

Albert H. Kramer, Attorney, PLLC

1825 Eye Street, NW, Suite 600

Washington, DC 20006-5403

(202) 207-3649

December 22, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

EX PARTE

Re: WC Docket No. 11-141; Petition of GCB Communications, Inc., d/b/a Pacific Communications and Lake Country Communications, Inc., for Declaratory Ruling

Dear Ms. Dortch:

The attached outline of issues is submitted for inclusion in the record of the above referenced proceeding. The outline is an elaboration of points made in the ex parte presentation of December 19, 2011.

Please feel free to call if you have any questions.

Respectfully submitted,



Albert H. Kramer

cc: By Electronic Mail
Mr. William Dever
Ms. Denise Coca
Ms. Michelle Berlove
Mr. Joel Marcus

**Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141**

Albert H. Kramer, Attorney, PLLC
1825 I Street, NW, Suite 600
Washington, DC 20006
(202) 207-3649
Robert F. Aldrich
2946 Northhampton Street, NW
Washington, DC 20015
(202) 368-7893
Counsel for APCC

Claudio E. Iannitelli
Glenn B. Hotchkiss
Cheifetz Iannitelli Marcolini
111 West Monroe Street, 17th Floor
Phoenix, Arizona 83003
(602) 952-6000
*Counsel for GCB Communications, Inc., d/b/a
Pacific Communications, and Lake Country
Communications, Inc.*

December 22, 2011

TABLE OF CONTENTS

I.	THE FCC’S PAYPHONE COMPENSATION RULES PLACE THE TRACKING AND PAYMENT BURDENS SOLELY ON THE COMPLETING CARRIER	1
II.	A REASONABLE CONSTRUCTION OF THE “TRANSMIT” LANGUAGE IN THE PAYPHONE ORDERS IS CONSISTENT WITH THE PLAIN MEANING OF THE FCC REGULATIONS AND THE STATUTE	3
III.	THE COMMISSION’S ORDERS MAKE CLEAR THAT IT IS THE COMPLETING CARRIER’S RESPONSIBILITY TO “ENSURE THAT THERE ARE NO PROBLEMS IN PROVIDING AND RECEIVING THE FLEX ANI DIGITS FOR A PARTICULAR IXC OR LEC.”	6
IV.	IT IS FAIR TO REQUIRE COMPLETING CARRIERS TO BEAR THE BURDEN OF ADDRESSING FLEX ANI PROBLEMS.....	9
V.	REQUIRING PSPS TO PROVE THAT THE LEC TRANSMITTED PAYPHONE-SPECIFIC CODING DIGITS IS INCONSISTENT WITH THE COMMISSION’S DAC SCHEME.....	13

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

I. THE FCC'S PAYPHONE COMPENSATION RULES PLACE THE TRACKING AND PAYMENT BURDENS SOLELY ON THE COMPLETING CARRIER

- A. The fundamental issue in this case is whether if a payphone service provider ("PSP") has subscribed to a payphone line equipped with Flex ANI, the Completing Carrier is obligated to pay the PSP for calls from that payphone even though for some other reason there is a failure in the actual transmission of payphone-specific coding digits and some completed calls are not tracked by the Completing Carrier.
- B. This issue is straight-forwardly resolved by simply reading the text of the statute and the Commission's own codified regulations.
- C. The Commission's statutory mandate is to ensure that PSPs are fairly compensated for "each and every" interstate and intrastate call. 47 U.S.C. § 276.
- D. To carry out this mandate for 800-number and access code (or "dial-around") calls, the Commission imposed an unconditional payment obligation on "the Completing Carrier that completes a coinless access code or subscriber toll-free payphone call". 47 CFR § 64.1300(b), (d).
1. Without qualification, the rules state that the Completing Carrier must compensate the payphone service provider for each completed dial-around call.
 2. The Completing Carrier's Section 64.1300 obligation to compensate the PSP for every dial-around call is not only absolute, but is also independent of whether the Completing Carrier has succeeded in tracking all its completed dial-around calls – a matter that is addressed in a separate section of the rules.
 3. Therefore, if something goes wrong with the call tracking function, such as the absence or disappearance of payphone-specific coding digits, Completing Carriers are in no way relieved of their payment obligation under Section 64.1300 of the Commission's rules.

