

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

In the Matter of	)	
	)	WC Docket No. 11-141
Petition of GCB Communications, Inc. d/b/a	)	
Pacific Communications and Lake Country	)	
Communications, Inc. for Declaratory Ruling	)	

**DECLARATORY RULING**

**Adopted: June 29, 2012**

**Released: June 29, 2012**

By the Chief, Wireline Competition Bureau:

1. In this declaratory ruling, the Wireline Competition Bureau (Bureau) addresses the petition for declaratory ruling filed by GCB Communications, Inc. d/b/a Pacific Communications and Lake Country Communications, Inc. (GCB).<sup>1</sup> GCB filed its petition in connection with a primary jurisdiction referral from the United States District Court for the District of Arizona (District Court).<sup>2</sup> The Bureau clarifies that under section 276 of the Communications Act of 1934, as amended (the Act) and our implementing orders and rules,<sup>3</sup> a

<sup>1</sup> Petition of GCB Communications, Inc. d/b/a Pacific Communications and Lake Country communications, Inc. for a Declaratory Ruling to Clarify Payphone Service Providers' Responsibilities with Respect to the Transmission of Payphone-Specific Coding Digits in Order to Receive Per-Call Dial-Around Compensation for Completed Calls, (filed Aug. 9, 2011) (GCB Petition).

<sup>2</sup> The primary jurisdiction referral is an outgrowth of a lawsuit initially filed in 2007 by GCB against U.S. South Communications, Inc. (U.S. South) in the District Court. *GCB Communications, Inc., d/b/a Pacific Communications; and Lake Country Communications, Inc. vs. U.S. South Communications, Inc.*, Docket No. 2:07-cv-02054-SRB (D. Ariz. 2007) (*District Court Order*). U.S. South appealed the District Court's ruling in favor of GCB to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit). See *infra* at para. 14. On April 29, 2011, the Ninth Circuit reversed the District Court's ruling and remanded the matter back to the District Court. *GCB Communications, Inc. v. U.S. South Communications, Inc.*, 650 F.3d 1257, 1266 (9th Cir. 2011) (*Ninth Circuit Opinion*). On July 5, 2011, the District Court referred a question to the Commission concerning application of our payphone rules that we address here. *GCB Communications, Inc., d/b/a Pacific Communications; Lake Country Communications, Inc. v. U.S. South Communications, Inc.*, Docket No. 2:07-cv-02054-SRB (D. Ariz. 2011) (*District Court Referral Order*), attached as Exh. 1 to the GCB Petition.

<sup>3</sup> 47 U.S.C. § 276 (1996); 47 C.F.R. §§ 64.1300, 64.1310, and 64.1320 (2012); see *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20590-92, 20597-98, paras. 96-101, 112-14 (1996) (*First Report and Order*); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21265-66, 21278-80, 21281-82, paras. 64, 93-99, 103 (1996) (*Order on Reconsideration*) (together with the *First Report and Order*, the "First Payphone Orders"), vacated and remanded in part, *Illinois Pub. Telecomms Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) (subsequent history omitted); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 16387 (1997) (*October 1997 Bureau Waiver Order*); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998 (1998) (*March 1998 Coding Digit Waiver Order*); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum (continued....)

Completing Carrier's obligation to pay per-call payphone compensation is not contingent on whether it receives payphone-specific coding digits.<sup>4</sup>

2. The District Court is presiding over a payphone compensation dispute involving GCB and U.S. South. The District Court asked the Commission to answer the following two questions: (1) if a Payphone Service Provider (PSP) has ordered a payphone line from the serving LEC, whether the Completing Carrier is obligated to pay the PSP per-call compensation for completed coinless calls made from that payphone line; and (2) whether the PSP has responsibility for the transmission and receipt of payphone-specific coding digits by the carriers in the call path.<sup>5</sup>

3. We clarify that, under section 276 of the Act and our implementing orders and rules, once a PSP has ordered a payphone line from a LEC whose switch is coding-digit-capable, unless a PSP consents to an Alternative Compensation Arrangement (ACA) with the Completing Carrier, a Completing Carrier is obligated to pay the PSP per-call compensation for all completed calls made from the PSP's payphone line.<sup>6</sup> We further clarify that in the absence of an ACA, the Completing Carrier is responsible for ensuring that coding digits are being sent by the LEC or other carriers in the call path or otherwise ensuring that it has sufficient information to pay PSPs per-call compensation for all completed calls made from the PSP's payphone line.<sup>7</sup> Thus, a Completing Carrier must pay compensation for each completed call regardless of whether the Completing Carrier received payphone-specific coding digits with each individual call.

## I. BACKGROUND

### A. The Commission's Payphone Compensation Precedent

4. In 1996, when Congress enacted section 276, the Commission began implementing policies to "establish a per call compensation plan to ensure that all payphone

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Opinion and Order, 13 FCC Rcd 10893 (1998) (*April 1998 Per-Phone Order*); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 14 FCC Rcd 836 (1998) (together, *Bureau Coding Digits Waiver Orders*); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975 (2003) (*2003 Tollgate Order*); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration*, 19 FCC Rcd 21457 (2004) (*2004 Tollgate Reconsideration Order*) (together with the *2003 Tollgate Order*, the "*Tollgate Orders*").

<sup>4</sup> 47 C.F.R. § 64.1300(a) (defining a Completing Carrier as a long distance carrier, a switch-based long distance reseller (SBR), or a local exchange carrier (LEC) that completes a coinless access code or subscriber toll-free payphone call, also known as "dial-around" calls); 47 C.F.R. § 64.1300(b), (d) (requiring that "a Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by the parties by contract" or, in the absence of a contract, "at a per-call rate of \$.494.").

<sup>5</sup> *District Court Referral Order* at 2; GCB Petition at 3-4.

<sup>6</sup> *See supra* at note 3.

<sup>7</sup> *Id.*

service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . .”<sup>8</sup> Below, we summarize the relevant orders.

### 1. Payphone-Specific Coding Digits Requirements

5. *First Payphone Orders.* On September 20, 1996, in the *First Report and Order*, the Commission began the process of transitioning the industry to a per-call compensation system, in accordance with section 276.<sup>9</sup> The Commission adopted a “carrier-pays” system for per-call compensation and concluded that facilities-based interexchange carriers (IXCs) must compensate PSPs for each and every completed access code and subscriber toll-free call because IXCs are the primary economic beneficiaries of such calls.<sup>10</sup> The Commission defined a completed call as one that is “answered by the called party.”<sup>11</sup> The Commission also adopted the first payphone-specific coding digits requirements. The Commission found that the technology existed for IXCs to track calls from payphones to determine the amount of compensation the IXCs owed to PSPs.<sup>12</sup> The Commission therefore determined that “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.”<sup>13</sup> The Commission stated, “it is the responsibility of the carrier . . . as the primary economic beneficiary of the payphone calls, to track the calls it receives from payphones.”<sup>14</sup> The Commission concluded 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>15</sup> Because the Commission

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<sup>8</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>9</sup> See generally *First Payphone Orders*. The Commission has issued numerous payphone orders since that time. See *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778 (1997), *remanded*, *MCI Telecomms. Corp. v FCC*, 143 F.3d 606 (D.C. Cir. 1998); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999), *review denied*, *American Pub. Commc’ns. Council v FCC*, 215 F.3d 51 (D.C. Cir. 2000); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 FCC Rcd 8098 (2011) (*Second Order on Reconsideration*); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration, 16 FCC Rcd 20922 (2001) (*Third Order on Reconsideration*); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020 (2002) (*Fourth Order on Reconsideration*); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274 (2002) (*Fifth Order on Reconsideration*), *petition for review denied*, *AT&T Corp. v FCC*, 363 F.3d 504 (D.C. Cir. 2004); *Tollgate Orders*.

