrier customers is not practicable, because the Commission does not have the requisite jurisdiction to require the foreign carrier to bill and collect the PSP compensation.<sup>120</sup>

63.

64. In response to the Commission's request for comment on how it might address possible compensation fraud associated with the improper dialing of subscriber 800 numbers to increase compensation payments, a wide range of commenters argue that the Commission must take strong enforcement action, including imposing severe penalties, on any party engaging in such fraud.<sup>121</sup> These commenters further argue that while the possibility of fraud exists, the Commission cannot refuse to compensate subscriber 800 calls.<sup>122</sup> The RBOCs, GTE, and Cable & Wireless contend that, in addition to enforcement action by the Commission, the carrier-payors should be given some latitude to take action and withhold compensation to parties who engage in fraud.<sup>123</sup> MCI and American Express argue that the Commission should require the LECs to report any suspicious calling patterns with regard to subscriber 800 numbers.<sup>124</sup> Other parties argue that the "carrier pays" compensation mechanism proposed by the Commission encourages fraud.<sup>125</sup> Several parties further argue that requiring the calling party to deposit coins for subscriber 800 calls would eliminate the incentive to engage in fraudulent calling.<sup>126</sup> Sprint argues that keeping the per-call compensation amount at the marginal cost of the use of the payphone would also reduce fraudulent calling.<sup>127</sup> AT&T contends that the Commission should use a surrogate setting forth the average number of subscriber 800 calls from a payphone to calculate the payment of per-call compensation for these calls.<sup>128</sup> To prevent other types of potential fraud, Frontier and Sprint argue that the Commission must adopt a definition of "payphone" for compensation purposes.<sup>129</sup>

<sup>119</sup> CompTel Comments at 13; Excel Comments at 3; MCI Comments at 3; Sprint Comments at 8; WorldCom Comments at 10.

<sup>120</sup> MCI Comments at 3-4.

<sup>121</sup> See, e.g., Actel Comments at 6; APCC Reply at 26-28; MCI Comments at 5; NJPA Comments at 6; RBOC Reply at 8.

<sup>122</sup> Id.

<sup>123</sup> Cable & Wireless Comments at 5-6; GTE Comments at 5-6; RBOC Reply at 8.

<sup>124</sup> MCI Comments at 5; American Express Reply at 10-11.

<sup>125</sup> See, e.g., Frontier Reply at 5-6; MobileMedia Reply at 7-8.

<sup>126</sup> Arch Comments at 5; Intellicall Comments at 27; Page Net Comments at 10-11; One Call Comments at 5.

<sup>127</sup> Sprint Comments at 11.

<sup>128</sup> AT&T Comments at 15.

<sup>129</sup> Frontier Reply at 6; Sprint Reply at 2.

65.

66. Four states, Maine, New Hampshire, New Mexico, and Vermont, filing joint comments, argue that Section 276 applies only to payphones provided by the RBOCs.<sup>130</sup> They argue further that the Commission is without authority under Section 276 to adopt rules that apply to all payphones, including those provided by non-BOC LECs and independent payphone providers.<sup>131</sup>

67.

68. **ii. Compensation Amount**

69.

70. APCC, AT&T, Sprint, and other commenters argue that the Commission should adopt a national uniform rate that it deems compensable for all calls using a payphone.<sup>132</sup> They contend that uniformity is necessary to avoid imposing undue burdens on carriers that would result from varying rates. In addition, they assert that the payphones perform identical functions for each type of compensable call.<sup>133</sup> The RBOCs argue that the Commission need not prescribe a rate for each type of compensable call, and should, instead, let the market dictate the appropriate per-call rate.<sup>134</sup>

71.

72. Some commenters argue that certain types of calls should receive a different per-call compensation amount than others. WorldCom contends that the amount of compensation should vary with the duration of the call to the extent that marginal cost also varies.<sup>135</sup> Invision and the Inmate Coalition, providers of inmate payphones, assert that the Commission should adopt a \$.90 per-call compensation rate that would apply only to calls using inmate payphones located in penal institutions.<sup>136</sup> They argue that payphone services for inmates is a distinct, specialized industry, which is required to provide, at a significant capital investment, operator service, fraud control, extensive call controls, and monitoring services throughout the duration of its calls. They argue further that these factors warrant a higher per-call compensation rate.<sup>137</sup> Another inmate payphone provider, Gateway, contends that the Commission should not adopt a separate, higher rate for inmate payphone calls, because such a rate would give inmate providers

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<sup>130</sup> Maine Comments at 2-3.

<sup>131</sup> Id.

<sup>132</sup> See, e.g., AirTouch Comments at 7; APCC Comments at 4, 9, 12; AT&T Comments at 10; Sprint Comments at 24.

<sup>133</sup> AT&T Comments at 10; Sprint Comments at 24.

<sup>134</sup> RBOC Reply at 1.

<sup>135</sup> WorldCom Comments at 20.

<sup>136</sup> Inmate Coalition Comments at 13; Invision Comments at 5. Ameritech states that it would not oppose a special per-call compensation rate for calls using an inmate payphone. Ameritech Reply at 8-9.

<sup>137</sup> Inmate Coalition Comments at 2-3; Invision Comments at 5.

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double recovery of costs already included in their rates and surcharges.<sup>138</sup> Gateway also argues that the Commission should defer consideration of a higher rate until after its OSP Reform proceeding, and that inmate providers should petition the various states for relief from state operator services rate caps.<sup>139</sup> MCI opposes the provision of per-call compensation for calls using either inmate payphones or semi-public payphones.<sup>140</sup> It asserts that semi-public payphones already receive adequate compensation from the premises owners.<sup>141</sup> The RBOCs contend that per-call compensation for semi-public payphones is warranted, because there is no statutory basis to preclude semi-public payphones from receiving compensation, and carriers benefit from dial-around traffic that originated on semi-public payphones.<sup>142</sup>

73.

74. The RBOCs also argue that any per-call rate the Commission sets should be regarded as a default rate, which parties would be free to alter by contract.<sup>143</sup> MCI and Sprint contend that the per-call amount should be adjusted downward in the future to account for technological advances that will reduce PSP costs.<sup>144</sup> APCC contends, on the other hand, that the per-call compensation rate should rise automatically at the same rate as inflation.<sup>145</sup>

75.

76. A number of IXC's and other commenters support the Commission's tentative conclusion that the amount of per-call compensation should be based on PSP costs and argue that the Commission must adopt a marginal cost standard.<sup>146</sup> They argue that under a marginal cost standard, a PSP would be allowed to recover the costs associated with the wear on the payphone's keypad and handset, along with additional costs over fixed costs.<sup>147</sup> MCI provides a study authored by the Hatfield Associates, which analyzes the costs of providing service for

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<sup>138</sup> Gateway Reply at 3-7.

<sup>139</sup> Id.

<sup>140</sup> MCI Comments at 3.

<sup>141</sup> Id.

<sup>142</sup> RBOC Reply at 3. Semi-public payphones are payphones that a LEC typically provides in exchange for both the coin revenue generated by the payphone and a monthly fee, paid by the location provider, discounted from the rate for a business line. Semi-public payphones tend to be located, at the request of the location provider, where public access is limited and an insignificant amount of calls are made.

<sup>143</sup> Id. at 10-11; RBOC Comments at 12. See also Sprint Comments at 13.

<sup>144</sup> MCI Comments at 15; Sprint Comments at 21. Sprint also argues that the per-call compensation rate should be subject to periodic Commission review. Sprint Comments at 24.

<sup>145</sup> APCC Reply at 34; contra Sprint Comments at 24.

<sup>146</sup> See, e.g., American Express Reply at 6-8; CompTel Comments at 16; Frontier Comments at 6-10; ITA Reply at 12-13; MCI Comments at 13; Oklahoma CC Comments at 2; Sprint Comments at 17-18; WorldCom Comments at 19-20.

<sup>147</sup> Id.

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access code calls, and concludes that the appropriate compensation amount would be \$.083 for each compensable call.<sup>148</sup> MCI argues that the \$.083 per call is fair compensation, because PSPs already receive revenues in excess of costs.<sup>149</sup> Sprint contends that the Commission should adopt a marginal cost-based rate of \$.0675 per call, based on its view that the \$.25 rate it currently pays for access code calls fairly compensates independent payphone providers for all calls.<sup>150</sup> In its analysis, Sprint found that 27% of all non-revenue generating calls from payphones are operator service calls for which 27% of \$.25 is the appropriate per-call compensation amount, *i.e.*, \$.0675.<sup>151</sup> MCI and Sprint further argue that the Commission should consider anew the \$.12 per-call compensation amount originally proposed in the Commission's 1991 Notice of Proposed Rulemaking in the access code call compensation proceeding, CC Docket No. 91-35, because this rate reflects payphone costs on a per-call basis.<sup>152</sup> AT&T favors an unspecified compensation amount related to marginal cost and based on the total services long-run incremental cost ("TSLRIC") method, which would recover the costs of providing and maintaining the payphone instrument, exclusive of coin collection functions, and the monthly SLC and other tariffed LEC services specific to payphones.<sup>153</sup> AT&T argues that the TSLRIC standard is "more generous" than a marginal-cost standard, because it allows PSPs to recover the portion of payphone costs that benefit the carriers whose customers initiate calls at payphones.<sup>154</sup> 77.

78. The RBOCs and the independent payphone providers oppose the use of a marginal cost-based compensation amount.<sup>155</sup> They argue that fair compensation embraces more than cost recovery, and that marginal cost disregards fixed costs, which are significant for a PSP.<sup>156</sup> USTA and GTE argue that AT&T's proposed TSLRIC-based compensation is not relevant to the provision of competitive services where rates should be guided by the market, and it does not permit full recovery of costs.<sup>157</sup>

<sup>148</sup> MCI Comments at 13. MCI also argues that \$.1559 per call is the maximum per-call amount that the Commission should consider under a marginal cost standard. MCI Reply at 2.

<sup>149</sup> Id. at 3.

<sup>150</sup> Sprint Comments at 23. Sprint also argues that because PSPs are already adequately compensated, the Commission should prescribe a per-call compensation amount of \$0, which it claims would comply with Section 276(b)(1)(A). Id. at 18.

<sup>151</sup> Id. Sprint argues that, in any case, the maximum permissible per-call compensation would be \$.25, with a downward adjustment mechanism to take advantage of technological developments that will reduce costs. Id. at 21.

<sup>152</sup> MCI Comments at 13-14; Sprint Comments at 21.

<sup>153</sup> AT&T Comments at 6-8.

<sup>154</sup> AT&T Reply at 2.

<sup>155</sup> See, e.g., APCC Comments at 11; APCC Reply at 30-34; IPTA Comments at 5-6; MICPA Comments at 2-3; RBOC Reply at 11-15; Telaleasing Reply at 6-7.

<sup>156</sup> RBOC Reply at 13.

<sup>157</sup> GTE Reply at 2; USTA Reply at 5, 7.

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79.

80. The RBOCs and the independent payphone providers argue that the Commission should adopt a per-call compensation standard that looks both to overall PSP costs and revenues and to market-based pricing. The RBOCs and GTE, in particular, advocate a per-call compensation amount that relies on market-based proxies.<sup>158</sup> The RBOCs provide a study that analyzes commission rates paid to PSPs by IXC generally and commission rates paid by AT&T and concludes that the appropriate per-call compensation amount should be in the range of \$.81 to \$.90 per call.<sup>159</sup>

81.

82. APCC contends that the Commission must consider market-based surrogates in setting a per-call compensation amount.<sup>160</sup> It proposes that the Commission adopt a compensation amount of \$.40 per call, if the Commission extends this rate to local coin calls, or \$.80 per call for all non-local coin calls that use a payphone.<sup>161</sup> APCC argues that these proposed amounts would fairly compensate PSPs for use of their payphones.<sup>162</sup> Peoples, the largest independent payphone provider, argues that the Commission should adopt a per-call compensation amount of \$.45, which would apply to all calls, including local coin calls.<sup>163</sup> Peoples includes in its comments summaries of data that, it maintains, show that Peoples' average pre-tax cost per call using its payphones is \$.40.<sup>164</sup> Other independent payphone providers argue that the Commission should adopt per-call compensation amounts that range from \$.40 to \$.55 per call.<sup>165</sup> AT&T and Sprint disagree with the approach proposed by APCC and the RBOCs and argue that it relies too much on the factors set forth in the Second Report and Order, which they claim are flawed, and on 0+ commissions, which reflect PSP opportunity costs, a basis for compensation rejected by the Commission in the Second Report and Order.<sup>166</sup> In addition, they argue that APCC and the RBOCs do not disclose actual costs, but instead include substantial overhead, advertising, and marketing and sales expenses in their model.<sup>167</sup>

83.

84. One Call contends that the local coin rate should be used as a surrogate for a fair

<sup>158</sup> GTE Comments at 9; RBOC Comments at 8-11.

<sup>159</sup> RBOC Comments at 8-11.

<sup>160</sup> APCC Comments at 31-34.

<sup>161</sup> Id. at 31.

<sup>162</sup> Id. at 31-34.

<sup>163</sup> Peoples Comments at 14-15.

<sup>164</sup> Id. at 20-24.

<sup>165</sup> See, e.g., Actel Comments at 7 (\$.50); Communications Central Comments at 9-10 (\$.40); IPTA Comments at 6 (\$.55); NJPA Comments at 8-9 (\$.50).

<sup>166</sup> AT&T Reply at 4-11; Sprint Reply at 15-17.

<sup>167</sup> Id.

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per-call compensation amount.<sup>168</sup> Conquest argues that the Commission should cap the per-call compensation amount at the rate for a local coin call.<sup>169</sup> AT&T, MCI, and the RBOCs all oppose use of a local coin rate surrogate to achieve fair compensation for PSPs.<sup>170</sup> They argue that local coin rates are kept artificially low by regulators and have no relationship to either cost or the market.<sup>171</sup>

85.

86. Some commenters contend that the Commission should adopt a per-call compensation amount that is within the range established by the 1992 Second Report and Order in the access code call compensation proceeding. NTCA argues that continued use of the \$.40 per call rate adopted in the Second Report and Order would not be disruptive and would ensure fair compensation for PSPs.<sup>172</sup> APCC argues that the Second Report and Order sets forth the type of market-based surrogates that are appropriate for the Commission to consider in the instant proceeding.<sup>173</sup> PageNet argues that the Commission should examine the \$6 per month LEC access charge compensation for payphones, as set forth in the Second Report and Order, and use this amount plus an intrastate recovery element to reach an amount that could be divided by the average number of compensable calls to equal the appropriate per-call rate.<sup>174</sup> The RBOCs contend, on the other hand, that the \$.40 per call amount in the Second Report and Order is out of date and should be higher.<sup>175</sup> AT&T and Sprint argue that the factors used in the Second Report and Order are irrelevant for determining fair compensation, because the factors do not relate to marginal cost and concern costs that are recovered through other revenue streams.<sup>176</sup>

87.

### 88. c. Discussion

89.

90. Defining "Fair Compensation". Section 276(b)(1)(A) directs the Commission to establish a plan "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."<sup>177</sup> The 1996 Act does

<sup>168</sup> One Call Comments at 8.

<sup>169</sup> Conquest Comments at 11.

<sup>170</sup> AT&T Reply at 11; MCI Comments at 14; RBOC Reply at 16.

<sup>171</sup> Id.

<sup>172</sup> NTCA Comments at 2.

<sup>173</sup> APCC Reply at 29.

<sup>174</sup> PageNet Comments at 18. PageNet also argues that it would not be appropriate for the Commission to rely on the surrogates it set forth in the Second Report and Order. Id. at 17.

<sup>175</sup> RBOC Comments at 11.

<sup>176</sup> AT&T Comments at 6; Sprint Comments at 19-20.

<sup>177</sup> 47 U.S.C. § 276(b)(1)(A). As stated above, this provision exempts from the Commission's mandate "emergency calls and telecommunications relay services for hearing disabled individuals" and states that such calls "shall not be subject to such compensation." Id. Cf. Telecommunications Relay Services, and the Americans with



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not prescribe a particular course to achieve these goals, other than to specify that such action shall "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public[.]"<sup>178</sup> To comply with this mandate, we tentatively concluded in the Notice that we must provide for compensation only when PSPs are not already "fairly compensated" for a particular type of a call using a payphone.<sup>179</sup> A number of commenters contend that we must look to all of a payphone's possible revenue streams and ensure that the payphone, as a whole, is fairly compensated.<sup>180</sup> We disagree. We conclude that, by ensuring that all calls are fairly compensated, including those for which the PSP currently receives no revenue, we will "promote competition" among PSPs and "promote the widespread deployment of payphone services to the benefit of the general public[.]"<sup>181</sup> The marketplace will necessarily determine whether or not a particular payphone is economically viable.

**91.**

92. We conclude that, once competitive market conditions exist, the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones. It is only in cases where the market does not or cannot function properly that the Commission needs to take affirmative steps to ensure fair compensation, such as in the following situations. First, because TOCSIA requires all payphones to unblock access to alternative OSPs through the use of access codes (including 800 access numbers), PSPs cannot block access to toll free numbers generally. However, TOCSIA does not prohibit an IXC from blocking subscriber 800 numbers from payphones, particularly if the IXC wants to avoid paying the per-call compensation charge on these calls. This uneven bargaining between parties necessitates the Commission's involvement. Second, as discussed more fully below,<sup>182</sup> we conclude that each state should, in light of the instant proceeding, examine and modify its regulations applicable to payphones and PSPs, particularly those rules that impose market entry or exit requirements, and others that are not competitively neutral and consistent with the requirements of Section 276 of the Act. We conclude that, for purposes of ensuring fair compensation through a competitive marketplace, states need only remove those regulations that restrict competition, and they need not address those regulations that, on a competitively neutral basis, provide consumers with information and price disclosure. Third, we conclude that callers should have information in every instance about the price of the calls they

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Disabilities Act of 1990, Memorandum Opinion and Order, CC Docket No. 90-571, 10 FCC Rcd 10927 (Com. Car. Bur. 1995) (suspending enforcement of TRS coin sent-paid service requirements until August 26, 1997, and adopting an interim plan wherein, inter alia, local TRS coin sent-paid calls are to be free of charge, and toll TRS coin sent-paid calls are to be chargeable to calling cards or debit cards at rates equivalent to rates for similar coin sent-paid service by non-TRS users).

<sup>178</sup> 47 U.S.C. § 276(b)(1).

<sup>179</sup> Notice at para. 16.

<sup>180</sup> See e.g., APCC Comments at 4-12.

<sup>181</sup> 47 U.S.C. § 276(b)(1).

<sup>182</sup> See para. 60, below.

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make from payphones. To this end, we require that each payphone clearly indicate the local coin rate within the informational placard on each payphone.

93.

94. While the most appropriate way to ensure fair compensation is to let the market set the price for individual payphone calls, we conclude that this transition to market-based rates should occur in two phases. Because LECs will terminate, pursuant to Section 276(b)(1)(b), subsidies for their payphones within one year of the effective date of the rules adopted in this proceeding,<sup>183</sup> LECs will not be eligible to receive compensation under Section 276(b)(1)(a) until that termination date. This one-year period before per-call compensation is effective, as discussed below, will be the first phase of implementing the rules adopted in this proceeding. During this first phase, states may continue to set the local coin rate in the same manner as they currently do. States may, however, move to market-based local coin rates anytime during this one-year period. In addition, the states must conduct its examination of payphone regulations during this one-year period to review and remove, if necessary, those regulations that affect competition, such as entry and exit restrictions. IXCs will pay compensation for access code calls and subscriber 800 calls on a flat-rate basis. In addition, all payphones must provide free access to dialtone, emergency calls, and telecommunications relay service calls for the hearing disabled.

95.

96. In the second phase, which will begin one year after the effective date of rules adopted in this proceeding, LECs will be eligible to receive compensation, and per-call tracking capabilities will be in place. The carriers to whom payphone calls are routed will be responsible for tracking each compensable call and remitting per-call compensation to the PSP. During this second year, which is the first year of per-call compensation (as opposed to flat-rate compensation), the market will be allowed to set the rate for local coin calls, unless the state can show that there are market failures within the state that would not allow market-based rates.<sup>184</sup> In addition, during the second phase, which will be the first year of per-call compensation (after the initial year of flat-rate compensation), to allow us to ascertain the status of competition in the payphone marketplace, we conclude, as discussed below,<sup>185</sup> that IXCs must pay PSPs a default rate of \$.35 for each compensable call, which may be changed by mutual agreement. PSPs will be required to post the local coin rate they choose to charge at each payphone. During the second phase, we may review, at our option, the deregulation of local coin rates nationwide and determine whether marketplace disfunctions exist, such as locational monopolies caused by the size of the location with an exclusive PSP contract or the caller's lack of time to identify potential substitute payphones, and should be addressed by the Commission. If we find that the deregulation of local coin rates warrants a modification of our approach due to market failures, we may choose to set a cap on the number of calls subject to compensation from particular payphones to limit the exercise of locational market power. Absent such a finding, at the conclusion of the second phase, the market-based local coin rate at these payphones will be the

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<sup>183</sup> See paras. 181-183, below.

<sup>184</sup> See para. 61, below.

<sup>185</sup> See para. 72, below.

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default compensation rate for all compensable calls in absence of an agreement between the PSP and the carrier-payor.

97.

98. Ensuring Fair Compensation. Most commenters who address the issue agree with our tentative conclusion that we must provide for compensation for all access code calls, subscriber 800 and other toll-free number calls, including debit card calls.<sup>186</sup> In keeping with our long-term goal to have the market set the compensation amount, we define "fair compensation" above as where there is a willing seller and a willing buyer at a price agreeable to both. For each of these types of calls, the PSP either receives no revenue for originating these calls (*i.e.*, for subscriber 800 and other toll-free number calls), or it is unable to block callers from making such calls (access code calls). The record in this proceeding includes substantial evidence that the number of these types of calls using payphones has proliferated in the past several years.<sup>187</sup> We conclude, therefore, that we must provide for compensation for access code calls and subscriber 800 and other toll-free number calls, whether they are intrastate or interstate in destination.

99.

100. We tentatively concluded in the Notice that we need not provide for compensation for 0+ calls, because independent payphone providers and non-BOC LECs receive compensation through individual contracts with the payphone's presubscribed IXC.<sup>188</sup> We also tentatively concluded that "competition in this area ensures 'fair' compensation for PSPs."<sup>189</sup> The RBOCs contend, however, that because Section 276(b)(3) expressly grandfathered contracts existing before the date of the statute's enactment between the location provider and the presubscribed carrier on many BOC payphones, the BOCs would not otherwise receive any compensation for 0+ calls.<sup>190</sup> They argue that the Commission must ensure fair compensation for 0+ calls that use BOC payphones.<sup>191</sup> We agree and modify our tentative conclusion so that, once the BOCs reclassify their payphones and terminate all subsidies, pursuant to Section 276(b)(1)(B),<sup>192</sup> they may receive the per-call compensation established by this Order, so long as

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<sup>186</sup> Notice at para. 17.

<sup>187</sup> See, e.g., APCC Comments at 5-6; Communications Central Comments at Attachment B; Peoples Comments at 9-10; Telaleasing Reply at 8. For example, Peoples, the largest independent payphone provider, states that subscriber 800 calls are 13% of the calls (86 calls out of 665 calls total) originated by a typical Peoples payphone, while access code calls comprise 6.5% (43 calls). Peoples also states that subscriber 800 calls represent almost 50% of non-coin calls for which compensation is warranted. Peoples Comments at 9-10. Other independent payphone providers report similar levels of subscriber 800 and access code calling from their payphones. See para. 123, below.

<sup>188</sup> Notice at para. 16.

<sup>189</sup> Id.

<sup>190</sup> See para. 25, above.

<sup>191</sup> Id.

<sup>192</sup> See paras. 181-183, below.

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they do not otherwise receive compensation for use of their payphones in originating 0+ calls. We conclude further that, in the absence of a contract providing compensation to the PSP for intraLATA 0+ calls, the PSP shall be eligible to collect per-call compensation from the carrier to whom the call is routed. We also conclude that when a caller dials "0" and the payphone subsequently translates this digit, unbeknownst to the caller, into an 800 access number (i.e., as a way of presubscribing the payphone to a particular IXC), such a call is not compensable as an access code call, because it does not put the caller into contact with an alternative carrier.<sup>193</sup>

101.

102. We conclude that PSPs should receive compensation for international calls. We conclude that we have authority under Sections 4(i) and 201(b) of the Communications Act of 1934, as amended,<sup>194</sup> to ensure that PSPs are fairly compensated for international as well as interstate and intrastate calls using their payphones in the United States. In addition, as we stated in the Notice, we find no evidence of congressional intent to leave these calls uncompensated under Section 276. We agree with AT&T and other commenters that a payphone performs similar functions, regardless of the destination of the call.

103.

104. Local Coin Calls. As outlined above,<sup>195</sup> we believe that full and unfettered competition is the best way of achieving Congress' dual objectives to promote "competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public."<sup>196</sup> Competition over time will lead to the more efficient placement of payphones, improved payphone service, and lower prices for consumers. To encourage competition in the payphone marketplace, we ensure in this Report and Order that PSPs are fairly compensated for "each and every completed intrastate and interstate call[:]" terminate certain LEC subsidies for payphones; and permit all PSPs, including BOCs, to negotiate with the location provider regarding the selection of the presubscribed interLATA and intraLATA carriers.

105.

106. Once competitive conditions exist, we believe that the market should set the compensation amount for all payphone calls, including local coin calls. Because we have an obligation under Section 276 to ensure that the compensation for all local coin calls is fair, we conclude that the market should be allowed to set the price for all compensable calls, including a local coin call. We believe this approach is appropriate because, once PSPs are free to enter the market, and once callers are free to choose payphones for their calls, the market will ultimately determine whether a particular payphone is economically viable. According to the record in this proceeding, five states have already deregulated local coin rates.<sup>197</sup> In four of those states, Iowa,

<sup>193</sup> See Reconsideration Order, 8 FCC Rcd at 7154. See also Conquest Comments at 12.

<sup>194</sup> 47 U.S.C. §§ 4(i), 201(b).

<sup>195</sup> See paras. 11-19, above.

<sup>196</sup> 47 U.S.C. § 276(b)(1).

<sup>197</sup> See Ex Parte Letter of Michael Kellogg, Counsel, RBOCs, to William Caton, Acting Secretary, FCC (August 30, 1996).

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Nebraska, North Dakota, and Wyoming, the market-based rate is \$.35 per call.<sup>198</sup> In the other deregulated state, South Dakota, the market-based rate is \$.25 per call.<sup>199</sup>

107.

108. Historically, however, the rate for the most common type of call -- the local coin call -- has not been set by the market, but has instead been determined by state commissions.<sup>200</sup> In the Notice, we stated that Section 276 of the Act requires the Commission to ensure that the PSP receives fair compensation for each interstate and intrastate call, including local coin sent-paid calls.<sup>201</sup> Section 276 also states that "to the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."<sup>202</sup> We sought comment in the Notice on how we should exercise our jurisdiction under Section 276, and noted that we have a range of options for ensuring fair compensation for local coin calls, including setting a nationwide local coin rate for all calls originated by payphones, establishing specific national guidelines that states would use to establish a local rate that would ensure that all PSPs are fairly compensated and permitting the states to continue setting the coin rates for local payphone calls according to factors within their discretion.<sup>203</sup>

**109.**

110. As we stated in the Notice, the Commission recognizes that the states have long had a traditional and primary role in regulating payphones, including setting local call rates paid by end users.<sup>204</sup> This role, however, has been in the context of LECs providing local payphone service as part of their regulated service. Section 276, however, significantly alters the regulatory landscape by requiring that LEC provision of payphone service be on par with independent PSP provision of service.<sup>205</sup> In addition, by mandating that LEC payphones can no longer receive subsidies from basic exchange services, Section 276 greatly changes the way in which states set local coin rates. Further, Section 276(b)(1)(A) gives the Commission both the jurisdiction to ensure fair compensation for local coin calls and the mandate to establish a plan to compensate PSPs on a per-call basis. We also stated our concern in the Notice that "current local rates may not always 'fairly' compensate the PSP for use of its payphone[.]" because the caller

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<sup>198</sup> Id.

<sup>199</sup> Id.

<sup>200</sup> Notice at para. 19.

<sup>201</sup> Id.

<sup>202</sup> 47 U.S.C. § 276(c).

<sup>203</sup> Notice at para. 20-22.

<sup>204</sup> Id.

<sup>205</sup> See also Jt. Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) at 43 ("Conference Report"): "In crafting implementing rules, the Commission is not bound to adhere to existing mechanisms or procedures established for general regulatory purposes in other provisions of the Communications Act."

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may use the payphone at "a subsidized local coin rate[.]"<sup>206</sup> Based on the record in this proceeding, we conclude that a deregulatory, market-based approach to setting local coin rates is appropriate, because existing local coin rates are not necessarily fairly compensatory.

111.

112. We recognize, however, that the competitive conditions, which are a prerequisite to a deregulatory, market-based approach, do not currently exist and cannot be achieved immediately. Many states impose regulations on PSPs, including certain requirements that must be fulfilled before a PSP can enter or exit the payphone marketplace. We conclude that these state regulations are barriers to a fully competitive payphone market, and, therefore, "to the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."<sup>207</sup> In addition, in some locations, because of the size of the location with an exclusive PSP contract or the caller's lack of time to identify potential substitute payphones, the PSP may be able to charge an inflated rate for local calls based on its monopoly, pursuant to an exclusive contract with the location provider, on all payphones at the location. We conclude that such monopoly arrangements, in the absence of regulatory oversight, could impair competition.

113.

114. Based on these concerns, we conclude that the overall transition to market-based local coin rates should not occur immediately. As discussed below,<sup>208</sup> LECs will not be required to terminate, pursuant to Section 276(b)(1)(b), certain subsidies associated with their payphones until April 15, 1997. LECs will not be eligible to receive per-call compensation under Section 276(b)(1)(a) for one year, when all such subsidies are terminated. For this one-year period, the states will be responsible for both ensuring that PSPs are fairly compensated for local coin calls and protecting consumers from excessive rates. Eventually, when fully competitive conditions exist, the marketplace will address both concerns. We conclude that, during this one-year period before per-call, as opposed to flat-rate, compensation becomes effective, states may continue to set the local coin rate in the same manner as they currently do. States may, however, move to market-based local coin rates anytime during this one-year period, and are encouraged to do so. In addition, we conclude that during the same period, the states should take additional action to ensure that payphone competition is promoted. As discussed above,<sup>209</sup> we believe that ease of entry and exit in this market will foster competition and allow the market, rather than regulation, to dictate the behavior of the various parties in the payphone industry. To this end, each state should examine and modify its regulations applicable to payphones and PSPs, removing, in particular, those rules that impose market entry or exit requirements. We conclude that, for purposes of ensuring fair compensation through a competitive marketplace, the states should remove only those regulations that affect payphone competition; the states remain free at all times to impose regulations, on a competitively neutral basis, to provide consumers with

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<sup>206</sup> Notice at para. 22, n.64.

<sup>207</sup> 47 U.S.C. § 276(c).

<sup>208</sup> See para. 181, below.

<sup>209</sup> See paras. 11-19, above.

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information and price disclosure.<sup>210</sup> In addition, the states at all times must ensure that access to dialtone, emergency calls, and telecommunications relay service calls for the hearing disabled is available from all payphones at no charge to the caller.

115.

116. At the conclusion of this first one-year period, the market will be allowed to set the price for a local coin call, as discussed more fully above.<sup>211</sup> However, we conclude that we should make an exception to the market-based approach for states that are able to demonstrate to the Commission that there are market failures within the state that would not allow market-based rates.<sup>212</sup> Such a detailed showing could consist of, for example, a detailed summary of the record of a state proceeding that examines the costs of providing payphone service within that state and the reasons why the public interest is served by having the state set rates within that market. In addition, under our deregulatory, market-based approach, when states have concerns about possible market failures, such as that of payphone locations that charge monopoly rates, they are empowered to act by, for example, mandating that additional PSPs be allowed to provide payphones, or requiring that the PSP secure its contract through a competitive bidding process that ensures the lowest possible rate for callers. If a market failure persists after such action, the state should recommend the matter to the Commission for possible investigation.<sup>213</sup> In addition, during the second phase, after the initial year of flat-rate compensation, we may review, at our option, the deregulation of local coin rates nationwide and determine whether marketplace disfunctions, such as locational monopolies where the size of the location or the caller's lack of time to identify potential substitute payphones, exist and should be addressed by the Commission. At this point, if we find that the deregulation of local coin rates warrants a modification of our approach due to market failures, we may choose, for example, to set a cap on the number of calls subject to compensation from particular payphones to limit the exercise of locational market power. Absent such a finding, at the conclusion of the second phase, the market-based local coin rate at these payphones will be the default compensation rate for all compensable calls in absence of an agreement between the PSP and the carrier-payor.

117.

118. With regard to "411" directory-assistance calls, we noted that, while incumbent LECs in many jurisdictions currently do not charge the payphone caller for "411" calls made from their own phones, the LECs charge independent payphone providers for directory-assistance calls made from their payphones, and are not always allowed by the state to pass those charges on to callers.<sup>214</sup> We conclude that we must ensure fair compensation for "411" and other

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<sup>210</sup> We note that state regulations and requirements must comply independently with other provisions of the Communications. See e.g., 47 U.S.C. § 253.

<sup>211</sup> See para. 56, above.

<sup>212</sup> This public interest showing is distinct from state concerns regarding the establishment and funding of public interest payphones, as discussed in Part VI, below.

<sup>213</sup> In its investigation, the Commission would use an economic and antitrust analysis to evaluate the market failure and determine whether Commission action was necessary to promote the underlying goals of Section 276 of the Act. See paras. 2, 11-19, above.

<sup>214</sup> Notice at para. 19.

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directory assistance calls from payphones by permitting the PSP to charge a market-based rate for this service, although a PSP may decline to charge for this service if it chooses. In addition, to help ensure that a LEC does not discriminate in favor of its own payphones, we conclude that if the incumbent LEC imposes a fee on independent payphone providers for "411" calls, then the LEC must impute the same fee to its own payphones for this service.

119.

120. Completed Calls. We agree with the commenters that, because Section 276(b)(1)(A) mandates compensation for "each and every completed intrastate and interstate call," we must determine what constitutes a "completed" call for purposes of per-call compensation. We conclude that a "completed call" is a call that is answered by the called party. We have previously found that, where an 800 calling card call is routed through an IXC's platform, it should not be viewed as two distinct calls -- one to the platform and one to the called party.<sup>215</sup> In addition, in Florida Public Telecommunications Ass'n v. FCC, the United States Court of Appeals for the District of Columbia Circuit emphasized the one-call nature of a subscriber 800 call from the caller's point of view.<sup>216</sup> A number of commenters contend that the Commission should use a duration surrogate for completed calls. We conclude that exempting calls from per-call compensation because they are not of a requisite duration, whether 25 seconds<sup>217</sup> or 60 seconds,<sup>218</sup> would not be in accordance with Section 276's mandate that "each and every completed intrastate and interstate call" be compensated.<sup>219</sup> In addition, to comply with this mandate, we conclude that, as argued by the RBOCs, multiple sequential calls made through the use of a payphone's "#" button should be counted as separate calls for compensation purposes.<sup>220</sup>

121.

122. The RBOCs argue that the phrase "call using their payphone" in Section 276(b)(1)(A) covers completed calls received by payphones as well as those originated by payphones.<sup>221</sup> Bell Atlantic, BellSouth, PacTel, and NYNEX, maintain that the Commission should look to compensating incoming calls at some unspecified point in the future.<sup>222</sup> We do not agree, however, that Section 276(b)(1)(A) was intended to apply to both incoming and outgoing calls.<sup>223</sup> Because PSPs may block incoming calls, they are able to restrict use of their payphones

<sup>215</sup> Teleconnect Co. v. Bell Telephone Company of Pennsylvania, 10 FCC Rcd 1626, 1629 (1995). See also Long Distance/USA, Inc. v. Bell Telephone Company of Pennsylvania, 10 FCC Rcd 1634 (1995).

<sup>216</sup> Florida Payphone, 54 F.3d at 860.

<sup>217</sup> See CompTel Comments at 12.

<sup>218</sup> See Conquest Comments at 11; Intellicall Comments at 33-34; RBOC Reply at 3.

<sup>219</sup> 47 U.S.C. § 276(b)(1)(A) (emphasis added).

<sup>220</sup> Some IXCs allow a caller to make successive calls, once she dials her calling card information, by pushing the "#" button at the conclusion of each call to regenerate the dialtone.

<sup>221</sup> RBOC Comments at 5-6.

<sup>222</sup> Id.



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if they are concerned about a lack of compensation. For this reason, we conclude that incoming calls are not within the purview of Section 276, and we are not required, as a result, to address them in the instant proceeding.

123.

124. Payphone Fraud. The Commission has recognized, since it first addressed the issue of compensation for subscriber 800 calls in 1991, that a PSP "could attach an autodialer to a payphone and have it place repeated 800 calls ... to increase the amount of compensation [it] receives."<sup>224</sup> Section 227(b)(1) of the Act states that it is unlawful for any person to use an autodialer to call "any service for which the called party is charged for the call[.]"<sup>225</sup> We conclude that this provision bars the use of autodialers to generate payphone compensation by calling toll-free 800 numbers, which are billed to the called party. A number of commenters argue that the Commission must take strong enforcement action against those who engage in autodialer fraud. We agree. We will aggressively take action against those involved in such fraud. We have authority under the 1996 Act and our rules to take civil enforcement action against a payphone provider who deliberately violates the Commission's compensation rules by placing toll free calls simply to obtain compensation from the carriers. More importantly, such activity may be fraud by wire and subject to criminal penalties.<sup>226</sup> Should we receive information that a PSP is using, or is allowing use of, its facilities in this manner, we will refer the matter to the appropriate law enforcement agencies for criminal prosecution. Contrary to suggestions by some commenters,<sup>227</sup> it is not necessary, nor would it be in the public interest, for the Commission to select a particular method of per-call compensation, such as a marginal cost-based approach, or a particular compensation amount, *i.e.* low enough to discourage fraud, simply to avoid the possibility of fraud.

125.

126. Both Frontier and Sprint argue that the Commission should adopt a definition of "payphone" for compensation purposes.<sup>228</sup> We have previously adopted a definition of "payphone" in the access code call compensation proceeding, although the definition is used only for purposes of the billing and collection of the compensation in that proceeding.<sup>229</sup> We concluded that payphones appearing on the LEC-provided customer-owned, coin-operated telephone ("COCOT") lists were payphones that are eligible for compensation.<sup>230</sup> If a payphone provider does not subscribe to an identifiable payphone service, or if its payphone is omitted

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<sup>223</sup> The legislative history of this provision does not address incoming calls.

<sup>224</sup> First Report and Order, 6 FCC Rcd at 4746.

<sup>225</sup> 47 U.S.C. § 227(b)(1).

<sup>226</sup> See, e.g., 18 U.S.C. § 1343.

<sup>227</sup> See para. 37, above.

<sup>228</sup> Frontier Comments at 22; Sprint Reply at 2.

<sup>229</sup> Reconsideration Order, 8 FCC Rcd at 7156-57.

<sup>230</sup> Id. at 7156.

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from the COCOT list in error, the provider is required to provide alternative verification information to the IXC paying compensation.<sup>231</sup> We conclude that this definition of "payphone," regardless if the payphone in question is independently- or LEC-provided, will be sufficient for the payment of compensation as mandated by Section 276 and the instant proceeding. In addition, as discussed below,<sup>232</sup> all payphones will be required to transmit specific payphone coding digits as a part of their automatic number identification ("ANI"), which will assist in identifying them to compensation payors. Beyond the immediate purposes of paying compensation, we conclude that a payphone is any telephone made available to the public on a fee-per-call basis, independent of any other commercial transaction, for the purpose of making telephone calls, whether the telephone is coin-operated or is activated either by calling collect or using a calling card.<sup>233</sup>

127.

128. Compensation Amount. In the Notice, we noted that "while we are still confronted in the instant proceeding by the lack of reliable [independent payphone provider] cost data," we tentatively concluded that "PSPs should be compensated for their costs in originating ... calls" using their payphones.<sup>234</sup> We tentatively concluded further that these costs should be measured by appropriate cost-based surrogates.<sup>235</sup> We sought comment, in particular, on whether some measure of generic or industry-wide costs is available, or whether incumbent LEC costs would be a reasonable surrogate for the costs of independent payphone providers.<sup>236</sup> Upon review of the comments submitted in response to the Notice, we find that while few parties provided cost surrogate data, the RBOCs, Peoples, IPTA, and MCI, among others, present studies on payphone costs. These studies vary in both their approaches to calculating compensation and their conclusions on the appropriate per-call compensation amount that the Commission should adopt.

129.

130. A number of commenters, notably the IXCs, argue that the Commission should use the marginal cost of originating a payphone call as the basis for compensating PSPs. We conclude that use of a purely incremental cost standard for all calls could leave PSPs without fair compensation for certain types of payphone calls, because such a standard would not permit the PSP to recover a reasonable share of the joint and common costs associated with those calls.<sup>237</sup> We also reject, for similar reasons, suggestions by commenters that we use local coin rates

<sup>231</sup> Id. at 7157. See also Second Further Notice, 10 FCC Rcd at 11457.

<sup>232</sup> See para. 98, below.

<sup>233</sup> See 47 U.S.C. § 226(a)(2); 47 CFR §§32.2351, 68.3.

<sup>234</sup> Notice at para. 38.

<sup>235</sup> Id.

<sup>236</sup> Id.

<sup>237</sup> Cf. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, FCC 96-325, para. 672-703 (rel. Aug. 8, 1996) ("Local Competition Order") (describing total element long-run incremental cost methodology for pricing interconnection and unbundled network elements).

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currently in place as a surrogate for a per-call compensation.<sup>238</sup> As we stated in the Notice, "local coin rates in some jurisdictions may not cover the marginal [incremental] cost of the service."<sup>239</sup> Therefore, basing the per-call compensation amount on current local coin rates, which are frequently subsidized by state regulators, would not fairly compensate the PSPs. We also reject use of the \$.12 per-call compensation amount the Commission first discussed in its 1991 Notice of Proposed Rulemaking in the access code call compensation proceeding. We never adopted the \$.12 per-call amount, and that rate was effectively rejected when the Commission adopted a \$6 flat rate per payphone per month based on a per-call rate of \$.40.<sup>240</sup>

131.

132. On the other hand, the RBOCs and the independent payphone providers propose that the Commission use market-based surrogates to support a per-call compensation amount. In particular, these commenters provide data on both the average commissions paid to independent payphone providers by AT&T on 0+ calls and the average commission received by independent payphone providers on 0+ calls from all IXC's. Previously, in the access code call compensation proceeding, we relied upon AT&T 0+ commissions as a measure of the fair value of the service provided by independent payphone providers when they originate an interstate call.<sup>241</sup> We conclude that use of 0+ commission data would tend to overcompensate PSPs, because these commissions may include compensation for factors other than the use of the payphone, such as a PSP's promotion of the OSP through placards on the payphone. We, therefore, reject use of this commission data, as provided by the RBOCs and independent payphone providers, to calculate the per-call compensation amount.

133.

134. Because we have established elsewhere in this Report and Order that the payphone marketplace has low entry and exit barriers and will likely become increasingly competitive,<sup>242</sup> we conclude that the market (or the states, where there are special circumstances) is best able to set the appropriate price for payphone calls in the long term. We conclude further that the appropriate per-call compensation amount ultimately is the amount the particular payphone charges for a local coin call, because the market will determine the fair compensation rate for those calls. For example, if the rate at a particular payphone is \$.35, absent an agreement between the PSP and the carrier-payor for a different amount, then the PSP should receive \$.35 for each compensable call (access code, subscriber 800, and directory assistance). If a rate is compensatory for local coin calls, then it is an appropriate compensation amount for other calls as well, because the cost of originating the various types of payphone calls are similar. Although the Commission tentatively concluded in the Notice that PSPs should be compensated for their costs in originating calls, as these costs are measured by appropriate cost-based surrogates, we conclude that deregulated local coin rates are the best available surrogates for payphone costs and are superior to the cost surrogate data provided by the commenters.

<sup>238</sup> See para. 46, above.

<sup>239</sup> Notice at para. 22, n.64.

<sup>240</sup> Second Report and Order, 7 FCC Rcd at 3257.

<sup>241</sup> Id.

<sup>242</sup> See paras. 11-19, above.

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135.

136. We conclude that the per-call compensation amount equal to the local coin rate, is a default rate that will apply only in the absence of a negotiated agreement between the parties. PSPs, IXCs, subscriber 800 carriers, and intraLATA carriers may agree on an amount for some or all compensable calls that is either higher or lower than the local coin rate at a given payphone. In absence of an agreement, the PSP shall be entitled to receive compensation for compensable calls at a per-call rate equal to its local coin rate, which represents the market-based rate for a call at the payphone in question.

137.

