STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Declaratory Ruling or Rulemaking Regarding Customer Service Calls from Payphones	)

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APCC'S MOTION TO DISMISS LOCUS TELECOMMUNICATIONS, INC.'S PETITION FOR A DECLARATORY RULING

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To: Chief, Wireline Competition Bureau

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The American Public Communications Council, Inc., and its affiliated compensation collection clearinghouse, APCC Services, Inc. (collectively "APCC"),[1] hereby moves for summary dismissal of Locus Telecommunications, Inc.'s petition for declaratory ruling ("Petition"), in which Locus attempts to argue that toll-free calls placed to its customer service numbers are exempt from dial-around compensation under the Commission's payphone compensation rules. *See* 47 CFR §§ 64.1300-1320. The petition for declaratory ruling is an abuse of the Commission's processes and should be summarily dismissed.

I. INTRODUCTION AND SUMMARY

Under the Commission's rules, declaratory rulings may be issued to terminate controversy or remove uncertainty. Locus' petition, however, does not seek to address any bona fide controversy or genuine uncertainty as to the interpretation of the Commission's

[1] The American Public Communications Council, Inc. is a national trade association representing independent payphone service providers ("PSPs"). APCC Services, Inc., is an affiliate entity that collects dial-around compensation on behalf of more than 1,000 PSPs and has been authorized by the affected PSPs to pursue collection of the calls at issue.

compensation rules. As explained below, it is clear that, under the current compensation rule, customer service calls are subject to compensation and that the compensation is to be paid by the carrier (here MCI) that completed the calls to the called party (here Locus).[2] Moreover, according to the petition, in this case *both* the Completing Carrier (MCI) and the PSPs recognize that the calls are compensable.[3] It is only the called party, Locus, that is disputing whether the calls are compensable, in a transparent attempt to sow confusion so that Locus can avoid, as long as possible, payment of payphone surcharges to MCI.[4]

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[2] Locus makes a number of public policy arguments urging that compensation for customer service calls should not be required or should be applied at a reduced rate for reasons of public policy. Although these arguments are totally lacking in any merit, to the extent there is any substance to the arguments that warrants being addressed, the vehicle would be to amend the rule prospectively, not to distort and misinterpret the current rule. In fact, Locus requests in the alternative, in the event that its petition for declaratory ruling is denied, that the Commission initiate a rulemaking to amend the compensation rules. Locus thereby concedes that, if the Commission finds that customer service calls are compensable under the rule (as they clearly are for the reasons stated below), then Locus' only remedy is to amend the rule prospectively. This motion to dismiss does not seek dismissal of or otherwise address Locus' alternative petition for rulemaking. APCC will address the rulemaking request at such time as the Commission places it on public notice.

[3] Petition at 7 ("If APCC pursues recovery [of compensation from MCI], MCI will undoubtedly pay APCC . . . [and] will then invoice Locus for the Customer Service calls").

[4] APCC Services, Inc., first learned of the calls in question from MCI's Intermediate Carrier reports, which indicated that the calls were routed to Locus as a switch-based reseller ("SBR"). On the basis of that report, APCC Services sought payment initially from Locus as the Completing Carrier. Now it appears that MCI, not Locus, is the Completing Carrier.

It is perhaps understandable that MCI initially identified itself as an Intermediate Carrier for the calls at issue and included the calls in its Intermediate Carrier report, rather than paying for the calls itself as the Completing Carrier. As Locus admits, Locus never disclosed to MCI that it was using the toll-free numbers involved in these calls as customer service numbers rather than as access code numbers. Id. at 2-3 n. 3 ("Locus decides which MCI toll-free numbers are assigned to a particular use . . . . MCI plays no role in and has no knowledge of Locus' assignment and use of these toll-free numbers"). Based on the Intermediate Carrier reports, APCC has been trying to collect unpaid compensation from Locus for calls to the toll-free numbers at issue for almost two years. If Locus had disclosed in a timely manner that the toll-free numbers were customer service numbers, this matter could have been resolved long ago. With Locus having belatedly clarified that the calls reported by MCI are customer service calls,

Moreover, there is no uncertainty as to whether toll-free customer service calls are subject to compensation. The Commission's rules are clear: (1) payphone service providers ("PSPs") are entitled to compensation for completed calls placed to toll-free customer service numbers, including *carriers'* customer services numbers; and (2) such calls are completed when answered by the "called party," which for customer service calls is the *carrier* itself.[5] By trying to create ambiguity where there is none, Locus is abusing the Commission's processes. No purpose would be served by debating this issue before the Commission. Therefore, the Bureau should summarily dismiss the petition.

