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PUBLIC (REDACTED) VERSION

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF GAMEFLY, INC.	)))	Docket No. C2009-1

DOCUMENT COMPENDIUM OF GAMEFLY, INC.

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Counsel for GameFly, Inc.

November 22, 2010

Compendium of Documents
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Responses

RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO DISCOVERY REQUEST OF GAMEFLY INC.

GFL/USPS-34. Please produce all directives, guidance, guidelines, handbooks, instructions, manuals, notices, rules, SOPs, standards and similar communications issued by the Postal Service to limit the access of GameFly to USPS personnel or facilities after the filing of GameFly's complaint in this case.

RESPONSE:

See the attached letter, which directed that any request by GameFly to access postal facilities be routed through Headquarters officials. This will be in effect during the pendency of this complaint proceeding, and was designed to ensure that discovery be conducted through the established Commission processes.

William P. Galligan
Senior Vice President
Operations

UNITED STATES
POSTAL SERVICE

June 11, 2009

VICE PRESIDENTS, AREA OPERATIONS

SUBJECT: GameFly Complaint

GameFly has initiated litigation against the Postal Service by filing a complaint at the Postal Regulatory Commission regarding the handling and processing of its mailpieces. In short, GameFly complains its flat-size mail, containing game DVDs, does not receive the same manual processing as NetFlix and Blockbuster's letter-size mail containing movie DVDs.

I also understand GameFly representatives are reaching out to local plant, district, and area personnel in efforts to resolve service related issues with mail containing its game disks. While we encourage local personnel to address service issues raised by customers, our challenge is to respond to GameFly's inquiries and resolve what we can without compromising the Postal Service's legal position.

Given the nature of the complaint and its juxtaposition with our responsibility to provide consistent customer support, we request that all communication with GameFly flow through the Business Service Network (BSN). Any service or other inquiries received directly from GameFly staff should be directed to the BSN for action. Doreen Sanders, Los Angeles BSN representative, is equipped to handle GameFly inquiries and will utilize standard BSN processes for problem resolution with local BSN representatives.

GameFly service inquiries frequently include requests for access to plant floors with the intention of informing postal personnel how GameFly prefers that its mail be processed. Since that very processing lies at the heart of the complaint, our attorneys have advised that all requests for access to mail processing operations be referred to them directly. The contact attorney's handling this case are Ken Hollies, knollies@usps.gov, at 202-268-3083 and Keith Weidner, Keith.E.Weidner@usps.gov, at 202-268-6252. You may also contact Ken or Keith should you require additional legal guidance on GameFly inquiries.

Please ensure you communicate to your Executives that all communications relative to GameFly must be directed either to the BSN, or to our attorneys, as specified above.

Thank you for following up on this matter.

William P. Galligan
William P. Galligan

475 L'Enfant Plaza SW
Washington, DC 20260-2700
202-268-5100
Fax: 202 268-7509
www.usps.com

RESPONSE OF THE UNITED STATES POSTAL SERVICE TO
DISCOVERY REQUEST OF GAMEFLY, INC.

GFL/USPS-73. Please refer to Paragraph 81 of the parties' July 20, 2009, Joint Statement of Undisputed and Disputed Facts. Paragraph 81 contains the following contention by the Postal Service:

> [M]ail processing decisions concerning the automated or manual handling of Netflix DVD return mail are made locally based on determinations as to what makes the best sense in the local mail processing environment, and processing decisions to remove Netflix mail from automated operations ensure the overall efficiency of mail processing operations, based on the characteristics of Netflix mail (such as the density of its volume).

(a) Please identify all circumstances in which you contend that removing "Netflix mail from automation operations ensure[s] the overall efficiency of mail processing operations."

(b) Please produce all studies, analyses and similar documents that you contend support your response to part (a).

(c) Please explain how allowing "mail processing decisions concerning the automated or manual handling of Netflix DVD return mail" to be "made locally" in fact "ensure[s] the overall efficiency of mail processing operations".

(d) Please produce all studies, analyses and similar documents that you contend support your response to part (c).

RESPONSE:

a. Local plant managers often determine that it is more efficient to cull the identifiable pieces in an earlier non-distribution operation. This is easily performed due to factors such as high piece visibility, high volume density, and low volume variability.

b. This response is not predicated on any studies.

c. Allowing the exercise of local discretion ensures that the decision is made by a local official who is better aware of local conditions, including the prevalence of Netflix pieces and the mix of letters being processed in that plant.

d. This response is not predicated on any studies.

GFL/USPS-163

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GFL/USPS-163

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GFL/USPS-163

[Redacted – 3 pages]

Appendix USPS/GFL-4A

[Redacted – 4 pages]

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Appendix USPS/GFL-6

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Appendix USPS/GFL-6

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SUPPLEMENTAL ANSWER OF GAMEFLY, INC., TO
DISCOVERY REQUEST OF USPS
(July 27, 2010)

USPS/GFL-67. In your answer to USPS/GFL-4, you state "[t]he two individuals who managed these changes (Steve Brown and Jeff Kawasugi) left GameFly in December 2007 and August 2009, respectively, and GameFly did not retain the two employees' files on these matters." Did GameFly impose a litigation hold on the files of the two employees described above? Please describe the litigation hold, including the effective dates and the preserved content, and produce all documents related to the litigation hold. If you did not impose a litigation hold on the files of the two employees described in your answer to USPS/GFL-4, please explain the reasoning for this decision.

Supplemental Answer:

Please see GameFly's Supplemental Answer to USPS/GFL-4.

SUPPLEMENTAL ANSWER OF GAMEFLY, INC., TO
DISCOVERY REQUEST OF USPS
(July 27, 2010)

USPS/GFL-68. In your answer to USPS/GFL-4, you provide a partial email thread dated 6/2/2009. Please produce the complete email thread and the attachments referenced in that email thread.

Supplemental Answer:

Please see Supplemental Appendix USPS/GFL-4A.

Documents

GFL2046
[Redacted]

GFL2441
[Redacted]

Comments on Draft (8-28) DVD-by-Mail Cost Model
[Redacted – 14 pages]

Comments on Draft (8-28) DVD-by-Mail Cost Model
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GFL2524
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USPS92042

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USPS92044

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FE Return Scenario

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Cases

73 Rad. Reg. 2d (P & F) 1320, 8 F.C.C.R. 5522, 8 FCC Rcd. 5522, 1993 WL 757208 (F.C.C.)

FCC 93-388

****1** In the Matter of AMERICAN MESSAGE CENTERS, Complainant
v.
SPRINT COMMUNICATIONS COMPANY L.P., Defendant

File No. E-91-116

Released: August 17, 1993
Adopted: August 6, 1993;

***5522** By the Commission:

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

1. We have before us a complaint filed by American Message Centers (AMC) against Sprint Communications Company L.P. (Sprint) in which AMC alleges that Sprint violated Sections 201(b) and 202(a) of the Communications Act of 1934, as amended,[FN1] by imposing charges for unauthorized long distance calls that were placed through an AMC facility and ultimately carried on Sprint's interstate network. AMC has also filed a "Request for the Imposition of Sanctions and the Issuance of a Notice of Apparent Liability" (Request for Sanctions) alleging that Sprint made false or misleading statements to the Commission and failed to adhere to Commission rules pertaining to discovery and formal complaint pleading requirements. For the reasons discussed below, we deny AMC's complaint and its request for sanctions.[FN2]

II. BACKGROUND

2. AMC provides telephone answering services to retail customers by utilizing direct inward dial (DID) incoming lines linked to its central location in Sherman Oaks, California. A call to any of AMC's local numbers in California and Nevada is automatically forwarded via incoming WATS lines to AMC's Sherman Oaks location. Beginning in 1989, AMC subscribed to resold long distance telecommunications services, including WATS lines, that were provided by Telecom Management Systems, Inc. (TMS). TMS obtained these services from Pacific Bell and Sprint on a volume discount basis. The incoming WATS lines terminated on AMC's premises at what AMC refers to as its "COBOT Reception Center." [FN3] AMC alleges that it was assured by the manufacturer that the COBOT Reception Center equipment could not be used to route an incoming call to an outgoing line.[FN4]

3. In early April 1991, a Sprint representative informed AMC that there had been two incoming calls of unusual duration on AMC's incoming WATS lines.[FN5] Later that month, AMC determined that its monthly invoice from TMS contained charges for unauthorized outgoing international calls. AMC contacted TMS representatives who investigated and determined that unauthorized calls originating in New York City were being routed through AMC's COBOT Reception Center. AMC subsequently disconnected this equipment on or about April 17, 1993. In April, May, and June 1991, AMC received TMS invoices that contained $173,225.51 in charges attributable to allegedly fraudulent calls.[FN6]

4. In June 1991, TMS notified AMC that Sprint was holding TMS responsible for the charges associated with the allegedly fraudulent calls pursuant to its Tariff F.C.C. Nos. 1 and 2. TMS further advised AMC that it would, in turn, hold AMC responsible for the charges. AMC and TMS then entered into negotiations concerning payment of the charges. When they were unable to reach any agreement, TMS filed suit against AMC in the Superior Court of California, County of Los Angeles, to collect the unpaid charges.[FN7] On August 5, 1991, AMC's counsel contacted Sprint and requested that a meeting be held to discuss a settlement of the disputed charges. On August 9, 1991, Sprint rejected AMC's request, stating that it was requiring payment from TMS for the disputed services regardless of whether TMS collected for those services from other parties.[FN8] Sprint further advised AMC's counsel that any "arrangement"

between TMS and AMC regarding payment of the disputed charges was not the business of Sprint. On August 27, 1991, AMC requested that TMS, as Sprint's customer, give written notice to Sprint that it disputed the charges at issue, as required by Sprint's tariff.[FN9] TMS declined ***5523** to do so.[FN10] AMC subsequently filed complaints with the Commission charging TMS and Sprint with violations of Sections 201(b) and 202(a) of the Act in connection with their treatment of the disputed charges. TMS and AMC later reached a settlement of their dispute, and the Bureau dismissed AMC's complaint against TMS at the joint request of AMC and TMS.[FN11] The crux of AMC's complaint against Sprint is its claim that Sprint's demand that TMS pay all charges associated with the fraudulent calls placed through AMC's COBOT Reception Center is not authorized by Sprint's tariffs and is unjust and unreasonable under Section 201(b) of the Act and unreasonably discriminatory under Section 202(a). We address the parties' specific contentions below.

III. DISCUSSION

****2** A. AMC's standing to challenge Sprint's charges to TMS.

1. Contentions of the parties.

5. In its first two affirmative defenses, Sprint argues that AMC subscribed to TMS, not Sprint, services and that AMC's dispute over the unauthorized calls is therefore with TMS, not Sprint.[FN12] Sprint further notes that TMS itself has not denied that it received services from Sprint, has not challenged the accuracy of bills for those services, and has not questioned the applicability or validity of the relevant Sprint tariff provisions.[FN13] AMC replies that it “incurred damages that were proximately caused by Sprint's enforcement of its unlawfully vague tariff provisions against its subscriber,” TMS.[FN14] AMC characterizes its payment of $78,999.40 to settle a lawsuit brought by TMS to be “a direct result of Sprint's actions.” [FN15] According to AMC, “[i]f Sprint had not unlawfully insisted on payment [from TMS], AMC would not have been damaged.” [FN16] AMC also maintains that Section 208 of our rules “entitled AMC to bring this action even if it was not directly injured by Sprint's unlawful conduct.” [FN17]

2. Discussion.

6. We reject Sprint's threshold claim that the complaint should be dismissed because AMC was not the customer of Sprint at the time the alleged toll fraud occurred. The fact that AMC was not a customer of Sprint does not negate AMC's standing to file this complaint challenging the lawfulness of Sprint's common carrier practices, even in the absence of direct or indirect injury.[FN18] AMC has, as would any member of the public, a valid interest in ascertaining through this Section 208 proceeding whether Sprint is providing service to the public under unlawful tariff provisions or is otherwise engaging in unjust, unreasonable, or discriminatory practices in providing common carrier services.

