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May 12, 2009

BY HAND

Marlene H. Dortch, Secretary
Federal Communications Commission
c/o Natek, Inc.
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Washington, DC 20002

FILED/ACCEPTED
MAY 12 2009
Federal Communications Commission
Office of the Secretary

To: Chief, Wireline Competition Bureau

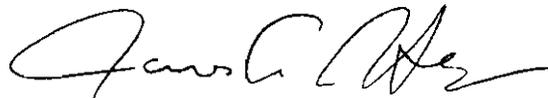
Re: Petition for Rulemaking of Dollar Phone Corp.
With Regard To Dial Around Compensation

Dear Ms. Dortch:

Transmitted herewith on behalf of Dollar Phone Corp. are the original and four copies of a Petition for Rulemaking With Regard To Dial Around Compensation. Also enclosed is an additional copy that we request be receipt-stamped and returned to the undersigned.

Should additional information be necessary in connection with this matter, kindly communicate directly with the undersigned.

Respectfully submitted,



James A. Stenger

Encls.

JAS:khh

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WCB 09-20



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

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In the Matter Of:)
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Petition For Rulemaking)
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) WCB Docket No. _____
Of)
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Dollar Phone Corp.)
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With Regard To Dial Around Compensation)
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To: Chief, Wireline Competition Bureau

**Petition For Rulemaking Of Dollar Phone Corporation
With Regard To Dial Around Compensation**

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Dated: May 12, 2009

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**Before the
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To: Chief, Wireline Competition Bureau

**Petition For Rulemaking of Dollar Phone Corporation
With Regard To Dial Around Compensation**

Dollar Phone Corporation ("Petitioner"), through its undersigned counsel, hereby submits this Petition for Rulemaking through counsel and pursuant to Section 1.401 of the Commission's Rules¹ and requests that the Commission amend the dial-around compensation ("DAC") rules in Section 64.1300 - 1340 of the Commission's rules² and in support hereof respectfully shows as follows.

I. Introduction

The Commission continues to process a significant number of complaints under the DAC rules. For example, the Commission indicated that the Commission received 71 complaints in 2006 and 38 complaints in 2007.³ A disproportionate number of the complaints are filed by

¹ 47 C.F.R. §1.1401.

² 47 C.F.R. §1.1300-1340.

³ Letter from Chairman Kevin J. Martin to The Honorable John D. Dingell in response to Questions for the Record from the December 5, 2007, Subcommittee on Telecommunications and the Internet hearing.

APCC Services, Inc. ("APCC"). APCC takes advantage of the lack of clarity in the existing DAC rules to file claims that are speculative in nature and do not serve the public interest.

Specifically, APCC accepts payments from calling card companies on a quarterly basis without objection or protest. These payments generally are accompanied by the required call data and are made through payment processing systems that have been audited. On the last day allowed by the Commission's rules for filing DAC claims, which may be as long as two years after a quarter has closed, APCC then files speculative claims for DAC. The claims filed by APCC are owned by APCC and are not owned by a payphone service provider ("PSP").⁴ The result is that the Commission's current rules allow speculative DAC claims to be filed by a non-PSP and funds obtained in Commission proceedings to be diverted from both calling card companies and PSPs.

In order to remedy this situation, the Commission should revise the DAC rules to ensure that the rules continue to serve the public interest. The Commission should shorten the timeframe for filing complaints to 45 days after quarterly call data is posted. Allowing a payee to accept quarterly payments without objection or protest for two years and then file a complaint does not serve the public interest. The Commission also should clarify that an audit is a safe harbor from a complaint. Where a completing carrier has been audited, the rules should bar a complaint based on mere speculation.

⁴ Motion for Leave to Amend Consolidated Amended Complaint, filed Jan. 10, 2008, in *APCC Services, Inc. v. AT&T Corp.*, Civil Action No. 1:99 CV 696 (D.D.C.) ("AT&T") Declaration of Ruth Jaeger at para. 2. See also Memorandum of Law at page 1 ("These allegations restate that the *aggregator plaintiffs* are the owners of the assigned claims and amend the allegations to further include that the assignments are irrevocable." (emphasis supplied); Motion of Intervenor APCC Services, Inc. for leave to file a statement in response to a question asked by the Court during oral argument, filed Sept. 17, 2008, in *Network IP, LLC v. FCC*, 2008 WL 4821709 (Nov. 7, 2008) ("APCC Services never represented - to the FCC, to this Court, or to any court involved in the AT&T and Sprint cases [*i.e.*, the United States Supreme Court] - that APCC Services had an obligation to remit all proceeds to payphone service providers ("PSPs"). It is only the carrier-defendants in the AT&T and Sprint cases who have argued that APCC Services was obligated to remit all proceeds to PSPs.")