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

- E. The regulations independently impose on Completing Carriers - not PSPs – an obligation to establish a call-tracking system that accurately tracks all the dial-around calls that they complete. 47 CFR § 64.1310(a)(1).¹
1. The Completing Carrier is required to track all dial-around calls, again without qualification. It is even required to submit a sworn statement that its payment is accurate and “is based on 100% of all completed calls that originate from the payphone service provider’s payphones.” 47 CFR § 64.1310(a)(3).
 2. By contrast with this unconditional tracking obligation, PSPs are not given *any* call tracking responsibilities under the regulations.²
 3. Thus, if something goes wrong with the call tracking function, such as the absence or disappearance of payphone-specific coding digits, it is the Completing Carrier, not the PSP, that has failed to meet the obligation to “accurately track... coinless access code or subscriber toll-free calls to completion.” 47 CFR § 64.1310(a)(1).
 4. Therefore, even if Section 64.1300 did not impose an independent, absolute payment obligation on the Completing Carrier, a Completing Carrier who fails to ensure that it receives payphone-specific coding digits from the local exchange carrier (“LEC”) would still be independently obligated to make the PSP whole for the Completing Carrier’s failure to fulfill its tracking obligation under Section 64.1310(a) of the rules.

¹ This is an unusual arrangement – normally it is the party providing the service that is responsible for metering usage of the service. But the Commission, for good reasons, chose to deviate from the norm, recognizing that Completing Carriers were much better situated than PSPs to track compensable calls. As a result of the Commission’s very deliberate policy decision, the obligation to track calls falls on the Completing Carrier.

² As discussed in Section II. below, some language in *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 20541(1996) (“*September 20, 1996 First Report and Order*”) and Order on Reconsideration, 11 FCC Rcd 21233 (1996), and (“*November 8, 1996 First Payphone Reconsideration Order*”) (collectively “*Payphone Orders*”), appeared to require PSPs to somehow, by themselves, “transmit” coding digits to interexchange carriers (“IXCs”). This language was clarified by the Bureau in *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998 (CCB 1998) (“*March 9, 1998 Coding Digit Waiver Order*”). As clarified, PSPs’ obligations regarding call tracking do not extend beyond subscribing to payphone lines, so that LECs are able to respond appropriately to IXCs’ requests for the Flex ANI coding digits service that LECs are required to offer to IXCs to facilitate IXCs’ performance of their tracking obligations.

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

- F. When payphone-specific coding digits are absent, it is quite possible that the root cause may lie in mistakes made by a LEC or an Intermediate Carrier, rather than by the Completing Carrier itself. If so, then the Completing Carrier may have a right to recover any damages³ from one of the other carriers involved. Any mistakes by other carriers, however, do not relieve the Completing Carrier of its unconditional obligation to pay *the PSP* for the call.⁴ Nor does it relieve the Completing Carrier of its call-tracking obligation.
- G. Therefore, as between the Completing Carrier and the PSP, *if* somebody is to be left “holding the bag” as a result of a Flex ANI error, the Commission’s regulations require that that somebody must be the Completing Carrier – not the PSP.
- H. As shown below, this straightforward application of the plain meaning of the Commission’s rules is (1) consistent with the Commission’s *Payphone Orders* and subsequent waiver orders, (2) is confirmed by the Bureau’s specific rulings in the *March 9, 1998 Coding Digit Waiver Order*, and (3) is the only outcome that is fair and that does justice to the underlying policies.

II. A REASONABLE CONSTRUCTION OF THE “TRANSMIT” LANGUAGE IN THE PAYPHONE ORDERS IS CONSISTENT WITH THE PLAIN MEANING OF THE FCC REGULATIONS AND THE STATUTE

³ Of course, an IXC would not necessarily incur any cognizable damages when it is merely asked to pay the same amount of compensation for dial-around calls transmitted *without* payphone-specific coding digits as it would have paid for the same calls had they been transmitted *with* the correct coding digits. To collect damages, a Completing Carrier might have to show that it incurred costs it would otherwise not have incurred and/or it failed to recover revenue, such as a surcharge charged to the caller, that it would otherwise have recovered had the LEC or carrier failing to deliver the correct coding digits in fact delivered the correct coding digits.

