

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APCC Services, Inc.,
Data Net Systems, LLC,
Davel Communications, Inc.,
Jaroth, Inc. dba Pacific Telemanagement)
Services, and
Intera Communications Corp.,
Complainants,
v.
TS Interactive, Inc.,
Defendant.
File No. EB-02-MD-012

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 2004

Released: June 10, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we grant an unopposed supplemental complaint for damages ("supplemental complaint" or "complaint for damages") filed by APCC Services, Inc., et al. ("APCC" or "Complainants") against TS Interactive, Inc. ("TS Interactive") pursuant to section 208 of the Communications Act of 1934, as amended (the "Act") and section 1.722 of the Commission's rules. In the liability phase of this proceeding, we granted a motion for default judgment against TS Interactive, thereby resolving a formal complaint alleging that TS Interactive breached section 276 of the Act by failing to pay dial-around compensation to Complainants for certain categories of completed coinless calls originating from payphones, in violation of Commission rules and orders. Consistent with that ruling, we now award damages to Complainants for dial-around compensation that TS Interactive has failed to pay for calls made from Complainants' payphones using resold services of Global Crossing Ltd. ("Global Crossing").

147 U.S.C. § 208.

247 C.F.R. § 1.722.

347 U.S.C. § 276.

4APCC Services, Inc., et al., v. TS Interactive, Order, 17 FCC Rcd 25523 (2002) ("Liability Order"). See 47 C.F.R. §§ 64.1300-64.1320. The Commission promulgated these rules to implement section 276 of the Act, 47 U.S.C. § 276.

II. BACKGROUND

A. The Parties and the Procedural Background

2. Complainants consist of payphone service providers (“PSPs”) and the agents of PSPs for the billing and collection of “dial-around compensation.”⁵ Defendant TS Interactive has been described by Complainants as a switch-based reseller of certain communications services of Global Crossing Ltd. (“Global Crossing”).⁶ During the relevant period, TS Interactive provided interstate and intrastate telephone toll service, and carried traffic originating from payphones owned or represented by Complainants.⁷

3. On April 19, 2002, Complainants filed a formal complaint (“formal complaint”) against TS Interactive seeking to recover unpaid “dial-around compensation” that TS Interactive was allegedly required to pay Complainants under section 276 of the Act and section 64.1300 *et seq.* of the Commission’s rules.⁸ Specifically, Complainants alleged that TS Interactive failed to pay them dial-around compensation, despite entering into a contract with Global Crossing in which TS Interactive assumed the responsibility to make such payments after February 28, 1999.⁹

4. Although TS Interactive made an initial settlement proposal, it eventually decided not to participate further in the liability phase of this proceeding.¹⁰ After TS Interactive failed to submit an answer to the complaint, Complainants filed a Motion for Default Judgment on the issue of liability.¹¹ TS Interactive also failed to file an opposition to Complainants’ Motion for Default Judgment.¹²

5. In the *Liability Order*, the Enforcement Bureau (the “Bureau”) found that TS Interactive was in default, and granted the complaint.¹³ In doing so, the Bureau was guided by four factors generally used by federal courts in construing Rule 55 of the Federal Rules of Civil Procedure,¹⁴

⁵*Liability Order* at 25524, ¶ 2. “Dial-around compensation” refers to the per-call payments that interexchange carriers (“IXCs”) must make to PSPs for certain categories of completed coinless calls originating from payphones, including access code calls and calls to subscriber toll-free numbers. 47 C.F.R. §§ 64.1300 *et seq.*

⁶*Liability Order* at 25524, ¶ 2.

⁷*Id.* at 25524, ¶ 2.

⁸*Id.* at 25524, ¶ 3; 47 C.F.R. §§ 64.1300 *et seq.*; 47 U.S.C. § 276.

⁹*Liability Order* at 25524, ¶ 3. In accordance with section 1.722 of the Commission’s formal complaint procedures, 47 C.F.R. § 1.722, Complainants requested that we bifurcate the liability and damages phases of this proceeding. *See Id.* at 25524, ¶ 3.