The Commission also should revise and clarify the rules regarding call coding. The DAC rules are based upon the North American Numbering Plan Administration ("NANPA") call coding system. The call coding system generally is working for payphone calls that go from a local exchange carrier ("LEC") to an inter-exchange carrier ("IXC"). These are calls with codes 27, 70 and 29. What is not working is the coding system for payphone calls that go from a LEC to a competitive local exchange carrier ("CLEC"). Such "POTS-translated calls" should be designated with code 25 but often are not. Completing carriers are not liable for un-coded calls under Commission rules and case law that have been in effect for ten years or more. Revised rules regarding call coding should be adopted and applied prospectively.

II. The Quarterly Data And Audit Rules Should Be Revised

The DAC statute calls for PSPs to be "fairly compensated" for payphone calls.⁵ Timeliness is a necessary component of fairness. Complaint procedures do not comply with the requirement of "fair compensation" where the procedures require a carrier to expend time and resources to prove the negative, that calls are not from payphones, as long as two years after a carrier has complied with the call data posting and audit rules,

Commission rules require completing carriers to post call data along with their quarterly DAC payments.⁶ Once the call data is posted, PSPs should be required to either accept or reject the DAC payment within a reasonable time, such as 45 days. In the event that a PSP does not file a written objection to the quarterly call data within a reasonable time, the PSP should be deemed to have accepted the payment and call data for that quarter. An objection to the quarterly call data should be required to be based upon concrete evidence, not mere speculation.

⁵ 47 U.S.C. §276(b)(1)(a); 47 C.F.R. §64.708(b).

⁶ 47 C.F.R. § 64.1310(a)(4).

That an audit should provide a safe harbor would appear to be non-controversial. Yet numerous complaints are filed notwithstanding the time and effort expended by the defendants in complying with the audit rule. The Commission should revise the audit rule to make the rule applicable both to completing carriers and to PSPs who file complaints.⁷ Under an audit rule, the audited party should have a reasonable expectation that once audited, the party will not be subject to complaints based upon mere speculation. Once an audit is done, a complaint should be barred unless the complainant offers concrete evidence that the audit is incorrect.

Revisions of the quarterly call data and audit rules would result in the prompt resolution of DAC claims, rather than allowing such claims to be filed two years after the fact. Calls from traditional payphones, smart payphones and inmate payphones that go to inter-exchange carriers generally are identified with codes 27, 70 and 29.⁸ The posting of quarterly call data on these calls and the audit of the call processing systems support the imposition of a 45 day time limit on complaints with regard to these calls.

The lack of a timely process for resolving claims for DAC on calls with codes 27, 70 and 29 is contrary to the public interest because it diverts resources from competitive service offerings to the litigation of stale claims. The vast majority of calls are *not* made from payphones.⁹ The cost of producing and reviewing call data, most of which does *not* relate to payphone calls, unnecessarily diverts resources in the private sector and at the Commission.

⁷ 47 C.F.R. §64.1320(a).

⁸ Under the NANPA code system, code 27 is the code used to identify a traditional payphone, typically owned by a LEC, that uses a special payphone line that provides coin supervision at the LEC central office and for which Code 27 is "hard-coded" into the LEC switch. Code 70 is used for calls from newer payphones that contain software that handles coin supervision within the phone and do not need a special payphone line. Code 29 identifies calls from inmate payphones.

⁹ The payphone industry is widely reported to be in decline. *See, e.g.*, "Once ubiquitous part of Americana becoming more and more scarce," Mitch Sneed, StarExponent.com, July 19, 2008. The decline of the payphone industry is result of the dramatic increase in the penetration of mobile phones, and is not due to any act or omission of completing carriers.

III. The Call Coding Rules Should Be Revised

The Commission is faced with a number of pending complaints filed by APCC that seek to hold calling card companies liable for un-coded calls. The calls at issue are those handled by CLECs rather than LECs and are referred to by APCC as "POTS-translated calls." Under the NANPA numbering system these calls are supposed to be identified with code 25. For one reason or another, the NANPA system has not been working with respect to such calls and the calls are received by calling card companies as un-coded calls. As the Commission's rules are based on the NANPA call coding system, the Commission should conduct a rulemaking to revise the rules with regard to calls handled by competitive carriers.

The Act authorizes the Commission to "prescribe regulations that establish a per call compensation plan."¹⁰ Thus, the Act grants the Commission discretion as to how to create and implement a plan for DAC. The Commission chose to require the transmission of coding digits under the NANPA system that would enable completing carriers to identify calls that originate from payphones. The *1998 Coding Digit Waiver* makes it abundantly clear that the Commission chose coding digits as the mechanism to implement the DAC system.¹¹

The Commission's reliance on the NANPA codes as the basis for the DAC system is entirely reasonable as the NANPA codes are the recognized basis for call numbering. The Commission granted a limited waiver of the coding requirement for a limited time period.¹² During that limited waiver period the Commission imposed alternative call tracking and DAC

¹⁰ 47 U.S.C. §276(b)(1)(a).

