

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

In the Matters of)	
)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996)	CC Docket No. 96-128
)	
2016 Biennial Review of Telecommunications Regulations: Wireline Competition Bureau)	WC Docket No. 16-132
)	
)	

**COMMENTS OF
ITTA – THE VOICE OF AMERICA’S BROADBAND PROVIDERS**

ITTA – The Voice of America’s Broadband Providers (ITTA) hereby submits its comments in support of the petition of Cincinnati Bell Any Distance Inc. (CBAD) for waiver of Section 64.1320 of the Commission’s rules, which effectively mandates an annual audit of payphone call tracking systems.¹ Not only is grant of a waiver to CBAD manifestly in the public interest, but the Commission should issue blanket relief to all Completing Carriers² pending its completion of a review of the ongoing viability of Section 64.1320.

¹ Cincinnati Bell Any Distance Inc. Petition for Waiver, CC Docket No. 96-128 (filed Apr. 25, 2017) (Petition); 47 CFR § 64.1320.

² For purposes of the payphone compensation rules, a Completing Carrier is defined as “a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes a local, coinless access code or subscriber toll-free payphone call.” 47 CFR § 64.1300(a).

I. CBAD HAS CLEARLY DEMONSTRATED “GOOD CAUSE” FOR A WAIVER

The Petition makes the following microphone drop-worthy assertion: “The cost of the annual audit to CBAD is now approximately *five times* the amount of payphone compensation that it pays annually.”³

On its face, Section 64.1320(f) seems to simply require that each Completing Carrier annually engage an independent third-party auditor merely to “verify” that no material changes have occurred concerning the Completing Carrier’s compliance with the criteria of the prior year’s audit report or, if a material change has occurred, that such change does not affect compliance with the audit criteria set forth in Section 64.1320(c). As CBAD explains, however, this “effectively requires that the payphone tracking system audit be repeated every year in order for the auditor to verify that there have been no material changes or that any material changes have not affected the completing carrier’s compliance.”⁴ Tracking the precipitous decline in the number of payphones in service as the increase in usage of wireless service and other means of communication has supplanted them, CBAD maintains that the amount of payphone compensation it has paid declined by more than 97 percent from 2005 to 2016.⁵ Yet, the cost of the annual audit is essentially fixed and has not materially changed.⁶ This is how CBAD is now

³ Petition at 3 (emphasis in original).

⁴ *Id.* at 2; see Letter from B. Lynn Follansbee, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, at 1 (filed Apr. 21, 2017) (USTelecom *Ex Parte*) (supporting a similar waiver petition filed by Sprint) (“this means that a covered completing carrier is required to complete an audit each year to confirm the current practices are in compliance even though the rule purports to only require an initial audit then an annual certification of no material changes”).

⁵ See Petition at 3.

⁶ See *id.*

faced with spending five times more on a system audit than the amount whose accuracy the system is intended to ensure.⁷

CBAD firmly acknowledges that relieving it of the audit requirement would not relieve it of its obligation to ensure that it is compensating payphone service providers (PSPs) for all compensable calls.⁸ In fact, audits of CBAD's call tracking system have "never identified any deficiencies," and "[f]or more than a decade, CBAD has been found to be appropriately compensating PSPs."⁹ CBAD also acknowledges that, even in the absence of an audit, if any complaint were to arise concerning the accuracy of CBAD's call tracking or compensation to PSPs, the Commission retains authority to investigate it.¹⁰ In addition, most long-distance providers use a clearinghouse such as the National Payphone Clearinghouse or Billing Concepts to process quarterly payments to PSPs, and they have effective investigation and dispute resolution processes in place to address any disparities between Completing Carrier and PSP data that may arise. Moreover, they would notify Completing Carriers if they noticed any irregularities in the quarterly data they provide it.¹¹

CBAD also has no reasonable alternative to a waiver of the audit rule. As CBAD demonstrates, the costs of settling payphone compensation individually with PSPs – the only

⁷ In addition to the cost for the independent auditor, Completing Carriers must divert internal resources to work with the auditor to complete the audit plan. *See* Letter from Karen Brinkmann, Counsel to CBAD, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-132, at 1 (filed Apr. 4, 2017) (CBAD *Ex Parte*).

⁸ *See id.* at 2; Petition at 4.

⁹ Petition at 2.

¹⁰ *Id.* at 4.

