

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of GCB Communications, Inc. d/b/a Pacific Communications And Lake Country Communications, Inc. for Declaratory Ruling	)	WC Docket No. 11-141

**JOINT COMMENTS OF THE AMERICAN PUBLIC COMMUNICATIONS  
COUNCIL, APCC SERVICES, INC., AND PETITIONERS GCB COMMUNICATIONS, INC.,  
d/b/a PACIFIC COMMUNICATIONS AND LAKE COUNTRY COMMUNICATIONS, INC.,  
IN OPPOSITION TO APPLICATION FOR REVIEW FILED BY U.S. SOUTH**

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August 31, 2012

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## SUMMARY

The core responsibility of Completing Carriers under the DAC regimen is to have a tracking system that “accurately” counts all payphone calls, not just calls with payphone-specific coding digits generated by Flex-ANI. Once this core principle is acknowledged, all the arguments proffered by U.S. South to support its alternate reading of the rule -that a system that relies on payphone-specific coding digits meets the requirements of the DAC Rule even if it fails to track all payphone generated calls- are erroneous and irrelevant.

The Bureau had authority to issue the Order since the Order implements existing Commission policy. Under the Commission’s Rules, the Bureau has full power to rule on and historically has ruled on primary jurisdiction referrals. The Bureau correctly found that while the *Payphone Orders* did require per call dial around compensation (“DAC”), they did not impose a requirement that individual calls from payphones be accompanied by payphone-specific coding digits. The Bureau was not establishing new policy when it stated the *March 1998 Coding Digit Waiver Order* did not address the latter issue; it was merely rejecting U.S. South’s assertions that the *March 1998 Coding Digit Waiver Order* had established a contrary policy.

In reaching its conclusion that the *Payphone Orders* did not impose a requirement that individual calls from payphones be accompanied by payphone-specific coding digits, the Bureau thoroughly examined the *Payphone Orders* and the policies implemented by the clear language of the DAC Rule. U.S. South does not refute the Bureau’s analysis. It strings together fragments of language from various orders and enhances them with its own language for its own “spin” instead of explaining why the Bureau’s analysis is in error.

A Completing Carrier can use the technology of its choice for its tracking system so long as it accurately tracks calls from payphones. The fact that the Commission required LECs to

provide payphone-specific coding digits through Flex ANI or ANI ii does not relieve a carrier relying on Flex-ANI of its responsibility to accurately track the calls. U.S. South's position to the contrary is utterly inconsistent with the plain language of the Commission's DAC rules and the history of the Commission's adoption of those rules.

The Order is factually accurate. U.S. South offers no specific facts to counter any factual statement made by the Bureau, as opposed to U.S. South's characterization of what the Order says. But even accepting U.S. South's characterization of the Order, the Order is factually accurate.

The Bureau's reading of the DAC Rule is compelled not just by the history of and policies reflected in the *Payphone Orders*, the *Tollgate Orders*, and related rulings, but by the clear unambiguous language of the Rule itself. The considerations advanced by U.S. South cannot change the plain requirements of the Rule. Those considerations *might, if* they had any merit, be proffered to support a change in the Rule in a rulemaking proceeding, but they cannot change the Rule in this proceeding. Moreover, any changes justified by the considerations advanced by U.S. South would also require other changes to the Rule to retain any balance between PSPs and Completing Carriers. But in any event, none of the considerations advanced by U.S. South in fact has merit.

That PSPs may have a remedy against the LEC if the LEC fails properly to transmit the coding digits does not relieve a Completing Carrier of its responsibilities. Moreover, failure to transmit coding digits can and does occur at many points in the call path. The carriers in the call chain are able to identify the source of the failure whereas the PSP cannot do so. Their business relationships up and down the chain mean they can hold the responsible carrier accountable.

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**JOINT COMMENTS OF THE AMERICAN PUBLIC COMMUNICATIONS  
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IN OPPOSITION TO APPLICATION FOR REVIEW FILED BY U.S. SOUTH**

The American Public Communications Council (“APCC”) <sup>1</sup> and APCC Services <sup>2</sup> ((jointly referred to as “APCC” unless the context clearly indicates otherwise), and Petitioners GCB Communications dba Pacific Communications and Lake Country Communications, Inc.,(jointly referred to as “Petitioners”) hereby submit joint comments in opposition to the Application for Review (AFR) filed by U.S. South Communications, Inc. (“U.S. South”) in the above captioned proceeding. <sup>3</sup> (The AFR is hereafter cited as “USS [page number]”). APCC and

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<sup>1</sup> APCC is APCC is the national trade association of independent payphone service providers (“PSP”s) and has participated in every major Commission proceeding involving payphones since 1984, including every proceeding leading up to and the proceeding adopting the current Rule, 47 C.F.R. § 64.1300-1320 (“Rule”)’ and in virtually every court action stemming from those proceedings as well as other major proceedings and litigation involving development and implementation of the Commission’s current payphone compensation Rules.

<sup>2</sup> APCC Services is a subsidiary of APCC that acts as a billing aggregator for PSPs in collecting dial around compensation and engages in collections activities, including formal and informal complaint proceedings at the Commission, and litigation in the courts, on behalf of its PSP customers. Since inception of the Commission’s dial around regimes, APCC Services has been required to bring dozens and dozens of collection proceedings on behalf of its customers.

<sup>3</sup> Under Section 1.115 (f) of the Commission’s Rules, APCC and Petitioners each are permitted to file Oppositions to the AFR up to 25 pages of length. In the interests of economy and convenience to all parties and the Commission, APCC and Petitioners are submitting these joint comments which exceed 25 pages by a few pages but

APCC Services participated in the proceeding below and are entitled to file comments in this AFR proceeding. The AFR seeks review of a Declaratory Ruling Order, DA 12-1046, issued on June 29, 2012 by the Wireline Competition Bureau (hereafter the “Bureau”). (The Declaratory Ruling is hereafter cited as “Order ¶[number]”).

## I. OVERVIEW AND INTRODUCTION

Essentially, the Order issued two rulings. First, once a PSP has ordered a payphone line from a LEC whose switch is coding-digit-capable, the PSP is entitled to per call dial around compensation (“DAC”) from the Completing Carrier<sup>4</sup> for completed calls from that line. The second ruling is that individual calls from payphones do not have to be accompanied by payphone specific coding digits to be eligible for per-call DAC.

At the outset, as part of its “Background” discussion, USS attempts to set up two requirements that it argues were “fundamental” to the Commission’s efforts to implement per call compensation. USS then links the two requirements in a way that leads it to the fundamental error which permeates its entire pleading. Moreover, the linkage which USS attempts to establish between the two requirements breaks down not only because of a logical gap but also because USS proceeds from a faulty factual premises that helps bring it to its faulty conclusions. USS argues from the premise that because there were not payphone unique ANI coding digits available when Section 276 was enacted, Completing Carriers had no technical means to identify

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which are well under the 50 pages to which they would be entitled if filing separately. To the extent leave is required for proceeding in this manner, APCC and Petitioners hereby request such leave.

<sup>4</sup> The term “Completing Carrier” was not formally incorporated into the Commission’s regulations until the Commission’s *2003 Tollgate 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). The term “Completing Carrier” is used throughout this petition to refer to the carrier responsible for payment of dial-around compensation to a PSP for a completed call made from the PSP’s payphone.

calls as originating at payphones. AFR 5. But that premise is incorrect. As the Order made clear, (Order ¶ 5) the Commission stated in the *First Report and Order*,<sup>5</sup> “Based on the information in the record, we conclude that the requisite technology exists for IXC’s to track calls from payphones.” Indeed, as the Order pointed out, (Order ¶¶ 7, 24) when the Bureau granted the *October 1997 Bureau Waiver Order*, which delayed the time at which Flex-ANI would be required to be deployed and made available to Completing Carriers, the Bureau made clear that the Completing Carriers were required to use the technology then available, which was the same technology as was available at the time the Telecommunications Act of 1996 was passed, to immediately begin paying per call compensation.<sup>6</sup>

Proceeding from this faulty factual predicate, USS states that the Commission adopted “two parallel requirements,” deployment by the LECs of Flex-ANI and establishment by Completing Carriers of “a system that ‘accurately’ tracks payphone calls.” USS 5. U.S. South, picking up its faulty factual predicate, states that deployment of Flex-ANI was required “[i]n order to supply the information to IXC’s necessary to support a per-call compensation scheme.”

