Oral Argument Requested

Nos. 09-17646, 10-16086 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GCB COMMUNICATIONS, INC., *et al.*,

Appellees,

v.

U.S. SOUTH COMMUNICATIONS, INC.,

Appellant.

On Appeal From the United States District Court
For the District of Arizona (Hon. Susan R. Bolton, District Judge)

BRIEF FOR APPELLANT

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Dated: September 17, 2010

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1, appellant U.S. South Communication, Inc., certifies that it is a wholly owned subsidiary of International Communications, Inc. ("InComm"), and has no parent companies, subsidiaries or affiliates that have issued shares to the public.

/s/ Glenn B. Manishin
Glenn B. Manishin

Counsel for Appellant U.S. South Communications, Inc.

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction under 28 U.S.C. § 1367(a) over the state claims because they "form part of the same case or controversy under Article III." *Id.*

This Court's jurisdiction over the district court's Oct. 30, 2009 final judgment, and the subsequent April 27, 2010 fee order and amended judgment, is based on 28 U.S.C. § 1291. Appellant timely filed its notice of appeal from the judgment on Nov. 23, 2009 (No. 09-17646). A second notice was filed from the fee order and amended judgment on May 10, 2010 (No. 10-16086).

STATEMENT OF THE ISSUES

1. Whether the district court lacked the power to sustain a private right of action under 47 U.S.C. § 201(b) and erred by interpreting controlling Federal Communications Commission (FCC) regulations *de novo*?

2. Whether the district court's refusal to refer the FCC's payphone compensation regulations to the agency for interpretation under the primary jurisdiction was erroneous or an abuse of discretion?

3. Whether the court's factual findings were supported by substantial evidence?

4. Whether key evidentiary rulings were harmful error?

5. Whether the award of prejudgment interest at 11.25% and hugely disproportionate attorneys' fees was an abuse of the court's discretion?

6. Whether the district court abused its discretion in managing trial and pretrial proceedings?

STANDARD OF REVIEW

A district court's legal conclusions, including statutory interpretation, are reviewed *de novo*. *E.g., SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003). The district court's factual findings are reviewed under the clearly erroneous standard. A court's "ultimate decision" regarding whether to exercise jurisdiction is reviewed for abuse of discretion, although "application of the primary jurisdiction doctrine is reviewed *de novo*." *Rhoades v. Avon Prods., Inc.,* 504 F.3d 1151, 1162 n.11 (9th Cir. 2007).

Judgment in a bench trial is reviewed for substantial evidence in the record. Management of pretrial and trial proceedings, including an award of attorneys' fees, is reviewed for abuse of discretion. *FTC v. Enforma Natural Prods.*, 362 F.3d 1204 (9th Cir. 2004). Mistakes of law or use of an incorrect legal standard are an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

STATEMENT OF THE CASE

GCB Communications, Inc. d/b/a Pacific Communications (GCB) and Lake Country Communications, Inc. (Lake Country), operators of public pay telephones (payphones), filed a three-count complaint against U.S. South Communications, Inc. (U.S. South) in 2007. RE 1.[1] The complaint asserted violations of § 201(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 201(b), along with state claims for unjust enrichment and implied contract. *Id.* The complaint sought monetary damages in an unspecified amount.

The gravamen of the complaint was that U.S. South had not compensated appellees for each and every completed telephone call placed, or "originated," from their payphones. RE 58 at 2. Later, GCB and Lake Country explained that "[a]s the result of discovery, Plaintiffs have learned" that U.S. South completed some calls made from their phones for which appellant had not remitted compensation because the calls did not include certain payphone-specific identifiers — known as "info digits" or "Flex-ANI" codes — that the FCC requires to be transmitted by local exchange telephone companies (LECs) and provided by payphone owners to long-distance phone companies. RE 58 at 2-3.

The complaint did not assert that U.S. South failed to comply with any administrative regulation promulgated by the FCC pursuant to § 276 of the Act (47

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[1] Citations to record excerpts, conclusions of law and findings of fact herein utilize the conventions "RE __," "COL ¶ __" and "FOF ¶ __," respectively. Citations to pages and lines of the trial transcript use "Tr. __:__." The district court's order containing its findings of fact and conclusions of law is included in the excerpts of record at RE 77. The court's subsequent attorneys' fee order appears at RE 102.

U.S.C. § 276) as part of the "per-call payphone compensation plan" developed by the agency in a series of decisions between 1996 and 2000. The parties stipulated before trial that U.S. South had paid appellees for *all* calls made from their payphones in the relevant time period — from Q3 2005 to Q2 2008 — that were received with correct payphone-specific Flex-ANI coding digits and completed by U.S. South. RE 64.

Appellees accepted U.S. South's 2009 offer to settle their damage claims for $34,500.00, but insisted that what they termed this "partial settlement" was insufficient unless the parties also agreed to a going-forward technical protocol for Flex-ANI problem resolution. RE 38. The district court denied U.S. South's motion to enforce the settlement — which argued that resolution of monetary damages eliminated the Article III case or controversy because plaintiffs' complaint did not ask for injunctive relief — calling the motion "disingenuous." RE 54. GCB and Lake Country never sought or moved for any equitable remedy. Appellees did not take third-party discovery. On August 25, 2009, the district court summarily denied a joint motion to extend discovery so that the parties could serve an additional subpoena on Level 3 Communications, Inc. (U.S. South's underlying carrier), notwithstanding the parties' explanation that evidence from Level 3 could be dispositive and allow summary judgment. RE 56; Tr. 788:4-788:15.[2]

The case was tried to the court on October 13-16, 2009. Appellees called no witnesses from the LECs, Level 3 or Atlantax, and offered no evidence as to why some calls received by U.S. South included incorrect Flex-ANI coding digits. The court denied U.S. South's request for post-trial briefing on the court's power under *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.,* 550 U.S. 45 (2007), to entertain a private right of action. Tr. 757. The court also rejected appellant's proposal, first advanced at the pretrial conference, that it refer interpretation of the payphone compensation regulations to the FCC for initial determination under the primary jurisdiction doctrine. Tr. 785:20-786:1.[3]

Two weeks after trial, the district court issued findings of fact and conclusions of law, entering judgment on the § 201 claim for $18,555.02, plus prejudgment interest of $4,969.94 at 11.25%. RE 77. The court concluded that plaintiffs

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[2] The district court's scheduling order provide that no *in limine* motions would be entertained. RE 55. Nonetheless, the district allowed plaintiffs to make such a motion and, at the pretrial conference, excluded evidence of so-called "no Flex-ANI" calls that U.S. South produced, completely inadvertently, only after discovery. *See, e.g.,* Tr. 789; RE 64. U.S. South disagrees with that ruling but does not contend it constituted an abuse of discretion. *See* Section V *infra.*

[3] Despite the court's instruction that no post-trial briefs were to be submitted, appellees without leave filed a brief on the statute of limitations. RE 70; *see* COL ¶¶ 17-21.

had not proven the elements of their unjust enrichment and implied contract claims, *id*., and that a portion of their damages was barred by the Act's statute of limitations. COL ¶¶ 17-21.

Subsequently, the district court awarded the full $81,583.50 in attorneys' fees and $8,602.43 in non-taxable costs sought by plaintiffs, disagreeing with U.S. South that such an award was not "reasonable" within the meaning of 47 U.S.C. § 206 despite its gross disproportionality to the compensatory damages. RE 102; *see* RE 80, 96, 100-01. The court rejected U.S. South's contention that its pretrial Rule 68 offer shifted the right to subsequent attorneys' fees to appellant. RE 102 at 2-4.

STATEMENT OF FACTS

U.S. South sells prepaid phone card services though retail vendors. As a long-distance (or "interexchange") common carrier, appellant has a regulatory obligation to compensate GCB and Lake Country for completed calls made from plaintiffs' pay telephones. In the absence, as here, of a negotiated price between U.S. South and the payphone owner(s), compensation is owed at an FCC-prescribed "default" rate of $0.494 per call. 47 C.F.R. § 64.1330(d). U.S. South made timely payments for all completed calls that included correct coding digits identifying the calls as having originated from payphones. Tr. 445:2-14. These info digits are known as "Flex-ANI."[4]

It is undisputed that U.S. South "compensated plaintiffs for all completed calls for which U.S. South received payphone-specific Flex-ANI digits." RE 64; FOF ¶ 47. Throughout the trial, there was testimony on so-called "no FLEX-ANI calls." This term was used to describe calls received by U.S. South that did not have the required 27 or 70 Flex-ANI payphone identifiers. Overwhelmingly, U.S. South received incorrect 00 or 07 info digits for these "no FLEX-ANI calls." Tr. 188:13-189:8, 442:21-444:25; FOF ¶¶ 49, 61.

Payphone compensation under the FCC's regulatory plan for per-call compensation is also known as "dial-around compensation" or "DAC." A prepaid card call from a payphone begins when a user picks up a payphone and dials the 1-8XX, or "800," toll-free number of the carrier. Such calls are routed by the payphone to the local telephone exchange company (LEC) serving that geographic region. The LEC then transports the call to an interexchange carrier — in this case Level 3 Communications, Inc. (L3) — which in turn transports the call to U.S. South as the "completing carrier." U.S. South pays compensation to the payphone

[4] The specific two-digit Flex-ANI identifiers required by the FCC to designate a call as having been originated from a payphone are 27, 29 and 70. FOF ¶ 29. Plaintiffs did not dispute, and the district court found, that "[f]or purposes of this case, only 27 and 70 are relevant (29 is for prison payphones and is not at issue herein)." FOF ¶ 33; Tr. 442:9-14.

owner, on a quarterly basis, for completed calls by use of a third-party agent (Atlantax) known as an aggregator. FOF ¶ 43. Appellees do not contend that U.S. South's system for determining whether payphone-originated calls are completed (using standard telecom industry network signaling) is defective.

