

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
UPM Technology, Inc.,)	Proceeding Number 23-64
)	Bureau ID Number EB-23-MD-001
Complainant,)	
)	
v.)	
)	
Unigestion Holding, S.A., d/b/a Digicel Haiti,)	
)	
Defendant.)	

ORDER ON RECONSIDERATION

Adopted: December 10, 2024

Released: December 11, 2024

By the Commission:

I. INTRODUCTION

1. UPM Technology, Inc. (UPM)—a provider of international telecommunications services—seeks reconsideration of the Federal Communications Commission’s (Commission or FCC) March 19, 2024, Memorandum Opinion and Order (*Complaint Order*) in the captioned formal complaint proceeding.¹ The *Complaint Order* addressed whether Unigestion Holding, S.A., d/b/a Digicel Haiti (Digicel Haiti)—a Haitian mobile carrier—violated sections 201(b) and 202(a) of the Communications Act of 1934, as amended (Act), by deactivating Subscriber Identity Module (SIM) cards that UPM purchased in Haiti and had shipped to the United States for use in UPM’s international wholesale call termination business. The *Complaint Order* found that, with regard to the claims in UPM’s Complaint, Digicel Haiti did not offer a common carrier or telecommunications service in the United States and thus was not subject to sections 201(b), 202(a), or 208 of the Act or the Commission’s jurisdiction.² Accordingly, the *Complaint Order* dismissed UPM’s claims with prejudice. As an independent and alternative basis, and assuming jurisdiction existed, the *Complaint Order* denied UPM’s claims because they lacked merit. UPM seeks reconsideration of the Commission’s determinations. For the reasons below, we deny UPM the relief it seeks.

II. BACKGROUND

2. The *Complaint Order* recites in detail the facts underlying this dispute.³ To summarize, Digicel Haiti sells prepaid mobile wireless services in Haiti.⁴ Digicel Haiti provided the services at issue in this dispute via Digicel Haiti SIM cards, which Digicel Haiti sold exclusively in Haiti.⁵ Without a

¹ *UPM Technology, Inc. v. Unigestion Holding, S.A., d/b/a Digicel Haiti*, Proceeding No. 23-64, Memorandum Opinion and Order, FCC 24-33, 2024 WL 1236500 (2024) (*Complaint Order*).

² Complaint, Proceeding Number 23-64, Bureau ID Number EB-23-MD-001 (filed Feb. 21, 2023) (Complaint).

³ *Complaint Order* at paras. 3-14.

⁴ *Id.* at para. 5. Digicel Haiti is not authorized under section 214 of the Act to provide either interstate or foreign communications. *Id.* at para. 3; see 47 U.S.C. § 214; 47 CFR § 63.18.

⁵ *Id.* at para. 5.

Digicel Haiti SIM card, a customer could not access Digicel Haiti's network and could not make calls using Digicel Haiti's prepaid wireless services.⁶ Moreover, the customer could not use a Digicel Haiti SIM card to access another carrier's network.⁷ A SIM card provided the card owner with a unique telephone number on Digicel Haiti's network; a subscription for prepaid wireless service on Digicel Haiti's network; an account associated with those services; and account management features pertaining to billing and payment.⁸ Access to Digicel Haiti's network was available immediately once the cardholder inserted the Digicel Haiti SIM card into a phone if a wireless network within range of the customer's phone authenticated the card as being a valid Digicel Haiti SIM.⁹

3. Digicel Haiti customers could pay for calls either on an individual per-minute basis or by adding a billing plan on their account.¹⁰ Their prepaid wireless service entitled them to make calls while in Haiti and "roaming" calls while outside Haiti, in countries where Digicel Haiti had mobile roaming arrangements with "host" carriers.¹¹ For calls made in Haiti, customers could add block-of-minute billing plans to their account.¹² For international roaming calls, they could pay for calls either at traditional roaming rates or by a discount rate plan.¹³ One such discount rate plan was "Roam Like You're Home" (RLYH), which afforded limited-duration discount pricing for international roaming service.¹⁴

⁶ *Id.* at paras. 4, 5.

⁷ See Digicel Haiti's Response in Opposition to UPM's Petition for Reconsideration, Proceeding No. 23-64, Bureau ID No. EB-23-MD-001 (Apr. 29, 2024) (Opposition) at 5, n.27 ("UPM offers no theory of why Digicel-Haiti SIM cards would be valuable to a consumer outside the context of the Digicel-Haiti service to which they allow access (leaving aside fraudulent use) . . ."). See also Complaint Exh. 1, Item 28, *Unigestion Holding, S.A. v. UPM Technology, Inc. et al.*, Case No. 3:15-CV-00185-SI, Transcript of Proceedings (D. Or. Nov. 14, 2022) (Testimony of G. Laborde, Legal and Regulatory Director, Digicel Haiti) at 112 (Bates No. 001530) (explaining that a SIM card can only access the issuing carrier's network).

⁸ *Complaint Order*, *supra* note 1, at paras. 4, 5, 23. Haitian telephone numbers are not included within the North American Numbering Plan. See 47 CFR § 52.4(c) (defining the North American Numbering Plan as the "basic numbering scheme for the telecommunications networks located in American Samoa, Anguilla, Antigua, Bahamas, Barbados, Bermuda, British Virgin Islands, Canada, Cayman Islands, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, Sint Maarten, St. Kitts & Nevis, St. Lucia, St. Vincent, Turks & Caicos Islands, Trinidad & Tobago, and the United States (including Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands)"). The Commission has exclusive jurisdiction over the portions of the North American Numbering Plan that pertain to the United States. See 47 U.S.C. § 251(e).

⁹ *Complaint Order*, *supra* note 1, at para. 7.

¹⁰ *Id.* at n.19. Calls could only be made if there were sufficient funds in the account associated with the SIM card. *Id.* at para. 6.

¹¹ *Id.* AT&T and T-Mobile were host carriers in the United States. Their networks (in conjunction with Digicel Haiti's network in Haiti) allowed Digicel Haiti's customers traveling in the United States to make calls using their Digicel Haiti SIM cards. *Id.* Accordingly, for the international roaming calls at issue in the Complaint, the U.S.-based host carriers, as well as other carriers with authorization to handle foreign calls, see 47 U.S.C. § 214, routed those calls within the United States and between the United States and Haiti. *Complaint Order*, *supra* note 1, at paras. 6, 7, 11. Digicel Haiti's role in routing these calls was confined to routing the calls within Haiti. *Id.*

¹² *Id.* at n.19.

¹³ *Id.* at para. 8.