138. Before we move to a local coin call default rate, however, we find it necessary to observe over time how the payphone marketplace will function in the absence of regulation. In particular, consumers facing time constraints may not be able to find, in certain locations, a reasonable substitute for a payphone located on the premises. In these cases where the location provider has an exclusive contract with a PSP, the PSP may be able to charge supra-competitive prices. The location provider would share in the resulting "locational rents" through commissions paid by PSPs. To the extent that market forces cannot ensure competitive prices at such locations, we may want to continue regulating, along with the states, the provision of payphone services generally or in particular types of locations where the size of the location or the caller's lack of time to identify potential substitute payphones could lead to locational monopolies. To allow us to ascertain the status of competition in the payphone marketplace, we conclude that we should establish the default per-call rate for two years before leaving it to the market to set rate, absent any changes in our rules. More specifically, as discussed below,<sup>243</sup> for the first year after the effective date of the rules adopted in this proceeding, IXCs will pay flat-rate compensation to PSPs. After the initial year, when per-call tracking capabilities will be in place, we conclude that IXCs will be required to pay a default rate of \$.35 per call, which is the local coin rate in four of the five states that have deregulated their local calling rates.<sup>244</sup> We conclude that the market-based rate in these states is the best evidence of a per-call compensation amount that will fairly compensate PSPs. Therefore, for the limited purpose of calculating compensation for PSPs for the first two years of compensation (one year of flat-rate and one year of per-call compensation), we will use a default rate of \$.35 per call, which is the rate in the majority of states that have allowed the market to determine the appropriate local coin rate. As discussed above,<sup>245</sup> the carrier-payor and the PSP may agree to a compensation rate that is different, and, therefore, the default rate would not apply. For coinless payphones, which by definition do not have a local coin rate, the default rate will remain \$.35 per call for as long as this rate is fairly compensable under Section 276(b)(1)(A).

139.

140. Various parties ask us to provide for either upward adjustments in the per-call amount to account for inflation,<sup>246</sup> or downward adjustments to take advantage of technological

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<sup>243</sup> See paras. 119-126, below.

<sup>244</sup> See Ex Parte Letter of Michael Kellogg, Counsel, RBOCs to William Caton, Acting Secretary, FCC (August 30, 1996).

<sup>245</sup> See para. 51, above.

<sup>246</sup> APCC Reply at 34.

advances.<sup>247</sup> We conclude that by making the per-call amount subject to negotiations, the marketplace will make the appropriate adjustments, whether upward or downward. We set this compensation rate as a default rate to be applied only if the PSP and the IXC are unable to negotiate some other form of compensation for compensable calls. Negotiations may lead to rates other than the default rate for several reasons. First, because virtually all of the costs are fixed costs and are not incurred on a per call basis, an IXC and a PSP might agree to a fixed compensation rate rather than compensation for the monthly number of calls. Second, there may be locations in which a payphone would not be financially viable if compensated at only \$.35 per compensable call, but would be viable at a higher compensation rate. If an IXC still found it profitable to carry calls at this higher rate, then it would be in the mutual interest of the two parties to negotiate a higher rate. Third, the IXCs may choose to pass on the per-call compensation rate to their customers. In the case of 800 subscriber calls, the IXC could pass on the cost to the called party. If the called party refused to accept calls for which it was charged \$.35, but was willing to accept calls with a lower charge, the IXC and the PSP may find it in their mutual interest to negotiate a per-call rate lower than \$.35. Fourth, in locations where a competing payphone could be placed without the permission of the location provider, a PSP may be willing to negotiate a lower rate than \$.35, rather than give an IXC the incentive to place a competing payphone.

141.

142. Some PSPs argue that they should be entitled to a per-call compensation amount greater than that set for local coin calls. In particular, inmate payphone providers argue that their costs of originating calls are greater than that of other payphone providers, which should entitle them to a special compensation rate of \$.90 per call.<sup>248</sup> We conclude at this juncture, however, that mandating a per-call amount for inmate payphones, which do not allow local coin calls, could possibly lead to a double recovery of costs already included in higher-than-average operator service rates and special surcharges on end-user phone bills for calls made on these payphones, as argued by Gateway, an inmate payphone provider that opposes a greater per-call amount.

143.

144. MCI argues that semi-public payphones should not receive any per-call compensation.<sup>249</sup> Section 276(d) states, however, that "in this section, the term 'payphone service' means the provision of public or semi-public pay telephones...." Pursuant to this definition, all subsidies for semi-public payphones are terminated under Section 276(b)(1)(B), just as they are for public payphones, "in favor of a compensation plan as specified in subparagraph (A)[.]" Therefore, we conclude that, contrary to MCI's arguments, semi-public payphones are entitled to receive per-call compensation in the same manner as public payphones.

145.

146. We reject the argument by four states that Section 276 applies only to

<sup>247</sup> MCI Comments at 15; Sprint Comments at 21.

<sup>248</sup> Inmate Coalition Comments at 2-3; Invision Comments at 5.

<sup>249</sup> MCI Comments at 3.

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payphones provided by the BOCs.<sup>250</sup> While Section 276(a), which the states cite as support for their argument, applies only to the BOCs, as do Sections 276(b)(1)(C) and Section 276(b)(1)(D), the remainder of Section 276 applies to all payphones, regardless of their provider.<sup>251</sup> When Congress intended to limit the scope of a particular provision in Section 276 to the BOCs, it used the term "Bell operating company."<sup>252</sup> Otherwise, it used the term "all payphone service providers[.]"<sup>253</sup> or simply "payphone service providers."<sup>254</sup> For example, Section 276(b)(1)(A) states that the per-call compensation plan must "ensure that all payphone service providers are fairly compensated[.]"<sup>255</sup> In addition, Section 276(b)(1) states that the Commission shall take action to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public[.]"<sup>256</sup> Therefore, based on the plain language of the statute, we conclude that Section 276 grants us the requisite authority to adopt rules that apply to all payphones, regardless of their provider, except where the language clearly applies only to the BOCs. Further, the legislative history of Section 276 refers to both the BOCs and independent payphone service providers.<sup>257</sup>

147.

148. **2. Entities Required to Pay Compensation**

149.

150. **a. The Notice**

151.

152. In the Notice, the Commission stated that either a "carrier-pays" system, where the IXC who receives the call would be required to pay a per-call charge to the provider of the payphone, or a "set use fee" system, where the toll-carrier would bill and collect from the end user and then remit payment to the PSP, would satisfy the requirements of the 1996 Act.<sup>258</sup> The Commission stated, however, that the carrier-pays mechanism is preferable because it would result in less transaction costs because the toll-carrier could aggregate its payments to payphone providers.<sup>259</sup> Under a set use fee, the Commission stated, these payments would be spread among

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<sup>250</sup> See Maine Comments at 2-3. Four states, Maine, New Hampshire, New Mexico, and Vermont, filed comments jointly. For purposes of discussion, we refer to the joint comments as "Maine Comments."

<sup>251</sup> 47 U.S.C. § 276.

<sup>252</sup> 47 U.S.C. §§ 276(a), 276(b)(1)(C), 276(b)(1)(D).

<sup>253</sup> 47 U.S.C. §§ 276(b)(1)(A), 276(b)(1)(E).

<sup>254</sup> 47 U.S.C. §§ 276(b)(1), 276(b)(3).

<sup>255</sup> 47 U.S.C. § 276(b)(1)(A) (emphasis added).

<sup>256</sup> 47 U.S.C. § 276(b)(1).

<sup>257</sup> Conference Report at 43.

<sup>258</sup> Notice at paras. 25-28.

<sup>259</sup> Id. at para. 28.

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a vast number of payphone callers through their individual telephone bills.<sup>260</sup> Therefore, the Commission tentatively concluded that the appropriate compensation mechanism is a "carrier-pays" mechanism that builds on existing procedures under which IXCs currently pay access code call compensation.<sup>261</sup> Commenters were encouraged to include data on the transaction costs that would likely be imposed by either the "carrier-pays" or "set use fee" compensation mechanisms.<sup>262</sup>

153.

154.

**b. Comments**

155.

156. A wide range of commenters, including AT&T, the RBOCs, GTE, various states, and some independent payphone providers, supports the Commission's tentative conclusion that a "carrier-pays" system for per-call compensation should be adopted.<sup>263</sup> They argue that this approach is the least burdensome, most cost effective, and places the obligation to pay on the primary economic beneficiary of the calls, the carrier that carries the call.<sup>264</sup> Some parties assert that under this system, or any other system in which the carrier is responsible for paying compensation, it is the underlying, facilities-based carrier that should be responsible for paying compensation to PSPs.<sup>265</sup> Two debit card providers argue that IXCs and LECs should not be permitted to pass on the costs of per-call compensation exclusively to 800 subscribers.<sup>266</sup> Frontier contends that, under the carrier-pays system, LECs as well as IXCs should be required to pay compensation.<sup>267</sup> Frontier also contends that the Commission should adopt a carrier-pays system that is administered by the LECs, who, unlike the IXCs, will be able to leverage their existing business relationships as billing and collection agents for other carriers.<sup>268</sup>

157.

158. Other commenters, including APCC, MCI, and Sprint, contend that the Commission should adopt a "set use fee," which would be collected by the carrier that handles

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<sup>260</sup> Id.

<sup>261</sup> Id.

<sup>262</sup> Id.

<sup>263</sup> See, e.g., American Express Reply at 10; Ameritech Comments at 8; AT&T Comments at 12-13; California PUC Comments at 13; Florida PSC Comments at 4; GTE Comments at 7-8; IPTA Comments at 16; ITA Comments at 12-16; MICPA Comments at 4-5; NJPA Comments at 7; New York DPS Comments at 7; Ohio PUC Comments at 8; Peoples Comments at 25; RBOC Comments at 6; Telaleasing Reply at 11; Teleport Comments at 4; Voice Reply at 2.

<sup>264</sup> Id.

<sup>265</sup> APCC Comments at 24-25; GTE Reply at 6-7; Indiana URC Comments at 4; New York DPS Comments at 7.

<sup>266</sup> Intellicall Reply at 12; MobileMedia Reply at 6.

<sup>267</sup> Frontier Comments at 20-21.

<sup>268</sup> Id. at 12-14.

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the call and remitted to the PSP to compensate it for the use of its payphone.<sup>269</sup> These commenters argue that such a government-mandated fee would give visibility to the costs of payphone compensation, and would appropriately place these costs on the cost causer and lead to better economic decisions.<sup>270</sup> They also argue that the carrier-pays approach involves greater transaction costs than the set use fee, and that the carrier-pays approach is simply a payment of a subsidy to PSPs.<sup>271</sup> Other parties specifically oppose a set use fee on the grounds, among others, that it would make the IXC an involuntary billing agent for the PSPs.<sup>272</sup> With regard to subscriber 800 calls, PageNet, a paging service whose customers use subscriber 800 numbers, contends that charging 800 subscribers a set use fee would be an unjust and unreasonable practice under Section 201(b) of the Act.<sup>273</sup> In addition, Intellicall, a debit card provider, argues that imposing fees on 800 subscribers would interfere with existing contracts between carriers and debit card providers.<sup>274</sup> While favoring a "carrier-pays" system, PacTel argues that the Commission should "grandfather" the existing set use fee imposed at the state level by the California PUC.<sup>275</sup> The RBOCs further argue that the Commission should grandfather all existing state set use fees.<sup>276</sup> On the other hand, Sprint and MWAA argue that the Commission must preempt all existing state set use fees and that the states must be directed to follow federal compensation models to avoid inconsistent state regulations.<sup>277</sup>

159.  
160. Various commenters, including small IXCs and paging services, argue that the Commission should adopt what they call a "caller-pays" compensation system.<sup>278</sup> Under this system, the calling party would always pay for the call by either depositing a coin or by billing the charge to a credit card or calling card.<sup>279</sup> For subscriber 800 calls, the calling party would

<sup>269</sup> See, e.g., APCC Comments at 23; CPA Comments at 5-8; MCI Comments at 6; One Call Comments at 5-6; Sprint Comments at 12.

<sup>270</sup> Id.

<sup>271</sup> Id.

<sup>272</sup> See, e.g., ITA Reply at 9-10; MICPA Comments at 4-5; MWAA Reply at 6; New York DPS Comments at 7; Teleport Comments at 3; TRA Comments at 23; WorldCom Comments at 12.

<sup>273</sup> PageNet Comments at 8. Cf. MobileMedia Reply at 6 (800 subscriber is wrong compensation payor).

<sup>274</sup> Intellicall Comments at 22.

<sup>275</sup> PacTel Reply at 2.

<sup>276</sup> RBOC Reply at 6-7.

<sup>277</sup> MWAA Reply at 4-6; Sprint Comments at 10.

<sup>278</sup> See, e.g., AirTouch Comments at 13; Arch Comments at 4 (for subscriber 800 calls); Excel Comments at 8; Frontier Comments at 10-12; MobileMedia Reply at 1-2, 3-7; PCIA Comments at 3-4; PageNet Comments at 10-11; Scherers Comments at 3-4, 6-7; WorldCom Comments at 11-12.

<sup>279</sup> Id.



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always be required to deposit a coin into the payphone.<sup>280</sup> These commenters argue all of the following: this approach would be no more burdensome than a local coin call; it would reduce transaction costs; and it would avoid the coin-free approach that is inconsistent with CPE treatment.<sup>281</sup> At least two commenters dispute the Commission's statement in the Notice that TOCSIA barred the Commission from imposing a coin-deposit compensation system for access code calls.<sup>282</sup> The two commenters argue that the adoption of rate guidelines or a rate cap would not be a prescription of advance payment by callers, as prohibited by TOCSIA.<sup>283</sup> A number of parties oppose either a fee imposed on the calling party or the coin-deposit requirement for certain types of calls under this system.<sup>284</sup> They argue that the impact on callers should be either minimized or transparent.<sup>285</sup>

161.

162. Conquest, Intellicall, MobileMedia, and PageNet contend that the Commission should recover the funds necessary for per-call compensation by raising the monthly subscriber line charge ("SLC") that is paid by all telephone customers.<sup>286</sup> They argue that because payphones are used at one time or another by virtually all telephone customers, they should collectively bear the cost of per-call compensation. In addition, they argue that there are no reliable data that show which segments of the population use payphones more than others.<sup>287</sup>

163.

164. Some commenters argue that some parties should either be exempted from the obligation to pay per-call compensation or be allowed to "phase-in" their payment obligations. TRA and Scherers argue that resellers of interexchange service should not be required to pay per-call compensation, at least on an interim basis, because they are unable to pass on these costs without severely impacting their business.<sup>288</sup> TRA, ITA, and American Express further argue that all existing debit cards should be "grandfathered" and the carriers exempted from having to pay per-call compensation on the calls associated with those cards.<sup>289</sup> ITA and Voice contend that per-call compensation obligations associated with debit cards should be phased in after six

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<sup>280</sup> Id.

<sup>281</sup> Id.

<sup>282</sup> Intellicall Comments at 32-33; MobileMedia Reply at 9-10.

<sup>283</sup> Id.

<sup>284</sup> See, e.g., Ameritech Comments at 8; Florida PSC Comments at 4; MWAA Reply at 6; New York DPS Comments at 7; Oklahoma Comments at 2; TRA Comments at 23; Texas PUC Comments at 3 (for access code calls); Virginia SCC Comments at 3.

<sup>285</sup> Id.

<sup>286</sup> Intellicall Comments at 21; MobileMedia Reply at 10-11; Page Net Comments at 7.

<sup>287</sup> Id.

<sup>288</sup> Scherers Comments at 4-9; TRA Comments at 5-12.

<sup>289</sup> American Express Reply at 10; ITA Comments at 22-23; TRA Comments at 15-16.

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months.<sup>290</sup>

165.

166. **c. Discussion**

167.

168. We agree with those commenters who maintain that the primary economic beneficiary of payphone calls should compensate the PSPs.<sup>291</sup> We conclude that the "carrier-pays" system for per-call compensation places the payment obligation on the primary economic beneficiary in the least burdensome, most cost effective manner. The Commission has previously adopted such an approach in the access code compensation proceeding, and the compensation participants have created a payment system that is an appropriate model for this proceeding.<sup>292</sup> We conclude that the carrier-pays system also gives IXCs<sup>293</sup> the most flexibility to recover their own costs, whether through increased rates to all or particular customers, through direct charges to access code call or subscriber 800 customers, or through contractual agreements with individual customers. Although some commenters would have the Commission limit the ways in which carriers could recover the cost of per-call compensation,<sup>294</sup> we conclude that the marketplace will determine, over time, the appropriate options for recovering these costs. In addition, under the carrier-pays system, individual carriers, while obligated to pay a specified per-call rate to PSPs, have the option of recovering either a different amount from their customers, including no amount at all. We conclude further that all IXCs that carry calls from payphones are required to pay per-call compensation.

169.

170. In the Notice, we discussed the option of adopting a "set use fee, " which would be collected by the carrier and remitted to the PSP to compensate it for the use of its payphone.<sup>295</sup> We tentatively concluded that this system involved greater transactions costs than the carrier-pays system, because a set use fee would spread payments among a vast number of payphone callers through their individual telephone bills.<sup>296</sup> A number of commenters maintain that the set use fee would involve fewer transaction costs and that the carrier-pays system

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<sup>290</sup> ITA Comments at 24-26; Voice Reply at 3.

<sup>291</sup> See para. 77, above.

<sup>292</sup> Second Report and Order, 7 FCC Rcd at 3257-60.

<sup>293</sup> For purposes of paying compensation for compensable calls and other associated obligations, such as the tracking of calls, we note that the term "IXC" includes a LEC when it provides interstate, intraLATA toll service. Currently, because LECs are not the primary carrier for subscriber 800 calls, the relevant toll calls for which LECs will be obligated to pay compensation are those that are made with use of a LEC-specific access code. As LECs (both incumbent and non-incumbent) begin to carry additional toll calls originated by payphones, they will be required to pay per-call compensation on those calls.

<sup>294</sup> See n. 262, above

<sup>295</sup> Notice at para. 28.

<sup>296</sup> Id.

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represents the payment of a subsidy to PSPs.<sup>297</sup> We disagree and conclude that the Commission's mandating that a particular set use fee be imposed and collected from callers on millions of payphone calls would lead to far greater transaction costs than through the carrier-pays system, particularly given the flexibility the carrier has under the carrier-pays system to recover the costs of per-call compensation as it sees fits.

171.

172. The "caller-pays" system advocated by a number of commenters is a variation of the set use fee under which the caller, as the "cost causer," would always be required to deposit coins to make a subscriber 800 call, and would have the option of either depositing coins or receiving a charge through a calling card for placing other types of calls that do not use a payphone's presubscribed carrier.<sup>298</sup> For reasons similar to those cited for rejecting the set use fee system, we likewise reject the caller-pays system. While depositing coins into a payphone to make, for example, a subscriber 800 call may not be more burdensome than a local coin call and may involve fewer transaction costs than a billed charge, we found in the Notice that any payment system that relies upon the deposit of coins "would appear to unduly burden many transient payphone callers by requiring them to deposit coins in addition to providing call-billing information."<sup>299</sup> We also noted in the Notice that "TOCSIA expressly prohibits the Commission from adopting compensation rules for interstate access code calls that require 'advance payment by consumers.'"<sup>300</sup> At least two commenters argue that the Commission could interpret this statutory prohibition as applying only to the prescription of a specific compensation amount, which would not preclude adoption of compensation amount guidelines, including a coin-deposit approach,<sup>301</sup> but we conclude that such an approach would contradict the congressional intent, and possibly the plain language, of Section 226(e)(2) of the Act.<sup>302</sup> We also reject the approach suggested by some commenters that the Commission should increase the monthly SLC, which compensates a LEC for non-traffic-sensitive costs associated with the use of its network, for all telephone customers to fund the per-call compensation system. We conclude that raising the SLC for this purpose would be contrary to the goals of the Act, because these payments would not be borne by either the primary economic beneficiary of payphone calls or the cost causer.

173.

174. Some commenters, including APCC, GTE, New York DPS, and Indiana URC, argue that it is the underlying, facilities-based carrier that should be required to pay compensation to the PSP in lieu of a non-facilities-based carrier that resells services, for example, to specific subscribers or to debit card users.<sup>303</sup> We agree. Although we have

<sup>297</sup> See para. 79, above.

<sup>298</sup> See para. 79, above.

<sup>299</sup> Notice at para. 27.

<sup>300</sup> Id.

<sup>301</sup> See para. 80, above.

<sup>302</sup> 47 U.S.C. § 226(e)(2).

<sup>303</sup> See para. 81, above.

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concluded that the primary economic beneficiary of payphone calls should bear the burden of paying compensation for these calls, we conclude that, in the interests of administrative efficiency and lower costs, facilities-based carriers should pay the per-call compensation for the calls received by their reseller customers.<sup>304</sup> Because they do not have their own networks, it would be significantly more burdensome for resellers to track calls from payphones. In addition, telecommunications services are often sold in advance, particularly in the debit card context, and resold more than once before a caller ultimately uses the service. In such situations, it would be difficult to identify the party that is liable for the per-call compensation. We conclude further that the facilities-based carriers may recover the expense of payphone per-call compensation from their reseller customers as they deem appropriate, including negotiating future contract provisions that would require the reseller to reimburse the facilities-based carrier for the actual payphone compensation amounts associated with that particular reseller.

175.

**176.** Various commenters, notably resellers and debit card providers, argue that the Commission should either exempt them on an interim basis from the obligation to pay compensation, or to "grandfather" debit cards that have already been issued from the compensation obligation. We conclude that, because Section 276 creates no exceptions for calls facilitated by resellers or debit card providers, such exemptions from the obligation to pay compensation, even on an interim basis, would be contrary to the congressional mandate that we ensure fair compensation for "each and every completed intrastate and interstate call."<sup>305</sup> While we have not placed the burden of paying per-call compensation directly on resellers or debit card providers, we conclude that the underlying carrier must begin paying compensation on all compensable calls facilitated by its reseller and debit card customers and it is, in turn, permitted to impose the payphone compensation amounts on these customers.

177.

### 178. **3. Ability of Carriers to Track Calls From Payphones**

179.

#### 180. **a. The Notice**

181.

182. The Commission tentatively concluded, in the Notice, that tracking mechanisms and surrogates exist, or might readily be made available, to support the per-call compensation plan mandated by Section 276(b)(1)(A).<sup>306</sup> We sought comment on what tracking options are currently, or may soon be, available. Additionally, we sought further comment on the ability of existing IXC-based tracking mechanisms to accommodate all payphone providers and IXCs. In the event that no standard technology or mechanism available for tracking exists, the Commission sought comment on alternative surrogate methodologies that could be devised. Finally, we sought comment on which party or parties, whether IXCs, PSPs, or intraLATA carriers, should be required to develop and maintain the tracking or surrogate methodologies.<sup>307</sup>

<sup>304</sup> See, e.g., ITA Comments at 12-16 ("regulatory nightmares" involving excessive network upgrades and transaction costs can be avoided by requiring underlying carrier to pay compensation).

<sup>305</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>306</sup> Notice at para. 30.

<sup>307</sup> Id.

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183.

184. The Commission also tentatively concluded that IXC and intraLATA carriers should be required to initiate an annual independent verification of their per-call tracking functions, to be made available for FCC inspection, to ensure that they are tracking all of the calls for which they are obligated to pay compensation.<sup>308</sup> Additionally, the Commission sought comment on whether BOCs and other LECs that provide network tracking for their own payphones should be required to make those tracking services available to independent payphone providers at the same rates, terms, and conditions as they provide themselves.<sup>309</sup>

185.

186. **b. Comments**

187.

188. The RBOCs support the Commission's tentative conclusion that the requisite technology currently exists for carriers to track calls routed to them from payphones.<sup>310</sup> The RBOCs argue further that no standardized technology for tracking calls needs to be prescribed by the Commission, and that carriers should be permitted to use whatever technology they prefer to meet their tracking obligations.<sup>311</sup> They request that, if the Commission requires the carrier receiving the call to provide the call tracking, then the Commission should not preclude LECs and PSPs from developing their own call tracking capabilities.<sup>312</sup> The RBOCs also contend that the Commission should establish both a timeline for achieving full call tracking capabilities within 12 months after the effective date of the rules, and interim compensation rates based on average calling rates until then.<sup>313</sup>

189.

190. The RBOCs, USTA, Sprint, One Call, California PUC, and others argue that the Commission should require that IXCs that receive the calls from payphones be obligated to provide the call tracking necessary for compensation.<sup>314</sup> These parties argue that only IXCs can track calls to completion, IXCs are the primary economic beneficiary of these calls, and that non-IXC tracking surrogates are not reliable.<sup>315</sup> Ameritech argues, on the other hand, that the IXCs should not be required to track calls, except during a brief transition period.<sup>316</sup>

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<sup>308</sup> Id. at para. 31.

<sup>309</sup> Id.

<sup>310</sup> RBOC Comments at 7.

<sup>311</sup> Id.

<sup>312</sup> Id. at 8.

<sup>313</sup> Id.

<sup>314</sup> See, e.g., California PUC Comments at 11; MICPA Comments at 5; One Call Comments at 7; RBOC Comments at 7; Sprint Comments at 13; USTA Reply at 3-4.

<sup>315</sup> RBOC Comments at 7; Sprint Comments at 13-14.

<sup>316</sup> Ameritech Comments at 11-12.

191.

192. Other commenters note difficulties that they argue are inherent with IXC tracking capabilities. MCI and Sprint argue that each payphone should be required to generate 07 or 27 coding digits within the automatic number identification ("ANI") for the carrier to track calls.<sup>317</sup> AT&T states that it currently cannot track subscriber 800 calls because it receives only the ANI of the terminating telephone.<sup>318</sup> Because it estimates that a per-call tracking ability for subscriber 800 calls will take one year to achieve, AT&T argues that the Commission should use a surrogate for these calls, which relies on "studies made from a representative weighted sample of central-office-implemented payphones."<sup>319</sup> The RBOCs propose a year phase-in period for tracking subscriber 800 calls, but argue that AT&T's proposed surrogate would rely on central-office-implemented or "dumb" payphones, which are found in low usage areas and, therefore, would underestimate the volume of subscriber 800 calls.<sup>320</sup> USTA also supports relying on a surrogate for subscriber 800 calls for a one year transition period.<sup>321</sup> Some IXCs, such as MCI, Cable & Wireless, and CompTel, contend that carrier tracking is not practical or appropriate, and that it would involve substantial new investment.<sup>322</sup> Cable & Wireless estimates that it would require a \$1 million investment to establish a tracking mechanism for all of the calls that its network carries.<sup>323</sup> Cable & Wireless also contends that requiring IXCs to track calls would lead to an impossible administrative task on the part of the carriers, because the IXCs would need to search all of their call records to identify and separate out calls from payphones.<sup>324</sup>

193.

194. APCC argues that the Commission has a number of options for mediating the per-call tracking burden of the small carriers. One option, according to APCC, would be to require the LECs to track calls on behalf of small IXCs.<sup>325</sup> A second option, APCC argues, would be to relieve small carriers of the tracking obligation and have them pay per-call compensation, particularly for subscriber 800 calls, on a flat rate per month according to their percentage of toll revenue or, if possible, their percentage of overall payphone and non-payphone 800 service traffic.<sup>326</sup> The RBOCs contend, on the other hand, that the small carriers should be required to

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<sup>317</sup> MCI Comments at 10; Sprint Comments at 16.

<sup>318</sup> AT&T Comments at 14-15.

<sup>319</sup> Id. at 15.

<sup>320</sup> RBOC Reply at 7.

<sup>321</sup> USTA Reply at 3-4.

<sup>322</sup> See, e.g., Cable & Wireless Comments at 9-11; CompTel Comments at 8; MCI Comments at 8.

<sup>323</sup> Cable & Wireless Comments at 10.

<sup>324</sup> Id. at 9-11.

<sup>325</sup> APCC Reply at 20-21.

<sup>326</sup> APCC Comments at 27.

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track individual calls using payphones or contract out the tracking to another party, because carriers that benefit from being in the market must accept the responsibilities that go with it.<sup>327</sup> 195.

196. Various commenters, particularly some IXC and Ameritech, argue that the Commission should place the obligation to track calls using a payphone on LECs, PSPs, or a combination of both. For example, CompTel argues that LECs should provide the tracking, and the PSPs should pay the LECs for this service.<sup>328</sup> MCI and Indiana URC contend that LECs and PSPs should share the responsibility for tracking calls.<sup>329</sup> WorldCom argues that per-call tracking should be the responsibility of the LECs,<sup>330</sup> while Ameritech and Scherers argue that the PSPs should assume this obligation.<sup>331</sup> These parties contend that LEC- or PSP-based tracking would be superior because those who want payment must keep count of compensable calls and bill for them, and all payphones will soon be able to obtain call detail information to make this possible.<sup>332</sup> Ameritech argues that the Commission should require IXCs to process answer supervision for LECs engaged in tracking.<sup>333</sup> The RBOCs, GTE, and NECA oppose a tracking system that would place the responsibility for tracking calls on LECs.<sup>334</sup> They argue both that the Commission should not disproportionately burden the LECs while other parties receive the primary benefit for these calls, and that only IXCs can track calls to completion and detect multiple calls within a single dialing transaction.<sup>335</sup> USTA contends that LECs are not able to track subscriber 800 calls.<sup>336</sup>

197.

198. The RBOCs support the Commission's tentative conclusion that carriers should be required to initiate an annual independent verification of their per-call tracking functions for a period of two years, provided that both the Commission and PSPs be allowed to inspect this verification.<sup>337</sup> APCC argues that the Commission should require annual independent audits of carriers' per-call tracking functions and require the carriers to compare their data against parallel LEC or smart payphone data.<sup>338</sup> Telaleasing argues that such an audit should occur on a

<sup>327</sup> RBOC Reply at 9.

<sup>328</sup> CompTel Comments at 9-10.

<sup>329</sup> MCI Comments at 8; Indiana URC Comments at 4.

<sup>330</sup> WorldCom Comments at 14-15.

<sup>331</sup> Ameritech Comments at 11; Scherers Comments at 5.

<sup>332</sup> Ameritech Comments at 11; Scherers Comments at 5; WorldCom Comments at 14-15.

<sup>333</sup> Ameritech Reply at 10.

<sup>334</sup> GTE Reply at 7-8; NECA Reply at 2; RBOC Reply at 6-7. See also Puerto Rico Telephone Reply at 6.

<sup>335</sup> Id.

<sup>336</sup> USTA Reply at 3-4.

<sup>337</sup> RBOC Comments at 7.

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quarterly basis.<sup>339</sup>

199.

200. **c. Discussion**

201.

202. Based on the information in the record, we conclude that the requisite technology exists for IXCs to track calls from payphones. We recognize, however, that tracking capabilities vary from carrier to carrier, and that it may be appropriate, for an interim period, for some carriers to pay compensation for "each and every completed intrastate and interstate call" on a flat-rate basis until per-call tracking capabilities are put into place, as discussed below.

203.

204. We conclude further that, as stated in the Notice, it is the responsibility of the carrier, whether it provides intraLATA or interLATA services, as the primary economic beneficiary of the payphone calls, to track the calls it receives from payphones,<sup>340</sup> although the carrier has the option of performing the tracking itself or contracting out these functions to another party, such as a LEC or clearinghouse. In other words, while we assign the burden of tracking on the carrier receiving the call from a payphone, parties to a contract may find it economically advantageous to place this tracking responsibility on another party. We decline to require LECs or PSPs to perform per-call tracking themselves. Neither LECs nor PSPs are the primary economic beneficiaries of payphone calls. We conclude, however, that LECs, PSPs, and the carriers receiving payphone calls should be able to take advantage of each other's technological capabilities through the contracting process. To this end, we agree with the RBOCs and conclude that no standardized technology for tracking calls is necessary, and that IXCs may use the technology of their choice to meet their tracking obligations.<sup>341</sup>

205.

206. MCI and Sprint contend that each payphone should be required to generate 07 or 27 coding digits within the ANI for the carrier to track calls.<sup>342</sup> We agree. Currently under our rules, LECs are required to tariff federally originating line screening ("OLS") services that provide a discrete code to identify payphones that are maintained by non-LEC providers.<sup>343</sup> We conclude that LECs should be required to provide similar coding digits for their own payphones.

207.

208. AT&T states that it currently cannot track subscriber 800 calls because it receives only the ANI of the terminating telephone, and it estimates that a per-call tracking

<sup>338</sup> APCC Comments at 26.

<sup>339</sup> Telaleasing Reply at 11.

<sup>340</sup> Notice at paras. 29-31.

<sup>341</sup> See RBOC Comments at 7.

<sup>342</sup> MCI Comments at 10; Sprint Comments at 16.

<sup>343</sup> Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Third Report and Order (rel. Apr. 5, 1996) at para. 34 ("OLS Order").



ability for subscriber 800 calls will take one year to achieve.<sup>344</sup> Other commenters, such as the RBOCs and USTA, propose a one-year transition before carriers are required to track subscriber 800 calls. In view of the current difficulties in tracking such calls, we conclude that a transition is warranted for requiring carriers to track compensable calls. Therefore, we require carriers to provide for tracking of all compensable calls they receive from payphones, through any arrangement they choose, as soon as possible, but no later than one year from the effective date of the rules adopted in this proceeding.<sup>345</sup> Until that date, carriers must pay flat-rate compensation, as specified below.<sup>346</sup>

209.

210. We recognize that implementing a per-call tracking capability will require new investments for some carriers, particularly small carriers, but we conclude that the mandate of Section 276 that we ensure a fair "per call compensation plan" for "each and every completed intrastate and interstate call" requires these carriers to provide tracking for calls for which they receive revenue, even though they previously did not have to compensate the PSP for many of these calls. We conclude further that, by permitting carriers to contract out their per-call tracking responsibility, and by allowing a transition for tracking subscriber 800 calls, we have taken the appropriate steps to minimize the per-call tracking burden on small carriers. In addition, we conclude that, to parallel the obligation of the facilities-based carrier to pay compensation, the underlying, facilities-based carrier has the burden of tracking calls to its reseller customers, and it may recover that cost from the reseller, if it chooses.

211.

212. In the Notice, we tentatively concluded that carriers should be required to initiate an annual verification of their per-call tracking functions to be made available for FCC inspection upon request, to ensure that they are tracking all of the calls for which they are obligated to pay compensation. We require this verification for a one-year period, the 1998 calendar year, and delegate to the Chief, Common Carrier Bureau, the authority to establish the form and content, if necessary, of the verification documentation of these per-call tracking capabilities. We conclude that requiring carriers to maintain the appropriate records and certify as to the accuracy of both the data and the tracking methodology would facilitate the prompt and accurate payment of per-call compensation. We also conclude that PSPs should be allowed to inspect this certification, apart from any proprietary network data. In addition, we expect that the PSPs and carriers performing the tracking will work together to reconcile or explain any PSP data that are inconsistent with the annual certification. We decline to adopt, however, the suggestions of some commenters that we require a full-scale independent audit of a carrier's tracking capability, or mandate that the verification occur on a quarterly basis. A full-scale audit or a quarterly verification would impose too great of a burden on carriers in an area where we have encouraged them to use technology and other arrangements of their choice in implementing a per-call tracking capability.

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<sup>344</sup> AT&T Comments at 14-15.

<sup>345</sup> As discussed at para. 49, above, IXCs also have the option of avoiding the obligation to pay per-call compensation for subscriber 800 calls by blocking these calls from payphones.

<sup>346</sup> See paras. 119-126, below.

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213.

214. **4. Administration of Per-Call Compensation**

215.

216. **a. The Notice**

217.

218. In the Notice, the Commission tentatively concluded that the direct-billing arrangement established for the payment of compensation from IXC to PPOs should be used with the simple addition of requiring IXCs, and the intrastate interexchange operations of LECs, to send back to each PSP a statement indicating the number of toll-free and access code calls that each carrier has received from each of that PSP's payphones.<sup>347</sup> The Commission also proposed to establish a requirement that the carrier responsible for paying compensation file annually a brief report with the Common Carrier Bureau listing the total amount of compensation paid, pursuant to the rules adopted in this proceeding, to PSPs for intrastate, interstate, and international calls; the number of compensable calls received by the carrier; and the number of payees.<sup>348</sup> Such a requirement would help ensure that the carriers are tracking all of the calls for which they are obligated to pay compensation.<sup>349</sup>

219.

220. Because the compensation mechanism proposed in the Notice uses the ANI as the basis for tracking calls, the Commission tentatively concluded that minimal regulatory guidelines for the industry should be adopted regarding resolution of disputed ANIs in the per-call compensation context.<sup>350</sup> Possible guidelines for which the Commission has sought comment are as follows: (1) intraLATA carrier provision of a list of payphone ANIs to IXCs (e.g., each quarter); (2) verification of disputed ANIs by intraLATA carrier on request; (3) maintenance of verification data for at least 18 months after the close of a compensation period; (4) acceptance of compensation claims once an intraLATA carrier makes a positive identification of an installed payphone; (5) IXC denial of payment for compensation claims that are submitted by a PSP over one year after the end of the period in question.<sup>351</sup>

221.

222. **b. Comments**

223.

224. APCC argues that the compensation payor should bear the costs associated with the administration of the compensation mechanism.<sup>352</sup> Various commenters argue that the Commission should use a direct-billing arrangement for the payment of compensation from IXCs

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<sup>347</sup> Notice at paras. 32-33.

<sup>348</sup> Id. at para. 33.

<sup>349</sup> Id.

<sup>350</sup> Id. at para. 34.

<sup>351</sup> Id.

<sup>352</sup> APCC Reply at 25-26.

to PSPs that is similar to the one adopted in the access code call compensation proceeding.<sup>353</sup> MCI argues that under the Commission's proposed direct-billing arrangement, carriers should be required to report to the Commission only the total amount of compensation paid to all PSPs annually.<sup>354</sup> Other commenters, notably the small IXCs, contend that the LECs are better equipped than the IXCs and intraLATA carriers to administer the payment of per-call compensation.<sup>355</sup> Some of these commenters argue that PSP-administered compensation would be preferable to that handled by the carriers receiving the payphone calls.<sup>356</sup> SDN argues that compensation should be based on a national formula and administered by the individual states.<sup>357</sup> 225.

226. The RBOCs, Sprint, APCC, and Peoples support the Commission's tentative conclusion that minimal regulatory guidelines for the industry should be adopted regarding resolution of disputed ANIs.<sup>358</sup> They argue that LECs must be given an incentive to provide accurate and timely verification of ANIs for independently provided payphones.<sup>359</sup> MCI argues that a dispute resolution process is not necessary if payphones are required to transmit certain information digits associated with payphone-originated calls.<sup>360</sup> 227.

228. The commenters also make a number of suggestions on the possible dispute resolution guidelines articulated by the Commission in the Notice. GTE argues that mandatory procedures in this area are not necessary, because of the increased costs they will entail.<sup>361</sup> In addition, GTE argues that PSPs are able to file a complaint with the Commission when they have a dispute regarding compensation.<sup>362</sup> With regard to the list of payphone ANIs provided each quarter by the LECs, AT&T argues that it is the LEC that provides the payphone line that must provide the list, not the intraLATA carrier presubscribed to the payphone.<sup>363</sup> GVNW argues that requiring LECs to furnish IXCs with a quarterly list of ANIs is too costly and burdensome, and

<sup>353</sup> See, e.g., AT&T Comments at 16; GVNW Comments at 4.

<sup>354</sup> MCI Comments at 11.

<sup>355</sup> See, e.g., Cable & Wireless Comments at 11-12; CompTel Comments at 10-11; Excel Comments at 6-7; Frontier Comments at 12-14; WorldCom Comments at 17-18.

<sup>356</sup> Cable & Wireless Comments at 13; Excel Comments at 7; MCI Comments at 19.

<sup>357</sup> SDN Comments at 2.

<sup>358</sup> APCC Comments at 29; Peoples Comments at 26; RBOC Comments at 7; Sprint Comments at 15.

<sup>359</sup> Id.

<sup>360</sup> MCI Comments at 11.

<sup>361</sup> GTE Comments at 8-9.

<sup>362</sup> Id.

<sup>363</sup> AT&T Comments at 17.

technology-based solutions to tracking problems will eventually make this list unnecessary.<sup>364</sup> AT&T requests that the Commission require the LECs to submit the ANI list to the IXC within 30 days of the end of a compensation period.<sup>365</sup>

229.

230. AT&T and Sprint contend that if the LEC does not provide verification of a disputed payphone ANI, carriers should not be required to pay compensation.<sup>366</sup> AT&T further contends that LECs should be required to provide verification in a timely fashion.<sup>367</sup> MICPA argues that carriers should not be able to use delays in LEC verification to delay the payment of compensation to PSPs.<sup>368</sup> APCC argues that the Commission should impose a penalty for LECs that do not make a verification when requested.<sup>369</sup> MCI suggests that if a payphone is disconnected, the LEC should be required to notify the compensation-paying carriers within 24 hours.<sup>370</sup> NTCA contends that the possible guidelines outlined by the Commission would impose too great of a burden on small LECs.<sup>371</sup> MCI argues that the statute of limitations for the payment of compensation should not be tolled while ANIs are being disputed.<sup>372</sup> Two state associations of independent payphone providers argue that the Commission must prohibit the carriers from imposing undue burdens on PSPs before paying compensation.<sup>373</sup>

231.

232. A number of independent payphone providers argue that the Commission should shorten the quarterly compensation period.<sup>374</sup> Peoples and Telaleasing both suggest that carriers should pay compensation to PSPs on a monthly basis.<sup>375</sup> MCI argues that it should not be required to pay compensation on claims more than three months old.<sup>376</sup> Sprint argues that, to reduce the administrative burden and costs associated with the payment of compensation,

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<sup>364</sup> GVNW Comments at 3.

<sup>365</sup> AT&T Comments at 17.

<sup>366</sup> AT&T Comments at 17-18; Sprint Comments at 15.

<sup>367</sup> AT&T Comments at 17.

<sup>368</sup> MICPA Comments at 6.

<sup>369</sup> APCC Comments at 29.

<sup>370</sup> MCI Comments at 12.

<sup>371</sup> NTCA Comments at 5-6.

<sup>372</sup> MCI Comments at 12.

<sup>373</sup> IPTA Comments at 19; MICPA Comments at 6.

<sup>374</sup> IPTA Comments at 21; MICPA Comments at 6; Peoples Comments at 26; Telaleasing Reply at 11.

<sup>375</sup> Peoples Comments at 26; Telaleasing Reply at 11.

<sup>376</sup> MCI Comments at 12.

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carriers should be allowed to defer payment to PSPs until the PSP is due to receive a minimum of \$10 from that carrier.<sup>377</sup> The RBOCs contend that the Commission should impose a penalty on carriers who demonstrate a wilful failure to pay compensation.<sup>378</sup> APCC argues that PSPs should be allowed to charge interest for payments that have been due for more than 90 days.<sup>379</sup> 233.

234. To facilitate the payment of compensation, CompTel argues that PSPs should register with a central resource all payphones for which carriers must pay compensation.<sup>380</sup> It argues that this step would reduce administrative costs for all parties, avoid duplication of efforts, and negate the risk of multiple payments to separate parties claiming ownership of the same payphone.<sup>381</sup> APCC argues that, to avoid additional payment disputes, each LEC bill for payphone service must affirmatively state that it is for payphone service.<sup>382</sup>

235.

### 236. c. Discussion

237.

238. We conclude that we should adopt a direct-billing arrangement between IXCs and PSPs, once tracking capabilities are in place, that would build on the arrangement established in the access code call compensation proceeding, with the addition of the requirement that these carriers must send back to each PSP a statement indicating the number of toll-free and access code calls that each carrier has received from each of that PSP's payphones.<sup>383</sup> This arrangement places the burden of billing and collecting compensation on the parties who benefit the most from calls from payphones -- carriers and PSPs. For this reason, we conclude that it would not be appropriate to burden LECs with the administration of the per-call compensation mechanism, because their economic interest in the compensable calls is significantly less than that of the IXCs and PSPs. While PSPs could be efficient administrators of a compensation mechanism, we conclude that the carriers already responsible for tracking the calls and paying compensation for them have the greatest ability and incentive to establish the most efficient means of administering the payment of compensation. As with the tracking of calls, carrier-payers are free to use clearinghouses, similar to those that exist for access code call compensation, or to contract out the direct-billing arrangement associated with the payment of compensation. We decline to leave it to the individual states to administer compensation, as suggested by SDN,<sup>384</sup> because we believe the parties can agree on a solution more efficient than the likely varying approaches adopted by each of the states.

<sup>377</sup> Sprint Comments at 15.

<sup>378</sup> RBOC Comments at 7.

<sup>379</sup> APCC Comments at 30. See also Telaleasing Reply at 11.

<sup>380</sup> CompTel Comments at 11. See also GTE Comments at 7-8; Oklahoma CC Comments at 3.

<sup>381</sup> CompTel Comments at 11.

<sup>382</sup> APCC Comments at 30.

<sup>383</sup> Notice at paras. 32-33.

<sup>384</sup> See para. 104, above.

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239.

240. We also proposed in the Notice to establish a requirement that the carrier responsible for paying compensation file each year a brief report with the Common Carrier Bureau listing the total compensation paid to PSPs for intrastate, interstate, and international calls; the number of compensable calls carried by the carrier; and the number of payees.<sup>385</sup> Such a requirement would help ensure that the carriers are tracking all of the calls for which they are obligated to pay compensation. This requirement will apply to calendar year 1998, when tracking capabilities are in place and compensation is being paid on a per-call basis. While MCI argues that carriers should be required to report only the total amount of compensation to all PSPs annually, we conclude that more detailed reporting is necessary to monitor the per-call payphone compensation mechanism in its initial complete calendar year to help ensure that all IXCs are paying their respective compensation obligations. We conclude further that, once per-call compensation is routinely paid by IXCs, this reporting requirement will be terminated after the carriers have filed their reports for the 1998 calendar year.<sup>386</sup> Carrier-payors should file their reports as soon as possible after the end of the calendar year, but no later than the end of the first quarter of the following year. To implement the reporting requirement, we delegate to the Chief, Common Carrier Bureau, the authority to establish the form and content, if necessary, of the annual report listing the total amount of compensation paid to PSPs, including the authority to extend or limit the scope of this report.

241.