The FCC requires completing carriers to deploy a system to track payphone calls to completion. FOF ¶ 23. Appellees introduced no evidence that the U.S. South call tracking system failed to comply with the applicable regulations or that mandatory, annual audits of that system were unlawful. U.S. South relies on the presence of payphone-specific Flex-ANI to determine if 800 calls received at its prepaid switch (or "platform") originate from a payphone. FOF ¶ 24. The call data associated with all telephone calls includes the numbers from which the calls are placed (referred to in the industry as Automatic Number Identification, or "ANIs"), the date, time and duration of each call, and Flex-ANI coding digits, if any, received with each call. Tr. 419:8-420:9, 435:1-436:22.

These electronic call detail records (CDRs) are initially created by the "originating LEC." The digital telecommunications switches of each carrier along the "call path" automatically receive and forward the call detail information without manipulation. Tr. 408:14-20 419:1-420:9. Level 3 routes all the call data it receives to U.S. South, without change, including whatever Flex-ANI coding digits were transmitted by the LEC. RE 64; FOF ¶ 57; Tr. 71:11-25. In their pretrial disclosures and during the course of discovery, plaintiffs did not identify any LEC or carrier (including L3) as a source of discoverable facts. RE 62, 64.

There is a single point of interconnection between the networks of L3 and U.S. South. Tr. 404:13-406:22, 435:1-436:22. Thus, U.S. South receives in the normal course all call detail information L3 receives unless there is a systemic technical failure. Tr. 542:13-543:1, 566:12-568:3, 575:10-576:2. U.S. South has never experienced such a systemic loss of CDR information. Tr. 422:20-423:4, 429:4-429:25, 440:14-441:8, 566-568, 568:19-569:2.

Flex-ANI is the industry standard for identifying calls that originate from payphones. Tr. 446:14-17, 507:24-508:3; FOF ¶ 15; RE 64. The FCC has determined that the transmission and provision of payphone-specific Flex-ANI codes to carriers with all calls is "a prerequisite to payphone per-call compensation."[5]

Appellant does not know in real time which ANIs are associated with payphone calls unless payphone-specific Flex-ANI data is transmitted and received. FOF ¶ 24. As payphone operators, GCB and Lake Country do not know whether calls placed to U.S. South's prepaid card platform are completed.[6] That

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[5] *In re Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996,* Memorandum Opinion and Order, 13 F.C.C. Rcd. 4998, 5006 ¶ 13 (1998).

[6] There is no dispute that calls that reach U.S. South's 800 platform, but are not terminated by a LEC to the called party (*e.g.,* no answer, busy, etc.), are not considered "completed" for purposes of per-call payphone compensation. Calls to

information is transmitted automatically to U.S. South by the LEC which terminates a payphone call, but the telephone network has no technical mechanism to send call completion signaling back to payphone service providers (PSPs).

U.S. South takes quarterly call detail records reflecting all completed calls which include payphone-specific Flex-ANI digits and sends that information to its aggregator. FOF ¶ 43. Atlantax manages the payment process between PSPs and its clients; U.S. South does not directly interact with payphone operators. Tr. 424:19-425:21. GCB and Lake Country also use an agent to manage their payphone compensation revenues. Bulletins, Inc. is appellees' compensation agent whose president, Paul Brooks, testified at trial as an expert witness. Plaintiffs did not introduce testimonial, deposition or documentary evidence from Level 3, Atlantax or any of their originating LECs.

Appellees have experienced periodic problems when the LECs failed to transmit correct payphone-specific Flex-ANI digits. Tr. 368:23-369:19. When this happens, GCB and Lake Country issue a "trouble ticket" and report the issue to the LECs for escalation. *Id.* Plaintiffs did not produce information regarding trouble tickets sent to their originating LECs in discovery. Tr. 527:21-23; *see id.* 195:19-23.

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a dial-around platform's 800 number are known under the FCC's rules as "access code" 800 calls. Most payphones do not require a user to deposit coins for 800 or other toll-free calls, which are thus referred to as "coinless" calls.

U.S. South asserted, through the testimony of a senior executive and from expert witness Bruce Renard, an unaffiliated former president of one of the nation's largest payphone companies, that U.S. South used "customary and reasonable carrier systems and procedures for tracking and paying compensation on dial-around calls, in accordance with applicable FCC requirements and general industry standards, during the period at issue in this case." *E.g.,* Tr. 688:20-689:2. Plaintiffs disputed before trial that U.S. South's call tracking system was accurate, but introduced no direct or opinion evidence on that issue at trial. GCB and Lake Country never contended that U.S. South violated the FCC's mandate (codified at 47 C.F.R. § 64.1310(a)(1)) requiring each completing carrier to maintain a system that "accurately" tracks payphone calls to completion.

One of the problems plaguing the payphone industry is that if a LEC stops transmitting correct Flex-ANI digits, Flex-ANI functionality is often temporarily unavailable for all payphone lines at that switch until the LEC repairs or replaces it. Tr. 595:17-596:3. Flex-ANI can "work today and not work tomorrow" or be out "for a few hours or days . . . [or] months." *Id*. Plaintiffs' expert Brooks agreed that because a large proportion of calls for which plaintiffs claim compensation are clumped in short time spans, if Flex-ANI dropped off the payphone line that could affect whole stretches of calls. Tr. 224:4-20.

Brooks testified on cross-examination about calls in specific time frames. He addressed circumstances in which U.S. South both received *and* did not receive payphone Flex-ANI from an individual phone — concluding that he could not infer whether the problem with Flex-ANI transmission was more likely with the LEC or with Level 3. Tr. 178:7-180:22; 188:13-189:8; 193:6-194:3. He also could not draw an inference from circumstances in which U.S. South received payphone Flex-ANI for one payphone line associated with a LEC, but not for another of the same LEC, again conceding that he could not tell whether the problem was more likely with the LEC or with L3. Tr. 211:16-18, 213:7-16, 216:1-217:14, 281:4-20.

Both sides presented expert opinion on the dial-around compensation regulatory plan. The experts testified that U.S. South should test its network for receipt of payphone Flex-ANI if the company observed incidents in which it was not receiving such Flex-ANI; however, Brooks believes this is a regulatory requirement and Renard believes it is simply a good business practice. Tr. 82:7-83:3; 631:20-634:15, 682:14-684:25. The receipt of Flex-ANI coding digits other than those for payphones is not an indication to a long-distance carrier of a network or system failure, because payphone calls are a small and diminishing percentage of telephone traffic. Tr. 400:13-17, 401:23-402:4, 690:3-694:4.

Brooks opined that § 276 required the FCC "to create a system so that payphone owners are compensated for each and every coinless call completed from their payphones." Tr. 5:9-13. Renard opined that U.S. South is required to pay compensation for calls originating from payphones that are transmitted with payphone Flex-ANI digits and completed. Tr. 605:16-606:8. Renard further explained that perfection is not required, Tr. 612:8-613:13, but that the FCC created the best system it could. *Id.* 595:24-596:3; *see* 618:21-621:1.

Appellees did not notify U.S. South or Atlantax of any payment shortfall before filing suit, considering that a "waste of time." Tr. 354:18-22. They did not challenge U.S. South's annual payphone compensation audits at the FCC, as was their right. Nor did they assert underpayment in an administrative complaint or business dispute, despite the fact that, as plaintiffs' counsel stressed, their CEO viewed the compensation remitted as a "red flag." Tr. 797:13-15. GCB and Lake Country only quantified, by estimate using average completion percentages, the number of calls they claim were unpaid in a damages model presented at trial.

The ultimate issue — because the evidence did not show whether the problem of incorrect Flex-ANI was caused by plaintiffs, their LECs or by U.S. South and/or Level 3 — was which party under the FCC's plan bears the risk of uncertainty in the amount of compensation owed. U.S. South adduced expert testimony that where, as here, "it's undeterminable where the problem is," then "the payphone owner bears the risk of loss." Tr. 665:9-665:14. GCB and Lake Country maintained that because "the primary purpose of this whole regulatory scheme . . . was to compensate the PSPs for each and every completed coinless call from their payphones," Tr. 774:24-775:2, the carrier is responsible. As appellees' counsel argued eloquently:

> [We] cannot believe that the FCC would say that a completing carrier like U.S. South has no obligation to do a single thing to confirm that it's receiving Flex-ANI or to test the system once in a while. It can turn a blind eye to that. And so long as it doesn't get the digits, it's immune. But that's effectively the position that U.S. South is asking you to adopt.

Id. at 775:3-775:11.

Finally, plaintiffs' witnesses testified that Flex-ANI automatically is included where a PSP orders and installs a payphone line to the originating LEC, using bills received from the LECs (to which U.S. South objected) to establish that they had, in fact, correctly purchased payphone lines. Tr. 300-01; FOF ¶ 52. Yet GCB and Lake Country did not introduce evidence, or argue, that the FCC rule requiring payphone owners to "generate" and "transmit" payphone-specific coding digits with each call was satisfied by "provisioning" a payphone line with Flex-ANI upon ordering.