II. THE RULING REQUESTED BY LOCUS WOULD VIOLATE THE COMMUNICATIONS ACT AS WELL AS THE COMMISSION'S RULES

There is no uncertainty whatever that toll-free calls completed to a carrier's customer service numbers – just like toll-free calls completed to any other company's customer service numbers – are subject to compensation. Under the Commission's rules, carrier-paid

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(Footnote continued)
it follows that MCI is the Completing Carrier for those calls. Therefore, APCC Services is requesting payment from MCI. Given that Locus itself is implicated in MCI's failure to pay, however, APCC Services reserves the right to pursue payment from Locus, in the alternative, for all the calls that MCI reported delivering to Locus' customer service operation.

While APCC provides the information in this footnote as background, the issue of whether it is MCI or Locus which is responsible for paying for the calls does not affect the merits of the issue on which Locus has sought declaratory relief – namely, whether PSPs are entitled to compensation for the calls.

[5] APCC does not here address Locus' factual allegations regarding what occurred in the negotiations between Locus and APCC Services, since those negotiations are irrelevant to the issues raised in the petition. To clarify the record, however, APCC does not contend that "Customer Service calls appearing on MCI's Reports are *de facto* completed." Petition at 5. APCC did not use the term "*de facto* completed" – the calls are completed, pure and simple, like any other subscriber toll-free call whether answered by a human voice or an automated voice prompt.

compensation is due for completed calls that are placed by dialing toll-free numbers, including both "access code calls" and "subscriber toll-free calls." 47 CFR §§ 64.1300(b), 64.1310(a). The rules do not provide exemptions from compensation for any toll-free calls other than emergency calls and calls placed via telecommunications relay services. *Id.* § 64.1300(c).

Moreover, even if the Commission's rules were perceived to leave room for interpretation on this point, the Commission could not grant Locus' petition. The requested ruling would violate Section 276 of the Communications Act. 47 U.S.C. § 276. The statute is clear: PSPs are entitled to be "fairly compensated for *each and every* completed intrastate and interstate call made using their payphone" – again, except for emergency calls and calls placed via telecommunications relay services. *Id.* § 276(b)(1)(A) (emphasis added). The statute does not recognize any other exceptions. Therefore, even if there was ambiguity in the Commission's rules on whether toll-free calls to carriers' customer service numbers are compensable, the Commission has no authority to waive the statutory compensation requirement with respect to such calls.[6]

Further, there is no conflict between the Commission's rule requiring compensation for customer service calls and state laws prohibiting charges to the caller for customer service calls. *See* Petition at 15-17. In adopting a carrier-pays compensation rule, the Commission did not attempt to dictate at all how carriers should recover compensation costs from their customers. Specifically, the compensation rule does not require carriers to assess payphone surcharges on end users for each call that is subject to compensation. Rather, the rule allows carriers various

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[6] *See Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20586 ¶ 87 (1996) ("*First Payphone Order*") ("such exemptions from the obligation to pay compensation, even on an interim basis, would be contrary to the congressional mandate that we ensure fair compensation for 'each and every completed intrastate and interstate call'").

alternatives, including the recovery of compensation payments "through increased rates to all or particular customers." *First Payphone Order* at 20584 ¶ 83. Thus, to the extent that state laws may prohibit prepaid card service providers from assessing customer service charges on the caller, the Commission has specifically authorized the recovery of compensation payments for such calls in a different manner.[7]

In fact, for Locus to incur a compensation surcharge for toll-free customer service calls without being able to pass the charge on to the caller is an entirely normal result under the compensation rules. Indeed, it is in the very nature of "toll-free" subscriber calls – which comprise a huge proportion of total dial-around calling – that the cost of the call is paid by the toll-free subscriber, *not* the caller. Every day, thousands of toll-free calls are placed from payphones to companies like United Airlines, Marriott, VISA, and other companies, none of whom charges the caller. Ordinarily, the caller is only charged for the call in the case of the limited segment of dial-around calls known as "access code" calls, *i.e.*, primarily prepaid card and calling card calls. With respect to customer service calls, Locus is in the same position as

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[7] Under the Commission's rules, it is up to the carrier that owes the compensation, which in this case apparently is MCI, whether to surcharge its toll-free service subscriber, which in this case is Locus. *See First Payphone Order* ¶ 49, *quoted* by Locus in the Petition at 16. Thus, the rules do not determine how much, if any, of the compensation payment and related costs Locus will ultimately incur. Although Locus complains of MCI's "market power," which allegedly would enable MCI to extract an inflated surcharge from Locus, any issues of "market power" are between MCI and Locus. Further, Locus' allegations regarding "market power" conflict with a long-line of Commission decisions that have found the long distance market to be effectively competitive. *See, e.g., Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005) and cases cited therein. Moreover, in adopting the current payphone compensation rule, the Commission specifically rejected the claim that interexchange carriers have market "leverage" over SBRs. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19990 ¶ 33 (2003). To the extent that Locus is seeking reconsideration of those decisions, it must pursue such relief in a more appropriate proceeding. The Commission cannot allow competitive issues between carriers to become a basis for depriving PSPs of the compensation to which they are entitled by law.

the companies mentioned above – it is an 800 number subscriber. All other 800 number subscribers are similarly assessed a surcharge for toll-free calls originating from payphones and virtually all do not recover the surcharge by imposing a charge on the caller.