242. While we have elected to burden the LECs only insignificantly in creating the per-call compensation mechanism mandated by Section 276 of the Act, we conclude that we must establish minimal regulatory guidelines for the payphone industry regarding resolution of disputed ANIs to give LECs<sup>387</sup> a greater incentive to provide accurate and timely verification of ANIs for independently provided payphones. While any party may file a complaint with the Commission about disputed ANIs, we conclude that the better practice is for LECs who maintain the list of ANIs to work with both carrier-payors and PSPs to resolve disputes more efficiently and quickly before lodging a complaint with the Commission. We also conclude that we should require that each LEC must submit to each carrier-payor on a quarterly basis a list of ANIs of all payphones in the LEC's service area (called the "COCOT list" in the access code call compensation proceeding).<sup>388</sup> We disagree with GVNW's proposal that furnishing the quarterly list of ANIs is too costly and burdensome for LECs. As stated above, we have attempted to minimize the burdens on LECs, and no party has shown that there is currently an effective substitute for this list, despite the future promise of technological solutions.

243.

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<sup>385</sup> Notice at para. 33.

<sup>386</sup> Id. at para. 33, n. 90.

<sup>387</sup> As AT&T correctly points out, it is the LEC that provides the payphone line that must provide the list of ANIs, not the intraLATA carrier presubscribed to the payphone. AT&T Comments at 17.

<sup>388</sup> Second Report and Order, 7 FCC Rcd at 3259. LECs are permitted to "recover their reasonable costs in generating and producing these lists through direct charges" to the carriers using them. Reconsideration Order, 8 FCC Rcd at 7157. "COCOT" is an acronym for customer-owned, coin-operated telephone.

244. In response to the various arguments made by commenters, we conclude that the following guidelines will facilitate the proper verification of payphone ANIs by LECs. First, LECs must provide a list of payphone ANIs to carrier-payors within 30 days of the close of each compensation period (i.e., each quarter). Second, LECs must provide verification of disputed ANIs on request, in a timely fashion. Such verification data must be maintained and available for at least 18 months after the close of a compensation period. Third, once a LEC makes a positive identification of an installed payphone, the carrier-payor must accept claims for that payphone's ANI until the LEC provides information, on a timely basis, that the payphone has been disconnected. Fourth, a LEC must respond to all requests for ANI verification, even if the verification is a negative response. Carrier-payors are not required to pay compensation once the LEC verifies that the particular ANI is not associated with a COCOT line for which compensation must be paid. Fifth, carrier-payors should be able to refuse payment for compensation claims that are submitted long after they were due. Carriers should not refuse payment on timeliness grounds, however, for ANIs submitted by a PSP up to one year after the end of the period in question. Further, the period for a PSP to bring a complaint to the Commission based on an ANI disputed by the carrier-payor will not begin to accrue until the carrier-payor issues a final denial of the claim.

245.

246. We conclude that the guidelines, as outlined above, will facilitate the proper verification of payphones without imposing undue burdens on LECs, PSPs, or carrier-payors. In adopting these guidelines, we reject a number of proposals by commenters. First, in response to the argument of AT&T and Sprint that they not be required to pay compensation when a LEC fails to verify a particular ANI, we conclude that by directing LECs to respond to all requests for verification, carriers should be able to avoid payment only when the LEC issues a negative response to the verification inquiry. Second, we conclude that mandating a penalty on the LEC, as urged by APCC, for failing to respond to a verification request in a timely manner, is not necessary when the Commission's complaint process is available. Similarly, the complaint process is available to PSPs for instances of a carrier's wilful failure to pay compensation, as discussed by the RBOCs. We note that we will aggressively take action on such complaints. Third, we conclude that requiring a LEC to notify all carrier-payors of a payphone disconnection within 24 hours would be too great a burden to place on LECs, particularly when they are required to provide ANI lists only on a quarterly basis. Such notification, however, should occur on a basis as timely as possible. Fourth, we conclude that, for purposes of bringing a complaint before the Commission concerning a carrier's payment of payphone compensation, the time period for the statute of limitations does not begin to run until after the carrier-payor considers a compensation claim and issues a final denial of the claim. To conclude otherwise, as suggested by MCI, would permit a carrier-payor to delay a denial of the claim to preclude a PSP's complaint remedy before the Commission.

247.

248. Various independent payphone providers argue that we should require compensation to be paid on a monthly basis. In the access code call compensation proceeding, we allowed the parties to determine how and when compensation would be paid, and quarterly compensation period was adopted by the industry through consensus.<sup>389</sup> While the industry may

<sup>389</sup> Second Report and Order, 7 FCC Rcd at 3259.

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decide upon a similar compensation period for per-call compensation, we leave the details associated with the administration of this compensation mechanism to the parties to determine for themselves through mutual agreement.<sup>390</sup> We disagree, however, with MCI's proposal that carriers not be required to pay compensation claims that are more than three months old. Because a carrier-payor's administrative expenses are presumably reduced through the payment of compensation on a quarterly, as opposed to monthly, basis, we conclude that the reasonable trade-off is that the carrier remains liable, as discussed above,<sup>391</sup> for compensation claims that are submitted within one year of the end of the compensation period in question. The parties may themselves revisit this issue if they elect a shorter compensation period. Sprint argues that a carrier should be allowed to defer payments to individual PSPs until the amount due aggregates to \$10 from that carrier to the particular PSP for all of its payphones. We agree and conclude that such a requirement would reduce the administrative expenses associated with the payment of compensation. If PSPs would like to charge interest on overdue payments from IXCs, as suggested by APCC,<sup>392</sup> they should negotiate such a provision in their compensation agreement with the particular carrier.

249.

250. We agree with APCC that the payment of compensation would be facilitated and some disputes avoided if LECs were required to state affirmatively on their bills to PSPs that the bills are for payphone service. We conclude that LECs who have knowledge that a particular phone line is used for a payphone, must indicate on that payphone's monthly bill that the amount due is for payphone service. We also agree with CompTel's suggestion that the registration of all payphones with a central resource or clearinghouse would reduce administrative costs for all parties and would avoid duplication of efforts. We decline, however, to mandate the creation of a central resource or clearinghouse for compensation purposes, and believe that the parties themselves are better able to establish such a resource that would be directly connected to the payment of compensation.

251. **5. Interim Compensation Mechanism**

252.

253. **a. The Notice**

254.

255. The Commission sought comment on whether independent payphone providers should receive some measure of interim compensation, to be paid until the effective date of the final rules adopted in this proceeding, for the growing volume of dial-around calls originated from their payphones.<sup>393</sup> Those who support such relief were instructed to comment on the appropriate interim compensation amount, how such an interim compensation mechanism could be structured, and the feasibility of implementing an interim plan when final rules are required to be in place in nine months.<sup>394</sup> The Commission also requested comment on the legal

<sup>390</sup> Id.

<sup>391</sup> See para. 113, above.

<sup>392</sup> See para. 108, above.

<sup>393</sup> Notice at para. 39.

<sup>394</sup> Id. at para. 40.



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basis for, and practical consequences of, making such interim compensation effective as of the release date of the Notice.<sup>395</sup>

256.

257. **b. Comments**

258.

259. Various independent payphone providers and BellSouth argue that the Commission should prescribe interim relief for independent payphone providers, retroactive to the date of the Notice and to be paid until the effective date of the rules adopted in this proceeding, for the growing volume of dial-around calls originated from their payphones.<sup>396</sup> They argue that independent payphone providers, unlike the LECs, are uncompensated for the majority of coinless calls that use their payphones, and that the quantity of these calls is increasing.<sup>397</sup> They also argue that delays for unforeseen reasons will likely impact the effective date of the final rules in this proceeding, which makes an interim relief mechanism a necessity for the survival of their businesses.<sup>398</sup> These commenters suggest compensation amounts that range from \$.40 on a per-call basis<sup>399</sup> to \$24,<sup>400</sup> \$38.70,<sup>401</sup> and \$40<sup>402</sup> on a flat rate per phone basis. Intellicall suggests that the Commission prescribe interim relief through a "caller-pays" coin deposit approach.<sup>403</sup> BellSouth also argues that LEC-owned payphones should be eligible to receive interim relief once they have removed all subsidies from their payphone operations.<sup>404</sup> The RBOCs, GTE, AT&T, MCI, Sprint, and One Call all oppose granting interim relief to independent payphone providers.<sup>405</sup> They argue that such relief would be unadministrable because it would require parties to participate in two payment systems, and interim relief would be without a statutory basis.<sup>406</sup> AT&T states that it does not oppose interim relief for access code

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<sup>395</sup> Id.

<sup>396</sup> APCC Comments at 34-40; BellSouth Comments at 6-7; Communications Central Comments at 10-11; NJPA Comments at 9-10; Peoples Comments at 10-11; Telaleasing Reply at 8.

<sup>397</sup> APCC Comments at 34-37; Peoples Comments at 10-11.

<sup>398</sup> Id.

<sup>399</sup> APCC Comments at 36-40; Communications Central Comments at 10-11.

<sup>400</sup> NJPA Comments at 9-10.

<sup>401</sup> Peoples Comments at 10-11, accord BellSouth Reply at 2; Telaleasing Reply at 9.

<sup>402</sup> APCC Comments at 36-40.

<sup>403</sup> Intellicall Comments at 36.

<sup>404</sup> BellSouth Reply at 2.

<sup>405</sup> AT&T Comments at 11; GTE Comments at 10; MCI Comments at 15; One Call Comments at 8; RBOC Comments at 19-20; Sprint Comments at 25.

<sup>406</sup> Id.

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calls only.<sup>407</sup>

260.

261. c. **Discussion**

262.

263. Because the IXCs required to pay compensation to PSPs are not required to track individual compensable calls until one year from the effective date of the rules adopted in this proceeding, we conclude that PSPs should be paid monthly compensation on a flat rate by IXCs with annual toll revenues in excess of \$100 million, beginning on the effective date of the rules adopted in this proceeding and ending on October 1, 1997.<sup>408</sup> This flat-rate monthly compensation will apply proportionally to individual IXCs, based on their respective annual toll revenues. For reasons of administrative convenience of the parties, we conclude that we should model the interim mechanism adopted in this Report and Order on that set forth in the access code call compensation proceeding.<sup>409</sup> In the access code compensation proceeding, CC Docket No. 91-35, we excused several carriers from the obligation to pay flat-rate compensation for originating access code calls, because they certified that they were not providers of "operator services," as defined by TOCSIA.<sup>410</sup> We note that Section 276's requirement that we ensure fair compensation for "each and every completed intrastate and interstate call," including access code calls, supersedes the compensation obligations established in CC Docket No. 91-35, including the waivers granted to AT&T and Sprint.<sup>411</sup> Because Section 276 is the statutory authority for mandating per-call compensation for all compensable calls, including access code calls, the statutory exclusion in TOCSIA for those carriers that are not providers of "operator services" is no longer a basis for being excused from the obligation to pay either the total flat-rate compensation amount established in the instant proceeding, or a portion thereof.

264.

265. In the Notice, we set forth the history of the flat-rate compensation mechanism we adopted for access code calls. TOCSIA had directed the Commission to determine whether independent payphone providers should receive compensation for originating interstate calls to non-presubscribed OSPs from their payphones.<sup>412</sup> The Commission concluded

<sup>407</sup> AT&T Comments at 11.

<sup>408</sup> Unlike the per-call compensation mechanism adopted in this Report and Order, the interim flat-rate compensation obligation applies to both facilities-based IXCs and resellers that have respective toll revenues of \$100 million per year.

<sup>409</sup> See generally Second Report and Order, Reconsideration Order, and Second Further Notice.

<sup>410</sup> Second Further Notice, 10 FCC Rcd at 11463.

<sup>411</sup> Two IXCs, AT&T and Sprint, certified to the Commission that they were able to pay compensation on a per-call basis and petitioned the Commission for approval to pay compensation on that basis. See Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Memorandum Opinion and Order, 10 FCC Rcd 1590 (Com. Car. Bur. 1994) ("AT&T Waiver"); Memorandum Opinion and Order, 10 FCC Rcd 5490 (Com. Car. Bur. 1995) ("Sprint Waiver"). They argued that a per-call compensation mechanism would better serve the Commission's objective to implement a more cost-based approach to compensation for calls to non-presubscribed OSPs. The Common Carrier Bureau agreed and granted AT&T and Sprint the right to pay compensation in the amount of \$.25 per call in lieu of paying per-phone compensation to PPOs. Id.

<sup>412</sup> 47 U.S.C. § 226(e)(2).

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in the Second Report and Order that a per-call compensation mechanism was preferable because it would create greater incentives for PPOs to place their payphones in locations that generate the most traffic. The Commission concluded, however, that it was not technically feasible to implement such a mechanism at that time.<sup>413</sup> Instead, the Commission adopted flat-rate compensation in the amount of \$6 per phone per month (based on average of 15 access code calls at a rate of \$.40 per call), on an interim basis.

266.

267. When we adopted a compensation mechanism for interstate access code calls, the Commission concluded that, because they did not involve use of a "carrier-specific access code"<sup>414</sup> and were routed directly to an end user, subscriber 800 calls were not within the class of calls for which TOCSIA directed the Commission to consider compensation.<sup>415</sup> The Commission, therefore, limited compensation to interstate "access code calls."<sup>416</sup> In July 1992, in response to a petition for reconsideration by the APCC, the Commission affirmed its conclusion that subscriber 800 calls were not within the Commission's definition of interstate "access code calls" for which compensation should be paid.<sup>417</sup> In 1992, after the Commission affirmed its exclusion of subscriber 800 calls from the class of compensable access code calls, the Florida Pay Telephone Association ("FPTA") sought judicial review in the United States Court of Appeals for the District of Columbia Circuit of this aspect of the First Report and Order and the Subscriber 800 Reconsideration Order. In its Florida Payphone decision,<sup>418</sup> the Court found no reason to distinguish between the routing of access code calls and subscriber 800 calls. Therefore, it reversed and remanded the case to the Commission to "consider the need to prescribe compensation for subscriber 800 calls 'routed to providers of operator services that are other than the presubscribed provider of operator services.'"<sup>419</sup>

268.

269. We first re-examine the basis for setting the \$.40 per-call compensation amount that was aggregated to a flat rate of \$6 per month. In the 1992 Second Report and Order, the Commission identified three reasonable compensation approaches that established a range of

<sup>413</sup> Second Report and Order, 7 FCC Rcd at 3252-53.

<sup>414</sup> The Second Report and Order defines an "access code" as a "sequence of numbers that, when dialed, connects the caller to the OSP associated with that sequence, as opposed to the OSP presubscribed to the originating line. Access codes include 10XXX in equal access areas and "950" Feature Group B dialing (950-0XXX or 950-1XXX) anywhere, where the three-digit XXX denotes a particular IXC. Some OSPs use an 800 number as an access code." Id. at 3251 n.1.

<sup>415</sup> First Report and Order, 6 FCC Rcd at 4746 (citing S. Rep. No. 439, 101st Cong., 2d Sess. 19 (1990), reprinted in 1990 U.S. Code Cong. & Ad. News 1577, 1582). "Subscriber 800 calls" consist of calls to an 800 number assigned to a particular subscriber. See Florida Payphone, 54 F.3d at 859.

<sup>416</sup> Id.

<sup>417</sup> Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Order on Reconsideration, 7 FCC Rcd 4355, 4367 (1992) ("Subscriber 800 Reconsideration Order").

<sup>418</sup> Florida Payphone, 54 F.3d at 857.

<sup>419</sup> Id.

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reasonable compensation rates. The three approaches were: (1) as a surrogate for independent payphone provider costs, access charge compensation that a LEC receives for its regulated provision of payphones; (2) as a measure of value to OSPs of receiving access code calls, charges for a transfer by a LEC live operator to an OSP of the caller's choice ("O-transfer service charges"); and (3) AT&T's federally regulated operator service rates on calls made from payphones presubscribed to AT&T.<sup>420</sup> We conclude that these three approaches, which are based on a different standard than that in Section 276, are inapplicable for determining interim compensation in the instant proceeding. Our focus in the instant proceeding is to let the market set the appropriate compensation amount. As discussed above,<sup>421</sup> for the limited purpose of calculating compensation for PSPs on a flat-rate basis until per-call compensation becomes mandatory we will use a rate of \$.35 per call, which is the rate in the majority of states that have allowed the market to determine the appropriate local coin rate.

270.

271. We next re-examine the average number of access code calls originated by a payphone per month. In 1992, the Commission found that the average was 15 calls. As summarized below, data on the record in the instant proceeding indicate that the average number of access code calls per month is now considerably higher. In addition, similar data show the volume of subscriber 800 calls generated by the average payphone.

272.

273. Various independent payphone providers and the RBOCs submitted data on the average number of access code and subscriber 800 calls originated respectively by their payphones. Together, these data cover payphones located in geographically diverse areas across the country. Peoples, the largest independent provider, states that each of its payphones originates, on average, 43 access code calls and 86 subscriber 800 calls per month (total of 129 compensable calls).<sup>422</sup> Communications Central, another large independent payphone provider, states that each of its payphones originates an average of 49.5 access code calls and 79.7 subscriber 800 calls per month (total of 130 compensable calls).<sup>423</sup> Telaleasing states that each of its payphones originates an average of 37 access code calls and 87 subscriber 800 calls per month (total of 124 compensable calls).<sup>424</sup> APCC states that it surveyed approximately 100,000 payphones owned by 20 diverse providers and found that, in a three-month period in 1996, each payphone originated an average of 40 access code calls and 100 subscriber 800 calls per month (total of 140 compensable calls).<sup>425</sup> Data provided by the RBOCs show that the payphones

<sup>420</sup> See Second Report and Order, 7 FCC Rcd at 3255-57.

<sup>421</sup> See para. 56, above.

<sup>422</sup> Peoples Comments at 9-10. Peoples' estimates are derived from the total number of calls originated by all of its payphones over a six-month period spanning late 1995 to early 1996. Id.

<sup>423</sup> Communications Central Comments at Attachment B. Communications Central's estimates are derived from the total number of calls originated by all of its payphones over a one-month period in 1996. Id.

<sup>424</sup> Telaleasing Reply at 8. Telaleasing's estimates are derived from the total number of calls originated by all of its payphones over a one-month period in 1996. Id.

<sup>425</sup> APCC Comments at 5-6.

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maintained by five of the seven RBOCs originate, on average, 52 access code calls and 80 subscriber 800 calls per payphone per month (total of 132 compensable calls).<sup>426</sup>

274.

275. The data on the record from the five PSP sources noted in the preceding paragraph yield similar average monthly compensable call volumes. Based on the call volume data provided by the PSPs, we conclude that, for purposes of calculating flat-rate compensation, that the average payphone originates a combined total of 131 access code calls and subscriber 800 calls per month.<sup>427</sup> When 131 calls per month is multiplied by the \$.35 compensation amount, the monthly flat-rate compensation amount is \$45.85. We conclude that this \$45.85 flat-rate amount must be paid by carriers, proportionally to their annual toll revenues, to PSPs. This flat-rate obligation applies to access code calls and subscriber 800 calls originated on or after the effective date of the rules adopted in this proceeding.<sup>428</sup> PSPs that are affiliated with LECs will not be eligible for this interim compensation until the first day of the month following their reclassification and transfer of payment equipment along with the termination of subsidies, as discussed below.<sup>429</sup>

276.

277. We decline to require that per-call compensation be paid retroactive to the date of release of the Notice.<sup>430</sup> We conclude that the rules adopted in this Report and Order, including the requirement that interim flat-rate compensation be paid until per-call tracking capabilities are in place, provides compensation to PSPs as soon as practicable. For the same reasons discussed elsewhere in this Report and Order,<sup>431</sup> we also reject Intellicall's argument that interim compensation be mandated through a "caller pays" coin-deposit approach.

278.

279.

## **280.B. RECLASSIFICATION OF INCUMBENT LEC-OWNED PAYPHONES**

281.

282. In the foregoing Part, we establish rules and guidelines to ensure that PSPs are fairly compensated for calls originating at their payphones. For certain PSPs -- those who are

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<sup>426</sup> See Ex Parte Letter of Michael Kellogg, Counsel, RBOCs, to William Caton, Acting Secretary, FCC (August 23, 1996).

<sup>427</sup> The PSP data tend to show that one third of the total amount of compensable calls are access code calls, while two thirds are subscriber 800 calls.

<sup>428</sup> We conclude that on the effective date of the interim compensation set forth in this Order, the \$6 per payphone per month compensation for access code calls, as set forth in CC Docket No. 91-35, is terminated. See para. 119, above.

<sup>429</sup> See generally, Part B of this Report and Order.

<sup>430</sup> The independent payphone providers refer to this retroactive compensation as "interim relief." See para. 117, above. The interim flat-rate compensation that we mandate in this Report and Order, pursuant to Section 276(b)(1)(A), is for the first year after the effective date of the rules adopted in this proceeding. The term "interim" refers to the one-year period before compensation is to be paid on a per-call basis.

<sup>431</sup> See para. 85, above.

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LECs -- the new compensation arrangement can be implemented only upon the discontinuance of the regulatory system under which they now recover their costs of providing payphone service. In this Part, we describe the necessary steps for the LECs' transition to the new compensation framework, and set a schedule for the LECs' implementing actions.

283.

284. Section 276(b)(1)(B) directs the Commission to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a [per-call] compensation plan[.]"<sup>432</sup> Currently, incumbent LEC payphones, classified as part of the network, recover their costs from Carrier Common Line (CCL) charges assessed on those carriers that connect with the incumbent LEC. In order to comply with Section 276(b)(1)(B) by removing payphone costs from the CCL charge and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, the Notice sought comment on: (1) the prospective classification of incumbent LEC payphones as Customer Premises Equipment (CPE); (2) the transfer of incumbent LEC payphone equipment assets from regulated to nonregulated status; (3) the termination of access charge compensation and all other subsidies for incumbent LEC payphones; and (4) the classification of AT&T payphones.

285.

286. **1. Classification of LEC Payphones as CPE**

287.

288. **a. The Notice**

289.

290. In the Notice, we tentatively concluded that incumbent LEC payphones should be treated as nonregulated, detariffed CPE.<sup>433</sup> We also proposed that incumbent LECs, whether or not they provide payphone service, must offer individual central office coin transmission services to PSPs under a nondiscriminatory, public, tariffed offering.<sup>434</sup> To this end, we sought comment on both the central office coin services that must be made available by incumbent LECs to the PSPs to achieve this goal, and the type of services and the technological requirements necessary to allow independent payphone providers to use payphones that are equivalent to those payphones currently used by LECs. In addition, we sought comment on any industry standards that may need to be developed with respect to potential claims regarding any demonstrable network reliability concerns that may result from PSPs connecting their payphones that make use of central office coin transmission services.<sup>435</sup>

291.

292. Because the incumbent LECs have used central office coin services in the past, but have not made these services available to independent payphone providers for use in their provision of payphone services, we sought comment on whether incumbent LEC provision

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<sup>432</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>433</sup> Notice at para. 42.

<sup>434</sup> Id. at para. 45.

<sup>435</sup> Id.

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of coin transmission services on an unbundled basis should be treated as a new service under our price cap rules.<sup>436</sup> Because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, we tentatively concluded that the new services test is necessary to ensure that central office coin services are priced reasonably.<sup>437</sup> Additionally, we sought comment on whether incumbent LECs not currently subject to price cap regulation should be required to submit cost support for their central office coin services, pursuant to Sections 61.38, 61.39, and 61.50(i) of our rules.<sup>438</sup>

293.

294. We also tentatively concluded that Section 68.2(a)(1) of our rules should be amended to facilitate registration of both instrument-implemented and central-office-implemented payphones and sought comment on this tentative conclusion.<sup>439</sup> In addition, we tentatively concluded that the demarcation point for all new LEC payphones should be consistent with the minimum point of entry standards for other wireline services and, in addition, tentatively concluded that the demarcation point should be the same one as incumbent LECs use for independent payphone providers today.<sup>440</sup> Finally, we sought comment on what services (such as fraud protection, installation and maintenance services, joint marketing opportunities, per-call tracking capabilities, and call validation services) other than those associated with central office coin transmission services provided to their own payphones by incumbent LECs, particularly the BOCs, should be unbundled under the rules to be adopted in this proceeding and made available to PSPs.<sup>441</sup>

295.

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<sup>436</sup> Id. at para. 46.

<sup>437</sup> Id.

<sup>438</sup> Id.

<sup>439</sup> Id. at para. 47.

<sup>440</sup> Id.

<sup>441</sup> Id. at para. 48.

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296. **b. Comments**

297.

298. **i. CPE Deregulation**

299.

300. Most of the parties support reclassifying payphone equipment as CPE and generally assert that deregulating payphone equipment is important in establishing a competitive payphone market.<sup>442</sup> Ohio PUC, on the other hand, argues that payphones should be detariffed but not deregulated and a charge should be imputed for LEC payphones.<sup>443</sup> Florida PSC supports deregulating payphones because needed functionalities are available either from the set or the network and because deregulation will ensure that payphone service is not subsidized. Florida PSC argues, however, that smaller LECs should be given a choice whether to deregulate CPE, because separating costs is burdensome.<sup>444</sup> Ameritech contends that payphone deregulation should apply to all LECs, not just incumbent LECs, because Section 276 (b)(1)(B) is not limited in applicability.<sup>445</sup>

301.

302. The RBOCs argue that there should be a twelve-month transition period to nonregulated status for payphone CPE.<sup>446</sup> Others argue there should be no transition period, or a shorter period than twelve months, for example, 90 days after release of an order.<sup>447</sup> BellSouth argues that it should be able to conduct deregulated operations immediately on the release of this Report and Order.<sup>448</sup>

303.

304. GPCA argues that a separate subsidiary should be required for BOCs that merge.<sup>449</sup> Ohio PUC argues that Tier 1 LECs should provide payphones through a separate subsidiary if payphone equipment is deregulated.<sup>450</sup> Most of the parties, however, do not argue

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<sup>442</sup> AT&T Comments at 18; USTA Comments at 5; Ameritech Comments at 13; NJPA Comments at 10; SCPCA Comments at 2; Sprint Comments at 25; CPA Comments at 10-11; MCI Comments at 15; RBOC Comments at 23; GPCA Comments at 5 [Note: with regard to payphone reclassification and nonstructural safeguards, APCC relies on and agrees with GPCA comments. See APCC Comments at 41; APCC Reply at 35]; California PUC Comments at 14; USTA Comments at 5; GTE Reply Comments at 8-10.

<sup>443</sup> Ohio PUC Comments at 9-10 .

<sup>444</sup> Florida PSC Comments at 4-5. Florida recommends that LECs with less than 100,000 access lines be allowed to choose whether to deregulate CPE. Id.

<sup>445</sup> Ameritech Comments at 3-4 .

<sup>446</sup> RBOC Comments at 30.

<sup>447</sup> International Telecard Comments at 26-27; GPCA Reply at 15.

<sup>448</sup> BellSouth Reply at 8.

<sup>449</sup> GPCA Comments at 4.

<sup>450</sup> Ohio PUC Comments at 13.



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that a separate subsidiary is required<sup>451</sup> and Florida PSC argues that it should be the option of the LEC.<sup>452</sup> The RBOCs argue that the Commission's accounting safeguards and price cap rules are sufficient to deter cross-subsidization.<sup>453</sup> They also argue that a separate subsidiary requirement is against the plain language of the 1996 Act and that such a requirement was dropped from the Senate version.<sup>454</sup> PacTel argues that the nonstructural safeguards of Computer III were expressly mandated by Section 276.<sup>455</sup>

305.

306.

**ii. Unbundling of Payphone Services**

307.

308.

The RBOCs and PacTel argue that the Commission should not require more unbundling than is necessary to ensure that PSPs and LECs are able to use the same payphones -- standard central-office coin line and the alternate (smart set) access line. They also argue that the unbundling criteria used in Computer III should apply to any further unbundling.<sup>456</sup> California PUC and GTE state that access line and central office transmission services should be tariffed.<sup>457</sup> Ameritech states that it will offer tariffed coin line service, centralized office based coin rating, and signaling functionality, or payphone line (like business line).<sup>458</sup> GPCA argues that coin line and alternate access line do not provide all the needed capabilities.<sup>459</sup> MCI argues that the BOCs should provide all functionalities used in their delivery of payphone services on a nondiscriminatory basis, including coin transmission services and other associated services.<sup>460</sup>

309.

310.

GVNW argues that the interconnection rules must be flexible for small LECs because small LECs do not implement payphone services in the same way as do the BOCs, and that small LECs should only have to provide payphone services to others that they are providing to themselves.<sup>461</sup> AT&T states that competitive access providers (CAPs) should not

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<sup>451</sup> Florida PSC at 6; NJPA Comments at 11-12; SW Bell Reply at 5; USTA Comments at 5; PacTel Reply Comments at 2-5; Sprint Comments at 25.

<sup>452</sup> Florida PSC Comments at 6.

<sup>453</sup> RBOC Reply at 21-23.

<sup>454</sup> RBOC Comments at 40, n.53.

<sup>455</sup> PacTel Reply at 2-5.

<sup>456</sup> PacTel Reply at 2-5; RBOC Reply at 21-23.

<sup>457</sup> California PUC Comments at 14; GTE Reply at 8-10.

<sup>458</sup> Ameritech Comments at 16-17.

<sup>459</sup> GPCA Reply at 3.

<sup>460</sup> MCI Comments at 16.

<sup>461</sup> GVNW Comments at 5-7.

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have to offer central office coin service unless they provide payphone service themselves.<sup>462</sup> NCTA and OPASTCO argue that LECs should not have to provide a specific set of payphone services, such as central coin services, that they are not already equipped to provide because of the significant investment required to upgrade switches.<sup>463</sup> Florida PSC states that all LECs in Florida tariff payphone blocking, screening, and intercept services.<sup>464</sup>

311.

312. AT&T argues that LECs should be required to offer under tariff all functions used in their delivery of payphone services, including: all central office intelligence, answer supervision, collect refund, far end disconnect, call blocking and screening options, access to some monitoring and disaggregation routines, and 911 services.<sup>465</sup> GPCA argues that all network functions must be unbundled and charges should be imputed for inputs from regulated services. GPCA also argues that the following functions should be unbundled: answer supervision, the intercept signal (indicating that the call cannot be completed as dialed), coin collect and return functionality, and rate schedule functionality. In addition, GPCA asserts that these functionalities are necessary to provide fraud protection and to ensure that cross subsidies are eliminated.<sup>466</sup> CPA supports GPCA's recommended list of functionalities.<sup>467</sup>

313.

314. AT&T contends that LECs must offer public access line services for resale at rates that reflect the economic cost of providing the services through TSLRIC-based prices,<sup>468</sup> while SW Bell argues that Section 252 pricing should not apply to Section 276 payphone services.<sup>469</sup> California PUC asserts that LECs should unbundle and provide tariffed payphone services and that new services should be justified with cost studies.<sup>470</sup> CPA argues that whatever rates are established for payphone services should be imputed to the LEC payphone operations.<sup>471</sup> The RBOCs, USTA and GTE argue that unbundled payphone services should be tariffed at the state level and therefore not subject to the new services test under the Commission's rules.<sup>472</sup>

315.

<sup>462</sup> AT&T Comments at n. 37; AT&T Reply at n.71. See also NCTA Comments at 5.

<sup>463</sup> NCTA Reply at 4-6; OPASTCO Reply at 2-3.

<sup>464</sup> Florida PSC Comments at 7.

<sup>465</sup> AT&T Comments at 19, n. 36 & at 22, n. 42-43.

<sup>466</sup> GPCA Reply at 1-7.

<sup>467</sup> CPA Reply Comments at 15-16.

<sup>468</sup> AT&T Comments at 19, n. 36.

<sup>469</sup> SW Bell Reply at 7.

<sup>470</sup> California PUC Comments at 16.

<sup>471</sup> CPA Reply at 15-16.

<sup>472</sup> RBOC Comments at 25; USTA Reply at 7; GTE Reply at 9.

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316. **iii. Other Payphone Services**

317.

318. GPCA asserts that other services should be available on an equal access basis, including fraud protection, special number assignments, installation and maintenance, billing and collection, validation, per call tracking, and joint marketing. GPCA also argues that if operator services are available in the LEC network, and commissions are paid to the LEC, the commissions should be available to independent payphone providers.<sup>473</sup> MCI contends that fraud protection, installation and maintenance, per-call tracking, and call validation services should be available to independent payphone providers.<sup>474</sup> The RBOCs and Sprint argue that these additional services are not necessary for PSPs to provide service.<sup>475</sup>

319.

320. **iv. Registration and Demarcation Point for Payphones**

321.

322. The RBOCs, MCI, and Oklahoma CC assert that Section 68.2(a)(1) of our rules should be amended to include registration of both instrument-implemented and central-office-implemented payphones.<sup>476</sup> The RBOCs argue that the embedded, installed base should be grandfathered but new sets and refurbished sets (with added functionality) should have to be registered.<sup>477</sup> GPCA does not oppose grandfathering the installed base of payphones from Part 68 registration, but argues that refurbished payphones should not be grandfathered.<sup>478</sup> The RBOCs contend that standards for interconnection should be established by revising Section 68.3 of our rules to include specifications for central-office-implemented payphones.<sup>479</sup> Anchorage Telephone suggests that a technical committee should be established to develop interconnection standards.<sup>480</sup>

323.

324. AT&T, MCI, and Sprint contend that the demarcation point for LEC payphones should be the same as it is today for independent payphone providers.<sup>481</sup> GPCA argues that the demarcation point should be applied in a nondiscriminatory manner to all

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<sup>473</sup> GPCA Reply at 7-14.

<sup>474</sup> MCI Comments at 15-16. MCI contends that a "cuckoo" tone (which identifies the phone to an operator as a payphone) should be available for fraud protection, rather than specialized phone numbers used for LEC phones today. *Id.* at 16.

<sup>475</sup> RBOC Comments at 25; Sprint Comments at 26.

<sup>476</sup> RBOC Comments at 26; MCI Comments at 16; Oklahoma CC Comments at 3.

<sup>477</sup> RBOC Comments at 26.

<sup>478</sup> GPCA Reply at 7.

<sup>479</sup> RBOC Comments at 26, n.28.

<sup>480</sup> Anchorage Telephone Comments at 1.

<sup>481</sup> AT&T Comments at 18 n.34; MCI Comments at 16; Sprint Comments at 25-26.

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payphones and that LECs should be required to set demarcation points for different types of sites if the points will vary. GPCA also asserts that embedded inside wire should be available to all providers on an equal basis and that the demarcation point for embedded and new inside wire should be the same.<sup>482</sup> The RBOCs argue that the demarcation point should be treated flexibly.<sup>483</sup> In contrast, CPA argues that the demarcation point should not be flexible and should be at the minimum point of entry.<sup>484</sup>

325.

326.

**c. Discussion**

327.

328.

**i. CPE Deregulation**

329.

330.

We conclude that to best effectuate the 1996 Act's mandate that access charge payphone service elements and payphone subsidies from basic exchange and exchange access revenues be discontinued, incumbent LEC payphones should be treated as deregulated and detariffed CPE. The Commission determined in Computer II that CPE should be deregulated and detariffed to ensure that the costs associated with regulated services are separated from the competitive provision of the equipment used in conjunction with those services.<sup>485</sup> The Commission concluded that CPE should be unbundled from its underlying transmission service in order to prevent improper cross-subsidization.<sup>486</sup> Consistent with this prior finding, we conclude that LEC payphones must be treated as unregulated, detariffed CPE in order to ensure that no subsidies are provided from basic exchange and exchange access revenues or access charge payphone service elements as required by the Act.

331.

332.

In Computer II, the Commission specifically excluded coin-operated payphones from the definition of CPE.<sup>487</sup> The Commission found that, unlike other CPE, which could be unbundled from basic exchange service, coin-operated payphones were still integrated with the LECs' network facilities and concluded that payphones owned by LECs and AT&T should remain part of regulated basic communications service.<sup>488</sup> The Commission later extended this determination to LEC coinless payphones.<sup>489</sup> Thereafter, the Commission, in the Coin

<sup>482</sup> GPCA Comments at 7, 10-11.

<sup>483</sup> RBOC Comments at 27.

<sup>484</sup> CPA Comments at 10-11.

<sup>485</sup> Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 445 (1980) (Computer II), modified on recon., 84 FCC 2d 50 (1981), modified on further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert denied, 462 U.S. 938 (1983).

<sup>486</sup> Computer II, 77 FCC 2d at 466-7, 474.

<sup>487</sup> Id. at 447, n. 57.

<sup>488</sup> Id.

<sup>489</sup> Petition for Declaratory Ruling of Tonka Tools, Inc. and Southern Merchandise Corp. Regarding American

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Registration Order, recognized the right of nonLEC payphone providers to interconnect smart payphones to the interstate public switched network.<sup>490</sup> Following this order allowing the interconnection of smart payphones, independent payphone providers began to compete with the LECs. Currently, there are approximately 1.5 million LEC payphones and approximately 350,000 competitively provided payphones.<sup>491</sup> We conclude that the market for payphone CPE is competitive and that it is no longer necessary to treat payphone CPE differently by integrating LEC payphones with the underlying service. Moreover, we conclude that the transient public that uses payphones will best be served by the wide availability of competitive payphones services. We also conclude that it is not in the public interest to continue to treat LEC payphones as regulated equipment, while treating independent payphones as CPE, and that deregulation of payphones is consistent with the procompetitive approach set forth in Section 276.<sup>492</sup> We have recently deregulated inmate payphones<sup>493</sup> and most of the parties in this proceeding agree that incumbent LEC payphones should also be deregulated and detariffed.<sup>494</sup> Accordingly, we conclude that incumbent LEC payphones must be deregulated, detariffed and classified as CPE for regulatory purposes.<sup>495</sup>

333. We decline to limit the deregulation of payphones to those owned by larger LECs, as suggested by the Florida PSC, because Section 276 is not limited in application to larger LECs. Moreover, we conclude that the benefits we have observed in CPE deregulation apply to payphones and that these benefits apply regardless of the size of the LEC.

334.

335. We decline to require the BOCs or other incumbent LECs to provide their payphone CPE through a structurally separated affiliate.<sup>496</sup> We discuss below the nonstructural

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Telephone and Telegraph Company Provision of Coinless Pay Telephones, 58 RR2d 903, 910 (1985) (Tonka Tools).

<sup>490</sup> See Registration of Coin Operated Telephones, Memorandum Opinion and Order, 49 Fed. Reg. 27763 (1984) (Coin Registration Order).

<sup>491</sup> See para. 9, above.

<sup>492</sup> 47 U.S.C. § 276(b)(1)

<sup>493</sup> Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, Declaratory Ruling, 11 FCC Rcd 7362 (1996) (Inmate Services Order); Petitions for Waiver and Partial Reconsideration or Stay of Inmate-Only Payphones Declaratory Ruling, Order, 11 FCC Rcd 8013 (Com. Car. Bur. 1996) (Inmate Services Waiver Order).

<sup>494</sup> We discuss at paras. 159, below, the equipment to be deregulated and detariffed and the method of valuation.

<sup>495</sup> See also para. 190, below, regarding AT&T payphones. Section 255 of the 1996 Act requires manufacturers of telecommunications equipment and CPE, and telecommunications service providers, to ensure that their equipment and services are accessible to persons with disabilities, if readily achievable. 47 U.S.C. § 255(b)-(c). If such access is not readily achievable, the manufacturer or service provider must ensure that the equipment or service is compatible with existing peripheral devices or specialized CPE commonly used by persons with disabilities, if readily achievable. 47 U.S.C. § 255(d). The implementation of Section 255 will be addressed in a separate proceeding.

<sup>496</sup> See paras. 192-207, below, for a discussion of the statutory mandate that we "prescribe a set of

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safeguards we require for BOCs to provide payphone CPE on an integrated basis and decline to require, as proposed by some commenters, that other incumbent LECs be required to provide CPE through structurally separate affiliates. Section 276 does not require LEC or BOC provision of payphone service through a separate subsidiary. Although the 1996 Act does not specifically prohibit the Commission from imposing a separation requirement, it requires the establishment of nonstructural safeguards for the BOCs, a clear statement that nonstructural safeguards, rather than structural separation, are mandated.<sup>497</sup> Moreover, Section 276 does not require even nonstructural safeguards for other LECs. Other sections of the 1996 Act, including Section 272, BOC provision of interLATA services, and Section 274, BOC provision of electronic publishing, specifically require structural separation. In addition, in the BOC CPE Relief Order we removed the structural separation requirements established in Computer II for BOC provision of CPE because we concluded that nonstructural safeguards were sufficient to deter cross-subsidization and discrimination and the high costs of mandatory structural separation were not in the public interest.<sup>498</sup> This conclusion is also applicable in the context of BOC provision of payphone CPE. We also note that the Computer II structural separation requirements were not applied to the provision of CPE by other LECs.<sup>499</sup> Finally, we note that nonstructural accounting safeguards applicable to the BOCs' provision of payphone service are being established in a separate proceeding.<sup>500</sup> Accordingly, we do not impose structural separation requirements for the provision of payphones by the BOCs or other LECs. As we did in the BOC CPE Relief Order, we preempt states' ability to impose structural separation requirements on the payphone operations of the BOCs or other LECs.<sup>501</sup> We do not, however, preempt the states from imposing on nonBOC LECs nonstructural safeguards that are no more stringent than those we impose on the BOCs.

336.

### **337. ii. Unbundling of Payphone Services**

338.

339. We conclude, pursuant to Computer II, Section 201, 202, and 276 of the Act, and previous CPE decisions, that incumbent LECs must offer individual central office coin transmission services to PSPs under nondiscriminatory, public, tariffed offerings if the LECs

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nonstructural safeguards for [BOC] payphone service ... which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III ... proceeding." 47 U.S.C. § 276(b)(1)(C).

<sup>497</sup> See 47 U.S.C. § 276(b)(1)(C).

<sup>498</sup> Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987)(BOC CPE Relief Order).

<sup>499</sup> See Computer II, 77 FCC 2d at 469-70. Structural separation requirements initially imposed on GTE were removed on reconsideration. See 84 FCC 2d at 72-75.

<sup>500</sup> See Implementation of the Telecommunications Act of 1996: Accounting Safeguards under the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 11 FCC Rcd 9054 (1996) ("Accounting Safeguards NPRM").

<sup>501</sup> BOC CPE Relief Order, 2 FCC Rcd at 143. See 47 U.S.C. § 276(c).

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provide those services for their own operations.<sup>502</sup> Under Computer II, all carriers must unbundle basic transmission services from CPE.<sup>503</sup> Moreover, Section 202 of the Act prohibits a carrier from discriminating unreasonably in its provision of basic service.<sup>504</sup> We conclude that incumbent LECs must provide coin service so competitive payphone providers can offer payphone services using either instrument-implemented "smart payphones" or "dumb" payphones that utilize central office coin services, or some combination of the two in a manner similar to the LECs. Because the incumbent LECs have used central office coin services in the past, but have not made these services available to independent payphone providers for use in their provision of payphone services, we require that incumbent LEC provision of coin transmission services on an unbundled basis be treated as a new service under the Commission's price cap rules. Because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, we conclude that the new services test is necessary to ensure that central office coin services are priced reasonably. Incumbent LECs not currently subject to price cap regulation must submit cost support for their central office coin services, pursuant to Sections 61.38, 61.39, or 61.50(i) of the Commission's rules.<sup>505</sup> Incumbent LECs must file tariffs with the Commission for these services no later than January 15, 1997. To the extent that this requirement precludes the BOCs from complying with the Computer II, Computer III, and ONA network information disclosure requirements, we waive the notice period in order to ensure that these services are provided on a timely basis consistent with the other deregulatory requirements of this order.<sup>506</sup> Pursuant to this waiver, network information disclosure on the basic network payphone services must be made by the BOCs by January 15, 1997.

340.

341. We conclude that tariffs for payphone services must be filed with the Commission as part of the LECs' access services to ensure that the services are reasonably priced and do not include subsidies.<sup>507</sup> This requirement is consistent with the Section 276 prescription

<sup>502</sup> Computer II, 77 FCC 2d at 387-9; 47 U.S.C. §§ 201, 202, and 276; BOC CPE Relief Order, 2 FCC Rcd at 143.

<sup>503</sup> See 47 C.F.R. § 64.702(e).

<sup>504</sup> See 47 U.S.C. § 202(a).

<sup>505</sup> 47 C.F.R. §§ 61.38, 61.39, 61.50(i).

<sup>506</sup> Network disclosure requirements are discussed in Computer II, 2 FCC Rcd at 150-151; 3 FCC at 23-24; and Computer III at 3 FCC Rcd at 1164-65. The Commission may waive a rule for good cause shown, in whole or in part, on the Commission's own motion or petition. 47 C.F.R. § 1.3. Regarding the waiver standard, see Wait Radio v. Federal Communications Commission, 418 F.2d 1153 (D.C. Cir. 1969); Northeast Cellular Telephone Co. v. Federal Communications Commission, 897 F.2d 1164 (D.C. Cir. 1990). See also Inmate Services Waiver Order 11 FCC Rcd at 8013 (granting a waiver of the network disclosure notice period to enable the provision of payphone services for inmate payphones before the required notice period).

<sup>507</sup> BOCs have filed payphone service tariffs with the Commission. See e.g., US West Communications, Tariff FCC No. 5, Pay Telephone Sent-Paid Services, August 5, 1994; BellSouth Communications Inc., Tariff F.C.C.No. 1, Access Service, Coin Services, January 31, 1992. See 47 U.S.C. § 276(c) and §§ 201-205 regarding authority to require tariffing of basic payphone services.

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that all subsidies be removed from payphone operations. We decline to require, as proposed by AT&T, that the pricing regime under Sections 251 and 252 apply to all Section 276 payphone services offered by incumbent LECs. Section 276 does not refer to or require the application of Sections 251 and 252 to LEC payphone services. In addition, the elements and services to be offered under Sections 251 and 252 are not available to entities that are not telecommunications carriers, and many PSPs are not telecommunications carriers.<sup>508</sup> In addition, Section 276 does not refer to or require the application of Sections 251 and 252 to LEC payphone services. Moreover, Section 276 specifically refers to the application of Computer III and ONA requirements, at a minimum for BOC provision of payphone services. Accordingly, we conclude that Computer III tariff procedures and pricing are more appropriate for basic payphone services provided by LECs to other payphone providers. Pursuant to Section 276(c), any inconsistent state requirements with regard to this matter are preempted.