<sup>10</sup> *First Report and Order*, 11 FCC Rcd at 20584, para. 83.

<sup>11</sup> *Id.* at 20573, para. 63.

<sup>12</sup> *Id.* at 20590, para. 96.

<sup>13</sup> *Id.* at 20575, para. 66. As discussed below, because payphones technically cannot transmit coding digits, the Bureau later clarified in the *March 1998 Coding Digit Waiver Order* that it was the LEC that must implement and transmit coding digits and make this service available through its interstate access tariffs to the IXC. See *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5010, 5012, 5017-18, 5020, paras. 20, 24, 33, 37.

<sup>14</sup> *First Report and Order*, 11 FCC Rcd at 20590-91, para. 97.

<sup>15</sup> *Id.*

recognized that “tracking capabilities vary from carrier to carrier”<sup>16</sup> and it would take some time to implement the coding digits requirement, it gave the industry one year from the effective date of the rules to do so, until October 7, 1997.<sup>17</sup> In the interim, while coding digits were being implemented, the Commission required IXCs to pay compensation to PSPs on a monthly “per-phone” basis.<sup>18</sup>

6. In the *Order on Reconsideration*, with respect to coding digits, the Commission stated that “[o]nce per-call compensation becomes effective . . . to be eligible for such compensation, payphones will be required to transmit specific payphone coding digits as a part of their ANI, which will assist in identifying them to compensation payors.”<sup>19</sup> Thus, the Commission made the implementation and transmission of coding digits a prerequisite for PSPs to be eligible for compensation on a per-call basis.<sup>20</sup> The Commission further stated that “[e]ach payphone must transmit coding digits that specifically identify it as a payphone, and not merely as a restricted line.”<sup>21</sup> The Commission also held that LECs must make such coding digits available to PSPs, on a tariffed basis, as a part of the ANI for each payphone.<sup>22</sup>

7. *Bureau Coding Digits Waiver Orders*. The industry encountered difficulties implementing coding digits by October 7, 1997, the date by which implementation was to be achieved, and had disagreements concerning how to comply with the payphone-specific coding digits requirements in the *First Payphone Orders*.<sup>23</sup> In 1997 and 1998, the Bureau issued several orders that clarified and waived, under certain circumstances, the payphone-specific coding digits requirements.<sup>24</sup> On October 7, 1997, the Bureau released the *October 1997 Bureau Waiver Order*, extending the deadline to implement payphone-specific coding digits until March 9,

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<sup>16</sup> *Id.* at 20590, para. 96.

<sup>17</sup> *Id.* at 20567, 20578, 20591, 20601, paras. 51, 72, 99, 119.

<sup>18</sup> *Id.* at 20601, para. 119. The Commission initially required IXCs with annual toll revenues in excess of \$100 million to compensate PSPs on a flat-rate per-phone basis, with the rate set based on that carrier’s share of overall annual toll revenues, but in 2002 the Commission required all IXCs and LECs to compensate PSPs on a per-phone basis. *Id.*; *Fourth Order on Reconsideration*, 17 FCC Rcd at 2027, para. 17.

<sup>19</sup> *Order on Reconsideration*, 11 FCC Rcd at 21265-66, para. 64. In the *Order on Reconsideration*, the Commission also addressed the payphone compensation responsibilities for calls involving carriers that maintain their own switches. *Id.* at 21277, para. 92. Recognizing that facilities-based carriers were the primary economic beneficiary of payphone calls and were capable of tracking calls, the Commission imposed on SBRs the responsibility to pay compensation to the PSPs. *Id.* The Commission also reaffirmed the compensation responsibilities of switchless long distance resellers. The Commission stated that, “[i]f a [reselling] carrier does not maintain its own switching capability, then, as set forth in the [*First Report and Order*], the first underlying carrier remains obligated to pay compensation to the PSP in lieu of its [reseller] customer that does not maintain a switching capability.” *Id.*

<sup>20</sup> *Id.* at 21266, para. 64.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16388-89, paras. 5-7.

<sup>24</sup> See *id.* at 16387-88, para. 2; *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 4999-5003, paras. 1-6; *April 1998 Per-Phone Order*, 13 FCC Rcd at 10893-95, paras. 1-4.

1998.<sup>25</sup> The Bureau found that a waiver was warranted “to afford LECs, IXC’s, and PSPs an extended transition period for the provision of payphone-specific coding digits without further delaying the payment of per-call compensation as required by section 276.”<sup>26</sup> The Bureau held, however, that paying per-call compensation to PSPs should not be delayed and that, in the absence of coding digits, IXC’s should compensate PSPs on a per-call basis by manually examining their call records against the LEC-provided list of payphones.<sup>27</sup> Specifically, the Bureau stated that “payphones appearing on LEC-provided lists of payphones will be eligible for per-call compensation even if they do not transmit payphone-specific codes.”<sup>28</sup> Thus, the Bureau waived the prior determination that the ability to transmit coding digits was a prerequisite to the obligation to pay per-call compensation to PSPs.<sup>29</sup>

8. On March 9, 1998, the Bureau issued the *March 1998 Coding Digit Waiver Order*, which granted LECs a number of limited waivers (under certain circumstances) of the payphone-specific coding digits requirement, in certain instances for an indefinite period.<sup>30</sup> The Bureau clarified that automatic number information indicators (ANI ii)<sup>31</sup> and flexible automatic numbering identification (Flex ANI)<sup>32</sup> are the two methods to provide payphone-specific coding digits that comply with the requirements of the *First Payphone Orders*.<sup>33</sup> The Bureau made clear

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<sup>25</sup> *October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16387, para. 2.

<sup>26</sup> *Id.* at 16387-88, para. 2.

<sup>27</sup> *Id.* at 16390, para. 9.

<sup>28</sup> *Id.*

<sup>29</sup> *October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16387-88, 16390, paras. 2, 4, 9. *See also Order on Reconsideration*, 11 FCC Rcd at 21265-66, para. 64 (“Once per-call compensation becomes effective, we clarify that, to be eligible for such compensation, payphones will be required to transmit specific payphone coding digits as a part of their ANI, which will assist in identifying them to compensation payors.”).

<sup>30</sup> *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5008, 5025-41, paras. 3, 50-82 (granting a number of waivers from the requirement to provide payphone-specific coding digits, including by providing additional time to implement coding digits and by waiving the requirement for non-equal access switches until such switches are either upgraded to equal access or replaced).

<sup>31</sup> *Id.* at 5009-10, para. 19 (explaining that, “ANI ii is a widely used technology that sends a two-digit code along with the ANI. Five codes are currently available through the conventional ANI ii methodology. The transmitted ANI ii codes, hardwired as part of the switch’s generic software, identify the call as ‘27’ if the call is from a ‘dumb’ payphone or ‘07’ for a restricted line, which includes ‘smart payphones’ as well as other types of calls, such as hotel calls. Thus, ANI ii provides, along with the billing number, a unique coding digit identifying dumb payphones with the ‘27’ code, but not providing a unique coding digit identifying smart payphones, which are identified with the ‘07’ coding digit that also identifies other calls such as hotel and hospital calls. Because the payphone-specific coding digit is not available for a payphone call that is coded with the ‘07’ number, call tracking is difficult using conventional ANI ii. Additional ANI ii codes to enable unique identification of smart payphones can be hardcoded into LEC switch software, but this requires substantial vendor involvement and may be very costly.”).