¹⁴ *Id.* After paying an enrollment fee, customers enrolled in the RLYH international roaming discount rate plan were charged the equivalent of \$0.09 per minute, which was the rate charged for local calls in Haiti. *Id.* In contrast, Digicel Haiti's traditional international roaming rates were in excess of the equivalent of \$1.99 per minute. *Id.*

4. UPM “participated in the spot market for international voice service to identify wholesale carriers that had traffic for termination in other countries.”¹⁵ It did not serve any retail customers.¹⁶ UPM’s business model involved exploiting arbitrage opportunities that enabled it to charge its carrier customers for terminating international calls at rates lower than those of the destination country carrier.¹⁷ With respect to international traffic bound for Haiti, UPM sought to enable its wholesale customers to avoid paying Digicel Haiti’s higher benchmarked call termination rates through the use of approximately 8,000 Digicel Haiti SIM cards it paid contractors to purchase in Haiti and ship to UPM in Oregon.¹⁸ There, UPM loaded the cards into a “SIM Unit” and routed its wholesale carrier customers’ calls through the Internet to the switches of the host wireless carriers.¹⁹ The host wireless carriers, in turn, sent the calls to Digicel Haiti’s international switching partner in Miami or New York, which then delivered the calls to Digicel Haiti in Haiti.²⁰ Using the account management features of the SIM cards, UPM added the RLYH discount rate plan to the cards’ accounts.²¹ Digicel Haiti initially was unaware of UPM’s activities,²² and UPM did its best to keep Digicel Haiti in the dark.²³ When routing calls to Haiti, UPM passed to Digicel Haiti the phone number associated with one of the SIM cards UPM loaded in its SIM Unit—not the telephone number of the person actually making the call.²⁴ Moreover, the SIM Unit utilized “human behavior” technology, which allowed a pool of SIM cards to mimic calling patterns of individual SIM card holders, rather than exhibit patterns associated with wholesale carrier bypass services using Digicel Haiti’s SIM cards.²⁵ Once it became aware that UPM was using SIM cards in this manner, Digicel Haiti deactivated the cards.²⁶

5. Digicel Haiti sued UPM in the U.S. District Court for the District of Oregon (Court), alleging various counts, including a claim for fraud by concealment.²⁷ UPM filed numerous counterclaims against Digicel Haiti, including claims arising under the Act, which the Court referred to the Commission pursuant to the primary jurisdiction doctrine.²⁸ Following trial of Digicel Haiti’s claims against UPM, a jury unanimously found by clear and convincing evidence that UPM and its Chief Executive Officer had engaged in fraud by concealment.²⁹

6. At the Commission, UPM maintains that it is Digicel Haiti’s conduct that is unlawful. Specifically, UPM’s Complaint asked the Commission to issue an order finding that: (a) “beginning no later than June 2014, Digicel Haiti is a common carrier and a telecommunications carrier subject to the

¹⁵ *Id.* at para. 9.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at para. 11.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See generally id.* at paras. 11, 16 & n.19.

²² *Id.* at paras. 11-12. UPM did not have any contractual relationships with Digicel Haiti, such as an interconnection agreement or a wholesale agreement allowing it to resell Digicel Haiti’s prepaid wireless services or to purchase SIM cards directly from Digicel Haiti. *Id.* at para. 11.

²³ *See infra* note 98.

²⁴ *Complaint Order, supra* note 1, at para. 11.

²⁵ *Id.* at n.49.

²⁶ *Id.* at para. 12.

²⁷ *Id.* at para. 13.

²⁸ *Id.*

²⁹ *Id.*

Act with respect to its RLYH service”; (b) as such, Digicel Haiti violated sections 201(b) and 202(a) of the Act by “cutting off the SIM cards that UPM was using to resell RLYH service”; and (c) Digicel Haiti is liable to UPM for damages and attorneys’ fees under section 206 of the Act.³⁰ The Commission disagreed with UPM. The *Complaint Order* dismissed UPM’s claims with prejudice, finding that Digicel Haiti did not offer a common carrier or telecommunications service in the United States and thus was not subject to sections 201(b), 202(a), or 208 of the Act or the Commission’s jurisdiction.³¹ The *Complaint Order* further denied UPM’s claims, finding they lacked merit.³²

7. UPM filed a Petition for Reconsideration,³³ arguing that the *Complaint Order*’s holdings are unsupported and inconsistent with contract law, the Communications Act, and Commission precedent.³⁴ Digicel Haiti opposes the Petition.³⁵ For the reasons below, we dismiss the Petition on procedural grounds and, as an independent and alternative basis for this decision, deny it on the merits.

III. DISCUSSION

8. According to UPM, the *Complaint Order* “contains two main flaws,” namely its determinations that “Digicel-Haiti is not a carrier under the Commission’s jurisdiction” and that “blocking resale of Digicel-Haiti’s services was reasonable and not unreasonably discriminatory.”³⁶ UPM contends that these conclusions must be reconsidered and reversed, because they contravene the Act and Commission precedent. We address UPM’s arguments below.

A. Based on the Evidence, the *Complaint Order* Correctly Found that Digicel Haiti Is Not Subject to the Commission’s Jurisdiction as Relevant Here.

1. Digicel Haiti Does Not Offer a Telecommunications Service, and Therefore Does Not Act as a Telecommunications Carrier, in the United States.

9. A central premise of the Petition is its repeated assertion that Digicel Haiti offers and charges for telephone calls from the United States to Haiti.³⁷ The Petition’s remaining arguments concerning “conflation” of equipment and services are relevant only if UPM is correct that Digicel Haiti’s

³⁰ *Id.* at para. 14 (citing *Complaint*, *supra* note 2, at 42, para. 91).

³¹ *Complaint Order*, *supra* note 1, at paras. 2, 16-29.

³² *Id.* at paras. 30-36. For this independent and alternative conclusion, the Commission assumed *arguendo* that jurisdiction exists. *Id.* at para. 30.

³³ Petition for Reconsideration, Proceeding No. 23-64, Bureau ID No. EB-23-MD-001 (Apr. 18, 2024) (Petition); Reply to Opposition to Petition for Reconsideration, Proceeding No. 23-64, Bureau ID No. EB-23-MD-001 (May 6, 2024) (Petition Reply).

³⁴ Petition at 5-25; Petition Reply at 4-10.

³⁵ See Opposition, *supra* note 7.

³⁶ Petition at 1.

³⁷ See, e.g., Petition at 1 (stating that Digicel Haiti “offers and charges for telephone calls from the United States to Haiti”), 12 (arguing that the *Complaint Order* “failed to consider the facts surrounding Digicel-Haiti’s offer and provision of the service of completing calls from the United States to Haiti”); Petition Reply at 7 (arguing that “Digital-Haiti is a telecommunications carrier” because it is offering “United States-to-Haiti calling”).

actions on the calls to Haiti constitute telecommunications services under the Act.³⁸ Ultimately, the Petition fails to make this showing.³⁹

10. UPM contends that Digicel Haiti does not offer services “exclusively” in Haiti.⁴⁰ But beyond referencing the Act’s definition of “telecommunications carrier,” the Petition fails to cite any authority supporting this contention.⁴¹ Indeed, UPM never fully explains its argument,⁴² but rather appears to contend that, because Digicel Haiti offered international roaming services and played some role in routing calls between the United States and Haiti, it necessarily offered telecommunications service subject to the Commission’s jurisdiction.⁴³ However, the *Complaint Order* explained that, based on multiple provisions of the Act and the Commission’s longstanding precedents regarding its jurisdiction over foreign carriers on international calls, Digicel Haiti is not acting as a telecommunications carrier, either in the United States or between the United States and Haiti, with respect to the calls at issue.⁴⁴ As relevant here, the Commission directly regulates only the United States carriers that offer domestic service and the routing of the calls between the United States and the foreign country.⁴⁵ That is why Digicel Haiti—as well as all of the other foreign carriers that offer their foreign subscribers international roaming within the United States—does not have or need authority under section 214 of the Act.⁴⁶

³⁸ See Petition at 6, 8, 11 (taking issue with “conflating” or the “conflation of” SIM cards and telecommunications service); Petition Reply at 2, 4 (same). Nevertheless, we address below UPM’s arguments concerning contract formation (*see infra* paras. 14-17), integrated services (*see infra* note 77), and customer premises equipment (*see infra* paras. 18-19).