B. Sprint's Tariff Provisions.

1. Contentions of the parties.

7. We next address AMC's challenge to the tariff provision upon which Sprint relies in assigning TMS liability for charges associated with the allegedly fraudulent calls. Identical language in Section 3.11.4 of Sprint Tariff F.C.C. Nos. 1 and 2 provides in pertinent part: “Subscriber shall be responsible for the payment of all charges for service provided under this Tariff....” AMC maintains that this language does not provide a “clear and explicit” explanation that Sprint will hold a subscriber responsible for charges resulting from remote access toll fraud.[FN19] This deficiency, according to AMC, violates Sections 61.2 and 61.54(j) of the Commission's rules, which require tariff provisions to be clear, explicit, and definite [FN20] AMC also contends that because fraudulent calls are unlawful, they do not constitute services provided under tariff and, hence, are not covered by the general payment obligation of the tariffs.[FN21]

8. In answer to the complaint, Sprint denies that its tariff provisions are vague and ambiguous and maintains that the provisions clearly obligate customers to pay all charges for services that they receive from Sprint, including those obtained through the unauthorized use of a customer's facilities.[FN22] Sprint maintains that even if TMS had incurred the disputed charges as a result of the unauthorized use of its telephone system,[FN23] it would nonetheless be required under the terms of Sprint's tariffs to pay for the services obtained.[FN24] Sprint argues that AMC has presented no credible evidence to show that Sprint does not consistently ***5524** apply its tariffs to hold subscribers liable for unauthorized or fraudulent calls or that Sprint was negligent in any way with respect to the unauthorized calls.[FN25]

****3** 9. In reply, AMC contends that Sprint's reliance on the Bureau's decision in Chartways is misplaced. According to AMC, the Bureau "held only that AT & T's tariffs were not vague, specifically because exceptions to payment obligations were explicitly stated in the tariffs." [FN26] AMC also quotes language from Chartways to support its claim that "the Commission must rule that US Sprint's tariffs are unreasonably vague because they do not specify customer liability for unauthorized use." [FN27]

2. Discussion.
10. We are not persuaded by AMC's claims that the relevant Sprint tariff provisions violate Sections 201(b) and 203(c) of the Act or Sections 61.2 and 61.54(j) of our rules because they do not specify that the customer is responsible for unauthorized use of services provided under the tariffs. Section 61.2 states that "all tariff publications must contain clear and explicit explanatory statements regarding rates and regulations." Section 61.54(j) provides that the:

> general rules ..., regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified.

The general payment obligation in Sprint Tariff F.C.C. Nos. 1 and 2 contains the explicit statement that the "Subscriber shall be responsible for the payment of all charges for service provided under this Tariff...." As AMC acknowledges,[FN28] the tariff provisions contain no exception to this payment obligation. In the absence of such an exception, the clear meaning of the relevant tariff provisions is that the subscriber's obligation includes liability for unauthorized usage of services provided under tariff.[FN29] Moreover, we disagree with AMC's contention that unauthorized calls do not utilize services provided under tariff. Such calls, though unlawfully placed, are possible because a subscriber has ordered and is being provided service under a carrier's tariff.[FN30] Therefore, we find that the general payment obligation quoted above applies to unauthorized or otherwise fraudulently placed calls.

C. AMC's Section 202(a) Claim.
1. Contentions of the parties.
11. AMC contends that Sprint engaged in unlawful price discrimination by insisting that TMS pay Sprint in full for the toll fraud charges while relieving other subscribers from liability.[FN31] Sprint counters that AMC has provided no credible evidence to show that Sprint does not consistently apply its tariffs to hold its subscribers liable for unauthorized usage.[FN32] Sprint further argues that its customer, TMS, did not experience any remote access toll fraud and did not seek to be relieved of any charges. Sprint contends, therefore, that even had it relieved other customers of charges resulting from such type of fraud, which it states it has a policy of not doing, Sprint has not violated Section 202(a) by refusing to relieve TMS of the charges in question here.[FN33]

****4** 2. Discussion.
12. We are not persuaded that AMC has alleged facts sufficient to establish a claim of unreasonable discrimination under Section 202(a) of the Communications Act. The crux of AMC's discrimination claim is its allegation that Sprint has a policy of adjusting toll fraud charges incurred by non-resale customers while insisting that resale customers such as TMS pay the full amount of such charges. We find it significant that Sprint's customer for the services, TMS, did not dispute or otherwise challenge Sprint's actions in assessing the charges for the fraudulent calls. Indeed, the record shows that TMS refused to do so when requested by AMC.[FN34] Since this is not a case where the customer requested or even challenged any particular treatment or action by Sprint, we find that AMC has failed to state a cause of action under Section 202(a).

***5525** D. AMC's Motion to Compel Responses to Interrogatories
1. Contentions of the Parties
13. On January 20, 1992, AMC propounded interrogatories to Sprint seeking information regarding Sprint's handling of the calls and charges at issue in the complaint as well as Sprint's general practices, policies and procedures in handling toll fraud matters. AMC also sought information regarding the amounts Sprint had billed and collected from its customers for services provided as a result of toll fraud for the years 1988 through 1991. On February 20, 1992, Sprint filed a response in which it generally objected to the interrogatories on the grounds that AMC had not opposed Sprint's motion to dismiss the complaint for failure to state a claim. Sprint argued that in any event, the interrogatories were irrelevant, immaterial and burdensome.[FN35] AMC filed a motion to compel on March 6, 1992, arguing, inter alia,

that it had properly stated a cause of action in its complaint and that the requested information was relevant and necessary to a determination by the Commission. AMC also asserted that Sprint had failed to act in good faith in filing what AMC describes as a conclusory statement objecting to the interrogatories.

2. Discussion

14. We note at the outset that none of the interrogatories propounded by AMC seek information that would be relevant or helpful to our consideration of the issue that we have determined to be properly before us, that is, whether the tariff provisions under which Sprint held TMS liable for the allegedly fraudulent calls are lawful under Sections 201(b) and 203(c) of the Communications Act and Sections 61.2 and 61.54(j) of the Commission's rules. The interrogatories go essentially to AMC's claim that Sprint's handling and discussion of the disputed toll fraud charges with TMS in comparison with its treatment of other Sprint customers constituted unreasonable discrimination within the meaning of Section 202(a) of the Act. In light of our determination that the specific allegations presented by AMC in this proceeding are insufficient to state a cause of action under Section 202(a), we deny AMC's motion to compel.

****5** E. AMC's Request for Sanctions.

1. Contentions of the parties.

15. AMC requests the Commission to impose sanctions on Sprint for what it describes as willful violations of Sections 1.17, 1.720 and 1.729 of the Commission's rules.[FN36] AMC's Section 1.17 claims center around Sprint's response to a letter filed by counsel for AMC urging the Commission to grant AMC's complaint against Sprint so that Sprint would not profit from toll fraud.[FN37] In a responsive letter, counsel for Sprint represented that “Sprint has never received any money from TMS for such services” and “likely will never receive any money from TMS” because TMS had filed for bankruptcy.[FN38] AMC contends that Sprint's statements were false and misleading because Sprint had in fact already received payments from TMS for the toll fraud charges. AMC submitted copies of checks from AMC to TMS that, AMC claims, provided funds for TMS to make payments to Sprint for outstanding charges, including those attributable to the fraudulent calls at issue here. AMC contends that without those disclosures. Sprint's “flat statement that [it] got no money from the toll fraud could have influenced the Commission to rule against AMC on the issue of damages.” [FN39] AMC argues that Sprint's false and misleading statements were in clear violation of Section 1.17 of the Commission's rules,[FN40] which prohibits any Commission licensee from making “any misrepresentation or willful material omission” in any written statement submitted to the Commission.[FN41]

16. AMC's allegations of Section 1.720 and 1.729 violations stem from what AMC characterizes as Sprint's failure to proffer any affidavit or declaration to support its statements of fact [FN42] and its failure to respond in good faith to AMC's discovery requests.[FN43] Specifically, AMC argues that Sprint violated Section 1.720(c) by making “a myriad” of unsupported factual representations, none of which are susceptible to official notice by the Commission. Moreover, AMC contends, Sprint violated Section 1.720(g) by refusing “to maintain ‘the continuing accuracy and completeness of all information’ it furnished in this case.” [FN44] As for its discovery claims, AMC maintains that Sprint's refusal to answer the interrogatories propounded by AMC violates the clear requirements of Section 1.729(b). AMC argues that the evidence supports a finding that Sprint's violations were egregious, intentional and repeated. Therefore, AMC contends, the Commission should assess the maximum monetary forfeiture for the transgressions.[FN45]

17. Sprint filed an opposition urging summary dismissal of AMC's Request for Sanctions. Sprint argues that AMC's request represents nothing more than an attempt by AMC to use the Commission's processes to obtain by threat and intimidation the money it purportedly paid TMS for calls placed through AMC's equipment.[FN46] Sprint argues that the ***5526** statements cited by AMC as a basis for sanctions referred only to the charges and services at issue in this proceeding. Sprint claims that these statements were intended to convey the idea that any payments it had received were not necessarily applied to the charges for the fraudulent calls at issue here.[FN47] Sprint argues that it is under no obligation, legal or otherwise, to determine the source of funds and apply them to a particular part of a customer's indebtedness. The promissory note on which TMS made payments was for substantially more than the alleged toll fraud charges, and these payments, according to Sprint, can be attributed to any of the outstanding TMS

charges.[FN48]

****6** 18. Sprint claims that in any case, the letter in question was intended to inform the Commission that TMS had filed for bankruptcy and to respond to AMC's claim that Sprint was profiting from the crime of toll fraud. Sprint notes that even if the TMS payments were applied proportionately to all the unpaid charges covered by the promissory note, including those attributable to toll fraud, over two-thirds of the note still remained unpaid at the time of the bankruptcy filing. Sprint states that because of the unsecured nature of the TMS debt. Sprint is likely to lose a significant amount of money.

19. As for the alleged violation of Section 1.720 of the rules, Sprint argues that AMC's claims are totally without merit because it has supplied all relevant documentation or relied upon the documentation and statements supplied by AMC itself to support its positions.[FN49] Sprint further contends that AMC's claim that it violated Section 1.729 of the rules is equally without merit because it simply availed itself of the right under the Commission's rules to object to any interrogatory propounded by the opposing party.[FN50] Sprint argues that although AMC filed a motion to compel, it did not demonstrate " 'the relevance and necessity for the requested information' " as required under Section 1.729(c).[FN51]

2. Discussion

20. We have reviewed the evidence and arguments presented by the parties and are not persuaded that Sprint's statements were misleading or otherwise sanctionable as AMC contends. Nor do we believe that AMC's allegations raise substantial and material questions of fact suggesting misrepresentation or lack of candor that would call into question, in light of Sprint's explanation. Sprint's qualifications to be a Commission licensee. Our review of the statements and the context in which they were made revealed no support for AMC's claim that they were knowingly false or misleading when made. The principal evidence relied upon by AMC are copies of cancelled checks which it claims it gave to TMS for the express purpose of making payments to Sprint for the outstanding toll fraud charges. AMC also submitted a declaration by Deborah Ward, President of TMS, in which Ms. Ward states that the checks were cashed by TMS "and used to purchase cashier checks payable to Sprint." According to AMC this evidence clearly shows that Sprint had received approximately $80,000 from TMS that were directly traceable to AMC's payments to TMS for the toll fraud charges.[FN52] Sprint has acknowledged that it had received payment from TMS at the time it filed its statements in the complaint proceeding but maintains that the statements were intended to convey the idea that the payments received from TMS were not necessarily for the disputed charges. Sprint points out that TMS submitted the amounts without specifically designating them as payments for any of the toll fraud charges.[FN53] Sprint explains further that the amount owed by TMS was substantially more than the charges at issue in AMC's complaint and argues that it was under no obligation to determine the source of the payments and apply them to any particular part of the debt owed by TMS. In the absence of some indication in the record that TMS specifically earmarked its payments to Sprint as payments for the calls disputed in AMC's complaint, we conclude that AMC has failed to rebut Sprint's explanation.

****7** 21. Moreover, we find that neither AMC's allegations of misrepresentation nor Sprint's responsive statements relate to a matter of decisional significance in this complaint proceeding. None of the disputed statements are relevant to our determination of the lawfulness of Sprint's tariff provisions. Further, we have determined that AMC has failed to allege facts sufficient to establish a claim of unreasonable discrimination within the meaning of Section 202(a) of the Act. Accordingly, we deny AMC's Request for Sanctions based on alleged violations of Sections 1.17 and 1.720 of the rules.

22. Finally, AMC has provided no legal support or rationale for its claim that Sprint violated Section 1.729(b) of the rules by responding to AMC's interrogatories in the manner that it did. In any event, we have denied AMC's motion to compel responses to the interrogatories on the grounds that the information requested is not relevant to our determination of the issues raised in AMC's complaint.

IV. CONCLUSION

23. For the reasons discussed above, we find that AMC has failed to establish that tariff provisions at issue are unlawfully vague or ambiguous within the meaning of Sections 201(b) and 203(c) of the Com-

munications Act or Sections 61.2 and 61.54(j) of our rules. We also conclude that AMC has failed to allege facts sufficient to establish a claim of unreasonable discrimination under Section 202(a) of the Act. Finally, we find that the record presented in this matter does not warrant the imposition of sanctions requested by AMC.

***5527** V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, and 206–208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), § 154(j), 201, and 206–208, that the above-captioned complaint filed by AMC IS DENIED.

25. IT IS FURTHER ORDERED that the Motion to Dismiss filed by Sprint IS DENIED.

26. IT IS FURTHER ORDERED that AMC's Motions to Compel Answers to Interrogatories IS DENIED.

27. IT IS FURTHER ORDERED that AMC's Motion for Final Order or For Discovery Rulings, IS GRANTED to the extent indicated herein and otherwise IS DISMISSED as moot.

