



Posted: 06/2002

## **PSPs Take One on the Chin in DAC Fight**

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The issue of dial-around compensation (DAC) has been one of the most vexing problems 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 that often have 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 PSPs looked first to the first carrier in line for compensation. However, not surprisingly, these carriers generally have denied liability, claiming the downstream reseller was obligated to make payment. Of course, these resellers also have denied responsibility, insisting they had no direct liability to the PSP and that, at most, they were obligated only 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, directly and through one or more industry associations established to secure payment. The PSPs also have brought a number of court actions seeking damages against carriers and resellers for nonpayment of DAC.

In bringing these court actions, PSPs apparently have assumed that the Telecom Act and/or the regulations promulgated by the FCC under the act create a "private cause of action." In other words, PSPs assumed the act and regulations give individuals the right to sue to recover DAC. This assumption would appear to be incorrect. In a stunning setback for the payphone industry, a federal district court judge in Texas recently dismissed with prejudice a complaint brought by a PSP to recover DAC. The court agreed with the carrier-defendant that neither Section 276 of the Telecom Act, nor the regulations promulgated by the FCC under the act, allow for an individual to sue to recover DAC.

Close scrutiny of Section 276 confirms the court's conclusion. It does not establish carrier liability for damages nor provide for an individual's right to sue to recover such damages. Instead, it merely imposes a specific obligation solely on the FCC to promulgate

regulations. Thus, the court concluded only the FCC could violate Section 276. Several other courts have reached this same conclusion.

The court also rejected the notion that the Telecom Act (or DAC regulations drafted under the act) creates an implied private right of action. After reviewing the relevant legal criteria, including the intent of the drafters, the court concluded neither the drafters of Section 276 nor the drafters of the related FCC regulations intended to create a private right of action. Moreover, with respect to the regulations, the court pointedly noted that where the FCC had intended to allow individuals to sue in defense of their rights in other contexts, it had done so expressly, using clear language.

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

The court's decision represents a major setback for PSPs that, to an increasing degree, have been seeking the intervention of the courts to secure payment of DAC. This 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 action -- whichever is ultimately determined to be appropriate -- is likely to be time-consuming and cumbersome. As of late April, the plaintiffs in the Texas case have yet to file an appeal. If they do, this issue will be considered by the federal circuit court. Although we have no reason to believe the circuit court will reach a different decision, we do expect the case will generate substantial interest among PSPs, carriers and resellers alike.

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