

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

APCC Services, Inc., Davel Communications, )  
Inc., ETS Payphones, Inc., Goldentel, Inc., )  
Kellee Communications Group, Inc., )  
NSC Communications Public Services )  
Corporation, PayTel Communications, Inc., )  
and West Coast Coin, Inc., )  
Complainants, )  
v. )  
IDT Corporation, )  
Respondent. )

File No. EB-05-MD-002

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 2006

Released: July 11, 2006

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this order, we address a formal complaint<sup>1</sup> filed by APCC Services, Inc. (“APCC”), and several payphone service providers against IDT Corporation (“IDT”) pursuant to section 208 of the Communications Act of 1934, as amended (“Act”).<sup>2</sup> The Complaint alleges that IDT violated sections 201(b) and 416(c) of the Communications Act<sup>3</sup> by failing to produce certain documents as required by rule 47 C.F.R. § 64.1320(g). Because IDT provided those documents to APCC after the Complaint was filed, however, the Complaint is moot and, accordingly, we dismiss it.

II. BACKGROUND

A. The Parties

2. Complainants Davel Communications, Inc., ETS Payphones, Inc., Goldentel, Inc., NSC Communications Public Service Corporation, West Coast Coin, Inc., Kellee Communications Group, Inc., and PayTel Communications, Inc. (collectively, the “PSP

<sup>1</sup> Complaint, File No. EB-05-MD-002 (filed Feb. 1, 2005) (“Complaint”).

<sup>2</sup> 47 U.S.C. § 208.

<sup>3</sup> 47 U.S.C. §§ 201(b), 416(c).

Complainants”) are payphone services providers. APCC is an agent of the PSP Complainants, and of other payphone service providers, for the billing and collection of dial-around compensation.<sup>4</sup>

3. IDT is a common carrier providing interexchange telecommunications services. IDT is also a “Completing Carrier,” as defined by section 64.1300(a) of the Commission’s rules.<sup>5</sup>

#### **B. The Relevant Law**

4. The Commission’s payphone compensation rules are designed to ensure, *inter alia*, that payphone service providers are fairly compensated for coinless calls originated from their payphones.<sup>6</sup> For the period at issue here, those rules require that the last facilities-based long distance carrier in a call path, the “Completing Carrier,” compensate the payphone service provider for coinless calls that are completed by that carrier.<sup>7</sup>

5. To help ensure accurate reporting of calls (and, thus, accurate payment for those calls), the Commission’s rules require a Completing Carrier to establish detailed procedures for tracking and paying compensation for payphone-originated calls.<sup>8</sup> The Commission’s rules also require Completing Carriers to engage an independent third-party auditor to prepare a “System Audit Report” verifying the accuracy and reliability of the call tracking system.<sup>9</sup> Completing Carriers must submit their System Audit Reports to, among others, the Commission and all payphone service providers for which they complete calls.<sup>10</sup> In addition, the rules require that “[s]ubject to protections safeguarding the auditor’s and the Completing Carrier’s confidential and proprietary information, the Completing Carrier shall provide, upon request, to the payphone service provider for inspection any documents, including working papers, underlying the System Audit Report.”<sup>11</sup> This provision lies at the heart of the dispute in the instant case.

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<sup>4</sup> Revised Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-05-MC-002 (filed May 13, 2005) (“Revised Joint Statement”) at ¶¶ 9-10. *See generally* 47 C.F.R. §§ 64.1300-64.1320 for rules governing payphone compensation obligations.

<sup>5</sup> Revised Joint Statement at ¶ 11; 47 C.F.R. § 64.1300(a) (defining a “Completing Carrier” 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”).

<sup>6</sup> *See, e.g., In the Matter of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 19 FCC Rcd 21457, ¶ 1 (2004) (subsequent history omitted)(“October 2004 Payphone Order”); *see also* 47 U.S.C. § 276; 47 C.F.R. §§ 64.1300-64.1320.

<sup>7</sup> *See, e.g., October 2004 Payphone Order* at ¶ 2; *see also* 47 C.F.R. § 64.1300.

<sup>8</sup> 47 C.F.R. § 64.1310(a)(1).

<sup>9</sup> 47 C.F.R. § 64.1320(a).

<sup>10</sup> *See* 47 C.F.R. § 64.1320(b). Completing Carriers can comply with the requirement to submit the report to payphone service providers by posting a copy on either their website or a clearinghouse website. 47 C.F.R. § 64.1320(b)(2).

<sup>11</sup> 47 C.F.R. § 64.1320(g).