As just pointed out, the Commission found that the technology to track payphone calls already existed and never implied that payphone specific coding digits were required to *enable* Completing Carriers to track payphone calls. Rather, at the time the Commission adopted the

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<sup>5</sup> 11 FCC Rcd 20590, ¶ 90. Although the Order thus found that it was not correct that the ability to track calls did not exist at the time of the *Payphone Orders*, U.S. South simply ignores the Order’s finding and does not even mention it. Perhaps this is because U.S. South has virtually just cut and pasted the same arguments as appeared in its original Opposition to the Petition filed in August, 2011. It is literally just woodenly repeating the same arguments almost verbatim without taking account of the Order. Compare “Background” at USS 4-8 of the AFR with “Opposition of U.S. South to Petition for Declaratory Ruling” at 5-8, filed by U.S. South on August 31, 2011.

In these comments, APCC uses the same short cite forms as the Bureau used in the Order. For the convenience of the Commission, we have attached full citations for each of the cited materials as an attachment to these comments. The attachment also contains full citations to the various pleadings filed in the earlier phase of this proceeding that are cited in these comments.

<sup>6</sup> While the Bureau stated that the Completing Carriers could, if necessary, “manually” compare their call records to LEC lists of payphones, (Order ¶ 7) of course the comparison is done by computer processing of the two sets of data. See Order at n.88 and accompanying text. The process involves comparing the ANIs in the call detail records to the ANIs on the LEC payphone list.

requirement of payphone specific coding digits, as the Order (¶ 25) points out, the Commission said that “all payphones will be required to transmit specific payphone coding digits as a part of their automatic number identification (‘ANI’), which will *assist* in identifying dial around calls to compensation payors.”<sup>7</sup> Indeed the Commission went on to say specifically that Completing Carriers were free to use the technologies of their choice to accurately track payphone calls. The Commission stated that “no standardized technology for tracking calls is necessary, and that [Completing Carriers] may use the technology of their choice to meet their tracking obligations.”

<sup>8</sup> It would be utterly inconsistent for the Commission to have said both that payphone specific coding digits were necessary to allow per-call tracking because no other technology existed and then to say that carriers were free to use the other, according to U.S. South, non-existent technologies.<sup>9</sup>

While no particular tracking system was required, whatever the tracking system that was adopted, it had to be “accurate”, and U.S. South is correct in this assertion. But the *sina qua non* is that the system must be “accurate”, even if, as we discuss further below, the system the Completing Carrier has adopted is to track payphone-specific coding digits using the Flex-ANI system whose deployment the Commission mandated “to assist”, not to insulate carriers from fault or any other failure, in meeting the responsibility to *accurately* (Order ¶ 32) track *and* compensate PSPs for payphone calls. There is no dispute in this case that in fact U.S. South failed to track accurately all the calls that originated from the Petitioners’ payphones, and hence

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<sup>7</sup> *First Payphone Order*, 11 FCC Rcd at 20575-76, ¶ 66 (emphasis added).

<sup>8</sup> *Id.* at 20590-91, ¶ 97.

<sup>9</sup> In fact, as pointed out in the proceedings before the Bureau, many carriers use other technologies and systems to track payphone calls, including on-line and/or database based systems of the type described in the Order at ¶ 24.

that it failed in the central responsibility imposed upon it – to accurately track and pay for all payphone calls for which it is the Completing Carrier.

Once this latter point is recognized, all of U.S. South’s arguments fall away. For example, while ignoring the fact that its system failed to accurately track some of Petitioners’ calls and that it failed to compensate Petitioners for some of the calls from Petitioners’ payphones, U.S. South repeatedly asserts in various ways that the Commission is imposing “strict liability” (*e.g.*, USS 3, 8) on U.S. South or that it did no wrong because it adopted a system to accurately track Flex-ANI payphone-specific coding digits.<sup>10</sup> Even assuming that it is the case that “strict liability” were being imposed, which as explained in the Order (¶ 36) it is not, the responsibility imposed by the Commission’s orders, indeed by the Section 276 mandate that PSPs be “compensated for each and every completed intrastate and interstate call”, requires a tracking system that *accurately tracks all calls*, not a system that accurately tracks the payphone specific coding digits generated by Flex-ANI but that ignores other payphone calls.<sup>11</sup>

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<sup>10</sup> U.S. South asserts, for example, that “there is no showing it did anything wrong” (USS 6); there is no showing that the failure to track and pay “was the fault” of the Completing Carrier (USS at 7); “Petitioners’ court complaint did not assert that U.S. South violated **any** regulation or order promulgated pursuant to Section 276. . .” (USS n. 13 (*emphasis in original*)); it violates “public policy under Section 276 to impose payment liability on carriers who, as in this case, have done everything required of them” (USS 8).

Not only does U.S. South fail to recognize its core violation of failing to accurately track and pay, but in fact, it did not do most of the things required of it. As Petitioners pointed out in their Reply Comments (n.30), “Indeed so lacking in confidence was [U.S. South] in the integrity of its tracking system that it has not filed a CFO certification with its quarterly payments, as required by Commission rules (47 CFR §64.1310) since 2007. And with good reason: despite its repeated assertions regarding the accuracy of its tracking system, [U.S. South] failed to file a system audit report, as required by the Commission rules (47 CFR §64.1310) for each of the years since 2006.”

<sup>11</sup> What U.S. South conveniently does not explain to the Commission is that once the dispute with Petitioners had surfaced, U.S. South began blocking calls from Petitioners’ payphones. U.S. South could of course have used the Flex-ANI code detection system, which it now tells the Commission worked perfectly and met all U.S. South’s obligations under the Commission’s rules, to block the calls from Petitioners’ payphones. But for purposes of blocking calls from Petitioners’ payphones, U.S. South did not rely on the FANI tracking system upon which it based its compensation payments; rather it blocked those calls in real time by tracking by the ANI alone. *See* Petitioners’ Reply Comments at n. 15. Not only does this conduct speak for itself, but it also puts the lie to other U.S. South arguments: that the Bureau’s ruling in this matter will prevent carriers who don’t want to carry payphone calls from blocking calls from payphones or prevent real time billing by Competing Carriers. *See also*, text accompanying note 41, *infra*. Obviously if U.S. South could block calls using ANIs alone, so can other carriers. *See also* Order ¶ 37.

See Order ¶¶ 28, 30, 32. Thus, U.S. South has violated what U.S. South itself recognizes is the fundamental precept and premise of the Commission’s rule – that its tracking system *accurately* track and that U.S. South compensate for all completed payphone calls.<sup>12</sup>

In the face of this core violation, and its failure to meet the heart of the requirement of the Commission’s rule – that the tracking system it has adopted *accurately* track payphone calls for compensation – U.S. South nonetheless stands before the Commission and states, time after time, that it has done nothing wrong, that it has committed no violation, that it did everything required of it, etc. Although U.S. South does not come out explicitly and say so, what it is seeking is a ruling that so long as a carrier –in this case U.S. South– has adopted a system that counts calls with payphone specific coding digits, it does not have to track payphone calls accurately and it can be relieved of its compensation obligations with respect to those calls it failed to track. *See also* discussion at Section III (D) at 22-23, *infra*. The Bureau correctly rejected the ruling requested by U.S. South.

