



ASK THE ASSOCIATION

An intermittent email newsletter for members of the International Prepaid Communications Association

A project of the Legal, Tax and Regulatory Committee of the IPCA, "Ask The Association seeks to air insights, analyses and opinions on important issues facing those in the prepaid telecom card industry. The Association can not take responsibility for the accuracy of opinions voiced here and will print all responsible replies. Your questions to the newsletter are encouraged.

DIAL AROUND COMPENSATION: IS IT TRUE I CAN'T BE SUED FOR NOT PAYING IT?

Dear Telecard Association: I understand that a recent court case through out the case brought by a payphone service provider (PSP) against a company for not paying dial-around-compensation (DAC). What's the real story?

Signed: "DAC Curious"

Dear DAC Curious: In response to your question, we asked an attorney who represented the defendant in the case and who was successful, Neil Ende of the Technology Law Group provided us with the following article.

Federal Court Strikes Down Private Right of Action for Collecting Dial Around Compensation

The issue of dial around compensation ("DAC") has been one of the most vexing problems that the Federal Communications Commission ("FCC") has faced in recent years. FCC policy, as implemented through Section 276 of the Telecommunications Act of 1996, requires that Payphone Service Providers ("PSPs") be compensated for every completed call originated

from their station sets. As to this requirement, at least, there is little controversy.

More difficult, however, has been the determination of who is obligated to pay and how payment is to be made. The FCC has wrestled with this issue in numerous lengthy orders and reconsideration orders which have often done as much to create confusion as to resolve the payment issue.

In the interim, PSPs have sought payment, often from everyone who touched the call after it left the payphone. Typically, the PSP have looked, first, to the primary carrier for compensation, However, not surprisingly, these carriers have generally denied liability, claiming instead that it was the downstream reseller who was obligated to make payment. Of course, these resellers have also denied responsibility, claiming—usually correctly—that they had no direct liability to the PSP and that most, they were only obligated to reimburse the carrier for amounts paid to the PSP. The net of this process has been that, in many cases, PSPs have been unable to collect amounts they believe are due for calls originated from a payphone.

In an effort to vindicate their perceived rights, PSPs have, for a number of years, filed

complaints with the FCC, both directly and through one or more industry associations established to secure payment. Moreover, of late, the PSPs have also brought a number of court actions seeking damages against carriers and resellers for nonpayment of DAC.

In bringing these court actions, PSPs have apparently assumed that the Telecom Act created a private cause of action for the recovery of DAC. This assumption would appear to be incorrect. Indeed, in a stunning setback for payphone industry, a federal district court judge in Texas recently dismissed, with prejudice, a complaint brought by a PSP to recover DAC. *See Phonetel Technologies, Inc, et al., v. Network Enhanced Telecom d/b/a Network IP*, No. 2:01-CV-274 [Memorandum Opinion and Order (unpublished), March 11, 2002]. In that M&O, the Court agreed with the carrier-defendant that the neither Section 276 of the Telecom Act, nor the regulations promulgated by the FCC thereunder, create a private right of action for the recovery of DAC.

Close scrutiny of Section 276 sustains the Court's conclusion. Specifically, unlike Sections 206 and 207 of the Communications Act, which specifically establish carrier liability for damages and provide for a private right of action to recover such damages, Section 276 contains no equivalent right. To the contrary, Section 276 merely imposes a specific obligation solely **on the FCC** to promulgate regulations, to wit: "the Commission shall take all actions necessary . . . to prescribe regulations that establish . . . a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every intrastate and interstate call using their payphone" Thus, the Court concluded that "[B]ecause Section 276 only commands the Commission to promulgate regulations, it cannot be violated by a party other than the FCC." Several other courts have reached this same conclusion.

The Court also rejected the notion that either the Telecom Act or the DAC regulations promulgated thereunder created an implied private right of action. After reviewing the relevant legal criteria, including the intent of the drafters, the

Court concluded that neither the drafters of Section 276, nor the regulations promulgated thereunder by the FCC, intend to create a private right of action. Indeed, with respect to the regulations, the Court pointedly noted that where the FCC had intended to create a private right of action in other contexts, it had done so expressly, using clear language.

In dismissing the complaint, the Court suggests that aggrieved PSPs are required to seek relief exclusively through the FCC's complaint process. The Court, however, leaves open the important question as to whether such PSPs could actually obtain direct payment of DAC through such complaints, or merely indirectly through enforcement of the payment obligation by the FCC.

The MO&O represents a major setback for PSPs which, to an increasing degree, have been seeking the intervention of the courts to secure payment of DAC. The Court's decision, if followed, will foreclose that avenue of relief, leaving PSPs to pursue available remedies only before the FCC, where, at best, the complaint process or eventual enforcement actions—whichever is ultimately determined to be appropriate—is likely to time consuming and cumbersome.

Technology Law Group served as counsel to one of the defendants in the referenced proceeding and has substantial experience and success in representing carriers and resellers on dial around issues before the FCC and the federal courts. If you would like a copy of the MO&O, additional information on this proceeding, or on dial around issues generally, please feel free to give us a call at 202.895.1707, or to contact us via email at mail@tlgdc.com