⁴ As discussed in Section IV below, contrary to U.S. South’s argument, it is not unreasonable to in this sense impose on Completing Carriers “strict liability” to pay for those calls for which they are required to pay by regulation. U.S. South’s lament that it “has done nothing” wrong, even if accurate, is beside the point. Neither has the PSP “done anything wrong” but the PSP is required to allow from its payphone the call whose primary economic benefit accrues to U.S. South. See Sections IV below and ¶G in the text following this note.

Payphone Compensation/Flex ANI Declaratory Ruling WCB Dkt. No. 11-141

This issue was the subject of extensive briefings by the parties.⁵ In the end, it will be up to the Commission to interpret this language, as it is language of the Commission's own orders that is at issue. Here we summarize the PSPs' position.

- A. The Commission's 1996 orders stating that "payphones will be required to transmit payphone-specific coding digits"⁶ must be interpreted in context.
1. The Commission was *not* trying to set conditions for payment for each dial-around call. It had already been determined that PSPs were entitled to compensation for "each and every" dial-around call.
 2. Rather, the Commission was trying to define which payphones are "eligible" for per-call compensation in the first place. *Id.* In the payphone rulemaking, the issue had arisen whether any changes should be made in the criteria for determining whether a given payphone is eligible to be paid compensation. It is clear from the context that the Commission was trying to determine eligibility for compensation on a phone-by-phone basis, not a call-by-call basis. The language is reasonably interpreted as saying that, in order to be eligible for compensation, a payphone must be set up to transmit payphone-specific digits identifying calls from that payphone as compensable. Whether the digits are actually transmitted on every single call is not relevant to whether the *payphone* is eligible.
 3. Nothing in the *Payphone Orders* supports the proposition that the Commission determined that compensation should be withheld if coding digits were accidentally omitted from certain calls originating from otherwise eligible payphones.

⁵ See, e.g., Petition at 17-18, 24-27, 31-38.

⁶ *September 20, 1996 First Report and Order*, 11 FCC Rcd at 20575-76, ¶66. See also *November 8, 1996 First Payphone Reconsideration Order*, 11 FCC Rcd at 21265-66, ¶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. Each payphone must transmit coding digits that specifically identify it as a payphone, and not merely as a restricted line. We also clarify, pursuant to a request by MCI, that LECs must make available to PSPs, on a tariffed basis, such coding digits as a part of the ANI for each payphone.")(emphasis added).

Payphone Compensation/Flex ANI Declaratory Ruling WCB Dkt. No. 11-141

- B. Likewise, the purpose of the Bureau's *March 9, 1998 Coding Digit Waiver Order* was to determine when it was appropriate to transition from a regime where only those carriers who were able to do would be paying per call compensation to a regime where all carriers were required to migrate to a per-call compensation system in which individual payments could be made for each call.
1. Due to a conflict between LECs and IXC's over whether existing LEC switch capabilities – using a limited set of coding digits - were adequate to identify payphone calls for call-tracking purposes, the date set for the commencement of *per-call* compensation payments had had to be postponed.
 2. Thus, the Bureau's characterization of Flex ANI as a "prerequisite" for per-call compensation simply meant that IXC's would be required to actually begin tracking payphone calls and paying *per call* compensation no later than when Flex ANI was available from an end office.
- C. Further, the *March 9, 1998 Coding Digit Waiver Order* clarified the "transmit"⁷ language by spelling out the functions that each entity involved is responsible for in the transmission and reception of coding digits.
1. As to PSPs, the Bureau imposed on PSPs only one specific obligation regarding Flex ANI - to subscribe to payphone lines in order to make it possible for LECs to transmit the specific coding digits that Completing Carriers might use if the Completing Carrier so chose to identify payphone calls. *March 9, 1998 Coding Digit Waiver Order*, 13 FCC Rcd 5017-18,