## II. PROCEDURAL ISSUES

### A. THE ORDER IMPLEMENTS EXISTING LAW AND THE BUREAU HAD JURISDICTION TO ISSUE AND PROPERLY ISSUED THE RULING

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U.S. South, while acknowledging that the Bureau has authority to issue interpretations of rules under Section 0.91 of the Rules, argues that it was beyond the authority of the Bureau to

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<sup>12</sup> U.S. South repeatedly makes nonsensical statements like Petitioners did not “claim, let alone prove, that U.S. South’s call tracking system was in any way deficient or otherwise violated the requirement of Section 64.1310(a)(1) of the rules that each carrier utilize an ‘accurate’ call tracking methodology.” USS 6, 22. U.S. South refuses to acknowledge the basic point that its tracking system violated the Commission’s rules in the most fundamental way: the system was *in*accurate, *not* accurate, because in fact it failed to track the calls that admittedly came from Petitioners’ payphones. If U.S. South really believed that Petitioners’ allegations were legally deficient, its remedy was to file a motion to dismiss in the U.S. District Court, which it failed to do. *See* USS n.8. Similarly, it is irrelevant that Petitioners proceeded directly to court instead of filing a complaint at the Commission. *See, e.g.*, USS 22.

issue the Order because of the limitation in Section 0.291(a)(2) on the authority of the Bureau to issue rulings involving novel questions of law. U.S. South cites the Commission's delegation of authority to the Bureau to "fill in holes" in the Commission's recently issued *Connect America Fund* Report and Order.<sup>13</sup> U.S. South observes that in the Order, the Bureau stated that the "*Coding Digit Waiver Order* 'simply did not address whether compensation was owed for completed calls when Flex ANI coding digits were not transmitted with each call'", and argues that the Bureau was filling in a hole left by the *Coding Digit Waiver Order*. USS 9-10.

Whatever relevance the language in *Connect America Fund* may have in its particular context, that U.S. South would argue that it could possibly be relevant here is indicative of the extent to which U.S. South has misapprehended the Order. The Order spent several paragraphs explaining that the first two *Payphone Orders* had required per call compensation but did not require that payphone specific coding digits had to accompany a call in order to be eligible for compensation. The Order analyzes the specific language contained in the *Payphone Orders* and the context of the implementation of DAC and concludes that the Commission always intended for there to be per call compensation and that the Commission did not intend for it to be a condition for payment on an individual call that payphone specific coding digits accompany the call. Order ¶¶ 19-27. In other words, the Order specifically finds that the *Payphone Orders* spoke directly to the question raised by the Petition of whether coding digits had to accompany each payphone call.

It was U.S. South and the Court of Appeals who seized on and introduced the *March 1998 Coding Digit Waiver Order*, incorrectly insisting that that order enshrined as the policy of the Commission that coding digits must accompany each individual call. When the Bureau, at

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<sup>13</sup> WC Docket No. 10-90, et. al, FCC 11-161 (released November 18, 2011).

the end of its discussion of the *Payphone Orders*, said the *March 1998 Coding Digit Waiver Order* did not speak to the need for coding digits to accompany specific calls, it was not “filling a hole.” It was responding to and rejecting U.S. South’s and the Court of Appeals’ interpretation and argument that the *March 1998 Coding Digit Waiver Order* stated a policy of requiring the digits.<sup>14</sup> The Order made clear that the policy and rules regarding per call compensation and the transmission of coding digits was already set by the *Payphone Orders*. There was, and is, no “hole to fill,” no omission, no conflict, etc. – except as U.S. South sought to find one. The “hole” was fabricated by U.S. South out of “whole” cloth. Thus, because the Order is merely an interpretation and implementation of policy already established in the *Payphone Orders*, the Order was clearly within the Bureau’s authority. *See also* Section III (D), at 21-22, *infra*.

B. THERE IS NO OTHER REASON FOR THE COMMISSION TO REVIEW THE ORDER

U.S. South also argues that the Commission should review the Order out of comity to the court because it is “unseemly” and disrespectful of the court for the Commission to allow Staff to rule on a primary jurisdiction referral from a court. U.S. South acknowledges that this is not currently the Commission policy but argues that it should be and states that “disposition of primary jurisdiction referrals by the staff on delegated authority, even if permissible without a proceeding-specific delegation . . . should be precluded as a matter of practice.” USS 10. It is unclear whether U.S. South is questioning the Bureau’s authority to act without a specific delegation. *See also* USS 2 (“there is nothing in the Commission’s Rules permitting disposition

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<sup>14</sup> That the *March 1998 Coding Digit Waiver Order* was key to the Court of Appeals decision is made clear in the discussion of the Court decision and the *March 1998 Coding Digit Waiver Order* contained in the Order. Similarly, in the AFR and as we discuss later in this pleading, U.S. South begins its substantive argument for reversal of the Order by discussing the *March 1998 Coding Digit Waiver Order*. Referring to the *March 1998 Coding Digit Waiver Order*, U.S. South states “In 1998, the Common Carrier Bureau determined that the transmission and provision of payphone-specific Flex-ANI codes . . . “ USS 12. U.S. South does go on to discuss and interpret some of the language of the *Payphone Orders*; the discussion is simply a repeat of the arguments already rejected by the Order and which are discussed below.

of primary jurisdiction petitions on delegated authority . . .”). But in any event, there is no question but that the Bureau has such authority. Section 0.91(a) of the rules states that it is the function of the Bureau to act “for the Commission . . . in all matters pertaining to the regulation . . . of communications common carriers.” The Staff has up until now had full authority to rule on primary jurisdiction referrals, and indeed has routinely ruled on such referrals.<sup>15</sup> It is not the Commission’s practice to issue “delegation orders” on specific proceedings, and none was issued in the earlier Bureau rulings on primary jurisdiction referrals. Indeed, to require the Commission to do so would defeat the purpose of the delegation provisions and the provisions assigning and defining the functions of the Bureau.

U.S. South argues that primary jurisdiction referrals should go to the full Commission for disposition. If the Commission believes such a policy might be appropriate, it should adopt the policy by a change to its rules. It would be highly inappropriate to adopt such a policy in a particular proceeding, and especially in the instant proceeding. U.S. South specifically consented in the District Court to the referral of the matter. Order ¶16. All of the policy arguments advanced by U.S. South for having the full Commission decide the case existed at the time the Petition was filed. U.S. South made no request, formal or otherwise, to have the Petition referred to the full Commission, either at the time of filing its Opposition or at any other point in this proceeding. Now having obtained an unfavorable ruling from the Staff, it is unseemly of U.S. South to protest that the decision should have gone to the Commission in the first place. Indeed U.S. South is precluded from doing so. Under Section 1.115(c) of the Commission’s Rules, parties are precluded from raising in an AFR arguments on which the Bureau was afforded no opportunity to rule.

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<sup>15</sup> *E.g., Unimat, Inc. v. MCI Telecommunications Corporation*, 14 FCC Rcd 7829 (1999); *WATS International Corp. v. Group Long Distance (USA), et. al*, 11 FCC Rcd 3720 (1995).

U.S. South claims that the AFR satisfies all of the criteria for Commission review of action taken on delegated authority under Section 1.115(b)(2). As we demonstrate below, this is simply inaccurate. With only a few minor exceptions,<sup>16</sup> the AFR is simply a repetition of points made to the Bureau and properly rejected for the reasons advanced in the Order.<sup>17</sup>

Petitioners and APCC respectfully submit that the Commission should summarily deny the AFR given the paucity of new arguments made in the AFR. Doing so will resolve not only the instant proceedings, but also the dispute between Petitioners and US South regarding unpaid dial around compensation for calls made between 2005 and 2008, which began with the filing of Petitioners' complaint in October 2007, resulted in a bench trial verdict for Petitioners in October 2009, an appeal of that verdict to the Ninth Circuit and an unfortunately erroneous appellate decision in April 2011, and finally, a referral of primary jurisdiction to the FCC after remand in July 2011. In short, it is time to end this dispute once and for all, so Petitioners and APCC ask the Commission to deny expeditiously the AFR.<sup>18</sup>

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<sup>16</sup> We point out the exceptions as they are discussed and rebutted. See notes 27, 29, 41, and text accompanying each, *infra*.

<sup>17</sup> Indeed, most of the AFR is a virtual cut and paste, with perhaps a word or two changed, of the exact same sections of the U.S. South's original Opposition to the Petition filed on August 31, 2011. Specific examples will be cited in the discussion below. This in and of itself is grounds to dismiss the AFR. *Alpine PCS, et. al*, 25 FCC Rcd 469, 481 (2010) ("A petition that simply reiterates arguments previously considered and rejected will be denied.")