342.

343. Parties argue that several other network services and network elements should be unbundled and provided to payphone providers. We decline to impose this requirement on all LECs. We do not find that such unbundling is necessary to provide payphone services. In addition, some features require substantial costs to make switch changes.<sup>509</sup> Moreover, pursuant to Computer III and ONA requirements discussed below, BOCs must unbundle additional network elements when requested by payphone providers based on specific criteria established in the Computer III and ONA proceedings. In Computer III, we decided that it was not necessary to apply this requirement to other LECs, and we similarly conclude that it is not necessary to direct other LECs to unbundle additional services or unbundled elements in this proceeding because additional services are not necessary to provide payphone services and because other LECs do not represent the same control of payphone facilities as the BOCs.<sup>510</sup> We note, however, that any basic transmission services provided by a LEC to its own payphone operations must be available under tariff to other payphone providers pursuant to Computer II.<sup>511</sup> States may impose further payphone service unbundling requirements that are not inconsistent with Section 276 requirements and requirements established herein.<sup>512</sup>

344.

### 345. **iii. Other LEC Payphone Services**

346.

<sup>508</sup> See Local Competition Order at para. 876 (holding that the services that incumbent LECs offer to PSPs are retail services provided to end users, and should be available at wholesale rates to telecommunications carriers and Section 251(c)(4), but need not be made available at wholesale rates to independent PSPs that are not telecommunications carriers).

<sup>509</sup> See *ex parte*, Michael K. Kellogg to William F. Caton, Secretary, FCC, September 6, 1996 at 3; GVNW Comments at 5-7.

<sup>510</sup> See Computer III Phase II Order at 3101. For example, Congress did not require that Computer III safeguards, at a minimum be applied to other LECs. See 47 U.S.C. § 276(b)(1)(C). Under Section 251, LECs must provide nondiscriminatory access to unbundled network elements to certain carriers. See Local Competition Order.

<sup>511</sup> Computer II, 77 FCC 2d at 387-9; 47 C.F.R. 64.702.

<sup>512</sup> See para. 145, above.



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347. We conclude that incumbent LECs should provide certain other services to other payphone providers if they provide those services to their own payphone operations. These services must be made available by the LEC or its affiliate to other payphone providers on a comparable basis in order to ensure that other payphone providers do not receive discriminatory service from the LECs once LEC payphones are deregulated, and to ensure that other payphone providers can compete with LEC payphone operations. Specifically, parties have indicated the need for the following services to enable them to compete effectively for the provision of payphones: fraud protection, special number assignments, installation and maintenance, billing and collection, validation, per-call tracking, and joint marketing. We have already addressed above the per-call tracking requirements. We conclude that fraud protection, special numbering assignments, and installation and maintenance of basic payphone services should be available to other providers of payphone services on a nondiscriminatory basis. Validation services are required by another proceeding.<sup>513</sup> We do not require the incumbent LECs to joint market the payphone operations of other providers. We have concluded that the market for payphone CPE is competitive and LECs do not have any specific advantage in marketing payphone services in a deregulated payphone market. LEC personnel or affiliates will have to market to payphone location providers in the same manner as other payphone providers to obtain payphone locations. Regarding billing and collection services, we conclude that if a LEC provides basic, tariffed payphone services that will only function in conjunction with billing and collection services from the LEC, the LEC must provide the billing and collection services it provides to its own payphone operations for these services to independent payphone providers on a nondiscriminatory basis.<sup>514</sup> We expect this requirement to apply, for example, in situations where coin services require the LEC to monitor coin deposits and such information is not otherwise available to third parties for billing and collection. We adopt this requirement to ensure that when a LEC has structured its payphone services in a way that they could not operate without the LECs billing and collection services, those services will be available to other payphone providers on the same basis they are available to the LEC.

348.

**349. iv. Registration and Demarcation Point for Payphones**

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351.

We amend our Part 68 rules to provide for the registration of central-office-implemented coin payphones to enable independent payphone providers as well as the LECs to utilize "dumb" payphones. Under the Coin Registration Order and current Part 68 rules, only instrument-implemented payphones can be registered for connection to the network.<sup>515</sup> Amending our rules enables independent payphone providers to have the same choices as LECs in providing payphone services. Parties did not object to proposed Part 68 changes in the Notice. Accordingly, we adopt amendments to Section 68.2(a)(1) and Section 68.3 of the Commission's

<sup>513</sup> See Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Report and Order and Request for Supplemental Comment, CC Docket 91-115, 7 FCC Rcd 3528 (1992); Second Report and Order, 8 FCC Rcd 4478 (1993).

<sup>514</sup> See note 634, below, Computer III proceeding, regarding authority over nonregulated activities like billing and collection and enhanced services.

<sup>515</sup> See Coin Registration Order, note 490, above.

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rules to facilitate registration of both instrument-implemented and central-office-implemented payphones. Consistent with the Commission's prior practice with regard to existing CPE, in order to avoid unnecessary costs, and because these existing phones do not present potential harm to the network, we grandfather existing LEC payphones from the our revised Part 68 requirements, unless the basic functionality in the payphones is changed.<sup>516</sup> We require incumbent LECs to submit proposed interconnection requirements to effectuate such interconnection within 90 days of the effective date of this order. The California Payphone Association (CPA) filed before the Commission a Petition for Rule Making requesting that Section 68.2(a)(1) of the rules be amended to allow for the registration of all coin-operated telephones and that the Commission re-examine and clarify its interpretation of Section 68.2(a)(1). We note that our decision herein addresses the relief requested in the CPA petition. Our Report and Order also effectively grants a petition filed by the Public Telephone Council to treat payphones as CPE,<sup>517</sup> and resolves the issues raised in RM 8723 regarding exclusion of public payphones from end user access charges.

352.

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<sup>516</sup> The Commission has previously exempted existing CPE from Part 68 registration requirements. See 47 C.F.R.(b)-(h).

<sup>517</sup> 3 FCC Rcd 4779 (1988); 4 FCC Rcd 737 (1989).

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353. Consistent with our objective of treating incumbent LEC and independent payphone providers' payphones in a similar manner, we conclude that the demarcation point must be the same as incumbent LECs use for independent payphone providers today. Accordingly, the demarcation for all new LEC payphones must be consistent with the minimum point of entry, demarcation point standards for other wireline services.<sup>1</sup> The Commission has previously allowed equipment reclassified as CPE, resulting in a change in the demarcation point, to remain in the same location because of the costs involved in relocating the equipment.<sup>2</sup> Accordingly, we grandfather the location of all existing LEC payphones in place on the effective date of this order because of the difficulty and cost of moving these payphones to meet our new demarcation point requirements. Similarly, we do not require that network interfaces be placed for existing LEC payphones unless these payphones are substantially refurbished, for example, upgraded from dumb to smart payphones or replaced.

354.

355. **2. Reclassification or Transfer of Payphone Equipment to Nonregulated Status**

356.

357. **a. The Notice**

358.

359.

In the Notice, we sought comment on the specific assets to be transferred, and tentatively concluded that the assets to be transferred should be defined generally in terms of CPE deregulation.<sup>3</sup> Thus, we tentatively concluded that the assets to be transferred may include all facilities related to payphone service, including associated deferred income tax reserves and depreciation, but likely would not include the loops connecting the payphones to the network, or the central office "coin-service" or operator-service facilities supporting incumbent LEC payphones.<sup>4</sup> We proposed to transfer the payphone equipment at undepreciated baseline cost plus an interest charge based on the authorized interstate rate of return to reflect the time value of money.<sup>5</sup> We also tentatively concluded that a phase-in period for a transfer of payphone-related assets is not necessary, because payphone terminal equipment consists of less than one percent of total plant investment for the entire LEC industry.<sup>6</sup> In the Notice, we also sought comment on whether our approach to asset transfer is consistent with the 1996 Act's definition of "payphone service" as the "provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services."<sup>7</sup>

<sup>1</sup> 47 C.F.R. § 68.3.

<sup>2</sup> Id.

<sup>3</sup> Notice at para. 49.

<sup>4</sup> Id.

<sup>5</sup> By baseline cost, we mean either the depreciated original cost at the time of the initial assignment or allocation of existing plant or the original cost of subsequently acquired new plant. Id.

<sup>6</sup> Notice at para. 49.

<sup>7</sup> Id.

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360.

361. **b. Comments**

362.

363. Both USTA and MCI indicate that all public telephone terminal equipment, including associated assets and depreciation, should be transferred, but not loops or central office coin-service or operator-service facilities.<sup>8</sup> GVNW argues that the assets to be transferred should include investment, depreciation, maintenance and overhead.<sup>9</sup> Florida PSC asserts that loops and central office features should not be deregulated so that they will be available to all.<sup>10</sup> GTE argues that only pay station investment should be transferred.<sup>11</sup> The RBOCs list the assets that should be transferred to include: payphones, enclosures, pedestals, coin counting machines, vehicles, land, and buildings used solely for payphone services.<sup>12</sup>

364.

365. GPCA argues that location contracts associated with payphones should be assigned an economic value to recover ratepayer equity and achieve competitive equity. GPCA contends that the Commission can use present value, appraisals, or auctions to value the contracts.<sup>13</sup> Peoples also argues that the contracts should be valued, noting that it had valued the location contracts and goodwill at approximately 70 percent in a recent purchase of payphone assets.<sup>14</sup> SDPOA argues that the name brand associated with LEC payphones should also be valued in the transfer of assets.<sup>15</sup> CPA asserts that LEC payphone assets should be valued at a going concern value and that a transfer at net book value would give the LECs a competitive advantage.<sup>16</sup> Brill argues that BOCs should not be allowed financial and accounting advantages, and cites other competitive advantages that, it states, the BOCs have in some jurisdictions.<sup>17</sup>

366.

367. Ameritech and USTA argue that the accounting treatment for transferred assets should be governed by Section 32.27(c) of our rules regarding transactions with

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<sup>8</sup> USTA Comments at 6; MCI Comments at 15-16.

<sup>9</sup> GVNW Comments at 8.

<sup>10</sup> Florida PSC Comments at 6.

<sup>11</sup> GTE Reply at 8-10.

<sup>12</sup> RBOC Comments at 30.

<sup>13</sup> GPCA Comments at 15-16; GPCA Reply at 13-14; See also CPA Reply at 12; SCPCA at 6-7.

<sup>14</sup> Peoples Reply at 20-21.

<sup>15</sup> SDPOA Reply at 3.

<sup>16</sup> CPA Reply at 12-15.

<sup>17</sup> Brill Comments at 4.

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affiliates.<sup>18</sup> USTA argues that there is no need to alter our Part 64 rules to create cost pools or to change current accounting practices.<sup>19</sup> Ameritech states that Section 32.27(c) requires that assets be transferred at the higher of estimated fair market value or net book value and that the cost allocation manual process provides the mechanism for making the asset transfer.<sup>20</sup> The RBOCs argue that the payphone assets should be valued at net book value, as the Commission has done in the past including the recent Inmate Services Order,<sup>21</sup> and that the Commission should require LECs to transfer only those assets in their existing regulated accounts.<sup>22</sup> They assert that location contracts are not in their regulated accounts and are intangibles that have never been recognized in Commission rate proceedings.<sup>23</sup> The RBOCs also argue that establishing market value for payphone assets would be costly and cause delays.<sup>24</sup> AT&T asserts that payphone assets should be valued at net book value in accordance with the Commission's existing rules.<sup>25</sup>

368.

369. The RBOCs contend that the asset transfer should occur within 12 months.<sup>26</sup> GPCA opposes a delay of up to 12 months for asset transfers and elimination of access charge elements and subsidies, and argues that these requirements must be completed by November 8, 1996.<sup>27</sup> GPCA recommends that the Commission implement requirements no later than 90 days after release of this Report and Order.<sup>28</sup> Ameritech argues that there is no need for a phase-in period.<sup>29</sup> MCI does not object to up to 12 months for transition, but argues that the Commission should set a specific date.<sup>30</sup> USTA contends that the deregulation should be flash

<sup>18</sup> Ameritech Comments at 14; USTA Reply at 7-8.

<sup>19</sup> USTA Comments at 5.

<sup>20</sup> Ameritech Comments at 13-14.

<sup>21</sup> See note 493, above.

<sup>22</sup> RBOC Reply at 19-21. See also SW Bell Reply at 4-6. The RBOCs assert that in the Inmate Services proceeding, only payphones were transferred and they were recorded at net book value in Account 32.2351, Public Telephone Equipment. The RBOCs also note, however, that land and buildings are transferred at appraised value. RBOC Comments at n. 28.

<sup>23</sup> RBOC Comments at 28 & Attachment, Anderson Report at 20.

<sup>24</sup> RBOC Comments at 28.

<sup>25</sup> AT&T Reply at 26-28.

<sup>26</sup> RBOC Comments at 30.

<sup>27</sup> GPCA Reply at 15-17.

<sup>28</sup> Id.

<sup>29</sup> Ameritech Comments at 14.

<sup>30</sup> MCI Reply at 9.

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cut in order to eliminate subsidies.<sup>31</sup>

370.

**371. c. Discussion**

372.

373. As an initial matter, we have already determined that neither Section 276 nor our past experience requires the BOCs' competitive provision of payphone services to take place on a prospective basis through the use of structurally separate affiliates.<sup>32</sup> Instead, in this Report and Order, we require that, if a BOC does not provide payphone services through a separate affiliate, it must provide these payphone services using nonstructural safeguards as described in our Computer III Orders and ONA proceedings and consistent with Section 276, because we conclude that, in the absence of structural separation, our nonstructural safeguards provide sufficient protection against the possibility of cross-subsidization of nonregulated activities.<sup>33</sup> Those nonstructural safeguards include the cost allocation rules and affiliate transactions rules adopted in the Joint Cost Order.<sup>34</sup> Under those rules, the BOCs and other incumbent LECs must classify each of their activities as regulated or nonregulated in accordance with our requirements.<sup>35</sup> We now require that the BOCs and other incumbent LECs, subject to our joint cost rules, classify their payphone operations as nonregulated for our Part 32 accounting purposes. We note, however, that the BOCs or other incumbent LECs are free to provide these services using structurally separate affiliates if they choose to do so.<sup>36</sup> Therefore, our discussion below will address two possible approaches a carrier may take in reclassifying its payphone activities as nonregulated: (1) a carrier may maintain its payphone assets on the carrier's books but treat the assets as nonregulated, or (2) a carrier may transfer its payphone assets to a separate affiliate engaged in nonregulated activities.

374.

375. In the Notice, we sought comment on three primary aspects of the reclassification of payphone assets from regulated to nonregulated status. We solicited comment on the proper accounting treatment for the reclassification or transfer of the payphone assets from a regulated activity to a nonregulated activity. We also sought comments on the specific assets to be reclassified or transferred.<sup>37</sup> We tentatively concluded that the assets to be

<sup>31</sup> USTA Comments at 8.

<sup>32</sup> See para 145, above.

<sup>33</sup> See paras. 199-207, below.

<sup>34</sup> See Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987) (Joint Cost Order), recon., 2 FCC Rcd 6283 (1987) (Joint Cost Reconsideration Order), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom., Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C.Cir. 1990).

<sup>35</sup> 47 C.F.R. § 32.23(a).

<sup>36</sup> In the Accounting Safeguards NPRM, we sought comment on what rules should apply to transactions between a LEC and a separate payphone affiliate. Id. at para. 118.

<sup>37</sup> Notice at para. 49.

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transferred should be defined generally in terms of CPE deregulation and that this would include all facilities related to payphone service, including associated depreciation and deferred income taxes, but likely would not include the loops connecting the payphones to the network, the central office "coin-service," or operator service facilities supporting incumbent LEC payphones.<sup>38</sup> We next tentatively concluded that a phase-in period was not necessary for the reclassification or transfer of the payphone assets to nonregulated status and sought comment on this tentative conclusion.<sup>39</sup> We address these questions and tentative conclusions in the sections that follow.

376.

377.

**i. Specific Assets Reclassified or Transferred**

378.

379.

We adopt our tentative conclusion, supported by numerous commenters,<sup>40</sup> that the payphone assets to be reclassified or transferred include all facilities related to payphone service, including associated accumulated depreciation and deferred income tax liabilities. We do not agree with GVNW that related expenses, such as maintenance, should also be reclassified and transferred<sup>41</sup> because expenses are period costs that should be associated with the status of the service at the time they were incurred. That is, expenses incurred during the period payphones were regulated remain as regulated expenses and expenses incurred after payphone deregulation should be classified as nonregulated expenses. We, however, do not include as payphone assets to be reclassified or transferred the loops connecting the payphones to the network, the central office "coin-service," or operator service facilities supporting incumbent LEC payphones because these are part of network equipment necessary to support basic telephone services.

380.

381.

In adopting our tentative conclusion, we disagree with commenters such as GPCA, Peoples, SDPOA and others who assert that, in all instances, the value of intangible assets that have not been capitalized on the books of the carrier, such as location contracts and brand names, should be included in the payphone assets reclassified to nonregulated status.<sup>42</sup> We note that these assets are not recorded in the carriers' Part 32 accounts and, in fact, are not, without some triggering event such as a purchase or sale, required to be recorded by either generally accepted accounting principles or our Part 32 accounting rules. We do, however, discuss these intangible assets in more detail below as they relate to actual payphone asset transfers to separate affiliates or, in certain limited instances, to an operating division of the carrier.

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<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> See USTA Comments at 6; MCI Comments at 15-16; Florida PSC Comments at 6.

<sup>41</sup> GVNW Comments at 8.

<sup>42</sup> See GPCA Comments at 15-16; GPCA Reply at 13-14; Peoples Reply at 20-21; SDPOA Reply at 3.

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382.

**383. ii. Accounting Treatment for Assets Reclassified or Transferred**

384.

385. Our tentative conclusion in the Notice called for the transfer of the LECs' payphone assets to nonregulated operations to take place at the undepreciated baseline costs plus interest charges at the authorized rate of return for interstate services. The parties have correctly pointed out that this standard only applies in those circumstances where there has been an underforecasting of demand for nonregulated usage requiring a transfer to compensate ratepayers for the additional risks they have borne due to the underforecasting.<sup>43</sup> Since the issue at hand does not involve an underallocation of payphone costs between regulated and nonregulated activities, we see no need to consider this approach any further.

386.

387. The parties question whether the carriers should account for the transfer or reclassification of the payphone assets from regulated to nonregulated status at "fair market value" or the net book value of the assets.<sup>44</sup> While Section 276 provides us with discretion to change our accounting rules to provide safeguards in excess of those provided by Computer III, we believe that our existing rules are sufficient to meet the requirements of Section 276. We conclude that our existing rules require that this determination be based on whether a carrier maintains the assets in its regulated Part 32 accounts or instead transfers the payphone assets to a separate affiliate or an operating division within the carrier that is treated as an affiliate.

388.

389. Carriers that do not transfer the payphone assets to a separate affiliate make no reclassification accounting entries to their Part 32 regulated accounts. The reclassification of these assets to nonregulated status is accomplished instead through the operation of our Part 64 cost allocation rules.<sup>45</sup> Accordingly, we conclude that payphone investment in Account 32.2351, Public telephone terminal equipment, and any other assets used in the provision of payphone service, along with the associated accumulated depreciation and deferred income tax liabilities should be directly assigned or allocated to nonregulated activities pursuant to our cost allocation rules.<sup>46</sup> LECs should establish whatever Part 64 cost pools<sup>47</sup> are needed and should file revisions to their cost allocations manuals within sixty (60) days prior to the effective date of the change.<sup>48</sup> This will ensure that the provision of payphone service is

<sup>43</sup> See Joint Cost Order, 2 FCC Rcd at 170-171.

<sup>44</sup> See, e.g., RBOC Reply at 19-21.

<sup>45</sup> 47 C.F.R. §§ 64.901-904. See also Inmate Services Order, 11 FCC Rcd at 7374.

<sup>46</sup> RBOC Comments at 28, citing Inmate Services Order. See also Letter from Michael K. Kellogg to William F. Caton, Secretary dated August 30, 1996 at 9 (RBOC Ex Parte 8/30/96).

<sup>47</sup> Inmate Services Order, 11 FCC Rcd at 7374. "Cost pools" are comprised of logical homogeneous groupings of costs that maximize the extent to which cost causative allocation factors can be used to divide costs between regulated and nonregulated activities. Implementation of Further Cost Allocation Uniformity, Memorandum Opinion and Order, 8 FCC Rcd 4664 (1993).



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separate and distinct from the provision of common carrier services in accordance with our rules. 390.

391. On the other hand, carriers that transfer their payphone assets to either a separate affiliate or an operating division that has no joint and common use of assets or resources with the LEC and maintains a separate set of books in accordance with Section 32.23(b) of our rules must account for the transfer according to the affiliate transactions rules of Section 32.27(c) which require that the transfer be recorded at the higher of fair market value or cost less all applicable valuation reserves (net book cost).<sup>49</sup> Fair market value has been defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."<sup>50</sup> We conclude, that in instances when the transfer of payphone assets is governed by Section 32.27(c), it is appropriate, as argued by CPA, that the going concern value associated with the payphone business be taken into consideration in determining fair market value.<sup>51</sup> Such going concern value should, as asserted by GPCA and Peoples, include intangible assets such as location contracts that add value to the payphone business.<sup>52</sup> These intangible assets would be considered in the theoretical purchase price negotiated by a willing buyer and seller. We do not believe, however, that the intangible asset value of BOC or LEC brand names should be included in the determination of going concern or fair market value because a BOC or a LEC would not transfer the right to use its brand name to a third party willing buyer.

392.

393. The operation of our cost allocation rules and our affiliate transactions rules serve to protect ratepayers from different concerns. The cost allocation rules are used to provide guidance to carriers as to how joint and common costs are to be allocated among regulated and nonregulated activities that impact upon regulated activities. These rules are premised on the assumption that ratepayers benefit from the economies of scope associated with integrated operations of regulated and nonregulated activities. Since costs are recorded in regulated accounts, the Commission retains the ability to scrutinize costs associated with nonregulated activities. For example, carriers must file cost allocation manuals. These manuals are subject to

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<sup>48</sup> 47 C.F.R. § 64.904(b).

<sup>49</sup> 47 C.F.R. §§ 32.23(b), 32.27(c). In applying the affiliate transactions rules to asset transfers to operating divisions that maintain a separate set of books and do not jointly use assets or resources with the carrier, we have provided a safeguard to protect against a carrier that attempts to avoid our affiliate transactions rules by "reincarnating a nonregulated affiliate as an operating division." Joint Cost Reconsideration Order, 2 FCC Rcd at 6296.

<sup>50</sup> 26 C.F.R. § 1.170-1. See also, Accounting Safeguards NPRM at para. 83.

<sup>51</sup> See CPA Reply at 12-15.

<sup>52</sup> See GPCA Comments at 15-16; GPCA Reply at 13-14; Peoples Reply at 20-21. This conclusion is also supported by the APCC and GPCA ex parte filing dated September 11, 1996 to the extent that the ex parte filing relates to transfers to separate affiliates. Letter from Albert H. Kramer, Attorney for APCC and GPCA, to William F. Caton, Secretary, dated September 11, 1996 (APCC & GPCA Ex Parte 9/11/1996).

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public comment and must be audited annually by an independent auditor.<sup>53</sup> The report of the independent auditor must also be submitted to the Commission.<sup>54</sup> These procedures promote fair cost allocation and protect regulated ratepayers from absorbing the costs of nonregulated activities. In addition, as assets are retained on the books of the carrier, any resulting gains from a sale of those nonregulated assets accrue to the carrier and to the benefit of ratepayers and shareholders.

394.

395. Our affiliate transactions rules also afford a level of protection to ratepayers. These rules first protect ratepayers by requiring that when an affiliate transfers to or performs a service for the carrier, those assets or services are not charged to regulated ratepayers at an inflated price. In addition, when the carrier transfers assets to an affiliate, the operation of our affiliate transactions rules effectively captures on the carrier's books any appreciation in value of those assets, thus ensuring that any eventual gains would accrue to the benefit of the ratepayers and shareholders.

396.

397. The difference in accounting treatment for payphone assets either reclassified as nonregulated pursuant to our Part 64 cost allocation rules or transferred to a separate affiliate and accounted for in accordance with our Part 32 affiliate transactions rules stems primarily from the fact that in one instance there is no transfer, only a reallocation of assets to nonregulated status, and in the other instance, there has been an actual transfer. In addition, in the first instance our rules are designed to promote fair cost allocation between regulated and nonregulated activities; in the second instance, our rules are designed to protect against cross-subsidies between separate companies by capturing any appreciated value of assets transferred on the books of the carrier.

398.

399. We note that some parties assert that, based on the holding of the Court of Appeals for the D.C. Circuit in Democratic Central Committee,<sup>55</sup> the proper measure of value for an asset reclassified from regulated to nonregulated status is the asset's economic value, which would ordinarily be its fair market value.<sup>56</sup> Democratic Central Committee involved the distribution of capital gains realized from the sale to a third party of property that had been transferred out of the rate base. Although Democratic Central Committee provided several general guiding principles on which the Commission fashioned its affiliate transactions rules, we note that the facts in that case did not involve affiliate transactions.<sup>57</sup> Accordingly, we do not think that case is directly applicable either to the situation where a carrier retains the payphone

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<sup>53</sup> See 47 C.F.R. § 64.904(a).

<sup>54</sup> 47 C.F.R. § 64.904(b).

<sup>55</sup> Democratic Central Committee v. Washington Metropolitan Area Transit Commission, 485 F.2d 786 (D.C.Cir. 1973), cert. denied, 415 U.S. 935 (1974) (Democratic Central Committee).

<sup>56</sup> See, e.g., GPCA Comments at 16-17.

<sup>57</sup> Joint Cost Reconsideration Order, 2 FCC Rcd at 6295.

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assets on its books or transfers the payphone assets to a separate affiliate. In both instances, ratepayers are protected by the application of our accounting safeguards.

400.

401. One of the primary goals of Section 276 is that a BOC shall not be allowed to subsidize its payphone operations directly or indirectly from its telephone exchange operations or its exchange access operations. In order to achieve this goal, Congress required that we adopt at a minimum the nonstructural safeguards of Computer III. In Computer III, the Commission reexamined its regulatory regime for the provision of enhanced services and established nonstructural safeguards for the provision of enhanced services on an integrated basis. These safeguards included the cost allocation rules and the affiliate transactions rules the Commission developed in the Joint Cost Order. These nonstructural safeguards include our Part 64 cost allocation rules and our Part 32 affiliate transactions rules. We also note that the Conference Report states:

402.

"[t]he BOC payphone operations will be transferred, at an appropriate valuation, from the regulated accounts associated with local exchange services to the BOC's unregulated books. The Commission's implementing safeguards must be at least equal to those adopted in the Commission's Computer III proceedings."<sup>58</sup>

We believe that, consistent with Computer III, our cost allocation rules and affiliate transactions rules, as discussed above, provide rules for the appropriate valuation of the reclassification or transfer of payphone assets and we see no compelling argument to deviate from those well-settled rules at this time.<sup>59</sup>

1. APCC and GPCA argue that the legislative history cited in the previous paragraph makes clear that Congress intended that the assets be "transferred."<sup>60</sup> We disagree. We have already stated that Section 276 does not require that a BOC establish a separate affiliate to hold the payphone assets.<sup>61</sup> In fact, the Senate version of Section 276 authorized the Commission to determine whether to require Bell operating companies "to provide payphone service...through a separate subsidiary..."<sup>62</sup> This authorization was deleted from the final version of Section 276. If Congress intended that there be a "transfer", we believe that Congress would have required the BOCs to establish separate affiliates for their payphone operations. Congress

<sup>58</sup> Conference Report at 43.

<sup>59</sup> We note that in the Accounting Safeguards NPRM, we proposed changes to the affiliate transactions rules of Section 32.27 of our rules. See Accounting Safeguards NPRM at paras. 70-88.

<sup>60</sup> Ex Parte Letter from Albert Kramer, Counsel, APCC to William Caton, Acting Secretary, FCC (September 11, 1996) at 3.

<sup>61</sup> See para. 145, above.

<sup>62</sup> S. 652, 104th Cong., 1st Sess., § 265(c) (1995). See also RBOC Comments at 40, n. 53.

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did not do so. Instead, Congress in the very next sentence of the legislative history states that the Commission's implementing safeguards must, at a minimum, be at least equal to those adopted in the Computer III proceedings. These safeguards include our cost allocation rules. Our cost allocation rules are applicable when a carrier maintains integrated regulated and nonregulated activities. To read congressional intent to require a "transfer" would effectively eliminate our cost allocation rules from application to payphone operations. This is contrary to Section 276 which states that the Commission shall prescribe regulations that prescribe a set of nonstructural safeguards for BOC payphone service which "at a minimum, include[s] the nonstructural safeguards equal to those adopted in the Computer Inquiry-III...proceeding."<sup>63</sup> Computer III included our cost allocation rules as a part of the nonstructural safeguards and thus they are applicable to BOC payphone operations. To exclude the cost allocation rules would be contrary to Section 276's intent that they be included.

2.

3. We also agree with the RBOCs that our cost allocation rules only require a reassignment of payphone assets from regulated to nonregulated status.<sup>64</sup> In reality, carriers maintain these assets in regulated Part 32 accounts and do not establish "unregulated books." These accounts are considered "regulated" accounts even though a carrier may assign the entire amount in an account to nonregulated activities. Using regulated accounts serves the public interest by allowing Commission scrutiny of nonregulated activities as they potentially impact regulated activities, maintaining a minimal amount of regulatory burden while protecting regulated ratepayers from cross-subsidies and cost misallocations, and preserving economies of scope that accrue to ratepayers from integrated operations. We believe regulated ratepayers are better served by the requirement that carriers account for payphone operations in regulated accounts than if we required them to account for payphone operations in "nonregulated" accounts or "unregulated books."

4.

### 5. **iii. Other Matters**

6.

7. We require the LECs to reclassify any pay telephone investments recorded in Account 32.2351, Public telephone terminal equipment, and other assets used in the provision of payphone service, along with the associated accumulated depreciation and deferred income tax liabilities, from regulated to nonregulated status pursuant to our Part 64 and Part 32 rules by April 15, 1997 when the associated revised tariffs are effective. We thus agree with Ameritech that we should adopt our tentative conclusion that a phase-in period is unnecessary.<sup>65</sup>

8.

### 9. **3. Termination of Access Charge Compensation and Other Subsidies**

10.

#### 11. **a. The Notice**

<sup>63</sup> 47 U.S.C. § 276(b)(1)(C).

<sup>64</sup> See RBOC Ex Parte 8/30/96 at 8.

<sup>65</sup> Ameritech Comments at 14.

12.

13. In the Notice, we tentatively concluded that incumbent LECs must reduce their interstate CCL charges by an amount equal to the interstate allocation of payphone costs currently recovered through those charges.<sup>66</sup> LECs subject to the price cap rules would treat this as an exogenous cost change to the Common Line basket pursuant to Section 61.45(d) of the Commission's rules.<sup>67</sup> We requested incumbent LECs to identify in their comments all accounts that contain costs attributable to their payphone operations and sought comment on whether specific cost pools and allocators should be used to capture the nonregulated investment and expenses associated with their payphone operations.<sup>68</sup> We also sought comment on whether a transition period is necessary to move from subsidized compensation to per-call compensation for LEC payphones, and how that transition would proceed.<sup>69</sup> We also proposed, in accordance with the mandate of Section 276(b)(1)(B), to require incumbent LECs to remove from their intrastate rates any charges that recover the costs of payphones.<sup>70</sup> Additionally, we solicited comment on whether we should set a deadline and a specific mechanism for elimination of any intrastate subsidies, or whether it would be consistent with the statute, as well as preferable from a policy perspective, to permit the states to formulate their own mechanisms for achieving this result within a specific time frame.<sup>71</sup>

14.

15. We also tentatively concluded that, to avoid discrimination among PSPs, the Subscriber Line Charge should apply to subscriber lines that terminate at both LEC and competitive payphones.<sup>72</sup> We sought comment on whether, to the extent that LECs charge or impute to their own payphone operations only the multi-line business SLC, which is less than the full interstate cost of the subscriber lines connecting their payphones to the network, and recover the balance of the cost of these lines through the CCL charge, they may, in effect, be subsidizing their payphones with access charge revenues, in violation of Section 276.<sup>73</sup> We sought comment on whether LECs in those circumstances should charge or impute to their own payphone operations, as well as to independent payphone providers, an additional monthly charge representing the difference between the SLC cap and the full interstate cost of these subscriber lines.<sup>74</sup> We also sought comment on whether comparable changes should be made to incumbent

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<sup>66</sup> Notice at para. 51.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id. at para. 52.

<sup>71</sup> Id.

<sup>72</sup> Id. at para. 53.

<sup>73</sup> Id. at para. 54.

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LECs' intrastate rates.<sup>75</sup>

16.

17.

**b. Comments**

18.

19.

**i. Carrier Common Line Charge**

20.

21.

The Florida PSC agrees that LECs must reduce their interstate CCL charge by an amount equal to their interstate allocation of payphone set costs currently recovered through these charges.<sup>76</sup> USTA asserts that there is no need for a federally-imposed cost support, create cost pools, or change current accounting procedures.<sup>77</sup> USTA asserts that incumbent LECs subject to price caps should remove the costs of payphone operations through an exogenous cost adjustment to the common line price cap basket price cap index (PCI), and that rate-of-return LECs should adjust regulated rates for the charges in asset and operating costs based on the results of the accounting changes made to assets and expenses.<sup>78</sup>

22.

23.

Ameritech agrees that exogenous treatment is appropriate for transfer of payphone CPE from regulated to nonregulated status.<sup>79</sup> One Call agrees that the CCL charge should be reduced to eliminate both interstate and intrastate subsidies.<sup>80</sup> MCI argues that all direct and indirect costs for interstate and intrastate costs should be removed and that Account 2351 and associated expenses and additional interstate allocated costs should be removed.<sup>81</sup> GPCA contends that the payphone providers' end-user common line charges should be in the carrier common line fund.<sup>82</sup> AT&T argues that the removal of payphone costs from interstate access should not be transferred to the Base Factor Portion of the Common Line Basket, but should remain as part of the Part 69 category.<sup>83</sup>

24.

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<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Florida PSC Comments at 7.

<sup>77</sup> USTA Comments at 5, n.2.

<sup>78</sup> Id. at 9; GTE Reply at 8-10.

<sup>79</sup> Ameritech Comments at 14.

<sup>80</sup> One Call Comments at 9.

<sup>81</sup> MCI Comments at 17.

<sup>82</sup> GPCA Comments at 17.

<sup>83</sup> AT&T Reply at 27, n.70.

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25. CPA argues that attempts to extend the period should be rejected.<sup>84</sup> In contrast, GVNW and Texas PUC assert that a short transition period is necessary to recover costs.<sup>85</sup> The RBOCs argue for a transition period of up to 12 months during which per-call compensation would not be available to the RBOCs, while GPCA argues there should be no more than a 90-day transition period after release of this Report and Order.<sup>86</sup> NECA asserts that the CCL charge should continue until the Commission finalizes decisions on access reform and universal service have been made. NECA argues there will be no discrimination because LECs can bill the CCL charge for all interstate calls and the SLC to all payphones.<sup>87</sup>

26.

27.

**28.**                    **ii. Intrastate Rates**

29.

30. Florida PSC asserts that intrastate adjustments vary and that a national scheme is impractical. Instead, the Commission could set a date for removal of state subsidies.<sup>88</sup> California PUC is concerned that, if LECs cannot recover the interstate costs of subscriber lines because the CCL mechanisms are removed, the state's local phone charges and the state-mandated pay station service charge may not fully recover costs.<sup>89</sup> USTA argues that the payphone line is a common line and should be tariffed at the state level.<sup>90</sup> USTA also contends that states should be permitted to formulate mechanisms to remove intrastate costs.<sup>91</sup>

31.

**32.**                    **iii. Subscriber Line Charge**

33.

34. Florida PSC and the Ohio PUC argue that access lines terminating at LEC payphones should be subject to SLC imputation.<sup>92</sup> Ameritech and SW Bell argue that a SLC should be imputed to all payphones.<sup>93</sup> GPCA opposes application of the SLC to payphones but if the Commission imposes such a requirement, GPCA also opposes any additional charge in

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<sup>84</sup> CPA Reply at 8.

<sup>85</sup> GVNW Comments at 8.

<sup>86</sup> RBOC Comments at 31; GPCA Reply at 15.

<sup>87</sup> NECA Comments at 5, n. 19.

<sup>88</sup> Florida PSC Comments at 7.

<sup>89</sup> California PUC Comments at 15.

<sup>90</sup> USTA Reply at 7.

<sup>91</sup> USTA Comments at 9.

<sup>92</sup> Florida PSC Comments at 8; Ohio PUC Comments at 12.

<sup>93</sup> Ameritech Comments at 14; SW Bell Reply at 7-9.

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addition to what is required of other end users.<sup>94</sup> USTA also opposes imposition of an additional charge for the difference between the SLC cap and the full cost of subscriber lines. USTA argues that if there are any loop subsidies they will be uniform for all loops, not just payphone loops.<sup>95</sup> SW Bell argues that the SLC should apply to payphones because payphones use common lines and access the public switched network just like any other common line service.<sup>96</sup> Sprint supports the additional charge to all PSPs including LECs to the extent that the multi-line business SLC is less than the full interstate cost of subscriber lines.<sup>97</sup>

35.

36. **c. Discussion**

37.

38. In the telephone network, payphones, as well as all other telephones, are connected to the local switch by means of a subscriber line. The costs of the subscriber line that are allocated to the interstate jurisdiction are recovered through two separate charges: a flat-rate SLC assessed upon the end-user customer who subscribes to local service; and a per-minute CCL charge assessed upon IXCs that recovers the balance of the interstate subscriber line costs not recovered through the SLC. LEC payphone costs are also included in the CCL charge. The CCL charge, however, applies to interstate switched access service that is unrelated to payphone service costs. While independent payphone providers are required to pay the SLC for the loop used by each of their payphones, LECs have not been required to pay this charge because the subscriber lines connected to LEC payphones have been recovered entirely through the CCL charge.

39.

40. We conclude that to implement Section 276 (b)(1)(B) of the 1996 Act, incumbent LECs must reduce their interstate CCL charges by an amount equal to the interstate allocation of payphone costs currently recovered through those charges. LECs subject to the price cap rules would treat this as an exogenous cost change to the Common Line basket pursuant to Section 61.45(d) of the Commission's rules. The incumbent LECs' residential SLC is limited to \$3.50 per month and their multi-line business SLC is currently subject to a \$6.00 per month cap.<sup>98</sup> Those LECs with interstate subscriber line costs that exceed this amount recover a portion of the interstate costs of subscriber lines through the CCL charge. The issue of the appropriate interstate SLC has been referred to a Federal-State Joint Board.<sup>99</sup>

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<sup>94</sup> GPCA Reply at 17-19.

<sup>95</sup> USTA Comments at 10. See also RBOC Comments at 32.

<sup>96</sup> SW Bell Reply at 7-8.

<sup>97</sup> Sprint Comments at 28.

<sup>98</sup> 47 C.F.R. § 69.104.

<sup>99</sup> See Federal-State Joint Board on Universal Service, NPRM and Order Establishing Joint Board, FCC 96-93 at para. 114 (rel. March 8, 1996) ("Joint Board Notice"). We note that pursuant to Section 254 of the Act, we have referred to the universal service joint board the matter of how to recover the interstate allocated portion of the subscriber loop costs. Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order



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41.

42. Incumbent LECs today generally recover payphone costs allocated to the interstate jurisdiction through the per-minute carrier CCL charge they assess on IXCs and other interstate access customers for originating and terminating interstate calls. The incumbent LEC assesses the independent payphone provider a SLC (at the multi-line business rate) to recover the payphone common line costs associated with that phone.<sup>100</sup> In the case of competitive payphones, an independent payphone provider recovers its payphone costs out of the revenue it receives from end users, premises owners, and OSPs to whom its payphones are presubscribed. The 1996 Act mandates that the Commission "discontinue the intrastate and interstate carrier access charge payphone service elements and payments ... and all intrastate and interstate subsidies from basic exchange and exchange access revenues[.]"<sup>101</sup>

43.

44. Accordingly, we adopt rules that provide for the removal from regulated intrastate and interstate rate structures of all charges that recover the costs of payphones (*i.e.*, the costs of payphone sets, not including the costs of the lines connecting those sets to the public switched network, which, like the lines connecting competitive payphones to the network, will continue to be treated as regulated). Therefore, we conclude that incumbent LECs must file revised CCL tariffs with the Common Carrier Bureau no later than January 15, 1997 to reduce their interstate CCL charges by an amount equal to the interstate allocation of payphone costs currently recovered through those charges, scheduled to take effect April 15, 1997. LECs subject to the price cap rules must treat this as an exogenous cost change to the Common Line basket pursuant to Section 61.45(d)(1)(v) of our rules.<sup>102</sup> Incumbent LECs must identify and report accounts that contain costs attributable to their payphone operations. Incumbent LECs must identify specific cost pools and allocators that are required to capture the nonregulated investment and expenses associated with their payphone operations. LECs must file this information with the Common Carrier Bureau by January 15, 1997.

45.

46. LECs that file tariffs pursuant to Section 61.38 or Section 61.39, rate-of-return regulation, or Section 61.50, optional incentive regulation, must file tariffs to revise interstate CCL rates to remove the payphone investment and any other assets used in the

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Establishing Joint Board, CC Docket No. 96-45, FCC 96-93 (adopted and released on Mar. 8, 1996). The decision to remove payphone costs from the CCL charge and the decision to impose a SLC to all subscriber lines that terminate at both LEC and competitive payphones was not referred to the universal service joint board.

<sup>100</sup> We recently reaffirmed a decision by the Common Carrier Bureau concluding that independent payphone providers should be classified as "end users" under our rules. *C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 9775 (1995), petition for review filed, *C.F. Communications Corp. v. FCC and United States*, No. 95-1563 (D.C. Cir. filed Nov. 6, 1995). Thus, independent payphone providers are required to pay a SLC for their use of common lines connected to the payphones they serve, but are not assessed a per-minute CCL charge.

<sup>101</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>102</sup> 47 C.F.R. § 61.45(d)(1)(v).

provision of payphone service along with the accumulated depreciation and deferred income tax liabilities from the common line costs recovered through those rates. As stated previously, these LECs must reclassify payphone assets from regulated to nonregulated activity pursuant to Part 64 rules. Expenses incurred after payphones are deregulated should be classified as nonregulated expenses. The CCL rate reduction must account for overhead costs assigned to common line costs as a result of payphone investment and expenses. We require these LECs to recalculate their CCL rates, using the same data and methods they used to develop their current CCL rates, except those calculations should exclude payphone costs.

47.

48. Price cap LECs are also required to revise their CCL rates, using the following method to remove payphone costs from their CCL rates. First, price cap LECs should develop a common line revenue requirement using ARMIS costs for calendar year 1995. Second, price cap LECs are required to develop a payphone cost allocator equal to the payphone costs in Section 69.501(d) divided by total common line costs, based on 1995 ARMIS data. Each LEC is required to reduce its PCI in the common line basket by this payphone cost allocator minus one.

49.

50. We require, pursuant to the mandate of Section 276(b)(1)(B), incumbent LECs to remove from their intrastate rates any charges that recover the costs of payphones. Revised intrastate rates must be effective no later than April 15, 1997. Parties did not submit state-specific information regarding the intrastate rate elements that recover payphone costs. States must determine the intrastate rate elements that must be removed to eliminate any intrastate subsidies within this time frame.

51.

52. Finally, we conclude that, to avoid discrimination among payphone providers, the multiline business SLC must apply to subscriber lines that terminate at both LEC and competitive payphones. We conclude that the removal of payphone costs from the CCL and the payment or imputation of a SLC to the subscriber line that terminates at a LEC nonregulated payphone will result in the recovery of LEC payphone costs on a more cost-causative basis consistent with the requirements of the 1996 Act.<sup>103</sup> No action we take today affects the authority of states to address the state ratemaking implications of reclassification or transfer of payphone assets.

53.

54. **4. Deregulation of AT&T Payphones**

55.

56. **a. The Notice**

57.

58. In the Notice, we tentatively concluded that payphones provided by AT&T should be classified as CPE, finding that discontinuing possible subsidies for AT&T payphones would be congruent with the 1996 Act's requirement that the Commission discontinue subsidies for other payphones (i.e., those owned by incumbent LECs) and would provide for

<sup>103</sup> See Ameritech/SW Bell Waiver at para. 25.

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symmetrical regulation of the payphone industry.<sup>104</sup> We cited two other reasons why this proposed action is in harmony with the other rules we proposed in this proceeding. First, since Tonka Tools,<sup>105</sup> AT&T payphones have been subject to the same regulatory treatment as BOC payphones. Once LEC telephones, including those provided by the BOCs, are declared to be CPE, the basis for treating AT&T payphones as network equipment no longer exists. Second, we believe that deregulating AT&T payphones is consistent with our general policy to deregulate non-dominant carriers. In the Notice, we also tentatively concluded that the bundling of pay telephone equipment with underlying transmission capacity would be treated pursuant to the rules proposed in the Interstate, Interexchange Marketplace proceeding.<sup>106</sup>

59.

60. **b. Comments**

61.

62. Those commenting on AT&T payphones were unanimous in concluding that AT&T payphones should be deregulated.<sup>107</sup> The RBOCs assert that AT&T payphones should be deregulated in the same manner as LEC payphones.<sup>108</sup> AT&T argues, however, that AT&T payphones should not be treated like LEC CPE but should be removed from all regulation except Part 68 registration and treated like independent payphone providers.<sup>109</sup>

63.