¹¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; TDS Telecommunications Corporation, Petition for Waiver of Coding Digit Requirement*, 13 FCC Rcd 4998 (1998) ("*1998 Coding Digit Waiver*"), paras. 11-13 and 86-98.

¹² *TDS Telecommunications Corporation, Petition for Waiver of Coding Digit Requirement*, 13 FCC Rcd 4998 (1998) ("*1998 Coding Digit Waiver*"), paras. 11-13 and 86-98

payment conditions.¹³ The waiver expired and so did the alternative call tracking and DAC payment conditions.

The fact that a waiver was granted underscores that payphone calls must be coded in order to be eligible for DAC. A waiver is needed when compliance with a rule or order cannot be accomplished. Had the Commission not required coding of the calls, the waiver requests would have been unnecessary. Likewise, the alternative payment conditions were ordered only during the time period when carriers could not meet the call coding requirements.

The obligation of completing carriers to establish a call tracking system must be read in conjunction with the *1998 Coding Digit Waiver* and the other orders discussed therein. In those orders the Commission requires LECs and PSPs to transmit coding digits that identify calls that originate from payphones. The Commission's rules provide that completing carriers must track payphone coded calls through to termination to determine whether the calls are completed (since PSPs are only entitled to be paid for completed calls).¹⁴ The obligation to track a call through to termination is not triggered unless the completing carrier first receives a coding digit indicating that the call originated from a payphone.

The *1998 Coding Digit Waiver* holds that the carriers are obligated to pay DAC during the waiver period, even though payors were not receiving the coding digits, because an interim compensation mechanism was in place that was not based upon per call compensation. During the interim period, the carriers were authorized to recover the cost of DAC by imposing

¹³ *1998 Coding Digit Waiver* at para. 91; see also, *AT&T Request for Limited Waiver of the Per-call Compensation Obligation*, 13 FCC Rcd 1089 (April 3, 1998).

¹⁴ 47 C.F.R. §64.1310(a)(1).

surcharges on their customers. Only under those limited circumstances and for that limited time period, did the Commission require DAC to be paid for calls that did not have coding digits.¹⁵

Ten years have passed since the limited, temporary waiver period and the Commission clearly has assumed that the NANPA coding digit system is working. Given that a number of complaints pending before the Commission indicate that code 25 is not working for calls handled by competitive carriers, the fair and expeditious course is for the Commission to conduct a rulemaking to address the issue.

IV. Revised Rules For Un-Coded Calls Should Only Be Applied Prospectively

The DAC system is based upon the NANPA coding digits and completing carriers rely upon the Commission's rules and decisions in handling DAC processing. The NANPA call coding system generally is working for payphone calls handled by LECs with codes 27, 70 and 29, but is not working for payphone calls handled by competitive carriers that may not be coded with required code 25. The problem of uncoded calls should be addressed in a rulemaking as the existing rules and decisions are based on the NANPA call codes. It would be unfair and unjust to create new law in an adjudication and impose retroactive liability that would harm the competitive market for telecommunications services.

Retroactive liability poses a significant risk of harm to the public interest because the quarterly call data and audit rules do not require timely objections and allow DAC claims to be filed two years after a quarter has closed, as shown above. DAC complaints have resulted in the creation of new law without taking public comment and the new law has been applied

¹⁵ *1998 Coding Digit Waiver* at para. 91. APCC admits that the DAC compensation system is based on the NANPA code system, "In the 1996 *Payphone Orders*, the Commission required local exchange carriers ("LECs") to implement a system for transmitting payphone-specific coding digits to interexchange carriers ("IXCs") along with the payphone ANI with each call originating from each payphone line." APCC Conditional Petition for Rulemaking filed November 24, 2008, at 4, note 9. Such circuitous and protracted litigation is not an appropriate means of resolving the issue of liability for un-coded calls and is inconsistent with the statutory requirement of "fair compensation." The APCC Petition was withdrawn as a result of a private settlement but raised public policy issues that should not be left unresolved.

retroactively.¹⁶ The Commission's decisions have imposed retroactive liability on calling card companies that has driven them out of business.¹⁷ This does not serve the public interest as it undermines rather than promotes a competitive market for telecommunications services. Rather, the Commission should take up the issue of liability for un-coded calls in a rulemaking, hear input from the industry and adopt new rules of prospective application.