¹¹ *See* CBAD *Ex Parte* at 1-2.

alternative to the audit requirement under the Commission's rules¹² – would similarly far eclipse the aggregate amount of payphone compensation at issue, leading to an equally absurd result.¹³

Waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest, and when evaluating a waiver request, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy.¹⁴ The skewed cost of the audit relative to the amount of payphone compensation CBAD actually owes, CBAD's impeccable track record of accuracy of its payphone call tracking system, the existence of additional safeguards to ensure that CBAD continues to appropriately compensate PSPs, and the lack of a reasonable alternative to a waiver together overwhelmingly support CBAD's request. CBAD has clearly shown that "good cause" exists for a waiver.¹⁵

II. THE COMMISSION SHOULD PROVIDE BLANKET RELIEF FROM SECTION 64.1320 FOR ALL COMPLETING CARRIERS THAT HAVE PREVIOUSLY COMPLETED SUCCESSFUL AUDITS

For the same reasons that waiver is merited for CBAD, the Commission should provide all Completing Carriers comparable relief from the annual audit of payphone call tracking systems where they have already successfully completed the audit.

The annual audit requirement was established in 2003 when the payphone business was much more prominent than it is today and the amount of payphone compensation paid was not insignificant. Since then, the number of payphones in service has plummeted from almost 1.5

¹² See 47 CFR § 64.1320(a).

¹³ See Petition at 5; see also *USTelecom Ex Parte* at 2 ("the cost of negotiating and executing contracts with so many carriers for such a small amount of total compensation would not be cost-effective").

¹⁴ See *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); see also, e.g., *Small Business Exemption from Open Internet Enhanced Transparency Requirements*, Order, 32 FCC Rcd 1772, 1774, para. 6 (2017).

¹⁵ 47 CFR § 1.3 (rules may be waived on petition "if good cause therefor is shown").

million to fewer than 100,000 today.¹⁶ Whereas the amount of payphone compensation that CBAD has paid declined by more than 97 percent over the past decade,¹⁷ the industry-wide degree of decline is even higher.¹⁸ At the same time, not only have audit costs not fallen proportionately to the decline in payphone compensation, they have at least remained materially the same, if not risen.¹⁹ While CBAD’s audit costs an eye-popping *five times* as much as the payphone compensation it owes, even Sprint, with much larger payphone-originated call volumes, spends on its audit 15 percent of the compensation it pays from handling coinless payphone calls – and, as Sprint emphasizes, this is compensation paid, *not* net revenue.²⁰

In addition to the continuing safeguards noted by CBAD for ensuring accurate payphone compensation from Completing Carriers to PSPs -- even in the prospective absence of an annual systems audit requirement -- USTelecom confirms that “it has been years since any audits have identified material changes to most companies’ payphone call tracking systems.”²¹ USTelecom then concludes that “[t]his evidence of continuous compliance throughout a period where there

¹⁶ See FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Payphone Statistics: 1997 – Most Recent at Tbl. 1 (WCB 2017), <https://www.fcc.gov/general/iatd-data-statistical-reports>. To illustrate further, Sprint asserts that in conducting the 2016 audit, “Sprint’s auditor had difficulty locating a sufficient number of working payphones to conduct test calls.” Sprint Comments, WC Docket No. 16-132, at 2 (Dec. 5, 2016) (Sprint Biennial Review Comments).

¹⁷ See Petition at 3.

¹⁸ See Sprint Biennial Review Comments at 1 (“if Sprint’s experience is typical, payphone calling volumes have decreased by 99 percent in the last decade”); USTelecom *Ex Parte* at 2 (“[c]all volumes on payphones have dropped by 99.5 percent”).

¹⁹ See Petition at 3 (audit costs have not materially changed); Sprint Petition for Waiver, CC Docket No. 96-128, at 2 (filed Apr. 7, 2017) (Sprint Petition) (audit costs have risen).

²⁰ See Sprint Petition at 2.

²¹ USTelecom *Ex Parte* at 2.

was a massive decline in payphone use and compensation shows that an audit is not necessary to protect the financial interests” of PSPs.²² ITTA agrees.