64. **c. Discussion**

65.

66. We conclude that AT&T payphones must be deregulated, detariffed and treated as CPE. As we concluded above, there is a competitive market for payphones, and, pursuant to Section 276, subsidies must be removed from payphone service. AT&T payphones have been treated like BOC payphones for regulatory purposes.<sup>110</sup> It would be incongruous to deregulate payphone equipment owned by all other carriers except AT&T. We conclude, therefore, that AT&T payphones must be removed from regulation and treated as independent PSPs' payphones. Accordingly, we require that AT&T follow the same procedures discussed above for valuing LEC payphone assets and transferring them to nonregulated status. After

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<sup>104</sup> Notice at para. 56.

<sup>105</sup> Tonka Tools, note 489, above.

<sup>106</sup> Notice at para. 55.

<sup>107</sup> AT&T Reply at 27; RBOC Comments at 32; California PUC Comments at 15; Florida PSC Comments at 8; USTA Comments at 10; MCI Comments at 15.

<sup>108</sup> RBOC Comments at 32.

<sup>109</sup> AT&T Reply at 27. With regard to bundling of AT&T payphones and phones services, MCI suggests that the Commission review the effect of this proposal after one year. MCI argues, however, that even if the Commission allows bundling, the payphone transmission service should be available separately. MCI Comments at 16.

<sup>110</sup> Tonka Tools, note 489, above.

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deregulation, AT&T payphones will be subject to the same requirements as independent payphone provider payphones.

67.

68. With regard to the issue of bundling of transmission capacity and payphone CPE, we note that in the Interstate, Interexchange Marketplace Notice, we stated that we would consider in this proceeding "the issue of bundling pay telephone equipment with the underlying transmission capacity."<sup>111</sup> In the Notice, we tentatively concluded that other IXC bundling issues should be treated under the same rules that we proposed in the Interstate, Interexchange Marketplace proceeding.<sup>112</sup> We decline to adopt in this proceeding any rules regarding the bundling of payphone CPE with the underlying transmission capacity.<sup>113</sup> We do not have a sufficient record to revise, with regard to payphone CPE, the Commission's conclusion in the Computer II proceeding that there are public interest benefits in unbundling CPE from the underlying transmission service.<sup>114</sup> The issue of IXC CPE bundling will be addressed in the Interstate, Interexchange Marketplace proceeding.

69.

70.

#### **71.C. NONSTRUCTURAL SAFEGUARDS FOR BOC PROVISION OF PAYPHONE SERVICE**

72.

73. The foregoing parts establish a compensation arrangement that applies equally to the payphone operations of the BOCs, other LECs, AT&T and PSPs not affiliated with LECs. In this part, we address certain operating requirements that are imposed only on the BOCs' payphone operations.

74.

75. Section 276(b)(1)(C) directs the Commission to "prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry - III (CC Docket No. 90-623) proceeding[.]"<sup>115</sup> As referred to in Section 276(b)(1)(C), Section 276(a) provides that a BOC "(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and (2) shall not prefer or discriminate in favor of its payphone service."<sup>116</sup>

<sup>111</sup> Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, CC Docket No. 96-61 (rel. Mar. 25, 1996) at para. 91 (Interstate, Interexchange Marketplace Notice).

<sup>112</sup> Notice at para. 55.

<sup>113</sup> Interstate, Interexchange Marketplace Notice at para. 91.

<sup>114</sup> Computer II, 77 FCC 2d at 438-447; 47 C.F.R. § 64.702(e).

<sup>115</sup> 47 U.S.C. § 276 (b)(1)(C).

<sup>116</sup> 47 U.S.C. § 276(a).

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76.

77. **1. The Notice**

78.

79.

In the Notice, we tentatively concluded that all Computer III<sup>117</sup> nonstructural safeguards must be applied to meet our obligation "to prescribe nonstructural safeguards for [BOC] payphone service" under the 1996 Act.<sup>118</sup> We also solicited comment on whether there are other nonstructural safeguards that, while not explicitly specified in Computer III, should be applied to BOC payphones.<sup>119</sup>

80.

To ensure BOC compliance with the Computer III and Open Network Architecture (ONA) requirements, we proposed a requirement that each BOC file, within 90 days of the effective date of this Report and Order, an initial Comparably Efficient Interconnection (CEI) plan describing how it intends to comply with the CEI equal access parameters and nonstructural safeguards for the provision of payphone services.<sup>120</sup>

82.

Currently, the Commission regulates BOC provision of enhanced services through CEI and ONA requirements that mandate unbundled nondiscriminatory access to BOC network features and functionalities.<sup>121</sup> Pursuant to these requirements, BOCs must file a service-specific CEI plan before offering any enhanced service on an integrated basis.<sup>122</sup> A BOC

<sup>117</sup> See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration Order); Phase I Order and Phase I Reconsideration Order vacated California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (California I); Phase II, 2 FCC Rcd 3072 (1987) (Computer III Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1989) (Phase II Further Reconsideration Order); Phase II Order vacated, California I, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (California II); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order), BOC Safeguards Order vacated in part and remanded, California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California III), cert. denied, 115 S.Ct. 1427 (1995).

<sup>118</sup> Notice at para. 58.

<sup>119</sup> Id.

<sup>120</sup> Id. at para. 60.

<sup>121</sup> Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration Order); 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993) (BOC ONA Amendment Reconsideration Order); 6 FCC Rcd 7646, 7649-50 (1991) (BOC ONA Further Amendment Order); 8 FCC Rcd 2606 (1993) (BOC ONA Second Further Amendment Order), pet. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

<sup>122</sup> Phase I Order, 104 FCC 2d at 964-965.

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must demonstrate in its CEI plan how it would provide competing enhanced service providers with "equal access" to all basic underlying network services the BOC used to provide its own enhanced services.<sup>123</sup> Subsequently, the Commission required BOCs to develop and implement ONA plans detailing more fundamental unbundling of their basic network services.<sup>124</sup> ONA requires further unbundling of network elements than under CEI because it is not limited to those elements associated with specific BOC enhanced services.<sup>125</sup> In 1993, the Common Carrier Bureau lifted structural separation requirements after each BOC demonstrated that its ONA plan complied with the BOC Safeguards Order.<sup>126</sup> Following the California III court decision,<sup>127</sup> the Commission has continued to require BOCs to file CEI plans for each individual enhanced service they offer in addition to fulfilling the access requirements of its ONA plan.<sup>128</sup>

## 2. Comments

1. California PUC, One Call, Ameritech, and USTA support Computer III safeguards and CEI.<sup>129</sup> Florida PSC argues that, if nonstructural safeguards are used, specific cost

<sup>123</sup> See Phase I Order, 104 FCC 2d at 1036.

<sup>124</sup> Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, 10 FCC Rcd 8360, 8372, para. 17 (1995) ("Computer III Further Remand Proceedings").

<sup>125</sup> Id.

<sup>126</sup> See Bell Atlantic's Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 3877 (1992) (Bell Atlantic Order); Southwestern Bell Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 7294 (1992) (SWBT Order); US West Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 3639 (1992) (US West Order); Ameritech Operating Companies Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 4104 (1992) (Ameritech Order); New York Telephone Company and New England Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 7 FCC Rcd 8633 (1992) (NYNEX Order); Pacific Bell and Nevada Bell Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 3982 (1993) (Pacific Order); BellSouth Corporation Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket Nos. 90-623 and 88-2, Phase I, 8 FCC Rcd 4864 (1993) (BellSouth Order).

<sup>127</sup> California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California III), cert. denied, 115 S.Ct. 1427 (1995).

<sup>128</sup> Regarding further proceedings on remand, see Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 10 FCC Rcd 8360 (1995).

<sup>129</sup> California PUC Comments at 17; Ameritech Comments at 15; One Call Comments at 9-10; USTA Comments at 10.

pools and allocators should be used to identify the existence of subsidies.<sup>130</sup> GPCA supports the Computer III safeguards and argues that they should be strengthened by requiring that the BOCs also: (1) provide unbundled specific services such as answer supervision and flexible call rating based on subscribers specifications, and continue to provide dialtone and blocking and screening; (2) offer volume discounts on a equal basis to aggregators; (3) provide service order processing; (4) implement safeguards against interference with letters of agency; (5) follow Customer Proprietary Network Information (CPNI) restrictions; (6) file CEI plans; (7) conduct independent audits; and (8) maintain publicly available contracts.<sup>131</sup> SW Bell argues that there is no incentive for cross-subsidization with price cap regulation and the elimination of sharing.<sup>132</sup> Ameritech disagrees with the Commission that a separate proceeding is necessary to develop accounting safeguards different than those applied in Computer III.<sup>133</sup> Inmate Coalition argues that additional safeguards should include accounting and fraud control, billing and collection, and CPNI availability.<sup>134</sup> USTA argues that pursuant to Section 276, nonstructural safeguards only apply to BOCs.<sup>135</sup> GPCA argues that the Computer III safeguards should apply to other LECs, particularly those with annual revenues greater than 100 million dollars, including GTE, Sprint and Alltel, and LECs that service Puerto Rico and the Virgin Islands.<sup>136</sup> Ohio PUC argues that Computer III nonstructural safeguards should apply to all LECs if payphones are deregulated and structural separation is not imposed.<sup>137</sup>

2.

3. AT&T and GPCA support the imposition of CEI plans on the BOC provision of payphone services.<sup>138</sup> The RBOCs and PacTel argue that CEI plans are not necessary because these are basic, not enhanced services.<sup>139</sup> AT&T contends that CPNI requirements should apply to BOC provision of payphones.<sup>140</sup> One Call argues that if CPNI is not restricted, it

<sup>130</sup> Florida PSC Comments at 8.

<sup>131</sup> GPCA Comments at 8-12, 23-25.

<sup>132</sup> SW Bell Reply at 4-6.

<sup>133</sup> Ameritech Comments at 15-16; One Call Comments at 9-10.

<sup>134</sup> Inmate Coalition Comments at 22.

<sup>135</sup> USTA Reply at 7-8.

<sup>136</sup> GPCA Reply at 18; GPCA Comments at 26.

<sup>137</sup> Ohio PUC Comments at 13.

<sup>138</sup> AT&T Comments at 22; GPCA Comments at 23-25.

<sup>139</sup> PacTel Reply at 5-6.

<sup>140</sup> AT&T Comments at 23, n.47.

should be available to all providers.<sup>141</sup> GPCA contends that information about the use of LEC payphones is CPNI that should be available to any party upon reasonable request.<sup>142</sup> AT&T supports the network information disclosure requirements established in our implementation of Section 251 of the 1996 Act, plus the addition of two requirements that BOCs file network information disclosures with the Commission, and that there be one year notification of network changes.<sup>143</sup>

4.

5. **3. Discussion**

6.

7.

a. **Nonstructural Safeguards**

8.

9.

In addition to the accounting safeguards that we will adopt with respect to payphone services in the accounting safeguards proceeding, we conclude that the Computer III and ONA nonstructural safeguards will provide an appropriate regulatory framework to ensure that BOCs do not discriminate or cross-subsidize in their provision of payphone service. The Commission and the BOCs have substantial experience in the application of these safeguards that will facilitate their use in the context of BOC payphone services. We conclude that we do not have to adopt any additional safeguards beyond Computer III and ONA because of the comprehensive nature of that regulatory structure and the lack of a record necessary to conclude that a more burdensome framework should be adopted and is in the public interest. As discussed above, we decline to require structural separation requirements. To ensure that the BOCs comply with the Computer III and ONA nonstructural separation requirements for the provision of payphone services, we require that, within 90 days after the effective date of this Report and Order, BOCs must file CEI plans describing how they will comply with the Computer III unbundling, CEI parameters, accounting requirements, CPNI requirements as modified by Section 222 of the 1996 Act, network disclosure requirements, and installation, maintenance, and quality nondiscrimination requirements.

10.

11.

The Computer III nonstructural safeguards currently apply to a BOC's provision of payphone service if enhanced services are provided through the payphone.<sup>144</sup> Under the Computer III and ONA framework, BOCs are permitted to provide enhanced services on an integrated basis subject to nondiscrimination safeguards. The safeguards the Commission adopted in Computer III and ONA include: (1) nondiscriminatory access to network features and functionalities; (2) restrictions on the use of CPNI; (3) network information disclosure rules; (4) nondiscrimination in the provision, installation, and maintenance of services as well as

<sup>141</sup> One Call Comments at 10.

<sup>142</sup> GPCA Comments at 21.

<sup>143</sup> AT&T Comments at 22-3.

<sup>144</sup> See American Telephone and Telegraph Company Petition for Limited Waiver of Comparably Efficient Interconnection Requirements of Third Computer Inquiry; Report and Order, 8 FCC Rcd 6808 (1993).



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nondiscrimination reporting requirements; and (5) cost accounting safeguards. We conclude that all Computer III and ONA nonstructural safeguards must be applied to meet our obligation under the 1996 Act.<sup>145</sup> Pursuant to these requirements, we note that any basic services provided by a BOC to its payphone affiliate must be available on a nondiscriminatory basis to other payphone providers and that payphone providers may request additional unbundled payphone services through the 120 day ONA service request process.<sup>146</sup>

12.

13. Except for the Commission's Part 64 cost allocation rules and Part 32 affiliate transaction rules, we decline to apply the Computer III nonstructural safeguards to other LECs. We concluded in the BOC CPE Relief Order that application of those safeguards would be "unduly burdensome and not necessary to protect against potential anticompetitive conduct."<sup>147</sup> We similarly, declined to apply Computer III and ONA nonstructural safeguards to other LECs, except GTE.<sup>148</sup> Moreover, Section 276 specifically directs the Commission to establish nonstructural safeguards for the BOCs, but does not include such a requirement regarding other LECs.<sup>149</sup>

14.

15. **b. BOC CEI Plans**

16.

17. We require that each BOC file, within 90 days of the effective date of this Report and Order, an initial CEI plan describing how it intends to comply with the CEI equal access parameters and nonstructural safeguards for the provision of payphone services. In Computer III, CEI plans have been an integral part of ensuring that BOCs do not discriminate in providing basic underlying services to enhanced services providers. We likewise require the filing of CEI plans for payphone services, even though we have traditionally only required such plans for the BOC provision of enhanced services, to ensure that the BOCs provide payphone services in a nondiscriminatory manner and consistent with other Computer III and ONA requirements. Finally, we conclude that this requirement is consistent with the requirement in Section 276 that we establish safeguards, at a minimum, "equal to those adopted in the Computer III Inquiry."<sup>150</sup>

18.

<sup>145</sup> 47 U.S.C. § 276(b)(1)(C).

<sup>146</sup> See BOC ONA Order, 4 FCC Rcd at 205-6; BOC ONA Amendment Order, 5 FCC Rcd at 3117; BOC ONA Further Amendment Order, 6 FCC Rcd at 7654-6.

<sup>147</sup> BOC CPE Relief Order, 2 FCC Rcd at 157; See also 3 FCC Rcd 22 (1987).

<sup>148</sup> Computer III Phase II Order, 2 FCC Rcd at 3101. In 1994, the Commission decided to apply the Computer III and ONA requirements to GTE Corporation. Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, CC Docket No. 92-256, 9 FCC Rcd 4922 (1994).

<sup>149</sup> 47 U.S.C. § 276(b)(1)(C).

<sup>150</sup> Id.

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19. In a CEI plan, a BOC must describe how it intends to comply with the CEI "equal access" parameters for the specific payphone service it intends to offer. The CEI equal access parameters include: interface functionality; unbundling of basic services; resale; technical characteristics; installation, maintenance, and repair; end user access; CEI availability; minimization of transport costs; and availability to all interested customers or enhanced service providers.<sup>151</sup>

20.

21. In its CEI plan, a BOC must explain how it will unbundle basic payphone services. Thus, a BOC must indicate how it plans to unbundle, and associate with a specific rate element in a tariff, the basic services and basic service functions that underlie its provision of payphone service.<sup>152</sup> Nonproprietary information used by the BOC in providing the unbundled basic services will be made available as part of CEI.<sup>153</sup> In addition, any options available to the BOC in the provision of such basic services or functions would be included in the unbundled offerings.<sup>154</sup>

22.

23. A BOC also must explain in its CEI plan how it will comply with the CPNI requirements. We have continued to require compliance with the Computer III and ONA CPNI requirements that are not inconsistent with Section 222 of the 1996 Act, which was immediately effective.<sup>155</sup> In the CPNI NPRM, we are currently examining a carrier's obligations under the CPNI provisions of the 1996 Act.<sup>156</sup> We disagree with GPCA's contention that pursuant to the Commission's CPNI requirements, usage of LEC payphones should be treated as aggregate CPNI that should be made available to any party upon request.<sup>157</sup> Under Computer III and ONA BOCs must make aggregate CPNI available to third parties if they make it available to BOC personnel for marketing. This requirement does not apply merely upon a third party's request, and the requirement does not apply to LECs other than the BOCs. Moreover, aggregate CPNI includes compilations of CPNI information, not individual locations.<sup>158</sup> We will consider

<sup>151</sup> Phase I Order, 104 FCC 2d at 1039-1043.

<sup>152</sup> Id. at 1040.

<sup>153</sup> Id.

<sup>154</sup> Id.

<sup>155</sup> 47 U.S.C. § 222. See Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking, CC Docket No. 96-115 (rel. May 17, 1996) (CPNI NPRM).

<sup>156</sup> CPNI NPRM at para. 37-8.

<sup>157</sup> The statute defines the term "aggregate customer information" as "collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed." 47 U.S.C. § 222(f)(2).

<sup>158</sup> Computer III Phase II Order, 2 FCC Rcd at 3097.

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the requirements for LEC provision of aggregate CPNI under Section 222 in the CPNI proceeding.<sup>159</sup>

24.

25. BOCs must comply with the Computer III and ONA network information disclosure requirements. The BOCs cannot design new network services or change network technical specifications to the advantage of their own payphones.<sup>160</sup> Pursuant to these rules, the BOCs must disclose information about changes in their networks or new network services at two different points in time.<sup>161</sup> First, disclosure must occur at the "make/buy" point: when a BOC decides to make for itself, or procure from an unaffiliated entity, any product whose design affects or relies on the network interface. Second, a BOC must publicly disclose technical information about a new service 12 months before it is introduced. If the BOC can introduce the service within 12 months of the make/buy point, it would make a public disclosure at the make/buy point. The public disclosure, however, must not occur less than six months before the introduction of the service.<sup>162</sup>

26.

27. In addition, BOCs must comply with the Computer III and ONA requirements regarding nondiscrimination in the quality of service, installation, and maintenance. BOCs must indicate in their CEI plans how they will comply with these requirements. We do not impose any new continuing reporting requirement because BOCs are already subject to reporting requirements pursuant to Computer III and ONA.<sup>163</sup> BOCs must report on payphone services as they do for other basic services.

28.

29.

### 30.D. ABILITY OF BOCs TO NEGOTIATE WITH LOCATION

#### 31. PROVIDERS ON THE PRESUBSCRIBED INTERLATA CARRIER

32.

33. Section 276(b)(1)(D) of the 1996 Act directs the Commission to eliminate the court-ordered competitive barrier prohibiting the BOCs from participating in the selection of presubscribed interLATA carriers to their payphones, unless we find such activity to be contrary to the public interest.<sup>164</sup> While independent payphone service providers, as well as non-BOC

<sup>159</sup> CPNI NPRM at para. 37.

<sup>160</sup> BOC Safeguards Order, 6 FCC Rcd at 7602-04.

<sup>161</sup> Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 2 FCC Rcd 3072, 3087-88 (1988). The network information subject to disclosure includes only network changes or new basic services that affect the interconnection of enhanced services with the network. Id. at 3097. These network disclosure rules parallel those for CPE.

<sup>162</sup> Computer III, 3 FCC Rcd 1150, 1164 (1988).

<sup>163</sup> See BOC ONA Reconsideration Order, 5 FCC Rcd at 3093, 3096, Appendix B.

<sup>164</sup> 47 U.S.C. § 276(b)(1)(D); See United States v. Western Elec. Co., 698 F. Supp. 348, 360 (D.D.C. 1988).

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LECs, may receive a portion of the commissions from IXC's on interLATA operator service calls using the presubscribed carrier to their payphones, the BOCs do not receive any revenues directly from these calls. At the same time, BOCs have received subsidies from local access services for their payphone operations, which have not been available to independent payphone service providers.<sup>165</sup> Section 276 promotes competition for the provision of payphone services by directing the elimination of both these market-distorting factors.<sup>166</sup>

34.

35.

36.

37.

**38. 1. Is BOC Ability to Negotiate Presubscription**  
**39. in the Public Interest?**

40.

41.

**a. The Notice**

42.

43. Under Section 276(b)(1)(D) of the 1996 Act, the Commission is to "provide for Bell operating company payphone service providers to have the same right that independent payphone service providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest." The legislative history of Section 276 states that the location provider "has the ultimate decision-making authority in determining interLATA services in connection with the choice of payphone providers."<sup>167</sup>

44.

45. In the Notice, the Commission sought comment on whether the BOCs should be permitted to select and contract with the interLATA carriers that carry interLATA traffic from BOC payphones.<sup>168</sup> The Commission sought comment on whether the ability to select the interLATA carrier serving their payphones is likely to permit the BOCs to behave anticompetitively in the payphone market in the absence of safeguards to prevent cost misallocations and discrimination.<sup>169</sup> Similarly, the Commission sought comment on whether the structural and accounting safeguards mandated under Sections 271 and 272 of the 1996 Act, and any Commission rules implementing these safeguards, are sufficient to prevent anticompetitive abuses. The Commission also sought comment on to what extent a BOC not authorized to provide in-region interLATA service under Section 271 of the 1996 Act should be allowed to

<sup>165</sup> See Section III.B., above.

<sup>166</sup> 47 U.S.C. § 276(b)(1)(B) and (D)

<sup>167</sup> S. Conf. Rep. No. 104-230 at 44.

<sup>168</sup> Notice at para. 71.

<sup>169</sup> Id. at para. 72.

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participate in the selection of the interLATA carrier, especially if the BOC has a non-attributable interest in the interLATA carrier, such as an option to purchase or an agreement to merge.<sup>170</sup>

46.

47.

**b. Comments**

48.

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<sup>170</sup>

Id.

49. The RBOCs and Ameritech argue that the Act specifically directs the Commission to allow the BOCs to negotiate presubscription carriers for their payphones unless the Commission makes a finding that such authority is contrary to the public interest.<sup>1</sup> Other commenters, however, argue that the Commission should grant this authority only if and when it can affirmatively conclude that allowing the BOCs to negotiate would be in the public interest.<sup>2</sup> Oncor additionally asserts that consideration of this issue is premature until such time as the Commission has adopted rules addressing other requirements of the 1996 Act, including those governing interconnection rights, and the authority of BOCs to provide in-region interLATA service.<sup>3</sup>

50.

51. The RBOCs assert that granting them equal rights with the independent PSPs to negotiate presubscription for their payphones promotes the public interest. The RBOCs argue that an essential assumption underlying the 1996 Act is that competition is in the public interest, and it is therefore in the public interest to allow the them to compete against the independent PSPs with respect to presubscription of their payphones.<sup>4</sup> The RBOCs assert that such authority is critical to establishing market parity and increasing competition between BOC and non-BOC PSPs.<sup>5</sup> The RBOCs and Ameritech state that under the current rules, they are at a competitive disadvantage due to the inability to offer "one-stop shopping" to location providers who wish to deal with a single entity for equipment, local service and toll service.<sup>6</sup> The RBOCs also argue that the existing presubscription restriction denies consumers the benefits of true competition by preventing them from aggregating interLATA and intraLATA traffic in order to negotiate the best possible rates from interLATA carriers, while allowing the independent PSPs to do so.<sup>7</sup> Additionally, the RBOCs and Ameritech contend that if they are denied the equal opportunity to negotiate interLATA carriers, while simultaneously being stripped of existing payphone-supporting subsidies, the public will be harmed by the likely reduction in the number of payphones they provide.<sup>8</sup> Finally, the RBOCs and Ameritech assert that granting them equal opportunity to choose the carrier for their payphones would serve to protect consumers from price-gouging carriers, since they have a strong interest in protecting the reputation and brand

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<sup>1</sup> RBOC Comments at 42; Ameritech Comments at 22.

<sup>2</sup> See, e.g., AT&T Comments at 26; Oncor Comments at 2-3.

<sup>3</sup> Oncor Comments at 11-13.

<sup>4</sup> RBOC Reply at 25; BellSouth Comments at 8.

<sup>5</sup> RBOC Comments at 41-42. See also USTA Comments at 11.

<sup>6</sup> Ameritech Comments at 20; RBOC Comments at 41-42.

<sup>7</sup> RBOC Comments at 41-42.

<sup>8</sup> Id.; Ameritech Comments at 21-22.

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name recognition of their payphones.<sup>9</sup>

52.

53. Other commenters, including state regulatory agencies, agree that increased competition resulting from authorizing the BOCs to negotiate for presubscription of their payphones would, standing alone, be in the public interest.<sup>10</sup> Many non-LEC commenters, however, also express concern that such authority would present serious risk of exclusionary conduct by the BOCs, which would be contrary to the public interest.<sup>11</sup>

54.

55. Many of the commenters expressing concern about the BOCs' ability to act anticompetitively if allowed to negotiate presubscription carriers with location providers pointed to the BOCs' 80 percent or greater share of the payphone units in their respective regions.<sup>12</sup> These commenters argue that this high share of the payphone market will allow the BOCs to aggregate large volumes of traffic in order to extract concessions from the IXC's (in the form of either lower rates or higher commissions), not available to the independent PSPs, and which in turn could be used to extend their share of the payphone market.<sup>13</sup> AT&T states that BellSouth, US West and GTE have already contacted AT&T and other IXC's concerning the possibility of entering into contracts for the delivery of 0+ interLATA service from their companies' entire base of payphones.<sup>14</sup> Some of these commenters contend that the ability to aggregate their volumes and direct them to a single carrier would allow the BOCs to exercise a degree of control in the interLATA market prior to being authorized to provide interLATA service pursuant to Section 271 of the 1996 Act.<sup>15</sup> WorldCom also identifies the BOCs' exclusive control over their line-based 0+ calling cards as an additional basis for leveraging the location providers selection of the presubscribed IXC.<sup>16</sup>

56.

57. Some commenters, including the IXC's, assert that the BOCs should not be allowed to negotiate for presubscription of their payphones at least until they satisfy the requirements for entering the interLATA market pursuant to Section 271 of the 1996 Act.<sup>17</sup>

<sup>9</sup> RBOC Comments at 42-43; BellSouth Comments at 7-8; Ameritech Comments at 21.

<sup>10</sup> See, e.g., California PUC Comments at 18; Virginia SCC Comments at 3-4; Florida PSC Comments at 8-9; SDPOA Reply at 2.

<sup>11</sup> See, e.g., AT&T Comments at 24-27.

<sup>12</sup> APCC Comments at 42-43; New Jersey Payphone Comments at 16-17; AT&T Comments at 24-26; Oncor Comments at 6; CompTel Comments at 17.

<sup>13</sup> Id.; See also CompTel Comments at 17-21.

<sup>14</sup> AT&T Comments at 25-26.

<sup>15</sup> Id. at 24; APCC Comments at 42-43; CPA Comments at 20; CompTel Comments at 17-21.

<sup>16</sup> WorldCom Comments at 22.

<sup>17</sup> AT&T Comments at 24; MCI comments at 19; Sprint Comments at 29-30; CompTel Comments at 20-21.

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These commenters argue that until the BOCs face significant competition in the local exchange market, they will be able to subsidize commission payments to location providers with regulated service revenue and, thus, behave anticompetitively in the payphone market.<sup>18</sup> Some commenters also assert that the BOCs could be expected to leverage the market power they currently possess, both in the payphone market and local telephone markets, to inhibit the development of competition in the payphone market.<sup>19</sup>

58.

59. The RBOCs contend that the payphone market is competitive and that they do not, and cannot, exercise market power in the payphone industry.<sup>20</sup> While acknowledging that they have between 60 and 80 percent of the payphone units in their respective regions, the RBOCs assert that this is not an appropriate measure of market share or market power.<sup>21</sup> BellSouth argues that market share measurements based upon number of payphone units are misleading because a significant portion of the BOC payphones are non-competitive or semi-public payphones producing below market-level revenues, while the independent PSPs have targeted high volume locations.<sup>22</sup> BellSouth asserts that within the most competitive market segments, market share numbers actually indicate competitive parity.<sup>23</sup> BellSouth submitted estimated market share data for states within its region stating that, while independent PSPs have only 39 per cent of the payphone units, they have almost 55 per cent of the public payphone revenues, compared with BellSouth's 45 per cent.<sup>24</sup> GPCA disagrees with the market share data submitted by the BOCs, including their exclusion of semi-public payphones while including small-business-self-supply payphones (payphone sets which permit small businesses to self-supply payphone service) in the independent payphone providers' market share.<sup>25</sup>

60.

61. The RBOCs also assert that the payphone market has very low entry barriers, so that any efforts to exclude competition would be futile.<sup>26</sup> Information submitted by BellSouth states that, within its region, no state has fewer than 107 certificated independent PSPs, while two states (Florida and South Carolina) each have more than one-thousand

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<sup>18</sup> MCI Comments at 19; Oncor Comments at 6.

<sup>19</sup> Oncor Comments at 5-10; One Call Reply at 6.

<sup>20</sup> RBOC Reply at 26-27; BellSouth Comments at Appendix 1, p.1; BellSouth Reply at 3.

<sup>21</sup> BellSouth Comments at Appendix 1, p. 14-16.

<sup>22</sup> *Id.*; BellSouth Reply at 3-4.

<sup>23</sup> BellSouth Reply at 4 and Exhibit A.

<sup>24</sup> *Id.* at Exhibit A.

<sup>25</sup> GPCA Reply at 20 n.7 (referencing BellSouth Comments at Attachment 1, p. 15).

<sup>26</sup> RBOC Reply at 27; BellSouth Comments at Appendix 1, p. 8-16.



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independent PSPs.<sup>27</sup> BellSouth and Ameritech contend that existing nonstructural and structural safeguards are adequate to protect against attempts to leverage market power in local telephone service or to engage in discriminatory conduct.<sup>28</sup> BellSouth also argues that until a BOC is allowed to offer in-region interLATA service, interexchange service will be acquired by the BOC PSPs from a separate affiliate, making subsidization easily detected.<sup>29</sup> Ameritech contends that Congress has specifically resolved this issue by both granting BOCs equal rights with non-BOC PSPs to participate in the selection of carriers for its payphones and granting them the right to provide interLATA service themselves. Thus, Ameritech argues, Congress has determined that the promotion of one's own affiliated interLATA services, whether done by a BOC itself or a through a separate pay telephone operation, is not to be condemned as discrimination.<sup>30</sup> BellSouth and Ameritech also assert that the location provider's ultimate control in selecting the PSP will act as a check on a BOC's ability to exercise market power.<sup>31</sup>

62.

63. Many commenters urging against authorizing BOC presubscription rights also propose options for minimizing the anticompetitive potential should the Commission decide to approve that authority. As noted above, several of these comments assert that granting BOCs the ability to presubscribe their payphones should be delayed at least until the BOCs are faced with competition in the intraLATA market.<sup>32</sup> Other commenters argue that the Commission should require structural separation between the BOCs' carrier services and their payphone services.<sup>33</sup> Peoples supports giving BOCs the freedom to select the interLATA carrier serving their payphones, but only if they offer payphone service from a structurally separate subsidiary.<sup>34</sup> California PUC expresses concern as to whether existing nonstructural safeguards provide sufficient protection against anticompetitive behavior by the BOCs, but contends that Commission oversight in the form of reporting requirements on the BOCs with respect to implementation of nondiscriminatory payphone service should provide adequate notice of anticompetitive abuses.<sup>35</sup> To deter such abuses, California PUC asserts that the states should be

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<sup>27</sup> BellSouth Reply at Appendix B.

<sup>28</sup> RBOC Comments at 43; Ameritech Comments at 25-28.

<sup>29</sup> RBOC Comments at 43.

<sup>30</sup> Ameritech Comments at 25-27.

<sup>31</sup> BellSouth Comments at 7, 9; Ameritech Comments at 19.

<sup>32</sup> See, e.g., AT&T Comments at 24; CompTel Comments at 21; MCI Comments at 19; Sprint Comments at 29-30.

<sup>33</sup> See, e.g., One Call Reply at 6-7; APCC Comments at 43-44; ACTEL Comments at 12.

<sup>34</sup> Peoples Reply at 22-23.

<sup>35</sup> California PUC Comments at 18; see also Virginia SCC Comments at 3-4.

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given authority to prevent BOCs from giving more favorable interLATA rates to their own payphone operations or other similar anticompetitive behavior.<sup>36</sup>

64.

65. The RBOCs contend that the Commission need not adopt rules in addition to the structural and accounting safeguards mandated under Sections 271 and 272 of the 1996 Act in order to prevent them from engaging in cross-subsidization or other anticompetitive conduct with respect to their payphone activities.<sup>37</sup> Ameritech asserts that the Commission has incorrectly assumed that the nondiscrimination provisions of Section 272 of the 1996 Act will apply to the BOCs' participation in the choice of interLATA carrier at BOC payphones. It argues that it will not be the network part of the BOC that will be selecting the interLATA carrier, but the entity that owns the payphones -- which by that time will have gone through the nonstructural separation required by Section 276. Ameritech contends that the payphone entity will not be required to maintain separation from the BOC subsidiary providing in-region interLATA services, and therefore there will be no Section 272 rule against discrimination applicable as between the payphone operation and the interLATA separate subsidiaries.<sup>38</sup>

66.

67. Some commenters propose limitations designed to prevent the BOCs from leveraging their high payphone interLATA volume in order to obtain rates not available to independent PSPs.<sup>39</sup> APCC contends that if the Commission decides to grant the BOCs the ability to presubscribe their payphones, then the Commission should also adopt rules requiring any independent PSPs aggregating at least one-third of the non-LEC payphone volume in a region to qualify for the lowest rates made available by a carrier to a competing BOC.<sup>40</sup> CPA and GPCA argue that the Commission should consider placing a limit on the volume of calls that must be aggregated to receive an IXC's highest available commission level for 0+ interLATA calls.<sup>41</sup> Several other commenters urge the Commission to adopt safeguards that would limit the volume of traffic that a BOC could route to a single interLATA carrier, as well as limit the BOCs' ability to aggregate payphone volume into a single commission agreement.<sup>42</sup> Florida PSC contends that the Commission should adopt rules to prevent the BOCs from giving more favorable interLATA rates to their own payphone operations than to their payphone

<sup>36</sup> California PUC Comments at 18-19. Also Florida PSC Comments at 9.

<sup>37</sup> BellSouth Comments at 8; RBOC Comments at 37-40; RBOC Reply at 21-22, 29.

<sup>38</sup> Ameritech Comments at 25-26.

<sup>39</sup> See, e.g., One Call Reply at 6-7; APCC Comments at 43-44; CPA Comments at 20-21; ACTEL Comments at 11-12; GPCA Reply at 20-22.

<sup>40</sup> APCC Comments at 43-44.

<sup>41</sup> CPA Comments at 20-21; GPCA Comments at 10.

<sup>42</sup> CPA Comments at 20-21; One Call Reply at 6-7.

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competitors.<sup>43</sup>

68.

69. Some commenters urging limitations on the BOCs' ability to presubscribe their payphones contend that such limitations are only needed until competition sufficiently develops to prevent anticompetitive conduct by the BOCs.<sup>44</sup> Peoples asserts that structural separation would be an appropriate transitional requirement to prevent cross-subsidization and allow the development of full competition in the payphone industry, but could be phased out after the BOCs have reclassified their payphone assets and removed all of the subsidies out of their basic service rates.<sup>45</sup> Other commenters argue that restrictions should apply to a BOC's ability to presubscribe itself even after being granted authority to offer interLATA service pursuant to Section 271.<sup>46</sup> CompTel argues that BOC participation in the presubscription selection process should be delayed at least until after the BOC satisfies the Section 271 competitive checklist. Even then, CompTel asserts, safeguards will be necessary to prevent anticompetitive conduct by the BOCs, including (1) limiting the volume of traffic a BOC can route to a single carrier; (2) prohibiting the BOC from presubscribing itself for interLATA calls from its payphones; and/or (3) limiting the number of calls the BOCs can aggregate into a single commission agreement.<sup>47</sup> NJPA asserts that once the BOCs are allowed to enter the interLATA market, they will undoubtedly direct all interLATA calls from their payphones to themselves, and accordingly asserts that the Commission should prohibit indefinitely the BOCs from negotiating presubscription for their payphones.<sup>48</sup> AT&T argues that even after a BOC satisfies the Section 271 requirements, the Commission should not allow a BOC (or other LEC) to negotiate with location providers within its own region until the Commission has individually evaluated how each LEC's control over local exchange facilities and extensive payphone penetration affects its ability to behave anticompetitively.<sup>49</sup>

70.

71. The RBOCs assert that any regulatory restrictions which limit the portion of interLATA traffic a BOC can deliver to any particular carrier, or the number of interLATA calls that must be aggregated to receive an IXC's highest available commission level, are inefficient, anticompetitive, and unnecessary.<sup>50</sup> The RBOCs contend that the public interest standard of

<sup>43</sup> Florida PSC Comments at 9.

<sup>44</sup> See, e.g., Peoples Comments at 22.

<sup>45</sup> Id.

<sup>46</sup> APCC Comments at 44; CompTel Comments at 21.

<sup>47</sup> CompTel Comments at 21.

<sup>48</sup> NJPA Comments at 17.

<sup>49</sup> AT&T Comments at 24. See also Oncor Comments at 7.

<sup>50</sup> RBOC Reply at 23-28.

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Section 276 does not require the Commission to delay granting them presubscription negotiation authority until after they are authorized to provide in-region interLATA service pursuant to Section 271, noting that Congress chose not to link those two sections of the 1996 Act.<sup>51</sup>

73. Location providers, including airports and hospitals, maintain that authorizing the BOCs to select the interLATA carrier for their payphones could deprive the location providers of a significant source of revenues by reducing or eliminating commissions paid to them for the placement of payphones.<sup>52</sup> These location providers assert that the 1996 Act establishes that location providers should retain ultimate authority to determine the carriers serving payphones on their premises, and argue that the Commission should not implement rules which would restrict the location provider's authority in this regard.<sup>53</sup> Airport and hospital location providers also assert that the commissions they receive from PSPs help reduce the cost of operating these public facilities, thus allowing the BOCs to engage in conduct likely to reduce these commission levels would be contrary to the public interest.<sup>54</sup> Some location providers also contend that they have a reputational interest in both the quality of service from payphones on their premises and in protecting their customers from unfair rates when using such payphones.<sup>55</sup> Some location providers assert that if the Commission allows the BOCs to negotiate presubscription, then the Commission should also make clear that the location providers retain the ultimate decision concerning interLATA carriers for payphones on their premises.<sup>56</sup> ACI-NA states that while it agrees with the tentative conclusion that all PSPs, including the BOCs, should be authorized to negotiate with location providers concerning the choice of interLATA carrier, the Commission should also make it clear that PSPs may not contract with any carrier over the objection of the location provider.<sup>57</sup>

74.

75. The RBOCs argue that location providers always retain the ultimate decision-making authority concerning interLATA carriers for payphones on their premises through their choice of payphone service provider.<sup>58</sup> Ameritech states that the public interest analysis required

<sup>51</sup> BellSouth Comments at 8; RBOC Reply at 29.

<sup>52</sup> AAAE Comments at 1-3; ACI-NA at 3-5; AHA TelePlan Comments at 1; Cleveland Clinic Foundation Comments at 1; NATSO Comments at 2-3. See also City of Kansas City, Missouri Comments at 1-3.

<sup>53</sup> Id.; Admirals Club Comments at 1; AHA TelePlan Comments at 1; Greyhound Lines, Inc. Comments at 1; ARVC Comments at 1-3.

<sup>54</sup> AAAE Comments at 1-3; ACI-NA Comments at 2-5; AHA TelePLAN Comments at 1.

<sup>55</sup> ARVC Comments at 1-3.

<sup>56</sup> See, e.g., DFW Comments at 1.

<sup>57</sup> ACI-NA Comments at 5; also DFW Comments at 1.

<sup>58</sup> RBOC Reply at 26 and n. 25.

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under the 1996 Act does not protect the interests of location providers in high commission levels, especially to the extent such commissions are recouped by the carriers through higher rates to consumers.<sup>59</sup>

76.

77. **c. Discussion**

78.

79. Section 276(b)(1)(D) directs the Commission to grant the BOCs the right to negotiate with location providers for the presubscription of interLATA carriers for their payphones, unless we determine that such rights would be contrary to the public interest.<sup>60</sup>

80.

81. Commenters arguing that BOC participation in the selection of presubscribed interLATA carriers for their payphones is contrary to the public interest contend that the BOCs' large share of existing payphone units, as well as their continuing near-monopoly over local access service, will allow them to engage in anticompetitive conduct in the payphone services market if granted unfettered interLATA presubscription rights.<sup>61</sup> The proponents of this view make two basic arguments. First, they assert that the BOCs' large share of the existing payphones will enable them to aggregate their payphone volumes, in order to obtain from IXC's lower rates (or higher commission levels) than those available to independent payphone providers.<sup>62</sup> This cost advantage would, in turn, allow the BOCs to strengthen their position as the dominant players in the provision of payphone services by enabling them to either pay higher commissions to location providers, or to offer lower rates to end users. Second, these commenters argue that the BOCs will be able to use their bottleneck control over local service facilities to subsidize or discriminate in favor of their own payphone operations.<sup>63</sup> We address each of these arguments separately below. We conclude, however, that the record does not support a finding that it would be contrary to the public interest to allow the BOCs to negotiate with location providers with respect to selecting and contracting for the interLATA carriers presubscribed to their payphones.

82.

83. Some commenters arguing against granting the BOCs such presubscription rights assert that the BOCs will be able to solidify, or even expand, their current dominant share of the payphone services market by using their existing size to negotiate lower interexchange rates than are available to non-BOC payphone service providers. Even if we assume that the BOCs will be able to aggregate their traffic to obtain superior deals from the IXCs, however, it does not necessarily follow that this represents injury to competition or the

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<sup>59</sup> Ameritech Reply at 15.

<sup>60</sup> 47 U.S.C. § 276(b)(1)(D).

<sup>61</sup> See, e.g., AT&T Comments at 24-26; APCC Comments at 41-44.

<sup>62</sup> Id.

<sup>63</sup> See, e.g., MCI Comments at 19.

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public interest. Rather, competition is injured only if the BOCs' size somehow allows them to exercise market power.<sup>64</sup> As we stated in Competition in the Interstate Interexchange Marketplace:

84.

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<sup>64</sup> See, e.g., Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1336 (7th Cir.) (Easterbrook, J.) ("Market share is just a way of estimating market power, which is the ultimate consideration").

The issue is not whether [the dominant competitor] has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market. . . . Such advantages do not . . . mean that these markets are not competitive . . . [or] that it is appropriate for government regulators to deny the incumbent the efficiencies its size confers in order to make it easier for others to compete.<sup>1</sup>

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<sup>1</sup> Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, FCC 91-251, 6 FCC Rcd 5880, 5891-92 (1991). See also Application of McCaw and AT&T, 9 FCC Rcd 5836, 5862 at para. 38 (1994).

Volume discounts are common in the business world, and typically represent a recognition by the seller of the economies of scale it realizes from the transaction.<sup>1</sup> If these volume discounts are passed through to the end user, consumers benefit. Even if they are not passed on to consumers, the pre-existing level of competition is not injured because prices remain the same to end users. The only resulting injury is to competitors, not competition.<sup>2</sup>

1. The issue that we must examine is whether the BOCs will be able to exercise market power if allowed to participate in the interLATA presubscription process for their payphones. We have previously defined "market power" as "the ability to maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."<sup>3</sup> The 1992 Joint Merger Guidelines similarly define market power as "the ability profitably to maintain prices above competitive levels for a significant period of time."<sup>4</sup> There are two ways in which a competitor may profitably raise and sustain prices above competitive levels and thereby exercise market power. First, a competitor may be able to raise and sustain prices by restricting its own output. Second, a company may be able to raise and sustain prices by increasing its rivals' costs or restricting its rivals' output through its control of an essential output, such as access to bottleneck facilities, that its rivals need to offer their services.

2.

3. The commenters arguing that the BOCs will be able to exercise some degree of market power each start with the assertion that the BOCs control 80 percent or more of the installed payphone base.<sup>5</sup> The BOCs, however, have provided information that indicates that their individual shares of payphone units in their regions range from 62-65 percent for Pacific Bell, BellSouth and US West, to approximately 80 percent for Ameritech and Southwestern Bell.<sup>6</sup> These percentage shares do not include semi-public payphones, which the BOCs assert do not accurately reflect market power, because they are typically not revenue generating and are

<sup>1</sup> We note that nothing in our regulations, or the antitrust laws, prevent a group of independent payphone service providers which do not possess market power, either individually or jointly, from combining their purchases to take advantage of volume discounts. See, e.g., Northwest Wholesale Stationers Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 295, 105 S.Ct. 2613, 2620 (1985) (recognizing that group purchasing may facilitate competition by enabling smaller retailers to reduce prices so as to compete more effectively with large retailers).

<sup>2</sup> "It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S.Ct. 2578, 2588 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521 (1962)).

<sup>3</sup> Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof, CC Docket No. 79-252, Fourth Report and Order, FCC 83-481, 95 FCC 2d 554, 558 ("Competitive Carrier Fourth Report and Order") (citing II P. Areeda & D. Turner, Antitrust Law 322 (1978)).

<sup>4</sup> 1992 Merger Guidelines at ¶ 0.1. See also Matsushita Elec. Industries Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986); Brooke Group Ltd., above.

<sup>5</sup> See, e.g., APCC Comments at 41.