³⁹ It is worth noting that UPM does not challenge the *Complaint Order*’s holding that RLYH is “not in itself ‘telecommunications’ under the Act” and that even if RLYH “had been offered to the public in the United States, such offering does not constitute telecommunications service under the Act.” See *Complaint Order*, *supra* note 1, at para. 24. See also Petition, *supra* note 33, at 20, n.49.

⁴⁰ See *id.* at 11-13.

⁴¹ See *id.* at 12 (citing 47 U.S.C. § 153(51)). A “telecommunications carrier” is “any provider of telecommunications services.” 47 U.S.C. § 153(51). “Telecommunications service,” in turn, is the “offering of telecommunications for a fee directly to the public . . .” *Id.* § 153(53).

⁴² See, e.g., Petition, *supra* note 33, at 12 (claiming that it is “self-evident” that Digicel Haiti is offering telecommunications in the United States).

⁴³ See *id.* at 13-17; Petition Reply, *supra* note 33, at 7-8 & n.9.

⁴⁴ See *Complaint Order*, *supra* note 1, at paras. 17-20, 25-26 (citing, *inter alia*, sections 2(a), 3, 214 of the Act), 27 (stating that “[l]ike the foreign carriers that receive international calls from the United States, Digicel Haiti’s actions and operations on the roaming calls at issue are outside the United States, and the Commission’s direct authority relevant here extends only to the U.S.-based carriers and the carriers that transport calls between the United States and Haiti”), 28 (describing the jurisdictional findings as “sensible policy,” because a “ruling that the Commission can adjudicate complaints against a foreign wireless carrier offering international roaming to its customers outside the United States, even where it does not transmit calls to and from the United States or offer its services (such as by selling SIM cards) in the United States, would put the Commission in the position of directly regulating many foreign carriers, potentially resulting in unnecessary conflicts with foreign regulators”), n.111 (citing multiple Commission precedents regarding the regulation of international calling and the Commission’s authority over entities involved in such calls), n.117 (explaining why the “international roaming features that were part of Digicel Haiti’s prepaid wireless services did not mean that Digicel Haiti was offering common carrier services in the United States”).

⁴⁵ See *id.* at para. 27 (“Like the foreign carriers that receive international calls from the United States, Digicel Haiti’s actions and operations on the roaming calls at issue are outside the United States, and the Commission’s direct authority relevant here extends only to the U.S.-based carriers and the carriers that transport calls between the United States and Haiti.”).

⁴⁶ See *id.* at paras. 3, 28, n.115. See also 47 U.S.C. § 214 (addressing extension of lines; discontinuance of service; certificate of public convenience and necessity); 47 CFR § 63.18 (requiring authorization to construct or operate a

(continued...)

11. Nevertheless, UPM argues that Digicel Haiti's activities in the United States "were substantial," citing Digicel Haiti's roaming contracts with U.S. carriers, as well as marketing efforts to the Haitian diaspora community living in the United States.⁴⁷ UPM misses the point. The facts it alleges could be relevant, for example, in establishing minimum contacts for purposes of asserting personal jurisdiction.⁴⁸ However, such arguments do not rebut the *Complaint Order*'s findings about the services and providers subject to the Commission's direct authority as relevant here. Rather, the pertinent Commission authority rests on the provisions of the Act cited in the *Complaint Order*, including the Act's definition of "telecommunications service," as interpreted in the *Complaint Order*. As the *Complaint Order* explained, in the international calling context, the intercarrier agreements necessary to enable routing on international calls to a foreign country have never been sufficient to allow the Commission to regulate directly the foreign carrier's rates, terms, or practices.⁴⁹ Likewise, there are no precedents, and UPM cites to none, where the Commission has regulated foreign carriers offering international roaming via the types of arrangements at issue here.⁵⁰

12. Moreover, UPM's reliance on the concept of resale is misplaced.⁵¹ UPM claims that the *Complaint Order* "never deals with the analysis and holding of the *Parts 1 and 63 Order*,"⁵² which UPM summarizes as "when a carrier arranges for its roaming partner to carry a roaming subscriber's calls back

new line "between the United States, its territories or possessions, and a foreign point"). Relatedly, UPM expresses concern that the *Complaint Order* noted (correctly) three times that Digicel Haiti "lacks facilities in the United States and did 'not itself' transport calls between the United States and Haiti." Petition, *supra* note 33, at 16, n.42. According to UPM, this "suggests" that the *Complaint Order*'s analysis of the Commission's jurisdiction or Digicel Haiti's carrier status was "affected" by the fact that Digicel Haiti "was not facilities-based." *Id.* The *Complaint Order* did not rest on the distinction between carriers that are or are not facilities-based. Rather, the Commission considered the call path of the wholesale traffic in this case and the role Digicel Haiti played in handling the traffic exclusively in Haiti, rather than within the United States or between the United States and Haiti. *Complaint Order*, *supra* note 1, at paras. 20-26. These record facts led the Commission correctly to conclude that Digicel Haiti did not act as a telecommunications carrier subject to the Commission's jurisdiction with respect to those calls. *Id.* at para. 29.

⁴⁷ Petition, *supra* note 33, at 12. Through the "Diaspora Program," friends and family of Digicel Haiti subscribers living outside Haiti could "top up" the SIM cards of relatives and friends living in Haiti. See UPM's Reply, Proceeding Number 23-64, Bureau ID Number EB-23-MD-001 (filed Apr. 3, 2023) (Complaint Reply) at 34-35.

⁴⁸ Indeed, UPM made such an argument in its Complaint Reply. See Complaint Reply at 34 (arguing that Digicel Haiti had "more than sufficient 'minimum contacts' with the United States, so there can be no question that the Commission's exercise of jurisdiction does not offend traditional notions of fair play and substantial justice").

⁴⁹ *Complaint Order*, *supra* note 1, at paras. 25-27 & n.117. UPM argues that, under the *Complaint Order*'s logic, the "Commission would have no jurisdiction over any reseller that chose to incorporate and sell its services from outside the country (for example, via the Internet)." Petition, *supra* note 33, at 17. This categorical claim is wrong. The Commission has authority to regulate foreign carriers that offer U.S. domestic service or offer to perform the foreign transport between the United States and a foreign country for a fee to the public in the United States, including the requirement that foreign carriers obtain section 214 authority when appropriate. See, e.g., *China Telecom (Americas) Corp. v. FCC*, 57 F.4th 256, 261 (D.C. Cir. 2022) (discussing application of section 214 to a foreign carrier). Nothing in the *Complaint Order* is to the contrary.