The district court, *sua sponte*, asked U.S. South's counsel during closing whether that was the proper interpretation of the rule. Tr. 778-80. U.S. South parried the court's inquiry by citation to and excerpts from other FCC payphone compensation orders. *Id.* Appellees did not comment. The district court did not request an FCC *amicus* brief on that controlling question and, as noted, declined to make a primary jurisdiction referral to the agency before adopting the novel interpretation suggested by its questioning.

SUMMARY OF ARGUMENT

The central legal questions presented in these consolidated appeals are whether the district court lacked the power to entertain a private right of action for damages[7] or erred by applying its own *de novo* interpretation of the applicable FCC regulations. The case arises from an arcane area of telecommunications regulation known as per-call payphone compensation, but boils down to the overriding, simple question of whether under a regulatory system developed pursuant to statutory mandate by the FCC, which side bears the risk of loss or uncertainty in the amount of money owed by U.S. South to GCB and Lake Country.

U.S. South complied with all its FCC-mandated compensation obligations; the district court did not specifically conclude that appellant violated a single per-call payphone compensation regulation. Consequently, since the FCC has never determined that anything U.S. South did constitutes an "unreasonable practice" unlawful under § 201(b) of the Communications Act, 47 U.S.C. § 201(b), the district

[7] *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007).

court was not empowered to award monetary damages. The statutory command that payphone owners receive compensation for "each and every completed [payphone] call"[8] is explicitly subject to FCC implementation by rulemaking and, as this Court has held, does not as a matter of law serve as the basis for a private damages claim.

To reach its conclusion that U.S. South was liable for the disputed amount, a mere $18,000 and change, the district court was also compelled to undertake some seriously flawed judicial *jujitsu*. The court construed the applicable FCC regulation on the "transmission" of Flex-ANI payphone-identifying codes as not applicable to plaintiffs and, on that basis, concluded that U.S. South must pay per-call compensation to GCB and Lake Country for all completed calls even where payphone-specific Flex-ANI identifiers, a central feature of the Commission's compensation plan and expressly a "prerequisite to payphone per-call compensation,"[9] are not present. Appellees stipulated that U.S. South had already paid for every completed call transmitted with correct payphone Flex-ANI. The district court's rejection of this as a dispositive legal defense in favor of its own *de novo* construction, concocted from of a single word in just one of the entire series of

[8] 47 U.S.C. § 276.

[9] *In re Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 F.C.C. Rcd. 4998, 5006 ¶ 13 (1998).

FCC rules and orders on payphone compensation, exceeded the court's authority and appropriate role under *Chevron* by failing to accord judicial deference to the agency's interpretation.

The third major issue presented in this appeal is under what circumstances a district court may award attorneys' fees that are hugely disproportionate to (*i.e.*, quadruple the amount of) a plaintiff's compensatory damages pursuant to a statute authorizing "reasonable" attorneys' fees. The district court all but overlooked that question. The court's failure to conduct a careful and searching examination of proportionality constitutes a clear abuse of discretion.

There are a number of subsidiary questions, including (i) erroneous and harmful errors on the admissibility of key evidence, (ii) the sufficiency of the evidence itself, and (iii) the district court's exercise of discretion in managing pretrial and trial activities, for instance (a) rejecting U.S. South's motion to enforce the pretrial settlement without addressing the weighty issue presented of the court's Article III subject matter jurisdiction, and (b) denying leave for the parties, pursuant to a joint request, to pursue a potentially dispositive third-party subpoena after the close of discovery. These are fully discussed below and, like the three key issues of the district court's power and scope of fee award discretion, represent independent grounds for this Court to reverse or vacate both the judgment and attorneys' fee award.

ARGUMENT

I. THE DISTRICT COURT LACKED THE POWER TO SUSTAIN A PRIVATE RIGHT OF ACTION UNDER *GLOBAL CROSSING* AND ERRED BY INTERPRETING DISPOSITIVE FCC REGULATIONS *DE NOVO*

The district court appears to have reasoned that the Supreme Court's decision in *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007), gave it the authority to award damages under the Communications Act for violation of the FCC's regulation requiring carriers to "establish a call tracking system that accurately tracks [payphone] calls to completion." COL ¶¶ 1-4, *citing* 47 C.F.R. § 64.1310(a)(1).[10]

This conclusion is erroneous for two reasons. *First*, the FCC has never determined that violation of § 64.1310 of its rules is an "unreasonable practice" for purposes § 201 of the Act, 47 U.S.C. § 201(b). Therefore, the district court lacked the power to fashion a private right of action because a violation (even if shown, which it was not in this case) of that regulation is not, of itself, a violation of the Act.[11] *Second*, the district court's rejection of U.S. South's principal Flex-ANI

[10] The district court mis-cited this regulation as "47 C.F.R. § 1310(a)(1)," RE 77, a typographical mistake.

[11] U.S. South emphatically urged the district court to permit post-trial briefing, arguing that the court did not have the "responsibility . . . or [] competence to decide in general what's reasonable under the Communications Act pursuant to the Supreme Court's ruling in *Global Crossing.*" Tr. 778:16-19; *see id.* at 755:14-21. Because the court rejected that request, its opinion does not

defense, based on the court's *de novo* interpretation of the FCC's companion rule making the sending and receipt of payphone-specific coding digits "a prerequisite to payphone per-call compensation,"[12] improperly substituted the court's own construction for the Commission's. That exceeds a district court's power to disregard an administrative agency's statutory interpretation under the well-established *Chevron* doctrine.[13] The district court's judgment can and should be vacated on either or both of these grounds.

A. Only Practices Specifically Held By the FCC To Be Unreasonable Support Private Damages Actions Under the Communications Act

Section 276 of the Communications Act, the ultimate source of the rights claimed by appellees, instructs the FCC to "prescribe regulations that . . . 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." 47

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properly differentiate between a violation of 47 U.S.C. § 201(b), based on a prior FCC determination of unreasonableness, and a naked alleged violation of a standalone regulation like § 64.1310(a)(1), as demonstrated in Sections I(B) and II *infra*.

[12] COL ¶¶ 9-10.

[13] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *accord, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

U.S.C. § 276. Yet a payphone provider has no authority to sue based on § 276[14] because it is the prohibition of unreasonable acts and practices in § 201 which, by way of 47 U.S.C. § 207, allows a private right of action under the statute. Therefore, the fundamental question here is whether a violation of the call tracking regulation relied on by the district court is an unreasonable practice for purposes of § 201 and thus a violation of the Communications Act, entitling appellees to sue for damages.[15]

The answer to this inquiry is no; the district court exceeded its power in allowing a private damages action. That is because the FCC has never held that a violation of the call-tracking obligation of 47 C.F.R. § 64.1310(a)(1) is an unreasonable practice under § 201(b). The key point in *Global Crossing* was that "[t]he FCC [had] determined that a carrier's refusal to pay the [payphone] compensation ordered amounts to an 'unreasonable practice' within the terms of § 201(b)." 550 U.S. at 50-52. As this Court explained in the decision affirmed by the Supreme Court, a § 201 violation only exists where "[a] failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasona-

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[14] *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-51 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004).

[15] Appellant could have presented these legal issues on a FED. R. CIV. P. 12(b)(6) motion to dismiss, but naively thought foregoing motions practice would avoid legal fees and thus produce a rapid pretrial settlement. That unfortunately was not the case. *See* Section V(A) *infra.*

ble practice in violation of § 201(b) of the Act." *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1064 (9th Cir. 2005).

Appellees did not allege that U.S. South failed to pay "in accordance with the FCC's rules," and never claimed a specific violation of ***any*** of the regulations, including § 64.1310(a)(1), implementing the agency's compensation plan.[16] More importantly, the FCC has not determined that a carrier's failure to "establish" an "accurate" call tracking system is an unreasonable practice under the Act. There is nothing in the long series of orders and decisions from the agency that links any one of the many and hyper-technical requirements of its payphone compensation scheme to the Act's damages provisions. That is because the Commission has held only that PSPs must have recourse to courts to collect compensation where an IXC "refuses" or "fails" to remit.

The issue in this case is markedly different. U.S. South paid appellees substantial per-call compensation during the relevant time period. The only contested matter at trial was whether that amount was correct and, if not, whether U.S. South (the completing carrier, or IXC) or GCB and Lake Country (the payphone providers, or PSPs) should bear the risk of inaccuracy. FOF ¶¶ 47-51; Tr. 661:23-665:15

[16] Appellees also never alleged, and the district court did not hold, that U.S. South violated § 64.1320 of the Commission's rules for annual audits of a carrier's call-tracking system. 47 C.F.R. § 64.1320. Indeed, the district court did not enter a finding of fact or conclusion of law specifically to the effect that U.S. South failed to comply with *any* of the regulations implementing § 276.

(questioning by the court). Accordingly, there was no refusal or failure here to remit payphone compensation triggering the private right of action recognized in *Global Crossing.*

Nor is there an FCC finding that violation of the call tracking regulation is an unreasonable practice. Indeed, since the Commission itself has emphasized that an "accurate" system under § 64.1310 (a)(1) does not need to be perfect,[17] there is no basis to assert that failure to accurately track "each and every" payphone call is *per se* unreasonable under the Act.