⁷ All parties and the Court of Appeals now agree that the issue is whether PSPs are required to ensure *that the LECs* transmit the payphone-specific coding digits. Initially, the language in some of the Commission's orders created some confusion as to whether the payphones themselves had to transmit the coding digits. For example, the *March 9, 1998 Coding Digit Waiver Order* states that "LECs transmit payphone-specific coding digits to PSPs, and . . . PSPs transmit those digits from their payphones to IXC's." *March 1998 Order* ¶ 13. There is now agreement that ANIs and their accompanying codes originate in the LEC's end office and that the PSP plays no part whatsoever in the actual transmission of coding digits and has no way to determine, on its own, which digits are being transmitted. *See, e.g. GCB Comms v. U.S. South Comms.*, No. 09-17646. Slip Op. at 5592 (9th Cir. April 29, 2011) (hereafter "*GCB*") ("the Flex-ANI codes are not directly transmitted by the phones themselves . . . the LEC will attach the digits to the call . . .") It is unclear to what extent the Commission's language about payphones transmitting digits may have led the Court of Appeals to conclude that even though in fact the payphones do not transmit digits, the PSPs should be held responsible for their transmission. As shown in Section III, however, the Bureau ruled that the actual transmission of coding digits is a matter that must be addressed between the LECs and their customers, the IXC's.

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

¶33.⁸ There is no suggestion in the orders that, having ensured that their payphones are subscribed to payphone lines, PSPs are required to take any further steps to ensure that payphone digits are actually transmitted to and received by the IXCs on every dial-around call. Indeed as discussed below, the Commission has stated that PSPs are not even required to request Flex-ANI or coding digits on the payphone lines so long as the PSP subscribes to a payphone line.

2. With respect to LECs, the *March 9, 1998 Coding Digit Waiver Order* set forth at length the requirements for the LECs to implement and provide Flex-ANI and payphone-specific coding digits. *Id.* 13 FCC Rcd 5012, ¶¶23, 32-33. Tariffing and timing requirements were also prescribed. *Id.* 5018-22, ¶¶ 34-43.
3. The responsibilities imposed on Completing Carriers are discussed in Section III below.

III. THE COMMISSION'S ORDERS MAKE CLEAR THAT IT IS THE COMPLETING CARRIER'S RESPONSIBILITY TO "ENSURE THAT THERE ARE NO PROBLEMS IN PROVIDING AND RECEIVING THE FLEX ANI DIGITS FOR A PARTICULAR IXC OR LEC."

⁸ Until then, some PSPs had preferred to subscribe to ordinary business exchange service offered by LECs, rather than payphone line service. The Bureau determined that LECs would be unable to recognize that such lines had payphones attached and that LECs would transmit calls from these lines with generic ANI coding digits rather than the payphone-specific coding digits.

Payphone Compensation/Flex ANI Declaratory Ruling WCB Dkt. No. 11-141

- A. The *March 9, 1998 Coding Digit Waiver Order* clearly states that IXCs – i.e., Completing Carriers⁹ - are responsible for ensuring that they actually receive Flex ANI digits from LECs. 13 FCC Rcd 5020, ¶37. The Commission has made it very explicit that it is the Completing Carriers’ responsibility, not the PSPs’, to ensure that Flex ANI digits are actually transmitted by LECs:
1. First, the Bureau defined Flex ANI as an exchange access service that LECs are required to offer to IXCs - not PSPs – in their access tariffs. *March 9, 1998 Coding Digit Waiver Order*, 13 FCC Rcd 5019-20, ¶¶ 35,-37. Thus, it is very clear that the IXCs, not the PSPs, *are the LECs’ customers* for purposes of the transmission of coding digits.¹⁰
 2. Second, the Bureau recognized that some IXCs *did not want* to utilize Flex ANI for call-tracking purposes.¹¹ The Bureau made it very clear that IXCs could use whatever call identification method they wanted; however, the Bureau also made clear that *IXCs are responsible for making sure that their selected call identification method – be it Flex ANI or some other method – actually works. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 10893, 10904, ¶ 19 (1998) (*April 3, 1998 Per Phone Waiver Order*) (“that an IXC may decide not to take FLEX ANI from the LEC for that end office does not relieve the IXC of paying per-call compensation for that payphone once payphone-specific coding digits are available”).

⁹ The term “Completing Carrier” was not formally incorporated into the Commission’s regulations until 2003. See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975 (2003) (“*September 30, 2003 Revision Order*”). Although the Commission has over the years shifted payment responsibility between carriers, the Commission’s regulations promulgated pursuant to Section 276 have from virtually the beginning embraced the concept captured in the current definition of “Completing Carrier” as 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.” 47 C.F.R. § 64.1300(a).