The Commission should not impose retroactive liability for un-coded calls as doing so would violate both the bar on retroactive rulemaking and the statutory requirement that DAC must be "fair compensation." The Supreme Court held in *Bowen* that under the Administrative Procedures Act agencies may adopt rules only "of future effect."¹⁸ The Commission has taken pains to ensure that its actions comply with the *Bowen* standard. The Commission has held that, "[b]y definition, a rule has legal consequences only for the future."¹⁹ The Commission also has recognized that, "[i]mpermissible retroactivity involves, by definition, the application of a new rule to past occurrences."²⁰

¹⁶ E.g., *APCC Services, Inc. v. Radiant Telecom, Inc.*, 23 FCC Rcd 8962 (May 20, 2008)(hereafter "*Radiant*"). Although *Radiant* was chosen as the lead case and other cases were stayed pending a decision in *Radiant*, nevertheless public comment was not invited.

¹⁷ During the *Radiant* case the defendant calling card companies were liquidated and their counsel withdrew. *Radiant* at para. 11 and note 35.

¹⁸ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216, 109 S.Ct. 468 (1988). While *Bowen* stands as an absolute bar to retroactive rulemaking, the Court distinguished adjudication, noting that administrative agencies, like courts, have the right to adjudicate disputes arising from past conduct. *Bowen*, 488 U.S. at 216. (The distinction between rulemaking and adjudication is "the entire dichotomy upon which the most significant portions of the APA are based.") However, *Bowen* further stands for the proposition that adjudication involves the application of rules to past conduct *where those rules were in effect at the time the conduct occurred*. In *Bowen* the Supreme Court rejected the position of the Secretary of Health and Human Services that, after promulgating a new rule, the Secretary could apply the rule retroactively under his authority to adjudicate adjustments to medicare reimbursements. *Bowen*, 488 U.S. at 220.

¹⁹ E.g., *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, 23 CR 410, 15 FCC Rcd 25020 (Dec. 13, 2000), para. 37; *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1998* (Apr. 1, 2003), paras. 10-11.

²⁰ E.g., *In the Matter of Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures*, 19 FCC Rcd 2551 (Feb. 4, 2004), para. 22; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 72 RR 2d 649, 8 FCC Rcd 3359 (April 30, 1993), paras. 118-121.

Retroactive imposition of liability for un-coded calls would be manifestly unjust and unfair as it would create new law contrary to the *1998 Coding Digits Waiver* and other cases upon which completing carriers have relied. Even where the Commission decides to proceed by adjudication, including a declaratory ruling, the decision may not be applied retroactively where the decision changes rather than applies the law or where retroactive application of the decision would be unjust because a party reasonably has relied upon contrary Commission pronouncements.²¹

The Commission retains discretion as to whether to address an issue by rulemaking or by adjudication.²² Nevertheless, the Supreme Court also held that an administrative agency should be more circumspect than a court in making new law through adjudication because an administrative agency, unlike a court, has the option of using rulemaking to make new law.²³ Where the Commission chooses to proceed by rulemaking, the rules adopted may only be applied prospectively.²⁴

²¹ The Commission declined to apply retroactively its declaratory ruling in *AT&T's Phone-to-Phone IP Telephony* noting, "The D.C. Circuit has explained that whether to permit retroactive application of an agency decision 'boil[s] down to . . . a question grounded in notions of equity and fairness.' One relevant factor is whether there has been 'detrimental reliance' on prior pronouncements by the Commission." *Id.* at para. 22; see also, *Communications Vending v. Citizens Communications*, 17 FCC Rcd 24201 (Nov. 19, 2002), para. 33; *In re Gaco Communications*, 94 FCC2d 761 (June 21, 1983), para. 24. In *Vonage* the D.C. Circuit recently held that the Commission could not suspend the carrier's carrier rule, even temporarily, as doing so would result in duplicative USF contributions. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007). By contrast, the D.C. Circuit's decision to uphold retroactive application of charges in *AT&T Calling Card Services* was based upon a finding that, "AT&T had no reasonable basis to expect to avoid these obligations merely by adding an unsolicited advertising message to its prepaid calling card service. *AT&T Calling Card Services* at para. 32, affirmed, *AT&T v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

²² *Qwest v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007)(hereinafter "*Qwest*").

²³ *SEC v. Chenery*, 332 U.S. 194, 202, 67 S. Ct. 1575 (1947). ("Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct....")

²⁴ *Qwest* at 539 ("[I]n a rulemaking context . . . the retroactivity issue is now moot because of *Bowen v. Georgetown University Hospital*.")

V. Conclusion

Wherefore, for the foregoing reasons, Petitioner respectfully requests that the Commission commence a rulemaking proceeding to revise the dial around compensation rules as set forth herein.

Respectfully submitted,

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