The district court erred by assuming that noncompliance with any FCC regulation on payphone compensation is a violation of the statute, empowering a damages award under § 206 of the Act. COL ¶ 3. That is plainly not the law, because otherwise every FCC rule could end up as a federal district court case. *Global Crossing*, 423 F.3d at 1071 (FCC's "interpretation of § 416(c) is unreasonable because it would make every pronouncement of the Commission automatically enforceable in a private action, contrary to the intent of Congress"). As this Court explained, *Global Crossing* does **not** "suggest that every violation of FCC regulations is an unjust and unreasonable practice." *North County Comms. Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1159 (9th Cir. 2010).

[17] *In re Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19994 ¶ 39 n.109 (2003).

Since the agency possesses ample power to fine or sanction carriers that violate its rules and orders,[18] there is no basis to transform routine regulatory compliance into damages suits unless the FCC itself makes a determination that deviation from a specific regulation rises to the level of an unreasonable practice justifying a civil remedy under the Act. That is why this Court has held squarely that "an FCC determination is integral to claims involving § 201(b)." *North County*, 594 F.3d at 1158. "[I]t is within the Commission's purview to determine whether a particular practice constitutes a violation [of § 201(b)] for which there is a private right to compensation." *Id.* at 1157.

In sum, where the FCC deems a regulation sufficiently important that non-compliance is considered an unreasonable practice, and thus the equivalent of a statutory violation, as in *Global Crossing* it can and readily will make such a determination. Only when the FCC has first done so, however, may a district court entertain an action for damages based on an alleged regulatory violation. In the absence of such an administrative determination here, the district court exceeded its powers by providing for a private damages action under § 207. Any other conclusion would improperly "put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges,

[18] 47 U.S.C. §§ 154(i), 503(b); 47 C.F.R. § 1.80; *United States Telecom. Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994).

instead of in the hands of the Commission." *Greene v. Sprint Comms. Co.*, 340 F.3d 1047, 1053 (9th Cir. 2003); *accord, North County,* 594 F.3d at 1158.

Section 276 is of no aid. The statutory objective of payment of per-call compensation for "each and every completed [] call," 47 U.S.C. § 276, is not self-executing. *Greene,* 340 F.3d 1047; *Global Crossing,* 423 F.3d 1064-70. Consequently, PSPs cannot prevail on a Communications Act claim that a carrier's compensation system is "unreasonable," or fails to track all payphone calls, absent proof that a specific FCC rule was violated. Tr. 755:14-21. As U.S. South emphasized:

> Your Honor knows that you're not an Administrative Procedure Act reviewing court deciding whether the FCC's regulations are permissible or not. . . . You're also not a reviewing court under the *Global Crossing* case that's entitled to entertain a lawsuit that goes beyond something that the FCC has already said in its regulations, as they have with coding digits, that this is what the obligation is. *If plaintiffs have a claim as to unreasonableness, it's one they have not brought. It would be a negligence claim. There's no negligence claim in this case.*

Tr. 783:11-19 (emphasis supplied).

Rejecting that analysis, the district court accepted appellees' amorphous theory of liability on the assumption that if a carrier does not pay for each and every completed payphone call, its tracking system is conclusively not "accurate" and it is therefore liable, by virtue of an "unreasonable" practice under § 201(b), to payphone providers for damages. The FCC has never so much as intimated that is a proper construction of its per-call payphone compensation rules. This is a serious error going to the heart of the proper role of a district judge in our nation's system of administrative law and federal courts of limited jurisdiction.

B. The District Court Erred By Failing To Accord the FCC's Interpretation of the Agency's Own Regulations Judicial Deference Under *Chevron*

U.S. South's position below was simple: plaintiffs' pretrial stipulation that every call received with payphone-specific Flex-ANI coding digits was paid by appellant was fatal as a matter of law. RE 64 at 19-20; Tr. 776:24-778:9. The district court rejected that defense based on its *sua sponte* interpretation of the FCC rules — raised for the only time at trial by the district judge herself in a single question — as requiring only the "provision," or ordering, of Flex-ANI capability, not the "transmission" of payphone-specific coding digits with calls from PSPs. COL ¶¶ 8-11; FOF ¶¶ 47, 49. This conclusion is manifestly erroneous.

It is well-settled that a district court may not substitute its interpretation of a statute, or regulations promulgated thereunder, for that of the agency itself. *E.g.*, *Greene*, 340 F.3d at 1050-51; *Global Crossing*, 423 F.3d at 1064-67. The court violated that fundamental rule by

> interpret[ing] the word "provision" in the FCC's order to be a term of art in the telecommunications industry, specifically in the dial-around compensation arena, meaning to initiate. Specifically, the [c]ourt read[] that language to state that PSPs are obligated to set up (or "provision") their payphone lines with Flex-ANI capability when the lines are initiated by the local LEC.

COL ¶ 10. Consequently, the district court concluded, "U.S. South owes Plaintiffs dial-around compensation for the calls at issue here, regardless of whether the proper Flex-ANI digits were transmitted." *Id.* ¶¶ 8, 11.

This holding improperly takes a long series of FCC rules totally out of context. The Commission's 1998 *Memorandum Opinion and Order* (MO&O), the sole decision relied on, according to the district court required that "LECs *transmit* payphone-specific coding digits to PSPs, and that PSPs *provide* those digits from their payphones to IXCs." COL ¶ 9 (emphasis supplied).[19] The court's construction of "provide" as requiring only initial installation of Flex-ANI capability, rather than inclusion of payphone-specific codes with each call, is belied by the FCC's selection of payphone-specific coding digits as the technical means to implement per-call compensation and the agency's consistent use of the words "transmit" and "generate" to describe payphone owners' Flex-ANI obligations.

For instance, the Commission's initial 1996 *Payphone Order* concluded that "each payphone should be required to *generate* 07 or 27 coding digits within the

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[19] In fact, the district court misquotes the FCC's 1998 order, which instead stated "… and that PSPs *transmit* those digits from their payphones to IXCs." 13 F.C.C. Rcd. at 5006, ¶ 13 (emphasis supplied). The work "provide" appears later in that paragraph, completely innocuously, with regard to both LECs and PSPs.

ANI for the carrier to track calls."[20] In its 1996 *Reconsideration Order*, the FCC clarified that "[e]ach payphone must *transmit* coding digits that specifically identify it as a payphone, and not merely as a restricted line."[21] And the later 1998 *MO&O* reiterated that "for payphones to be eligible for compensation, payphones will be required to *transmit* specific payphone coding digits."[22] The district court's interpretation is also flatly contradicted by the parties' joint pretrial representation that "this 'Flex-ANI' data (which is required to be *transmitted* with the call[s]) *should be generated by Plaintiffs' payphones.*" RE 38 at 2 (emphasis supplied).

More generally, the FCC's compensation plan utilized an initial transition period of per-phone compensation, in which carriers were directed to remit a specified amount to each ANI identified as a payphone by the serving LEC. This was replaced one short year later (subject to extensions via waiver) with a per-call system under which the "transmission" of payphone-specific coding digits is explicitly a "prerequisite" to compensation.[23] Denying carriers the right to rely on

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[20] *In re Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C. Rcd. 20541, 20591 ¶ 98 (1996) (emphasis supplied).

[21] *In re Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 F.C.C. Rcd. 20541, 20591 ¶ 64 (1996) (emphasis supplied).

[22] 13 F.C.C. Rcd. at 5006 ¶ 13 (emphasis supplied; citation omitted).

[23] Tr. 621:2-621:22; 47 C.F.R. § 64.1301.

Flex-ANI is thus the equivalent of requiring that they pay off of payphone ANI lists, the very system the FCC resolved as a matter of administrative policy should be in place only temporarily.[24]

The court's factual findings that Flex-ANI is a "software capability" for which the FCC "ordered the LECs who provide payphone lines" to offer, and for which "each carrier in the call path" — but not the payphone owner itself — "must be able to receive and transmit," are of no relevance to its legal analysis. FOF ¶¶ 12-14, 17. A district court cannot reject an administrative agency's application of its rules because the court believes they may be based on an incorrect factual assumption. The FCC has held that payphones must "generate" Flex-ANI by "transmit[ting] payphone coding digits as part of their ANI." There is no dispute that the calls here did not include payphone-specific Flex-ANI codes. FOF ¶¶ 49-51. Even if this Flex-ANI functionality is totally within the LECs' domain, moreover, the court agreed that it is the "industry standard" for payphone compen-

[24] The district court's factual finding that "a real-time lookup of an ANI to see if it is associated with a payphone is technically feasible, but is less practical," FOF ¶ 15; *id.* ¶ 24, is as irrelevant to the FCC's scheme as plaintiffs' argument that U.S. South should have paid for all completed calls from every phone appearing on the ANI lists. Tr. 621:4-623:2. It is up to the agency to decide how to implement § 276's compensation objective, balancing the interests of all interested parties. Whether or not a different approach is possible technically is immaterial to the court's responsibility. That conclusion, of course, is quite without regard to the uncontradicted fact that use of ANI lists would be so costly as to put U.S. South "out of the prepaid card business." Tr. 503:18-505:4.

sation. FOF ¶ 15. Consequently, the district court's findings implying that the FCC as a factual matter does not require the "transmission" of correct Flex-ANI codes with every payphone call as a condition of compensation are irrelevant, clearly erroneous or both.

The court's parallel legal conclusion is equally wrong. By interpreting the FCC's rules to compel only the initial ordering and installation of Flex-ANI capability, the district court invented a result-oriented construction of the Commission's regulations without even mentioning the deference owed to agencies by the judiciary. Yet it is settled under *Chevron* that courts must defer to an agency's interpretation "so long as the construction is 'a reasonable policy choice for the agency to make'" that does not contravene "the unambiguously expressed intent of Congress." *Global Crossing*, 423 F.3d at 1064, *quoting Brand X*, 545 U.S. at 2700, 125 S. Ct. at 2702, and *Chevron*, 467 U.S. at 842-43, 845.