<sup>6</sup> BellSouth Comments at Appendix 1, Table 2.



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therefore not subject to aggressively competition by the independent payphone service providers.<sup>7</sup> The independent payphone service providers dispute these market share figures.<sup>8</sup>

4.  
5. We first note that these market share figures are relevant only to the BOCs' ability to exercise market power in the provision of payphone services -- not, as contended by some commenters, to their ability to obtain interexchange rates lower than those available to the independent payphone service providers. Volume discounts are based on the volume of traffic, not on the number of phones from which such traffic originates. Thus, a more relevant examination in this regard would be the volume of traffic generated by BOC payphones, versus that of non-BOC payphones. Unfortunately, there is very limited data in the record on this point. The most pertinent information was submitted by BellSouth, showing that (excluding their semi-public payphones) they currently generate only 45 per cent of the payphone revenues in their region.<sup>9</sup> It is quite clear, in any event, that the BOCs' share of the payphone market does not allow them to exercise market power with respect to the IXCs.<sup>10</sup>

6. As to the BOCs' ability to exercise market power in the provision of payphone services, market share analysis, standing alone, does not tell us the likelihood that the dominant firm will be able to sustain supracompetitive prices.<sup>11</sup> If entry into the market is sufficiently easy, it will prevent the dominant competitor from profitably maintaining prices above competitive levels.<sup>12</sup> citing, Application of General Electric Co., 4 FCC Rcd 8207, 8209 (1989). See also II P.

<sup>7</sup> Id.

<sup>8</sup> GPCA Reply at 20 n.7.

<sup>9</sup> BellSouth Reply at Exhibit A.

<sup>10</sup> APCC refers to the BOCs being able to demand "supracompetitive commission levels from carriers." APCC Comments at 42. This would require the BOCs to exercise monopsonistic market power over the IXCs. See, 1992 Merger Guidelines at ¶ 0.1 (explaining that the effects of monopsony power are assessed in a manner analogous to monopoly power). Since, from a technical perspective, there is no difference between the interexchange facilities made available to residential or business customers and those made available for calls from payphones, the ability to demand "supracompetitive" prices from the IXCs would require a BOC to have market power in the IXC market as a whole. See Competitive Carrier Fourth Report and Order, 95 FCC 2d at 562-64 (viewing interexchange services as comprising a single market); also, McCaw, above, 9 FCC Rcd. at 5847, para. 14. That is clearly not the case here. See RBOC Reply at 27 n.27 (noting that BOC payphone traffic only accounts for approximately \$1.9 billion, or less than 3%, of the approximately \$67 billion interexchange market).

<sup>11</sup> In light of the changes taking place in the telecommunications industry, it is important to emphasize that market share and market concentration data, evaluated alone, may either understate or overstate the likelihood of firms being able to exercise market power in the future. We recognize that any evaluation of market power based upon current market shares may underestimate the BOCs' potential to exercise some market power if allowed to engage in presubscription, since even they readily admit that this ability will make them more effective competitors. At the same time, other changes to the industry which we are undertaking both in this rulemaking and other rulemakings implementing the 1996 Act, may greatly reduce the BOCs' ability to maintain market share, particularly in the provision of local service. See, e.g., Local Competition Order, note 508, above.

<sup>12</sup> 1992 Merger Guidelines at para. 3.0. See also McCaw, supra, 9 FCC Rcd. at 5868, para. 51:

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Areeda & D. Turner, Antitrust Law, para. 505 at 328 ("Substantial market power can persist only if there are significant and continuing barriers to entry"). Potential entry will act as a deterrent if it would be timely, likely, and sufficient in magnitude, character and scope to counteract the anticompetitive effect of concern.<sup>13</sup> In markets where entry meets these requirements, high market share generally does not raise antitrust concerns.<sup>14</sup>

7.

8. We find the record demonstrates that the market for provision of payphone services has very low barriers to entry, and such entry would act to prevent the BOCs from sustaining prices above competitive levels if allowed to negotiate with location providers for the interLATA carriers for their payphones.<sup>15</sup> In reaching this conclusion, we start with the fact that thousands of competitors are already in the market.<sup>16</sup> Most of these companies have very small operations. Indeed, the largest of these independents, Peoples, has only 40,000 payphones, less than 3 percent of the national payphone market.<sup>17</sup> While we understand the arguments of the independent payphone providers that their small size makes them vulnerable to BOC predatory conduct, the existence of literally thousands of small competitors demonstrates that entry is relatively easy and does not require investment or scale levels that would deter many potential competitors.

9.

10. We also note that among the non-BOC payphone service providers are AT&T, MCI and Sprint.<sup>18</sup> Although these companies' presence in the payphone market is currently small, at least relative to the BOCs, these companies certainly have the financial resources to make an aggressive expansion of their payphone operations. We believe that this would be particularly likely if, as at least one IXC commenter suggests, the BOCs attempt to use

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A company's high market share may be inoffensive if the relevant market has many potential entrants -- where, if the company attempted to raise price, lower quality, or fail to innovate, a new competitor could enter the market promptly, offer competitive prices and quality, and thus frustrate the first company's anticompetitive plan.

<sup>13</sup> 1992 Merger Guidelines at para. 3.0.

<sup>14</sup> Id.

<sup>15</sup> See, e.g., BellSouth Comments at Attachment 1.

<sup>16</sup> See, e.g., BellSouth Reply at Attachment A.

<sup>17</sup> Peoples Comments at 4. See BellSouth Comments at Attachment, p. 15 (stating that there are approximately 1.5 million payphone stations, excluding semi-public payphones).

<sup>18</sup> See, e.g., Ex parte letter from Ben G. Almond, BellSouth, to William Caton, Acting Secretary, FCC, August 15, 1996; Sprint Comments at 2 (noting that Sprint currently has 50,000 payphones)..

their current market share to squeeze excessive concessions from the IXC providers.<sup>19</sup>

11.

12. We also find that any ability that the BOCs might have to raise prices to end users above competitive levels is severely restricted by the ability of end users to dial around the presubscribed interLATA carrier. TOCSIA requires, and will continue to require, open access for such calls at payphones. Peoples estimates that 19.4 per cent of the calls originated by its payphones are either access code calls (6.5 per cent) or subscriber 800 calls (12.9 per cent).<sup>20</sup> A sustained effort by the BOCs to pass on monopoly price levels to consumers would certainly induce more end users to take advantage of this alternative.<sup>21</sup>

13.

14. As noted above, the second way in which a competitor can sustain supracompetitive prices is through the control of a bottleneck facility. We recognize that for the immediate future, the BOCs will continue to retain effective control over local access facilities. Accordingly, we are concerned about any potential ability the BOCs may have to leverage that market power in favor of their payphone operations.

15.

16. One way in which a BOC might be able to leverage its market power over local access facilities is by discriminating in favor of its own payphones in the provision of such services.<sup>22</sup> For example, a BOC could discriminate against its payphone services competitors by providing them with poorer quality interconnection to the BOC's local network than it provides to its own payphone operations, or could unnecessarily delay satisfying its competitors' requests to connect to the BOC's local network or with respect to repair services. To the extent that a BOC can thereby raise its rivals' costs of doing business, or damage its rivals' reputation for quality service, the BOC may be able to raise its own payphone service rates. Alternatively, some commenters have asserted that the BOCs will attempt to leverage their control over local access facilities by subsidizing their payphone operations from basic exchange and exchange access revenues.<sup>23</sup> As addressed above, Section 276(b)(1)(B) of the 1996 Act requires the elimination of all such subsidies.<sup>24</sup> Improper allocation of costs may allow a BOC to recover

<sup>19</sup> AT&T Comments at 25. See also 1992 Merger Guidelines at para. 1.32.

<sup>20</sup> Peoples Comments at 9.

<sup>21</sup> For the same reasons, alternative forms of mobile communications, including cellular telephones, are an adequate substitute for payphones for many end users. See McCaw, supra, at 5847, para. 14 (finding anecdotal evidence of substitution occurring between interexchange calls from cellular telephones and interexchange operator-assisted and credit card "wireline" calls). Thus, the proliferation of such telephones acts as another constraint on the ability to sustain supracompetitive prices for payphone services.

<sup>22</sup> See, generally, U.S. v. Western Electric Co., 993 F.2d 1572, 1578 (D.C. Cir.), cert. denied sub nom. Consumer Federation of America v. U.S., 510 U.S. 984 (1993) (examining the BOCs' ability to use monopoly power over local exchange service in order to raise the costs, and thereby reduce the output, of any rival information services provider).

<sup>23</sup> See, e.g., MCI Comments at 19; Oncor Comments at 6.

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costs incurred in its payphone operations from subscribers to the BOC's regulated exchange services, potentially harming such captive subscribers of local services and providing the BOC's payphone operations with an unfair advantage over its competitors.<sup>25</sup>

17.

18. We conclude, however, that the nonstructural and accounting safeguards we are requiring with respect to the BOCs' payphone operations are sufficient to deter such abuses, or to allow the Commission to identify abuses if they occur.<sup>26</sup> As discussed above, we are applying all Computer III and ONA nonstructural and accounting safeguards to the BOCs' provision of payphone services, and requiring that any basic services provided by a BOC to its own payphone operations be available on a nondiscriminatory basis to other payphone providers.<sup>27</sup> In particular, we are requiring each BOC to file an initial CEI plan describing how it intends to comply with the Computer III and ONA equal access parameters and nonstructural safeguards for the provision of payphone services, including a description of how each BOC will comply with the requirements for nondiscrimination in the quality of service, installation, and maintenance.<sup>28</sup> In connection with our discussion of these safeguards, we previously stated our conclusion that they provide an appropriate regulatory framework to ensure that BOCs do not engage in improper subsidization or discriminate in the provision of services required by their payphone competitors.<sup>29</sup> We also note that such payphone competitors may file a complaint to the Commission if they believe a BOC has failed to satisfy its obligations under these provisions.<sup>30</sup>

19.

20. For the reasons stated above, we decline to adopt the recommendation of

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<sup>24</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>25</sup> For purposes of market power analysis, we would be concerned that the improper allocation of costs would enable the BOC to price its payphone services at predatory levels (*i.e.* below the cost incurred to provide those services), drive out its competitors, and then raise prices above competitive levels. As discussed above, however, we have determined that ease of entry and other factors make it highly unlikely that a BOC could recoup the costs of such predation through sustained supracompetitive prices. See paras. 229 - 232, above. See also Brooke Group Ltd., 113 S.Ct. at 2588 ("Recoupment is the ultimate objective of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation").

<sup>26</sup> See 47 U.S.C. § 276(b)(1)(C).

<sup>27</sup> See para. 199, above.

<sup>28</sup> See paras. 202 - 206, above.

<sup>29</sup> See para. 199, above. See also California III, 39 F.3d at 927-929.

<sup>30</sup> We also note that these nonstructural safeguards are sufficient, in conjunction with other requirements of the 1996 Act, to address the concerns raised by California PUC. See California PUC Comments at 18-19. See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (rel. July 18, 1996) (Non-Accounting Safeguards NPRM). Accordingly, we decline to adopt the recommendation of California PUC to grant the states the authority to implement further restrictions.

commenters asserting that the risk that the BOCs will seek to leverage their control over local access facilities requires us to mandate structural separation of the BOCs' payphone operations before allowing them to participate in interLATA presubscription for their payphones.<sup>31</sup> As discussed, we have previously found that Computer III-type nonstructural and accounting safeguards generally to be effective in deterring improper allocation of costs and discrimination.<sup>32</sup> Moreover, we find that the statutory language clearly reflects a Congressional determination that structural separation of the BOCs' payphone operations from their core business is neither necessary nor appropriate. Section 276(b)(1)(C) specifically directs the Commission to "prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement" the non-subsidization and non-discrimination provisions of Section 276(a). We note that Congress has, where it deemed necessary, prescribed structural separation requirements as a precondition to BOC entry into a line of business.<sup>33</sup>

21.

22. Since we are relying on the nonstructural and accounting safeguards established pursuant to Section 276(b)(1)(C) to deter anticompetitive conduct, however, we believe that it is prudent to ensure that such safeguards are in place before the BOCs are allowed to participate in interLATA presubscription for their payphones. Accordingly, a BOC will not be allowed to engage in the conduct authorized by Section 276(b)(1)(D) until it has submitted and received approval of an initial CEI plan filed pursuant to Section 276(b)(1)(C).<sup>34</sup> We find that this is a reasonable requirement for meeting our statutory mandate of protecting the public interest in this area.

23.

24. For all of the reasons discussed above, we also decline to place restrictions on the BOCs' ability to negotiate for the selecting and contracting of intraLATA carriers presubscribed to their payphones. Most of the commenters urging such restrictions base their proposals on the BOCs' ability to exercise market power through the aggregation of interLATA traffic from their payphones.<sup>35</sup> Since we find that the BOCs are unlikely to be able to exercise such market power, any restrictions on their ability to aggregate interLATA volume, or to direct interLATA traffic to a particular carrier, are unwarranted.<sup>36</sup>

<sup>31</sup> See, e.g., Peoples Comments at 22; APCC Comments at 43-44.

<sup>32</sup> See para. 237, above.

<sup>33</sup> See, e.g., 47 U.S.C. §§ 271 and 272.

<sup>34</sup> See paras. 200 - 205, above.

<sup>35</sup> See, e.g., APCC Comments at 43-44; One Call Reply at 6-7.

<sup>36</sup> We also note that our conclusion here is consistent with the statutory requirement to ensure that payphone owners are fairly compensated for each and every call made from their payphones. Sec. 276(b)(1)(A). While this issue is addressed more specifically at paras. 48 through 54, above, the record reflects that a payphone owner's ability to influence the decision of presubscribed interLATA carrier is a contributing factor to the revenues earned by that payphone owner. Indeed, BOC, IXC and independent payphone provider commenters all recognize that the ability to aggregate payphone traffic strengthens the PSP's ability to negotiate low rates from carriers. See, e.g.,

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25.

26. We are also mindful of the statement in the Conference Report that location providers retain "the ultimate decision-making authority in determining interLATA services in connection with the choice of payphone providers."<sup>37</sup> We interpret this statement as a mandate to ensure that strong competition exists in the payphone industry. So long as competition exists among payphone service providers, location providers will continue to have the ultimate choice of carrier through their selection of payphone service provider.<sup>38</sup> As to the location providers' argument that BOC participation in the presubscription process will lead to a reduction in, or elimination of, the commissions they receive in connection with placing payphones on their premises, we find this argument unpersuasive. We find it unlikely that the introduction of additional competition would lead to commissions being reduced below competitive levels. In this respect, we note that MCI and independent payphone service providers have asserted just the opposite -- that the BOCs will attempt to gain market share by offering location providers higher commissions which their competitors will be unable to match.<sup>39</sup> We also note that, to the extent that these commissions are recouped from end users in the form of higher rates, protecting higher commissions is not a strong public interest concern weighing heavily against granting the BOCs presubscription authority.

27.

28. We conclude that competition in the provision of payphone services is sufficiently strong to ensure location providers freedom of choice concerning the interLATA carriers for payphones on their premises. In addition to the conclusions expressed above, we also note that the record indicates that many long-term agreements currently exist between location providers and payphone service providers or carriers, concerning the choice of presubscribed interLATA carrier.<sup>40</sup> Since these agreements will expire over time, the existence of these enforceable agreements will help to ensure the continued availability of choice in the selection of carriers. We emphasize, however, that a location provider's ability to choose should be protected from unjust and unreasonable practices which seek to foreclose meaningful choice. Such practices include unreasonable interference with pre-existing agreements between location providers and payphone service providers or carriers, or conduct which is unduly coercive of the location provider's right to choose the carrier for payphones on its premises. Such conduct may violate Section 201 of the Act, which proscribes unjust and unreasonable practices by common

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RBOC Comments at 42; APCC Comments at 42-43; AT&T Comments at 25. See also Ex parte letter from Michael Kellogg, Counsel, RBOC Coalition, to William Caton, Acting Secretary, FCC, August 29, 1996 at Attachment 1, p.1 (asserting that "RBOC participation in the selection of the interLATA carrier is critical to the Commission's per-call compensation scheme").

<sup>37</sup> S. Conf. Rep. 104-230 at 44.

<sup>38</sup> See Ameritech Comments at 24.

<sup>39</sup> APCC Comments at 42; MCI Comments at 19.

<sup>40</sup> See BellSouth Comments at 9.

carriers.<sup>41</sup>

29.

30. As a final point, we address the argument of some commenters that BOC participation in the interLATA presubscription of their payphones would constitute the offering of interLATA service, without first meeting the requirements of Sections 271 and 272 of the 1996 Act.<sup>42</sup> Section 276 of the 1996 Act, however, provides only that BOCs be given equal rights with independent payphone providers "to select and contract with, the carriers that carry interLATA calls from their payphones . . ."<sup>43</sup> We interpret the phrase "select and contract with," as granting the BOCs no more than the right to participate as a contractual intermediary between a location provider and a third-party interLATA carrier. Such conduct does not amount to the provision of interLATA telecommunications service addressed under Sections 271 and 272.<sup>44</sup> Moreover, we find nothing in the statutory language, or legislative history, to indicate that Congress intended the restrictions of Sections 271 and 272 to encompass the specific conduct authorized in Section 276.

31.

32. BellSouth, however, has asked us to find that Section 276(b)(1)(D) allows the BOCs to engage in reselling, as well as branding, of presubscribed interLATA service to their payphones.<sup>45</sup> BellSouth asserts that "Section 276 does not reference other sections of the 1996 Act but immediately does away with MFJ interLATA prohibitions (but only for RBOC payphone units . . .) unless the FCC finds interLATA rights for RBOC PSPs not to be in the public interest."<sup>46</sup> While we recognize that independent payphone providers have the ability to engage in the resale and/or branding of presubscribed interLATA service to their payphones, we do not interpret the language of the 1996 Act to grant this authority to the BOCs.<sup>47</sup> As explained above, the 1996 Act provides that the BOCs are to be given equal rights with independent payphone service providers "to negotiate with the location provider on the location provider's

<sup>41</sup> 47 U.S.C. §201(b).

<sup>42</sup> See, e.g., AT&T Comments at 24; CompTel Comments at 21.

<sup>43</sup> 47 U.S.C. § 276(b)(1)(D).

<sup>44</sup> See 47 U.S.C. § 153(46). See also Non-Accounting Safeguards NPRM.

<sup>45</sup> See Ex parte letter from, Ben G. Almond, BellSouth, to William F. Caton, Acting Secretary, FCC, filed in CC Docket 96-128, August 8, 1996.

<sup>46</sup> See Ex parte letter from Ben G. Almond, BellSouth, to William F. Caton, Acting Secretary, FCC, filed in CC Docket No. 96-128, August 16, 1996, at Attachment p.2.

<sup>47</sup> We have previously defined "resale" as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without "adding value") for profit." Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097, Report and Order, 60 F.C.C. 2d 261, 271 (1976). Also Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, FCC 96-263 (July 12, 1996).

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selecting and contracting with, and subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones . . ."<sup>48</sup> We interpret this language as envisioning the "carrier" as being someone other than the BOC to whom negotiating rights are being given.<sup>49</sup> We do not find that Congress intended to allow BOCs to provide interLATA telecommunications services to its payphone customers, including through resale, other than as set forth in Section 271(b).<sup>50</sup> In this respect, we note that the 1996 Act defines telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."<sup>51</sup> We find that, for purposes of Section 276, resale by a BOC of interLATA service for its in-region presubscribed payphones, which service will ultimately be used by consumers of payphone services, lies outside of the specific rights granted by Section 276(b)(1)(D) of the 1996 Act.<sup>52</sup>

33.

34. **2. Grandfathering of Contracts**

35.

36. **a. The Notice**

37.

**38.** Section 276(b)(3) states that "nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment" of the 1996 Act. We tentatively concluded that this section of the 1996 Act grandfathers all contracts in existence as of February 8, 1996.<sup>53</sup> In addition, we sought comment on what should be considered a Section 276(b)(3) contract for purposes of Section 276(b)(1)(D), and we tentatively concluded that a Section 276(b)(1)(D) contract must be, at least, a lawful agreement where both parties intended to be bound.<sup>54</sup>

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<sup>48</sup> 47 U.S.C. §276(b)(1)(D).

<sup>49</sup> Our conclusion here is underscored by the language of the Conference Report which describes Section 276(b)(1)(D) as providing the BOCs the same rights as independent payphone providers "in negotiating with the interLATA carriers for their payphones." S. Conf. Rep. 104-230 at 43-44.

<sup>50</sup> See 47 U.S.C. §271(a): "Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section." See BellSouth Comments at 9 ("BellSouth recognizes, of course, that nothing in Section 276 shall act to shortcut the requirements of Section [sic] before a BOC's long distance affiliate can offer service in a particular state.")

<sup>51</sup> 47 U.S.C. §153(46) (emphasis added).

<sup>52</sup> Bell Atlantic has filed an ex parte letter which is in agreement with the our conclusion here. See Ex parte letter from Marie Breslin, Bell Atlantic, to William Caton, Acting Secretary, FCC, filed in CC Docket No. 96-128, August 28, 1996.

<sup>53</sup> Notice at para. 73.

<sup>54</sup> Id.



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39.

40. **b. Comments**

41.

42. Each of the commenters agrees with the Commission's tentative conclusion that contracts between location providers and payphone service providers or interLATA or intraLATA carriers in force as of February 8, 1996 should be grandfathered and remain in effect.<sup>55</sup> Oncor asserts that contracts entered into subsequent to February 8, 1996 should also be given full effect by the Commission.<sup>56</sup>

43. The RBOCs argue that the Commission should specify that the grandfathering provision applies only to contracts enforceable by either party and, specifically, that a location provider's letter of authorization (which authorizes the IXC to serve a particular payphone) is not enforceable by the IXC and should therefore not be grandfathered.<sup>57</sup> Sprint also asserts that a contract can only be grandfathered if it includes binding obligations applicable to both parties -- which would not include letters of authorization that do not require the location provider to subscribe to the IXC's service for any fixed length of time.<sup>58</sup>

44.

45. AT&T maintains that the definition of contract for these purposes should include all agreements which commit a location owner to select a particular IXC for phones at its premises. AT&T asserts that this would include lawfully executed letters of authorization.<sup>59</sup> ACI-NA also contends that the Commission should adopt a broad definition of contracts to be grandfathered under the 1996 Act, including letters of authorization and term extensions, so as to not disadvantage location providers that may rely on existing presubscription agreements for a necessary income stream.<sup>60</sup> CompTel also argues that location providers' letters of authorization constitute contracts that Congress intended to be grandfathered by the 1996 Act, since such agreements are typically part of mutually binding initial service orders or contracts with IXCs.<sup>61</sup> AT&T urges the Commission to affirm that interference with any existing contract at any time is an unjust and unreasonable practice under Section 201(b).<sup>62</sup>

46.

47. Metropolitan Washington Airports Authority replies that so long as

<sup>55</sup> See, e.g., AT&T Comments at 27; CompTel Comments at 21; RBOC Comments at 45.

<sup>56</sup> Oncor Comments at 13-14.

<sup>57</sup> RBOC Comments at 45.

<sup>58</sup> Sprint Comments at 30.

<sup>59</sup> AT&T Comment at 27. See also Oncor Comments at 14.

<sup>60</sup> ACI-NA Comments at 4.

<sup>61</sup> CompTel Comments at 22.

<sup>62</sup> AT&T Comments at 27.

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location providers have decision-making authority, it is unnecessary for the Commission to resolve the issue of whether LOAs are binding agreements grandfathered by the 1996 Act.<sup>63</sup> Instead, it argues that the determination of whether specific LOAs are binding on the parties should be left to applicable state law.<sup>64</sup>

48.

49. c. **Discussion**

50.

51. We affirm our tentative conclusion that the 1996 Act grandfathers all contracts in force between location providers and payphones service providers or interLATA or intraLATA carriers which were in force and effect as of February 8, 1996. Since the statutory language is specifically limited to the date of enactment of the 1996 Act, and because there is an insufficient record to evaluate the propriety of extending that provision, we reject the argument that we extend this grandfathering protection to contracts entered into subsequent to February 8, 1996.<sup>65</sup>

52.

53. As the statutory language specifically limits the scope of this provision to "contracts," we leave to applicable state law the question of whether a particular agreement constitutes an enforceable contract. We note that the comments reflect a difference of opinion as to the legal obligations involved in letters of authorization ("LOAs").<sup>66</sup> It may be that this disagreement reflects the fact that LOAs may be entered into under differing circumstances, reflecting various levels of commitment and/or consideration by the parties. Accordingly, we express no opinion as to whether particular LOAs would or would not constitute contracts for purposes of this section of the 1996 Act.

54.

55. We do find, however, that interference with enforceable agreements between a location provider and either a payphone service provider or an interLATA or intraLATA carrier constitutes an unjust and unreasonable practice in violation of Section 201(b) of the 1996 Act.<sup>67</sup> We also find that practices involving undue coercion of location providers with respect to their choice of interLATA carrier for payphones on their premises may be found unjust and unreasonable. Such practices interfere with the efficient operation of the market by restricting choices, and thereby limit the benefits of competition.

56.

57.

**58.E. ABILITY OF PAYPHONE SERVICE PROVIDERS TO NEGOTIATE WITH**

<sup>63</sup> Metropolitan Washington Reply at 6-7.

<sup>64</sup> Id.

<sup>65</sup> See, Oncor Comments at 13-14.

<sup>66</sup> Compare AT&T Comments at 27; RBOC Comments at 45. See also Metropolitan Washington Reply at 6-7.

<sup>67</sup> 47 U.S.C. §201(b).

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**59. LOCATION PROVIDERS ON THE PRESUBSCRIBED INTRALATA CARRIER.**

60.

61. Section 276(b)(1)(E) directs the Commission to provide all payphone service providers with the right to participate in the selection of the intraLATA carriers presubscribed to their payphones.<sup>68</sup> In implementing this mandate, we seek to eliminate existing barriers upon any payphone service provider's ability to compete on this basis.

62.

**63. 1. The Notice**

64.

65. Section 276(b)(1)(E) of the 1996 Act directs the Commission to "provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones." In the Notice, we tentatively concluded that all PSPs, whether LECs or independent payphone service providers, should be given the right to negotiate with location providers concerning the intraLATA carrier.<sup>69</sup> We also tentatively concluded that the intraLATA carrier presubscribed to a payphone should be required to meet minimum Commission standards for the routing and handling of emergency calls.<sup>70</sup>

66.

**67. 2. Comments**

68.

69. Commenters generally agree with the tentative conclusion that all payphone service providers should have the ability to negotiate with location providers for the selection of intraLATA carriers from their payphones.<sup>71</sup> Those who commented on the issue also agree with our tentative conclusion that minimum standards for the handling and routing of emergency calls should be required of all intraLATA carriers presubscribed to a payphone.<sup>72</sup>

70.

71. Some commenters, including AT&T, MCI and SCPCA, assert that, in order to ensure effective competition in the intraLATA market, the Commission should specifically preempt any state requirement mandating the routing of intraLATA calls to the incumbent LEC.<sup>73</sup> AT&T also argues that the Commission should preempt any other state requirements that

<sup>68</sup> 47 U.S.C. § 276(b)(1)(E).

<sup>69</sup> Notice at para. 75.

<sup>70</sup> Id.

<sup>71</sup> See, e.g., AT&T Comments at 28; MCI Comments at 19; ACI-NA Comments at 4; Florida PSC Comments at 9; RBOC Comments at 43-44; APCC Comments at 45-46; ACTEL Comments at 12; NJPA Comments at 18; SCPCA Comments at 8.

<sup>72</sup> See, e.g., Florida PSC Comments at 9; APCC Comments at 45-46; California PUC Comments at 19; Sprint Comments at 31.

<sup>73</sup> AT&T Comments at 28; MCI Comments at 19; SCPCA Comments at 8.

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are inconsistent with the provisions of Section 276, including those requiring the inclusion of ILEC payphones in the presubscription process in states with toll dialing parity orders issued prior to December 15, 1995.<sup>74</sup> AT&T additionally asserts that the Commission should require immediate intraLATA presubscription for all BOC payphones located in areas where intraLATA presubscription is technically feasible.<sup>75</sup> Florida PSC argues that end-users placing 0- calls often seek assistance from live operators for emergency purposes, and therefore the Commission should continue to allow 0- traffic to be routed exclusively to the LEC.<sup>76</sup>

72.

73. The RBOCs assert that the Commission should not mandate the adoption of new technologies in order to allow intraLATA presubscription at the central office switch.<sup>77</sup> The RBOCs state that such a requirement is neither technically feasible, nor necessary, since independent payphone service providers can program their "smart" payphones to select a presubscribed intraLATA carrier without relying on the local exchange carrier's central switching programming. Instead, the RBOCs contend that central office based presubscription for payphones should be addressed at the same time as all other intraLATA presubscription issues under Section 251 of the 1996 Act.<sup>78</sup>

74.

75. ACI-NA asserts that while all payphone service providers should be authorized to negotiate with location providers on an equal basis, the Commission should make it clear that payphone service providers may not contract with a carrier over the objections of the location provider.<sup>79</sup> Independent payphone service providers also argue that the Commission should make explicit that the right to choose an intraLATA carrier includes the right to use the carrier for local sent and non-sent paid calls.<sup>80</sup> SCPCA also contends that all PSPs should be able to negotiate with location providers for selecting the local operator service for their payphones.<sup>81</sup>

76.

### 77. **3. Discussion**

78.

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<sup>74</sup> AT&T Comments at 28.

<sup>75</sup> Id.

<sup>76</sup> Florida PSC Comments at 9.

<sup>77</sup> RBOC Comments at 43-44.

<sup>78</sup> Id. See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, FCC 96-333 (rel. Aug. 8, 1996) ("Local Competition Second Order").

<sup>79</sup> ACI-NA Comments at 4.

<sup>80</sup> APCC Comments at 45-46; NJPA Comments at 18.

<sup>81</sup> SCPCA Comments at 8.

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79. We affirm our conclusion that all payphone service providers should have the right to negotiate with location providers concerning the intraLATA carriers presubscribed to their payphones. This conclusion is consistent with both the specific language of Section 276, as well as with the 1996 Act's goal of bringing competition into this industry segment.<sup>82</sup>

80.

81. We also affirm our tentative conclusion that intraLATA carriers presubscribed to payphones should be required to meet our minimum standards for routing and handling of emergency calls. We recently addressed this issue in CC Docket 94-198, in which we extended to aggregators, including payphone owners, standards for routing emergency calls.<sup>83</sup> This conclusion reflects our finding, also discussed in connection with public interest payphones, that payphones often serve a critical role in accessing emergency service.<sup>84</sup> By mandating the application of these minimum standards to intraLATA carriers presubscribed to payphones, we seek to ensure that individuals can receive timely and proper assistance when they rely on payphones for 0- or 911 emergency calls.<sup>85</sup>

82.

83. Because Section 276(b)(1)(E) establishes that all payphone service providers are to have the right to negotiate for intraLATA carriers for their payphones, we find that state regulations which require the routing of intraLATA calls to the incumbent LEC are inconsistent with the 1996 Act. Section 276(c) specifically states that "to the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."<sup>86</sup> Since we have found state requirements that mandate the routing of any or all intraLATA calls to an incumbent LEC to be inconsistent with the requirements of Section 276(b)(1)(E), we conclude that all such state requirements are preempted by the Commission's regulations.<sup>87</sup>

<sup>82</sup> With respect to dialing parity requirements for intraLATA carriers presubscribed to payphones, see paras. 291 - 293, below (deferring to the Section 251(b) rulemaking on dialing parity with respect to technical and timing requirements concerning dialing parity for payphones).

<sup>83</sup> See Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators, CC Docket No. 94-158, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4532 (1996). These standards require aggregators and operator service providers to ensure immediate connection of emergency calls to the proper service for the reported location of the emergency, if known, and, if not known, for the originating location of the call. 47 C.F.R. §64.706.

<sup>84</sup> See para. 277, below.

<sup>85</sup> We are addressing similar concerns in a separate rulemaking regarding enhanced 911 emergency services. See 911 Notice.

<sup>86</sup> 47 U.S.C. § 276(c).

<sup>87</sup> The Commission also has general authority to preempt state regulation of intrastate communications services where such regulation would thwart or impede the Commission's exercise of its lawful authority over interstate communications services, such as when it is not "possible to separate the interstate and intrastate portions of the asserted FCC regulation." Louisiana Public Service Commission v. FCC, 476 U.S. 355, 375 n. 4 (1986).

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84.

85. We take particular note, however, of Florida PSC's argument that states should be allowed to mandate that 0- calls from payphones be routed exclusively to the incumbent LEC.<sup>88</sup> Florida PSC notes that such a requirement is necessary to ensure that emergency calls, where the caller simply dials "0" and nothing else, are delivered to a live, local operator. We believe that requiring 0- calls to be initially routed to the LEC is not necessarily inconsistent with the provisions of Section 276(b)(1)(E), so long as the state does not mandate that the LEC ultimately carry non-emergency intraLATA calls initiated by dialing "0" only.

86.

87. As with the selection of an interLATA carrier, payphone location providers will have ultimate decision-making authority in the selection of intraLATA carriers for payphones located on their premises through their selection of a payphone service provider.<sup>89</sup> Obviously such choice is predicated on the development of competition in the in-region, intraLATA market. Once choice of intraLATA providers becomes available, however, PSPs can be expected to compete for locations through, among other things, the intraLATA carriers presubscribed to their payphones. As with the selection of interLATA carriers, interference with existing agreements between location providers and payphone service providers or intraLATA carriers, as well as undue coercion restricting the location provider's exercise of choice of such carriers, may constitute unjust and unreasonable practices in violation of Section 201(b) of the Act.<sup>90</sup>

88.

**89.**

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<sup>88</sup> Florida PSC Comments at 9.

<sup>89</sup> See S. Conf. Rep. 104-230 at 44 (House amendment provided that "[l]ocation providers prospectively also have control over the ultimate choice of interLATA and intraLATA carriers in connection with their choice of payphone service providers").

<sup>90</sup> 47 U.S.C. §201(b). See discussion at para. 242, above.

## 1.F. ESTABLISHMENT OF PUBLIC INTEREST PAYPHONES

2.

3. Section 276(b)(2) of the 1996 Act directs us to determine whether there is a need for maintaining payphones serving public health, safety, and welfare goals, and, if so, to ensure that such payphones are supported fairly and equitably.<sup>91</sup> As noted above, we recognize the potential that a freely competitive marketplace may not provide for payphones in locations where they serve important public policy objectives, but which, for various reasons, may not be economically self-supporting. To address the potential for such market failure, we establish guidelines by which the states may ensure the maintenance of payphones serving public interests in health, safety and welfare, in locations where they would not otherwise be available as a result of the operation of the market.<sup>92</sup> Consistent with our primary reliance on the competitive marketplace, however, these guideline require that the states administer and fund such public interest payphone programs in a manner which is competitively neutral, and which fairly and equitably compensates entities providing public interest payphones.

4.

### 5. **1. The Notice**

6.

7. Section 276(b)(2) of the 1996 Act directs the Commission to "determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably." In the Notice, we sought comment on whether it is in the public interest to maintain payphones.<sup>93</sup> We also sought comments on options for maintaining public interest payphones.<sup>94</sup> One option would be for the Commission to prescribe federal regulations for the maintenance of these payphones. A second option would be for the Commission to establish national guidelines for public interest payphones. A third option for maintaining public interest payphones would be to defer to the states to determine, pursuant to their own statutes and regulations, which payphones should be treated as "public interest payphones."<sup>95</sup>

8.

9. In the Notice, we also sought comment on whether a "public interest payphone" should be defined as a payphone that both (1) operates at a financial loss, but also fulfills some public policy objective, such as emergency access; and (2) even though unprofitable by itself, is

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<sup>91</sup> 47 U.S.C. § 276(b)(2).

<sup>92</sup> See S. Conf. Rep. 104-230 at 43.

<sup>93</sup> Notice at paras. 77-78.

<sup>94</sup> Id. at paras. 78-81.

<sup>95</sup> Id.

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not provided for a location provider with whom the PSP has a contract.<sup>96</sup> Under this definition, many payphones that fulfill important public policy objectives would not be included because they would be paid for, in the form of lower commission payments, by the entity that is requesting that a payphone be placed in a particular location to fulfill a public policy objective.<sup>97</sup>

10.

11. In addition, we sought comment on appropriate mechanisms for meeting the statutory directive that we ensure public interest payphones are funded "fairly and equitably."<sup>98</sup> We sought comment on whether such a mechanism should be addressed through federal regulations, federal guidelines for the states, or by the states themselves. We requested that those commenters supporting a Commission-mandated funding mechanism detail how the mechanism would function, including who would be eligible to receive funding, who would be responsible for paying into the fund, and who would administer the funding mechanism.<sup>99</sup>

12.

13. **2. Comments**

14.

15. Most commenters agree that payphones can serve important public interests in health, safety and welfare, and that there is a need to ensure that payphones are maintained in locations where they may not be self-supporting.<sup>100</sup> For example, New York City asserts that, in the absence of incentives, PSPs are unlikely to place payphones in indispensable locations such as under-served residential neighborhoods and areas with significant emergency demands.<sup>101</sup> New York City states that payphones in such areas serve an important role in providing the public with basic communications services, an avenue to obtain information, and access to critical emergency services.<sup>102</sup> Idaho PUC states that payphones in rural areas often generate little revenue, but may be the only means of public telephone communication for miles.<sup>103</sup> New Jersey DRA also asserts that public interest payphones provide services to individuals in poor and isolated communities who might otherwise not have any access to the exchange network, and are particularly necessary for assuring that such individuals have access

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<sup>96</sup> Id. at para. 80.

<sup>97</sup> Id.

<sup>98</sup> Id. at para. 82. See 47 U.S.C. § 276(b)(2).

<sup>99</sup> Notice at para. 82.

<sup>100</sup> See, e.g., New York City Comments at 3; Ohio PUC Comments at 15; CPA Comments at 21; Ameritech Comments at 29; New Jersey DRA at 3.

<sup>101</sup> New York City Comments at 3.

<sup>102</sup> Id.; also Maine PUC Comments at 10.

<sup>103</sup> Idaho PUC Comments at 1.



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to emergency services such as 911.<sup>104</sup> Puerto Rico Telephone states that those who by necessity use payphones as a substitute for residential telephone service rely on such payphones as their means of access to emergency services, as well as their means of communication with family members, employers, businesses and others.<sup>105</sup> Many commenters agree that public interest payphones are an integral part of efforts to achieve universal service.<sup>106</sup>

16.

17. A few commenters, however, assert that the Commission need not take any action at this time to ensure the maintenance of public interest payphones. MCI contends that the issue of public interest payphones is part of the larger question of ensuring that all consumers have access to telephone service, and should, therefore, be referred to the Federal-State Joint Board on Universal Service.<sup>107</sup> The Iowa Utilities Board argues that the Commission should defer to the states with respect to public interest payphones because Iowa has found that it is "not necessary to establish rules requiring public interest payphones" in that state.<sup>108</sup>

18.

19. Most commenters assert that the Commission should leave to the states the primary responsibility for administering public interest payphone programs.<sup>109</sup> A number of state and local regulatory agencies argue that any public interest payphones program should be left primarily to the states, because national guidelines could not adequately and economically prescribe locations or criteria for such payphones throughout the country. These commenters emphasize that state and local entities, including police, fire, rescue and public welfare agencies, are best situated to evaluate community needs and objectives.<sup>110</sup> Several state agencies note that they already have, or are prepared to develop, programs which provide for placing payphones in locations where they might otherwise not exist.<sup>111</sup> For example, several states comment that they require incumbent local exchange carriers in their jurisdictions to place at least one payphone in

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<sup>104</sup> New Jersey DRA Comments at 3.

<sup>105</sup> Puerto Rico Telephone Comments at 2.

<sup>106</sup> See, e.g., New Jersey DRA Comments at 3; GVNW Comments at 8-9; Sprint Comments at 31-32; MCI Comments at 20; Texas PUC Comments at 5; GTE Comments at 16-17.

<sup>107</sup> MCI Comments at 20. See also Sprint Comments at 31-32.

<sup>108</sup> Iowa Utilities Board Comments at 4. See also US West Reply at 6.

<sup>109</sup> See, e.g., APCC Comments at 47; RBOC Comments at 46; CPA Comments at 22; Maine PUC Comments at 11-12; New Jersey DRA Comments at 4; AT&T Reply at 28; NTCA Reply at 7.

<sup>110</sup> California PUC Comments at 20-21; Maine PUC Comments at 11-12; Ohio PUC Comments at 16-17; Texas PUC Comments at 5; Idaho PUC Comments at 1-2; New Jersey DRA Comments at 4; New York DPS Comments at 8; Virginia SCC Comments at 4; also, New York City Comments at 4-8; Puerto Rico Telephone Comments at 1-4.

<sup>111</sup> California PUC Comments at 20; Ohio PUC Comments at 16-17; New York City Comments at 5-7; Texas PUC Comments at 5.

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each exchange area.<sup>112</sup>

20.

21. One state plan referenced often in the comments is the California Universal Services program. California's program requires that LECs maintain "public policy" payphones at locations where revenues are not sufficient to profitably support a payphone.<sup>113</sup> The program requires that: (1) a selected committee evaluate the need for payphones at locations where they do not already exist; (2) the LECs install and maintain these payphones with the acknowledgement that revenues will not cover costs of installation and operation; (3) all PSPs support these payphones through a monthly rate charged to connect their payphones to the network; and (4) all LECs with payphones support these payphones with a contribution from their competitive public and semi-public payphones. Thus, the costs of supporting these public interest payphones are borne not by the general body of ratepayers, but rather by the payphone industry as a whole.<sup>114</sup> CPA asserts that this program does not place an undue burden on PSPs because the criteria for public interest payphones has been narrowly drawn, resulting in only one per cent of all payphones in the state being identified as public interest payphones.<sup>115</sup> The RBOCs, however, assert that the California plan may not work in other states, particularly in rural areas where the number of competitive payphones may be small relative to the number of public interest payphones.<sup>116</sup>

22.

23. Several commenters, particularly the BOCs and independent payphone providers, urge the Commission to adopt national guidelines for state implementation of a public interest payphone program.<sup>117</sup> The RBOCs argue that the 1996 Act requires the Commission to adopt a narrow definition of what constitutes a public interest payphone in order to limit what state and local governments can require of payphone providers.<sup>118</sup> They argue that since the 1996 Act requires the installation of public interest payphones only "in locations where there would otherwise not be a payphone,"<sup>119</sup> state and local regulators should not be allowed to require the installation of public interest payphones in locations where a payphone already exists, or on the premises of a location provider who has an existing contract for the placement of a payphone.<sup>120</sup>

<sup>112</sup> Ohio PUC Comments at 16; Idaho PUC Comments at 1; Missouri PSC Reply at 3.

<sup>113</sup> California PUC Comments at 20

<sup>114</sup> Id.

<sup>115</sup> CPA Comments at 21-24.

<sup>116</sup> RBOC Comments at 47.

<sup>117</sup> Id. at 46-47; Ameritech Comments at 29-31; CPA Comments at 22.

<sup>118</sup> RBOC Comments at 46-47.

<sup>119</sup> 47 U.S.C. § 276(b)(2).

<sup>120</sup> RBOC Comments at 46-47; Ameritech Comments at 29-30.

Ameritech specifically recommends adoption of guidelines, similar to the existing California model, which specify that a public interest payphone is one that would not "break even," and would not exist in the location absent public intervention.<sup>121</sup> The RBOCs and Ameritech urge rules limiting the designation of "public interest payphones" to those requested by state or local governmental agencies for purposes of ensuring health, safety, and welfare.<sup>122</sup> The RBOCs also contend that local governmental agencies already provide for the public interest payphones by requiring the placement of certain numbers of non-profitable payphones as part of their contracts with individual payphone service providers for the placement of competitive payphones.<sup>123</sup> A few state commenters also stated that it may be appropriate for the Commission to adopt basic national guidelines in order to ensure the deployment of public interest payphones in critical locations.<sup>124</sup>

24. Puerto Rico Telephone contends that because of the particularly low level of residential telephone service, any definition of public service payphones adopted by the Commission should include payphones that are used as a substitute for local residential telephone service.<sup>125</sup> GVNW, which represents small LECs, also recommends a broader definition of public interest payphones in order to ensure adequate access to payphones in schools, public parks, and other public locations.<sup>126</sup>

25.

26. Among the independent payphone providers, APCC argues that the legislative history indicates that location providers, including state and local governments, having an existing contract with a PSP for the placement of payphones, should be precluded from having public interest payphones located on their premises.<sup>127</sup> CPA argues that the Commission should set basic national guidelines, while leaving implementation to the states.<sup>128</sup> It recommends the criteria of the California program as a good model for narrowly defining the scope of public interest payphones.<sup>129</sup>

27.

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<sup>121</sup> Ameritech Comments at 29-30.

<sup>122</sup> RBOC Comments at 46-47; Ameritech Comments at 32.

<sup>123</sup> RBOC Comments at 46.

<sup>124</sup> Oklahoma CC Comments at 4. See also New Jersey DRA Comments at 3-4; New York DPS Comments at 8.

<sup>125</sup> Puerto Rico Telephone Comments at 3-4.

<sup>126</sup> GVNW Comments at 8-10.

<sup>127</sup> APCC Comments at 50-51.

<sup>128</sup> CPA Comments at 22.

<sup>129</sup> Id. at 22-23; APCC Comments at 50-51.