<sup>32</sup> *Id.* at 5010, para. 20 (explaining that, “FLEX ANI codes are generated in end office databases and FLEX ANI is more flexible and easily modified to add additional coding digits than conventional ANI ii. When FLEX ANI codes are available, they are outpulsed with the call, instead of the embedded hardcoded ANI ii digits. [Flex ANI] enables the assignment of more two digit codes (potentially 00-99) for payphones in addition to the ‘27’ code already provided by ANI ii, including ‘29’ for prison/inmate payphones and ‘70’ for ‘smart’ payphones.”).

<sup>33</sup> *Id.* at 5000, para. 2.

that the LEC was responsible for implementing payphone-specific coding digits<sup>34</sup> and granted LECs either a set amount of additional time or, depending on the type of switch they had, until the LECs upgraded or replaced their switches to meet the Commission's payphone-specific coding digits requirement.<sup>35</sup>

9. The Bureau also required LECs to modify their interstate access tariffs to provide that IXC may request Flex ANI service without charge if it is for the purpose of complying with the per-call compensation requirements of the *First Payphone Orders*.<sup>36</sup> The Bureau allowed LECs to recover from PSPs the costs of providing Flex ANI to IXCs.<sup>37</sup> Thus, the LEC would charge the PSP monthly on a per-line basis until the costs for implementation of Flex ANI for payphone compensation were recovered. The Bureau declined to require that PSPs order the Flex ANI service.<sup>38</sup> The IXC, if it chose, could select the Flex ANI service from the LEC.<sup>39</sup> As it did in the *October 1997 Bureau Waiver Order*, the Bureau again required IXCs to compensate PSPs on a per-call basis whether or not the IXC received Flex ANI coding digits.<sup>40</sup>

10. On April 3, 1998, in the *April 1998 Per-Phone Order*, the Bureau granted IXCs the option of paying PSPs on a per-phone or per-call basis when payphone-specific coding digits were not available from the LEC.<sup>41</sup> The Bureau required that IXCs compensate PSPs – either on a per-call basis or on a per-phone basis – even in the absence of payphone-specific coding digits.<sup>42</sup> At the same time, the Bureau made clear that “IXCs must pay per-call compensation, not per-phone compensation, once Flex ANI is available in an end office.”<sup>43</sup> The Bureau stated

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<sup>34</sup> As the Ninth Circuit and U.S. South have acknowledged, payphones do not transmit Flex ANI codes. *Ninth Circuit Opinion*, 650 F.3d at 1266; U.S. South Opposition at 9. Rather, the LEC attaches the codes to calls originating from payphones after the calls reach the serving end office. *Ninth Circuit Opinion*, 650 F.3d at 1266.

<sup>35</sup> *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5001, 5025-41, paras. 3, 50-82.

<sup>36</sup> *Id.* at 5018-19, para. 35. The Bureau stated that “[t]o comply with the requirements of the Payphone Orders, LECs must provide FLEX ANI to IXCs through their interstate tariffs, so that IXCs can identify which calls come from payphones.” *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 5020, para. 37.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 5002, para. 4 (“As required in the *Bureau Waiver Order*, payphones appearing on the LEC-provided lists of payphones are eligible for per-call compensation even if they do not transmit payphone-specific coding digits.”); *id.* at 5009, para. 18 (explaining that another method, although not automatic or in real time, is to examine ANI lists to identify completed calls originated by payphones as “ANI lists are used by IXCs after the call is completed to match the call information (ANI) received with the call (usually the calling number) with the LEC list of payphone numbers (ANIs) in a LEC’s serving area in order to identify that the call came from a payphone.”).

<sup>41</sup> *April 1998 Per-Phone Order*, 13 FCC Rcd at 10893-95, para. 1.

<sup>42</sup> *Id.* at 10893-95, paras. 1-4.

<sup>43</sup> *Id.* at 10904, para. 19.

that once payphone-specific coding digits were available, an IXC could not evade its obligation to pay per call by deciding not to take Flex ANI from the LEC for that end office.<sup>44</sup>

## 2. Current Payphone Compensation Rules

11. Since 1998, the Commission has adopted several different approaches to the matter of precisely which carrier is responsible for compensating the PSP. In 2001, in the *Second Order on Reconsideration*, the Commission required the “first underlying facilities-based interexchange carrier to whom the LEC directly delivers the call to compensate the PSP.”<sup>45</sup> On October 3, 2003, however, the Commission modified its rules defining the carrier responsible for payment.<sup>46</sup> By this time, most LECs had implemented the payphone-specific coding digit requirements, and most of the payphones were being compensated on a per-call versus per-phone basis.<sup>47</sup> The Commission adopted comprehensive rules placing payment responsibility on the “Completing Carrier,” which the Commission defined to mean “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>48</sup> As the “primary economic beneficiaries” of completed calls, Completing Carriers must compensate PSPs under the Commission’s rules.<sup>49</sup>

12. Completing Carriers under these per-call rules are required to compensate PSPs for completed payphone calls in one of two ways: (1) by contract, known as an ACA, or (2) by compliance with the Commission’s per-call rules.<sup>50</sup> In the absence of an ACA, Completing Carriers must compensate PSPs for each and every completed payphone call in the manner specified by Commission rules. In particular, to effectuate that compensation requirement, each Completing Carrier must establish a call tracking system; audit the system in accordance with certain standards; file audit reports with the Commission, PSPs, and Intermediate Carriers (those that switch payphone calls to other facilities-based long distance carriers); make quarterly payments to PSPs; provide PSPs with a quarterly sworn statement by the chief financial officer (CFO); and provide quarterly reports to the PSPs.<sup>51</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Second Order on Reconsideration*, 16 FCC Rcd at 8105, para. 15.

<sup>46</sup> *See 2003 Tollgate Order*, 18 FCC Rcd 19975; *2004 Tollgate Reconsideration Order*, 19 FCC Rcd 21457; 47 C.F.R. §§ 64.1310 *et seq.*

<sup>47</sup> *See Fifth Order on Reconsideration*, 17 FCC Rcd at 21277, para. 4.

<sup>48</sup> *See* 47 C.F.R. § 64.1300(a).

<sup>49</sup> *2003 Tollgate Order*, 18 FCC Rcd at 19988, para. 27; *see also APCC Services, Inc., v. Radiant Telecom, Inc., Intelligent Switching and Software, LLC., and Radiant Holdings, Inc.*, 23 FCC Rcd 8962, 8964 (explaining that the Completing Carrier sells the dial-around service to end-user customers (or provides switching for a switchless reseller who sells to the end-users) and can recover payphone compensation from those customers). The Commission had previously encouraged direct relationships and agreements between PSPs and carriers for tracking and payment of payphone compensation. *See, e.g., Third Order on Reconsideration*, 16 FCC Rcd at 20923, para. 3.

<sup>50</sup> 47 C.F.R. §§ 64.1300; 64.1310; 64.1320.

<sup>51</sup> 47 C.F.R. §§ 64.1310; 64.1320.