⁵⁰ *Complaint Order*, *supra* note 1, at paras. 25-28 & nn.77, 117.

⁵¹ Petition, *supra* note 33, at 13-17 (citing *In the Matter of Amendment to Parts 1 and 63 of the Commission's Rules*, Report and Order, 22 FCC Rcd 11398 (2007) (*Parts 1 & 63 Order*) and *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 F.C.C. 2d 261 (1976) at para. 17, *aff'd on reconsideration*, 62 F.C.C. 2d 588 (1977), *aff'd sub nom., AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978)); Petition Reply, *supra* note 33, at 8, n.9 (citing *Parts 1 & 63 Order*, 22 FCC Rcd at 11405-06, paras. 20-21).

⁵² Petition, *supra* note 33, at 14. UPM acknowledges that the Commission discussed the *Parts 1 and 63 Order* and held that it "did not address international roaming offered by foreign carriers to their customers." *Id.* at 14 (citing *Complaint Order*, *supra* note 1, at n.77). UPM's disagreement is with the Commission's refusal to extend that holding to the facts of this case.

to the carrier's home country, the carrier is engaging in resale, and thus providing telecommunications services, subject to the Act."⁵³ According to UPM, the fact that the *Parts 1 and 63 Order* "was dealing with United States carriers already under the Commission's jurisdiction . . . is true but beside the point."⁵⁴ Yet it is exactly the point. The provisions cited in the Petition surround a discussion of the Commission's holding that, in an international roaming arrangement involving the customers of *U.S.-CMRS carriers*, jurisdiction under the Act exists when "a U.S.-licensed CMRS carrier offers its customers a telecommunications service from a point outside the United States to a point within the United States."⁵⁵ Put differently, the *Parts 1 and 63 Order* only applied to U.S.-CMRS carriers, and thus does not support UPM's claim that foreign-based CMRS carriers are subject to Commission authority when offering their Haitian customers an international roaming service in connection with Haitian wireless service.⁵⁶ Accordingly, the *Parts 1 and 63 Order* is inapplicable here, and the Petition provides no basis for broadening that order's scope to regulate foreign carriers not providing a common carrier service under the Act.⁵⁷

13. In any event, the Petition's repeated assertion that Digicel Haiti is "reselling" U.S. carriers' service (and thus is subject to the Commission's jurisdiction) ignores the distinction the Commission consistently has made between roaming and resale.⁵⁸ Commission precedent explains that

⁵³ Petition, *supra* note 33, at 14 (citing *Parts 1 & 63 Order*, 22 FCC Rcd at 11404-06, paras. 20-21, n.57).

⁵⁴ *Id.* (citing *Complaint Order*, *supra* note 1, at n.77) (stating that "[t]he *Parts 1 & 63 Order* did not address international roaming offered by foreign carriers to their customers.") (citation omitted).

⁵⁵ *Parts 1 & 63 Order*, 22 FCC Rcd at 11404, para. 19 (emphasis added).

⁵⁶ The *Parts 1 and 63 Order* examined whether the Commission should amend its rules to "clarify that U.S.-authorized resale carriers can resell the U.S.-bound international services of either U.S. carriers or foreign carriers." *Parts 1 and 63 Order*, 22 FCC Rcd at 11404, para. 18. Based upon the record in the proceeding, the *Parts 1 and 63 Order* amended sections 63.18(e)(2) and 63.23 of the Commission's rules "to permit explicitly all U.S.-authorized resale carriers to provide international service by reselling the international services of any other authorized U.S. common carrier or foreign carrier, or by entering into a roaming or other arrangement with a foreign carrier." *Parts 1 and 63 Order*, 22 FCC Rcd at 11399, para. 3. UPM has not explained how sections 63.18(e)(2) or 63.23 of the Commission's rules apply to Digicel Haiti's offer of international roaming services to its Haitian customers.

⁵⁷ UPM's Petition Reply faults the Commission for somehow "diverging from precedent" by holding that foreign carrier Digicel Haiti's actions were not unlawful under the Act. *See* Petition Reply, *supra* note 33, at 8. As explained in the *Complaint Order*, however, UPM "cites to no precedents in which the Commission has regulated international roaming offered by foreign carriers via the sale of wireless services exclusively in a foreign country, and we are aware of none." *Complaint Order*, *supra* note 1, at n.117.

⁵⁸ Petition, *supra* note 33, at 4-5, 14-25. Indeed, over many years, the Commission developed two distinct sets of rules for wireless resale and then for roaming, further underscoring the distinction between those two concepts. *Compare Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15819-24, paras. 5-17 (2007) (*2007 Roaming Order*) (background regulatory discussion), 15836, para. 51 (explaining that the Commission's rule requiring carriers to provide automatic roaming was not meant to revive the resale rule, which had sunset), *with Interconnection & Resale Obligations Pertaining to Com. Mobile Radio Servs.*, Report and Order, 11 FCC Rcd 18455, 18457-59, paras. 3-6 (1996) (discussing background of cellular resale rule), 18462-63, para. 12 (finding that "an explicit ban on resale is unlawful, as are practices that effectively (i.e., indirectly) restrict resale, unless they are justified as reasonable"), 18472, para. 33 (extending resale requirements to broadband PCS and certain SMR providers and establishing a sunset date for the resale rule five years after the Commission awarded the last group of initial licenses for allocated broadband PCS spectrum) and *Interconnection & Resale Obligations Pertaining to Com. Mobile Radio Servs.*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340 (1999) (upholding the 1996 decision to sunset the resale rule). Nor is the distinction between resale and roaming undermined by *dicta* in the *Parts 1 and 63 Order*, as the Petition suggests. *See* Petition, *supra* note 33, at 16-17. In that order, the Commission found U.S. carriers providing international roaming subject to its jurisdiction regardless of the type of underlying arrangement. *See Parts 1 and 63 Order*, 22 FCC Rcd at 11405-06, para. 21 ("[T]he relevant question is not whether a U.S.-CMRS carrier is operating as a reseller, . . . but whether the CMRS carrier

(continued....)

“CMRS resale entails a reseller’s purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider.”⁵⁹ In contrast, “[r]oaming arrangements between wireless service providers enable customers of one provider to receive services from another provider’s network when traveling outside of their own provider’s network coverage area.”⁶⁰ Here, it is undisputed that Digicel Haiti had “roaming arrangements” with AT&T and T-Mobile.⁶¹ Digicel Haiti’s facilities are in Haiti.⁶² Through roaming arrangements, Digicel Haiti simply enabled its customers to receive the services from the networks of AT&T and T-Mobile when the customers traveled outside Digicel Haiti’s network coverage area.⁶³ Here again, UPM’s argument that the international roaming arrangements constitute “resale” by a foreign carrier of domestic services runs contrary to two clear and established principles: the Commission has not ever asserted authority over international roaming calling offered by foreign carriers and has consistently declined to regulate foreign carriers that handle international calls between the United States and foreign countries.⁶⁴

provides its customers with the ability to place a US-inbound call by entering into an arrangement with a foreign carrier to provide that international service.”). As explained above, the *Parts 1 and 63 Order* did not address or assert authority over international roaming offered by foreign carriers, and thus its statements about the Commission’s jurisdiction over U.S.-based carriers do not require the outcome sought by UPM.