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28. Many commenters, particularly state and local regulators, contend that funding for public interest payphones should also be left to the discretion of the states.<sup>130</sup> Maine PUC asserts that if the Commission does attempt to prescribe national siting standards, then the Commission must also provide the states federal or interstate-derived funding to support such requirements.<sup>131</sup> Otherwise, it contends, the Commission should not limit the funding options available for state administration of public interest payphone programs.<sup>132</sup> Other commenters argue that to meet the 1996 Act's requirement that public interest payphones be "supported fairly and equitably," such payphones should be paid for by the requesting party.<sup>133</sup> Specifically, the RBOCs assert that the Commission should require requesting entities, including state and local governments, to compensate PSPs in an amount that allows the PSP to recover its costs for establishing a public interest payphone, plus a reasonable rate of return.<sup>134</sup> The BOCs argue that any funding mechanism that requires the PSPs to share in the responsibility of providing public interest payphones would necessitate a complex analysis of market share or a running tally of the number of payphones each PSP provides in a particular area.<sup>135</sup> Puerto Rico Telephone and NTCA also contend that, if the Commission determines that public interest payphones should be maintained, then the Commission is also obligated to ensure that such payphones are properly funded.<sup>136</sup> They recommend that the Commission establish a fund segregated from other universal service support mechanisms, and administered by the NECA, to support public interest payphones. NECA affirms in its comments its ability to implement such a program.<sup>137</sup>

29.

30. APCC also maintains that the states should be given the discretion to determine the funding mechanism for public interest payphones, including funding based upon surcharges for all PSPs serving the location, or through a universal service mechanism funded by all rate payers.<sup>138</sup> While endorsing the funding mechanism adopted in the California plan, CPA argues that an alternative funding mechanism would be to allow PSPs to seek subsidy support for

<sup>130</sup> See, e.g., Maine PUC Comments at 11; New York City Comments at 9; Ohio PUC Comments at 17; Texas PUC Comments at 5. See also, APCC Comments at 47.

<sup>131</sup> Maine PUC Comments at 12.

<sup>132</sup> Id.

<sup>133</sup> Id.; Ameritech Comments at 32; also USTA Comments at 11; NTCA Comments at 7; GTE Comments at 16-17.

<sup>134</sup> RBOC Reply at 33 (noting, however, that California's existing system should be grandfathered because it works due to the state's uniquely competitive factors).

<sup>135</sup> Id.

<sup>136</sup> Puerto Rico Telephone Reply at 4-5; NTCA Reply at 7. See also NECA Comments at 6-7.

<sup>137</sup> NECA Comments at 6-7.

<sup>138</sup> APCC Comments at 47-51; also GPCA Reply at 22.

non-self-supporting payphones determined to be in the public interest, with award of the payphone location to the PSP bidding to provide a payphone at that location for the lowest subsidy amount.<sup>139</sup> GTE asserts that the Commission should require states to adopt rules for public interest payphone programs that are competitively neutral, including requiring fair compensation to PSPs providing public interest payphones, and ensuring that all PSPs may participate in such programs on a voluntary basis.<sup>140</sup> GTE argues that states may establish funds to ensure that public interest payphone programs are supported fairly, or could support such payphones as part of their state universal services fund.<sup>141</sup> SW Bell also urges the Commission to require the states to adopt competitively neutral funding mechanisms for public interest payphone programs, including the use of competitive bidding for the right to provide public interest payphones.<sup>142</sup>

31.

32. **3. Discussion**

33.

34. We conclude that there is a need to ensure the maintenance of payphones that serve the public policy interests of health, safety, and welfare in locations where there would not otherwise be payphones as a result of the operation of the market.<sup>143</sup> As demonstrated by the comments, all payphones serve the public interest by providing access to basic communications services.<sup>144</sup> We are particularly concerned about the role served by payphones in providing access to emergency services, especially in isolated locations and areas with low levels of residential phone penetration. Indeed, in some such areas, payphones are the only readily available means of accessing these critical communications services.<sup>145</sup> Moreover, as several commenters recognize, some payphones which are most critical for public health, safety and welfare purposes, are also the least likely to be economically self-supporting.<sup>146</sup> With the elimination of subsidies which have helped support such payphones in the past, as directed by the 1996 Act, it is possible that many of these payphones could disappear absent the availability of alternative methods to ensure their existence.<sup>147</sup>

<sup>139</sup> CPA Comments at 24.

<sup>140</sup> GTE Comments at 16-17.

<sup>141</sup> Id.

<sup>142</sup> SW Bell Comments at 8.

<sup>143</sup> 47 U.S.C. § 276(b)(2). See S. Conf. Report 104-230 at 43.

<sup>144</sup> See, e.g., New Jersey DRA Comments at 3-4; New York City Comments at 3.

<sup>145</sup> See, e.g., New York City Comments at 3; Puerto Rico Telephone Comments at 1-4; Idaho PUC Comments at 1.

<sup>146</sup> See, e.g., Idaho PUC Comments at 1-2.

<sup>147</sup> See 47 U.S.C. § 276(b)(1)(B).

35.

36. Many states have already developed systems for identifying the need for public interest payphones, and developing solutions to address that need.<sup>148</sup> Indeed, we find that the states are typically in a superior position to evaluate the need for payphones which serve community interests in health, safety and public welfare. In particular, the states are better equipped than the Commission to respond to geographic and socio-economic factors affecting the need for such payphones that are too diverse to be effectively addressed on a national basis.<sup>149</sup>

37.

38. We also find that the existence of a variety of state and local plans already providing for payphones serving public welfare goals demonstrates that the states are able to successfully administer such programs. For example, we note the program adopted in California, which all parties involved appear to view as having successfully provided for public interest payphones in the most critical locations.<sup>150</sup> The California program is funded by the payphone industry as a whole, yet is endorsed by payphone providers doing business in the state because, in part, it narrowly defines the criteria for public interest payphones to locations where there is a true public welfare need not being met by the competitive marketplace.<sup>151</sup> These criteria include requirements that a public interest payphone not be located on the premises of a person receiving compensation under a contract for the placement of other payphones, that access to the payphone be unrestricted, and that the payphone be at least a specified distance away from any other payphones.<sup>152</sup> The experience in California has been that only a very small number of locations, relative to the overall number of payphones, meet the narrow criteria for public interest payphones.<sup>153</sup> It may be, however, that in other states such a program would not effectively provide for public interest telephones because there are insufficient numbers of competitive payphones available to adequately and fairly support the locations meeting the criteria for public interest payphones.<sup>154</sup> Other states, however, have responded to an identified need for payphones necessary to satisfy public health, safety, and welfare concerns by requiring LECs to provide at least one public payphone in each telephone exchange,<sup>155</sup> or by requiring the placement of

<sup>148</sup> See NTCA Comments at 6-7 (describing several state requirements for the provision of payphone service where it might otherwise not exist); also Missouri PSC Reply at 3; Ohio PUC Comments at 16-17; California PUC Comments at 20; Idaho PUC Comments at 1.

<sup>149</sup> See, e.g., Idaho PUC Comments at 1-2; New York DPS Comments at 8; Maine PUC Comments at 11.

<sup>150</sup> See, e.g., California PUC Comments at 20-21; CPA Comments at 22-24; RBOC Comments at 47, n. 62; SDPOA Reply at 3.

<sup>151</sup> CPA Comments at 22-24; SDPOA Comments at 3.

<sup>152</sup> CPA Comments at 23.

<sup>153</sup> CPA Comments at 22-24 (stating that less than 2,000 of the 200,000 payphones in the state, or less than one percent, were found to have met these criteria).

<sup>154</sup> See RBOC Comments at 47, n. 62; US West Reply at 6;

<sup>155</sup> See, e.g., Missouri PSC Comments at 3; Ohio PUC Comments at 16.

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unprofitable payphones as part of contracts with PSPs for the placement of profitable payphones on public property.<sup>156</sup>

39.

40. The existence of these various and diverse plans confirms both that the states have the authority to adequately address the need for public interest payphones, and that any effort to implement a uniform national program is unlikely to be as successful in accounting for differing conditions among the states. We also believe that any effort by the Commission to implement such a national program would be beyond our current resource capabilities. For all of the above reasons, we conclude that the primary responsibility for administering and funding of public interest payphone programs should be left to the states.

41.

42. While we leave the administration of public interest payphones to the states, we believe that the 1996 Act requires us to impose minimum guidelines for establishment of a public interest payphone program to meet our statutory obligation to ensure the maintenance of such payphones. In particular, we believe it is very important to establish a basic definition of public interest payphones that is narrowly tailored to payphones that are truly needed for the public interest reasons enunciated in the statute. The 1996 Act describes public interest payphones as those "which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone . . ."<sup>157</sup> The Conference Report further explains that "the term does not apply to a payphone located near other payphones, or to a payphone that, even though profitable by itself, is provided for a location provider with whom the payphone provider has a contract."<sup>158</sup> The definition proposed in the Notice encompasses both of these statements. We also note that the limitations reflected in the Conference Report are similar to those included in the California program's criteria for "public policy payphones."<sup>159</sup>

43.

44. We adopt as a definition of "public interest payphone," a payphone which (1) fulfills a public policy objective in health, safety, or public welfare, (2) is not provided for a location provider with an existing contract for the provision of a payphone, and (3) would not otherwise exist as a result of the operation of the competitive marketplace. This definition is similar in effect to the one proposed in the Notice. We conclude that the statute and Conference Report reflect a congressional intent that reliance on the public interest payphone provision is to be limited to instances where a payphone location serves a strong public interest that would not be fulfilled by the normal operation of the market. Thus, a state may not require that a public interest payphone be installed on premises where a location provider already has a contract for the maintenance of a competitive payphone, even if such contract requires the location provider

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<sup>156</sup> RBOC Comments at 46.

<sup>157</sup> 47 U.S.C. § 276(b)(2).

<sup>158</sup> S. Conf. Rep. 104-230 at 43.

<sup>159</sup> See CPA Comments at 23.

to pay for the continued maintenance of such payphone.<sup>160</sup>

45.

46. The 1996 Act directs the Commission, in the event that we find the need for public interest payphone programs, to "ensure that such public interest payphones are supported fairly and equitably."<sup>161</sup> We find that this provision requires a national guideline that companies providing public interest payphones be fairly compensated for the cost of such services. We leave to the discretion of the states how to fund their respective public interest payphone programs, so long as the funding mechanism, (1) "fairly and equitably" distributes the costs of such a program, and (2) does not involve the use of subsidies prohibited by Section 276(b)(1)(B) of the 1996 Act.<sup>162</sup> Thus, a state may choose to fund public interest payphones from its general revenues through a process that ensures that companies providing public interest payphones are fairly compensated and in a manner that does not otherwise affect the competitive balance of the industry.<sup>163</sup> Similarly, a state or local government may include requirements for placing non-profitable payphones as part of a voluntary, contractual agreement with a payphone services provider for the installation of competitive payphones on public property.<sup>164</sup>

47.

48. Alternatively, states may address the need for public interest payphones by adopting appropriate rules in conjunction with their responsibilities for ensuring universal service pursuant to Section 254(f) of the 1996 Act.<sup>165</sup> We note that issues relating to public

<sup>160</sup> We note that public interest payphones are distinct from some public payphones that are classified by various states as "semi-public" payphones. Semi-public payphones tend to be payphones placed in locations, at the request of the premises owner, that do not generate significant amounts of traffic. See RBOC Comments at 48-49. The LEC providing the semi-public payphone typically receives the coin revenues from the payphone, as well as a monthly fee discounted from the rate for a business line.

<sup>161</sup> 47 U.S.C. § 276(b)(3).

<sup>162</sup> See 47 U.S.C. § 276(b)(1)(B) & (b)(3)

<sup>163</sup> State programs supporting public interest payphones are also subject to the provisions of Section 253(b) of the 1996 Act which requires that such a program be implemented on a "competitively neutral basis." 47 U.S.C. §253(b). One means of achieving a competitively neutral process is by choosing the payphone services provider for public interest payphone locations through a competitive bidding process, i.e., whereby the location is awarded to the PSP bidding to serve the location for the lowest subsidy level. See, e.g., RBOC Comments at 46-47; CPA Comments at 24 (suggesting an alternative whereby a payphone provider could seek subsidy support for a particular location, but only through an auction whereby the right and obligation to provide a payphone at the location would be given to the PSP bidding the lowest subsidy amount). Alternatively, a funding program, like California's, which relies upon levies on all payphone service providers in the state, may be appropriate to the extent that it treats all PSPs, including LECs, in a competitively neutral manner and eliminates subsidies from local access charges. See paras. 269 and 277, above.

<sup>164</sup> See, e.g., RBOC Comments at 46.

<sup>165</sup> Section 254(f) provides:

(f) State Authority. - A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service.



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interest payphones were not referred to the Universal Services Federal-State Joint Board in Docket 96-45.<sup>166</sup> Section 254(f), however, provides that states may adopt regulations to preserve and advance universal service within each state, not inconsistent with the rules we will eventually adopt in that proceeding.<sup>167</sup> Accordingly, any state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state so long as such regulations include additional specific, predictable, and sufficient mechanisms to support such definitions or standards, and that do not burden or rely on federal universal service support mechanisms.<sup>168</sup> We note that among the among the criteria established by the 1996 Act for defining services that are to be supported by a universal services program, are whether such telecommunications services "are essential to education, *public health, or public safety* . . . [and] are consistent with the *public interest, convenience, and necessity*."<sup>169</sup> We find that the implementation of a public interest payphone program is consistent with these goals, and may be a valuable tool in the states' efforts to achieve universal service.<sup>170</sup> Therefore, we find that states may establish funding mechanisms for public interest payphones either by meeting the funding requirements of Section 276(b)(2), as limited by Section 276(b)(1)(B), or in accordance with state universal service rules adopted pursuant to Section 254(f) in conjunction with Section 276(b)(2) and (b)(1)(B).

49.

50. In furtherance of our statutory responsibility under Section 276(b)(2), we direct each state to review whether it has adequately provided for public interest payphones in a manner consistent with this Report and Order. In particular, each state should evaluate whether it needs to take any measures to ensure that payphones serving important public interests will

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Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

47 U.S.C. §254(f).

<sup>166</sup> See Joint Board Notice at para. 57, n. 128.

<sup>167</sup> 47 U.S.C. §254(f).

<sup>168</sup> Id.

<sup>169</sup> 47 U.S.C. §254(c)(1)(A) and (D) (emphasis added). See Joint Board Notice at para. 9.

<sup>170</sup> See Maine PUC Comments at 12; New Jersey DRA Comments at 3; Texas PUC Comments at 5; Sprint Comments at 31-32; .

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continue to exist in light of the elimination of subsidies and other competitive provisions established pursuant to Section 276 of the 1996 Act, and that any existing programs are administered and funded consistent with the requirements described above. This review must be completed by each state within two years of the date of issuance of this Report and Order, and may be conducted in conjunction with each state's study of the payphone marketplace which we are requiring in connection with the transition to market-based payphone compensation.<sup>171</sup>

51.

52. Finally, we do not delegate our entire responsibility under Section 276(b)(2) to "ensure that such public interest payphones are supported fairly and equitably."<sup>172</sup> If interested parties believe that a state is not supporting public interest payphones fairly and equitably, such parties may file a petition with the Commission asserting that the state is not providing for payphones in accordance with Section 276(b)(2) and the guidelines we adopt in this Report and Order, as may be amended from time to time.

53.

54.

## 55.G. OTHER ISSUES

56.

### 57. 1. Dialing Parity

58.

#### 59. a. The Notice

60.

61. We tentatively concluded in the Notice that the benefits of the dialing parity requirements to be adopted pursuant to Section 251(b)(3) of the 1996 Act should extend to all payphone location providers.<sup>173</sup> We sought comment on this and other methods for achieving dialing parity for payphone location providers, and users, of payphones that are consistent with the definition of dialing parity under Section 3(15) of the 1934 Act, as amended.<sup>174</sup> As a related matter, we also sought comment on whether we should extend the unblocking requirements established in TOCSIA to all local and long distance calls.<sup>175</sup>

62.

#### 63. b. Comments

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<sup>171</sup> See para. 60, above.

<sup>172</sup> 47 U.S.C § 276(b)(2).

<sup>173</sup> Notice at para. 84. Section 251(b)(3) states that all LECs have the duty to "provide dialing parity to competing providers of telephone exchange service and telephone toll service." 47 U.S.C. §251(b)(3).

<sup>174</sup> Id. See 47 U.S.C. §153(15) ("The term 'dialing parity' means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation among 2 or more telecommunications services providers (including such local exchange carrier)").

<sup>175</sup> Notice at para. 84.

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64.

65. AT&T, MCI, Sprint and the Virginia SCC all agree with the Commission's tentative conclusion that the benefits of the dialing parity requirements to be adopted pursuant to Section 251(b)(3) of the 1996 Act should extend to all payphone location providers.<sup>176</sup> While the RBOCs agree with the tentative conclusion, they assert that such benefits should be exercised indirectly through the PSP's programming of their "smart" payphones to select a presubscribed intraLATA carrier, as opposed to directly through presubscription at the LEC's central office switch.<sup>177</sup>

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<sup>176</sup> AT&T Comments at 29; MCI Comments at 20; Sprint Comments at 32; Virginia SCC Comments at 4.

<sup>177</sup> RBOC Comments at 43-44.

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66. The Florida PSC contends that a PSP should be able to "program" its payphones to route 1+ and 0+ toll calls to the preferred carrier.<sup>1</sup> GVNW argues that it is the states who should be given the discretion of determining when and how dialing parity for intraLATA calls should be applied to payphones.<sup>2</sup>

67.

68. AT&T requests that the Commission mandate inclusion of all incumbent LEC payphones in the presubscription process in the 15 states with toll dialing parity orders issued prior to December 15, 1995 as well as immediate intraLATA presubscription for all BOC payphones located in territories where intraLATA presubscription is now technically available.<sup>3</sup> The RBOCs argue that the Commission should deny AT&T's immediate intraLATA presubscription request, contending that this request is without basis in Section 276 and cannot be implemented for intraLATA payphone calls, apart from intraLATA residential and business calls.<sup>4</sup> According to the RBOCs, intraLATA dialing parity for payphone calls should operate on the same timetable as for all other calls.<sup>5</sup>

69.

70. AT&T and MCI both argue that the Commission should adopt intraLATA unblocking requirements similar to the interLATA carrier unblocking requirements established in TOCSIA.<sup>6</sup> Sprint argues that the interLATA unblocking requirements established pursuant to TOCSIA should extend to all local and long distance calls.<sup>7</sup> Ameritech argues that the existing anti-blocking rules promulgated under TOCSIA remain sufficient to prevent aggregators from defeating LEC equal access features, so long as all LECs are mandated to continue providing these features.<sup>8</sup> According to Ameritech, Section 251(b)(3) of the 1996 Act does not incorporate the full list of equal access features in that it relies on a definition of dialing parity which includes only presubscription and omits mention of 10XXX or other dialed access codes.<sup>9</sup> Therefore, Ameritech argues that because the dialing parity rules of Section 251(b)(3) do not include an express reaffirmation of the LECs' duty to honor 10XXX and other access codes, the Commission should expressly articulate such a reaffirmation in its implementation of Section

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<sup>1</sup> Florida PSC Comments at 10.

<sup>2</sup> GVNW Comments at 10.

<sup>3</sup> AT&T Comments at 28 n.51.

<sup>4</sup> RBOC Reply at 31-32.

<sup>5</sup> Id.

<sup>6</sup> AT&T Comments at 29; MCI Comments at 20.

<sup>7</sup> Sprint Comments at 32.

<sup>8</sup> Ameritech Comments at 33.

<sup>9</sup> Id. at 33-34.

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251(b)(3).<sup>10</sup>

71.

72.

c. Discussion

73.

74.

In our recently issued order implementing the Section 251(b)(3) dialing parity requirements, we concluded that dialing parity was an important element in fostering vigorous local exchange and long distance competition "by ensuring that each customer has the freedom and the flexibility to choose among different carriers for different services without the burden of dialing access codes."<sup>11</sup> We believe that this statement is equally applicable to fostering vigorous competition in the payphone industry, and accordingly affirm our tentative conclusion that the benefits of dialing parity requirements adopted pursuant to Section 251(b)(3) of the 1996 Act should extend to all payphone location providers.

75.

We also conclude that the technical and timing requirements established pursuant to Section 251(b)(3), and Section 271(c)(2)(B), should apply equally to payphones.<sup>12</sup> We find that burden on the LECs in requiring them to provide dialing parity for payphones, prior to all other phones, outweighs any competitive benefit that might result. In this respect, we note that independent payphone service providers' "smart payphones" can adequately create dialing parity within the payphone unit pending the implementation of true dialing parity.

77.

Finally, we conclude that the unblocking of carrier access codes mandated by TOCSIA and our rules for interstate calls should also apply to intrastate (including local) access code calls. This may already be normal within the industry, and no party objected to our proposal. Allowing unrestricted access to a caller's preferred carrier is an essential feature of creating a competitive payphone industry, and we have created a mechanism that ensures that the PSP will receive compensation for all access code calls, including intrastate calls. Given the existence of compensation and the pro-competitive purpose of Section 276 of the 1996 Act, and in the absence of any technical limitations, we find that unblocked access for all access code calls from payphones is required.

79.

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<sup>10</sup> Id.

<sup>11</sup> Local Competition Second Order, at para. 9. We also noted in that Order that Section 251(b)(3) creates a duty to provide dialing parity with respect to all telecommunications services, and does not limit the types of traffic or services for which dialing parity must be provided. Id. at para. 12.

<sup>12</sup> See Id. at 2-5, 14-45. In general, we adopted in that order a dialing parity schedule that requires each LEC, including a BOC, to implement toll dialing parity no later than February 8, 1999; requires each LEC, including a BOC, to provide toll dialing parity throughout a state coincident with its provision of in-region, interLATA or in-region, interstate toll service in that state. We also require all LECs, other than BOCs, that are either already offering or plan to begin to provide in-region, interLATA or in-region, interstate toll service before August 8, 1997, to implement toll dialing parity by August 8, 1997. We also note in that Order that Section 271 of the 1996 Act requires BOCs to provide intraLATA dialing parity throughout a state coincident with the exercise of their authority to offer interLATA services originating within the state. See 47 U.S.C. §271(e)(2)(A).

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**80. 2. Letterless Keypads**

81.

**82. a. The Notice**

83.

84. In the Notice, the Commission expressed a concern that use of letterless keypads may frustrate the intent of Congress, as expressed in TOCSIA, to permit callers to reach the OSP of their choice from payphones. We also stated that letterless keypads ultimately frustrate Congressional intent, as expressed in the 1996 Act, "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public[.]"<sup>13</sup> Therefore, the Commission tentatively concluded that the use of letterless keypads violates both TOCSIA and the 1996 Act by preventing callers from accessing their OSP of choice, and we solicited comment on how the Commission should take action to prohibit use of these "by-pass" letterless keypads to restrict the availability of "vanity" access numbers.<sup>14</sup>

85.

**86. b. Comments**

87.

88. A wide range of commenters, including IXCs, RBOCs, independent LECs, state utility commissions and PPOs, share our concern that letterless keypads prevent consumers from reaching their OSP of choice and inhibit competition in the payphone industry.<sup>15</sup>

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<sup>13</sup> Notice at para. 85.

<sup>14</sup> Id.

<sup>15</sup> See, e.g., Actel Comments at 12-13; Ameritech Comments at 37; California PUC Comments at 21; GVNW Comments at 10-11; Idaho PUC Comments at 2-3; Indiana URC Comments at 6-7; MCI Comments at 20-21; Ohio PUC Comments at 17-18; Oklahoma CC Comments at 4; RBOC Comments at 49; Scherers Comments at 3; Sprint Comments at 33; Texas PUC Comments at 5-6; Virginia SCC Comments at 4.

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The Ohio PUC cites complaints by consumers and "representatives of persons with communications disabilities."<sup>16</sup> In addition, many of the commenters agree with the Commission's tentative conclusion that letterless keypads violate both TOCSIA and the 1996 Act.<sup>17</sup> A significant number of commenters encourage the Commission to ban these devices entirely.<sup>18</sup>

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<sup>16</sup> Ohio PUC Comments at 18.

<sup>17</sup> See, e.g., California PUC Comments at 21; Indiana URC Comments at 6; MCI Comments at 20-21; Sprint Comments at 33; Texas PUC Comments at 5.

<sup>18</sup> See, e.g., Ameritech Comments at 37; GVNW Comments at 10; Idaho PUC Comments at 3; Indiana URC Comments at 6; RBOC Comments at 49; Scherers Comments at 3; Sprint Comments at 33; Texas PUC Comments at 6.

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89. Alternatively, Sprint argues for promulgation of positive rules requiring alphanumeric keypads on all payphones.<sup>1</sup> MCI, Scherers, and the Indiana URC argue for penalties to be assessed against offenders.<sup>2</sup> In particular, MCI calls for "significant Commission forfeitures," while Scherers endorses punitive fines and disconnection of service as a response to violations.<sup>3</sup> Sprint proposes further that no IXC should be required to provide compensation to any PSP found to be violating the proposed rule on letterless keypads.<sup>4</sup>

90.

91. **c. Discussion**

92.

93. We now conclude, as we tentatively concluded in the Notice, that the use of letterless keypads violates both TOCSIA and the 1996 Act. We find that an exclusively numeric payphone keypad defeats a caller's attempt to reach its OSP of choice through the use of commonly-used "vanity" access sequences such as AT&T's "1-800-CALL-ATT" and "10ATT" or MCI's "1-800-COLLECT." Such access sequences, which can be easily remembered by consumers, require the presence of both alphabetic and numeric characters on payphone keypads. A letterless keypad, therefore, clearly defeats a consumer's attempt to utilize these heuristic sequences. In their sales material, letterless keypad manufacturers have specifically positioned these devices as "by-pass keypad[s]" that "prevent[] dial around [calls]."<sup>5</sup> No party has commented on a plausible purpose for these devices other than to restrict access to a non-presubscribed carrier.

94.

95. To promote consumer access to OSPs, TOCSIA required the unblocking of 800 and 950 access numbers at aggregator locations and directed the Commission to mandate the unblocking of 10XXX access codes and/or the establishment of 800/950 access numbers by each OSP.<sup>6</sup> We conclude that letterless keypads violate the unblocking requirements of TOCSIA by preventing consumers from reaching their OSP of choice through the dialing of vanity access sequences. A payphone keypad without alphabetic characters serves the same purpose as the blocking that is prohibited by TOCSIA. Accordingly, we will take enforcement action, including forfeitures, if such devices are used, just as we would take action against other forms of blocking. Moreover, OSPs may not pay commissions to PSPs whose payphones block access.<sup>7</sup>

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<sup>1</sup> Sprint Comments at 33.

<sup>2</sup> Indiana URC Comments at 7; MCI Comments at 21; Scherers Comments at 3.

<sup>3</sup> MCI Comments at 21; Scherers Comments at 3.

<sup>4</sup> Sprint Comments at 33.

<sup>5</sup> Notice at para. 87.

<sup>6</sup> 47 U.S.C. § 226(e).

<sup>7</sup> 47 C.F.R. § 64.704(b)(2).



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97. Independent of TOCSIA requirements, we conclude that the practice of deploying letterless keypads inhibits consumer choice in the selection of OSP services and is anticompetitive. Likewise, we conclude that such deployment restricts the availability of payphone OSP services to the general public. The 1996 Act seeks "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public[.]"<sup>8</sup> Therefore, we conclude that use of letterless keypads is inconsistent with the 1996 Act.

98.

### **99. 3. Oncor Petition**

100.

101. On August 7, 1995 Oncor Communications, Inc. filed a petition asking the Commission to prescribe compensation for public payphone premises owners and presubscribed OSPs. Oncor states that such compensation "is necessary to remedy the injustices resulting from access code calls."<sup>9</sup> The Commission invited comment on Oncor's petition by Public Notice released September 12, 1995. We deny Oncor's request. As commenters note, the presubscribed OSP incurs no costs when a consumer makes an access code call from a payphone, and it would be inequitable to require any party to compensate the OSP because the caller chose not to use it.<sup>10</sup> Moreover, there is no need for us to prescribe compensation for premises owners. The rules that we adopt in this Report and Order will ensure that PSPs are fairly compensated for calls that originate on their facilities, and market forces will ensure that the PSPs fairly compensate premises owners.

102.

103.

## **IV. PROCEDURAL MATTERS**

### **1. Petitions for Reconsideration and Ex Parte Presentations**

1. Parties must file any petitions for reconsideration of this Report and Order within 30 days from release of this document. We hereby waive, on our own motion, the requirements of Section 1.4 of our rules to establish this new date of public notice in light of the deadline established in the 1996 Act to complete this proceeding. Parties may file oppositions to the petitions for reconsideration pursuant to Section 1.106(g) of the rules, except that we require that oppositions to the petitions be filed within seven (7) days after the date for filing the petitions for reconsideration. The Commission will not issue a separate notice of any petitions for reconsideration; this paragraph serves as notice to all interested parties of the due dates for petitions and oppositions. In addition, the Commission hereby waives Section 1.106(h) of the rules and will not accept reply comments in response to oppositions. We conclude that these actions are necessary to complete all Commission action in this proceeding, which involves

<sup>8</sup> 47 U.S.C. § 276(b).

<sup>9</sup> Oncor Petition at 1.

<sup>10</sup> See MCI Comments on Oncor's Petition at 2-3; Comments of APCC on Oncor's Petition at 2.

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issues concerning the Commission's expedited implementation of the 1996 Act, by the statutory deadline of November 8, 1996. We will consider all relevant and timely petitions and oppositions before final action is taken in this proceeding.

2.

3. To file a petition for reconsideration in this proceeding parties must file an original and ten copies of all petitions and oppositions. Petitions and oppositions should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. If parties want each Commissioner to have a personal copy of their documents, an original plus fourteen copies must be filed. In addition, participants should submit two additional copies directly to the Common Carrier Bureau, Enforcement Division, Room 6008, 2025 M Street NW, Washington, D.C. 20554. The petitions and oppositions will be available for public inspection during regular business hours in the Dockets Reference Room (Room 230) of the Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554. Copies of the petition and any subsequently filed documents in this matter may be obtained from ITS, Inc., 2100 M Street, NW, Suite 140, Washington, DC 20037, (202) 857-3800.

4.

5. Petitions for reconsideration must comply with Sections 1.106 and 1.49 and all other applicable sections of the Commission's rules.<sup>11</sup> Petitions also must clearly identify the specific portion of this Report and Order for which relief is sought. If a portion of a party's arguments does not fall under a particular topic listed in the outline of this Report and Order, such arguments should be included in a clearly labelled section at the beginning or end of the filing. Parties may not file more than a total of ten (10) pages of ex parte submissions, excluding cover letters. This 10 page limit does not include: (1) written ex parte filings made solely to disclose an oral ex parte contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written material filed in response to direct requests from Commission staff. Ex parte filings in excess of this limit will not be considered as part of the record in this proceeding.

6.

## 7. **2. Final Paperwork Reduction Act Analysis**

8.

9. The decision herein has been analyzed with respect to the Paperwork Reduction Act of 1995, Pub. L. 104-13, and several of its requirements have been approved in accordance with the provisions of that Act. The Office of Management and Budget ("OMB") made several suggestions for our proposals:

10.

11. Report of Local Exchange Companies of Cost Accounting Studies. OMB suggested that the description and justification for this requirement be clarified.<sup>12</sup> The rules require incumbent LECs to offer individual central office coin transmission services to PSPs

<sup>11</sup> See 47 C.F.R. § 1.49. We require, however, that a summary be included with all comments, although a summary that does not exceed three pages will not count toward the page limits. The summary may be paginated separately from the rest of the pleading (e.g., as "i, ii"). Id.

<sup>12</sup> Notice of Office of Management and Budget Action, (OMB No. 3060-0721) (Released September 8, 1996).

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under a nondiscriminatory, public tariffed offering if the LECs provide those services for their own operations. Because the incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, we require them to submit cost support for their central office coin services, on a one-time basis. This will ensure that the services are reasonably priced and do not include subsidies.

12.

13. Report of Bell Operating Companies of Initial Comparably Efficient Interconnection Plans. OMB requested that we provide revised cost and burden hour estimates.<sup>13</sup>

The cost and burden hour estimates have not changed.

14.

15. Annual Filing of Nondiscrimination Reports by Bell Operating Companies. OMB requested that we provide revised cost and burden hour estimates.<sup>14</sup> The cost and burden hour estimates have not changed.

16.

17. Quarterly Report of IntraLATA Carriers Listing Payphone Automatic Number Identification (ANIs). OMB suggested that we allow interLATA carriers to use innovative approaches to provide ANIs, such as posting the information on the Internet or distributing the information via electronic mail.<sup>15</sup> We have not specified the manner in which interLATA carriers must supply carrier-payors with the list of payphone ANIs. InterLATA carriers are free to use any technologies at their disposal to distribute the necessary information.

18. Public Disclosure of Network Information by Bell Operating Companies. OMB suggested that we weigh the reporting and notification burden of this requirement, as well as consider shortening the period of public disclosure from a minimum of six months, so as not to unfairly burden BOCs by delaying technical modifications to their systems.<sup>16</sup> We agree with OMB that we should choose the least burdensome method to accomplish our goal of prohibiting the BOCs from discriminating in the provision of payphone service. We believe, however, that a minimum six-month period of public disclosure prior to the introduction of a new service is vital to ensure that BOCs do not design new network services or change network technical specifications to the advantage of their own payphones.

19.

20. Annual Report of Interexchange Carriers Listing the Compensation Amount Paid to Payphone Providers and the Number of Payees. OMB suggested that we weigh the burden imposed by the payment and information mechanism contained in this requirement.<sup>17</sup> We agree with OMB that we should choose the least burdensome method to accomplish our goal of

<sup>13</sup> Notice of Office of Management and Budget Action, (OMB No. 3060-0722) (Released August 26, 1996).

<sup>14</sup> Notice of Office of Management and Budget Action, (OMB No. 3060-0725) (Released August 26, 1996).

<sup>15</sup> Notice of Office of Management and Budget Action, (OMB No. 3060-0719) (Released August 26, 1996).

<sup>16</sup> Notice of Office of Management and Budget Action, at 2 (OMB No. 3060-0723) (Released August 29, 1996).

<sup>17</sup> Notice of Office of Management and Budget Action, at 2 (OMB No. 3060-0724) (Released August 29, 1996).

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ensuring that all IXC's are paying their respective compensation obligations. Therefore we conclude that this reporting requirement will be terminated after the carriers have filed their reports for the 1999 calendar year. In addition, for further flexibility, we delegate to the Chief, Common Carrier Bureau, the authority to establish the details, as necessary, of this annual report, including the authority to extend or limit the scope of this report.

21.

22. Quarterly Report of Interexchange Carriers Listing the Number of Dial Around Calls for Which Compensation is Being Paid to Payphone Owners. OMB suggested that we weigh the burden imposed by the payment verification mechanism contained in this requirement.<sup>18</sup> We agree with OMB that we should choose the least burdensome method to accomplish our goal of ensuring that billing and collection are as efficient as possible. In fact, we weighed several alternatives to achieve optimum efficiency and the least burdensome approach, before imposing this requirement. This requirement is imposed on the IXC's because they have the greatest ability and incentive to establish the most efficient means of administering the payment of compensation.

23.

**24. 3. Final Regulatory Flexibility Act Analysis**

25.

26. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice. The Commission sought written public comment on the proposals in the Notice, including comment on the IRFA.<sup>19</sup> The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).<sup>20</sup>

27.

**28. A. Need for and Objectives of this Report and Order and the Rules Adopted Herein**

29.

30. \_\_\_\_\_

31. \_\_\_\_\_ The Commission, in compliance with Section 276 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the 1996 Act), promulgates the rules in this Order to promptly implement Section 276 of the 1996 Act, which directs the Commission, among other things, to adopt rules that: (1) establish a plan to ensure fair compensation for "each and every completed intrastate and interstate call using [a] payphone[;]"<sup>21</sup> (2) discontinue intrastate and interstate carrier access charge payphone service elements payments and intrastate

<sup>18</sup> Notice of Office of Management and Budget Action, at 2 (OMB No. 3060-0726) (Released August 29, 1996).

<sup>19</sup> Notice at paras. 95-102.

<sup>20</sup> Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" ("SBREFA"), codified at 5 U.S.C. § 601 et seq.

<sup>21</sup> 47 U.S.C. § 276(b)(1)(A).

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and interstate payphone subsidies from basic exchange services;<sup>22</sup> (3) prescribe nonstructural safeguards for Bell Operating Company (BOC) payphones;<sup>23</sup> (4) permit the BOCs to negotiate with payphone location providers for the intraLATA carriers presubscribed to their payphones;<sup>24</sup> (5) permit all payphone providers to negotiate with the location provider for the intraLATA carriers presubscribed to their payphones;<sup>25</sup> and (6) adopt guidelines for use by the states in establishing public interest payphone programs.<sup>26</sup>

1. The objective of the rules adopted in this Order is "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public."<sup>27</sup> In doing so, we are mindful of the balance that Congress struck between this goal of bringing the benefits of competition to consumers and its concern for the impact of the 1996 Act on small businesses.

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<sup>22</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>23</sup> 47 U.S.C. § 276(b)(1)(C).

<sup>24</sup> 47 U.S.C. § 276(b)(1)(D).

<sup>25</sup> 47 U.S.C. § 276(b)(1)(E).

<sup>26</sup> 47 U.S.C. § 276(b)(2).

<sup>27</sup> 47 U.S.C. § 276(b)(1).

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**B. Analysis of Significant Issues  
Raised in Response to the IRFA**

1. \_\_\_\_\_ Summary of the Initial Regulatory Flexibility Analysis (IRFA). In the IRFA, the Commission found that the rules we proposed to adopt in this proceeding may have a significant impact on a substantial number of small business as defined by section 601(3) of the RFA. The IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. The Commission received one comment on the potential impact on small business entities, which the Commission considered in promulgating the rules in this Order. Frontier commented generally that the compensation scheme advanced in the NPRM was "unnecessarily onerous and inefficient" and "in conflict with the goals of the ... Regulatory Flexibility Act."<sup>28</sup> Frontier did not comment specifically on what aspect of the compensation scheme would have economic impact on small business entities. We disagree with Frontier's general assertion that the compensation scheme is in conflict with the Regulatory Flexibility Act. Our rules are designed to facilitate the development of competition, which benefits many small business entities. The rules will ensure that payphone services providers, many of whom may be small business entities, receive fair compensation. Our rules provide significant flexibility to permit the affected parties, including small business entities, to structure procedures that would minimize their burdens. For example, the rules require IXCs and intraLATA carriers, as primary economic beneficiary of payphone calls, to track the calls they receive from payphones. The carrier has the option of performing the function itself or contracting out these functions to another party, such a LEC or clearinghouse. We also provide a transition period. We believe that our rules are designed to effectively optimize the efficiency and minimize the burdens of the compensation scheme on all parties, including small entities.

**C. Description and Estimates of the Number of  
Small Entities Affected by this Report and Order**

1. For the purposes of this Order, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.<sup>29</sup> Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>30</sup> SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications,

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<sup>28</sup> Frontier Comments at 2.

<sup>29</sup> See 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

<sup>30</sup> 15 U.S.C. § 632. See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc., 176 B.R. 82 (N.D. Ga. 1994).

Except Radiotelephone) to be a small entity when it has fewer than 1,500 employees.<sup>31</sup>

2.

3. We have found incumbent LECs to be "dominant in their field of operation" since the early 1980s, and we consistently have certified under the RFA<sup>32</sup> that incumbent LECs are not subject to regulatory flexibility analyses because they are not small businesses.<sup>33</sup> We have made similar determinations in other areas.<sup>34</sup> However, in the Local Competition proceeding, several parties, including the SBA, commented that we should have included small incumbent LECs in the IRFA pertaining to that order.<sup>35</sup> We recognize SBA's special role and expertise with regard to the RFA, and intend to continue to consult with SBA outside the context of this proceeding to ensure that the Commission is fully implementing the RFA. Although we are not fully persuaded that our prior practice has been incorrect, we will, nevertheless, include small incumbent LECs in this FRFA to remove any possible issue of RFA compliance. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this FRFA. Nevertheless, as mentioned above, we include small incumbent LECs in our FRFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."<sup>36</sup>

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<sup>31</sup> 13 C.F.R. § 121.201.

<sup>32</sup> See 5 U.S.C. § 605(b).

<sup>33</sup> See, e.g., Expanded Interconnection with Local Telephone Company Facilities, Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5809 (1991); MTS and WATS Market Structure, Report and Order, 2 FCC Rcd 2953, 2959 (1987) (citing MTS and WATS Market Structure, Third Report and Order, 93 F.C.C.2d 241, 338-39 (1983)).

<sup>34</sup> See, e.g., Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7418 (1995).

<sup>35</sup> The Small Business Administration (SBA), the Rural Telephone Coalition (Rural Tel. Coalition), and CompTel maintain that the Commission violated the RFA when it failed to include small incumbent LECs in its IRFA without first consulting SBA to establish a definition of "small business." See Local Competition Order at paras. 1328-1330.

<sup>36</sup> See 13 C.F.R. § 121.210 (SIC 4813).

### Telephone Companies (SIC 4813)

1. Total Number of Telephone Companies Affected. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by the SBA. The United States Bureau of the Census (the Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.<sup>37</sup> This number encompasses a broad category which contains a variety of different subsets of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."<sup>38</sup> For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order. We estimate below the potential small entity telephone service firms or small incumbent LECs that may be affected by this Order by service category.

1. Wireline Carriers and Service Providers. The SBA's definition of small entities for telephone communications companies, other than radiotelephone (wireless) companies, is one employing fewer than 1,500 persons.<sup>39</sup> The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.<sup>40</sup> All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

2.

3. Local Exchange Carriers. Neither the Commission nor SBA has

<sup>37</sup> United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

<sup>38</sup> 15 U.S.C. § 632(a)(1).

<sup>39</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>40</sup> 1992 Census, supra, at Firm Size 1-123.



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developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).<sup>41</sup> According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.<sup>42</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this Order.

1. Interexchange Carriers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 97 companies reported that they were engaged in the provision of interexchange services.<sup>43</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules adopted in this Order.

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<sup>41</sup> All carriers that provide interstate service are required to pay into the TRS Fund, which provides access to Telecommunications Device for the Deaf (TDD). See generally, 47 C.F.R. §§ 64.601 et seq.

<sup>42</sup> Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (TRS Worksheet).

<sup>43</sup> Id.

1. Competitive Access Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 30 companies reported that they were engaged in the provision of competitive access services.<sup>44</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 30 small entity CAPs that may be affected by the decisions and rules adopted in this Order.

1. Operator Service Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services (OSPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 29 companies reported that they were engaged in the provision of operator services.<sup>45</sup> Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 29 small entity operator service providers that may be affected by the decisions and rules adopted in this Order.

2.

3. Pay Telephone Operators. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 197 companies reported that they were engaged in the provision of pay telephone services.<sup>46</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 197 small entity pay

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<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

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telephone operators that may be affected by the decisions and rules adopted in this Order.

4.

5. Resellers (including debit card providers). Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies (SIC 4812 and 4813). The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 206 companies reported that they were engaged in the resale of telephone services.<sup>47</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 206 small entity resellers that may be affected by the decisions and rules adopted in this Order.

6.

7. 800-Subscribers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to 800-subscribers. The most reliable source of information regarding the number of 800-subscribers of which we are aware appears to be the data we collect on the number of 800-numbers in use.<sup>48</sup> According to our most recent data, at the end of 1995, the number of 800-numbers in use was 6,987,063. Although it seems certain that some of these subscribers are not independently owned and operated businesses, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of 800-subscribers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 6,987,063 small entity 800-subscribers that may be affected by the decisions and rules adopted in this Order.

8.

9. Location Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to location providers. A location provider is the entity that is responsible for maintaining the premises upon which the payphone is physically located. Due to the fact that location providers do not fall into any specific category of business entity, it is impossible to estimate with any accuracy the number of location providers. Using several sources, however, we have derived a figure of 1,850,000 payphones in existence.<sup>49</sup> Although it seems certain that some of these payphones are not located on property owned by location providers that are small business entities, nor does the figure take into account the possibility of

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<sup>47</sup> Id.

<sup>48</sup> Federal Communications Commission, CCB, Industry Analysis Division, FCC Releases, Study on Telephone Trends, Tbl. 20 (May 16, 1996).

<sup>49</sup> There are approximately 1.5 million LEC payphones. Statistics of Communications Common Carriers, 1994/1995 edition, Common Carrier Bureau, FCC at 159, Table 2.10 (1995). There are approximately 350,000 competitively provided payphones. See Ex Parte Letter of Michael Benson, Senior Product Manager, PPO Compensation Clearinghouse, Cincinnati Bell to Michael Carowitz, Attorney, Common Carrier Bureau, FCC (April 24, 1996). Cincinnati Bell, as the payphone compensation paying agent for three interexchange carriers, states that it receives quarterly bills from PPOs for more than 350,000 competitively provided payphones. Id.

multiple payphones at a single location, we are unable at this time to estimate with greater precision the number of location providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,850,000 small entity location providers that may be affected by the decisions and rules adopted in this Order.

10.

11. Wireless (Radiotelephone) Carriers (including paging services). The SBA's definition of a small business radiotelephone company is one employing fewer than 1,500 persons.<sup>50</sup> The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.<sup>51</sup> The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

1. Cellular Service Carriers (including paging services). Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 789 companies reported that they were engaged in the provision of cellular services.<sup>52</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 789 small entity cellular service carriers that may be affected by the decisions and rules adopted in this Order.

1. Mobile Service Carriers (including paging services). Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of

<sup>50</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>51</sup> United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) (1992 Census).

<sup>52</sup> Id.

which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 117 companies reported that they were engaged in the provision of mobile services.<sup>53</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 117 small entity mobile service carriers that may be affected by the decisions and rules adopted in this Order.

2.

3. Broadband PCS Licensees (including paging services). The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than \$40 million in the three previous calendar years. Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.<sup>54</sup> The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions.<sup>55</sup> Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in this Order includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auction.

4.