13. Under the rules, PSPs receive reports from both the Completing Carrier and Intermediate Carriers to assist them in identifying compensable and noncompensable calls and to identify noncompliant Completing Carriers.<sup>52</sup> The Commission intended these reports to “improve the ‘audit trail’ for the PSPs by providing a means to verify the accuracy of call tracking reports from carriers in the call path” and “identify SBRs that are not compensating [them] and to challenge the payments in instances where the PSP may believe that the data provided by other facilities-based long distance carriers is out of proportion to the data provided by the final SBR [or Completing Carrier] in the call path.”<sup>53</sup>

#### B. GCB Petition and Referral from District Court

14. *District Court.* In 2007, GCB, a PSP, filed a lawsuit against U.S. South, an SBR, in the federal District Court in Arizona claiming that, as a Completing Carrier, U.S. South was required to pay GCB for completed coinless payphone calls, as required under section 276 of the Act and the Commission’s payphone compensation rules.<sup>54</sup> U.S. South is an issuer of prepaid calling cards, and the payphone calls at issue “were placed on GCB’s payphones using U.S. South’s calling cards.”<sup>55</sup> U.S. South identifies which payphones were used to place calls with its calling cards through Flex ANI,<sup>56</sup> which has become the standard method for determining whether the call originated from a payphone.<sup>57</sup> U.S. South claimed, however, that it did not receive the Flex ANI coding digits for all calls and argued that it did not owe compensation to GCB for dial-around calls for which it did not receive the coding digits.<sup>58</sup> The District Court found U.S. South liable for failure to pay compensation to GCB for completed calls unaccompanied by Flex ANI, holding that “once PSPs ‘set up (or provision) their payphone lines with Flex-ANI capability’ they are owed compensation for completed calls, even if the Flex ANI coding is not sent to or received by the completing carrier.”<sup>59</sup> The District Court further held that because “‘the relevant regulations placed the burden for *accurately* tracking calls on the Completing Carrier (U.S. South) and not the PSP (plaintiffs),’ U.S. South owes GCB dial-around compensation for the disputed calls ‘regardless of whether the proper Flex ANI digits were transmitted.’”<sup>60</sup> U.S. South appealed that ruling to the Ninth Circuit.<sup>61</sup>

15. *Ninth Circuit.* On April 29, 2011, the Ninth Circuit reversed the District Court’s ruling. The Ninth Circuit stated: “The dispute in this case is over dial-around calls placed at

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<sup>52</sup> 47 C.F.R. §§ 64.1310(a)(4) and (c).

<sup>53</sup> 2003 *Tollgate Order*, 18 FCC Rcd at 20003, para. 52.

<sup>54</sup> *District Court Order*, *supra* note 2.

<sup>55</sup> *Ninth Circuit Opinion*, 650 F.3d at 1260-61.

<sup>56</sup> *Id.* at 1261.

<sup>57</sup> *See supra* at para. 8.

<sup>58</sup> *See Ninth Circuit Opinion*, 650 F.3d at 1262; GCB Petition at 7.

<sup>59</sup> *Ninth Circuit Opinion*, 650 F.3d at 1262.

<sup>60</sup> *Id.* (quoting the District Court’s decision) (italics in original).

<sup>61</sup> GCB Petition at 7; *Ninth Circuit Opinion*, 650 F.3d at 1260.



GCB's payphones, but for which the FLEX-ANI digits were not received by U.S. South."<sup>62</sup> The Ninth Circuit added that "[w]hile the parties argue over who erred regarding those digits, the District Court saw no need to resolve that question because, in its opinion, it did not matter as long as GCB had made a provision for transmitting the Flex-ANI number, even if the number was not transmitted."<sup>63</sup> The Ninth Circuit disagreed with the District Court and found in favor of U.S. South holding that "GCB, through its LEC, must assure that the Flex-ANI is transmitted into the system; their duty ends there."<sup>64</sup> The Ninth Circuit relied almost entirely on a particular passage in the *March 1998 Coding Digit Waiver Order* to find in favor of U.S. South. The Ninth Circuit quoted the Bureau's statements that:

LECs transmit payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones to IXC. The provision of payphone specific coding digits is a prerequisite to payphone per call compensation payments by IXCs to PSPs for subscriber 800 and access code calls.<sup>65</sup>

Based on this language, the Ninth Circuit found that "the ultimate transmission obligation is upon the PSP, rather than the completing carrier. That cannot be discharged by making a provision to transmit; transmission itself is required."<sup>66</sup> The Ninth Circuit did not, however, decide the question of whether U.S. South owed compensation to GCB.<sup>67</sup> The Ninth Circuit reversed and remanded back to the District Court.<sup>68</sup> The Ninth Circuit added that it did not "intend to preclude the district court from revisiting and reconsidering the question of whether the primary jurisdiction doctrine should be applied to this case, especially in view of the fact that there has been some difficulty in determining the proper construction of the FCC's orders."<sup>69</sup>

16. On July 5, 2011, at GCB's request, the District Court referred the following question to the Commission under a primary jurisdiction referral:

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<sup>62</sup> *Ninth Circuit Opinion*, 650 F.3d at 1265.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1268.

<sup>65</sup> *Id.* at 1265 (quoting *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5006, para. 13).

<sup>66</sup> *Id.* at 1266; *see also id.* (explaining that "[w]e are mindful of the fact that in the way the industry developed, the Flex-ANI codes are not directly transmitted by the payphones themselves — those phones are not set up to do so. Thus, rather than an LEC transmitting the code digits to the PSP, which then transmits them from the payphones to the IXCs, the PSP will purchase the appropriate lines from the LEC. When a call comes from the payphone, the LEC will attach the digits to that call and then forward it into the system. As we see it, that makes no real difference: whether an LEC transmits the Flex-ANI digits to the payphone, which then transmits them — necessarily back through the LEC — into the system, or whether that circular route is avoided and the LEC adds the Flex-ANI digits when the call comes to it from the payphone, the result is necessarily the same. By the time the call leaves the LEC and enters the system, the Flex-ANI digits will be attached — or should be. And, for good or ill, the FCC has made it clear that it is the duty of the PSP — vis-à-vis the completing carrier — to make sure that happens.").

<sup>67</sup> *Id.* at 1268.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

If the Payphone Service Provider ('PSP') has ordered a payphone line from the serving Local Exchange Carrier ('LEC'), is the Completing Carrier obligated to pay the PSP per-call compensation for completed coinless calls made from that payphone line, and the PSP has no responsibility for the transmission and receipt of payphone-specific coding digits by the carriers in the call path[?]<sup>70</sup>

U.S. South did not object to the question or the primary jurisdiction referral to the Commission, filing with the District Court a "Notice of Consent to Primary Jurisdiction Referral."<sup>71</sup>

17. On August 9, 2011, GCB filed its petition, asking the Commission to respond to the District Court's question and issue a declaratory ruling clarifying that "once a PSP orders a payphone line from the serving LEC, a Completing Carrier is obligated to pay the PSP per-call compensation for completed dial-around calls made from the PSP's payphone line, and that the PSP has no responsibility for the transmission and receipt of payphone-specific coding digits by the carriers in the call path."<sup>72</sup> U.S. South opposes the GCB Petition,<sup>73</sup> arguing that the Commission should reiterate that "payphone-specific Flex ANI must be transmitted with each payphone-originated call and [declare] that [a Completing Carrier] may permissibly rely on Flex-ANI to identify payphone calls consistent with the longstanding mandate that carriers deploy an accurate payphone call-tracking system under section 64.1301(a)(1) of the FCC's per-call payphone compensation rules."<sup>74</sup> U.S. South further states that GCB and other PSPs would have a remedy against their LEC if Flex ANI is not correctly transmitted.<sup>75</sup>

## II. DISCUSSION

18. We provide guidance on the respective obligations of PSPs, LECs, and Completing Carriers concerning the transmission of payphone-specific coding digits and the responsibility to compensate PSPs for completed calls when payphone-specific coding digits are not transmitted with a payphone call. Under section 276 of the Act and our implementing orders and rules, once a PSP has ordered a payphone line from a LEC whose switch is coding-digit-capable, unless a PSP consents to an ACA with the Completing Carrier, the Completing Carrier

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<sup>70</sup> GCB Petition at Exh. 1. Contrary to U.S. South's assertion, the issue before the Commission in this proceeding is not "whether U.S. South was required to pay GCB for completed coinless payphone calls – dial-around calls – if U.S. South did not receive coding digits that would identify the calls as GCB payphone calls." U.S. South Opposition at 2, quoting *Ninth Circuit Opinion* at 1260. Rather, today we answer the more general question referred to us by the District Court and presented to us in the GCB Petition. We do not address the merits of the Parties' respective claims and defenses in the underlying litigation as we do not have before us the record in that proceeding. Rather, we expect that the District Court will apply this Declaratory Ruling to the factual record developed in the litigation before it.