The FCC's use of "transmission" and "generation" of Flex-ANI **interchangeably** with respect to payphone owners' obligations, and its consistent policy that payphone-specific coding digits are a condition precedent (a "prerequisite") to per-call compensation, are entitled to just as much deference as the agency's rulemakings and regulations themselves.[25] It was impermissible for the court to

[25] For judicial review and deference purposes, the FCC's rulemaking orders, regulations and adjudicative orders are all the same. *Hawaiian Tel. Co. v. Pub.*

depart from the FCC's usage without a determination that such an interpretation is not a reasonable policy choice within the scope of the agency's delegated powers under the familiar two-step *Chevron* analysis. Nothing in the Act — and nothing mentioned either by plaintiffs or the district court — suggests that the FCC's construction of its rule requiring the "generation" of Flex-ANI as the actual "transmission" of payphone-specific coding digits with all calls is contrary to the express terms of the statute or beyond the agency's discretion by PSPs.[26] Therefore, even if the district court were empowered to entertain a private damages action, the court's unilateral reinterpretation of the FCC's regulations was erroneous and must be reversed.

That appellees bear the consequence of any ambiguities, or possible factual mistakes, underlying the payphone compensation plan is the inevitable result of the options available to litigants under the Act. Section 207 authorizes an injured party either to sue for damages in court or to file a complaint with the agency, but

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Utils. Comm'n, 827 F.2d 1264, 1270-72 (9th Cir. 1987); *Global Crossing*, 423 F.3d at 1065-67.

[26] Plaintiffs' suggestion that the expert testimony introduced at trial proved conclusively that the FCC's Flex-ANI "language doesn't literally mean what it says," Tr. 800:5-20, is preposterous. Since a federal court of appeals cannot "trump the agency's construction," unless the enabling statute "leaves no room for agency discretion," *Global Crossing*, 423 F.3d at 1065, expert testimony introduced before a district court obviously cannot trump an administrative agency either.

not both. 47 U.S.C. § 207. By suing instead of filing an FCC complaint, GCB and Lake Country made an election. In an administrative proceeding the FCC would have the power to interpret its rules and decide whether, as plaintiffs' evidence implied, the payphone compensation plan does not or should not require that PSPs "transmit" correct Flex-ANI codes with every payphone call. *See* Tr. 781:8-782:22. The Commission could also have granted relief even if, as here, it had not previously ruled that a practice is "unreasonable" under the statute. *Id.*

The corollary to these undeniable options is that, having elected under § 207 to make a federal case out of the meager amount they were allegedly owed, appellees lost the ability to contest the validity or interpretation of the FCC's regulations. Those rules, in turn, require on their face that Flex-ANI accompany every payphone call and make its generation *and* transmission by payphones for all calls a condition precedent to compensation. Thus, having stipulated that U.S. South paid for every completed call sent with payphone-specific Flex-ANI digits, appellees sealed their own fate as a matter of law given their voluntary choice of forum.

II. THE DISTRICT COURT ERRED BY FAILING TO MAKE A PRIMARY JURISDICTION REFERRAL TO RESOLVE THE PROPER INTERPRETATION OF THE FCC'S FLEX-ANI REGULATIONS

The district court's decision does not address U.S. South's request that, if it believed the FCC's regulations to be ambiguous, the court make a primary jurisdiction referral to the agency. Tr. 785:10-786:9. Judge Bolton overruled that proposal in favor of interpreting, as a matter of first impression, the FCC's per-call compensation rules in a way that conflicts with their plain meaning. This was erroneous and a plain abuse of discretion.

A. The Settled Criteria for Primary Jurisdiction Here All Strongly Support a Referral to the FCC for Resolution of the Controlling Issue Under the Agency's Regulations

The primary jurisdiction doctrine is a judicially created procedure applicable to claims cognizable in federal court that contain issues within the specialized competence of an administrative agency. *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). It is "designed to protect agencies possessing quasi-legislative powers" that are "actively involved in the administration of regulatory statutes." *North County*, 594 F.3d at 1154 (citation omitted). When the doctrine is invoked, federal courts will typically stay the case and refer dispositive, complex regulatory issues to the applicable agency for resolution. *Syntek*, 307 F.3d at 778.

Despite its name, the primary jurisdiction doctrine is not jurisdictional. *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993). It is "a prudential doctrine under which courts may, under appropriate circumstances," decide that "the initial decisionmaking responsibility" should be performed administratively and not judicially. *County of Santa Clara v. Astra United States*, 588 F.3d 1237, 1251 (9th Cir. 2009) (quotation omitted). Thus, a primary jurisdiction referral "doesn't bind" the court, but rather allows for a "temporary reprieve while the expert agency gives its views" so that the court "can take them into account in deciding what the law should be." Tr. 786:3-786:6.

Primary jurisdiction of course is not intended "to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002), *quoting United States v. General Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987). Yet if any case ever presented a compelling reason to employ the doctrine, it is this one, in which the plaintiffs argued that the language of the Commission's Flex-ANI regulations "doesn't literally mean what it says," *see* note 26 *supra*, and in which the district court "read" the controlling agency orders to mean something the FCC itself has never articulated. COL ¶¶ 8-9, 10, 11.

Under the settled criteria for primary jurisdiction, it was error for the court to refuse to refer the proper interpretation of § 64.1310(a)(1) and related payphone orders to the FCC. This Court has stressed that "primary jurisdiction is properly invoked when a claim is cognizable in federal court but requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *County of Santa Clara*, 588 F.3d at 1251, *quoting Brown*, 277 F.3d at 1172. There is no debate that whether the FCC's rules require “transmission” of Flex-ANI with every call, or whether an “accurate” tracking system may permissibly rely on these payphone-specific identifiers, is an issue of first impression in federal court.[27] These are also undeniably complicated matters that Congress expressly “committed to a regulatory agency.” *Id.*

Rather than construe regulations itself, the district court should either have applied their facial meaning under *Chevron*, as demonstrated in Section I(B), or referred them to the FCC for a determination whether the rules mean what they say. This Court has held that a district court should employ the referral procedure where a case, among other things, arises under a statute that “subjects an industry or activity to a comprehensive regulatory authority” and that requires “expertise or uniformity” in administration. *County of Santa Clara*, 588 F.3d at 1252; *Syntek*, 307 F.3d at 781. It does not take analysis to conclude that each of these factors strongly supports an administrative referral in this case to sustain the district court’s judgment. The court’s failure to apply the primary jurisdiction doctrine was therefore reversible error.

[27] *See* RE 56 at 4 (parties jointly report that “whether U.S. South can rely solely on the presence or absence of [correct] Flex-ANI information digits . . . is an issue of first impression that quite likely would have industry-wide ramifications”).

B. In Fashioning a Regulatory Interpretation *Sua Sponte* Without Any Support In the Agency's Underlying Decisions, the District Court Abused Its Discretion By Denying a Primary Jurisdiction Referral

That conclusion is reinforced by the fact that the entire point of primary jurisdiction directly contradicts what the district court did here. Because the doctrine does not require all claims related to agency expertise first to be decided administratively, the "particular agency deferred to must be one that Congress has vested with the authority to regulate an industry or activity such that it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question." *United States v. Culliton*, 328 F.3d 1074, 1082 (9th Cir. 2003); *accord, County of Santa Clara,* 588 F.3d at 1251. Congress in § 276 vested the FCC with plenary authority to regulate payphone compensation, delegating full quasi-legislative power to "establish a per-call compensation plan" by "prescrib[ing] regulations."

This Court does not appear to require an appellant to meet the prevailing standard for abuse of discretion when reviewing a lower court's application of the primary jurisdiction procedure. *E.g., Syntek*, 307 F.3d at 782-83 (vacating judgment and remanding with instructions to stay the action pursuant to the primary jurisdiction doctrine). Counsel freely acknowledges that the precedents on standard of appellate review for primary jurisdiction are not altogether clear. The Court has stated that "[a]lthough we review the ultimate decision to decline to exercise jurisdiction for abuse of discretion, we conduct *de novo* review of the [district] court's application of the primary jurisdiction doctrine." *Rhoades*, 504 F.3d at 1162 n.11; *accord*, *North County*, 594 F.3d at 1153. Here, the district court did not decline to exercise jurisdiction; it declined to invoke primary jurisdiction.

In the context of this case, U.S. South respectfully suggests that the standard of review makes no difference. Either the district court erred by refusing to apply the doctrine or, alternatively, its failure even to address the issue — especially once the district judge decided to construe the FCC's Flex-ANI decisions in a way the agency itself never articulated — was an abuse of discretion. The district court's aggrandizement of unilateral power to interpret dispositive administrative regulations was a serious departure from its appropriate judicial competence and should therefore be reversed.

III. THE DISTRICT COURT'S JUDGMENT IS CONTRARY TO THE SUBSTANTIAL WEIGHT OF THE RECORD EVIDENCE

Like jury verdicts, a judgment in a bench trial may be affirmed only where it is supported by substantial evidence in the record. *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994). The district court's decision below does not meet that standard.