28. IT IS FURTHER ORDERED that the Motion for Sanctions filed by AMC IS DENIED.

William F. Caton

Acting Secretary

FN1 47 U.S.C. §§ 201(b), 202(a).

FN2 AMC also filed a motion to compel responses to its first set of interrogatories served on Sprint on January 20, 1992. Sprint has opposed the motion to compel. AMC subsequently filed a motion requesting the Commission to issue a final appealable order resolving its complaint or, in the alternative, an order requiring further discovery on the issues raised in the complaint. See Motion for Final Order or For Discovery Rulings, filed December 17, 1992. In light of our action denying AMC's motion to compel, see infra, para. 14, and its underlying complaint, AMC's alternative request for further discovery is now moot.

FN3 AMC describes the COBOT Reception Center as "an automated attendant or automated reception center that routes calls within the company." Complaint at Tab. 1, p. 2.

FN4 Complaint at 8.

FN5 Id. According to Sprint, it contacted AMC only after being unable to reach Sprint's actual customer, TMS. Answer at 7.

FN6 Complaint at 11. Of this total amount, the underlying Sprint charges to TMS were approximately $145,000, according to AMC; the remaining amount reflected charges levied by TMS for its services. In addition, the August 1991 invoice that AMC received from TMS included $647.24 in charges attributable to allegedly fraudulent calls. Id. at 14.

FN7 See Telecom Management Systems, Inc. v. American Message Centers, No. BC033601 (L.A.Super.Ct., filed July 1, 1991).

FN8 Complaint at Exhibit 7 (letter from George S. Duesdieker, Sprint, to Russell D. Lukas, counsel for AMC, et al.).

FN9 Id. at 14.

FN10 Id.

FN11 See American Message Centers v. Telecom Management Service, Inc., 7 FCC Rcd 2250 (Com.Car.Bur.Enf.Div.1992).

FN12 Answer at 20.

FN13 Id. at 20–21.

FN14 Reply at 3.

FN15 Id. at 4.

FN16 Id.

FN17 Id.

FN18 Section 208 of the Communications Act, 47 C.F.R. § 208, provides, in pertinent part:

> Any person ... complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition ... whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission.... No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. [emphasis added]

See also, Comark Cable Fund III, 100 FCC2d 1244, recon. denied, 103 FCC2d 600, 604–605 (1987), remanded sub nom. Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D.C.Cir.1987), clarified on remand, 3 FCC Rcd 3096 (1988), pet. for rev. denied, 872 F.2d 465 (D.C.Cir.1989), rehearing denied (D.C.Cir. June 27, 1989), cert denied, U.S. (1990), 110 S.Ct. 757.

FN19 Complaint at 27.

FN20 Id. at 28 (citing 47 C.F.R. §§ 61.2 and 61.54(j)).

FN21 Id. at 28; Reply at 8.

FN22 Answer at 21–22.

FN23 Sprint does not dispute AMC's claim that the calls were placed through the unauthorized use of AMC's equipment.

FN24 Answer at 21–22 (citing Chartways Technologies, Inc. v. AT & T Communications, 6 FCC Rcd 2952, 2954 (Com.Car.Bur.1991), appl. for rev. pending).

FN25 Id. at 24–25.

FN26 Reply at 6 (emphasis in original).

FN27 Id. at 8.

FN28 Reply at 8 (“Sprint's tariffs provide absolutely no exception to the general payment obligations of the subscribers”).

FN29 Contrary to AMC's argument, we find no support in Chartways for the proposition that such a tariff provision must always contain specific exceptions to general payment obligations in order to be lawful under Sections 201(b) and 203 of the Act and the Commission's rules. Moreover, AMC's use of language from Chartways to support this proposition appears to contradict the conclusion actually reached by the Bureau. See Chartways, 6 FCC Rcd at 2954 (“[the Bureau was] unpersuaded ... that the tariffs are unreasonably vague because they do not specify customer liability for unauthorized use....”) (emphasis added).

FN30 AMC has not alleged that Sprint was negligent or otherwise acted in an unreasonable manner in connection with the transmission of the disputed calls that would relieve TMS of liability for the toll fraud charges.

FN31 Complaint at 31–32. According to AMC, “[i]ndustry sources have advised [[[it] that US Sprint has reached settlement involving toll fraud disputes.” Id. at n. 79. AMC attempts to bolster its discrimination claims by arguing that the facts “establish” that Sprint collects less than its tariff rates from its non-resale customers when they are victimized by toll fraud but refused to even discuss settlement of charges incurred by TMS, one of its resale customers. Motion for Final Order at 7–8.

FN32 Answer at 23.

FN33 Motion to Dismiss at 6.

FN34 Complaint at p. 14. Further, we note that AMC has settled both the California law suit brought against it by TMS and its own Section 208 complaint against TMS. This apparently voluntary settlement ended AMC's dispute with the only entity from which it had obtained service and to which it had any potential liability for charges resulting from the unauthorized calls. We find no evidence in the record indicating that Sprint had any involvement, either direct or indirect, in the dealings between AMC and TMS.

FN35 Opposition to Motion to Compel at 1.

FN36 See 47 C.F.R. §§ 1.17 (Truthful written statements and responses to Commission inquiries and correspondence). 1.720 (Formal Complaints, General pleading requirements), and 1.729 (Interrogatories to parties).

FN37 AMC Reply to Opposition To Motion To Compel at 7.

FN38 Letter of Michael B. Fingerhut, Sprint, to the Commission, dated September 3, 1992.

FN39 Id. at 18.

FN40 47 C.F.R. § 1.17.

FN41 We note that AMC has filed an application for review of ruling by the Chief, Common Carrier Bureau which denied its petition to deny the merger of Centel Corporation and Sprint. See Applications of Centel Corporation and Sprint Corporation For Consent to Transfer Control of Authorizations, 8 FCC Rcd 1829 (Com.Car.Bur.1993), application for review pending. AMC had petitioned the Commission to designate a hearing to determine whether Sprint possesses the requisite qualifications to be a Commission licensee in light of the alleged misrepresentations made in AMC's Section 208 complaint proceeding. The Bureau found that AMC's allegations failed to raise a substantial and material question of fact regarding Sprint's qualifications to be a Commission licensee.

FN42 Request for Sanctions at 27–28.

FN43 Id. at 29–30.

FN44 Id. AMC contends, in effect, that Sprint had ample opportunity to correct its false and misleading statements but failed to do so.

FN45 Id. at 30.

FN46 Opposition to Motion for Sanctions at 1–3.

FN47 Sprint Opposition to Request for Sanctions at 16.

FN48 Id. at 4–5. Sprint points out that the first payment by TMS on the promissory note was well before any AMC payment to TMS, while the third TMS payment to Sprint was well before the final AMC payment to TMS. Sprint adds that the amount of the second TMS payment to Sprint was for less than any of the AMC payments to TMS. Id. at 6–7.

FN49 Id. at 18–20.

FN50 Id. at 20.

FN51 Id. at 20.

FN52 Request for Sanctions at 7–12 and Exhibit 1.

FN53 Opposition at 8.

FCC

73 Rad. Reg. 2d (P & F) 1320, 8 F.C.C.R. 5522, 8 FCC Rcd. 5522, 1993 WL 757208 (F.C.C.)
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
APCC Services, Inc.,	)	File No. EB-05-MD-016
	)	
Complainant,	)	
	)	
v.	)	
	)	
Radiant Telecom, Inc.,	)	
Intelligent Switching and Software, LLC, and	)	
Radiant Holdings, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2008 **Released: May 20, 2008**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in substantial part a formal complaint[1] filed by APCC Services, Inc. ("APCC") against Radiant Telecom, Inc. ("Radiant"), Intelligent Switching and Software, LLC ("ISS"), and Radiant Holdings, Inc. ("Radiant Holdings") (collectively, "Defendants") under section 208 of the Communications Act of 1934, as amended ("Act").[2] APCC alleges that Defendants violated sections 201, 276, and 416 of the Act[3] by failing to comply with Commission payphone rules that impose compensation, call tracking, and other obligations on "Completing Carriers."[4] The principal question presented is whether any of the Defendants is a completing carrier within the meaning of 47 C.F.R. § 64.1300 and the orders implementing that regulation. As explained below, we find that whereas Radiant is a switchless reseller that bears no payment responsibility under our rules, ISS is a Completing Carrier. Because ISS has failed to comply with the payphone compensation rules, we order ISS to pay APCC damages in the amount of $574,073.07, plus interest. Because we grant APCC's claims under section 201(b) of the Act, and such grant will afford APCC all the relief to which it would be entitled under sections 276 and 416(c) of the Act, we dismiss without prejudice APCC's claims under sections 276 and 416(c) of the Act.

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[1] Formal Complaint, File No. EB-05-MD-016 (filed Aug. 2, 2005) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. §§ 201, 276, 416.

[4] *See* 47 C.F.R. § 64.1300(a).

II. BACKGROUND

A. Payphone Compensation Regime

2. Section 276(b)(1)(A) of the Act directs the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."[5] The statute itself does not specify the entity that must pay compensation, but the Commission's orders and rules implementing the statutory directive establish payphone service providers' ("PSPs'") rights to compensation for calls made from their payphones.[6]

3. The Commission's task of establishing a per call compensation plan for coinless payphone calls is complex, for multiple entities may be involved in the transmission of a coinless call.[7] The local exchange carrier ("LEC") serving the payphone transports the call to the switching facilities of an interexchange carrier ("IXC").[8] Although the initial IXC may transport the call to the terminating LEC,[9] often the initial IXC transports the call to a "reseller." The call may then be transported to one or more additional resellers before it is ultimately switched back to an IXC that transports the call to the terminating LEC.[10] In almost all, if not all, such cases, however, one carrier that handles the call will collect money from the ultimate customer, or provide services directly to a switchless reseller that collects money from the ultimate customer, whether that retail end user is a calling card customer or a subscriber to a toll-free number. That carrier will process the call at the mid-point of the call stream, between the IXC that first accepts the call from the originating LEC and the IXC that finally hands the call to the terminating LEC.

4. Some resellers possess the switching equipment required to perform the function of routing the call; other resellers (*i.e.*, "switchless resellers") lack such equipment, so they only resell the telecommunications service (*i.e.*, the ability of a customer to place a coinless payphone call), and rely on other carriers to perform the actual switching and transmission functions required to complete the call.[11]

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[5] 47 U.S.C. § 276(b)(1)(A). The Commission has interpreted the statutory term "completed call" to mean "a call that is answered by the called party." *In the Matter of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19987, ¶ 25 (2003) ("*Tollgate Order*").

[6] *See, e.g., Tollgate Order*, 18 FCC Rcd at 19976, ¶¶ 1-2.

[7] *See, e.g., APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp., Complainants, v. Network IP, LLC, and Network Enhanced Telecom, LLP, Defendants*, Memorandum Opinion and Order, 20 FCC Rcd 2073, 2075, ¶ 4 (2005) ("*Network Order*"); Order on Review, 21 FCC Rcd 10488 (2006). "Coin calls" placed from a payphone directly compensate the PSP for use of the payphone and are not involved in the Commission's payphone compensation rules, which pertain to coinless "dial around" calls in which the caller does not directly compensate the payphone operator (*e.g.,* 1-800 and other toll-free calls and calls using access codes to reach a service provider of choice). *See Network Order*, 20 FCC Rcd at 2075, ¶ 4.

[8] *Network Order*, 20 FCC Rcd at 2075, ¶ 5.

[9] *Id*.

[10] *Id*.

[11] *Id*. at 2076, ¶ 6.

Only resellers that possess switching equipment ("switch-based" resellers or SBRs) can physically receive the call and route it onward, either to the LEC serving the call recipient or to the switch of another reseller.[12] Resellers typically do not own transmission facilities, but perform only switching and rely on IXCs to actually transport the call. However, any reseller may sell the underlying telecommunications service to the public, or to a switchless reseller. Such sales often take the form of prepaid calling cards, as they did in this case.[13]

5. The Commission has issued a series of orders addressing which carrier in the call path of a coinless payphone call should compensate the PSP.[14] Prior to the implementation of the current payphone rules, the Commission required the "first underlying facilities-based interexchange carrier to whom the LEC directly delivers the call to compensate the PSP."[15]

6. The Commission revised that approach in the *Tollgate Order*,[16] which placed the compensation obligation on the "Completing Carrier."[17] A "Completing Carrier" is defined 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."[18]

7. The Commission imposed the compensation obligation on Completing Carriers for two reasons. First, the Commission determined that Completing Carriers "are the primary economic beneficiaries of coinless payphone calls transferred to their switch." That is, the Completing Carrier sells the dial-around service to end-user customers (or provides switching for a switchless reseller who sells to the end-users) and can recover payphone compensation from those customers.[19] Second, the Commission found that, given their position in the call stream, Completing Carriers "possess the most accurate call completion information for such calls."[20]

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[12] *Id.*

[13] *Id.* at ¶ 7.