<sup>71</sup> See GCB Petition at Exh. 1.

<sup>72</sup> *Id.* at 38.

<sup>73</sup> See generally U.S. South Opposition.

<sup>74</sup> U.S. South Opposition at i. AT&T and Sprint Nextel agree with U.S. South. See AT&T Reply at 5; Sprint Nextel Reply at 2.

<sup>75</sup> U.S. South Opposition at 21.

is obligated to pay the PSP per-call compensation for all completed calls made from the PSP's payphone line.<sup>76</sup> We further clarify that in the absence of an ACA, the Completing Carrier is responsible for ensuring that coding digits are being sent by the LEC or other carriers in the call path or otherwise ensuring that it has sufficient information to pay PSPs per-call compensation for all completed calls made from the PSP's payphone line.<sup>77</sup> Thus, a Completing Carrier must pay compensation for each completed payphone-originated call regardless of whether the Completing Carrier received payphone-specific coding digits with each individual call.

19. The Commission's rules unambiguously place the burden and duty on the Completing Carrier to compensate the PSP for each and every completed call under our per-call rules.<sup>78</sup> When the Commission initially required in the *First Report and Order* that LECs become coding-digit capable, it did not qualify this general obligation; coding digits were simply one method by which carriers responsible to compensate PSPs could track payphone calls. The *March 1998 Coding Digit Waiver Order* did not alter the obligation to compensate PSPs for each and every completed call even when coding digits were not transmitted or received.

**A. The March 1998 Coding Digit Waiver Order Passage Concerned the Transition from Per-Phone to Per-Call Compensation**

20. We begin by examining the passage in the *March 1998 Coding Digit Waiver Order* on which the Ninth Circuit relied to conclude that the Commission had imposed an affirmative duty on the PSP concerning payphone-specific coding digits:

In the *Payphone Orders*, the Commission imposed a requirement that, by October 7, 1997, LECs transmit payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones to IXC. The provision of payphone-specific coding digits is a prerequisite to payphone per call compensation payments by IXCs to PSPs for subscriber 800 and access code calls.<sup>79</sup>

The Ninth Circuit interpreted this passage as placing a duty on the PSP to ensure that its serving LEC transmits Flex ANI with each call.<sup>80</sup> The Ninth Circuit also seems to have concluded that if Flex ANI coding digits are not transmitted with each payphone call, the PSP is not entitled to compensation for the completed call.<sup>81</sup> The Ninth Circuit relied on this passage to find that “[b]y

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<sup>76</sup> See *supra* at note 3.

<sup>77</sup> *Id.*

<sup>78</sup> *2004 Tollgate Reconsideration Order*, 19 FCC Rcd at 21459-60, para. 5 (summarizing the responsibilities imposed on Completing Carriers by the payphone compensation rules).

<sup>79</sup> *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5006, para. 13; see also *Ninth Circuit Opinion*, 650 F.3d at 1265 (also citing *Order on Reconsideration*, 11 FCC Rcd at 21265-66, para. 65).

<sup>80</sup> *Ninth Circuit Opinion*, 650 F.3d at 1266 (stating that “[n]evertheless, while a PSP is responsible for transmission of the proper information in the first place, its obligation ends there.”).

<sup>81</sup> *Id.*

the time the call leaves the LEC and enters the system, the Flex-ANI digits will be attached – or should be.”<sup>82</sup>

21. We disagree with the Ninth Circuit’s reading of that passage from the *March 1998 Coding Digit Waiver Order* because the court did not interpret it in the proper context. Reading the *March 1998 Coding Digit Waiver Order* in its entirety, in the context of its guidance of the industry’s transition from a per-phone to a per-call compensation regime, and along with other Commission orders explaining the responsibilities of PSPs, LECs, and IXC’s, it is apparent that the Bureau did not impose on PSPs an obligation to ensure that Flex ANI coding digits are transmitted with each and every payphone call or to ensure that its serving LEC transmits the Flex ANI coding digits.

22. The passage relied on by the Ninth Circuit appeared in an order governing the transition from a *per-phone* compensation system to a *per-call* system. This passage summarized the Commission’s *First Payphone Orders*, which required carriers to compensate PSPs on a per-phone basis until “per-call tracking capabilities are put into place.”<sup>83</sup> In transitioning the industry to a per-call regime, as noted above, the Commission recognized that a per-call payment system depends upon having in place the ability to track each and every call to completion.<sup>84</sup> Thus, a PSP’s or LEC’s ability to transmit coding digits was not a “prerequisite” in the sense that no compensation was due in the absence of coding digits, but rather in the sense that the availability of coding digits would trigger the switch from per-phone compensation to per-call compensation in accordance with Section 276.<sup>85</sup>

23. The Bureau did not place on PSPs the duty either to transmit the coding digits themselves or to ensure that the LEC transmitted the coding digits as a prerequisite to compensation under section 276. Reading the *March 1998 Coding Digit Waiver Order* as imposing such a duty would be inconsistent with the *First Payphone Orders*, where the Commission established that PSPs were entitled to compensation for “each and every completed” call, consistent with Congress’ directive in section 276. The obligation to compensate PSPs occurs when a call is placed on a payphone and the called party answers the call. When the Bureau referred to a requirement that “LECs transmit payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones to IXC’s,” the Bureau was explaining that the payphone coding digits would be transmitted from the LEC’s end office

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<sup>82</sup> *Id.*

<sup>83</sup> *First Report and Order*, 11 FCC Rcd at 20590, para. 96.

<sup>84</sup> See *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5006-07, para. 13 (“In the *Order on Reconsideration*, the Commission clarified that for payphones to be eligible for compensation, ‘payphones will be required to transmit specific payphone coding digits.’” (emphasis added)).

<sup>85</sup> The Commission and the Bureau have consistently spoken in terms of payphones, not individual calls, being eligible for per-call compensation. See *Order on Reconsideration*, 11 FCC Rcd at 21265-66, para. 64, and 21278-80, paras. 93-99; *October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16388, para. 4; *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5018, para. 33. We note that our “prerequisite” requirement still applies today. While most of the waivers have since expired, some LECs with non-equal access switches have a waiver of the payphone-specific coding digit requirement until they replace or upgrade their switches to allow for the transmission of Flex ANI. See *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5036, para. 73; 47 C.F.R. § 64.1301(e).

along with the payphone ANI (or payphone number). While the language, read in isolation, may appear to require the PSP itself to transmit ANI data, the context demonstrates that the Commission imposed no such affirmative duty on the PSP. This is made clear in the *March 1998 Coding Digit Waiver Order*, which states that “the availability of payphone-specific coding digits was never a *sin[e] qua non* for the payment of payphone compensation.”<sup>86</sup> Per the *First Report and Order*, during the one-year interim period, IXCs were required to pay PSPs on a per-phone basis until coding digits were implemented.<sup>87</sup> In the *October 1997 Bureau Waiver Order*, the Commission waived the prerequisite requirement and granted LECs additional time to implement payphone-specific coding digits, until March 9, 1998.