Judge Bolton never explained whether, how or, if so, on what evidentiary basis she concluded that the absence of Flex-ANI was more likely than not caused by U.S. South or Level 3. Plaintiffs adduced no evidence that either U.S. South or

L3 was at fault for the lack of correct Flex-ANI information in the approximately 15,000 calls received without payphone-specific identifiers. Therefore, the district court necessarily relied on inferences derived from circumstantial evidence. These unarticulated inferences are impermissible and are infected as a matter of law by a series of plainly incorrect evidentiary rulings.

A. Plaintiffs' Stipulation That U.S. South Paid All Completed Calls Received With Correct Payphone Flex-ANI Digits is Fatal

Appellees' theory of the case is simplistic and wrong. GCB and Lake Country claimed that, as payphone service providers, they in fact are responsible only for ordering from the LEC a payphone line for each pay telephone deployed, and therefore that it was incumbent on the LECs, L3 and U.S. South — but not at all on plaintiffs — to ensure that Flex-ANI payphone-specific coding digits were actually transmitted with calls from plaintiffs' phones. Tr. 761-764 (closing argument).

The reason this theory, which the district court embraced, is erroneous is that appellees offered no evidence showing, or even suggesting, that the lack of correct Flex-ANI information on the disputed calls was caused by anything U.S. South or L3 did. Appellees made a tactical decision — driven by the tiny amount of per-call compensation in dispute — not to introduce evidence from their serving LECs or from L3 on the reason why incorrect payphone Flex-ANI was transmitted and received with some, but not all, of their calling traffic. Tr. 761-64 (closing argument).

This factual shortcut is impermissible because plaintiffs indisputably had the burden of proof. By stipulating, as the facts compelled, that ***correct*** payphone Flex-ANI was not received by U.S. South on ***all*** of the so-called "no Flex-ANI" calls, GCB and Lake Country defaulted on that burden. In the absence of evidence from the LECs or L3 as to what in fact happened — specifically why some calls from plaintiffs' ANIs were accompanied by correct Flex-ANI and some were not, *see* FOF ¶ 60; COL ¶ 10 — appellees could not and hence did not meet their preponderance of the evidence burden.

Plaintiffs' necessary pretrial concession fatally undermined their factual case. In the absence of evidence showing that the proximate cause of the lack of correct Flex-ANI was attributable to L3 or U.S. South, GCB and Lake Country themselves made it impossible to satisfy the "more likely than not" burden of proof. In short, plaintiffs' stipulation made all the evidence at trial irrelevant as a matter of law.

> That stipulation and the law means [sic] that all of the evidence before [the court] is not material. And it's not material not because plaintiffs may be right that it's an unreasonable business practice. It might even be unreasonable for purposes of the Communications Act [for a carrier] not to test. But because the law is that we are entitled to pay and are required to pay only when payphone-specific coding digits are received, [U.S. South must prevail as a matter of law].

Tr. 777:12-777:18 (closing argument).

B. On the Trial Record, Plaintiffs Did Not Meet Their Burden of Proving That Any Incorrect Flex-ANI Codes Were Caused By U.S. South or Level 3

Before trial, plaintiffs would not concede that "[t]here is no problem or error in U.S. South's system for tracking and compensating calls requiring dial-around compensation." RE 64 at 9. Nonetheless, GCB and Lake Country did not attempt to prove there was anything deficient about U.S. South's call tracking system, or that L3 was responsible for the lack of correct Flex-ANI coding associated with some of their payphone calls. In light of this glaring omission, appellees did not satisfy the burden to substantiate their purported § 201 claim under the preponderance of the evidence standard.

The following excerpt from U.S. South's portion of the joint pretrial order (edited for brevity) summarizes the evidentiary failure by appellees.

> Plaintiffs cannot prove their case [by] a preponderance of the evidence. Three undisputed, material facts are all that need be considered: (1) U.S. South has elected to require Flex-ANI digits… (2) for those completed calls [with which] U.S. South received Flex-ANI digits appropriate for dial-around compensation, U.S. South paid [appellees] … and (3) there is no problem or error in U.S. South's system for tracking and compensating calls… Plaintiffs have no evidence that U.S. South's [system for] tracking and compensating calls for dial-around compensation is deficient in any way [and] cannot establish why [correct] Flex-ANI digits . . . are not being delivered to U.S. South.

RE 64 at 9.

Beyond this fundamental absence of proof, the district court's factual findings and legal conclusions cannot be reconciled with the record for a number of reasons. These include:

1. The parties stipulated that "U.S. South has a tracking system to identify payphone-originated calls for purposes of paying dial-around compensation. The call data for a particular call, which would include the Flex-ANI coding digits (if present), is captured at U.S. South's switch."[28] Under these uncontested facts, adopted by the district court (FOF ¶ 25), there is no basis for the conclusion that appellees "more likely than not properly provisioned their payphone lines with Flex-ANI capability." COL ¶ 11. That is because, as the court expressly found, "[t]here are a number of reasons Level 3 [and thus U.S. South] might not have received Flex-ANI digits, including failure to order Flex-ANI from the originating LEC. Another possibility is that the digits were not properly transmitted by the originating LEC." FOF ¶ 60.[29]

[28] RE 64 at 19.

[29] As summarized in the Statement of Facts, other reasons shown by the evidence could include a replacement of the local telephone company switch, a problem with the LEC's Flex-ANI software inserting no or non-payphone coding digits, a defect in the payphone line, or the payphone equipment or software itself. The second circumstance, which plaintiffs' CEO admitted in fact occurred periodically, would be reflected in maintenance records and the "trouble tickets" issued by GCB and Lake Country to their serving LECS, but which plaintiffs improperly did not disclose except in testimony at trial. The failure of appellees to produce these highly relevant documents in discovery, which U.S. South raised (and first

2. Plaintiffs claimed, by way of expert testimony, that because other completing carriers paid dial-around compensation for calls from the same ANIs for which U.S. South did not at times receive correct Flex-ANI codes (*see* FOF ¶ 61), Flex-ANI from their originating LECs must have been working properly. The district court adopted this reasoning in part by concluding that "[c]ompleting carriers — including U.S. South — received Flex-ANI digits from Plaintiffs' pay-phones, according to Plaintiffs' expert, Paul Brooks." COL ¶ 11.

Yet what other carriers may have done has no relevance to why U.S. South received incorrect Flex-ANI information. As Bruce Renard, appellant's expert and the former president of one of the nation's largest PSPs, testified:

> [I]f there was absolutely no Flex-ANI on the line, that could indicate that the Flex-ANI had been dropped in the call path. If there was a 00 or a 07 or some other Flex-ANI, that would indicate that Flex-ANI was working, meaning passed all the way through the call path [to the completing carrier], but that it was put on — the wrong digits were put on the front end of the LEC switch…

Tr. 688:20-689:2. Renard also opined, without contradiction, that U.S. South used "customary and reasonable carrier systems and procedures for tracking and paying compensation" in accordance with "applicable FCC requirements and general industry standards." *Id.*

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learned of) upon eliciting this testimony at trial, was not addressed by the district court.

Consequently, the only reasonable inference to be drawn from the fact that a relatively small proportion of the payphone calls from appellees were received by U.S. South with missing or incorrect Flex-ANI coding digits is that "because we were getting them from L3, it couldn't be a problem with L3 not ordering [Flex-ANI], and it is . . . more likely than not *not* a problem with L3 failing to transmit or strip the digits." Tr. 788:16-788:22 (emphasis supplied).[30] On the other hand, no reasonable inference that other carriers actually received correct Flex-ANI digits can be drawn from the fact that they paid per-call compensation for calls made from the same ANIs, because plaintiffs offered no evidence that other carriers also "did not receive the 27 or 70 Flex-ANI digits for some number of calls received at the[ir] switch." FOF ¶ 49.

The comparison with these other carriers therefore fails because appellees chose not to introduce third-party evidence. Instead, they advanced the remarkable

[30] "The inference that because we are getting Flex-ANI, as Your Honor has pointed out — payphone-specific or nonpayphone-specific — that . . . somehow it's more likely a problem with us or Level 3 is counterintuitive." Tr. 787:2-787:8. *Accord,* FOF ¶ 61 ("[a]t all relevant times, U.S. South received Flex-ANI digits from Level 3 . . . from the ANIs at issue in this case"). *See* Tr. 566-69 (could not be L3 problem because otherwise U.S. South would have received widespread complaints from most if not all PSPs for non-payment of DAC). Nonetheless, the district court rejected the parties' request to extend discovery to pursue the actual facts from L3 for summary judgment. Having foreclosed the "best source of that evidence," Tr. 788:4-788:15, the court cannot permissibly shift the burden to U.S. South by declaring, *ipsi dixit,* that whether L3 received correct Flex-ANI from plaintiffs' LECs is irrelevant based on a concocted interpretation of the regulations.

proposition that the burden of proof "is entirely on the carrier" and PSPs "don't have to do anything." Tr. 780:24-781:7. Yet the law squarely places the burden on appellees; in a court of law, plaintiffs have to go out and get the evidence.

3. The district court concluded that "as the service does not involve any additional charge, there would be no reason for PSPs like Plaintiffs to *not* include Flex-ANI capability when initiating a payphone line." COL ¶ 11 (emphasis in original). However, the court ignored uncontested evidence that national carriers like L3 routinely order Flex-ANI at every LEC from which they receive traffic and that the service is also free to IXCs:

> U.S. South had every reasonable basis to rely on the fact that Level 3 would have [ordered Flex-ANI] in the normal course. . . . [L]ook, there's no reason for a Level 3 not to have Flex-ANI in place. As we pointed out earlier, it doesn't cost them anything. They're a national carrier. They know what the requirements are. And they know they will be in trouble if they hadn't ordered it. So there's really no down-side and no reason to think they wouldn't have ordered it.