<sup>18</sup> Petitioners note that in the AFR, U.S. South accuses Petitioners of opposing a referral of primary jurisdiction both at trial and on appeal. USS 2, n.3. In fact, US South did not seek a referral of primary jurisdiction in the District Court until just six days before trial. Petitioners understandably opposed that eve of trial request, which the District Court denied, and subsequently opposed US South's argument on appeal that the District Court's denial of the request for a referral of primary jurisdiction was an abuse of discretion. On remand, Petitioners moved for a referral of primary jurisdiction, which US South did not oppose. Thus, any suggestion by US South that Petitioners have unnecessarily delayed these proceedings by not earlier agreeing to a referral of primary jurisdiction would be unfounded.

### III. THE ORDER SHOULD BE AFFIRMED

#### A. PAYPHONE SPECIFIC CODING DIGITS ARE NOT REQUIRED TO ACCOMPANY EACH PAYPHONE CALL

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The Order correctly found that the Commission did not say that payphone specific coding digits had to be transmitted with each payphone call. Order ¶¶ 20-27. The Order analyzed the language used by the Commission in its full context and explained why, in that full context, the language referred to the event that would be the trigger for when per call compensation would be required, not to the requirements for specific calls. Moreover, when the Commission spoke of the transmission of ANIs with coding digits and eligibility for compensation, it referred to “payphones” and not individual calls. Order n.12 and accompanying text.

U.S. South does not rebut the Order’s analysis or explain why, in the context of the implementation of per call compensation, the Order’s analysis is incorrect. It picks up fragments of language from various waiver orders and one fragment from the *Order on Reconsideration* to argue that the language requires payphone-specific coding digits to accompany each call. USS 13. But U.S. South does not explain why the Order’s analysis, which found this language only referred to the triggering event that would end a period during which per phone compensation would be paid and begin the requirement for per call DAC to become mandatory, is incorrect.

Instead of refuting the logic of the Bureau’s analysis, U.S. South takes the fragments of the Commission’s language and intersperses those fragments with its own language to repeat virtually verbatim the same exact arguments it made in its original opposition.<sup>19</sup> Not only are these fragments irrelevant because they simply repeat arguments already addressed by the Order and fail to address the reasoning of the Order; the points in the AFR are, just as when they were

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<sup>19</sup> U.S. South’s arguments on this point, USS 12-14, are, except for two concluding sentences on page 14, taken almost verbatim from pages 11-14 of its original August 31, 2011 Opposition to the Petition.

part of the original Opposition to the Petition, extremely misleading. For example, U.S. South states that the “Commission itself repeatedly reaffirmed that Flex-ANI where available from a LEC central office must be ‘transmitted’ *with every payphone call.*” And again, the “Commission’s payphone orders . . . have consistently held that Flex-ANI ‘must be transmitted’ and ‘generated’ *with every payphone call.*” USS at 12. And once more “‘before they can receive per-call compensation’ [emphasis in USS pleading] from IXC’s, for subscriber 800 and access code calls,’ *payphone calls must include* [italics added by APCC] ‘payphone-specific coding digits.’” USS 14, citing *March 1998 Coding Digit Waiver Order*, 13 FCC Rcd at 5007, ¶14. But in each case, the italicized language *is not* the Commission’s language; it is language inserted by U.S. South, i.e., *U.S. South’s spin on the language used by the Commission*. As the Order pointed out, the Commission never said anything about payphone-specific coding digits accompanying specific calls,<sup>20</sup> but U.S. South simply repeats its view without explaining why the Bureau’s interpretation of the language in its historical context is incorrect and U.S. South’s “spin” is correct. In short, there is no analysis of the Order, but rather just a recitation, actually a re-recitation, of assertions and arguments previously rejected with no discussion of why the arguments should now be accepted.<sup>21</sup>

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<sup>20</sup> For example, the actual quote from the *March 1998 Coding Digit Waiver Order* makes clear that the waiver is “to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones *before they can receive per-call compensation* from IXC’s, for subscriber 800 and access code calls.” (Emphasis added). There is not a word about payphone-specific coding digits accompanying individual calls. Indeed the emphasis is, as the Order correctly observed, on “payphones.” See Order at n.12, and accompanying text.

<sup>21</sup> U.S. South does, in this section, address a point that had earlier generated some confusing language over whether the payphone “transmits” the coding digits or whether the coding digits are inserted and transmitted by the LEC. USS at 14. To the extent there was confusion over the issue, it has now been resolved by the pleadings and the Order. See Order at ¶¶ 23, 25. The material in the AFR addressing the issue was not deleted when U.S. South cut and pasted the language from its earlier Opposition into the AFR.

B. A COMPLETING CARRIER USING FLEX-ANI AS ITS METHOD OF TRACKING MUST STILL TRACK ALL CALLS ACCURATELY, THE SAME AS A CARRIER USING ANY OTHER CALL TRACKING METHODOLOGY

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Since the *Payphone Orders*, wherein, as discussed above, the Commission found that the technology existed for Completing Carriers to track calls, the Commission has repeatedly stated that “no standardized technology for tracking calls is necessary, and that [Completing Carriers] may use the technology of their choice to meet their tracking obligations.”<sup>22</sup> U.S. South argues that because the Commission chose Flex-ANI as the technology “to transmit specific payphone coding digits as a part of [the payphone’s] automatic number identification (‘ANI’), [in order to] assist in identifying dial around calls to compensation payors,”<sup>23</sup> Completing Carriers “must be able to rely upon such ‘coding digits’ in discharging their compensation obligations.” USS 15.<sup>24</sup> But as U.S. South recognizes on the same page, and as the Order affirms, (Order ¶ 32) “It is beyond question that the Commission permits IXC’s to utilize Flex-ANI as the basis for their payphone call tracking systems.” The issue here thus is not whether Flex-ANI can be used as the basis for a call tracking system. The issue here is whether, as U.S. South contends, the use of Flex-ANI relieves the Completing Carrier of the obligation to have an *accurate* call tracking system.

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<sup>22</sup> *First Payphone Order*, 11 FCC Rcd at 20590-91, ¶ 97

<sup>23</sup> *Id.*, 11 FCC Rcd at 20575-76, ¶ 66 (emphasis added).

<sup>24</sup> U.S. South again asserts incorrectly that “Flex-ANI . . . was mandated in order to provide the precise per-call information necessary for IXC’s to reliably track payphone calls . . .” USS 15. As previously discussed, the ability to track payphone calls already existed at the time of the *Payphone Orders*.

In support of its position, U.S. South relies on comments submitted by AT&T. USS 15-16.<sup>25</sup> But AT&T's arguments are essentially the same as U.S. South's, and equally unavailing. For example, AT&T states that Flex-ANI ensures that Completing Carriers can accurately track and bill their customers for payphone calls. But as the instant case makes clear, that is not true; Flex-ANI was used and the tracking was not accurate. AT&T states that Flex-ANI ensures that Completing Carriers can block payphone calls. But again, as the instant case illustrates, other methods of blocking payphone calls are apparently more efficacious, since when U.S. South decided to block calls from the Petitioners' payphones, it did not rely on Flex-ANI at all.<sup>26</sup> Of course, a Completing Carrier may use Flex-ANI for these purposes. But that is different from saying the Completing Carrier does not have to ensure that its tracking system is accurate in accordance with the Commission's Rules.

Nor does the Order render "reliance on [Flex-ANI] legally irrelevant" (USS 16) any more than reliance on any other technology, also permitted by the Commission's Rules, is rendered legally irrelevant or for that matter, legally relevant. The requirement is not a requirement of a specific technology; the requirement is for an accurate call tracking system. It is the latter that is "legally relevant."

U.S. South launches another erroneous attack on the Order by arguing that if the Order were correct in its interpretation of the *March 1998 Coding Digit Waiver Order*, there would have been no need to require IXCs to pay compensation because the *Payphone Orders* have always entitled PSPs to compensation irrespective of whether payphone specific digits were being transmitted. USS at 17. U.S. South cites language from the Order stating, "The

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<sup>25</sup> Other than the quote from the AT&T comments, most of the material on pages 15-16 of the AFR is lifted virtually verbatim from the original Opposition, at 15, 16, or 17, filed by U.S. South on August 31, 2011.