24. Importantly, during this time, IXCs were required to compensate PSPs on a per-call basis, not a per-phone basis, by using LEC ANI lists, even when coding digits had not yet been implemented.<sup>88</sup> The Bureau in the *October 1997 Bureau Waiver Order* stated that “payphones appearing on LEC-provided lists of payphones will be eligible for per-call compensation even if they do not transmit payphone-specific codes.”<sup>89</sup> In the *April 1998 Per-Phone Order*, the Bureau again waived the prerequisite requirement but granted IXCs the ability to pay PSPs on a per-phone or per-call basis, pursuant to the waiver, when LECs had not yet implemented the payphone-specific coding digit requirement.<sup>90</sup> It is thus clear that, in context, receipt of per-call compensation for particular completed calls never depended on the PSP’s providing Flex ANI information for such calls. Indeed, as the Ninth Circuit recognized, PSPs do not transmit Flex ANI codes.<sup>91</sup> The *March 1998 Coding Digit Waiver Order* simply did not address whether compensation was owed for completed calls when Flex ANI coding digits were not transmitted with each call.

25. In fact, the Commission always intended that PSPs would be compensated whether or not Flex ANI or ANI ii coding digits were attached to a call. The Commission stated

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<sup>86</sup> *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5031, para. 64.

<sup>87</sup> *First Report and Order*, 11 FCC Rcd at 20604, para. 125.

<sup>88</sup> *October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16390, para. 9; *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5002, para. 4. While this process may be more labor intensive for the IXC, the Bureau explained that, “ANI lists are used by IXCs after the call is completed to match the call information (ANI) received with the call (usually the calling number) with the LEC list of payphone numbers (ANIs) in a LEC’s serving area in order to identify that the call came from a payphone.” *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5009, para. 18 (also stating that these lists are used after a call is complete to perform billing and compensation). The Bureau did, however, require that PSP payphones be on LEC payphone lines to be eligible for per-call compensation during the interim period. *See id.* at 5018, para. 33.

<sup>89</sup> *October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16390, para. 9.

<sup>90</sup> *April 1998 Per-Phone Order*, 13 FCC Rcd at 10902, para. 17. The Ninth Circuit also did not discuss the Commission’s per-phone requirements. *See* 47 C.F.R. § 64.1301(e); *Fifth Order on Reconsideration*, 17 FCC Rcd at 21292-93, para. 58.

<sup>91</sup> *Ninth Circuit Opinion*, 650 F.3d at 1266. Indeed, the Bureau granted waivers to LECs in the *October 1997 Bureau Waiver Order* because “[r]efusal to waive this requirement would lead to the inequitable result that many payphone providers – particularly independent providers who do not control the network modifications necessary to permit payphone-specific coding digits to be transmitted – would be denied any compensation while implementation issues are being resolved by the industry.” *October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16390, para. 11.

in the *First Report and Order* that a tracking system and any tracking technology, such as Flex ANI coding digits, was simply a method to “assist” the carrier required to compensate the PSP for completed payphone calls.<sup>92</sup> Although the Commission did at times refer to PSPs, payphones, LEC switches, or LEC end-offices interchangeably when discussing the transmission of coding digits, that language cannot reasonably be read to impose an obligation on the PSP to ensure that the LEC transmits coding digits on each call or as a prerequisite to being entitled to compensation.<sup>93</sup> Furthermore, the implementation of payphone-specific coding digits does not allow Completing Carriers to avoid paying compensation when Flex ANI was not transmitted with the call.<sup>94</sup>

26. Section 276 requires the Commission to ensure that PSPs are fairly compensated for every completed call. The purpose is to “promote competition among [PSPs] and promote the widespread deployment of payphone services to the benefit of the general public.”<sup>95</sup> The Commission has never said that Completing Carriers are excused from compensating PSPs for completed calls that are not accompanied by Flex ANI or ANI ii coding digits. That approach could lead to an inequitable result because the PSP has the least visibility into and control over the network.<sup>96</sup> Moreover, the Completing Carrier, the primary economic beneficiary, would have little incentive to discover and report Flex ANI failures, as such failure would allow it to continue to receive the benefit of the PSP’s payphone for use by its customers without the need to pay for such services.<sup>97</sup>

27. Taken in context, as indicated in the *First Payphone Orders* and *Bureau Coding Digit Waiver Orders*, all LECs were required to become Flex ANI or ANI ii capable, which triggered the legal obligation for IXC to compensate PSPs on a per-call versus per-phone basis. As we have explained in previous orders, Flex ANI has become the standard technology and is used by most LECs today. Under our current rules, once a LEC becomes capable of transmitting payphone-specific coding digits, unless the PSP agrees to an ACA, the Completing Carrier must compensate the PSP on a per-call basis and may track calls by affirmatively selecting the Flex ANI service from the LEC’s tariff.<sup>98</sup> We never required that Flex ANI coding digits must be

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<sup>92</sup> *First Report and Order*, 11 FCC Rcd at 20575, para. 66 (emphasis added).

<sup>93</sup> See, e.g., *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5020, para. 36 (“Because many LECs have reported technical problems in transmitting payphone-specific coding digits even when FLEX ANI is available for a payphone, we require that in these two reports required herein, that LECs indicate which end offices and payphone ANI’s are ‘coding-digit-capable.’ A payphone is ‘coding-digit-capable’ when it is able to transmit payphone-specific coding digits that are capable of reaching an IXC point of presence (POP) for subscriber 800 and access code calls from payphones using 10XXX and 101XXXX.”).

<sup>94</sup> In fact, the Commission required per-phone compensation in instances where per-call compensation is not available. See 47 C.F.R. § 64.1301(e); *April 1998 Per-Phone Order*, 13 FCC Rcd at 10893, para. 1.

<sup>95</sup> 47 U.S.C. § 276(b)(1).

<sup>96</sup> See *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5030, para. 62.

<sup>97</sup> As noted by APCC and conceded by U.S. South, Flex ANI can fail at any given moment at any number of points along the call-path. APCC Comments at 6-8; U.S. South Reply at 6. Thus, even though PSPs have the ability to test a line, that does not mean that they will know at any given point in time either before or after testing that Flex ANI transmission has failed.

<sup>98</sup> *April 1998 Per-Phone Order*, 13 FCC Rcd at 10904, para. 19.

transmitted with each call, and such transmission was never a “prerequisite” for compensation. The Commission has consistently said that carriers obligated to compensate PSPs may track calls using the technology of their choice.<sup>99</sup> Flex ANI payphone-specific coding digits are one method for a Completing Carrier to automatically track calls and meet its obligations under section 276.