[14] *See, e.g., First Payphone Compensation Order*, 11 FCC Rcd at 20541 (1996); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Order on Reconsideration, 11 FCC Rcd 21233 (1996); Second Order on Reconsideration, 16 FCC Rcd 8098 (2001) ("*Second Order on Reconsideration*"), *vacated, Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2002) ("*Sprint v. FCC*").

[15] *Second Order on Reconsideration*, 16 FCC Rcd at 8108, ¶ 21.

[16] *See generally Tollgate Order*; Order on Reconsideration, 19 FCC Rcd 21457 (2004) ("*Tollgate Reconsideration Order*") (collectively, "*Tollgate Orders*").

[17] *Tollgate Order*, 18 FCC Rcd at 20018 (Appendix C); *see also* 47 C.F.R. § 64.1300(a).

[18] 47 C.F.R. § 64.1300(a).

[19] *See Tollgate Order*, 18 FCC Rcd at 19988, ¶ 28; *Tollgate Reconsideration Order*, 19 FCC Rcd at 21459, ¶ 3 ("In instances where an SBR completes a call dialed by the SBR's customer from a payphone, the Commission reasoned that the SBR was the primary economic beneficiary because the SBR's customer pays the SBR for the payphone call.").

[20] *Tollgate Order*, 18 FCC Rcd at 19988, ¶¶ 26, 35.

8. The *Tollgate Order* did not alter the obligations of switchless long distance resellers.[21] In the case of switchless long distance resellers, the Commission has recognized since the *First Payphone* Order in 1996 that although they are the primary economic beneficiary for calls made by their customers, they do not have the facilities to track calls.[22] In the interests of lower costs and administrative convenience, the Commission placed the responsibility on the entity with control over the tracking data, the underlying facilities-based long distance carrier, to compensate the PSPs on the switchless reseller's behalf.[23] The underlying facilities-based long distance carrier may recover payphone compensation from its switchless reseller customers.[24]

9. To ensure that Completing Carriers compensate PSPs for each and every completed payphone call,[25] a Completing Carrier must, in addition to paying compensation, also (i) establish a call tracking system that accurately tracks coinless payphone calls to completion;[26] (ii) provide quarterly Completing Carrier reports to PSPs listing the coinless payphone calls completed by the Completing Carrier;[27] and (iii) undergo a call tracking system audit by an independent third party and provide to the Commission and PSPs reports attesting to the accuracy of the system.[28]

10. As an additional measure to ensure that all payphone call activity is traced and accounted for, the Commission's rules also impose requirements on carriers that carry payphone traffic but do not themselves complete those calls. An "Intermediate Carrier" is defined as a "facilities-based long distance carrier that switches payphone calls to other facilities-based long distance carriers."[29] An Intermediate Carrier also must, every quarter, submit a call data report to each PSP that contains certain information about the calls that the Intermediate Carrier switched to other long distance carriers.[30] The quarterly reports provided by Intermediate Carriers are intended to help PSPs ensure that they are getting appropriate compensation from Completing Carriers.

[21] *Tollgate Order*, 18 FCC Rcd at 19976, ¶ 1 n.1.

[22] *Tollgate Order*, 18 FCC Rcd at 19978, ¶ 7.

[23] *Id.*

[24] *Id.*

[25] As noted, a "completed" call is one that is answered by the called party. Calls that are not answered by the called party are not compensable.

[26] 47 C.F.R. § 64.1310(a)(1).

[27] *Id.* at § 64.1310(a)(4).

[28] *Id.* at § 64.1320(a), (b).

[29] 47 C.F.R. § 64.1310(b).

[30] 47 C.F.R. § 64.1310(c). Each quarterly report must be in computer readable format and include: (1) a list of all facilities-based long distance carriers to which the Intermediate Carrier switched access code and toll-free calls dialed from the PSP's payphone; (2) a list of all access code and toll-free numbers dialed from each PSP's payphones that local exchange carriers delivered to the Intermediate Carrier and the Intermediate Carrier switched to the identified long distance carrier; (3) the total volume of calls switched to each of these numbers; and (4) the name, address, and phone number of the individuals for each identified long distance carrier who serves as the Intermediate Carrier's contact at the identified carrier. *Id.*

B. The Coinless Payphone Calls at Issue

11. Radiant is a calling card provider that issues calling cards in its name and on behalf of other entities.[31] Radiant does not own or lease a switch.[32] ISS is a facilities-based provider that offers calling card processing services and call switching to calling card providers, including Radiant.[33] Radiant Holdings is the parent company of ISS,[34] is not a carrier, and, like Radiant, does not own or lease a switch.[35]

12. The coinless payphone calls at issue here were made by end-user customers with prepaid calling cards issued by Radiant and other calling card providers.[36] The calls took the following path: A LEC routed the call from the payphone to an IXC, which, in turn, routed the call to a switch owned by ISS. The ISS switch and calling card processing platform prompted the caller to provide his or her calling card account number, verified the account number, and then switched the call to another switch, owned by Ntera, which then selected the IXC that offered the lowest cost on that call. Ntera switched the call to that IXC, which, in turn, transferred the call to a LEC for termination at the called party's phone. The ISS switching platform determined whether the call was completed for purposes of billing the caller.[37]

13. APCC is a billing and collections agent for PSPs, including the PSPs on whose behalf APCC brings the Complaint ("represented PSPs").[38] Defendants have not compensated APCC or the represented PSPs for any of the calling card calls delivered from the represented PSPs' payphones to the ISS switch during the third and fourth quarters of 2004.[39] Nor have Defendants provided Completing

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[31] Second Revised Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-05-MD-016 (filed Aug. 1, 2006) at 6, ¶ 36 ("Second Revised Joint Statement").

[32] *Id.* at 6, ¶ 38.

[33] Second Revised Joint Statement at 5, ¶ 34; 6, ¶ 41. ISS owns the switch it uses in providing these services. *Id.* at 5, ¶ 32.

[34] Second Revised Joint Statement at 2, ¶ 9. FCC filings state that Radiant Holdings is also Radiant's parent company. *See id.* at 2, ¶ 7. Defendants assert, however, that Radiant was spun off from Radiant Holdings in 2003. Revised Answer to Formal Complaint, File No. EB-05-MD-016 (filed Oct. 7, 2005) ("Revised Answer") at 8, ¶ 7. Radiant Holdings changed its name to Ntera Holdings, Inc. on March 23, 2004. Second Revised Joint Statement at 2, ¶ 8.

[35] Second Revised Joint Statement at 5, ¶ 29. On or about November 27, 2006, Defendants sought in Florida state court an Assignment for the Benefit of Creditors of each of the Defendants (which appears to be akin to a Chapter 7 liquidation proceeding under federal bankruptcy laws). *See* Notice Regarding (1) Change of Counsel Law Firm Affiliation, (2) Withdrawal of Counsel, and (3) Assessment of Defendants' Assignment for the Benefit of Creditor Filings, File No. EB-05-MD-016 (filed Jan. 19, 2007) at 2. Defendants' counsel since have withdrawn from the proceeding before the FCC, and no new counsel have entered an appearance in the FCC proceeding. *See* Letter to Albert H. Kramer, Robert F. Aldrich and Jacob S. Farber, counsel for Complainant, and Christopher W. Savage and Michael C. Sloan, counsel for Defendants, from Lia B. Royle, Special Counsel, EB, MDRD, FCC (dated Mar. 5, 2007).

[36] Second Revised Joint Statement at 7, ¶¶ 44, 46, 47.

[37] *Id.* at 5-6, ¶¶ 29-41; 8, ¶ 58; 10, ¶ 77.

[38] Second Revised Joint at 2, ¶¶ 1-3.

[39] *Id.* at 9, ¶ 60; 10, ¶ 79.

Carrier reports or call tracking system audit reports for that period, or otherwise complied with the Commission's "Completing Carrier" rules.[40]

III. DISCUSSION

A. Threshold Defenses

14. We begin by addressing two preliminary legal defenses that Defendants raise. First, Defendants argue that the Complaint should be dismissed because the Commission's rules do not permit class actions.[41] We disagree that APCC's complaint presents a class action case. A class action is a suit brought by "one or more members of a class … as representative parties on behalf of all [members of the class]."[42] APCC's Complaint was not brought by a member of a class, but by an agent (APCC) on behalf of its principals (the represented PSPs).[43] APCC's status as an agent thus distinguishes the cases relied upon by Defendants, in which a member of a class filed the complaint.[44]

15. Next, Defendants argue that APCC does not have standing because it, as opposed to the PSPs it represents, has not been damaged by Defendants' alleged failure to pay payphone compensation.[45] We reject this argument as well. Section 208 of the Act "explicitly confers standing upon 'any person' to complain of alleged wrongdoing by a common carrier, without regard to injury suffered or direct interest in the matter."[46]

B. "Completing Carrier" Analysis

16. This case turns on whether either Radiant or ISS is a "Completing Carrier" within the meaning of our rules and orders. Rule 64.1300(a) defines a "Completing Carrier" as "a long distance carrier or switch-based long distance reseller that completes a coinless . . . payphone call . . . ,"[47] and Rule 64.1300(b) places payment responsibility for dial around calls on "a Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases." Radiant and ISS contend that they are not Completing Carriers because in all cases calls that were handled by ISS's switch were subsequently sent to other carriers that performed switching

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[40] *Id.* at 8, ¶¶ 56-57.

[41] Revised Answer at 1, 3 n.7, 4 n.10, 6-7 ¶¶ 1-2.

[42] Fed. R. Civ. P. 23(b).

[43] *See* Second Revised Joint Statement at 2, ¶¶ 1-4; Complaint Ex. 4 (Jaeger Dec'n) at ¶¶ 4-6; Reply at 24-25.

[44] *See* Revised Answer at 1 (citing *Halprin, Temple, Goodman & Sugrue v. MCI Telecomm. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568 (1998) and *Orloff v. Vodafone Airtouch Licenses LLC*, Memorandum Opinion and Order, 17 FCC Rcd 8987 (2002)).

[45] Revised Answer at 2 n.1.

[46] *Philippine Long Distance Tel. Co. v. Int'l Telecom, Ltd.*, Memorandum Opinion and Order, 12 FCC Rcd 15001, 15005, ¶ 9 (1997). *Accord American Message Centers v. Sprint*, Memorandum Opinion and Order, 8 FCC Rcd 5522, 5523, ¶ 6 (1993), *petition for review denied sub nom., AMC v. FCC*, 50 F.3d 35 (D.C. Cir. 1995). *Cf. APCC Services, Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1242-45 (D.C. Cir. 2005), *vacated and remanded on other grounds*, 127 S. Ct. 2094 (2007) (holding that aggregators (including APCC), acting as assignees for PSPs, had standing to sue in federal district court to recover dial-around compensation for coinless payphone calls).

[47] 47 C.F.R. § 64.1300(a) (emphasis added).

functions. In that event, Radiant and ISS argue, some carrier downstream from them (not specifically identified) is the completing carrier. APCC contends that Radiant and ISS are Completing Carriers because their switch was the platform that performed calling card services and they were the primary economic beneficiaries of the calls, and that is the sense in which the Commission used the term "completing" in the *Tollgate Order*.

17. As an initial matter, Radiant itself is not liable for dial around compensation here. We find that Radiant is a switchless reseller that sold prepaid calling cards used to make some of the coinless payphone calls at issue here. Because it is not a switch-based reseller, Radiant cannot be a Completing Carrier liable for payment under Rule 64.1300(b). We therefore deny the Complaint with respect to Radiant.

18. ISS, by contrast, is a switch-based reseller and serves as the calling card processing platform for coinless calls placed via Radiant calling cards.[48] Thus, ISS stands in the shoes of Radiant for purposes of the Completing Carrier analysis. For the reasons set forth below, we find that ISS is a Completing Carrier and is therefore responsible for compensating PSPs for dial around calls placed from their payphones. ISS's failure to pay the required compensation violated rule 64.1300 and section 201(b) of the Act.

19. Rule 64.1300(a) does not define what it means to "complete" a call – the action that gives rise to payment liability – in the context of a prepaid calling card call. That term has no fixed technical meaning.[49] One possible interpretation, advanced by ISS, is that "completing" a call narrowly means serving as the final switch that directs the call to the terminating LEC. On that interpretation, ISS would not be a Completing Carrier because it does not serve as the last switch in the call chain. But another, broader, interpretation, put forth by APCC, is that "completing" a call means serving as the switch-based card processing platform on which a prepaid card call initially terminates and switching the call toward its ultimate destination. On that broader interpretation, ISS is a Completing Carrier.

20. We agree with APCC that § 64.1300 and *Tollgate Orders* use the term completion in the broader second sense described above. ISS's theory that the final switch before the terminating LEC completes the call is unsustainable on the face of the regulation, which defines a "Completing Carrier" as "a long distance carrier or *switch-based reseller* that completes" a dial-around call. But almost all, if not all, calls are ultimately handled by an IXC that not only transports the call but also necessarily performs some switching in order to route the call to the terminating LEC. If ISS were correct that "Completing Carrier" meant the last carrier to switch the call, an SBR would *never* be a Completing Carrier. ISS's interpretation would render the regulation's reference to switch based resellers meaningless. ISS's interpretation would also result in the unfair placement of payment liability on IXCs that did not, and could not, collect dial-around fees from the person that initiates the call.