Tr. 734:15-734:25. Therefore, the record does not support a reasonable inference that L3, and hence U.S. South, did anything unreasonable or unlawful with respect to the Flex-ANI regulations.

4. The district court's judgment is not affirmable because the evidence as to responsibility for the lack of correct Flex-ANI was, as plaintiffs' expert Brooks reluctantly conceded, inadequate to support a definitive conclusion. The court's findings do not distinguish whether the Flex-ANI "problem" resulted from a failure

to order Flex-ANI by L3 or that "the digits were not properly transmitted by the originating LEC." FOF ¶ 60.[31] It is elementary that where "the testimony of both parties [is] in balance or equally probable, then the plaintiff has failed to sustain his burden and [the fact finder] must find for the defendant." 4-73 MODERN FEDERAL JURY INSTRUCTIONS-CIVIL ¶ 73.01; NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTION 1.3.

Plaintiffs offered testimony regarding how *they* do business, but could not demonstrate what actually happened at either the LECs or at Level 3 for the so-called "no Flex-ANI calls." The court did not discredit any lay or expert testimony regarding how U.S. South implements the dial-around compensation plan, and recognized in its questioning of appellant's expert Renard that the ultimate issue was which party is at risk ***when the evidence, as here, is (at best to plaintiffs) in equipoise.*** Tr. 663:5-665:14. Only by fashioning an incorrect legal standard under which, as between plaintiffs and U.S. South, receipt of the Flex-ANI codes mandated by the FCC is unnecessary was the district judge able to rule for GCB and Lake Country. That ultimate finding thus cannot be affirmed under the preponderance of the evidence standard.

[31] The evidence showed that the only reason proffered for why U.S. South might have been responsible for the intermittent Flex-ANI outages on plaintiffs' payphone lines — multiple interconnecting trunks with its underlying IXC (Tr. 222:6-10 (Brooks)) — was incorrect because U.S. South has a single point of network interconnection with L3. Tr. 404:13-406:22, 435:1-436:22.

C. The District Court's Evidentiary Rulings Were Erroneous, Harmful and Reversible

1. The district court erred by admitting the undisclosed, hearsay data annexed to plaintiffs' expert report

The district judge admitted into evidence, over U.S. South's objection, the exhibits annexed to the report from plaintiffs' expert. *See, e.g.,* Tr. 99, 117, 124-126. The exhibits consisted of data, offered on the key factual issues of Flex-ANI receipt and payment, from *other carriers* that did not testify. They were used both to prove liability and to support appellees' damages model.

That was error under FED. R. EVID. 703. While an expert may rely on otherwise inadmissible hearsay, such evidence of itself is not admissible at trial. Indeed, Rule 703 was revised in 2000 to make clear that underlying information on which an expert witness permissibly relies does not as a result become admissible.

> Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.

ADVISORY COMM. NOTES TO RULE 703. Although the underlying information may be inquired into on cross-examination under FED. R. EVID. 705 (expert "may be required to disclose the underlying facts or data on cross-examination"), the proponent of the report, unlike the opposing party, cannot introduce that hearsay as substantive evidence.[32]

Therefore, it was incorrect for the district court to admit the exhibits to the Brooks report because they do not come within any exception to the hearsay prohibition. FED. R. EVID. 802-03. In addition, as emphatically pointed out by U.S. South without relief, the underlying data included in the exhibits to Brooks' report had not been disclosed to appellant during discovery. *See, e.g.,* Tr. 99, 117, 124-26. That violates both FED R. CIV. P. 26(a) and Rule 703 and is a second basis of reversible error.

2. The district court erred by admitting hearsay bills from appellees' originating LECs

The district court erred by admitting the LEC bills to GCB and Lake Country (Exh. 18) as they also were inadmissible hearsay.

Plaintiffs falsely contended that the bills were not offered to prove the truth of the matter asserted, which was the basis on which the court overruled U.S. South's objection. Tr. 298:14-23, 300:15-301:6. To the contrary, the record is clear that GCB and Lake Country specifically introduced these records to prove

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[32] Underlying inadmissible information may in certain circumstances be admitted "only for the purpose of assisting the jury in evaluating an expert's opinion" if the district court makes necessary findings as to probative value and prejudice. ADVISORY COMM. NOTES TO RULE 703. Even if applicable to bench trials, the district court made no such determination and admitted the report's exhibits as substantive evidence on both liability and damages.

their contents — that LECs charged appellees for payphone lines and thus that plaintiffs "own the payphone ANIs that are being billed" (Tr. 298:22-23, 300:15-21, 300:22-301:1) — in order to forestall the argument that they were at fault by having not ordered the necessary facilities on which Flex-ANI is provisioned by local telephone companies.

The court specifically used these "billing records" for precisely that purpose (COL ¶ 12). The district judge's explanation at trial that the records were admitted for the "limited purpose" of proving that "both plaintiffs are billed and pay bills for the lines," Tr. 301:3-5, is illogical. The mere fact of billing by LECs and payment by appellees is immaterial; the only relevance is the purported fact that the charges *are for payphone lines,* which requires acceptance of the contents of the bills themselves. The court's evidentiary ruling, the basis for one of its key legal conclusions as to appropriate payphone line ordering, was therefore overwhelmingly prejudicial and harmful error.

3. The district court erred by permitting plaintiffs to introduce *any* evidence regarding the LECs and other IXCs

U.S. South repeatedly objected to the introduction by GCB and Lake Country of a series of documents and testimony — including the Brooks report exhibits and the LEC bills — that purported to show what the LECs and other paying carriers did for the ANIs in question. *See* RE 64 at 10, 62-65 (joint pretrial order). The grounds were that evidence from or about such third-parties was impermissible because plaintiffs had not identified any of them in their "initial disclosures" under FED. R. CIV. P. 26(a)(1)(A).

That rule requires litigants to reveal "each individual likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses." Clearly, GCB and Lake Country at some point decided their claims "may" be proven in part by other carrier and LEC conduct and records; at the very least they realized so when Paul Brooks prepared his expert report using data on compensation paid by AT&T, MCI and others.

The nondisclosure was especially prejudicial to U.S. South. As defendant, U.S. South intended until sandbagged to seek judgment on the ground that, without direct third-party testimony, plaintiffs failed to make their case-in-chief. By permitting GCB and Lake Country to introduce evidence from and about these third parties, *and crucial inferences therefrom,* without timely identifying them as potential discovery sources — thus inducing U.S. South not to subpoena potential evidence from them — the district court unfairly undermined the central element of U.S. South's litigation strategy. That is extraordinarily harmful error.

IV. THE DISTRICT COURT ERRED IN AWARDING INTEREST AND HUGELY DISPROPORTIONATE ATTORNEYS' FEES

A. Prejudgment Interest on Federal Court Damages Is Not the Same As the FCC's Administrative Complaint Interest Rate

The district court's assessment of interest at 11.25% was incorrect. Plaintiffs relied on FCC decisions. RE 64 at 4 n.1. An action under § 201(b), however, is one for compensatory damages under a federal statute; it is *not* an administrative claim for nonpayment of payphone compensation. Appellees' § 207 election to sue forfeits their right to administrative interest.

At trial appellees cited a D.C. Circuit decision, applied by the district court, affirming an 11.25% rate. *See* COL ¶ 30 (citation omitted). The court of appeals there, however, did not analyze the legal foundation for that rate. Contrary to the district court's tardy fee award justification, moreover, prejudgment interest is not "statutory" and is not "part of the judgment [and] a component of Plaintiffs' damages." RE 102 at 3. The Act (47 U.S.C. § 206) provides for compensatory damages. The statute includes no provision for interest and clearly does not make prejudgment interest part of the "full amount of damages" under § 206.

Accordingly, interest is available on a Communications Act claim only pursuant to federal common law. The correct prejudgment interest on damages awarded for a federal claim is the T-bill rate of 28 U.S.C. § 1961(a), *Blanton v. Anzalone*, 760 F.2d 989, 993 (9th Cir. 1985), less than 1% today.

B. The District Court Failed To a Conduct a Proper Examination of the Proportionality of Attorneys' Fees

The district court awarded attorneys' fees of nearly four times the meager damages, *i.e.*, more than $80,000 in fees on damages of about $18,000. That was an unlawful abuse of discretion for two reasons.

1. U.S. South argued that the district court should not in this case award attorneys' fees grossly disproportionate to the compensatory damages. RE 100 at 13-15. Legal fees cannot be reasonable under § 206 unless they are rationally related to the actual damages recovered (the "success achieved") by the prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 440 (1983); *Morales v. City of San Rafael*, 96 F.3d 359, 362 (9th Cir. 1996). The court's fee order all but glossed over this point, stating only that (a) proportionality was not dispositive, which U.S. South had not contended, and (b) the award was not "unreasonable under the circumstances." RE 102 at 7.