**B. The Current Rules Require Compensation for “Each and Every Call” Regardless of Whether Flex ANI was transmitted or received for a Particular Call**

28. In 2003, the Commission revised the payphone compensation rules but kept in place the obligations concerning payphone-specific coding digits as discussed above. Completing Carriers today may, and many do continue to, rely upon Flex ANI to track and compensate PSPs for each and every completed call. The Commission adopted a new “compensation plan designed to address two problems that had plagued prior compensation plans: (1) due to the structure of the payphone-long distance network architecture, PSPs were unable to identify and locate the carriers that owed them compensation; and (2) carriers had demonstrated no incentive to acknowledge that they had completed payphone-originated calls, much less an incentive to track such calls accurately in order to calculate compensation owed the PSPs.”<sup>100</sup> To address these concerns, the Commission placed the compensation obligations on the “Completing Carrier,” and also placed the duty to accurately track all completed calls on the Completing Carrier. The Commission also gave the PSPs tools, where there had been none before, to enforce these obligations.<sup>101</sup>

29. Under our *Tollgate Orders*, a Completing Carrier has the option to compensate the PSP for each completed call by either complying with our per-call tracking and reporting rules or by reaching an ACA with the PSP.<sup>102</sup> If the Completing Carrier has chosen to track and report calls, section 64.1300(b) of our rules requires: “[A] Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider for that call . . .”<sup>103</sup> With the limited exceptions set forth in section 64.1300(c), this obligation is unqualified. The Commission’s rules do not make the obligation to pay contingent upon the transmission of payphone-specific coding digits.<sup>104</sup>

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<sup>99</sup> See *First Report and Order*, 11 FCC Rcd at 20590, para. 97; *2003 Tollgate Order*, 18 FCC Rcd at 19994, para. 39.

<sup>100</sup> *2004 Tollgate Reconsideration Order*, 19 FCC Rcd 21459, para. 4; see also *2003 Tollgate Order*, 18 FCC Rcd at 19983, para. 18.

<sup>101</sup> *2004 Tollgate Reconsideration Order*, 19 FCC Rcd at 21458, para. 2.

<sup>102</sup> See 47 C.F.R. § 64.1310(a). Under limited situations, PSPs are compensated on a per-phone basis. See 47 C.F.R. § 64.1301(e).

<sup>103</sup> 47 C.F.R. § 64.1300(b).

<sup>104</sup> These exceptions are calls to emergency numbers, calls by hearing-disabled individuals to a telecommunications relay service, and local coin calls. 47 C.F.R. § 64.1300(c).

30. The Commission's rules unambiguously place the burden and duty on the Completing Carrier to compensate the PSP for each completed call, the duty to accurately track all calls to completion, and to compensate PSPs each quarter on all completed calls.<sup>105</sup> The Completing Carrier's responsibilities are not mitigated when Flex ANI is not transmitted by the LEC or any carrier in the call path, nor are they affected by whether the Flex ANI digits are not transmitted and received by the Completing Carrier. The tracking obligation is related to, but independent of, the Completing Carrier's obligation to compensate PSPs for each and every completed payphone call. Thus, the burden is on the Completing Carrier to ensure that it is receiving the information that will enable it to track and compensate the PSP for each call.

31. Our payphone rules were intended to provide PSPs with the information they need to identify, locate, and obtain compensation from Completing Carriers, including identifying calls that were forwarded by LECs to Intermediate Carriers regardless of whether they were accompanied by Flex ANI digits but not compensated by the Completing Carrier.<sup>106</sup> We recognize that coding digit failures and mistakes will occur. However, if a Completing Carrier's customer places a call on the PSP's payphone, the legal obligation to compensate the PSP occurs when the called party answers the call. The Completing Carrier must ensure that it compensates for all completed calls.<sup>107</sup>

32. U.S. South argues that Completing Carriers should be permitted to rely on Flex ANI to track payphone-originated calls for compensation purposes.<sup>108</sup> We agree that a Completing Carrier may do so.<sup>109</sup> Indeed, the Commission reaffirmed in the *2003 Tollgate Order* that a Completing Carrier "may use the technology of its choice to track coinless payphone calls to completion, provided that its system permits an independent third-party auditor to verify the accuracy of the data so that the PSP is assured that it is properly compensated."<sup>110</sup>

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<sup>105</sup> *2004 Tollgate Reconsideration Order*, 19 FCC Rcd at 21459-60, para. 5 (summarizing the responsibilities imposed on Completing Carriers by the payphone compensation rules).

<sup>106</sup> *Id.* at 21460, para. 6.

<sup>107</sup> 47 U.S.C. § 276; 47 C.F.R. §§ 64.1300, 64.1310, and 64.1320; *see also March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5018, para. 33 ("Although payphones on the LEC ANI lists are eligible for per-call compensation during the waiver period of the *Bureau Waiver Order*, and this order, to ensure an orderly transition to the provision of FLEX ANI for all payphones on LEC payphone service lines, not just any LEC service line, PSP payphones must be on LEC payphones lines within 30 days of the release of this order to continue to be eligible for per-call compensation, even if the PSP payphones are on the LEC ANI lists."). U.S. South concedes that a PSP satisfies its "regulatory obligation ... by ordering a payphone line, which in turn triggers a LEC's obligation to provide payphone-specific Flex-ANI with each call." U.S. South Opposition at 10; *see also id.* at 14-15.

<sup>108</sup> *Id.* at 3.

<sup>109</sup> GCB also agrees that Completing Carriers may rely on Flex ANI to track calls. *See* GCB Reply at 6.

<sup>110</sup> *2003 Tollgate Order*, 18 FCC Rcd at 19994, para. 39. The Commission previously stated in the *First Report and Order* that carriers are allowed to track payphone-originated calls using any technology. *First Report and Order*, 11 FCC Rcd at 20591, para. 97 ("[N]o standardized technology for tracking calls is necessary, and ... IXCs may use the technology of their choice to meet their tracking obligations."). Moreover, the Bureau recognized in the *April 1998 Per-Phone Order* that certain carriers might choose not to receive Flex ANI. *See April 1998 Per-Phone Order*, 13 FCC Rcd at 10904, para. 19. U.S. South interprets these statements to mean that the Commission "did not want to foreclose future implementation of superior technological solutions for identifying payphone-originated calls to IXCs for compensation purposes." Letter from Glenn B. Manishin, Counsel to Duane Morris LLP, to Marlene H. (continued...)



But a Completing Carrier's responsibility does not end there. The Commission's current rules require the Completing Carrier to *accurately* track all calls to completion, regardless of the method it chooses to accomplish this.<sup>111</sup> Responsibility to ensure that the tracking system is accurate lies squarely with the Completing Carrier. Indeed, to ensure that the tracking system accurately tracks all completed calls, the Commission provided that "each Completing Carrier must undergo an audit of its § 64.1310(a)(1) tracking system by an independent third party auditor whose responsibility shall be ... to determine whether the call tracking system *accurately tracks payphone calls to completion*."<sup>112</sup> Additionally, the Completing Carrier's CFO must provide with its quarterly payments, "a sworn statement that the payment amount for that quarter is accurate and is based on *100% of all completed calls* that originated from that payphone service provider's payphones."<sup>113</sup> Under that approach, the risk that coding digits are not transmitted by the LEC is placed on the Completing Carrier and not upon the PSP.

33. We reject U.S. South's argument that, because Completing Carriers are allowed to rely on Flex ANI as the basis for their call-tracking systems under the Commission's rules, "there is no basis in the Commission's payphone compensation plan, its various waiver orders or public policy under Section 276 to impose payment liability on carriers who, as in this case, have done everything required of them under the payphone rules."<sup>114</sup> If a Completing Carrier chooses to track calls through Flex ANI, the burden is on the Completing Carrier to ensure that its system can accurately track all calls, and the Completing Carrier must compensate the PSP for each and every completed call.<sup>115</sup> Completing Carriers, as the primary economic beneficiaries, have implemented surcharges on their customers in order to provide for per-call compensation.<sup>116</sup> The Bureau previously determined that IXCs "would be benefiting unreasonably if we were to grant them a waiver of the payphone compensation obligations so that they do not have to pay per-call compensation when payphone-specific coding digits are not available."<sup>117</sup> We believe the same considerations apply and Completing Carriers would benefit unreasonably if they were relieved

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Dortch, Secretary, FCC, WC Docket 04-141 at 2 (filed Dec. 9, 2011). We disagree. As noted above, the Bureau has specifically found that IXCs can track calls without the use of payphone-specific coding digits. *See October 1997 Bureau Waiver Order*, 12 FCC Rcd 16390, para. 12; *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5042, para. 86.