### C. The Facts

6. On July 1, 2004, IDT filed its first System Audit Report with the Commission.<sup>12</sup> On September 14, 2004, APCC sent IDT a letter requesting, on behalf of APCC's unidentified payphone service provider principals, that IDT provide all documents underlying its System Audit Report. This letter initiated subsequent correspondence between the parties about the terms under which IDT was prepared to make the audit documents available.<sup>13</sup> For instance, IDT insisted that APCC identify the payphone service providers on whose behalf it was making the request, and asked for documentation of APCC's authority to do so.<sup>14</sup> Another point of contention was the location at which the audit documents would be produced. IDT indicated that it would make the documents available only at its New Jersey headquarters, while APCC demanded that IDT send copies of the documents to APCC in Washington, D.C.<sup>15</sup>

### D. The Complaint

7. On February 1, 2005, while the parties were still discussing production of the documents, APCC and the PSP Complainants filed their Complaint with the Commission. The Complaint alleges that IDT violated sections 201(b) and 416(c) of the Communications Act by engaging in a "dilatatory and obstructive pattern of conduct" in response to APCC's request for documents underlying the System Audit Report, and by failing to provide those documents to APCC or to the PSP Complainants.<sup>16</sup> The Complaint does not request payment of damages. The Complaint asks only that the Commission find that IDT violated rule 64.1320(g) and the Act and order IDT "either to deliver copies of the Underlying Documents to Complainants' attorneys, or alternatively, to allow Complainants to inspect the documents in Washington, D.C., and to request and receive copies of such documents, subject to the condition that Complainants reasonably compensate IDT for such copies, all in accordance with the protective agreement provided by Complainants."<sup>17</sup>

### E. The Motion to Dismiss

8. After the Complaint was filed, the parties continued discussions about IDT's production of the requested documents. A few months later, in June 2005, the parties agreed upon terms for disclosure of the audit documents to the Complainants.<sup>18</sup> IDT then filed a Motion to Dismiss the Complaint,<sup>19</sup> asserting that since the requested documents have now been made

<sup>12</sup> Revised Joint Statement at ¶ 12; Complaint Exh. 2.

<sup>13</sup> Complaint Exhs. 3-11.

<sup>14</sup> Complaint Exh. 7 at 2, Exh. 10 at 1.

<sup>15</sup> Complaint Exhs. 7, 8, 9, and 11.

<sup>16</sup> Complaint at 17-19.

<sup>17</sup> *Id.* at 61.

<sup>18</sup> See IDT's Motion to Dismiss, File No. EB-05-MD-002 (filed June 30, 2005) ("Motion to Dismiss") at 2; see also Complainants' Opposition to IDT's Motion to Dismiss, File No. EB-05-MD-002 (filed July 25, 2005) at 3.

<sup>19</sup> The Motion to Dismiss was filed after the Complaint, Answer, and Reply had all been filed, but shortly before the parties filed their Opposing Briefs and Reply Briefs in the case.

available to the Complainants, there is no longer any effective relief for the Commission to grant.<sup>20</sup> IDT argues that any guidance as to rights and responsibilities under rule 64.1320(g) should be determined in a rulemaking, where all interested parties would have a right to participate.<sup>21</sup>

9. Complainants, however, oppose the Motion to Dismiss on three bases. First, they assert that the challenged action is “capable of repetition, yet evading review,” and thus dismissal of the Complaint would encourage IDT “to repeat its dilatory and obstructive conduct” in response to future requests.<sup>22</sup> Second, they assert that there is a continuing adverse impact on them because they were harmed by the delay in obtaining the audit documents.<sup>23</sup> And finally, Complainants assert that the Commission can grant effective relief because IDT may have, “by design or mistake,” failed to produce all of the documents, such that an explicit Commission order to produce them is still necessary.<sup>24</sup> Complainants also argue that the Article III case-or-controversy requirement is applicable only to federal courts, not to the Commission.<sup>25</sup>

### III. DISCUSSION

10. As Complainants correctly point out,<sup>26</sup> section 208 complaints are not governed by Article III “case or controversy” standards.<sup>27</sup> Nevertheless, we can and do dismiss complaints when the issues raised therein have become moot.<sup>28</sup> Thus, we consider whether there is any remaining controversy in this case, and whether any effective relief can be granted.

11. As stated above, Complainants assert that there is a continuing controversy here,

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<sup>20</sup> Motion to Dismiss at 1-5. IDT also asserts that APCC’s claims should be dismissed because APCC, which is not a payphone service provider, lacks standing to assert that it was denied the right to inspect the audit documents. Motion to Dismiss at 4-5. Because we dismiss the Complaint as moot, this issue is also moot.

<sup>21</sup> Motion to Dismiss at 5-9.

<sup>22</sup> Complainants’ Opposition to IDT’s Motion to Dismiss at 2.

<sup>23</sup> *Id.* at 2-3.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.* at 4-5.

<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g., North Carolina Utilities Comm. v. FCC*, 537 F.2d 787, 791 (4<sup>th</sup> Cir. 1976) (holding that federal administrative agencies are not restricted to adjudication of matters that are “cases and controversies” within the meaning of Article III of the Constitution).