Simply put, the annual audit requirement has long since outlived any usefulness it may have once had. The requirement saddles carriers and their customers with wholly unnecessary costs that, pragmatically, do not meaningfully help PSPs, and are completely unreasonable compared to the very small compensation amounts whose accuracy the audits are intended to ensure. Therefore, ITTA urges that the Commission provide all Completing Carriers blanket relief from Section 64.1320 of its rules pending its completion of a review of the ongoing viability of Section 64.1320.²³ Such a review would also be consistent with the comments of Sprint and CBAD in the 2016 Biennial Review of Wireline Competition Bureau regulations proceeding.²⁴

When the Commission conducts such a review, it should perform a cost-benefit analysis of the ongoing usefulness of Section 64.1320. Chairman Pai recently announced that the

²² *Id.*

²³ For instance, the Commission or Wireline Competition Bureau could issue a temporary waiver to all Completing Carriers that would expire shortly following the completion of such a proceeding. Just this week, the International Bureau took precisely this approach when, on its own motion, it granted a temporary waiver of traffic and revenue reporting requirements until 60 days after release of a Commission Order in a proceeding addressing such reporting requirements that originated based on the record in the biennial review proceeding. *See Section 43.62 Reporting Requirements for U.S. Providers of International Services; 2016 Biennial Review of Telecommunications Regulations*, IB Docket Nos. 17-55 and 16-131, Order, DA 17-406 (IB May 1, 2017) (in this case, where the Commission believes that the benefits of the current reports have so diminished that they no longer outweigh the costs, temporarily waiving the reporting requirements until after completion of the proceeding will preserve the resources of the entities subject to the requirements as well as the Commission, and thus will serve the public interest). Or, the Enforcement Bureau could issue an advisory that it will not take any enforcement action against any Completing Carrier that does not have such an audit performed between now and the completion of a proceeding reviewing the ongoing viability of Section 64.1320. *See also* USTelecom *Ex Parte* (also advocating that the Commission grant all Completing Carriers a temporary waiver).

²⁴ *See* Sprint Biennial Review Comments at 1-2; Reply Comments of Cincinnati Bell Any Distance, WC Docket No. 16-132, at 1-2 (Jan. 3, 2017).

Commission will be resuscitating the role of cost-benefit analysis in its rulemaking activities.²⁵ Quoting former Office of Management and Budget Regulatory Chief Cass Sunstein, Chairman Pai emphasized that cost-benefit analysis is not merely a prospective exercise, but also should be utilized in evaluating the actual effects of regulations that are already on the books.²⁶ As CBAD argues, “[t]he audit requirement could not pass any reasonable cost-benefit analysis” in its case.²⁷ The same clearly would be true across the board with respect to Completing Carriers.

Finally, as part of its own argument for waiver of Section 64.1320, CBAD suggests that it could provide an annual officer certification directly to the Commission in lieu of engaging in an annual audit.²⁸ ITTA supports this as a reasonable safeguard not only to replace the annual audit, but also to supplant the requirement of Section 64.1310(a)(3) of the Commission’s rules²⁹ that the Completing Carrier’s chief financial officer (CFO) submit a sworn statement on a quarterly basis attesting to the accuracy of the payments tendered to each PSP that quarter. Due to their very nature, CFOs treat sworn statements with the utmost of gravity, and numerous internal processes (with their attendant resources) are now triggered quarterly to ensure that CFOs are able to back up these statements without fear of criminal exposure. However, given the record of accuracy of payphone call tracking systems³⁰ in conjunction with the plummeting sums at issue,

²⁵ See Remarks of FCC Chairman Ajit Pai at the Hudson Institute: The Importance of Economic Analysis at the FCC 3-4 (Apr. 5, 2017).

²⁶ See *id.* at 3 (“it is the duty of regulators to ‘obtain a careful and objective analysis of the . . . actual effects of regulations, whether positive or negative. . . . We need careful assessments before rules are issued, and we need continuing scrutiny afterwards.’”); see also *id.* at 4 (endorsing the criticisms by former FCC Commissioner Harold Furchgott-Roth of economics at the FCC, that there is “‘no precise statement that resembles an actual cost-benefit analysis . . . and no plan for reviewing performance over time.’”).

²⁷ Petition at 4.

²⁸ See *id.*

²⁹ 47 CFR § 64.1310(a)(3).

³⁰ See, e.g., Petition at 2; USTelecom *Ex Parte* at 2.

devoting such internal resources to this endeavor on a quarterly basis is overkill. An annual sworn statement should be more than sufficient to ensure that CFOs and their staffs are tendering payphone compensation payments with due accuracy.

III. CONCLUSION

For the foregoing reasons, the Petition should be granted expeditiously. Furthermore, blanket interim relief should be provided to all Completing Carriers from the requirements of Section 64.1320 pending the Commission's completion of a review of the ongoing viability of Sections 64.1310(a)(3) and 64.1320.

Respectfully submitted,

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