¹⁰ Indeed, it was certain IXCs – not PSPs – who demanded that Flex ANI be implemented in the first place. Since it was IXCs who insisted on Flex ANI being available, it was only logical for the Commission to place the burden on those IXCs who wanted it to ensure that they actually received it. In this regard, AT&T’s contention that PSPs are the customers of the LECs but IXCs are not, AT&T Reply Comments at 2,5, is meritless. See also Section IV(H)(6) and accompanying note 15, *infra*.

¹¹ See, e.g., *March 9 1998 Coding Digit Waiver Order*, 13 FCC Rcd 5015, ¶ 30 (“some IXCs have vacillated on the method they prefer for the provision of payphone-specific coding digits to their networks”); 13 FCC Rcd 5020, ¶36 (“LECs do not have to provide this [Flex ANI implementation status] information to an IXC that indicates that it does not require this information to pay per-call compensation”); 13 FCC Rcd 5032. ¶ 65, n. 183 (citing a letter from a coalition of major LECs as indicating that “MCI has . . . not requested FLEX ANI service”).

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

3. Third, the Bureau made clear that it *is up to the Completing Carrier*, not the PSP, *to take the initiative in ordering the Flex ANI service from the LEC* (either directly or through its Intermediate Carrier) if it decides to utilize Flex ANI coding digits for call tracking. *March 9 1998 Coding Digit Waiver Order*, 13 FCC Rcd 5020, ¶ 37 (“IXCs must request . . . this service PSPs are not required to request the LEC payphone-specific coding digits transmission service to IXCs”).
 4. Finally, the Bureau made it extremely clear that, if a Completing Carrier wants to rely on Flex ANI, *it is up to the Completing Carrier, not the PSP, to make sure that Flex ANI is actually transmitted to it by the LEC* (either directly or through an Intermediate Carrier). “IXCs must 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*” *Id.* (emphasis added). The Commission could not have made it clearer that part of the Completing Carrier’s tracking obligation is to make sure that Flex ANI is actually transmitted by the LEC.
- B. Given that, as shown above, the Completing Carrier is responsible for making sure that “there are no problems” in the actual transmission of Flex ANI with calls originating from an eligible payphone, it follows that, if Flex ANI is *not* actually transmitted, the Completing Carrier still owes compensation for calls originating from the phone.
1. Once the PSP has done its part by subscribing a particular payphone to a line equipped with Flex ANI, it has done its part in the “transmission” of Flex ANI, and has rendered the payphone “eligible” to be paid compensation on every dial-around call.
 2. If there is a lapse in Flex ANI transmission, the Completing Carrier is not relieved of its obligation to pay per-call compensation for each eligible payphone. The Completing Carrier owes the PSP payments for those calls that it failed to track due to the absence of Flex ANI digits.

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

IV. IT IS FAIR TO REQUIRE COMPLETING CARRIERS TO BEAR THE BURDEN OF ADDRESSING FLEX ANI PROBLEMS

- A. While U.S. South complains that requiring a Completing Carrier to pay for all the calls it receives, despite Flex ANI failures, amounts to “strict liability,” it fails to explain why “strict liability” is inappropriate when the issue is whether to require payment of money owed for the use of another’s facilities.¹² But in any event, “strict liability” is totally fair in this case, because Completing Carriers are well situated to prevent, detect, and fix Flex ANI failures, while PSPs are utterly unequipped to do so.
- B. The Commission has given Completing Carriers discretion to utilize the call tracking system that works best for them. Some Completing Carrier choose not to rely on Flex ANI. Each Completing Carrier is in the best position to determine whether the risks and benefits of Flex ANI make it a sensible choice for that Completing Carrier.
- C. If the Completing Carrier does choose to utilize Flex ANI, it must order the service from the LEC – either directly or through its Intermediate Carrier. If there is an Intermediate Carrier, that carrier has been selected by the Completing Carrier, and the contract between the carriers is a ready vehicle for ensuring that Flex ANI is ordered and that appropriate testing is done. In either case, the Completing Carrier is well situated to initiate the ordering of Flex ANI and to confirm that the LEC is actually providing the service.
- D. As the customer that is to receive Flex ANI digits, the Completing Carrier has the ability (again, either directly or through an Intermediate Carrier) as well as the legal obligation to “test” and “coordinate with LECs to obtain [Flex ANI] 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.”