<sup>28</sup> *See, e.g., Total Telecommunications Services, Inc. v. AT&T Corporation*, 16 FCC Rcd 5726 (2001) (dismissing claims as moot because there was no additional relief that could be granted), *remanded*, 317 F.3d 227 (D.C. Cir. 2003) (to explain dismissal of claim as “moot, *without prejudice*” (emphasis added)), *dismissed on motion of parties*, 18 FCC Rcd 11533 (Enf. Bur. 2003); *Transglobal Telcom, Inc. v. E-Tel, Inc.*, 16 FCC Rcd 21576 (Enf. Bur. 2001) (dismissing complaint as moot where challenged action had ceased and plaintiff had not requested damages) *National Wireless Resellers Ass’n v. AirTouch Communications, Inc.*, 15 FCC Rcd 13826 (Wireless Tel. Bur. 2000) (dismissing complaint as moot where the challenged program had been discontinued); *see also AT&T v. BellSouth*, 19 FCC Rcd 23898 (2004) (dismissing certain counts of a complaint on grounds that no additional relief could be afforded even if the Commission ruled in the complainant’s favor).

either because they continue to be adversely impacted by IDT's actions, or because the violation at issue is "capable of repetition yet evading review." In addition, Complainants argue that "[i]t is quite possible that either IDT or its auditor, whether by design or mistake, has failed to produce all the documents whose production is required,"<sup>29</sup> and that therefore the Commission can and should grant relief by explicitly directing IDT to produce all underlying documents. We find, however, that there is no continuing controversy, and that there is no longer any effective relief that we can grant in this case. Complainants did not request monetary damages, and have already obtained the relief they requested – access to IDT's audit documents. Accordingly, at this point, any ruling on whether IDT may have violated the Act and our rules would have no concrete impact in this particular case.

12. Complainants assert that they need a specific Commission order directing IDT to provide the audit documents in order to protect against the possibility that IDT has withheld some of those documents, either inadvertently or wilfully. We disagree. Complainants offer only speculation to suggest that they have not been given all of the audit documents. IDT is already subject to a Commission rule directing that it make those documents available to payphone service providers. We expect them to comply with that rule. Thus, we find that another Commission order directing them to do so, when we have no reason to believe that they are withholding documents, is unnecessary.

13. We also reject Complainants' assertion that this case is not moot because the action challenged is "capable of repetition, yet evading review."<sup>30</sup> As applied by the courts, this is a narrow exception to the "case or controversy" requirement, applicable only in "exceptional situations" . . . where the following two circumstances [are] simultaneously present: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again."<sup>31</sup> Complainants have not demonstrated such circumstances here. As to the duration of the challenged action, Complainants seem to consider it sufficient to speculate that IDT could choose to cease the offending behavior prior to the conclusion of a complaint proceeding. That is the case, however, in all complaint proceedings. The "capable of repetition" exception was meant to address actions that are inherently too short to be litigated.<sup>32</sup> Moreover, Complainants offer nothing other than speculation that IDT will subject them again to the circumstances of this case.<sup>33</sup> This is not enough to persuade us that we should issue a decision concerning a dispute that has become moot.

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<sup>29</sup> Complainants' Opposition to IDT's Motion to Dismiss at 3.

<sup>30</sup> *Id.* at 2. Although, as explained above, we are not governed by Article III concepts of standing and mootness, we address Complainants' argument here under Article III precedent because they have framed their argument in this context.

<sup>31</sup> *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990) (citations omitted).

<sup>32</sup> *See, e.g., Spencer v. Kemna*, 523 U.S. 1 (1998) (holding that the exception is inapplicable where party failed to show that duration of action is *always* so short as to evade review).

<sup>33</sup> *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) ("[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality.").

14. Nevertheless, to facilitate prompt production of audit documents in future cases, we provide the following guidance. First, we believe that it is reasonable to expect that a party requesting documents under rule 64.1320(g) will specifically identify on whose behalf it makes the request. Second, we note that rule 64.1320(g) effectively requires the Completing Carrier to permit payphone service providers to *copy* the audit documents, at the payphone service providers' expense, not merely to examine them. We agree with APCC that given the complex and technical nature of the documents at issue, it would be unduly burdensome to expect payphone services providers to conduct their "inspection" of audit documents entirely on the Completing Carrier's premises, and without any copies to mark up. To the extent that copying raises greater issues of safeguarding confidential information than does on-site inspection, we expect parties to be able to address this in their nondisclosure agreements.<sup>34</sup> And finally, we note that rule 64.1320(g) effectively requires Completing Carriers to ensure that their auditors are contractually obligated to provide the documents covered by the rule if a payphone service provider requests them. This obligation can readily be imposed when the auditor is engaged; if the Completing Carrier fails to take this step, then any "impossibility" of compliance will be of its own making. If the auditor failed to live up to its contractual obligation, we would consider whether the Completing Carrier had taken all reasonable steps to enforce compliance before we would excuse its failure to provide the documents as "impossible." In this case, it appears that IDT did, in fact, take steps to ensure that its auditors would provide the necessary documents. *See* IDT's Initial Brief at 14-15.

15. We find that there is no remaining dispute in this case, and no requested relief remaining for us to grant. Accordingly, we dismiss the Complaint as moot.

#### IV. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 254(i), 154(j), and 208, sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, and the authority delegated in section 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the

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<sup>34</sup> We note that these document production requirements are all "[s]ubject to protections safeguarding the auditor's and the Completing Carrier's confidential and proprietary information," as set forth at 47 C.F.R. § 64.1320(g).

Defendant's Motion to Dismiss IS GRANTED, that the Complaint IS DISMISSED WITH PREJUDICE as moot, and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith  
Chief, Enforcement Bureau