⁵⁹ *2007 Roaming Order*, 22 FCC Rcd at 15836, para. 51. In any event, as the *Complaint Order* noted, “UPM’s use of Digicel Haiti’s SIM cards and their international roaming features cannot be fairly characterized as resale, but rather seeks to transform them into an entirely different service.” See *Complaint Order*, *supra* note 1, at n.129.

⁶⁰ *Worldcall Interconnect, Inc. a/k/a Evolved Broadband v. AT&T Mobility, LLC*, 31 FCC Rcd 3527, 3527, para. 2 (2016) (*Worldcall*). Moreover, as the *Complaint Order* found and UPM acknowledges, the bar against resale is not absolute. See *Complaint Order*, *supra* note 1, at n.129. See also *Complaint*, *supra* note 2, at 30-31, para. 70 & n.117; *Petition*, *supra* note 33, at 21 & n.51.

⁶¹ *Complaint Order*, *supra* note 1, at para. 6.

⁶² See *id.* at para. 5.

⁶³ See *Worldcall*, 31 FCC Rcd at 3533-36, paras. 15-17 & nn.42, 45, 48 (emphasizing the distinction between resale and roaming and explaining that a provider uses roaming services to market extended coverage to consumers residing within the provider’s network coverage area and resale to acquire customers where a service provider does not have network coverage).

⁶⁴ See, e.g., *Complaint Order*, *supra* note 1, at paras. 25-28 & nn.77, 111, 117.

2. UPM's Contract Formation Arguments Do Not Undermine the *Complaint Order's* Analysis.

14. UPM challenges what it describes as the *Complaint Order's* “key theory” that “it was the original offer of the SIM card that represented the entire offer of prepaid wireless service on the part of Digicel Haiti, and the purchase of that SIM card from Digicel Haiti that represented the purchase of that service on the part of customers.”⁶⁵ As it did in its Complaint and Complaint Reply, UPM maintains that “general principles of contract formation . . . govern the determination of what a carrier is offering.”⁶⁶ According to UPM, “[s]elling SIM cards is not [o]ffering [s]ervices” and “pretending that an offer of SIM cards contains or constitutes an offer of services makes no sense.”⁶⁷ As explained below, UPM's contract formation arguments afford no basis for reconsideration.

15. To begin, UPM cites the *Wireline Infrastructure Declaratory Ruling*,⁶⁸ where the Commission concluded that a “carrier's description in its tariff . . . is dispositive of what comprises the ‘service’ being offered by that carrier for purposes of determining whether section 214(a) discontinuance authority is required.”⁶⁹ The Commission grounded its conclusion in the statutory text and longstanding precedent before also noting that “[t]raditional principles of contract law” supported its conclusion, as well.⁷⁰ But a key factor in our jurisdictional determination here is *where* the relevant service was being offered—a point not at issue in the *Wireline Infrastructure Declaratory Ruling*. And the *Complaint Order* amply described how our jurisdictional determination reflects the best understanding of the statutory text and accords with precedent.⁷¹ Indeed, Digicel Haiti is not authorized under section 214 of the Act to provide international common carrier service in the United States, nor has UPM alleged that Digicel Haiti has violated section 214 in any respect (e.g., by offering or discontinuing service without obtaining proper authority).⁷² In sum, UPM fails to persuade us that the secondary rationale of the

⁶⁵ Petition, *supra* note 33, at 6 (citing *Complaint Order*, *supra* note 1, at para. 21).

⁶⁶ See Petition Reply, *supra* note 33, at 4-7; Petition, *supra* note 33, at 2, 6-8, 11-13; Complaint, *supra* note 2, at 21-25, paras. 49-59; Complaint Reply, *supra* note 47, at 24-27, 29, 32.

⁶⁷ Petition, *supra* note 33, at 6. UPM disagrees with the *Complaint Order's* conclusion that Digicel Haiti provided its service “via a SIM card.” *Id.* at 6-7. “Via” means “by way of; through the medium or agency of; by means of.” See *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/via> (accessed June 27, 2024). As the *Complaint Order* explained—and UPM does not dispute—without a Digicel Haiti SIM card, a consumer cannot use Digicel Haiti's prepaid service. *Complaint Order*, *supra* note 1, at para. 4. See *Unigestion Holding, S.A. v. UPM Technology, Inc.*, Case No. 3:15-CV-00185-SI, Defendant UPM Technology, Inc.'s Motion for Summary Judgment (D. Or. Nov. 12, 2021) (ECF 254) at 2, n.2 (stating that “Digicel-Haiti sold SIM cards to enable subscribers to use its network.”). And a consumer cannot buy a Digicel Haiti SIM card and access a different carrier's network. *Complaint Order*, *supra* note 1, at paras. 5-7. In contrast, a holder of a driver's license can show it as proof of age at any dining establishment. See Petition, *supra* note 33, at 7 (“Saying that wireless services are provided ‘via’ a SIM card makes no more sense than saying a glass of wine is provided ‘via’ the driver's license a customer shows a waiter to prove they are over 21.”). Thus, “via” is apt, and it is inaccurate to say that Digicel Haiti SIM cards are “entirely distinct” from its prepaid wireless service. See *id.*

⁶⁸ Petition, *supra* note 33, at 2, 6 (citing *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 11180-82, paras. 143-45 (2017) (*Wireline Infrastructure Declaratory Ruling*)); Petition Reply, *supra* note 33, at 5 (same).

⁶⁹ *Wireline Infrastructure Declaratory Ruling*, 32 FCC Rcd at 11178, para. 128. The Commission further concluded that “[t]he contract between the carrier and the customer, as the objective source defining the service, is the best and only analogue to the tariff for detariffed services.” *Id.* at 11180, para. 143.

⁷⁰ *Id.*

⁷¹ *Complaint Order*, *supra* note 1, at paras. 16-29.

⁷² See *id.* at paras. 3, 13-14.

Wireline Infrastructure Declaratory Ruling justifies reconsideration of the outcome of the *Complaint Order* in the very different context of this complaint proceeding.

16. Regardless, we disagree that “as a matter of contract law, Digicel Haiti’s offering of SIM cards cannot be considered to be, or to include, an offering of services.”⁷³ According to UPM, “[n]othing in the record suggests that Digicel-Haiti tells people buying SIM cards that they are also buying services – because they are not.”⁷⁴ But as the *Complaint Order* explained, “the purchase of a Digicel Haiti SIM card established a subscription for Digicel Haiti’s prepaid wireless service on its network that included a telephone number and billing account.”⁷⁵ To the extent that UPM disagrees with that understanding or its implications, UPM is the complainant in this proceeding and, as such, bears the burden of proof.⁷⁶ Yet, it has put forth no evidence supporting its theories about what Digicel Haiti SIM card buyers think or expect.⁷⁷

17. What is more, UPM construes the *Complaint Order*’s analysis too narrowly. To be sure, the *Complaint Order* examined the critical role the SIM card played in provision of Digicel Haiti’s prepaid wireless service.⁷⁸ But the *Complaint Order* did not neglect other considerations to the extent

⁷³ Petition Reply, *supra* note 33, at 5.