<sup>26</sup> See note 11, *supra*, and Petitioners Reply Comments at n. 15.

Commission always intended that PSPs would be compensated whether or not Flex-ANI or ANI ii coding digits were attached to a call” (USS 2, 17, citing Order ¶ 25), and says this language is inconsistent with the Bureau’s interpretation of the *March 1998 Coding Digit Waiver Order*.<sup>27</sup>

The statement U.S. South finds inconsistent is in fact entirely consistent with the Bureau’s analysis. The reason the Bureau had to order the initiation of per call compensation in the *October 1997 Bureau Waiver Order* and continue it in effect in the *March 1998 Coding Digit Waiver Order* was because the triggering event contemplated by the Commission’s *Payphone Orders* to end the transition period during which per payphone compensation was permitted and initiate the period when per call compensation was required had not occurred, as explained in the Order.

In the Order, the Bureau had already found that the *Payphone Orders* did not require payphone-specific coding digits to accompany individual calls. Rather, as the Bureau had explained in earlier paragraphs of the Order, and as discussed above, the *Payphone Orders* had made the deployment by the LECs of a system for supplying payphone-specific coding digits the “prerequisite” i.e., the triggering event, for the requirement that the Completing Carriers begin paying per call compensation instead of per phone compensation. The LECs had not completed the deployment by the October, 1997 deadline, and so in the *October 1997 Bureau Waiver Order* the Bureau waived the “prerequisite” condition. *See* Order ¶ 23. Thus, the Bureau had to order the Completing Carriers to begin paying compensation because, although “the Commission always intended that PSPs would be compensated whether or not Flex-ANI or ANI ii coding digits were attached to a call”, (*id.*) the “prerequisite”, i.e., the triggering condition for the requirement that Completing Carriers pay per call compensation, had not been met. In the

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<sup>27</sup> This argument is one of the very few arguments that is not redundant of earlier arguments.

absence of the Bureau granting the waiver and ordering per call compensation, many PSPs “would be denied any compensation while implementation issues [associated with the implementation of the requirement that LECs have the ability to transmit payphone-specific coding digits] are being resolved.”<sup>28</sup> The reason the Bureau had to order the initiation of per call compensation was because the triggering event for its initiation had not occurred. There is no inconsistency between the language in the Order and its logic.

C. THE ORDER IS FACTUALLY ACCURATE, AND DOES NOT RELY ON ANY ERRONEOUS FACTUAL FINDINGS

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In an attempt to create an issue that meets the Commission’s review standards for AFRs, U.S. South attempts to conjure up a factual error in the Order.<sup>29</sup> U.S. South asserts that the Order is plainly wrong when it found that PSPs have no ability to monitor whether “Flex ANI is being transmitted *by the LEC.*” USS 17, citing Order at ¶¶ 26, 34 (emphasis added). U.S. South is wrong.

Initially, it is not clear that U.S. South has fairly characterized what the Bureau said in ¶ 34. The discussion cited by U.S. South occurred as part of the Bureau’s discussion rejecting U.S. South’s argument that PSPs had a sufficient remedy because they could sue the LEC if the LEC failed to transmit the coding digits. Order ¶¶ 34-35. The Bureau’s specific point in

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<sup>28</sup> *October 1997 Bureau Waiver Order*, 11 FCC Rcd 16390, ¶ 11. The *March 1998 Coding Digit Waiver Order* continued in effect the waiver granted for certain LECs in the *October 1997 Bureau Waiver Order* and likewise continued in effect the requirement that the Completing Carriers continue to pay per call compensation even where the LECs had not yet implemented payphone-specific coding digit capability in an end office. Indeed, in ¶ 24 of the Order, the Bureau had emphasized that the per call payment had been in effect at the time of the *Coding Digit Waiver Order*, concluding that there was therefore no need for the *Coding Digit Waiver Order* to, and thus it did not, address the issue of compensation when Flex-ANI digits were or were not transmitted with a call. U.S. South has separately objected to this conclusion as well, as discussed in the paragraphs of text preceding this note.

<sup>29</sup> This is the only instance, other than the erroneous argument discussed above, *see* text accompanying and following note 27, in Section III (B), *supra*, (where U.S. South incorrectly asserts a logical inconsistency between the Bureau’s interpretation of the *Payphone Orders* and the Bureau’s interpretation of the *October 1997 Bureau Waiver Order*) where U.S. South has proffered a new substantive argument, which as we demonstrate in the text is entirely meritless. As we have discussed, in the remainder of the AFR, U.S. South is instead simply repeating in almost the exact same words the arguments it made below.

response to that argument was that a LEC's failure to transmit digits may not be the cause of the underpayment since there could have been breakdowns elsewhere in the call chain. The Bureau then went on to state that even if a PSP “could ensure” that the LEC did transmit the digits, “(and in many cases it may not be able to do so),” ANI failure could occur elsewhere in the path. Order ¶ 34. While the Bureau’s statement has some ambiguity, it is clearly not an unequivocal statement that PSPs have no way to track Flex-ANI transmission by the LEC.

But more importantly, even if U.S. South has correctly characterized the Order as saying PSPs have no way to track Flex-ANI transmission by the LEC, U.S. South offers no specifics to refute the Order, and in fact, the Order is accurate. U.S. South’s only attempt to refute the Bureau’s finding is to make several assertions and discuss procedures, which, in U.S. South’s own words, do not serve the purpose of allowing a PSP to track a failure *by the LEC to transmit digits*,<sup>30</sup> but allow “PSPs to utilize [the procedures] as signals to identify and correct *a system deficiency*.” USS 18 (emphasis added). So even assuming the Order says what U.S. South asserts, -- PSPs have no ability to monitor transmission of Flex-ANI by the LEC -- U.S. South has not demonstrated its inaccuracy by citing procedures that allow identification of a “system

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<sup>30</sup> The only arguably relevant procedure that would tell a PSP anything about whether the LEC was transmitting the correct coding digits is if a particular facilities based carrier has established a test line to allow the PSP to call the number and get back a signal or recorded message indicating the coding digits were received by the carrier. But if the PSP gets back information that the digits are not on the call, the PSP has no way of knowing whether that is because of a LEC failure or a failure elsewhere in the call chain.

Moreover, as developed in the Petition (n.23) and as the Bureau explained, even if the test digits did accompany the call, all that test tells the PSP is that the coding digits are being received on a particular call at a particular time to that particular carrier. Each carrier has to be tested individually and not all carriers have the test lines; in fact, most, including most switch-based resellers, do not; it is only the largest underlying facilities-based carriers who have the test lines. And as a practical and economic matter, the tests can be conducted only infrequently, perhaps when a tech otherwise visits the phone for maintenance/servicing, because the test calls have to be made from the payphone.