21. That understanding is implicit in the *Tollgate Order*, which promulgated § 64.1300 and against which the regulation must be read. The *Tollgate Order* was premised on the idea of a three-part call chain in which an initial IXC carried the call from the originating LEC to the facilities of an SBR –

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[48] Revised Answer at 8 ¶ 6 ("ISS operates a hardware and software calling card platform that is used to provide service to Radiant and other calling card providers.") & 35 (describing "calling card/switching platforms operated by ISS").

[49] We have used "complete" to mean answered by the called party, but that is obviously not the sense of the word as used in § 64.1300. The "Completing Carrier" switches the call to "completion" whether or not it is answered by the called party.

the Completing Carrier – that could bill a customer (or in the case of an SBR like ISS that performed switching services for the billing switchless reseller) and that subsequently switched the call toward its final destination. The Completing Carrier was the middle link between the two legs of the call chain, even though multiple carriers might be involved in either leg. This is clear from the *Tollgate Order*'s extensive discussion about the Completing Carrier being the primary economic beneficiary of the call. The SBR that is the Completing Carrier, the Commission found, has "customers [that] use payphones in order to use the SBR's services to complete a call, whether it is a simple 800 number, a calling card, or a prepaid calling card. In other words, the PSPs provide services to the SBRs so that the SBRs can render services to their SBR customers. The SBR should be liable to pay for services rendered by its service providers."[50] That description applies precisely to Radiant, which sold calling cards to customers and used ISS to perform its switching and billing services.[51] "Completing Carrier" as used in the *Tollgate Order* did not refer to the last carrier to switch a call, but to the SBR that ultimately provided service to and collected money from the customer and thus was the primary economic beneficiary of the call. Here, that carrier is Radiant, and because ISS provides the relevant facilities-based services for Radiant, ISS is the Completing Carrier. It is no surprise that ISS in fact subtracted from the calling card accounts 28 cents per call to cover "FCC Mandated" "Payphone Charges."[52] As we stated in paragraph 3 of the *Tollgate Reconsideration Order*, the Completing Carrier SBR is "the primary economic beneficiary [of a coinless call] because the SBR's customer pays the SBR for the payphone call." No other carrier in the call chain subsequent to ISS would have had an opportunity to collect dial-around compensation payments from a customer.

22. The *Tollgate Order* also defined "Completing Carrier" as "the carrier best able to determine whether a payphone originated call directed to a SBR switch has been answered by the called party."[53] The Commission contrasted a Completing Carrier with other carriers in the call stream: an IXC "can track when the … call begins and ends, but has no way of discerning: (1) whether the call it delivers is only on the first leg of the call from the end-user's location; and (2) whether the call is launched and answered as an end-to-end completed call."[54] The Commission thus clearly contemplated that the Completing Carrier would *not* necessarily be the first or last carrier to switch a call, but rather the carrier in the call path with access to information about both legs of the call – *i.e.*, the carrier that operates the "platform" on which call information is collected and processed.[55] Again, ISS fits that description to a tee.

23. Consistent with that understanding, the *Tollgate Order* refers repeatedly to the Commission's intent to place payment liability on the carrier that owns the "platform" from which calls are "completed." For example, the *Tollgate Order* refers at paragraph 1 to payment for "Payphone-originated calls that are completed on [a] facilities-based long distance carrier's platform." Paragraph 43, discussing SBR audit reports, requires the SBR to send the report "to all PSPs for which the SBR

[50] *Tollgate Order*, 18 FCC Rcd at 19989, ¶ 29.

[51] *See* Second Revised Joint Statement at 14 ¶ 104 ("There are three functions involved in a prepaid dial-around call: (1) the originating IXC function; (2) the platform process/switching function; and (3) the terminating IXC function whereby the call is transported to the terminating LEC.")

[52] *See* Second Revised Joint Statement of Stipulated Facts at 7 ¶43.

[53] *Tollgate Order*, 18 FCC Rcd at 19992, ¶ 35.

[54] *Id*.

[55] *Id*.

completes payphone calls on its platform." Paragraph 36 states that the compensation must be paid by "the SBR on whose platform the coinless payphone call terminates." Paragraph 19 refers to the situation under the prior rule, where "PSPs lacked the information necessary to identify the origins of the calls switched to a SBR's platform." As mentioned above, ISS operates a platform on which calling card calls initially terminate and from which the calls are sent to their destinations for completion. Downstream IXCs do not operate such platforms.

24. ISS nevertheless claims that the Commission intended to place liability on the last carrier to switch a call to the terminating LEC. It relies on several points in the *Tollgate Reconsideration Order* in which the Commission stated (in various formulations) that "the last facilities-based long distance carrier in the call path that completes the call" must pay dial around compensation.[56] That reliance is misplaced for several reasons. First, the snippets relied on by ISS do not establish a strict last-switch approach. Statements placing liability on the last-switch-based carrier *that completes the call* simply beg the question of what it means to complete a call. As shown above, completing a call as used in the *Tollgate Order* means processing it at a platform and routing it toward its final destination, not simply being the last switch in the call chain. References to the "last switch" were plainly meant to distinguish the rules established in the *Tollgate Order* from the prior rules, which placed liability on the first switch-based carrier. Second, even if the statements relied on by ISS did suggest a strict last-switch approach, three or four isolated fragments could not contradict the entire analytical framework of the *Tollgate Order* and the far more numerous references to calls being completed on a processing platform, as discussed above.

25. It is of no moment that ISS does not, as it claims, receive call answer supervision information. One of the fundamental responsibilities placed upon the Completing Carrier was to implement a call tracking system that was audited and certified. As part of fulfilling that responsibility, ISS was required to arrange to have access to answer supervision supplied by downstream IXCs. ISS failed to do so, and it may not now turn its regulatory default into an affirmative defense.

26. Neither is ISS an "Intermediate Carrier" within the meaning of our rules. Rule 64.1310(b) defines an intermediate carrier as "a facilities-based long distance carrier that switches payphone calls to other facilities-based long distance carriers."[57] Because the category of Intermediate Carriers is mutually exclusive with that of Completing Carriers – one cannot be both with respect to the same call – the definition of Intermediate Carrier must be read to include an implied exception for Completing Carriers that switch a call to another carrier.[58] Any other reading would result in the strict last-switch rule that we have shown above was not the rule we intended to adopt. We note that although ISS claims to be an Intermediate Carrier, it in fact filed no Intermediate Carrier reports, as required by § 64.1310(c). To the contrary, ISS has in the past paid dial-around compensation to PSPs.[59]

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[56] Letter to Marlene H. Dortch, Secretary, FCC, from Christopher W. Savage and Michael C. Sloan, counsel for Defendants (dated Sept. 12, 2006) at 1-2 (citing *Tollgate Reconsideration Order*, 19 FCC Rcd at 21463, ¶¶ 2, 3, 12 (emphasis added)).

[57] 47 C.F.R. § 64.1310(b).

[58] Indeed, although we need not decide the matter in this case, it would seem that the most logical understanding of Intermediate Carrier would be those carriers that switch a call to a Completing Carrier, but not those coming later in the call stream. Once the Intermediate Carriers have notified the PSP of the Completing Carrier responsible for payment and call tracking, the PSP has no significant need to know what carriers subsequent to the Completing Carrier were involved in switching the call to termination.

[59] *See* Second Revised Joint Statement at 3-4.

27. In sum, we find that Radiant and the other calling card providers are switchless resellers that contracted with ISS, a facilities-based carrier, to complete payphone calls on their behalf. As such, for purposes of our payphone compensation rules, ISS was the "Completing Carrier" within the meaning of rule 64.1300(a) for the payphone calls at issue.[60]

C. Damages

28. Because ISS is a Completing Carrier, it is required to pay compensation for every call completed during the third and fourth quarters of 2004. APCC argues that ISS should be liable for *all* calls delivered from the represented PSPs' payphones to ISS's switch, regardless of whether they were in fact completed.[61] APCC notes that ISS violated Commission rules obligating Completing Carriers to track calls to completion, and that, as a result, it is not possible to determine the actual number of completed calls.[62] Thus, APCC argues, "It is entirely appropriate to make the violator, rather than the innocent PSP, bear any loss from any 'overpayments'…."[63] In contrast, ISS proposes that we apply a proxy to ascertain the number of completed calls. Specifically, ISS debits end users' accounts for calls lasting 30 seconds or longer,[64] and ISS contends that only these calls are "completed."[65]

29. We decline to accept either party's proposal and, *based on the limited record in this case*, adopt a middle view. APCC's proposal of compensation for all calls regardless of whether they are actually completed would contravene section's 276 directive that compensation be paid only for "*completed* intrastate and interstate call[s]."[66] In our view, it is implausible that every call delivered to ISS during the six months at issue was actually completed. We also believe that application of ISS's 30-second proxy under these circumstances, however, similarly would violate section 276. Clearly, application of the 30 second proxy as proposed would exclude any completed call that lasted fewer than 30 seconds. Moreover, ISS developed and understands the financial consequences of the 30-second proxy. In contrast, the represented PSPs did not have input into the proxy's development, nor could they be aware of its financial consequences. Use of the proxy here, then, would be tantamount to permitting ISS's unilateral negotiation of a reimbursement amount that does not reflect payment for *each and every* completed call to the represented PSPs as required under Section 276.

30. Because the Defendants failed to comply with the Commission's call tracking rules, we cannot ascertain the exact number of calls for which ISS is liable. Consequently, in order to ensure that the represented PSPs are adequately compensated, we believe it is appropriate to hold ISS liable not only for calls delivered from the represented PSPs payphones to ISS's switch lasting more than 30 seconds, but also for a significant portion of those calls lasting less than thirty seconds. Accordingly, we find that 1,031,667 of the calls delivered to ISS's platform during the third quarter of 2004, and 660,876 of the

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[60] We deny APCC's Motion to Strike Portions of Revised Answer, File No. EB-05-MD-016 (filed Oct. 20, 2005), because our disposition of the Complaint renders the issues in that motion moot.

[61] Complaint at 28-29, ¶¶ 78-80; Reply at 32-25, ¶¶ 54-61.

[62] Complaint at 28, ¶ 78; Reply at 34, ¶¶ 59-60.

[63] Reply at 33, ¶ 57.

[64] Second Revised Joint Statement at 8, ¶ 55; Answer Exh. 1 (Asad Decl.) at ¶ 7, Exh. 6 (Yelutas Decl.) at ¶ 8.

[65] Second Revised Joint Statement at 22-23, ¶ 171.

[66] 47 U.S.C. § 276(b)(1) (emphasis added).

calls delivered during the fourth quarter of 2004, were completed.[67] In this way, we endeavor to ensure that the represented PSPs collect the monies they are owed and that ISS is not unjustly enriched. We believe that the result reached here – although not perfect – more accurately represents the number of calls that were, in fact, completed. We emphasize that this course is the result of ISS's willful failure to comply with the rules that, when followed by Completing Carriers, ensure that the mandates of Section 276 are achieved.[68]

31. Finally, we remind Completing Carriers that, in addition to section 208 complaint proceedings, any Completing Carrier that violates the Commission's call tracking rules can be found liable pursuant to section 503 of the Act, which provides for forfeitures against "[a]ny person who is determined by the Commission … to have … willfully or repeatedly failed to comply with any… order issued by the Commission under this Act …."[69]

32. Defendants contend that the default rate for the fourth quarter of 2004 should be computed at the $.24 per call default rate rather than the $.494 per call default rate subsequently established in the 2004 *Rate Increase Order*.[70] Defendants rely on the fact that the increase in the default rate from $0.24 to $0.494 was not properly reflected in the Federal Register.[71] We disagree. Regulations must be read in

[67] ISS admits that the represented PSPs delivered 1,618,044 calls to ISS's platform in the third quarter of 2004, of which 445,290 calls were completed using ISS's thirty-second proxy, and that the represented PSPs delivered 1,132,857 calls to ISS's platform in the fourth quarter of 2004, of which 188,896 calls were completed using ISS's thirty-second proxy. Second Revised Joint Statement at 22, ¶¶ 171-72. Adding to the number of calls lasting 30 seconds or longer the number of calls mid-way between the parties' respective proffered numbers, we conclude that 1,031,667 of the calls delivered to ISS's platform during the third quarter of 2004 (*i.e.*, 445,290 + .5(1,618,044-445,290)), and 660,876 of the calls delivered during the fourth quarter of 2004 (*i.e.*, 188,896 + .5(1,132,857-188,896)), were completed.

[68] The Commission has discretion to conduct proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice," 47 U.S.C. § 154(j), and is obligated to award damages to which the complainant is entitled. 47 U.S.C. § 209. *See APCC Services, Inc. v. TS Interactive, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 10456, 10462, ¶ 16 (Enf. Bur. 2004) (where the record contains no call-detail records or other evidence establishing the number of calls actually completed, payphone compensation may be awarded based upon a "reasonable" estimation of call completion rates).