⁷⁴ Petition, *supra* note 33, at 6. *See also id.* at 6-7 (arguing that Haitians buying SIM cards from distributors do not consider or accept any offer of service from Digicel Haiti).

⁷⁵ *Complaint Order*, *supra* note 1, at para. 23. Relying upon a Securities and Exchange Commission (SEC) filing of Digicel Group Limited (Digicel Haiti’s parent company), UPM argues that “Digicel-Haiti knew full well that when it sold SIM cards, it was doing nothing more than inviting SIM card holders to establish an account.” Petition, *supra* note 33, at 10. But that document does not support UPM’s argument. The SEC filing addresses “subscriber acquisition costs” for the Digicel Group’s companies, and the use of the term “SIM only” sales “relates to customers acquiring a new subscriber account with [Digicel Group’s companies] without obtaining a subsidized handset.” *See* Complaint Reply Exh. 1, Item 22, Digicel Group Limited SEC Form F-1, at 67 (Bates No. 000652).

⁷⁶ *See Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (“Well-established FCC precedent imposes the burden of proof on the complainant in section 208 proceedings. So does our own.”); *see also Directel, Inc. v. American Tel. & Tel. Co.*, Memorandum Opinion and Order, 11 FCC Rcd 7554, 7560, para. 14 (1996) (same).

⁷⁷ We decline UPM’s invitation to “apply[] the logic” of the Commission’s “integrated information service” precedent to find that “[n]o rational customer could think that buying a SIM card means that they were buying services as well.” Petition, *supra* note 33, at 10-11 (citing *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Services*, Declaratory Ruling, 33 FCC Rcd 12075-76, para. 2 (2018)). In that proceeding, the Commission examined two factors—consumer perception and actual characteristics of service—to determine whether text messaging is an information service, not a telecommunication service under the Act. There is no suggestion here, however, that the services in dispute are information services, and the two-factor “integrated services” test is inapplicable. Moreover, even if it were, there is no evidence in the record of consumer perception regarding Digicel Haiti’s SIM cards or services. *See* Petition, *supra* note 33, at 11; Petition Reply, *supra* note 33, at 4, 7.

⁷⁸ *See Complaint Order*, *supra* note 1, at paras. 5, 23. Specifically, the SIM card provided the card owner with a unique telephone number on Digicel Haiti’s network, a subscription for prepaid wireless service on Digicel Haiti’s network, an account associated with those services, and account management features that enabled the card owner to manage the services and billing options available on the account. A subscription is “an arrangement for providing, receiving, or making use of something of a continuing or periodic nature especially on a prepayment plan.” *See Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/subscription> (accessed June 27, 2024). *See also, e.g., Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region, InterLATA Services in Oklahoma*, Memorandum Opinion and Order, No. 97-121, 12 FCC Rcd 8685, 8696-97, para. 17 (1997) (concluding that the term “subscriber” as used in the definition of local exchange service suggests that persons receiving the service pay a fee). Because the service offered through the SIM cards was prepaid, Digicel Haiti deducted the cost of a call from the SIM card account when the call was made. *See* Complaint, *supra* note 2, at 9, para. 21. This stands in contrast to postpaid services, which are billed after a call is made. *See* Complaint Exh. 3, Item 13, *Unigestion Holding, S.A. v. UPM*

(continued....)

potentially relevant, including in evaluating the regulatory history and in rejecting arguments raised by UPM.⁷⁹ On the contrary, in concluding that Digicel Haiti's actions at issue did not fall within the scope of the Act, the *Complaint Order* examined the full array of relevant facts and circumstances to address the questions of “*what* service Digicel Haiti offered and *where* it offered that service.”⁸⁰

3. UPM's Customer Premises Equipment (CPE) Arguments Are Untimely and Unsupported by Existing Precedent.

18. UPM claims that the *Complaint Order* treats the sale of Digicel Haiti's SIM cards and sale of its services as part of an “undifferentiated whole,” ignoring that the Act and Commission precedent distinguish between customer premises equipment (CPE) and telecommunications services.⁸¹ UPM posits that SIM cards are CPE on the “theory that the provision of authentication data to the network is an aspect of ‘originating’ calls on that network.”⁸² Therefore, UPM says, because “the Commission has always and without exception understood CPE and services to be different things,” on reconsideration, it must treat Digicel Haiti's sale of SIM cards and offering telecommunications services separately in determining whether Digicel Haiti offers common carrier or telecommunications services in the United States.⁸³

19. We dismiss this aspect of the Petition. UPM characterizes its CPE argument as an appropriate basis for reconsideration because the “conflation” of “an offering of SIM cards with an offering of services . . . appears for the first time in the Order itself.”⁸⁴ The record, however, belies UPM's claim. UPM's theory that SIM cards are CPE is merely a reminting of an earlier argument.⁸⁵ Specifically, in a lengthy footnote in its Complaint Reply, UPM argued that Digicel Haiti was attempting to “conflate the SIM cards it sells with the service it provides,” and UPM expressed its view that the “provision of SIM cards is not part of Digicel-Haiti's service.”⁸⁶ The *Complaint Order* rejected UPM's

Technology, Inc. et al., Case No. 3:15-CV-00185-SI, Deposition of M. Boute as Rule 30(b)(6) Witness for Digicel Haiti (Oct. 22, 2021) at 25-26 (Bates No. 00392-93).

⁷⁹ See, e.g., *Complaint Order*, *supra* note 1, at paras. 3, 5-7, 11, 18-22, 25-28.

⁸⁰ *Id.* at para. 27.

⁸¹ Petition, *supra* note 33, at 2-3, 8-10 (citing statutory definitions of customer premises equipment and telecommunications and telecommunications services, 47 U.S.C. § 153(16), (50), (53)). See Petition, *supra* note 33, at 3, 9-10 (citing *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C. 2d 384 (1980) (subsequent history omitted); *Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, Report and Order, 86 F.C.C. 2d 469 (1981); *Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd 4028 (1992); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange Access and Local Exchange Markets*, Report and Order, 16 FCC Rcd 7418 (2001); 47 CFR § 64.702(e). See also Petition Reply, *supra* note 33, at 4-5.

⁸² Petition, *supra* note 33, at 8, n.18.

⁸³ *Id.* at 10; see also *id.* at 8-9 (“The Order's conflation of CPE and services cannot be squared with the Act and must be reconsidered.”). Relatedly, UPM claims that, at a minimum, the Commission must recognize “its departure from precedent . . . [and] explain why it makes sense.” *Id.* at 9.

⁸⁴ *Id.* at 8-10; Petition Reply, *supra* note 33, at 2. As explained above, in determining whether Digicel Haiti offered common carrier or telecommunications services in the United States, the *Complaint Order* considered a number of factors—not just the role SIM cards played. See *supra* paragraphs 9-13. See also *Complaint Order*, *supra* note 1, at paras. 16-29.