¹⁰*Id.* at 25524-25, ¶ 4. *See APCC Services, Inc., et al., v. TS Interactive*, Letter from Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (July 10, 2002). TS Interactive has never provided any written explanation for its failure to participate in these proceedings.

¹¹*Liability Order* at 25524-26, ¶ 4. *See APCC Services, Inc., et al., v. TS Interactive*, Motion for Default Judgment with Supporting Memorandum of Law, File No. EB-02-MD-012 (filed Sept. 6, 2002).

¹²*Liability Order* at 25525-26, ¶ 4.

¹³*Id.*

¹⁴Fed.R.Civ.P. 55.

which concerns the appropriateness of default judgments.¹⁵ The Bureau found that: (1) the alleged facts, if true, constituted a violation of the Act;¹⁶ (2) TS Interactive had clearly failed to defend the complaint, and this failure had continued for a significant period of time and did not derive from excusable neglect or a good faith mistake;¹⁷ (3) Complainants had been substantially prejudiced by the delay caused by TS Interactive's failure to defend the complaint;¹⁸ and (4) Complainants had properly prosecuted this case.¹⁹ In addition, we found that the claim presented was not an important matter of public policy, such as a constitutional or statutory construction issue, but rather was a straightforward, private payment dispute in an amount that "is not so large as to preclude a default judgment."²⁰ Finally, we granted Complainants' request to bifurcate liability from damages, and directed APCC to file a supplemental complaint for damages within sixty days of the release of the *Liability Order*.²¹

6. TS Interactive was served with a copy of the *Liability Order* on December 20, 2002.²² TS Interactive did not file a petition for reconsideration or an application for review of the *Liability Order* and has not otherwise contested the Bureau's decision.

B. The Supplemental Complaint for Damages

7. APCC filed the supplemental complaint for damages on February 19, 2003. Upon review, Commission staff found that the supplemental complaint failed to comply with several of the Commission's rules, including section 1.722(h), which requires a computation of "each and every category" of damages for which recovery is sought.²³ Thus, Commission staff dismissed the supplemental complaint, without prejudice.²⁴ Complainants refiled their supplemental complaint for damages on April 11, 2003.²⁵ Once more, the supplemental complaint contained several deficiencies, but instead of dismissing it, Commission staff required that Complainants supplement the record to correct these deficiencies by August 15, 2003.²⁶ At the Complainants' request, Commission staff later extended

¹⁵Where appropriate, we take guidance from the Federal Rules of Civil Procedure. See, e.g., *Core Communications, Inc. v. Verizon Maryland Inc.*, 19 FCC Rcd 1935, 1939 n.29 (Enf. Bur. 2004); *Premier Network Services, Inc. v. Southwestern Bell Tel. Co.*, 18 FCC Rcd 11474, 11475 at ¶ 4 (Enf. Bur. 2003).

¹⁶*Liability Order* at 25527-27, ¶ 8.

¹⁷*Id.* at 25528, ¶ 9.

¹⁸*Id.* at 25528, ¶ 10.

¹⁹*Id.* at 25528, ¶ 11.

²⁰*Id.* at 25528-29, ¶ 12. At the time, the Complainants indicated that the claim was for \$99,000. *Id.*

²¹*Id.* at 22529, ¶ 13.

²²*APCC Services, Inc., et al., v. TS Interactive*, Letter from Sandra Gray, Staff Assistant, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Alan C. Hubbard and Gregory D. Kwan, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (December 20, 2002).

²³47 C.F.R. § 1.722(h). See *APCC Services, Inc., et al., v. TS Interactive*, Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (March 3, 2003) ("March 3 Dismissal Letter").

²⁴See March 3 Dismissal Letter.

²⁵*APCC Services, Inc., et al., v. TS Interactive*, Supplemental Complaint for Damages, File No. EB-02-MD-012 (filed April 11, 2003) ("Supplemental Complaint").