[69] 47 U.S.C. § 503(b)(1)(B).

[70] *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636 (2004) ("*Rate Increase Order*"). *See* Answer at 37-42.

[71] Answer at 40-41. In the *Rate Increase Order*, the Commission raised the default per-call compensation rate from $.24 to $.494. Therefore, rule 64.1300 as published in the *Federal Register* should have been revised at section (d) to state, "the carrier is obligated to compensate the [PSP] at a per-call rate of $.494." Instead, the *Federal Register* stated as follows:

> (b) Except as provided herein, a Completing Carrier … shall compensate the [PSP] for that [dial-around] call at a rate agreed upon by the parties by contract.
>
> (c) In the absence of an agreement as required by paragraph a [*sic*] of this section, the carrier is obligated to compensate the PSP at a per-call rate of $.494.
>
> (d) In the absence of an agreement as required by paragraph b of this section, the carrier is obligated to compensate the PSP at a per-call rate of $.24.

(continued…)

conjunction with all relevant promulgating orders.[72] Thus, rule 64.1300 should be read in conjunction with the *Rate Increase Order,* which clearly and repeatedly stated that the per-call compensation rate for dial-around calls was to be raised from $.24 per call to $.494 per call.[73] Moreover, it is "axiomatic that any regulation should be construed to effectuate the intent of the acting body."[74] The Commission clearly intended to raise the per-call compensation rate to $.494 per call; therefore rule 64.1300 must be construed so to state.[75] Finally, Defendants were not confused or misled by the error in the *Federal Register*. On the contrary, Defendants discuss at length the fact that the initial dial-around rate was $.24, that the *Rate Increase Order* increased that rate to $.494, that the *Federal Register* should have been revised at subsection "d" to reflect this increase, and that it did not do so.[76] Accordingly, the error is harmless, and Defendants' argument to the contrary lacks merit.[77] We therefore multiply the third quarter number of calls by $.24 and the fourth quarter 2004 calls by $.494, resulting in damages of $574,073.07.

33. In a similar vein, APCC requests that we award punitive damages against Defendants.[78] Assuming, without deciding, that we have authority to award punitive damages, the facts here do not justify any such award because APCC has not shown that Defendants acted "'maliciously, wantonly or

(Continued from previous page)
This error has been corrected. *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Erratum, 20 FCC Rcd 20231 (2005).

[72] Thus, for example, the United States Supreme Court upheld the Commission's rule obligating incumbent LECs to combine network elements, 47 C.F.R. § 315(c)-(d), on the basis of a limitation expressed not in the rule itself, but rather in the text of the order promulgating that rule. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 535-39 (2002) (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15648 ¶ 294 (1996) (subsequent history omitted)). *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005) (finding that Commission rule 52.21, 47 C.F.R. § 52.21, does not obligate wireline carriers to provide location portability because the promulgating order so states) (citing *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8356, ¶ 6 (1996); *Wyoming Outdoor Council v. USFS*, 165 F.3d 43, 53 (D.C. Cir. 1998) (reviewing a regulation's preamble as "evidence concerning contemporaneous agency intent"); *New York State Comm'n on Cable Television v. FCC*, 571 F.2d 95, 97-98 (2d Cir. 1978) (construing Commission rule 76.31(b), 47 C.F.R. § 76.31(b), in light of the order promulgating that rule).

[73] *See Rate Increase Order*, 19 FCC Rcd at 15665, ¶ 92 ("[W]e find that…it is appropriate to prescribe an increased default dial-around compensation rate of $.494 per call"); *id.* at 15637, 15661, ¶¶ 1, 80.

[74] *United States v. Miller*, 303 F.2d 703, 707 (9th Cir. 1962). *Accord United States v. Eastern of New Jersey, Inc.*, 770 F. Supp. 964, 976 (D. N.J. 1991); *United States v. Unitank Terminal Serv.*, 724 F. Supp. 1158, 1165 (E.D. Pa. 1989); *Harnischfeger Corp. v. EPA*, 515 F. Supp. 1310, 1314 (E.D. Wisc. 1981); *Diaz v. INS*, 648 F. Supp. 638, 644 (E.D. Cal. 1986).

[75] Relying on *Lal v. INS*, 255 F.3d 998, 1004 (9th Cir. 1999), Defendants argue that "an agency's regulations, as published in the *Federal Register*, take precedence over the text of a conflicting agency order." Answer at 41. *Lal* stands for no such proposition. The "conflicting agency order" in *Lal* was an appeal board's subsequent interpretation of an existing rule, not, as here, an agency order that promulgates, and explains, a revised rule.

[76] *See e.g.,* Answer at 4 (admitting that "the Commission may have intended to raise that rate from $0.24 to $0.494 per call," and citing the *Rate Increase Order*), Answer at 31-33, 38.

[77] *See United States Telecom Ass'n*, 400 F.3d at 41 (mislabeling a notice of proposed rulemaking as a request for comments on a petition for declaratory rulemaking was not fatal where the error was "plainly harmless").

[78] Complaint at 31-35, ¶¶ 85-96.

with a recklessness that betokens improper motive or vindictiveness.'"[79]

34. Finally, we address the issue of the appropriate interest rate. The Commission has determined that, for the period at issue, unpaid dial-around compensation accrues interest at the rate of 11.25% per year.[80] Under payphone industry practice, compensation for a dial-around call is due on the first day of the quarter that is one quarter after the one in which the billed call was made.[81] Accordingly, prejudgment interest begins to accrue on the day compensation is due.[82] Defendants argue that interest should be waived, or that the rate should be set in accordance with the statutory rate provided in 28 U.S.C. § 1961 because Defendants "had a solid legal basis for believing that no payments were due at all."[83] As discussed, however, the Commission has expressly stated that unpaid dial-around compensation shall accrue interest at the rate of 11.25% per year. Defendants' asserted misunderstanding of the law cannot set aside a Commission rule in these circumstances.

IV. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, and 208, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that APCC Services, Inc.'s claims against Intelligent Switching and Software, LLC under section 201(b) of the Act are GRANTED to the extent indicated herein.

36. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208, 276, and 416 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, 276, and 416, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that APCC Services, Inc.'s claims against Intelligent Switching and Software, LLC under sections 276 and 416 of the Act are DISMISSED WITHOUT PREJUDICE.

37. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, 276, and 416 of

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[79] *Halprin, Temple, Goodman, & Sugrue v. MCI Telecomm. Corp.*, 13 FCC Rcd 22568, 22582, ¶ 31 (1998) (citing *Strouth v. Western Union Telegraph Co.*, Initial Decision, 70 FCC 2d 525 (1977), *aff'd in relevant part*, 70 FCC 2d 506 (Rev. Bd. 1978)).

[80] *See, e.g.*, *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Memorandum Opinion and Order, 22 FCC Rcd 4286, 4291-92, ¶ 11 (2007) ("*APCC v. NetworkIP*"); *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, 15661, ¶ 79 (2004); *Bell Atlantic – Delaware, Inc. v. Frontier Communications Services, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 8112, 8115, ¶ 17 & n.43 (2001); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2630-31, ¶ 189 (1999); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778, 1805-06, ¶¶ 59-60 (1997) (some subsequent history omitted).

[81] *APCC v. NetworkIP*, 22 FCC Rcd at 4292, ¶ 11.

[82] *See, e.g.*, *id.; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21308, ¶ 101 (2002); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, AT&T Request for Limited Waiver of the Per-call Compensation Obligation, 13 FCC Rcd 10893, 10895, ¶ 3 (1998).

[83] Answer at 46, ¶ 81; *id.* at 57, ¶ 128.

the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, and 416, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that APCC Services, Inc.'s claims against Radiant Telecom, Inc. and Radiant Holdings, Inc. are DENIED.

38. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, and 209, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that, within 90 days of the release of this Order, Intelligent Switching and Software, LLC shall pay APCC Services, Inc. damages in the amount of $574,073.07, together with interest on such damages at the rate of 11.25%, accruing on the first day of the quarter that is one quarter after the one in which the billed call was made.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

No. 1280.

CALIFORNIA COMMERCIAL ASSOCIATION

v.

WELLS, FARGO & COMPANY.

Submitted March 2, 1908. Decided June 22, 1908.

1. The law does not justify the classification of shippers with regard to their interest in property shipped.
2. Ownership of property tendered for shipment can not be made a test as to the applicability of a carrier's rates.
3. In gathering several packages of goods together and shipping them under the carrier's rates on large shipments, a shipper is not by device evading the law, but is legally availing himself of the rates which the carrier offers.
4. The cost of carrying a "bulked shipment" is not greater than the cost of carrying the same amount of freight at the instance of an individual owner. The charge must therefore be the same in each case.
5. The defendant's rule against "bulked shipments" is discriminatory, unreasonable, and incapable of enforcement.
6. A number of packages of merchandise, aggregating 16,000 pounds in weight, were assembled in New York by the complainant's agent and offered to defendant at one time and one place, consigned under one bill of lading to the complainant, a voluntary association of San Francisco merchants. Defendant's tariff provided a rate of $8 per 100 pounds for shipments of 10,000 pounds and less than 20,000 pounds. Applying its rule as to "bulked shipments intended to be distributed by the consignee," defendant charged its parcel rate against each separate package; *Held,* That the rule against "bulked shipments" is illegal. Reparation awarded.

I. I. Brown and *Vogelsang & Brown* for complainant.

C. L. Brown and *H. D. Pillsbury* for defendant.

Seth Mann for Pacific Coast Jobbers and Manufacturers Association, intervener.

T. B. Harrison, jr., by permission of the Commission, for Adams Express Company.

Report of the Commission.

Lane, *Commissioner:*

Complainant is a voluntary association of wholesale and retail merchants of San Francisco, Cal. Defendant is an express company incorporated under the laws of the State of Colorado and subject to the provisions of the act to regulate commerce as amended. Defendant operates over various railroad lines between New York and San Francisco.

On August 17, 1907, a number of packages of merchandise, aggregating 16,000 pounds in weight, were assembled in New York by the complainant's agent, the New York Dry Goods Shipping Company, and offered to the defendant as one shipment at one time and one place consigned to the complainant. On the above date the defendant's legal rate for the carriage of merchandise by express from New York to San Francisco in shipments of more than 10,000 pounds and less than 20,000 pounds was $8 per hundred pounds. In its tariff filed with this Commission appeared the following: "Special Rates on Merchandise in large lots between Eastern offices and Pacific coast terminals reached exclusively by Wells, Fargo & Co."

Rates between New York and San Francisco.

	Per cwt.
500 pounds and less than 1,000 pounds	$12.00
1,000 pounds and less than 2,000 pounds	11.00
2,000 pounds and less than 5,000 pounds	10.00
5,000 pounds and less than 10,000 pounds	9.00
10,000 pounds and less than 20,000 pounds	8.00
20,000 pounds and over	7.00

The rule objected to, and in accordance with which the package rate was applied to these shipments, reads as follows:

Rule 3. Bulked shipments intended to be distributed by the consignee.—This company will not permit anyone to do business over its own lines in competition with itself by means of bulked packages. Objectionable packages are those containing either several parcels gathered by a shipper from others or those containing several parcels actually intended to be distributed at destination among several persons. When any package appearing to be bulked is offered by any person believed to be engaged in the business of bulking packages, it must not be accepted until the shipper has satisfied the agent, either by credible statements or by exhibiting the contents, that the package is not of the objectionable kind above defined. If such satisfactory evidence is not furnished the package must be refused. If the shipper admits or it is found on inspection that the package is bulked, as above defined, it must be refused, unless the shipper prepays the regular charges on each parcel contained in the package.

Agents must understand that they may only refuse the packages of persons believed on reasonable evidence to be carrying on the business above described, thereby competing with this company by using its facilities and cutting its rates.

Agents can not refuse packages containing several parcels, shipped by one shipper for himself and destined in good faith to one consignee. If in doubt as to the course to be pursued in dealing with any suspected shipper, the agent must report all facts to his superintendent, and meanwhile accept all packages offered until otherwise instructed. In case of any dispute or trouble the agent must immediately report all the facts to his superintendent. Packages must not in any case be opened by employees of the company, and if inspection is required it must be demanded of the shipper before acceptance for transportation.

It is not intended that the foregoing instructions shall in any way change our rules in regard to shipments containing packages from several shippers to one bona fide consignee, which have been packed by his own agent or employee.

For instance, if Smith & Co., of Chicago, buy goods from two or more houses in New York, and have their packages delivered to their local representative in New York to be made up by him into one shipment to be forwarded by express to Smith & Co., at Chicago, such shipment may be accepted and waybilled at the regular charge.

It is intended, however, that the instructions referred to shall be carried out whenever a shipment is offered which is believed to contain packages to be delivered to more than one consignee, whether said shipment is offered by an individual, a business house, a local express or a packing company, except that bulked shipments from merchants to their own exclusive establishment, or exclusive employee elsewhere, may be accepted as heretofore.