⁸⁵ Compare Complaint Reply, *supra* note 47, at 29, n.92; Petition, *supra* note 33, at 6-10; Petition Reply, *supra* note 33, at 4-7, with *Complaint Order*, *supra* note 1, at para. 23 & n.88.

⁸⁶ Complaint Reply, *supra* note 47, at 29, n.92.

contention that SIM cards are merely “physical objects,” noting that “[i]f the SIM cards are not part of the service, as UPM suggests, then it is not clear how Digicel Haiti’s conduct relating to the use of its SIM cards results in a cognizable claim under the Act.”⁸⁷ UPM’s repetition of the same argument here does not provide grounds for reconsideration.⁸⁸ In the alternative, even if the CPE argument can be characterized as somehow “new,” UPM did not make it before the Commission released the *Complaint Order*, even though UPM could (and thus should) have done so.⁸⁹ Accordingly, we dismiss these arguments in the Petition on procedural grounds.⁹⁰

B. The *Complaint Order* Correctly Found that Digicel Haiti’s Conduct Was Not Unjust or Unreasonable, or Unjustly or Unreasonably Discriminatory.

1. The *Complaint Order* Appropriately Evaluated the Jury’s Verdict.

20. The *Complaint Order* held that even if Digicel Haiti were a common carrier subject to the relevant provisions of the Act with regard to the service at issue, Digicel Haiti’s deactivation of SIM cards was not unjust and unreasonable or unreasonably discriminatory.⁹¹ UPM denies that it committed any type of fraud,⁹² notwithstanding a jury’s unanimous verdict that UPM engaged in fraud by concealment.⁹³ According to UPM, the Commission “deeply misunderstood” the “non-final non-binding jury verdict,”

⁸⁷ *Complaint Order*, *supra* note 1, at para. 23 & n.88. UPM’s CPE argument therefore is beside the point. Even if SIM cards—*i.e.*, the physical cards themselves—could be considered CPE, the key point of the *Complaint Order*’s analysis is that the sale of the SIM cards encompassed not only the sale of the physical cards but also Digicel Haiti service. *Id.* As explained above, UPM has failed to make its case here that the sale of the SIM cards should be seen as distinct from the sale of Digicel Haiti service. *See supra* paras. 16-17.

⁸⁸ *See* 47 CFR § 1.106(p)(3) (providing that petitions for reconsideration of a Commission action that “[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding” are among those that “plainly do not warrant consideration by the Commission” and may therefore be dismissed by a bureau).

⁸⁹ *See id.* § 1.106(c)(1) (explaining that a petition for reconsideration that relies on arguments not previously presented to the Commission may be granted if the arguments “relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission” or were “unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the . . . arguments in question prior to such opportunity”), (p)(2) (authorizing dismissal of petitions for reconsideration that “[r]ely on facts or arguments which have not previously been presented to the Commission and which do not meet the requirements of paragraphs (b)(2), (b)(3), or (c)” of rule 1.106).

⁹⁰ *See Scott Malcom DSM Supply, LLC, Somaticare, LLC*, Order on Reconsideration, 33 FCC Rcd 2410, 2412, para. 8 (2018) (“Neither the Act nor Rules require the Commission to be administratively burdened by petitions for reconsideration that reargue issues that were already addressed, or that rely on facts or arguments that the petitioner could have—but did not—present to the Commission at an earlier stage.”); *Qwest Commc’ns Co. v. N. Valley Commc’ns, LLC*, Order on Reconsideration, 26 FCC Rcd 14520, 14522–23, paras. 5–6 (2011) (“It is ‘settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.’”) (citing *S&L Teen Hosp. Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900, para. 3 (2002) (citations omitted); *All American, et al. v. AT&T*, Order on Reconsideration, 28 FCC Rcd 3469, 3471-72, at para. 6 (2013) (same)).

⁹¹ *Complaint Order*, *supra* note 1, at paras. 30-36.

⁹² Petition, *supra* note 33, at 4-5, 18-19; Petition Reply, *supra* note 33, at 8-9.

⁹³ *Complaint Order*, *supra* note 1, at para. 13. UPM blames Digicel Haiti for “configur[ing] its systems so that that [sic] there was no way for UPM to convey any information about any call, other than the information contained in the SIM card that was used to authenticate the call.” Petition, *supra* note 33, at 22, n.53. But any suggestion that UPM had an interest in conveying the actual telephone number of its wholesale carrier customers—as required by the Commission’s rules (*see Complaint Order*, *supra* note 1, at n.55)—strains credulity. The success of UPM’s call termination arbitrage business (including use of a SIM Unit) depended on *not* revealing to Digicel Haiti that calls were coming from UPM wholesale carrier customers rather than from Digicel Haiti retail customers traveling in the United States. *See id.* at para. 11 & n.104.

which UPM has asked the court to modify or set aside.⁹⁴ Specifically, UPM asserts that the *Complaint Order* “adopts the plainly erroneous notion” that the jury found UPM’s “routing of calls to Digicel Haiti” was fraudulent.⁹⁵ We disagree with this characterization of the *Complaint Order*,⁹⁶ and we simply quote the underlying jury verdict finding unanimously that “Digicel-Haiti prove[d] by clear and convincing evidence that UPM, Mr. Tran, or both engaged in fraud by active concealment by using human behavior simulation software in furtherance of Digicel-Haiti’s RLYH bypass (or RLYH) program.”⁹⁷ And regardless of the jury’s plainly worded finding that UPM’s activities at issue were fraudulent, the *Complaint Order* independently walked through UPM’s conduct, *i.e.*, UPM’s multi-layered efforts to conceal the identity of itself and its callers, holding that the Commission “will not endorse a carrier deceptively using a foreign carrier’s service in furtherance of an arbitrage scheme.”⁹⁸ Given the burden of proof on UPM as the complaining party, and with no basis provided by UPM for revisiting these findings, we see no basis for reconsideration.

21. More fundamentally, the *Complaint Order* identified factors unrelated to fraud or deception that we independently find sufficient to reject UPM’s arguments under sections 201(b) and 202(a). As the *Complaint Order* observed, “Digicel Haiti’s deactivation of the SIM cards appears to have served legitimate business needs,” such as ensuring it could anticipate and manage call volumes in conjunction with its business relationships with its roaming partners, and complying with obligations imposed by the Haitian regulator.⁹⁹ Based on these considerations, even standing alone, we conclude that UPM has failed to show that Digicel Haiti’s deactivation of SIM cards was unjust or unreasonable under section 201(b).