<sup>111</sup> 47 C.F.R. § 64.1310(a)(1). *See also* APCC Comments at 9.

<sup>112</sup> 47 C.F.R. § 64.1320(a).

<sup>113</sup> 47 C.F.R. § 64.1310(a)(3) (emphasis added).

<sup>114</sup> U.S. South Opposition at 3-4.

<sup>115</sup> A Completing Carrier must have an audited tracking system that tracks all completed payphone-originated calls. *See* 47 C.F.R. §§ 64.1310(a) and 64.1320(a). We do not presume to advise carriers on how to comply with this requirement when there are Flex ANI problems. The Bureau previously noted that carriers have the ability to track payphone calls, albeit after the fact, by using the quarterly ANI lists LECs must provide pursuant to section 64.1310(d) of the Commission's rules. *See October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16390, para. 9; *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5001-02, 5009, paras. 4, 17-18.

<sup>116</sup> *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5043, para. 86.

<sup>117</sup> *Id.*

of the obligation to compensate PSPs for completed calls when payphone-specific coding digits are not transmitted or received by the Completing Carrier.

34. We also reject U.S. South's argument that PSPs have a remedy against their serving LEC in instances where the LEC fails to transmit Flex ANI and that therefore it is unnecessary to require the Completing Carrier to compensate PSPs for calls for which Flex ANI is not transmitted.<sup>118</sup> We are unpersuaded by this argument for two reasons. First, it assumes transmission failure by the LEC. However, as noted by APCC and acknowledged by U.S. South, Flex ANI can, and often does, fail at various points along the call path.<sup>119</sup> Even if a PSP was able to ensure that Flex ANI transmission was occurring at the LEC level (and in many cases it may not be able to do so), the PSP would be unable to monitor transmission at points further along the call path. If we were to accept U.S. South's position, a Completing Carrier would be relieved from compensating for any call unaccompanied by Flex ANI, even if the failure in Flex ANI transmission occurred after the call left the LEC end-office, including failures by IXC carriers like U.S. South have contracted with to route the calls to their switches. That approach is not supported by our orders and rules, which place tracking responsibilities on Completing Carriers. Moreover, it would inappropriately place the burden on the PSP to ensure proper transmission along the entire call path even though the PSP has no visibility into the tracking system.

35. U.S. South's argument also ignores the fact that Flex ANI transmission is a tariffed service offered by the LEC to the Completing Carrier. Indeed, the Bureau stated that the PSP does not even have to request Flex ANI service when ordering a payphone line.<sup>120</sup> Rather, the Bureau stated that an IXC must affirmatively "request, test, and coordinate with LECs to obtain this service under carrier to carrier procedures to ensure that there are no problems in providing and receiving the FLEX ANI digits for a particular IXC or LEC."<sup>121</sup> If the failure occurred at either the LEC or the Intermediate Carrier level, the Completing Carrier has the business relationship with those carriers and can work with them to correct the transmission failure. Similarly, if a Completing Carrier has contracted with an Intermediate Carrier to carry incoming calls to its switch, and the Intermediate Carrier fails to transmit the coding digits, the Completing Carrier is in the best position to identify and redress that failure with the Intermediate Carrier.

36. U.S. South also argues that placing the burden on Completing Carriers to compensate PSPs for calls unaccompanied by Flex ANI results in holding Completing Carriers "solely responsible – as a matter of strict liability, *i.e.*, without any possible legal or factual defense – for any unexplained failure of Flex ANI transmission . . . ."<sup>122</sup> We disagree. As we indicated above, the Completing Carrier is responsible to compensate the PSP whether or not the

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<sup>118</sup> U.S. South Opposition at 21-22. AT&T supports U.S. South's argument and argues that it should be able to withhold compensation even under such circumstances. AT&T Reply at 2, 5.

<sup>119</sup> APCC Comments at 7; U.S. South Reply at 6.

<sup>120</sup> *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5020, para. 37.

<sup>121</sup> *Id.*

<sup>122</sup> U.S. South Reply at 5.

Flex ANI coding digits were transmitted or received by the Completing Carrier. The Completing Carrier, not the PSP, bears the risk of failures with the transmission of Flex ANI along the call path and must ensure that it compensates PSPs for each and every completed call. Additionally, the Commission's payphone compensation rules permit a Completing Carrier to dispute a PSP's entitlement to compensation for particular calls.<sup>123</sup> Thus, we do not believe that requiring Completing Carriers to compensate PSPs in situations where there has been a failure in Flex ANI transmission results in depriving Completing Carriers of their ability to raise legal and/or factual defenses to claims by PSPs for compensation for particular calls unaccompanied by Flex ANI.

37. Finally, AT&T argues that it would be unfair to require it to compensate PSPs for completed calls unaccompanied by Flex ANI because it will not be able to block such calls "for those customers who do not wish to incur the surcharges associated with such calls."<sup>124</sup> We must balance a carrier's desire to block calls with the goal of compensating PSPs. The Bureau has previously concluded that the potential harm to PSPs from the absence of compensation would be greater than the potential harm to a carrier from its inability to block certain payphone calls.<sup>125</sup>

### III. CONCLUSION

38. We conclude that, under section 276 of the Act and our implementing orders and rules, once a PSP has ordered a payphone line from a LEC whose switch is coding-digit-capable, unless a PSP consents to an ACA, a Completing Carrier is obligated to pay the PSP per-call compensation for all completed calls made from the PSP's payphone line.<sup>126</sup> We further clarify that in the absence of an ACA, the Completing Carrier is responsible for ensuring that coding digits are being sent by the LEC or other carriers in the call path or otherwise ensuring that it has sufficient information to pay PSPs per-call compensation for all completed calls made from the PSP's payphone line.<sup>127</sup> Thus, a Completing Carrier must pay compensation for each completed call regardless of whether the Completing Carrier received payphone-specific coding digits with each individual call.

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<sup>123</sup> 47 C.F.R. § 64.1320(e) (italics added).

<sup>124</sup> AT&T Reply at 3. At least some Completing Carriers charge their subscribers a surcharge in connection with dial-around calls to recover the per-call compensation they are required to pay PSPs. *See March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5043, para. 86.

<sup>125</sup> *Id.* at 5049-50, para. 97 ("[T]he potential harm from the absence of compensation to PSPs would be greater than the potential harm to ... payors from the inability to block certain payphone calls."); *October 1997 Bureau Waiver Order*, 12 FCC Rcd at 16391, para. 13.

<sup>126</sup> *See supra* at note 3.

<sup>127</sup> *Id.*

**IV. ORDERING CLAUSE**

39. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 276 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 276, and sections 0.91, 0.291 and 1.2 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.2, that the Declaratory Ruling in WC Docket No. 11-141 IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett  
Chief, Wireline Competition Bureau

## APPENDIX A

Comments/Oppositions  
in WC Docket No. 11-141

<u>Committer/Opponent</u>	<u>Abbreviation</u>
American Public Communications Council and APCC Services, Inc.	APCC
U.S. South Communications, Inc.	U.S. South

## Replies in WC Docket No. 11-141

<u>Replies</u>	<u>Abbreviation</u>
AT&T, Inc.	AT&T
GCB Communications, Inc. d/b/a Pacific Communications and Lake Country Communications, Inc.	GCB
Sprint Nextel Corporation	Sprint Nextel
U.S. South Communications, Inc.	U.S. South