"Exclusive establishment" or "exclusive employee" must not be interpreted to mean local expresses or any other public agency or organization.

Should any shipment be consigned to a local express or delivery company, at destination, agents must in all cases assume that it contains bulked packages, and before accepting same demand that it be opened for inspection. If shipper declines to comply with this request, the shipment must be refused.

If opened and found to contain bulked packages, it must be refused, unless the shipper prepays the regular charges on each package contained in the shipment.

Packages consigned to Delivery Companies, containing two or more packages, each bearing a separate number—for example, 1, 2, 3, etc.—will be treated the same as if the packages were addressed to separate individuals, and agents will exact a separate guaranteed charge on each numbered package.

The rules relating to bulked packages will apply to consignments of separate packages of berries, butter, or any other property all addressed to one consignee, but bearing thereon individual addresses or other marks, showing that the shipments are designed for separate consignees. (12943.)

The application of this rule resulted in the collection of some $676 in excess of the charges which would have been paid if the quantity rate had been applied. The complainant asks that the rule against bulked shipments be declared unlawful and that reparation be awarded in the amount of the excessive charges collected in accordance therewith.

The complainant contends that the rule in question is in violation of section 2 of the act to regulate commerce, which reads:

SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

The Commission is thus confronted with the question whether a rule is lawful under which a carrier may look beyond the transportation of the property to its ownership and refuse the benefit of its bulk or quantity rates to shipments which are intended to be distributed by the consignee after delivery at destination. Before passing to the discussion of this question it may be well to deal with several subordinate propositions which are here urged by the defendant:

(1) That the Commission is without jurisdiction in the premises and has no authority to grant the relief which is sought; (2) that the complainant has no legal status, and therefore can not of right demand any service from the defendant; (3) that the complainant is a common carrier and can not claim the benefit of another common carrier's transportation facilities.

First, the plea to the jurisdiction. Section 15 of the act gives the Commission full power to determine just and reasonable practices, and to order a carrier to cease and desist from any practice which the Commission may deem unjust and unreasonable. The power thus conferred is amply sufficient to give the Commission jurisdiction over the subject-matter of this complaint, and it is enough to say that this power has been exercised continuously and without challenge.

The second objection that the complainant has no legal status and can not rightfully demand service from the defendant is likewise without merit. Section 13 of the act provides that complaints may be preferred by "any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society." The complainant is clearly included within this category. The contention that an unincorporated association has no right to demand the service of a common carrier is a proposition altogether novel and startling.

Further, the defendant alleges that the complainant is a common carrier, and, in accordance with the doctrine of the *Express Cases*, 117 U. S., 1, can not claim the benefit of the defendant's transportation facilities. The answer to this defense is that the complainant is not a common carrier. The characteristics of a common carrier were pointed out with some care in the case of *Buckland* v. *Adams Express Co.*, 97 Mass., 124–129:

> They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume right of possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it.

The complainant does not hold itself out in any sense as a carrier; it does not transport goods, it does not maintain custody of them while in the course of transportation; in brief, it exercises no functions outside of those which are characteristic of the ordinary forwarding agent. Furthermore, the decision in the *Express Cases*, *supra*, which are relied on in this connection, covered only the case where one common carrier sought to compel another to put at its disposal a part of the actual machinery of transportation to the end that it might engage in the business of carriage over the latter's lines. By no possible interpretation, therefore, can the Express cases be held in point. We have been unable to find authority supporting the position of defendants, while there is abundant and respectable authority to the contrary. *Brown* v. *Denison*, 2 Wend., 593; *Roberts* v. *Turner*, 12 Johns. (New York), 232; 7 Am. Dec., 311, 313, note; Beale & Wyman, Railroad Rate Regulation, sec. 97.

The fundamental and large question involved in this case is the right of a carrier to determine what shippers may use its published rates. It is the contention of the defendant that it may refuse to grant the bulk rate (which in this case is analogous to the carload rate made by a railroad) to any but single owners of such shipments; that to permit any other use of the rate would be to induce many shippers of small packages (less than carload shippers) to unite their shipments in order to secure the lower rate applicable to large shipments, and thus the forwarding agency would come into being—an agency which could cut the package rate, render such rates unstable, grant preferences, and effect discriminations contrary to the spirit of the act to regulate commerce. To protect themselves against the creation of such agencies the rule has been drafted which has been quoted above. The effect of such rule has been seen in this case—a group of smaller merchants are denied a rate which a larger merchant is given; they tender the same number of packages of the same weight, containing the same goods as the large department store which is their rival, and they are charged a rate 50 per cent higher upon their shipments. A rule which works such a result can not be based on solid principle, even though it may have most specious and persuasive reasons to support it.

The express companies urge that unless such a rule is permitted, shippers will form such agencies and no one thenceforth will be able to tell what the real package or the less than carload rate is. The forwarding agency will give one shipper one rate, a second shipper another rate, a third another, and so the very purpose of the act, the uniformity of rates as between shippers, will be destroyed. We do not know that this will be so, but it is theoretically possible. The one certain answer to this argument is that the carrier makes but one rate and applies it without favor to each shipment that is tendered—to the small shipment the rate applicable thereto, and to the larger shipment its own fixed rate. The railroad or the express company offers to the world to transport a certain quantity of a certain character of freight for a certain definite amount of money, and it has no fair concern with the profit of the shipper or his interest in the property. It may ask that the shipment shall be what it purports to be in character and in weight, for that affects the rate; it may make reasonable rules to protect itself against a multiplicity of claims for loss or damage, for such claims ultimately affect the rate at which the carrier can afford to carry; it may refuse to accept the shipment except upon payment of the charges—these and, no doubt, other rules are properly within the carrier's prerogative, but we look in vain for authority to justify a classification of freight according to ownership. If we may hold as reasonable such a rule by which the utility of a rate is limited upon the carrier's knowledge of the persons to whom freight is really destined, we should be ready likewise to approve a rule which makes the right to use a rate depend upon the carrier's knowledge of the use to which the article is to be put by the ultimate consignee—whether a certain shipment of grain, for instance, is to be ground into flour, sown in the field, fed to cattle, or converted into liquor. Where can we logically stop if we depart from the simple tests which may be put by the carrier's agent at the time of shipment: (*a*) Who offers this shipment? (*b*) Of what does it consist? (*c*) To whom, and where, is it bound? For its purposes as a common carrier the railroad or the express company needs no other information than may properly be elicited by these questions, and it would appear improper and unreasonable that it should be permitted to go into the vague and illimitable realms outside of and beyond such needs. The carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use; and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed. To veer from this straight course, no matter to how slight a degree or for what apparently beneficial purpose, is to lead away from the policy of the law which condemns discriminations and preferences.

The principle that a consignor who is not the actual owner of the goods which he offers for shipment incurs the same obligations as if he were the ultimate owner is distinctly recognized in the case of *United States* v. *Milwaukee Refrigerating Transit Co. et al.*, 145 Fed. Rep., 1007. In that case a refrigerator company, by arranging with a brewing company, took the custody of all shipments of the brewing company, furnished the cars for transportation, negotiated with the railroads for shipping terms, the shipments being forwarded over the line of the road giving the most advantageous terms, and made final settlement with the railroad for the transportation furnished, the settlement allowing a certain rebate to the refrigerator company. The court says:

But, under the conceded facts, as we view them, the refrigerator company in its relations with the railroads, appears in another rôle—that of shipper. From the brewing company and other owners of goods intended for interstate and foreign transportation, the refrigerator company obtains the exclusive right to route the shipments to all competitive points, and then withholds or gives the business according to the railroad companies' resistance or submission to the threat of diverting the traffic unless a tenth or an eighth of the freight moneys be paid to it. Control of the traffic is as absolute in the refrigerator company as if it were owner, and in numerous transactions the owner is not the shipper. And if an owner, having full dominion in all respects, conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner and shipper. In this case, if the refrigerator company bought the beer, and paid the brewing company's bill, less freight, and then collected the beer accounts, and paid the railroads seven-eighths or nine-tenths of the published rates, the granting of a rebate or concession by a carrier to a shipper would not be denied, we take it; and yet, so far as ledger balances and profits of the brewing company, the refrigerator company, and the railroads are concerned, the present method in its results is precisely that.

If the forwarding agent is to be held to the strictest compliance with the law respecting his obligations as a shipper, he must certainly be entitled likewise to the exercise of all a shipper's rights. The shipper is the one who tenders the shipment to the carrier, and the law forbids discrimination between shippers.

Stress is laid by the defendant upon those provisions of the law which make it a misdemeanor for a carrier or a shipper "by any device" to evade collection or payment of the carrier's legally fixed tariff rates; and the use of a forwarding agent, such as the complainant, it is argued, is a device by which the "real shipper," the owner of the property, obtains the benefit of a rate not legally applicable to the traffic transported. The law is broad, clear, and explicit upon this point. It is needless to quote here the many passages of the Hepburn Act and of the supplemental Elkins law that are intended to secure equality of treatment for all shippers. These provisions are not intended, however, to extend the jurisdiction of the carrier over matters outside of its province as a common carrier, nor are they intended to limit and prescribe the use which shall be made of the rates which the carrier puts into effect. For it is to be kept in mind that these rates on large shipments and on small alike are the carrier's own rates, instituted and maintained by it; and so long as it chooses to maintain such rates we will not deny the public the right to use them.

In gathering several packages of goods together and shipping them under the carrier's rate on large shipments the shipper is not by device evading the law, but is in fact availing himself of the rates which under the law the carrier itself offers. The only shipper whom the carrier knows is the one offering the shipment, and the rate which this shipper pays is the lawful rate. The law condemns the use of a device to evade the payment of the lawful rate; it does not forbid the use of the rate. And so long as the carrier offers to transport a certain weight of goods at a fixed rate the shipper of these goods is certainly not evading the law by paying this rate.

The act to regulate commerce must be read as a whole, and no portion thereof is more definite or of greater public value than those provisions aimed at discrimination and preference, which under the decisions of our courts prohibit a classification of traffic upon the basis of the nature or character of consignees or consignors. A different rate may be given to the larger shipment, but it must be justified upon transportation conditions. The rate is made as applying to the shipment, not to the shipper.

The Supreme Court has placed the seal of its approval upon the issuance of party rate tickets upon the ground that the increased travel and resulting economy of operation constitutes such dissimilar circumstances as to justify the apparent discrimination against the individual passenger. *I. C. C.* v. *B. & O. R.R. Co.*, 145 U. S., 263. The argument against bulking shipments is analogous; for if it is proper for individuals to secure reduced passenger rates by means of combination it is equally lawful for them to secure reduced freight rates by means of combination. In each instance there is a resultant economy in operation which justifies the apparent discrimination. In the party rate case it was the carrier who was upholding its right to permit combination and make a lower rate for a number of passengers than was extended to one passenger; in this case it is the carrier who is discriminating against the combined shipments by making a rule which under like transportation conditions and circumstances gives one rate to one shipper and a different rate to another.

The Supreme Court has further held in the case of *Wight* v. *United States*, 167 U. S., 512, that the phrase "under substantially similar circumstances and conditions," as found in section 2 of the act prohibiting discrimination, refers to the matter of carriage. In so holding our court has followed the rulings of the English courts, the sections of the act to regulate commerce directed at discriminations and undue preferences being taken in large part from the English law, and the construction thereto given by the English courts has been regarded by the courts with such strong favor that these decisions are spoken of by the Supreme Court as being "incorporated into our statute." *I. C. C.* v. *B. & O. R. R. Co.*, *supra.*

The leading English case dealing with the interpretation of their law as to discrimination is *Great Western Railway Co.* v. *Sutton*, 4 L. R., 226, in which it was held that a carrier could not properly withhold from forwarding agents the privilege of bulking shipments, and thereby obtaining the benefit of quantity rates, Lord Chief Justice Blackburn saying:

I have already intimated to your lordships my opinion that *the circumstances must be those relating to the carriage, not to the consignor*, and that the fact that the plaintiff was a rival carrier does not in itself make a difference in the circumstances such as to justify a difference in the charge under the statute.

And in a still later case, *Denaby Main Colliery Co.* v. *Manchester Ry. Co.*, 11 Appeal Cases, 97, the Lord Chief Justice said:

I think it finally settled that for passing over the same portion of the railway the obligation to charge in respect of goods of the same description equally is imposed if they are under the same circumstances, and that the circumstances are those relating to the carriage of goods and not to the person of the sender.

There is but one case in the United States in which the point here involved has been passed upon. In *Lundquist* v. *Grand Trunk Western Railway*, 121 Fed. Rep., 915, a decision was rendered against the right of the forwarding agent to combine less than carload shipments of different owners into carload lots and thereby secure the carload rate. This decision is discredited by Judson in his work on interstate commerce (sec. 157) and is not in line with the above-cited decisions of the English courts. In the Lundquist case the learned judge of the circuit court refused to follow the English courts, although in a more recent opinion by the same circuit judge (*United States* v. *Wells Fargo Express Co.*, decided in April of this year) we find the cases which were repudiated in that case quoted as authority, and this comment made:

The portions of sections 2 and 3 which refer to unjust discrimination and undue and unreasonable preference are modeled from the English tariff act, and the constructions placed thereon by the English courts is deemed, to say the least, very persuasive. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S., 263; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S., 144; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197.