¹² Moreover, as explained in the Petitioners’ Reply Comments and as discussed above, *see* note 3, *supra*, although the Completing Carrier may be “strictly liable”, that does not mean that the Completing Carrier is without a remedy if another carrier in the call chain failed in its responsibilities.

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

- E. Similarly, the Completing Carrier is well positioned to detect Flex ANI failures. AT&T's claim that a Completing Carrier "has no way to distinguish between a Flex ANI failure and any number of other reasons that payphone-specific coding digits are not transmitted with a particular call" is not only unsupported, but demonstrably wrong.
1. A Completing Carrier that is motivated to do so can utilize payphone ANI lists – which LECs are required to provide on a quarterly basis (47 CFR § 64.1310(d)) - to identify any payphone-originated calls that have been delivered without payphone specific digits. Thus, contrary to AT&T's claim (AT&T Reply Comments at 4), a Completing Carrier *can* know "whether a particular payphone is connected to a payphone line" and "whether it is being used for dial-around calls and how many such calls are attempted." This information can even be obtained in real time with a high degree of accuracy, utilizing the prior quarter's ANI lists.¹³
 2. PSPs, by contrast, have no way to determine whether any calls were delivered to a particular carrier without payphone specific digits. (Test numbers are available only from a few Completing Carriers, and even where available, can only test whether calls made to the specific test number are delivered with payphone digits at the time the call is made.)
- F. In the event that a Completing Carrier does detect a Flex ANI failure, it has numerous ways to fix the problem and mitigate any losses. For example:
1. The Completing Carrier can test its own system to make sure that its tracking system is functioning correctly and is capturing payphone coding digits as it should. By contrast, even if a PSP could detect Flex ANI problems in a timely manner, the PSP has no visibility into the Completing Carrier's tracking system and thus cannot directly confirm whether that system is the source of the problem.

¹³ Few payphones are currently being added; indeed the trend is to remove payphones. Thus the prior quarter's list is likely to include all payphones that are in service in the current quarter and removed payphones that appeared on the prior quarter's list are not likely to have produced compensable calls.

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

2. The Completing Carrier can contact the LEC and/or the Intermediate Carrier in order to inquire about the problem, have new tests performed, and “coordinate under carrier to carrier procedures” to isolate the source of the problem. PSPs have no such ability.
 3. The Completing Carrier can utilize ANI lists to make sure that it captures all calls from the affected payphones, so that it can compensate the PSP. In addition, the Completing Carrier can use ANI lists to be sure that it bills its end-user customers for any surcharge uniquely applicable to payphone-originated calls.
- G. In summary, Completing Carriers, if motivated to do so, are well positioned to determine whether it is efficient for them to use Flex ANI for call tracking purposes, to make sure the service is ordered, to test the service to make sure it is working, to detect Flex ANI failures, and to fix the problem and mitigate any losses.
- H. PSPs, by contrast, have no ability to prevent, detect, or mitigate Flex ANI failures.¹⁴
1. PSPs are not involved in deciding whether to use Flex ANI or ordering the service from the LEC and/or Intermediate Carrier.
 2. Since PSPs do not either initiate or receive any transmissions containing Flex ANI digits, they have no way to know, in real time, whether the correct coding digits are being transmitted.
 3. PSPs are unlikely to even learn about Flex ANI failures until after their payments inexplicably drop and there has been an opportunity to study the carrier call reports in order to try to determine what has changed.

¹⁴ There is no merit to AT&T’s contention that if PSPs are entitled to be paid anyway when Flex ANI fails, they “would lack the appropriate incentive to monitor and address any Flex ANI issues.” It is quite hard enough for PSPs to collect the full compensation they are owed when Flex ANI is working. PSPs are well motivated to attempt to avoid disputes and further payment delays as a result of Flex ANI failures -- in those few instances where the PSP can gain knowledge of such failures.