5. At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Of the 153 qualified bidders for the D, E, and F Block PCS auctions, 105 were small businesses.<sup>56</sup> Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of less than \$125 million.<sup>57</sup> There are 114 eligible bidders for the F Block.<sup>58</sup> We cannot estimate, however, the number of

<sup>53</sup> Id.

<sup>54</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

<sup>55</sup> The FCC's Personal Communications Services (PCS) Entrepreneurs' Block (C Block) auction began on December 18, 1995 and closed on May 6, 1996. The reaction for 18 defaulted PCS C Block licenses commenced on July 3, 1996 and was completed on July 16, 1996.

<sup>56</sup> See Auction of Broadband Personal Communications Service (D, E, and F Blocks), Public Notice, DA 96-1400 (rel. Aug. 20, 1996).

<sup>57</sup> Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order, GN Docket No. 90-314, 11 FCC Rcd 7874 (1996).

<sup>58</sup> See Auction of Broadband Personal Communications Service (D, E, and F Blocks), Public Notice, DA 96-

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these licenses that will be won by small entities under our definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees<sup>59</sup> and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume for purposes of this FRFA, that all of the licenses in the D, E, and F Block Broadband PCS auctions may be awarded to small entities under our rules, which may be affected by the decisions and rules adopted in this Order.

1. SMR Licensees (including paging services). Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.<sup>60</sup> The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules adopted in this Order.

1. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions in this Order.

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1400 (rel. Aug. 20, 1996).

<sup>59</sup> 1992 Census, Table 5, Employment Size of Firms: 1992, SIC Code 4812.

<sup>60</sup> See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements, and Steps Taken by Agency to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, consistent with Stated Objectives**

1. Structure of the Analysis. In this section of the FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs as a result of this Order.<sup>61</sup> As a part of this discussion, we mention some of the types of skills that will be needed to meet the new requirements. We also describe the steps taken to minimize the economic impact of our decisions on small entities and small incumbent LECs, including the significant alternatives considered and rejected.<sup>62</sup>
- 2.
- 3.

**FAIR COMPENSATION FOR EACH AND EVERY COMPLETED INTRASTATE AND INTERSTATE CALL ORIGINATED BY PAYPHONES**

1. Summary of Projected Reporting, Recordkeeping and other Compliance Requirements. Section 276(b)(1)(A) directs the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone...."<sup>63</sup> To implement Section 276(b)(1)(A), this Order requires: (1) that the market set the price for local coin calls originated by payphones; (2) the appropriate per-call compensation amount for the service provided by independent payphone providers (PSPs) when they originate an interstate call should be the same amount the particular payphone provider charges for a local coin call; (3) the adoption of the "carrier pays" compensation system, which essentially places the payment obligation of per-call compensation on the primary economic beneficiary of payphone calls; (4) that the carrier, as the primary economic beneficiary of payphone calls, perform the tracking of calls it receives from payphones; (5) that carriers initiate an annual independent verification of their per-call tracking functions for a period of two years, to ensure that they are tracking all of the calls for which they are obligated to pay compensation, (6) a direct billing arrangement between IXC and intraLATA carriers and PSPs; (7) that LECs, who maintain the list of ANIs, have the burden of resolving disputed ANIs; and (8) that an interim compensation mechanism be set up under which PSPs are paid compensation at a flat monthly rate. Compliance with these requirements may require the use of engineering, technical, operational, accounting, billing, and legal skills.
- 2.
3. The payphone industry appears to have the potential of being a very competitive

<sup>61</sup> See 5 U.S.C. § 604(a)(4).

<sup>62</sup> See 5 U.S.C. § 604(a)(5).

<sup>63</sup> 47 U.S.C. § 276(b)(1)(A).

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industry once the significant subsidies and entry/exit restrictions which are presently distorting the competition are removed.<sup>64</sup> However, we perceive five potential areas that could have significant economic impact on small businesses and small incumbent LECs: (1) the amount of compensation paid to PSPs; (2) the "carrier pays" compensation system; (3) the administration of per-call compensation; (4) the direct billing arrangement between carriers and PSPs; and (5) the interim compensation mechanism.

4.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered: Amount of compensation: By requiring that the market set the price for individual coin calls originated by payphones we ensure that PSPs, many of whom may be small business entities, receive fair compensation. We considered different options in deciding upon this alternative. We reject proposals for adopting a national uniform rate of compensation for all calls using a payphone because a single, nationwide rate could jeopardize the financial viability of a majority of payphones. Rejection of this option allows for accounting for the significant variation in payphones in order to ensure the incentives to place and maintain phones in a variety of geographic areas.<sup>65</sup> We also reject proposals that certain types of calls should receive a different per-call compensation amount than others. We decline to interfere in marketplace transactions by providing for different compensation amounts for different types of calls, in instances where marketplace failures are limited or would have minimal impact on consumer welfare.<sup>66</sup> We do not perceive the need to intervene in an apparently structurally competitive industry.

6.

7. Many commentators, notably the IXC's, contend that marginal cost of originating a payphone call should be used as the basis for compensating PSPs. We conclude that use of a marginal cost standard or any closely related TSLRIC standard would leave PSPs under compensated, because such cost standards do not permit the recovery of any of a PSP's fixed costs, which make up the bulk of a PSP's costs. We also reject, for similar reasons, suggestions that current local coin rates be used as a surrogate for per-call compensation. Local coin rates are not necessarily fairly compensatory. Local coin rates in some jurisdictions may not cover the marginal cost of service and therefore, would not fairly compensate the PSPs.

8.

9. This "market sets the price" approach provides flexibility. Some PSPs may find it advantageous to set coin rates as low as \$.10 per call in select locations, perhaps as promotions to enhance their brand names. PSPs in other locations may choose to set the coin rate higher, e.g. \$.35 or \$.40 per call.<sup>67</sup> We expect our action to minimize regulatory burdens, expedite and simplify negotiations, and minimize economic impacts through lower transaction costs.

<sup>64</sup> See paras. 11-19, above.

<sup>65</sup> See paras. 49-51, 55-61, above.

<sup>66</sup> See para. 49, above.

<sup>67</sup> See para. 51, above.



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10.

11. We reject the proposal of the BOCs and some independent payphone providers to use AT&T O+ commissions as a measure of fair value of the service provided by independent payphone providers when they originate an interstate call. These commissions may include compensation for factors other than the use of the payphone, such as a PSP's promotion of the OSP through placards on the payphone. In the absence of reliable data, the appropriate per-call compensation amount is whatever amount the particular payphone charges for a local coin call. PSPs, IXC's, subscriber 800 carriers, and intraLATA carriers, many of whom may be small business entities, may find it advantageous to agree on an amount for some or all compensable calls that is either higher or lower than the local coin rate at a given payphone because it will grant parties in the payphone industry some flexibility and allow them to take advantage of technological advances.

12.

13. Payment of compensation: Various commenters, including small IXC's and paging services, proposed that the Commission should adopt the "carrier-pays" system.<sup>68</sup> We reject proposals to adopt "caller-pays" and "set use fee" systems, because we believe that they would involve greater transaction costs which can pose particular burdens for small businesses. We considered various alternatives to adopt the "carrier pays" system for per-call compensation because it places the payment obligation on the primary economic beneficiary in the least burdensome, most cost-effective manner. All carriers that receive calls from payphones are required to pay per-call compensation, whether they are IXC's or intraLATA carriers.<sup>69</sup> The "carrier pays" system gives the carriers the broadest latitude on how to recover the costs of payphone compensation, whether through increased rates to all or particular customers, through direct charges to access code call or subscriber 800 customers, or through contractual agreements with individual customers, thereby involving fewer transaction costs. In addition, under the carrier pays system, individual carriers have the option of recovering either a different amount from their customers or no amount at all.

14.

15. However, in the interests of administrative efficiency and lower costs, we require that facilities based carriers should pay the per-call compensation for calls received by their reseller customers. This would permit competitive facilities based carriers to negotiate contract provisions that would require the reseller to reimburse the carrier. We believe our actions will expedite and simplify negotiations, minimize regulatory burdens and the impact of our decisions for all parties, including small entities.

16.

17. Administration of per-call compensation: We considered various proposals to determine who should provide call tracking. This Order requires IXC's and intraLATA carriers, as primary economic beneficiary of payphone calls, to track the calls they receive from payphones. The carrier has the option of performing the function itself or contracting out these

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<sup>68</sup> See paras. 78,83, above.

<sup>69</sup> See para. 83, above.

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functions to another party, such as a LEC or clearinghouse. We recognize that tracking capabilities vary from carrier to carrier and it may be appropriate for some carriers to pay compensation at a flat rate basis until per-call tracking capabilities are put into place. Neither LECs nor PSPs are primary economic beneficiaries of payphone calls and PSPs do not universally have call-tracking capabilities. However, LECs, PSPs, and carriers receiving payphone calls should be able to take advantage of each others' technological capabilities through the contracting process.<sup>70</sup>

18.

19. In view of current difficulties in tracking such calls, we conclude that a transition period is warranted.<sup>71</sup> By permitting carriers to contract out their per-call tracking responsibility, and by allowing a transition period for tracking subscriber 800 calls, we have taken appropriate steps to minimize the per-call tracking burden on small carriers. In addition, to parallel the obligation to pay compensation, the underlying, facilities-based carrier has the burden of tracking calls to its reseller customers, and it may recover that cost from the reseller, if it chooses.<sup>72</sup>

20.

21. We conclude that carriers should be required to initiate an annual independent verification of their per-call tracking functions for a period of two years, to ensure that they are tracking all of the calls for which they are obligated to pay compensation. This would facilitate the prompt and accurate payment of all per-call compensation. We believe our actions will foster opportunities for small entities to gain access to such information without requiring investigation or discovery proceedings, and reduce delay and transaction costs.

22.

23. To establish minimal regulatory guidelines for the payphone industry regarding resolution of disputed ANIs, we conclude that LECs who maintain the list of ANIs must work with both carrier-payors and PSPs to resolve disputes more efficiently and quickly for all parties concerned. This provides LECs with the incentive, which they do not currently have, to provide accurate and timely verification of ANIs for independently provided payphones. Additionally, no other party has the information more readily available.<sup>73</sup> We expect this action to assist all parties, including small entities, expedite and simplify negotiations, and help equalize bargaining power.

24.

25. Each time a caller dials a subscriber 800 number, the PSP will also levy a charge which may be paid directly by the IXC, but will eventually be passed through to the 800 subscriber, either on a per-call basis or in the form of higher per minute rates. Establishment of the requirement that PSPs inform these subscribers of the price of the call they are deciding to accept, provide subscribers with the opportunity to accept or decline to accept the call based on

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<sup>70</sup> See para. 97, above.

<sup>71</sup> See para. 99, above.

<sup>72</sup> See para. 100, above.

<sup>73</sup> See paras. 112-113, above.

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the cost. Without the requirement, the PSP would have the ability to charge a high amount in the face of the subscriber's lack of information. We expect our action to facilitate good faith negotiations, and minimize regulatory burdens and the impact of our decisions for all parties, including small entities.

26.

27. While incumbent LECs in many jurisdictions currently do not charge payphone callers for "411" calls made from their own payphones, the LECs charge independent PSPs for directory assistance calls made from their phones. The PSPs are not always allowed by the state to pass those charges on to callers, which can pose particular burdens for them. In this Order we conclude that, to ensure fair compensation for "411" and other directory assistance calls from payphones, a PSP is permitted to charge a market-based rate for the service, although the PSP may decline to charge for this service if it chooses. In addition, we conclude that if the incumbent LEC imposes a fee on independent payphone providers for "411" calls, then the LEC must impute the same fee to its own payphones for this service.<sup>74</sup> We believe our action will facilitate the development of competition.

28.

29. The direct billing arrangement between IXC's and intraLATA carriers and PSPs adopted in this Order places the burden of billing and collecting information on the parties who benefit the most from calls from payphones: carriers and PSPs. Carriers must send to each PSP a statement indicating the number of toll-free and access code calls received from that PSP's payphones. The carrier-payor has the option of using clearinghouses, similar to those that exist for access code call compensation, or to contract out the direct-billing arrangement associated with the payment of compensation.<sup>75</sup> We expect our action will foster opportunities for small entities to gain access to such information without requiring investigation or discovery proceedings.

30.

31. Interim compensation mechanism: We considered various proposals regarding the feasibility of implementing an interim compensation mechanism before final rules go into effect. Because IXC's and intraLATA carriers are not required to track individual calls until October 1, 1997, we conclude that PSPs should be paid monthly compensation on a flat monthly rate. We expect that the flat rate obligation will be of administrative convenience for all parties involved, including small businesses.

32.

## RECLASSIFICATION OF LEC-OWNED PAYPHONES

1. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. Section 276(b)(1)(B) directs the Commission to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments ... and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a

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<sup>74</sup> See para. 62, above.

<sup>75</sup> See para. 110, above.

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[per-call] compensation plan."<sup>76</sup> Currently, incumbent LEC payphones, classified as part of the network, recover their costs from Carrier Common Line (CCL) charges assessed on those carriers that connect with the incumbent LEC. This Order requires incumbent LECs to (1) classify their payphones as detariffed and deregulated CPE;<sup>77</sup> (2) provide to PSPs nondiscriminatory access to unbundled central office coin transmission services and certain other services the LECs provide to their own payphones, and must file tariffs for central office coin services and those incumbent LECs that are not subject to price cap regulation must submit cost support for their central office coin service;<sup>78</sup> (3) transfer their payphone assets to unregulated accounts or affiliates at the market value of the "payphone going concern," by April 15, 1997, and obtain independent appraisal of the fair market value to submit to the Common Carrier Bureau within 180 days of the effective date of this Order;<sup>79</sup> and (4) reduce their interstate CCL charges by an amount equal to the interstate allocation of payphone costs currently recovered through those charges, and file revised CCL tariffs reflecting the changed rate structures.<sup>80</sup> Compliance with these requirements may necessitate the use of engineering, technical, operational, accounting, billing, and legal skills.

1. Some of the smaller incumbent LECs may find difficult the administrative burdens of reclassifying payphones as CPE, transferring payphone assets to unregulated accounts, and filing new tariffs. Therefore, if a requesting carrier, which may be a small entity, seeks access to an incumbent LEC's unbundled elements, the requesting carrier is required to compensate the incumbent LEC for any costs incurred to provide such access.

2.

3. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. The deregulation of LEC payphones is essential to promoting competition in the payphone industry. We reject several alternatives in making this determination, including proposals suggesting that the Commission (1) should allow smaller LECs to choose whether or not to deregulate their payphones;<sup>81</sup> and (2) should impose a structural separation requirement for incumbent LEC payphones.<sup>82</sup> The establishment of minimum national requirements for discontinuation of payphone subsidies from basic exchange and exchange access revenues should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs. National

<sup>76</sup> 47 U.S.C. § 276(b)(1)(B).

<sup>77</sup> See para. 142, above.

<sup>78</sup> See paras. 146-148, above.

<sup>79</sup> See paras. 161-169, above.

<sup>80</sup> See paras. 179-185, above.

<sup>81</sup> See para. \_\_\_\_, above.

<sup>82</sup> See para. 145, above.

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requirements may also allow new entrants, including small entities, to take advantage of economies of scale.

1. By requiring the incumbent LECs to offer individual central office coin transmission services to PSPs on a nondiscriminatory, public, tariffed offering, new entrants, which may include small entities, should have access to the same technologies and economies of scale and scope that are available to incumbent LECs. This will permit competitive payphone providers, some of whom are small business entities, to offer payphone services using either instrument implemented "smart payphones" or "dumb" payphones that utilize central office coin services. We reject the proposal suggesting that the Commission require incumbent LECs to provide on a nondiscriminatory basis all the services that they provide to their own payphone operations or require incumbent LECs to perform joint marketing of the payphone operations of other providers.<sup>83</sup> Instead, we require only that the incumbent LEC offer the following services on a nondiscriminatory basis if it provides such services to its own payphone operations: fraud protection, special numbering assignments, and installation and maintenance of basic payphone services. Rejection of this alternative will allow small incumbent LECs to distinguish certain services from services offered by other payphone providers. Our actions in this area could decrease entry barriers for small business entities and provide reasonable opportunities for all payphone service providers to provide service.

2.

#### **ABILITY OF PAYPHONE SERVICE PROVIDERS TO NEGOTIATE WITH LOCATION PROVIDERS ON THE PRESUBSCRIBED INTRALATA CARRIER**

1. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. Section 276(b)(1)(E) directs the Commission to "provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones."<sup>84</sup> This Order grants to all payphone service providers, including incumbent LECs, the right to negotiate with location providers concerning the intraLATA carriers presubscribed to their payphones.<sup>85</sup> We also preempt any state regulations mandating the routing of intraLATA calls to the incumbent LEC.<sup>86</sup> Compliance with these requirements should not necessitate the use of additional skills, since such skills are already used in negotiations concerning the interLATA carriers presubscribed to payphones.

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<sup>83</sup> See para. 148, above.

<sup>84</sup> 47 U.S.C. § 276(b)(1)(E).

<sup>85</sup> See para. 220 above.

<sup>86</sup> See para. 222 above.

1. Allowing all payphone service providers to negotiate with location providers concerning the intraLATA carriers presubscribed to their payphones could have a positive economic impact on payphone providers who are small business entities by allowing them flexibility to create favorable contract terms. Small incumbent LECs may suffer some negative economic impact because intraLATA calls will no longer be routinely routed to them.

2. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. State regulations that require routing of intraLATA calls to the incumbent LEC are preempted by this Order, thereby creating a national rule allowing all payphone service providers to negotiate with location providers concerning the intraLATA carriers presubscribed to their payphones. A national rule should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs. Our actions in granting to all payphone providers the same ability to negotiate with location providers on the selection of the intraLATA carrier presubscribed to the payphone will facilitate the development of competition.

3.

### **REQUIRING LECs TO PROVIDE DIALING PARITY FOR PAYPHONES**

1. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. The Order concludes that the dialing parity requirements of Section 251(b)(3) should extend to all payphone location providers and that the interLATA carrier unblocking requirements established in TOCSIA should be extended to all local and long-distance calls.<sup>87</sup> The Order requires that the technical and timing requirements established pursuant to Section 251(b)(3) and Section 271(c)(2)(B) should apply equally to payphones.<sup>88</sup> Compliance with these requirements may require the use of engineering, technical, and operational skills.

1. Requiring the LECs to extend dialing parity to payphone location providers may burden some small LECs.

2.

3. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. While this requirement may burden some small LECs, such burdens are far outweighed by the benefits gained from competition among local exchange and long distance carriers, many of whom are small business entities. We reject several alternatives in making this determination, including (1) a proposal suggesting that the states be given discretion to determine when and how dialing parity for intraLATA calls should be applied to payphones; (2) a proposal requiring LECs to provide dialing parity for payphones prior to all other phones; and (3) not altering the existing anti-blocking rules under TOCSIA. Rejection of these alternatives helps to ensure that small LECs will not be unnecessarily burdened. Furthermore, establishing a national rule should facilitate negotiations and reduce

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<sup>87</sup> See paras. 249, 251 above.

<sup>88</sup> See para. 250 above.

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regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.

4.

**5. E. Commission's Outreach Efforts to Learn of and Respond to the Views of Small Entities Pursuant to 5 U.S.C. § 609**

6.

7. Our staff has conducted several *ex parte* meetings with numerous outside parties and their counsel, several of whom may qualify as small business entities, during the pendency of this rulemaking to identify and discuss various aspects of the implementation of Section 276. For example, we have received *ex parte* suggestions and comments from the American Public Communications Council, a trade association that represents independent payphone providers, many of whom qualify as small business entities. We have attempted, to the furthest possible extent, to take into account as many of these concerns as possible in promulgating the rules contained in this Order.

8.

**F. Report to Congress**

1. The Commission shall send a copy of this FRFA, along with this Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

**V. CONCLUSION**

1. In this Report and Order, we have established procedures that will ensure that all payphone service providers are fairly compensated for every completed intrastate, interstate and international call, except for those calls excepted by statute, and we adopt interim compensation until the new compensation procedures are effective. We have also established procedures that ensure that all subsidies from basic exchange and exchange access revenues are removed simultaneous with the LECs' receipt of compensation for calls from LEC payphones. We require the BOCs to comply with certain nonstructural safeguards for their provision of payphone service, and allow them to negotiate with location providers for selecting and contracting with the carriers that provide interLata service from their phones. We set forth herein guidelines for public interest payphones, and establish guidelines for states to use in their proceedings for funding of such payphones.

2.

**VI. ORDERING CLAUSES**

1. Accordingly, pursuant to authority contained in Sections 1, 4, 201-205, 215, 218, 219, 220, 226, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 219, 220, 226, and 276, IT IS ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED.

2.

3. IT IS FURTHER ORDERED, that 47 C.F.R. Part 64, Subpart G and Subpart M

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ARE AMENDED as set forth in Appendix D, effective (30) days after publication of the text thereof in the Federal Register.

4.

5. IT IS FURTHER ORDERED, that 47 C.F.R. Part 64, Subpart M IS AMENDED as set forth in Appendix E, effective one year after publication of the text thereof in the Federal Register.

6.

7. IT IS FURTHER ORDERED, that 47 C.F.R. Part 68, Subpart A IS AMENDED as set forth in Appendix E, effective April 15, 1997.

8.

9. IT IS FURTHER ORDERED, that local exchange carriers SHALL RECLASSIFY their payphone assets and related expenses to nonregulated status on April 15, 1997.

10.

11. IT IS FURTHER ORDERED, that carriers required to file a cost allocation manual pursuant to 47 C.F.R. Section 64.903 or by Commission order SHALL FILE revisions to their manuals implementing the reclassification required herein no later than February 14, 1997.

12.

13. IT IS FURTHER ORDERED, that local exchange carriers SHALL FILE tariff revisions required by paras. 180 to 187 herein on January 15, 1997, to be effective April 15, 1997.

14.

15. IT IS FURTHER ORDERED, the Bell Operating Companies ARE GRANTED waivers of the time requirements of the Computer II and the Computer III network disclosure requirements in order to provide basic network payphone services by April 15, 1997. Pursuant to this waiver, network disclosure notification for these basic network payphone services must be filed no later than January 15, 1997.

16.

17. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL FILE CEI plans for the provision of payphone service not later than 90 days following publication of a summary of this Report and Order in the Federal Register.

18.

19. IT IS FURTHER ORDERED, that the waivers of Section 64.1301 of the Commission's Rules granted to AT&T and Sprint in the proceedings referenced in para. 119 above ARE REVOKED, effective 30 days after publication of a summary of this Report and Order in the Federal Register.

20.

21. IT IS FURTHER ORDERED, that the proceedings initiated by our Memorandum Opinion and Order on Further Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket 91-35, Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 10 FCC Rcd 11457 (1995), ARE TERMINATED.

22.

IT IS FURTHER ORDERED, that the July 18, 1988 Petition of the Public Telephone Council for a declaratory ruling that BOC Payphones should be treated as CPE IS DISMISSED AS MOOT.



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23.

24. IT IS FURTHER ORDERED, that the August 7, 1995 Petition of Oncor Communications, Inc. Requesting Compensation for Competitive Payphone Premises Owners and Presubscribed Operator Services Providers IS DENIED.

25.

26. IT IS FURTHER ORDERED, that the proceedings entitled Amendment of Section 69.2(m) and (ee) of the Commission's Rules to Include Independent Public Payphones Within the "Public Telephone" Exemption from End User Common Line Access Charges, RM 8723, ARE TERMINATED.

27.

28. IT IS FURTHER ORDERED, that the December 28, 1989 Petition of the California Payphone Association IS DISMISSED AS MOOT.

29.

30. IT IS FURTHER ORDERED, that the provisions set forth in Section 1.4 of the Commission's rules establishing the date of public notice for this Report and Order ARE WAIVED, and petitions for reconsideration SHALL BE FILED within 30 days of release of this document, and oppositions to the petitions must be filed within seven (7) days after the date for filing the petitions for reconsideration. For purposes of this proceeding, Section 1.106(h) of the Commission's Rules IS WAIVED, and the Commission will not accept replies to oppositions.

31.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

**APPENDIX A****TEXT OF SECTION 276****PROVISION OF PAYPHONE SERVICE**

(a) **NONDISCRIMINATION SAFEGUARDS.** -- After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service--

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) **REGULATIONS.** --

(1) **CONTENTS OF REGULATIONS.** -- In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that --

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) PUBLIC INTEREST TELEPHONES.-- In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) EXISTING CONTRACTS.-- Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996.

(c) STATE PREEMPTION.-- To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) DEFINITION.-- As used in this section, the term "payphone service" means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

**APPENDIX B****PARTIES FILING COMMENTS**

- 1 American Association of Airport Executives ("AAAE")
- 2 ACTEL, Inc. ("ACTEL")
- 3 Admiral's Club
- 4 AHA TelePLAN
- 5 Aid Association for Lutherans
- 6 Air Touch Paging ("Air Touch")
- 7 Airports Council International - North America ("ACI-NA")
- 8 American Hotel & Motel Association ("AHMA")
- 9 Ameritech
- 10 Anchorage Telephone Utility ("Anchorage Telephone")
- 11 American Public Communications Council ("APCC")
- 12 Arch Communications Group, Inc. ("Arch")
- 13 AT&T Corp. ("AT&T")
- 14 Bell Atlantic
- 15 Bell South Corporation ("Bell South")
- 16 Robert M. Brill, Esquire ("Brill")
- 17 Cable and Wireless, Inc. ("Cable & Wireless")
- 18 California Association of Long Distance Telephone Companies ("CALTEL")
- 19 California Payphone Association ("CPA")
- 20 People of the State of California and the Public Utilities Commission of the State of Cal
- 21 Call West Communications, Inc. ("Call West")
- 22 Cleveland Clinic Foundation ("Cleveland Clinic")
- 23 Communications Central, Inc. ("Communications Central")
- 24 Competitive Telecommunications Association ("CompTel")
- 25 ConQuest Long Distance Corp. ("ConQuest")
- 26 Dallas/Fort Worth International Airport ("DFW")
- 27 Excel Telecommunications, Inc. ("Excel")
- 28 Florida Public Service Commission ("Florida PSC")
- 29 Florida Public Telecommunications Association, Inc. ("FPTA")
- 30 Flying J Inc. ("Flying J")
- 31 Frontier Corporation ("Frontier")
- 32 Georgia Public Communications Association ("GPCA")
- 33 Greyhound Lines, Inc. ("Greyhound")
- 34 GTE Service Corporation ("GTE")
- 35 GVNW Inc./Management ("GVNW")
- 36 Idaho Public Utilities Commission ("Idaho PUC")
- 37 Illinois Public Telecommunications Association ("IPTA")
- 38 Independent Technologies, Inc. ("Independent Technologies")
- 39 Indiana Utility Regulatory Commission ("Indiana URC")
- 40 Inmate Calling Services Providers Coalition ("Inmate")
- 41 Intellicall Companies ("Intellicall")

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42	International Telecard Association ("ITA")	
43	InVision Telecom, Inc. ("InVision")	
44	Iowa Utilities Board	
45	City of Kansas City, Missouri ("Kansas City")	
46	Kampgrounds Of America, Inc. ("KOA")	
47	Lubbock County Sheriff's Office ("Lubbock County Sheriff")	
48	State of Maine Public Utilities Commission, State of New Hampshire Public Utilities	Cor
49	MCI Telecommunications Corporation ("MCI")	
50	Michigan Pay Telephone Association ("MPTA")	
51	Midwest Independent Coin Payphone Association ("MICPA")	
52	National Association of RV Parks and Campgrounds ("ARVC")	
53	National Exchange Carrier Association, Inc. ("NECA")	
54	NATSO, Inc. ("NATSO")	
55	New Jersey Payphone Association ("NJPA")	
56	New Jersey Division of the Ratepayer Advocate ("New Jersey DRA")	
57	New York City Department of Information Technology and Telecommunications ("New York City")	
58	New York State Department of Public Service ("New York DPS")	
59	National Telephone Cooperative Association ("NTCA")	
60	Public Utilities Commission of Ohio ("Ohio PUC")	
61	Oklahoma Corporation Commission ("Oklahoma CC")	
62	Oncor Communications, Inc. ("Oncor")	
63	One Call Communications, Inc. d/b/a Opticom ("One Call")	
64	Paging Network, Inc. ("PageNet")	
65	Personal Communications Industry Association ("PCIA")	
66	Pennsylvania Public Utility Commission ("Pennsylvania PUC")	
67	Peoples Telephone Company, Inc. ("Peoples")	
68	Promus Hotel Corporation ("Promus")	
69	Puerto Rico Telephone Company ("Puerto Rico Telephone")	
70	RBOC Payphone Coalition ("RBOC")	
71	Scherers Communications Group, Inc. ("Scherers")	
72	SDN Users Association, Inc. ("SDN Users")	
73	South Carolina Public Communications Association ("SCPCA")	
74	Southwestern Bell Telephone Company ("SW Bell")	
75	Sprint Corporation ("Sprint")	
76	Tarrant County, Texas ("Tarrant County")	
77	Telecommunications Resellers Association ("TRA")	
78	Teleport Communications Group Inc. ("Teleport")	
79	Public Utility Commission of Texas ("Texas PUC")	
80	Truckstops of America	
81	United States Telephone Association ("USTA")	
82	US Satellite Corp. ("US Satellite")	
83	US WEST, Inc. ("US WEST")	
84	Virginia State Corporation Commission ("Virginia SCC")	
85	Wisconsin Public Communications Association ("WPCA")	
86	WorldCom, Inc. d/b/a LDDS WorldCom ("WorldCom")	

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87 Yuma County Airport Authority, Inc. ("Yuma County Airport")

## APPENDIX C

## PARTIES FILING REPLY COMMENTS

- 1 Air Touch Paging ("Air Touch")
- 2 American Express Telecommunications, Inc. ("American Express")
- 3 Ameritech
- 4 American Public Communications Council ("APCC")
- 5 Arch Communications Group, Inc. ("Arch")
- 6 AT&T Corp. ("AT&T")
- 7 Bell Atlantic
- 8 Bell South Corporation ("Bell South")
- 9 Robert M. Brill, Esquire ("Brill")
- 10 California Payphone Association ("CPA")
- 11 People of the State of California and the Public Utilities Commission of the State of Cal
- 12 Communications Central, Inc. ("Communications Central")
- 13 Competitive Telecommunications Association ("CompTel")
- 14 Frontier Corporation ("Frontier")
- 15 Gateway Technologies, Inc. ("Gateway")
- 16 Georgia Public Communications Association ("GPCA")
- 17 GTE Service Corporation ("GTE")
- 18 Indiana Utility Regulatory Commission ("Indiana URC")
- 19 Inmate Calling Services Providers Coalition ("Inmate")
- 20 Intellicall Companies ("Intellicall")
- 21 International Telecard Association ("ITA")
- 22 MCI Telecommunications Corporation ("MCI")
- 23 Medeco
- 24 Metropolitan Washington Airports Authority ("Metropolitan Washington")
- 25 Michigan Pay Telephone Association ("MPTA")
- 26 Missouri Public Service Commission ("Missouri PSC")
- 27 MobileMedia Communications, Inc. ("MobileMedia")
- 28 Montana Public Service Commission ("Montana PSC")
- 29 National Exchange Carrier Association, Inc. ("NECA")
- 30 National Telephone Cooperative Association ("NTCA")
- 31 Public Utilities Commission of Ohio ("Ohio PUC")
- 32 One Call Communications, Inc. d/b/a Opticom ("One Call")
- 33 Organization for the Promotion and Advancement of Small Telecommunications Companies
- 34 Pacific Telesis Group ("PacTel")
- 35 Personal Communications Industry Association ("PCIA")
- 36 Peoples Telephone Company, Inc. ("Peoples")
- 37 Puerto Rico Telephone Company ("Puerto Rico Telephone")
- 38 RBOC Payphone Coalition ("RBOC")
- 39 San Diego Payphone Owners Association ("SDPOA")
- 40 Southwestern Bell Telephone Company ("SW Bell")

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- 41 Sprint Corporation ("Sprint")
  - 42 Tel leasing Enterprises, Inc. ("Tel leasing")
  - 43 Telecommunications Resellers Association ("TRA")
  - 44 Tennessee Regulatory Authority
  - 45 United States Telephone Association ("USTA")
  - 46 US WEST, Inc. ("US WEST")
  - 47 Voice Telephone Company ("Voice")
  - 48 Wisconsin Public Communications Association ("WPCA")



**APPENDIX D****RULES AMENDED (IMMEDIATE)**

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 is revised to read as follows:

**AUTHORITY: Sec. 4, 48 Stat. 1066, as amended: 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 276, 48 Stat. 1070, as amended; 47 U.S.C. 201, 218, 226, 228, 276 unless otherwise noted.**

2. The heading of Subpart M of Part 64 is revised to read as follows:

Subpart M -- Payphone Compensation

3. The first sentence of Section 64.1301(a) is revised to read as follows:

(a) Each payphone service provider eligible to receive compensation shall be paid \$45.85 per payphone per month for originating access code and toll-free calls.

4. Section 64.1301(b) is revised to read as follows:

(b) This compensation shall be paid by interexchange carriers (IXCs) that earn annual toll revenues in excess of \$100 million, as reported in the FCC staff report entitled "Long Distance Market Shares." Each individual IXC's compensation obligation shall be set in accordance with its relative share of toll revenues among IXCs required to pay compensation. For example, if total toll revenues of IXCs required to pay compensation is \$50 billion, and one of these IXCs had \$5 billion of total toll revenues, the IXC must pay \$4.585 per payphone per month.

5. Section 64.1330 is added to read as follows:

**64.1330 State Review of Payphone Entry and Exit Regulations and Public Interest Payphones.**

(a) Each state must review and remove any of its regulations applicable to payphones and payphone service providers that impose market entry or exit requirements.

(b) Each state must ensure that access to dialtone, emergency calls, and telecommunications relay service calls for the hearing disabled is available from all payphones at no charge to the caller.

(c) Each state must review its rules and policies to determine whether it has provided for public interest payphones consistent with applicable Commission guidelines, evaluate whether it

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needs to take measures to ensure that such payphones will continue to exist in light of the Commission's implementation of Section 276 of the Communications Act, and administer and fund such programs so that such payphones are supported fairly and equitably. This review must be completed by September 20, 1998.

6. Section 64.1340 is added to read as follows:

**64.1340 Right to Negotiate**

Unless prohibited by Commission order, payphone service providers have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA and intraLATA calls from their payphones.

7. Section 64.703(b) is revised by removing the "and" at the end of subsection (2); by renumbering subsection (3) as (4); and adding a new subsection (3) as follows:

(3) In the case of a pay telephone, the local coin rate for the pay telephone location; and

**APPENDIX E****RULES AMENDED (DEFERRED)**

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

**AUTHORITY: Sec. 4, 48 Stat. 1066, as amended: 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 276, 48 Stat. 1070, as amended; 47 U.S.C. 201, 218, 226, 228, 276 unless otherwise noted.**

2. Section 64.1301 is deleted.

3. Section 64.1300 is added to read as follows:

**64.1300 Payphone Compensation Obligation.**

(a) Except as provided herein, every carrier to whom a completed call from a payphone is routed shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract.

(b) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.

(c) In the absence of an agreement as required by subsection (a) herein, the carrier is obligated to compensate the payphone service provider shall do so at a per-call rate equal to its local coin rate at the payphone in question.

(d) For the initial one-year period during which carriers are required to pay per-call compensation, in the absence of an agreement as required by subsection (a) herein, the carrier is obligated to compensate the payphone service provider at a per-call rate of \$.35 per call. After this initial one-year period of per-call compensation, subsection (c) herein will apply.

4. Section 64.1310 is added to read as follows:

**64.1310 Payphone Compensation Payment Procedures.**

(a) It is the responsibility of each carrier to whom a compensable call from a payphone is routed to track, or arrange for the tracking of, each such call so that it may accurately compute the compensation required by Section 64.1300(a).

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(b) Carriers and payphone service providers shall establish arrangements for the billing and collection of compensation for calls subject to Section 64.1300(a).

(c) Local Exchange Carriers must provide to carriers required to pay compensation pursuant to Section 64.1300(a) a list of payphone numbers in their service areas. The list must be provided on a quarterly basis. Local Exchange Carriers must verify disputed numbers in a timely manner, and must maintain verification data for 18 months after close of the compensation period.

(d) Local Exchange Carriers must respond to all carrier requests for payphone number verification in connection with the compensation requirements herein, even if such verification is a negative response.

(e) A payphone service provider that seeks compensation for payphones that are not included on the Local Exchange Carrier's list satisfies its obligation to provide alternative reasonable verification to a payor carrier if it provides to that carrier:

(1) A notarized affidavit attesting that each of the payphones for which the payphone service provider seeks compensation is a payphone that was in working order as of the last day of the compensation period; and

(2) Corroborating evidence that each such payphone is owned by the payphone service provider seeking compensation and was in working order on the last day of the compensation period. Corroborating evidence shall include, at a minimum, the telephone bill for the last month of the billing quarter indicating use of a line screening service.

5. Section 64.1320 is added to read as follows:

**64.1320 Payphone Compensation Verification and Reports.**

(a) Carriers subject to payment of compensation pursuant to Section 64.1300(a) shall conduct an annual verification of calls routed to them that are subject to such compensation and file a report with the Chief, Common Carrier Bureau within 90 days of the end of the calendar year, provided, however, that such verification and report shall not be required for calls received after December 31, 1998.

(b) The annual verification required in this section shall list the total amount of compensation paid to payphone service providers for intrastate, interstate and international calls, the number of compensable calls received by the carrier and the number of payees.

6. The authority citation for Part 68 continues to read as follows:

**Authority:** Secs. 1, 4, 5, 201-5, 215, 218, 226, 227, 303, 313, 314, 403, 404, 410, 602 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 155, 201-5, 208, 215, 218, 226, 227, 303, 313, 314, 403, 404, 410, 602.

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7. Section 68.2(a)(1) is amended to read:

Of all terminal equipment to the public switched telephone network, for use in conjunction with all services other than party line service;

8. Section 68.3, the definition of "coin-implemented telephone" is deleted.

9. Section 68.3, is amended to add the definition of "instrument implemented telephone" to read:

*Instrument-implemented telephone:* A telephone containing all circuitry required to execute coin acceptance and related functions within the instrument itself and not requiring coin service signaling from the central office.

10. Section 68.3 definition of "Coin Service" is deleted.

11. Section 68.3 is amended to add the definition of "Central-office implemented telephone" to read:

*Central-office implemented telephone:* A telephone executing coin acceptance requiring coin service signaling from the central office.

**APPENDIX F  
INTERIM COMPENSATION OBLIGATIONS**

Company	1995 Total Toll Services Revenues (\$ in Millions)	% of Total Toll Revenues	Amount Per Phone Per Month
AT&T COMPANIES:			
AT&T COMMUNICATIONS, INC.	\$38,069	56.69%	\$25.9923406
ALASCOM, INC.	325	0.48%	0.2219000
MCI TELECOMMUNICATIONS CORP.	12,924	19.25%	8.8241091
SPRINT COMMUNICATIONS CO.	7,277	10.84%	4.9685115
LDDS WORLDCOM	3,640	5.42%	2.4852799
FRONTIER COMPANIES:			
ALLNET COMM. SVCS. dba FRONTIER COMM. SVCS.	827	1.23%	0.5646501
FRONTIER COMMUNICATIONS INT'L, INC.	309	0.46%	0.2109757
FRONTIER COMM. OF THE NORTH CENTRAL REGION	133	0.20%	0.0908083
FRONTIER COMMUNICATIONS OF THE WEST, INC.	127	0.19%	0.0867117
CABLE & WIRELESS COMMUNICATIONS, INC.	700	1.04%	0.4779384
LCI INTERNATIONAL TELECOM CORP.	671	1.00%	0.4581381
EXCEL TELECOMMUNICATIONS, INC.	363	0.54%	0.2478452
TELCO COMMUNICATIONS GROUP, INC.	215	0.32%	0.1467954
MIDCOM COMMUNICATIONS, INC.	204	0.30%	0.1392849
TEL-SAVE, INC. 9/	180	0.27%	0.1228985
U.S. LONG DISTANCE, INC.	155	0.23%	0.1058292
VARTEC TELECOM, INC.	125	0.19%	0.0853461
<i>Continued from the previous page</i>			

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Company	1995 Total Toll Services Revenues (\$ in Millions)	% of Total Toll Revenues	Amount Per Phone Per Month
GENERAL COMMUNICATION, INC.	120	0.18%	0.0819323
BUSINESS TELECOM, INC.	115	0.17%	0.0785185
ONCOR COMMUNICATIONS, INC.	111	0.17%	0.0757874
THE FURST GROUP, INC.	109	0.16%	0.0744218
AMERICAN NETWORK EXCHANGE, INC.	101	0.15%	0.0689597
TOTAL	67,153	100.00%	45.85

September 20, 1996

**Separate Statement of**  
**Commissioner Rachelle B. Chong**

*Re: In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35.*

In the Telecommunications Act of 1996,<sup>1</sup> Congress mandated twin goals for a restructuring of our nation's payphone industry. Congress directed the Commission to establish rules that "promote competition among payphone service providers and promote the widespread deployment of payphone services to the general public."<sup>2</sup> In this order, we effectuate Congress' intent by putting in place a new market-oriented scheme governing payphones. Thus, competition now becomes the new coin of the realm for the payphone industry.

I write separately to show my strong support for the new policies we unanimously adopt today. In my view, these innovative policies will strip away outmoded regulations, unleash competitive forces upon all segments of the payphone industry, and put in place a mechanism to preserve the continuing availability of payphones that serve the public interest.

The payphone industry is one in which competition with its attendant consumer benefits can easily thrive. However, our current payphone regulations were not crafted in a way that promoted regulatory parity between the market players or put a high premium on consumer protection. Under the statutory and regulatory framework that was in place prior to the 1996 Act, payphone providers were subject to different regulations whose application mainly depended upon whether an entity providing payphone service was a local exchange company or an independent payphone provider. For example, local exchange companies traditionally had the ability to subsidize their payphone operations with telephone service revenues and were restricted from choosing long distance providers on their payphones. In contrast, independent payphone providers had to support their operations mainly from revenues received at payphone stations and through commission arrangements with operator service providers. This disparate

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 *to be codified at* 47 U.S.C. §§ 151 *et. seq.* (1996 Act).

<sup>2</sup> 47 U.S.C. § 276(b)(1).



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treatment created certain incentives and distortions in the market that, during the past decade, resulted in supracompetitive rates at certain payphones and in consumer confusion. As the rest of the telecommunications industry moves swiftly into a new pro-competitive, deregulatory era, our payphone regulations cried out for revision.

In this order, we dismantle the existing regulatory system by putting in place rules that in essence will establish a new competitive payphone industry. These rules are designed to remove existing subsidies, provide for nondiscriminatory access to bottleneck facilities, ensure fair compensation for all calls originated on payphones, and allow all competitors equal opportunity to compete for essential aspects of the payphone business.

At the heart of our new policies is that we have agreed that the best way to ensure fair compensation for payphone service is to let the market set the price for individual payphone calls. In this order, we establish a two-stage process as a transition to market-based rates. During stage one, or during the first year after this order becomes effective, local exchange companies are required to terminate subsidies for their payphones and are not be eligible to receive compensation for non-coin calls made on their payphones until such subsidies are terminated. Independent payphone providers, however, will begin to receive compensation for access code calls and subscriber 800 calls on a flat-rate basis. In addition, during this first stage, the states may continue to set the local coin rate but may move to market-based local coin rates at any time during this one-year period. The states are asked to conduct an examination of payphone regulations to review and remove any regulations that affect competition.

In stage two, which will commence one year after this order becomes effective, carriers to whom payphone calls are routed must have in place a per-call tracking capability and are required to remit per-call compensation to payphone providers, including local exchange carriers. In this stage, the market will set the rate for local coin calls and we establish a \$.35 default compensation rate that interexchange carriers will pay to payphone providers for each compensable call. After the conclusion of the second stage, the market-based local coin rate at these payphones will be the default compensation rate for all compensable calls in the absence of an agreement between the payphone provider and the carrier-payor. Thus, in two years, with certain limited exceptions, we can look forward with confidence to competition -- rather than regulation -- determining calling and compensation rates in the payphone industry.

We also retain the discretion to review the deregulation of local coin rates nationwide and determine whether marketplace disfunctions in certain locational monopoly areas -- such as airports or train stations -- exist and should be addressed. If a problem arises, we will stand ready to step in and resolve any problems.

In deciding to rely on market forces, however, we have also refocused on consumers. I am pleased that we have put in place several safeguards to ensure their protection. We do so in light of the fact that payphones serve an important role in allowing people to place calls when they are away from home or the office. We require that all payphones must provide free access

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to dialtone. Further, our new rules require that payphone providers must prominently display the local coin rate they choose to charge at each payphone, so that consumers will have full information about the charges and can make an informed choice to use the payphone.

Payphones located in isolated or remote areas also serve as critical links to help when a person is faced with an unexpected emergency. In circumstances where the free market may not adequately encourage the deployment of payphones in locations that would serve public health, safety, and welfare needs, we establish guidelines by which the states may maintain and fund such public interest payphones. Under our order, states will be able to use their knowledge of local conditions to ensure that the public has access to telecommunications by requiring the maintenance of payphones at locations, such as along remote stretches of a rural road or on a county beach, that may not be economically self-supporting in the free market.

Our order also requires that every payphone provide free access to both emergency services and to telecommunications relay service (TRS) calls for the hearing disabled. I believe it is appropriate for the states to take the lead on public interest payphones in their states. I look forward to their good work in this area that is so fundamental to Congress' second goal in Section 276 -- the "widespread deployment of payphone services to the general public."<sup>3</sup>

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<sup>3</sup> 47 U.S.C. Section 276(b)(1).