The court ignored the thrust of appellant's arguments. U.S. South asserted that massively disproportionate attorneys' fees were inappropriate here (a) when plaintiffs indisputably could have settled for some $35,000 (almost double the judgment's damages) without trial, (b) where they failed to try to avoid litigation by raising the issues before filing suit, and (c) at the very least, absent a searching and considered review of proportionality.[33]

"Reasonable" fees can be $0. *Schlacher v. Law Offices of Phillip J. Rotche,* 574 F.3d 852, 857 (7th Cir. 2009). The court's rejection of U.S. South's pretrial settlement offer as a ground to limit fees was based in large part on its incorrect view that appellant's earlier motion to enforce was "disingenuous" and "questionable." RE 102 at 7-8 (*see* Section V(A)). The court never addressed whether a lawsuit was even required, overlooking that business negotiations, administrative proceedings[34] and notice of underpayment to U.S. South had all been disclaimed as a "waste of time" in plaintiffs' haste to make a federal case out of a tiny monetary dispute.

Most importantly, the court's analysis of proportionality was brusque, conclusory and superficial. Under *Moriarty v. Svec*, 233 F.3d 955, 967 (7th Cir. 2000), a district court "should evidence increased reflection before awarding attorneys' fees that are large multiples of the damages recovered or multiples of the

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[33] Given the absence of any legal authority for the district court's construction of the controlling FCC regulation, as demonstrated in Section I, the court's terse rejection of appellant's argument that U.S. South had presented a "meritorious defense" worthy of consideration in connection with attorneys' fees, RE 102 at 6 n.4, is inexplicable.

[34] Plaintiffs may find it impossible to "believe that the FCC would say that a completing carrier like U.S. South has no obligation to do a single thing to confirm that it's receiving Flex-ANI," *supra* at 14, but they intentionally refrained from the far less expensive option of petitioning for a declaratory ruling on that issue. 47 C.F.R. § 1.2.

damages claimed." That did not occur here. Had the court so reviewed the fee request, it would have been difficult to disagree that

> [n]o sensible plaintiffs would spend more than $100,000 [in fees and costs] in pursuit of only $18,500 plus modest interest. *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625-26 (7th Cir. 2000)("[T]he award looks unreasonable, for no sensible person spends $236,000 in pursuit of $34,500 (or even $163,500, treble the jury's original compensatory award).).

RE 100 at 15 (opp. memo.).

The irony is that the district court totally misunderstood the realities of this case. U.S. South was not "indifferent" to plaintiffs' fees because they were too high for federal court litigation, RE 102 at 9 n.7, but instead because the objective of preemptively suing here was to coerce settlement, without regard to fault, given the radically higher costs of corporate legal defense — which by definition exceed anything plaintiffs could, and indeed would, ever claim as damages. That is why appellees would only agree to settlement upon payment of their legal fees. That is why plaintiffs' counsel filed a half dozen payphone cases almost simultaneously. RE 11 at 6.

Lawsuits as economic blackmail should not be rewarded with hugely disproportionate attorneys' fees, especially when a complaint is used principally for monetary leverage. We suggest the Court follow *Moriarty* and hold that in exercising its discretion, a district court must present a compelling justification, based on a thorough and probing review of the litigation and its necessity, before awarding fees that are multiples of compensatory damages. The fee award in this case should at least be reversed and remanded under that standard.

2. The district court did not address the constitutional due process constraints on attorneys' fees. If punitive damages must presumptively bear a 1:1 relation to compensatory damages, as the Supreme Court has held, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), so too must legal fees under a fee-shifting statute. U.S. South preserved this issue by raising it expressly below. RE 100 at 15. It is a novel argument but a serious one that, by completely overlooking, was an abuse of discretion by the district court.

V. THE DISTRICT COURT ABUSED ITS DISCRETION IN MANAGING TRIAL AND PRETRIAL PROCEEDINGS

A. The District Court's Refusal To Enforce a Pretrial Settlement In Which Plaintiffs' Claims For Monetary Damages Were Indisputably Resolved Was a Clear Abuse of Discretion

The district court's denial of U.S. South's motion to enforce settlement was an abuse of discretion and illustrates the court's unfortunate inability to comprehend the fundamental limits of its Article III subject matter jurisdiction.[35]

[35] Appellant also believes the district court's rejection of our Rule 68 offer for fee-shifting purposes was an abuse of discretion because the court failed to address equitable estoppel, RE 100 at 4-8, but acknowledges that raising this issue only in a footnote may foreclose its right to appellate review of the matter.

U.S. South maintained that by agreeing to settlement of their monetary claims, GCB and Lake Country resolved the only contested causes of action in the case, thereby eliminating the "case or controversy" that is a constitutional condition of federal subject matter jurisdiction.

> Because the parties reached agreement on all of the relief plaintiffs sought in their complaint (monetary damages), this Court must find that . . . this litigation no longer presents a justiciable Article III case or controversy, and dismiss this action with prejudice.

RE 43 at 1-2. Astonishingly, the district court failed to appreciate that where a litigant does not seek injunctive or declaratory relief, its settlement of monetary damages resolves the entire controversy before the court. Whether or not GCB and Lake Country had in fact compromised their desire for a going-forward testing protocol for Flex-ANI transmission, RE 47, such relief was **not** requested from the court before, at or after trial. *See* 47 U.S.C. § 405(b) (authorizing injunctive relief under the Act against parties failing to obey "any" FCC order, "other than for payment of money"). The district court's holding that the so-called "partial settlement" did not dispose of the case is therefore incorrect.

Where a concrete dispute on the claims averred in a complaint no longer exists, there is no constitutional case or controversy before a federal court under Article III.[36] As noted, the complaint here did not demand an injunctive remedy and sought only monetary damages. There is no question that damages were totally resolved by the "partial" settlement; "the parties reached agreement on the sum U.S. South will pay to settle Plaintiffs' damages claims." RE 43 at 2 (citing RE 38). It is black-letter law that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate." *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991). Likewise, if the damages giving rise to Article III standing are remedied, a party lacks standing to sue because it has no direct injury the federal courts can ameliorate. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Consequently, the motion squarely (and appropriately) presented the issue whether, despite resolving the only claims in their complaint, plaintiffs nonetheless could still invoke the subject matter jurisdiction of a federal court within the "case or controversy" limitation of Article III.

The district court twice angrily declared that U.S. South's "claim that the parties' agreement . . . disposes of the entire action seems *disingenuous*." RE 54 at 5-6 (order; emphasis supplied); RE 102 at 8 (fee order; emphasis in original). To the contrary, this was a principled, although subtle, motion. Under *Samsung Elec.*

[36] Federal courts may adjudicate only actual, ongoing cases and controversies. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Courts of appeals review cases for an actual Article III controversy as a question of law without deference. *Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054, 1058 (Fed. Cir. 1995).

Co. v. Rambus, Inc., 523 F.3d 1374 (Fed. Cir. 2008) (where defendant "offered the entire amount" in dispute, "the case became moot" and the district court "had no case or controversy" to consider under Article III), the motion was well-grounded in law.[37] Therefore, the district court's decision was erroneous and its use of that effort by appellant to avoid trial as a basis on which to mete out punishment on U.S. South with an award of massive attorneys' fees to appellees, RE 102 at 8, represents a clear abuse of discretion.

B. The District Court's Refusal To Permit Post-Trial Briefing On the Key Legal Questions Presented Was a Clear Abuse of Discretion

The district court's denial of leave for post-trial briefing abused its discretion because of the serious legal questions presented under *Global Crossing* and the primary jurisdiction doctrine. *See* Section I *supra.*

Like its decision on settlement enforcement, if the district court had recognized that this case were about much more than a mere $18,000, it would in the sound application of its judicial powers have sought, indeed desired, briefing on whether the court had the authority to entertain the lawsuit or to disregard the administrative agency's construction of its rules. Once again, the court's failure to

[37] Indeed, since federal courts have an independent obligation to examine standing, mootness and other factual circumstances which could eliminate an actual case or controversy and thus deprive the court of subject matter jurisdiction, citation to cases applying such basic constitutional principles should have been unnecessary.

comprehend its Article III responsibilities produced decisions that cannot legitimately be sanctioned for a federal court.

C. The District Court's Denial of the Joint Motion For Leave to Extend Discovery to Pursue Level 3 Evidence Was a Clear Abuse of Discretion

The district court summarily denied the parties' joint motion for leave to extend discovery in order to serve and enforce a third-party subpoena on Level 3. RE 57. This was an abuse of discretion because the extension was explicitly requested in order to obtain potentially dispositive information and resolve the case on summary judgment. RE 56 at 4.

It is not sensible for a federal court, given today's huge and expanding caseload, to prevent litigants from presenting dispositive issues for resolution under FED. R. CIV. P. 56 without trial. At the very least, it was an abuse of discretion for the court to deny the joint motion without explanation. Unfortunately, it appears the district judge was determined to take the cause to trial because she believed discovery had been too time-consuming.

Had the court focused on the financial realities of this litigation, however, it would have been self-evident that the third-party procedure jointly proposed was manifestly in the interests of justice and judicial efficiency. The trial confirmed this, as the absence of information from L3 prevented both the parties and the court from making a definitive determination of fault for the lack of correct payphone-specific Flex-ANI. Therefore, summary denial of the joint motion was an abuse of the district court's discretion.

CONCLUSION

For all the foregoing reasons, the District Court's judgment, amended judgment and fee award should all be reversed and remanded or vacated.

Respectfully submitted,

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Dated: September 17, 2010

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) in that the brief contains 13,830 words, as calculated by the Microsoft Word 2007 software application, excluding those parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) in that the brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

/s/ Glenn B. Manishin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of September, 2010, he caused to be served a true and correct copy of the foregoing Brief for Appellant upon counsel for appellees, at the addresses below named, by ECF and email:

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