Indeed U.S. South makes much of the fact that the Petitioners in this matter could not demonstrate that the LEC was transmitting the digits but points to no procedure for Petitioners to have gotten the information from the LEC or U.S. South’s Intermediate Carrier, Level 3. It is an irony that U.S. South, who repeatedly touts the availability of test lines failed to set up a test line –indeed would not do so as part of a program to remediate its tracking system, *see* text at 27-28, *infra*-- so no PSP much less Petitioners could have used such a tool to know either whether its phone lines were transmitting digits to U.S. South or that U.S. South was not receiving the digits. *See* Petitioners’ Reply Comments at n.33.

failure" as opposed to a LEC failure to transmit the digits. Thus, U.S. South's assertion of factual error is meritless. In fact, U.S. South cannot demonstrate the statement's inaccuracy because the statement is accurate -- that PSPs have no ability to know whether the LEC is transmitting Flex ANI correctly -- unless the LEC tells the PSP, and there is no requirement that the LEC do so, and indeed the LECs don't do so. *See* Order ¶ 34.<sup>31</sup>

U.S. South also cites in support of its contention that there is a factual error a statement in ¶ 26, which was part of the Order's general background discussion explaining, as discussed above, that the Commission had not imposed in the *Payphone Orders* the requirement that individual calls be accompanied by payphone-specific coding digits. The Bureau observed that a policy consideration underlying the Commission's determinations in the *Payphone Orders* was that of all the parties in the call path, "the PSP has the least visibility and control over the network." U.S. South finds this seemingly unassailable observation to be "plainly wrong" and a "flatly erroneous finding." U.S. South is clearly incorrect. As discussed above and as U.S. South itself recognizes, PSPs have only indirect "visibility", if that is the correct term,<sup>32</sup> into the

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<sup>31</sup> *See* APCC Comments at 6-8, 11-18. APCC discussed at length why the data to show Flex-ANI failure at the LEC level was virtually impossible for PSPs to obtain and in fact the data was as a practical matter unavailable. To the extent the Order constitutes a finding by the Bureau that in fact Flex-ANI digit information is not available to PSPs, it is entitled to deference and is reviewed only if clearly erroneous. *See, e.g., Washoe County, NV and Sprint Nextel*, 23 FCC Rcd 11695, 11697, 11699 (2008). U.S. South has offered no specific facts that could justify overturning the Bureau's finding.

As a separate matter, and apart from the barriers discussed by APCC, questions may arise as to whether the Commission's own Customer Proprietary Network Information rules prevent a LEC from divulging Flex-ANI information with regard to particular carriers or particular calls. *See* 47 CFR §64.2005 (c).

<sup>32</sup> It may be useful to clarify what is meant by "visibility." While analogies have their own weaknesses, an analogy to a broken down car is useful. If the engine is running, but the car won't go, there is no "visibility" into the cause of the problem unless one can get under the hood, where one would have visibility to see that the linkage between the accelerator and the fuel pump has come loose, or under the car, where one would have visibility to see that the drive shaft has come loose. The driver, the PSP in this analogy, would know that the "system" is broken because the car won't go (payments for completed calls have fallen or there are unpaid calls, although because of the inherent delays in the DAC system, the PSP might not know for as long as six months after the car stopped moving, i.e., the payments slowed) but would have no visibility into the cause of the problem. By contrast, the person who can look under the hood or under the car, the carriers in the call path in the analogy, would have "visibility" into whether the problem is or is not in the part of the car (the network) under that carrier's control. PSPs have no visibility into what is broken in the network even if they can tell, in some instances, that it is not working. Moreover, PSPs do not have

network using the “procedures” that give them only generalized information that there is a “system deficiency.” Actual visibility into the network is limited to the carriers in the call path.

U.S. South’s argument really is that PSPs will know when Flex ANI is broken because they will see a drop in their compensation and the completion ratio for carriers. USS 18. The only nexus U.S. South draws between this assertion and why Completing Carriers should be relieved of liability for failure to track accurately payphone calls is a quote from comments submitted by AT&T to the effect that an IXC (and presumably a switch-based reseller, although AT&T does not mention switch based resellers) cannot distinguish Flex ANI failure from any other reason why payphone digits are not transmitted with a particular call. AT&T points out that a PSP has the knowledge about the payphone’s service status, whether it is connected to a payphone line, etc., and because the PSP has a customer relationship with the LEC, the PSP has the most leverage to get Flex ANI issues addressed. USS 18, quoting AT&T Reply Comments at 3-4.<sup>33</sup> From these statements, U.S. South argues that the “Order relies on the opposite assumption,” that IXCs have the business relationships with other carriers to allow the IXCs to get Flex ANI problems addressed, when in the case of switch-based Completing Carriers like U.S. South, they have no business relationship with the LEC that enables them to get Flex ANI issues addressed. USS 18.

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the right to look under the hood or under the car (into the network) to see what is wrong. And carriers, like U.S. South, frequently deny any assistance, such as making even rudimentary tools like a test line, available.

<sup>33</sup> In its comments, APCC explained why the PSPs have virtually no leverage in their dealings with the LECs. APCC Comments at 6-8. To the extent the Bureau accepted APCC’s analysis over AT&T’s summary assertions, it is fact finding entitled to deference. U.S. South needs to offer specific facts to overturn the Order. *See* n. 31, *supra*. U.S. South offers none.

AT&T also asserted that “PSPs have ample means to test Flex ANI and can do so on a routine basis.” AT&T does not address what else it can be talking about other than a test call number, whose limitations are addressed in Note 30, *supra*.

U.S. South is wrong again. In the very paragraph cited by U.S. South and the following paragraph, ¶¶ 34-35, the Bureau addressed these very points. For starters, the Order does not say that PSPs have no business relation with the LEC. Indeed the Order recognizes that the PSP does have such a relationship.<sup>34</sup> But the Order also recognizes that IXCs and switch-based resellers also have a relationship with the LECs. U.S. South “ignores the fact that Flex ANI transmission is a tariffed service offered by the LEC to the Completing Carrier,” which includes IXCs directly interconnecting with the LEC. Order ¶ 35. Thus, the IXCs as purchasers of access services have their own leverage with the LECs, and as access purchasers, their leverage is certainly greater than the PSP’s.

As for U.S. South’s concern that switch-based resellers have no direct relationship with the LEC, the Order addresses this issue twice in ¶ 35. First, the Order points out that if the coding digit issue is at the LEC or Intermediate Carrier level, the Completing Carrier has the business relationship with those carriers and can resolve the problem with them. Second, the Order is absolutely explicit in addressing directly the concern that U.S. South raises about the switch-based reseller’s lack of a relationship with the LEC: “a Completing Carrier [who] has contracted with the Intermediate Carrier . . . is in the best position to identify and redress” with the Intermediate Carrier any failure to receive coding digits. Indeed the same carrier to carrier procedures for testing and coordination mandated by the Commission for use between LECs and IXCs to ensure proper functioning of Flex ANI are available to Intermediate Carriers and their switch based reseller customers such as U.S. South. As the Order states, “If a Completing Carrier chooses to track calls through Flex ANI, the burden is on the Completing Carrier to ensure that

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<sup>34</sup> For example, the Order observes that in the *March 1998 Coding Digit Waiver Order*, the Bureau required PSPs to order payphone lines from the LEC. Order n.88

its system can accurately track all calls, and the Completing Carrier must compensate the PSP for each and every completed call.” Order, ¶ 33.<sup>35</sup>

There was no erroneous factual determination. The Bureau’s findings about the ability of PSPs to know whether the LEC transmitted payphone digits or the genesis of Flex ANI failure were accurate. And the Bureau correctly understood the business relationships involved and the ability of each party in the call chain to address the absence of coding digits.

D. THE ORDER CORRECTLY IMPLEMENTS THE COMMISSION’S PER CALL COMPENSATION REGIMEN

The Order correctly interpreted the Commission’s existing regulations. As discussed above, the Order went through a meticulous analysis of the Commission’s *Payphone Orders* and based its conclusions on an analysis of them. In the course of that analysis, the Bureau recited a variety of considerations that it believed bolstered its analysis and were factors in the Commission’s imposition of the rules it adopted.

U.S. South launches repeated attacks on the Order arguing that the factors and policy concerns mentioned in the Bureau’s analysis are irrelevant to an interpretation of the rules. *E.g.*, USS 19, citing Order ¶¶ 26, 33.<sup>36</sup> U.S. South is wrong. First, as U.S. South acknowledges,<sup>37</sup> the

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<sup>35</sup> The record of this proceeding precisely illustrates why the Order is correct. As Petitioners observed in their Reply Comments (n.16), U.S. South failed to use any of the carrier to carrier procedures or to even raise the issue of Flex-ANI with its underlying Intermediate Carrier. “[U.S. South] admitted in this case that its contracts with the Intermediate Carrier, Level 3, did not require Level 3 to transmit payphone-specific coding digits to [U.S. South], that [U.S. South] had not even inquired of Level 3 whether Level 3 had ordered payphone-specific coding digits from the LEC, that U.S. South had done no testing with Level 3 to verify that U.S. South was receiving coding digits on all payphone calls, and that it never requested that Level 3 send it payphone-specific coding digits, despite the fact that U.S. South’s entire ability to accurately track payphone calls depended on receipt of the digits” The ruling sought by U.S. South would absolve a Completing Carrier from any responsibility to ensure that in fact it is receiving the digits on which its system depends to count and compensate payphone calls. Under U.S. South’s reasoning, a Completing Carrier could have an “accurate” system for counting digits, but not order Flex-ANI and still be in compliance with the Commission’s rules. *See* Petitioners’ Reply Comments at 17-18.