²⁶*APCC Services, Inc., et al., v. TS Interactive*, Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R.

this deadline to October 3, 2003.²⁷ Pursuant to the staff's letter rulings, Complainants augmented the supplemental complaint with additional information filed on October 3, 2003 and October 9, 2003.²⁸ TS Interactive has failed to participate in any way in the damages phase of this proceeding.

III. DISCUSSION

A. Standard for Default Judgment

8. As in the liability stage of this proceeding, we must examine whether a default judgment for damages is appropriate here. As the Bureau stated in the *Liability Order*, section 1.724(a) of the Commission's rules requires a defendant in a formal complaint proceeding to file an answer within twenty days of service of the formal complaint, unless otherwise directed by the Commission.²⁹ Furthermore, section 1.724(d) of the Commission's rules states that "[a]verments in a complaint . . . are deemed to be admitted when not denied in the answer."³⁰ Although the Commission's formal complaint rules do not address default judgments specifically, when a defendant fails knowingly to answer a complaint against it, the Commission may find the defendant in default, and may consider the material facts alleged in the complaint to be admitted.³¹ The same general principles apply to supplemental complaints for damages.

9. As we did in the liability stage of this proceeding, we conclude that TS Interactive has clearly failed to defend the supplemental complaint; that TS Interactive's failure to defend has continued for a significant period of time; and that TS Interactive's failure to defend does not derive from excusable neglect or a good faith mistake. Furthermore, TS Interactive received timely notice of the supplemental complaint and of the deadline for filing its answer, yet failed to respond.³² This failure to participate or

Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (July 31, 2003).

²⁷*APCC Services, Inc., et al., v. TS Interactive*, Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (August 15, 2003). See *APCC Services, Inc., et al., v. TS Interactive*, Letter from Allan C. Hubbard and Gregory D. Kwan, Counsel for Complainants, to Jonathan Reel, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. EB-02-MD-012 (filed August 13, 2003).

²⁸*APCC Services, Inc., et al., v. TS Interactive*, Additional Materials to Complainants' Supplemental Complaint for Damages, File No. EB-02-MD-012 (filed October 3, 2003) ("October 3 Additional Damages Materials"); *APCC Services, Inc., et al., v. TS Interactive*, Additional Materials to Complainants' Supplemental Complaint for Damages, File No. EB-02-MD-012 (filed October 9, 2003) ("October 9 Additional Damages Materials"). The October 9 Additional Damages Materials supplemented a portion of the earlier filing. According to Complainants, the computer diskette attached to the October 3 Additional Damages Materials that identified the payphones represented by Complainant APCC was "not verified by" the National Payphone Clearinghouse. October 3 Additional Damages Materials at 6 n.7. See also paras. 12-13, *infra* (generally describing the role of the National Payphone Clearinghouse in this proceeding). The October 9 Additional Damages Materials consisted solely of a new diskette containing verified data, which was intended to replace the earlier diskette filed on October 3, 2003.

²⁹*Liability Order* at 25526, ¶ 5; 47 C.F.R. § 1.724(a).

³⁰47 C.F.R. § 1.724(d).

³¹See *Liability Order* at 25526, n.18.

³²See e.g., *APCC Services, Inc., et al., v. TS Interactive*, Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (August 15, 2003); *APCC Services, Inc., et*

otherwise defend the complaint has lasted for several months, and TS Interactive has neither offered a legitimate rationale for its failure to participate nor shown any indication that it has had a change of heart regarding its conduct. We therefore find that TS Interactive clearly, knowingly, and repeatedly failed to defend against the supplemental complaint for damages. Consequently, we grant default judgment on the supplemental complaint for damages with respect to Complainants APCC Services, Inc., Data Net Systems, LLC, and Intera Communications Corp.³³