22. With respect to UPM’s section 202(a) claim, the *Complaint Order* observed as a threshold matter that “UPM has failed to identify differential treatment of similarly situated customers of Digicel Haiti’s service in violation of section 202(a).”¹⁰⁰ And the considerations that we find sufficient to

⁹⁴ Petition, *supra* note 33, at 18-19; Petition Reply, *supra* note 33, at 2. On April 23, 2024, UPM filed a motion with the United States District Court for the District of Oregon seeking to set aside the unanimous jury verdict, arguing, *inter alia*, there was insufficient evidence at trial showing: (a) Digicel Haiti actually and justifiably relied on any allegedly misrepresented information; (b) Digicel Haiti was injured; (c) any allegedly concealed information was material; and (d) Digicel Haiti suffered damages. *Unigestion Holding, S.A. v. UPM Technology, Inc. et al.*, Case No. 3:15-CV-00185-SI, UPM’s Rule 50(b) Motion for Judgment as a Matter of Law or Alternative Rule 59(a) Motion for a New Trial (D. Or. Apr. 23, 2024) (ECF 554).

⁹⁵ Petition, *supra* note 33, at 18 (citing *Complaint Order*, *supra* note 1, at para. 15).

⁹⁶ Contrary to UPM’s assertion, the *Complaint Order* nowhere said that “routing calls to Digicel-Haiti” was itself fraudulent. Petition, *supra* note 33, at 18. Rather, the *Complaint Order* described the jury’s finding that UPM committed fraud *in the course of* its call routing operations.

⁹⁷ See *Complaint Order*, *supra* note 1, at para. 13 & n.62 (citing Answer Exh. 1, *Unigestion Holding, S.A. v. UPM Technology, Inc. et al.*, Case No. 3:15-CV-00185, Special Verdict (D. Or. Nov. 21, 2022) (ECF 526) (Bates Nos. DH-000001-03)).

⁹⁸ *Id.* at para. 33. In addition to the *Complaint Order*’s step-by-step description of UPM’s clandestine bypass operations, *see, e.g., id.* at paras. 11-12, 31, the underlying trial record is replete with examples of UPM’s efforts to conceal its activities. *See, e.g.,* Complaint Exh. 3, Item 31, *Unigestion Holding, S.A. v. UPM Technology, Inc. et al.*, Case No. 3:15-CV-00185-SI, Transcript of Proceedings (D. Or. Nov. 17, 2022) (Testimony of Kenneth McEwen, Technical Director, Bitek Group/Miracle Global) at 859:2-3 (Bates No. 002400) (“[Question:] Are [human behavior software] deployments used to avoid detection of bypass? [Answer:] “Yes.”). The record at trial further shows that UPM actively trained its employees to avoid fraud detection. *See* Complaint Exh. 3, Item 29, *Unigestion Holding, S.A. v. UPM Technology, Inc. et al.*, Case No. 3:15-CV-00185-SI, Transcript of Proceedings (D. Or. Nov. 15, 2022) (Testimony of Jesus Ruiz, former UPM employee) at page 326:21-24 (Bates No. 001775) (“[Question:] Isn’t it correct that UPM provided seminars and training for its employees on methods to avoid fraud detection techniques by carriers such as Digicel Haiti? [Answer:] Yes.”).

⁹⁹ *Complaint Order*, *supra* note 1, at para. 33 & n.136.

¹⁰⁰ *Id.* at para. 35.

reject UPM's claims of unjust and unreasonable practices under section 201(b) likewise persuade us to reject UPM's claims of unjust and unreasonable discrimination under section 202(a).¹⁰¹ Thus, we find sufficient grounds for our findings under sections 201(b) and 202(a) even apart from concerns about fraud or deceptive conduct.

2. The *Complaint Order* Rightly Rejected UPM's Benchmark Regime Policy Arguments.

23. Finally, UPM reraises its "tenuous assertion" that the Commission's international benchmark regime somehow provides a policy justification for its conduct, in that UPM's actions served to drive down Digicel Haiti's rates through competition.¹⁰² In UPM's view, the *Complaint Order* "misse[d] the point" of its benchmarking arguments "in two crucial respects."¹⁰³ First, despite the fact that Digicel Haiti's rates are benchmark compliant, the *Complaint Order* purportedly failed to acknowledge that the benchmark regime "depends on competition to force carriers like Digicel-Haiti to charge less than the permitted maximum."¹⁰⁴ Second, the *Complaint Order* allegedly failed to recognize that UPM is not "challenging the benchmark system itself."¹⁰⁵ Rather, UPM contends that "by pressing the point that Digicel-Haiti should be banned from restricting resale of its services, [it] is seeking to work within the existing benchmark system to accomplish that system's goal of lower, cost-based international termination rates."¹⁰⁶

24. As Digicel Haiti correctly notes, UPM made these exact arguments in its Complaint and Complaint Reply,¹⁰⁷ and the Commission "expressly considered and rejected" them.¹⁰⁸ Consequently, we dismiss these arguments as previously raised and addressed.¹⁰⁹ Alternatively, we deny these arguments.¹¹⁰ At bottom, UPM believes Digicel Haiti should be charging a "lower, cost-based international termination rate."¹¹¹ Even assuming that Digicel Haiti has harmed competition in the U.S. communications marketplace (something that UPM has not shown),¹¹² the *Complaint Order* correctly found that such a challenge to the lawful benchmark rate that United States carriers pay Digicel Haiti in Haiti is properly made in an industry-wide rulemaking proceeding rather than a complaint proceeding.¹¹³ In addition, the *Complaint Order* found that "even accepting UPM's assertion that its business model was designed to put downward pressure on monopolist's rates, the purported benefits of this strategy do not justify UPM's

¹⁰¹ See *supra* paras. 20-21. See also *Complaint Order*, *supra* note 1, at para. 36 & n.145.

¹⁰² Petition, *supra* note 33, at 23-24. See *Complaint Order*, *supra* note 1, at para. 32.

¹⁰³ *Id.* at 24.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Opposition, *supra* note 7, at 3 (citing Complaint, *supra* note 2, at 33-37, paras. 75-81; Complaint Reply, *supra* note 47, at 17).

¹⁰⁸ *Complaint Order*, *supra* note 1, at paras. 32-33. Compare Complaint, *supra* note 2, at 2, para. 4, 33, paras. 75-81; Complaint Reply, *supra* note 47, at 17; Petition, *supra* note 33, at 23-24, with *Complaint Order*, *supra* note 1, at para. 32.

¹⁰⁹ See *supra* note 88.

¹¹⁰ See 47 CFR § 1.106(j), (p).

¹¹¹ Petition, *supra* note 33, at 24.

¹¹² See *Complaint Order*, *supra* note 1, at para. 32.

¹¹³ *Id.*

fraudulent arbitrage scheme.”¹¹⁴ As the Petition fails to provide any persuasive basis to revisit the *Complaint Order*’s analysis of UPM’s benchmark argument, we decline to reconsider it.

IV. ORDERING CLAUSE

25. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 1, 2, 3, 4(i), 4(j), 201, 202, 206, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 153, 154(i), 154(j), 201, 202, 206, 208, and 405, and section 1.106 of the Commission’s rules, 47 CFR § 1.106, that UPM’s Petition for Reconsideration is **DISMISSED** on procedural grounds for the reasons stated herein, and, as an independent and alternative basis, **DENIED** for the reasons stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹¹⁴ *Id.* at para. 33. Moreover, as noted above, the Commission disagreed with UPM’s characterization that its use of Digicel Haiti’s SIM cards and their international roaming features constituted resale. *See supra* paras. 12-13.