<sup>36</sup> U.S. South also inaccurately accuses the Bureau of “repeating the fallacy that “the Act requires Completing Carriers to provide per-call compensation to the PSP . . .” whereas the Act imposes no such obligation; it is the

Bureau recited the factors the Commission considered in adopting the rules and the considerations used by the Commission, (*see, e.g.*, Order at ¶ 25, citing various rulings requiring at least some compensation where per-call compensation is not available). While the Bureau cannot adopt interpretations that are not supported by the language of the rules, where there are questions raised about the interpretation of the rules, the Bureau is clearly justified in using policy concerns of the Commission as interpretive aids in the manner of a legislative history.<sup>38</sup>

But more fundamentally, while the policy concerns recited by the Bureau reinforce the conclusions reached by the Bureau, they were not the only or even the main reason the Bureau reached its conclusions; the Bureau reached its conclusions because they are *what is “unambiguously” required by the rule*. As the Bureau pointed out, “the rules unambiguously place the burden and the duty on the Completing Carrier to . . . accurately track all calls . . . and to compensate PSPs each quarter for all completed calls.” Order, ¶ 30. The rule is crystal clear that the call tracking system must count calls accurately, not read Flex ANI payphone-specific coding digits accurately. U.S. South in essence keeps coming back to the same point stated in a variety of ways; that all the call tracking system has to do is read Flex ANI payphone-specific

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Commission’s rules that impose the obligation. Apart from the irrelevance of this attack, the Bureau did not say what U.S. South attributes to it. What the Bureau said in the only place cited by U.S. South is that “Section 276 requires the Commission to ensure that PSPs are fairly compensated for every completed call.” Order ¶ 26.

<sup>37</sup> U.S. South acknowledges “the Commission’s proper recognition of the ‘equity’ of requiring IXCs to track calls . . .” USS 19. U.S. South does go on to question the conclusions reached from consideration of those equities, but that in essence amounts to an argument that the Commission wrongly adopted the rules. It is not a proper attack on the correctness of the Bureau’s adherence to the requirements of the rules or the Bureau’s consideration of the factors considered by the Commission.

<sup>38</sup> U.S. South repeatedly states that policy concerns expressed by the Commission are not a reason for imposing liability if the language of the rule would not otherwise support liability. While this proposition may be valid, by analogy to *Chevron U.S.A Inc v. NRDC*, 467 U.S.837 (1984), under which an agency may rely upon legislative history to arrive at a reasonable interpretation of an ambiguity in a statute, *if there were ambiguities* in the rule, the Bureau may rely on the Commission’s statements in adopting the rule as interpretive aides to arrive at a reasonable interpretation of the rule. But as we discuss in the text immediately following this note, *the rule is unambiguous*.

coding digits correctly. *See, e.g.*, USS at 21.<sup>39</sup> As Petitioners pointed out, “[U.S. South] would interpret the requirement of Section 64.1310(a)(1) [as though it contained the italicized language]:

Each Completing Carrier shall establish a call tracking system that accurately tracks *payphone specific-coding digits when they are available on coinless access code or subscriber toll-free payphone calls and tracks coinless access code or subscriber toll-free payphone calls to completion.*”<sup>40</sup>

The rule would need to be amended to include the italicized language to support U.S. South’s interpretation. But without the italicized language the rule is unambiguously clear: it is “calls” that must be counted, not “calls with payphone-specific coding digits when they are available.”

Second, the Bureau backed up the clarity of the rule by discussing how the rule’s unambiguous language is exactly supported by the policy concerns the Commission articulated in adopting the rules. In the paragraphs leading up to the snippets of language quoted by U.S. South (USS 19), the Bureau extensively analyzed the *Tollgate Orders*. Order ¶¶ 28-32. The Bureau explained how, just as the *Payphone Orders* had never imposed a requirement that payphone-specific digits accompany every call, the *Tollgate Orders* required payment on every call irrespective of whether the call was accompanied by those digits.

Perhaps recognizing the deficiencies in its analysis, U.S. South devotes several pages of the AFR to in essence argue its own policy considerations for why the Bureau’s correct reading and interpretation of the unambiguous rules ought to be overturned. USS 20-22. *If* there were any merit to these arguments, which there *is not*, they *might* warrant some adjustment to the

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<sup>39</sup> Again, the entire argument from pp.19-22, with the exception of a new erroneous assertion (*see* text accompanying note 41, *infra*) and a very few edits to account for the fact that the arguments are now being used in the AFR, are taken virtually verbatim from the original U.S. South Opposition (at 17-21) filed on August 31, 2011.

<sup>40</sup> Petitioners’ Reply Comments at 6-7.

current rule. But they could not change the Bureau's correct interpretation of the current rules. In any event, all of U.S. South's arguments lack merit.

U.S. South resorts again to the argument that the Order reads "the Flex-ANI requirement out of the payphone plan" and renders it irrelevant. USS 20. As discussed above, Flex-ANI is relevant as part of a tracking system that counts calls accurately, not one that merely reads coding digits accurately. U.S. South also argues that if there is a malfunction elsewhere in the system, the "responsibility . . . lies totally with the Completing Carrier." U.S. South pleads this lack of "equity" as an "untoward result." *Id.* Whatever validity this argument might have as a basis for changing the rule, it is a policy argument properly raised in a proceeding to change the rule, not in a proceeding to interpret an unambiguous rule. Moreover, the argument is wrong. As the Order points out, the Completing Carrier and each carrier in the call chain can reach backwards to the carrier above it in the call chain with whom it has the relationship for accountability for any coding digit failure. Order ¶ 35.

Similarly, U.S. South complains that whatever the Commission's reliance on equities in striking the balance it struck in allocating responsibilities and reporting requirements when it adopted the rules, the current interpretation may prevent some cost recovery by prepaid calling card providers who require real time authentication for recovering their costs. USS 21. Again, this might be an interesting policy argument in a proceeding to change the requirements of the current rule. But there are two difficulties with it now. First, it is not accurate that the Bureau's ruling will interfere with anyone's ability to obtain real time authentication.<sup>41</sup> As the record in this proceeding demonstrates, Completing Carriers can rely on other means, such as ANI lists, to authenticate calls from payphones, as U.S. South did in this very proceeding when it sought to

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<sup>41</sup> This assertion is the one new point U.S. South has added to this section from when these identical points were raised at the Bureau level. *See* note 39, *supra*.

block calls from Petitioners' payphones.<sup>42</sup> Second, if there is a need for change to accommodate prepaid providers' Flex-ANI needs, those changes may also warrant a change in the reporting requirements. As U.S. South acknowledged, (USS 20) the rules adopted by the Commission were designed to balance the PSPs' lack of visibility into the network with fairness to carriers, resulting in reports that carriers must provide PSPs. But as APCC observed, (APCC Comments at 8) PSPs currently receive *no information in any of the reports they receive* from any carriers about coding digits. If the lack of coding digits were to be made a defense to failure to track and pay, a proper balancing of those interests might require that carriers, including LECs, IXC, and Intermediate Carriers to report on coding digits so PSPs could find the source of coding digit failures.

Nor does the ruling “strand” any investment in the facilities used to deploy Flex ANI. As has been observed multiple times, the Commission required PSPs to pay for the deployment of Flex ANI. The LECs have long ago recovered all the costs of deploying the service. And similarly, the service imposes no costs on IXCs. Because the service was entirely paid for by PSPs, the Commission has always required it to be offered for free to IXCs. Completing Carriers thus have obtained for free the foundation for building an accurate call tracking system;<sup>43</sup> that is not to say, as U.S. South would have it, that they have a safe harbor from any responsibility to ensure that their call tracking system is accurate.