10. In the damages context, however, we conclude that we have an obligation to ensure that the amount of the requested damages is appropriate, and we should not automatically accept the proffered amount as correct and reasonable.³⁴ For example, according to Federal Rule of Civil Procedure 8(d), “[a]verments in a pleading to which a responsive pleading is required, *other than those as to the amount of damages*, are admitted when not denied”³⁵ Moreover, Federal Rule of Civil Procedure 55(b)(2) provides that, when granting a default judgment, if “it is necessary to take account or to determine the amount of damages or to establish the truth of any averment by evidence . . . , the court may conduct such hearings or order such references as it deems necessary and proper.”³⁶ Thus, even when a default judgment is warranted based upon a party’s failure to defend, the allegations in the complaint with respect to the amount of the damages are not deemed true, and the court must ascertain the amount of damages with reasonable certainty.³⁷ In this spirit, Commission staff has carefully reviewed the damage calculation submitted by Complainants, and is satisfied that the amount summarized below is appropriate in this particular case.

B. Measuring Damages

11. Determining an appropriate measure of damages in this particular case presents a unique set of challenges. Complainants state that payphone dial-around compensation can only be calculated based on information and documents that reside solely in the possession of the switch-based

al., v. TS Interactive, Letter from Allan C. Hubbard and Gregory D. Kwan, Counsel for Complainants, to Jonathan Reel, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. EB-02-MD-012 (filed August 13, 2003); *APCC Services, Inc., et al., v. TS Interactive*, Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (July 31, 2003); *APCC Services, Inc., et al., v. TS Interactive*, Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (March 3, 2003).

³³See generally Fed.R.Civ.P. 55. Intera Communications Corp. apparently owns the rights of Complainant Jaroth, Inc. for the purposes of this litigation. See October 3 Additional Damages Materials at 8 and Exh. H. We deny the complaint with respect to Complainant Davel Communications, Inc., with prejudice, for failing to submit a request for damages.

³⁴See, e.g., 10a CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2688 (1998).

³⁵Fed. R. Civ. P. 8(d) (emphasis added).

³⁶Fed.R.Civ.P. 55(b)(2).

³⁷See, e.g., *Credit Lyonnais Securities. (USA), Inc. v. Alcantra*, 183 F. 3d 151, 154-5 (2d Cir. 1999); *Au Bon Pain Corp. v. Arctect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981); *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977); *U.S. v. Gant*, 268 F. Supp. 2d 29, 32-33 (D.D.C. 2003); *MCI WorldCom Communications, Inc. v. Gamma Communications Group, Inc.*, 204 F.R.D. 259, 262-63 (S.D.N.Y. 2001).

reseller (“SBR”);³⁸ in this case, TS Interactive. As described above, TS Interactive has failed to participate at any stage of this proceeding, and has refused to provide the relevant documentation that Complainants assert would allow the Complainants and Commission staff to calculate the amount of dial-around compensation that TS Interactive has failed or refused to pay during the relevant time period.³⁹ This appears to place the Complainants squarely between the proverbial rock and hard place.

12. At the time they filed their motion for default judgment, Complainants estimated the damage amount based on one unsubstantiated sentence contained in a letter from TS Interactive stating “that the matter involves a claim for less than \$100,000.”⁴⁰ Complainants then estimated the amount at issue to be \$99,000.⁴¹ According to Complainants, they relied on this estimate in their motion because, at that time, they had no other information.⁴²

13. Complainants state that they subsequently became aware of the website for the National Payphone Clearinghouse containing call information about each Global Crossing switch-based reseller that “have identified themselves as responsible for the payment of per-call compensation during the time periods covered by the data [January 1999 through December 2001].”⁴³ Furthermore, according to Complainants, the “Global Crossing Reseller Information” home page on the National Payphone Clearinghouse website contains files that segregate the number of calls that were placed by each payphone that was presubscribed to Global Crossing’s services by month and year, by payphone automatic number identification (“ANI”), and by SBR code for the period between January 1999 and December 2001.⁴⁴ With this data, Complainants determined the number of calls placed from their payphones using the services of Global Crossing that were resold by TS Interactive by simply cross-referencing to a list of all the payphones that they owned and controlled during the relevant time.⁴⁵