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

4. By then it is too late. Compensation payments and call reports do not even arrive until three to six months after the calls were made. (Moreover, one payment cycle may not be sufficient to establish a pattern that indicates the existence of a call tracking problem.)
5. Further, the call reports that Completing Carriers and Intermediate Carrier reports are required to provide to PSPs do not indicate whether those carriers are receiving payphone coding digits with specific calls – or whether they rely on Flex ANI at all. If the Commission had intended to place the burden on PSPs to address Flex ANI failures, it surely would have required LECs and IXC to provide quarterly reports indicating whether payphone coding digits were being actually transmitted and received.
6. Allowing another month for study and inquiries of carriers regarding possible causes of a payment drop, PSPs are unlikely to discover Flex ANI failures until, at earliest, four to seven months after the uncompensated calls were made.
7. Even after they discover the failure, PSPs, who are not the customers for Flex ANI service, do not have contractual or customer relationships with the carriers that would enable them to request testing of actual payphone calls to determine the source of any Flex ANI failure.¹⁵
8. Finally, even if they could immediately detect Flex ANI failures, PSPs have no way to ensure that the Completing Carrier uses alternative call-tracking methods to ensure that compensation is paid and to mitigate any losses from Flex ANI failures.
9. In short, PSPs are in no position to protect themselves from potentially catastrophic losses of compensation due to Flex ANI failures.

¹⁵ There is no basis for AT&T's speculation that the LEC serving a PSP is likely to be a CLEC affiliated with the PSP. AT&T Reply Comments at 5. On the contrary; most PSPs are captives of the ILEC. Similarly, as mentioned above, a PSP's "customer-service provider relationship with the LEC" does not give the PSP any leverage to ensure Flex ANI transmission. See note 10, *supra*. Under the Commission's prior orders, it is the IXC, not the PSP, who orders Flex ANI and who has the "customer-service provider relationship with the LEC regarding Flex ANI."

Payphone Compensation/Flex ANI Declaratory Ruling
WCB Dkt. No. 11-141

V. REQUIRING PSPS TO PROVE THAT THE LEC TRANSMITTED PAYPHONE-SPECIFIC CODING DIGITS IS INCONSISTENT WITH THE COMMISSION'S DAC SCHEME

- A. Recognizing that PSPs have no visibility or information about what goes on in the network, where the Commission intended for PSPs to have information to prove compensation is due, it provided for information to be provided by the carriers. The Commission has provided for PSPs to get Completing Carrier and Intermediate Carrier reports. Neither of these reports contains any information on coding digits and no reports are required of the LECs in their role as LEC.
- B. PSPs generally cannot determine from the Completing Carrier and Intermediate Carrier reports they receive the source of the breakdown that is causing underpayments of compensation. Nor do they know whether a particular Completing Carrier is tracking by payphone-specific coding digits or otherwise. If PSPs are required to show that the LEC sent the correct coding digits and/or to look to the LEC for a failure to send the digits, PSPs are likely to bring any LEC providing service to any of the PSPs payphones that sent calls to the Completing Carrier(s) into litigation in order to ease discovery and/or avoid statute of limitations problems in the event of a LEC failure.¹⁶ The Commission could not have meant to spawn all this unnecessary activity when the Completing Carrier is positioned to address the coding digit issue if it exists.
- C. To prove that the correct coding digits were sent with each call, PSPs would need to comb through the call records of billions of calls initiated by LEC switches, since payphone calls are not separately archived.¹⁷ The expense and burden of gathering the information from multiple and geographically diverse end offices serving payphones and then combing through the data will outweigh the value of litigation for a PSP, most of whom are small businesses.¹⁸ The Commission could not have intended to impose on LECs either the burden of such productions and/or litigation or to impose on PSPs the expense and burden of such litigation.

¹⁶ See APCC Comments at 11-14. See also note 17, *infra*, regarding the need to preserve records.

¹⁷ *Id.* at 15-18. We also note that the LEC may already have destroyed some of the call records if the calls were made beyond the LEC's normal retention period, and this is another reason LECs will be joined to litigation, to ensure the preservation of records. Under the Commission's rules, it is only the Completing Carrier that is required to retain records of payphone calls and only of completed calls to prove the accuracy of the completed calls the carrier reports. (Since by definition the litigation is about underpayment for calls, there will generally be calls reported by the Intermediate Carrier not paid by the Completing Carrier.) Moreover, since it generally takes several quarters before patterns emerge, the problem of losing records necessary to prove a case will be compounded.

¹⁸ See generally, *Id.*