Moreover, Locus' "fairness" argument completely disregards that to exempt customer service calls to Locus and other carriers from compensation would be patently unfair to PSPs, who would be deprived of the fair compensation mandated by the statute for "*each and every* completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A).

Neither does the fact that Locus may be unable to block customer service calls in some circumstances entitle it to claim that the calls are exempt from compensation. The Bureau addressed this precise issue shortly after establishing the compensation scheme, and unequivocally concluded that carriers could not justify a waiver of their payment obligations based on inability to block calls. During the period when payphone-specific coding digits were not yet available, the Commission granted limited waivers of the requirement for LECs and PSPs to provide coding digits to IXCs. The International Telecard Association ("ITA") (the trade association representing prepaid card providers) and a paging company (AirTouch) each requested that the Commission waive or otherwise suspend the compensation obligations as to them on the grounds that they were unable to block calls.[8] The Commission stated:

> We decline to grant a waiver to ITA and AirTouch of the payphone compensation requirements of the Payphone Orders because they are unable to block payphone calls . . . The establishment of a default compensation rate was itself intended, in part, to compensate for any unequal bargaining power arising out of the inability of carriers to block payphone calls.

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8 *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998, 5041-42 ¶¶ 84-85 (CCB 1998) ("*Coding Digit Waiver Order*").

Id ¶ 94. The Bureau added that "the 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." *Id.* ¶ 97.[9]

Finally, whatever the merits of Locus' suggestion that, in order to encourage carriers to allow customer service calls, a lower compensation rate should apply to such calls, that is patently a matter to be determined in a rulemaking – not in a request for interpretation of a rule that clearly states only a single applicable per-call rate.

III. CALLS TO CARRIERS' CUSTOMER SERVICE DEPARTMENTS ARE INDISPUTABLY COMPLETED WHEN ANSWERED BY THE CARRIER – WHETHER THE CALL IS HANDLED BY A HUMAN RECEPTIONIST OR AN IVR SYSTEM

It is equally clear that calls completed to carriers' customer service departments satisfy the Commission's definition of "completed call" – regardless of how they are answered by the carrier. As Locus acknowledges, the Commission has defined "completed call" as "a call that is answered by the called party."[10] In the case of a call to a carrier's customer service number, the called party is clearly the carrier itself – that is the party the caller intends to reach. Locus itself admits that callers using the toll-free numbers are attempting to reach Locus' customer service department, not some other party. Like other telephone calls, customer service calls are

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[9] Significantly, in the *Coding Digit Waiver Order*, the Commission was able to consider the ITA and AirTouch waiver requests only because it had granted PSPs a waiver as well, thus enabling it to condition the waiver granted to PSPs in ways that would be otherwise impermissible. Where, as here, there is no waiver regarding any obligations of PSPs, waiving carriers' payment obligations for customer service calls would be, as explained earlier, not only unjustified but utterly beyond the Commission's authority.

[10] *See First Payphone Order* at 20573-74 ¶ 63 (1996); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21242 ¶ 14 (1996); Memorandum Opinion and Order, 13 FCC Rcd 10893, 10915 ¶ 36 (1998).

completed when they are answered, regardless of whether the call is answered by a human receptionist or by interactive-voice response ("IVR") equipment or software.[11]

In these respects, calls placed to carriers' customer service numbers are no different than the millions of other toll-free calls placed from payphones to the customer service departments of companies like Southwest Airlines, Holiday Inn, American Express, Microsoft, and Citibank – the vast majority of which are answered by automated call processing systems, including IVR systems – and many of which are resolved on a wholly automated basis. Whether or not the company providing a customer service number is a carrier or some other entity, the called party is the entity whose customer service department answers the call, and the call is no less "completed" when it is answered by an IVR system than when it is answered (increasingly rarely) by an actual human being.