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<sup>42</sup> See note 11, *supra*. There are multiple sources of such lists. For example, PSPs must submit lists of currently deployed payphones each quarter in order to obtain compensation. The lists the LECs are required to produce for Completing Carriers on a quarterly basis are also available. In a time of declining deployment when virtually no new payphones are being deployed, any possible lag in the accuracy of these lists would be negligible.

<sup>43</sup> Nor was any “mandatory” technology “imposed on the telecommunications industry” by the Commission. USS 16. The ILECs alone (and not all of them since a number were exempted) were required to deploy a single piece of software in their end offices. Contrary to U.S. South’s assertion, no other segment of the industry was required to do anything with regard to Flex-ANI. As all parties have stated, and as the Bureau observed in the Order (¶ 32), the Completing Carriers were allowed to use the technology of their choice to track calls. There is no requirement that Completing Carriers or any other carrier use Flex-ANI.

E. ANY REMEDY AGAINST THE LEC FOR FAILURE TO TRANSMIT CODING DIGITS IS NOT A SUBSTITUTE FOR THE REQUIREMENT THAT COMPLETING CARRIERS HAVE ACCURATE CALL TRACKING SYSTEMS

U.S. South returns to its assertion that because the LECs may be liable for their failure to transmit coding digits properly, it was error for the “Petition and the Bureau”<sup>44</sup> to conclude PSPs will be left without a remedy and without compensation when a Completing Carrier fails to pay for calls lacking proper coding digits. USS 23.<sup>45</sup> USS states that the Order assumes that the failure to transmit coding digits is not in the LEC network and the fault must lie with an Intermediate Carrier or the Completing Carrier. *Id.*

U.S. South is wrong again. The Order simply said that wherever in the network a Flex-ANI error occurred, the carriers in the call chain would be able to identify the source of the failure, and because of their business relationships up and down the call chain, they could hold the responsible carrier accountable. Order, ¶¶ 34-35. *See also* discussion at 19-21, *supra*. There is no necessary predicate in the Order as to where the failure occurred. The carriers in the call chain are not only best positioned to find the failure, but the PSP is for all practical purposes, unable to find the genesis of the failure. *See* 17-18, *supra*. If the LEC failed to deliver coding digits properly, it might also be liable to either the PSP or the interconnecting carrier under the

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<sup>44</sup> Like earlier portions of the AFR, this section is lifted practically verbatim from the Opposition originally filed by U.S. South on August 31, 2011 except that U.S. South inserted “and the Bureau” after “the Petition” and added an argument about PSP incentives, but the arguments are otherwise identical. Compare Opposition filed on August 31, 2011 at 21-22. Indeed U.S. South cites the Petition instead of the Order in a number of places because there is nothing to cite in the Order that sets up the point U.S. South wants to make so it simply uses the language from the Opposition it filed in August, 2011 which had only the Petition to attack.

<sup>45</sup>, U.S. South continues to repeatedly assert that there are no allegations that U.S. South violated any Commission rule and that the Commission’s existing safeguards are adequate to protect PSPs despite the undisputed facts that U.S. South has ignored the rules and the safeguards by failing to file for five years the annual audits that U.S. South has itself said are integral to the integrity of the DAC system, that U.S. South has failed to file for at least 20 quarters the CFO certifications required by the Rule, etc, *See* note 10, *supra*.

Commission's Rule for that failure, but there is also direct responsibility to the carrier with whom it contracts to deliver the coding digits.<sup>46</sup>

U.S. South also worries that the Order will dissuade PSPs from entering into alternative compensation arrangements ("ACA"s) and will discourage carriers from carrying calls from payphones. USS 24. As with many of U.S. South's earlier arguments, *if* there were any merit to these arguments, they *might* be relevant in a proceeding to change the rules. But as U.S. South itself noted elsewhere, the rule must be observed as it is written, and the Bureau has correctly read the clear language of the rules.

In any event, U.S. South's arguments lack merit and would not prevail even in a proceeding where rule changes were possible. No one is more acutely aware than PSPs of declining call volumes from payphones. PSPs are highly motivated to enter into arrangements that keep traffic on payphones rather than drive traffic away. PSPs recognize that while carriers may block some calls from payphones, PSPs must provide nondiscriminatory access to all carriers, and indeed cannot even realistically block non-paying carriers. Thus, PSPs are highly motivated to enter into ACAs rather than litigate. Litigation is expensive and a burden on all.

Moreover, as the record in the instant proceeding demonstrates, PSPs are willing to negotiate on the basis of the data. In fact, Petitioners negotiated a settlement with US South conditioned on working out a protocol for fixing the problems with U.S. South's call tracking system, but that settlement fell apart not because Petitioners were unwilling to settle, but because U.S. South refused to work with Petitioners to fix its call tracking system. Thus, it was U.S. South who walked away from the settlement even in the face of data showing completed calls for which it had not paid. This is a strong indication that in the absence of the rule adopted by the

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<sup>46</sup> There is again irony in U.S. South's assertion that fault should lie with the LECs when U.S. South has admitted that it never tested with its Intermediate Carrier to ensure the presence of proper coding digits, its contracts contain no requirement for coding digits, etc. See note 35, *supra*.

Order, carriers will have no incentive to negotiate ACAs or any other arrangement even if they know there are completed calls for which they have not paid.

**IV. CONCLUSION**

For the foregoing reasons, APCC and Petitioners respectfully request that the Commission i) summarily deny the Application for Review; and ii) under any circumstances, act expeditiously to deny the Application for Review.

Respectfully submitted,

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August 31, 2012

## ATTACHMENT

The following are Commission documents and their form of citation:

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 20541, 20590-92, 20597-98, paras. 96-101, 112-14 (1996) (“**First Report and Order**”);

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Rcd 21233, 21265-66, 21278-80, 21281-82, paras. 64, 93-99, 103 (1996) (“**Order on Reconsideration**”) (together with the First Report and Order, the “**Payphone Orders**”), vacated and remanded in part, Illinois Pub. Telecomms Ass’n v. FCC, 117 F.3d 555 (D.C. Cir. 1997) (subsequent history omitted);

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order, 12 FCC Rcd 16387 (1997) (“**October 1997 Bureau Waiver Order**”);

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Memorandum Opinion and Order, 13 FCC Rcd 4998 (1998) (“**March 1998 Coding Digit Waiver Order**”);

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Memorandum Opinion and Order, 13 FCC Rcd 10893 (1998) (“**April 1998 Per-Phone Order**”);

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order, 14 FCC Rcd 836 (1998) (together, “**Bureau Coding Digits Waiver Orders**”);

Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 18 FCC Rcd 19975 (2003) (“**2003 Tollgate Order**”);

Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, 19 FCC Rcd 21457 (2004) (“**2004 Tollgate Reconsideration Order**”) (together with the 2003 Tollgate Order, the “**Tollgate Orders**”).

The following are documents in the record cited in the attached Comments in Opposition and the form of citation for each:

Petition of GCB Communications, Inc, d/b/a Pacific Communications and Lake Country Communications, Inc, for a Declaratory Ruling to Clarify Payphone Service Providers’ Responsibilities With Respect To The Transmission of Payphone-Specific Coding Digits In Order to Receive Per-Call Dial-Around Compensation for Completed Calls, filed August 9, 2011 (“**Petition**”);

Opposition of U.S. South to Petition for Declaratory Ruling, filed August 31, 2011 (“**Opposition**”);

Comments of the American Public Communications Council and APCC Services, Inc., filed September 30, 2011 (“**APCC Comments**”);

Reply Comments of GCB Communications, Inc, d/b/a Pacific Communications and Lake Country Communications, Inc., filed October 18, 2011 (“**Petitioners’ Reply Comments**”);

Reply Comments of AT&T, filed October 18, 2011 (“**AT&T Comments**”)

**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, the foregoing Joint Comments of the American Public Communications Council, APCC Services, Inc., and Petitioners GCB Communications, Inc. d/b/a Pacific Communications and Lake Country Communications, Inc, In Opposition to Application For Review Filed By U.S. South was sent via electronic mail to the following:

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