



TELECOMMUNICATIONS

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COURT RULES PSPS HAVE NO PRIVATE RIGHT OF ACTION TO DAC

The United States Circuit Court for the District of Columbia has recently considered whether Payphone owners and operators (“PSPs”) have a private right of action to sue long distance carriers (“IXCs” or “Interexchange Carriers”) for compensation for coinless payphone calls as required under federal law – Section 276 of the Communications Act – and Federal Communications Commission (“FCC”) regulations. The Court also considered whether payphone compensation collection associations (so-called “aggregators”), such as APCC, have standing to sue to collect such compensation.

The case, *APCC Services, Inc., et al. v. Sprint Communications Co.*, No. 04-7034 (D.C. Cir. June 28, 2005), stems from a suit filed by APCC and other aggregators, as well as various PSPs individually, to collect payphone compensation from Sprint and other IXCs. Most PSPs rely on “aggregators” to act as intermediaries between themselves and IXCs for the

collection of payphone compensation. In exchange for a fee typically based on the number of lines operated by a PSP, aggregators – like APCC – submit billing information to IXCs and pay over to the PSP the monies they receive from the IXCs.

The Court held that while aggregators did indeed have standing to sue to collect payphone compensation on behalf of PSPs; the PSPs had no private right of action to sue for such compensation under Section 276 of the Communications Act, or FCC regulations.

In determining whether a private right of action exists, a court is required to interpret the statute “to determine whether it displays an intent to create not just a private right but also a private remedy,” or in other words a “private right to enforce.”

In this case the PSPs acknowledged that Section 276 itself does not create a private right of action, and does not hold a common

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carrier liable for failing to comply with the requirements of the Act. Rather, the PSPs argued that a private right of action is created by Sections 206 and 207 of the Act which makes common carriers liable, and gives the injured party the right to sue, for any damages cause by any conduct deemed unlawful under the Act, or by any failure to do something required under the Act.

The court rejected the PSPs' argument that Section 276 creates a right of action for a PSP (or its assignee) to recover dial-around compensation from an IXC. Specifically, the Court found it critical that Section 276 did not contain "rights creating language" and that there is no violation of the Act to be remedied thought Sections 206 and 207 when an IXC fails to pay a PSP compensation prescribed by the FCC. Section 276, the Court found, does not establish a "right" to compensation *per se*, nor does it designate that compensation is to be obtained from IXCs, or that IXCs should be the party responsible for such compensation. Thus, the Court reasoned, because IXCs are not directed by Section 276 to take any action, any failure to pay cannot violate that Section and thus there is no private cause of action to enforce the payment obligation created by that Section.

The PSPs also argued that the IXCs' violation of the FCC's dial-around compensation regulations amounted to a

violation of Section 201 of the Act – which prohibits unjust and unreasonable conduct – for which a private right of action would be created under Sections 206 and 207.

The Court rejected this argument stating that noting in the Act or congressional intent suggested that Section 201 was meant to be a "catch-all" provision with the sweeping effect of transforming any violation by a carrier of an FCC regulation into a violation of the Act actionable in federal court. The Court noted that the FCC might have the power to interpret Section 201 to encompass the violation of its rules, but that there is no indication that it attempted or intended to do so in this instance.

Finally, the PSPs argued that a private right of action arose out of sections 407 and 416 of the Act which basically make it a violation of the Act to fail to comply with an FCC "order." In each instance, the PSPs argued that the dial-around compensation regulation constitutes an "order" of the commission.

The Court rejected both arguments and agreed with the IXCs that the term "order" under Sections 407 and 416 refers only to adjudicatory, and not to rulemaking decisions or orders as is the case with the FCC's dial-around compensation regulations.

TLG has been at the forefront of this issue, successfully arguing in two federal courts that PSPs do not have a private cause of action. If you would like additional information on this decision or on payphone compensation issues generally, please feel free to give us a call.

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