IV. CUSTOMER SERVICE CALLS ARE COMPENSABLE REGARDLESS OF WHO IS THE PRIMARY ECONOMIC BENEFICIARY AND REGARDLESS OF WHO IS IN THE BEST POSITION TO TRACK THE CALL

Locus' contention that customer service calls cannot be compensable because there is no "primary economic beneficiary" ("PEB") and/or because the PEB is not in the best position to track the call is even more frivolous than its other arguments, if that were possible.

In making this argument, Locus confuses the rule's underlying policy rationale with the rule itself. In its compensation *rulemaking* decisions, the Commission has considered the issues of who is the PEB and who is in the best position to track in order to make an *overall* determination which of the various types of carrier involved in a call should be assigned payment

[11] Since the 1970s, a high percentage of calls to residential end users have been answered by "answering machines" or voice message services. The Commission has never tried to prohibit carriers – or PSPs – from assessing charges for such calls.

responsibility under the *rule*. Like most rules, the compensation rule is intended to eliminate uncertainty as to which entity must comply; however, certainty could not possibly be achieved if, in order to assign payment responsibility in each individual instance, carriers and PSPs had to determine which carrier, if any, is the PEB and which carrier is in the best position to track the call. Instead, based on its determination as to which *class* of carriers best satisfies the PEB and call-tracking criteria, the Commission decided that the payment obligation should fall on the Completing Carrier, defined as the facilities-based long distance carrier that completes the dial-around call.[12] The Completing Carrier has payment responsibility under the rule, regardless of whether another carrier might be PEB or have better call tracking ability with respect to certain calls.[13]

Based on Locus' representation that the toll-free calls to its customer service number are delivered to Locus by MCI, it follows that MCI is the Completing Carrier and is thus responsible for paying for the call. Therefore, APCC Services will seek payment for the calls from MCI.

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[12] In the case of a local dial-around call, the rule places the payment obligation on the local exchange carrier that completes the call.

[13] Even if the issue of who is the PEB were relevant, Locus is simply incorrect in stating that it is not an economic beneficiary of customer service calls. Petition at 10. Businesses generally benefit economically from maintaining good customer relations. That is why they institute customer service numbers in the first place. Moreover, there is often a more direct economic benefit from such calls. Just as airlines can sell more tickets by allowing customers to call them for information about flights, banks and credit card companies facilitate customer transactions by allowing customers to call to check their balances. Similarly, prepaid card providers stimulate card use by allowing customers to call, *e.g.*, to check the balance on their cards.

V. THE BUREAU CAN DISMISS LOCUS' PETITION PURSUANT TO ITS DELEGATED AUTHORITY

The Bureau has authority to dismiss Locus' petition for declaratory ruling pursuant to its authority delegated by the Commission. Under Section 0.91(b) of the rules, the Wireline Competition Bureau has delegated authority to "[a]ct on requests for interpretation or waiver of the rules." 47 CFR § 0.91(b). This includes the authority to grant or deny petitions for declaratory ruling.[14] It follows that the Bureau also has authority to dismiss a petition for declaratory ruling that raises no issue of uncertainty and that is unnecessary, frivolous, and an abuse of the Commission's processes.[15]

APCC urges the Bureau to take immediate action dismissing this petition. Even after two years of experience under the rule, many SBRs continue to violate the rule and to try to avoid their payment responsibilities. Locus' petition appears to be nothing more than an attempt to delay incurring charges for payments that are clearly required under the rule. The Bureau must make clear to the reseller industry that such delaying tactics will not be tolerated.

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[14] *See, e.g.*, *Thrifty Call, Inc.*, Declaratory Ruling, 19 FCC Rcd 22240, 22253 ¶ 28 (CCB 2004) (Bureau denies petition for declaratory ruling as to the interpretation of a carrier's access tariff); *GVNW Inc./Management*, Order, 11 FCC Rcd 13915 (CCB 1996) (Bureau denies petition for declaratory ruling as to interpretation of Commission's universal service rules).

[15] *Cf. Petition for Declaratory Ruling Regarding AT&T's Network Interconnection Policy*, Order, 13 FCC Rcd 12082 (CCB 1998) (dismissing petition for declaratory ruling that certain carrier practices violate the Act, on the grounds that the matter is better resolved in a pending formal complaint); *Petition of Sprint for Declaratory Ruling to Declare Unlawful Certain RFP Practices by Ameritech*, Order, 13 FCC Rcd 20275 (Policy and Program Planning Division, CCB 1998) (dismissing petitions as moot).

CONCLUSION

For the foregoing reasons, Locus' petition for declaratory ruling must be summarily dismissed and APCC requests that this Motion to Dismiss be expeditiously granted..

Dated: December 14, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2006, a copy of the foregoing Motion to Dismiss *Petition of Locus Telecommunications*, Inc. for a Declaratory Ruling was delivered via first-class mail, postage pre-paid to the following:

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