It is our opinion that these provisions of the act to regulate commerce aimed at discriminations and preferences do not permit a carrier to deny the use of a published rate by distinguishing between those offering shipments for transportation. This is an unjust discrimination and an undue preference, not arising out of any transportation consideration, but arbitrarily created by the carrier for its own purposes.

Ownership can not be made a test as to the applicability of rates, for diversity of ownership does not differentiate the service which the carrier gives. Unless there be a difference in the conditions of carriage there can be no difference in charges under section 2 of the act as interpreted by the Supreme Court.

Basic theories of transportation support the principle which the courts have established. In the case of *Burlington, Cedar Rapids & Northern Ry. Co.* v. *Northwestern Fuel Co.*, 31 Fed. Rep., 652, the court, speaking by Mr. Justice Brewer, condemned as illegal a contract discriminating in favor of the large shipper, based solely on the amount of transportation. The court said (p. 655):

That such a discrimination is against public policy and not to be sustained I am very clear. On the face of it it is a discrimination based not upon the cost of transportation, upon the time and labor and annoyances which may result to the railroad company, but solely upon the amount of transportation. * * * If it be true, as held by Judge Wallace, that the rule forbidding an unjust discrimination does not necessarily prevent a railroad from charging a less rate to one who ships a large quantity than to one who ships a small quantity (and I am not prepared to deny that, under some circumstances, there is force in that proposition, on the same principle that a wholesale dealer sells a large bill of goods at a less rate than a small bill of goods), yet, even with that limitation, a discrimination so vast as this is, and so purely arbitrary, and which is so obviously solely in the interest of capital and not based upon reasonable distinction in favor of a large as against a small shipper, can not be sustained.

In the case of *Kinsley* v. *Buffalo, New York & Pennsylvania R. R. Co.*, 37 Fed. Rep., 181, the court said:

This charge is justified by the master upon the ground that the quantity of oil shipped by another shipper was much larger than that shipped by the petitioner, and hence that the larger proportion of expense attending the handling and transportation of the smaller shipment warranted a higher rate than was charged for the larger shipment. In this conclusion we do not agree with the learned master. It does not differentiate the service performed for several shippers nor the conditions and circumstances under which it was performed. The only difference is that in one case the quantity shipped was larger and in the other case it was smaller. This has been repeatedly held to be an insufficient and unwarrantable reason for discriminating rates of charge.

In the case of *Scofield* v. *Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C. Rep., 90, the Commission outlined the reasons which justify lower rates on larger shipments than on smaller ones as follows:

Reasons that are substantial exist for making the rate lower per barrel in carload lots than in less than carload quantities. The cost of service is very considerably less in the case of shipments in carload lots than in less than carload quantities. We have had occasion to pass upon this frequently, but the evidence here requires us to do so again. The shipment by the carload goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the waybill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than carload quantities. There is but one collection of charges for freight.

Where the shipment is made in less than carload quantities a separate receipt or bill of lading has to be given to every shipper for his parcel. A separate entry of every item has to be made on the waybill. The shipment is by a local freight train, which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a carload shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation.

It appears thus to be universally recognized that the only discrimination which can legally be made between a large shipment and a small one must be based upon the difference in the cost of service. It necessarily follows that when this difference in the cost of service is eliminated, the reason for the discrimination entirely fails. It becomes therefore important to determine whether a carrier is subjected to greater expense when transporting a "bulked shipment" than when transporting the same amount of freight owned by a single individual. The only element in the defense looking to the cost of operation is the argument that the carrier may be subjected to a multiplicity of suits by the various owners. While this contention may appear theoretically substantial, we think it is entitled to no practical weight. In the first place, it is proper to observe that claims for damages are not regularly incident to the carrier's service; they are the exception and not the rule, and when they do arise there would seem to be no difficulty in the way of their being settled with the actual shipper, whether he be owner or not. We know of no legal objection to the carrier's stipulating that claims for damages shall be preferred only by the consignor or consignee designated in the bill of lading. Even without this protection, it probably makes no material difference to the carrier whether a damage claim is divisible or not. In the case of *Buckeye Buggy Co.* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry.*, 9 I. C. C. Rep., 626, the Commission said in answer to this identical question:

To a lawyer this legal proposition may well seem to create a material difference in conditions; as applied to the actual transaction that difference is hardly substantial. Claims for loss or damage to property in transit make up a very small part of the operating expenses of a railway. It has been frequently said in testimony before us that a risk of this kind is so small that it is not taken into account in fixing rates and the relation of rates upon those commodities. If the liability itself is not considered, still less important is it who may bring suit for the damage.

We have no hesitation in concluding that when small packages are bulked and shipped under one bill of lading from a single consignor to a single consignee the extra expense incidental to the transportation of small packages individually is altogether eliminated. The cost of carrying a "bulked shipment" is not greater than when the same amount of freight is carried at the instance of an individual owner. Presumably the differential between the defendant's quantity rates and its rates on small packages is exactly equivalent to the difference in the cost of service. A greater differential would be illegal. When, therefore, the extra expense incidental to the handling of small packages is done away with, as in the case we are considering, the assessment of the carrier's quantity rates should render the transportation just as profitable as before. The carrier can not legally insist upon applying its small package rates, because the entire basis for these rates has disappeared. If it is the purpose of the defendant's rule to maintain an unreasonable differential, we unhesitatingly decline to give our sanction to this rule. It is not the function of a carrier to promote the growth of the large shipper at the expense of the small shipper, nor to burden the large shipper with any portion of the cost of giving service to his smaller competitor.

Judge Noyes, in his able work on American Railroad Rates, says (p. 103):

Allowances for quantity in the shape of a reduction for carload lots is not an unjust discrimination, but the general principle of an allowance for quantity—a preferential rate for large shippers—is indefensible. A merchant may charge less for his goods at wholesale than at retail. A private dealer may make concessions to obtain a large order. But a railroad is engaged in a business affected with a public interest, and must treat all alike. Personal discriminations based on quantity, regardless of difference in cost, are wholly unjustifiable.

In considering the reasonableness of such a rule it is not to be overlooked that it is not practicable to enforce it. No carrier can know who is the owner of property offered for shipment, nor whether the shipments offered are intended for the consignee named or are to be distributed among other persons. The information of the Commission is sufficiently broad on this matter to state with authority that it is the business custom of many shippers to combine shipments; a group of farmers often purchase seed or fertilizer in small lots and ship in one name to one consignee in order to secure the carload rate; dealers in machinery, which is difficult to load and unload, unite their purchases for purposes of transportation; one or more of the great steel companies sells its products only in carload lots, and small dealers unite in the purchase of a carload, which is divided at destination; a great volume of the produce business of the country is handled at point of origin and destination by agents who combine small shipments, both by express and rail, ship to themselves, and sell upon commission at destination. Is it practicable on each of the tens of thousands of such shipments made each day, for the carriers to make such examination at point of origin and point of destination as will justify it in permitting or denying the lower rate on the grounds stated in the rule? If the rule is valid it must be enforced. If not enforced in each proper case, the carrier is guilty of departure from its tariff provisions and subject to the penalties provided in the act. The carrier may not be excused under such rule from making such examination into the facts as will surely protect it against charge of infringing the law—a mere superficial examination of the shipment would not satisfy the positive requirements of the rule if it were valid. And it must be apparent that no carrier could with safety to itself assume the responsibility imposed by such rule and risk the penalties which would follow its breach. A rule which it can not enforce a carrier should not make, and certainly this Commission should not approve.

The impracticability of enforcing such rule is shown in this case, from which it appears that shipments had been previously made by complainant without objection by the carrier. And it is a matter of common knowledge that such rule has been regarded more in the breach than in the observance. The enforcement of such rule, we feel safe in saying from the records of this Commission, would do incalculable injury; indeed it would so affect transportation practices as to be nothing short of revolutionary. Few practices have become more firmly established in the transportation world than that of combining small quantities of freight of various owners and shipping at the relatively lower rates applicable to large consignments, and under this practice has developed an immense volume of traffic which otherwise could never have been brought into being. It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of the smaller industries and more surely establish the dominance of the greater industrial and commercial institutions.

There is a further element of discrimination in this case, and it is one which generally obtains among carriers who attempt to go into matters of ownership or distribution, which is worthy of mention. It appears from the carrier's tariffs that it will gather the various packages of various consignors which are destined to one consignee and ship them all at the bulk rate. Such rule manifestly permits the great department store or the wholesale dealer a privilege which is denied to the smaller merchant if the latter is not permitted to combine at point of origin his shipment with those of others.

Our conclusions are as follows:

Rule Three of defendant, as quoted above, is unjustly discriminatory, unjust, unfair, and unreasonable, in this: That it provides that defendant shall collect a greater compensation from certain persons for the transportation of property subject to the act to regulate commerce than defendant collects from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

A carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates. Defendant's rule against bulked shipments intended to be distributed by consignee is illegal. Complainant is entitled to reparation to an amount equal to the difference between the amount collected by defendant and the amount which would have been collected if defendant had applied the rate which under its tariffs is applicable to shipments of 10,000 pounds and less than 20,000 pounds in weight. The exact overcharge can not be determined upon the record, but if the parties can not agree as to the amount the case will be reopened for additional evidence.

An order will be entered in accordance with these conclusions.

HARLAN, *Commissioner*, dissenting:

All that is said by the Chairman of the Commission in his dissenting opinion in *Export Shipping Company Cases, infra*, p. 437, applies with even greater force here, and relieves me of the necessity of formally stating the reasons that compel me to dissent from the conclusions reached by the majority of the Commission in this proceeding. There is one question however that has had but little consideration in either proceeding, although of controlling importance in both, as it seems to me, and especially so here; and that is, How far may a carrier be compelled against its will to serve a competitor, to the detriment of its own interests?

It is regarded ordinarily as a principle of common right that a person engaged in any kind of business may refuse his services and the use of his facilities to a competitor. And I see no reason why this rule of self-protection, concededly sound in all other forms of commercial activity and enterprise, should not be available to common carriers. It is said however in the majority opinion that a forwarder is not a common carrier, and therefore is not a competitor of an express company, for example, when he gathers express matter from merchants and tenders it to the express company and demands its services in carrying the shipment to destination. This obviously is a strict, technical view of the status of a forwarder and of his relations to his patrons. It is true that he may not incur all the liabilities and subject himself to all the responsibilities that the law imposes upon common carriers, but a forwarder is nevertheless engaged in the business of transportation. Whatever may be the form under which the business is conducted, he makes his income out of transportation. He steps in between the express company and its patrons and collects express matter and delivers it at destination, and fixes and receives a rate that will compensate him for his services. Although it is said that in doing this he is simply taking advantage of the rates which the express company offers to the shipping public, yet in every practical and substantial sense he is himself the transporter of the merchandise so far as his patrons are concerned. If he is not a common carrier in the strict sense of that term, it is quite clear that he is not a shipper except in a very loose sense. And to call him a shipper and accord him the rights of a shipper under the act to regulate commerce is to ignore the fact that he has nothing of his own to ship, but is simply selling transportation to those who have. He is a mere trafficker in freight rates, just as a ticket scalper is a trader in passenger fares.

But the special point to which I wish briefly to allude here is that in carrying on his business the forwarder comes into immediate and direct competition with the express company. By getting in between the express company and the shipper the forwarder is able to give the shipper a rate that has no lawful existence and is subject to no regulation or control, a rate which the express company could not lawfully accord to the shipper and the shipper could not lawfully accept from it. The shipper gets the same transportation, but at less than the lawful rate, on packages or small shipments, while the forwarder is compensated for his services by selling the transportation at more than the lawful rate for bulked shipments. In my judgment this is nothing more or less than an absorption by the forwarder of the lawful revenues of the express company. And when an express company is required, as they are under the principles announced by the majority in this case, to carry for forwarders, they are in effect required to put their facilities at the service of, and to carry for, persons directly competing with them.

To give to forwarders the status and the rights of shippers is to make the business of forwarding a permanent feature in our commerce. This is to be regretted, not only because there seems to be no real general need of forwarders in this country, but because no advantage can come through them to the general public. Some shippers may in that way get lower rates than they now enjoy, but to the general shipping public the result can not be other than disadvantageous. Anything that tends to increase the bulked shipments of express companies tends to diminish their revenues, and as a consequence to require a readjustment of their rates. As was well stated on the argument, it is not economically a sound proposition to interpose a new factor in transportation between the shipper and the carrier, a middle man who must make his living out of transportation. While the immediate result of this decision may be to enable the forwarder to carry on his business at the expense of the revenues of the carrier, the ultimate result will be to require the shipping public to support both the carrier and the forwarder.

I am requested by the Chairman of the Commission to say that he concurs in this dissent.