14. This analysis, though, is incomplete. The Commission’s rules entitle payphone providers to compensation for every *completed* call.⁴⁶ The data available through the National Payphone Clearinghouse website, however, exhibits the number of calls placed, not the number of calls actually completed. Complainants’ expert, Mr. Pace, who identifies himself as “an owner and operator of a Mid-West independent payphone service provider (“PSP”) company [that also] act[s] as a consultant to other PSPs,”⁴⁷ has stated that, to determine an exact damage amount, TS Interactive’s call-detail records are

³⁸Supplemental Complaint at 9, ¶ 14; October 3 Additional Damages Materials at 6, n.9.

³⁹Supplemental Complaint at 9, ¶ 14; October 3 Additional Damages Materials at 6, n.9.

⁴⁰Supplemental Complaint at ¶¶ 12, 15 and 17. *See APCC Services, Inc., et al., v. TS Interactive*, Letter from Douglas R. Hirsch, Counsel for TS Interactive, to Warren Firschein, Attorney, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. EB-02-MD-012 (May 15, 2002) at 1.

⁴¹*See APCC Services, Inc., et al., v. TS Interactive*, Supplemental Complaint for Damages, File No. EB-02-MD-012 (filed February 19, 2003) at 5, ¶ 5 and 11, ¶ 23.

⁴²Supplemental Complaint at 9-10, 11, ¶¶ 15 and 17.

⁴³October 3 Additional Damages Materials at 2. *See* Supplemental Complaint at 11-12, ¶¶ 17-18.

⁴⁴October 3 Additional Damages Materials at 3. *See* Supplemental Complaint at 12, ¶ 18.

⁴⁵October 3 Additional Damages Materials at 3-10. *See* Supplemental Complaint at 12-13, ¶¶ 19-23.

⁴⁶47 C.F.R. § 64.1300. *See also* Supplemental Complaint at Attachment 9, Declaration of Gary L. Pace at 1-2, ¶ 3 (Pace Declaration”); October 3 Additional Damages Materials at 6, n.9.

⁴⁷*See* Pace Declaration at 1, ¶ 1.

required.⁴⁸ According to Mr. Pace, if such records were made available, Complainants could accurately measure damages by identifying each completed call originated from one of their payphones that was sent to Global Crossing and completed by Defendant's switch by matching the unique automated number identifications associated with each particular payphone.⁴⁹ Unfortunately, without the participation of the Defendant, Complainants state they have no means to access TS Interactive's call completion information.

15. To assist us in resolving this dilemma, Complainants' expert, Mr. Pace, has submitted an affidavit stating that, in his "extensive experience working with interexchange carriers, call completion rates have all been well above 50 percent."⁵⁰ Furthermore, he indicates that he is "aware of no plausible reason why a carrier would experience call completion rat[es] of less than 50 percent" and that he believe[s] a 50 percent call completion rate is an appropriate rate to apply to the instant case."⁵¹

16. Based on our review of the Global Crossing data submitted by Complainants from the National Payphone Clearinghouse, the statement by Complainants' expert that a 50 percent call completion ratio is reasonable, and TS Interactive's failure or refusal to rebut this figure, we conclude, for the purposes of this case only, that at least half of the calls attempted from Complainants' payphones were "completed," as that term is defined by the Commission's rules and orders. Since April 22, 1999, the prescribed rate for dial-around compensation has been \$0.24 per completed call.⁵² Thus, Complainants are entitled to recover \$0.24 on 50 percent of the attempted calls (or \$0.12 for each call attempted) from Complainants' payphones using Global Crossing's services that were resold by TS Interactive.

C. Complainants Have Abandoned Their Claim to Damages Prior to January 1, 2000.

17. Section 415(b) of the Act provides that a claim to recover damages must be filed within two years from the time the claim accrues.⁵³ Here, Complainants filed their Complaint on April 19, 2002. Thus, a straightforward application of section 415(b) would seem to require that Complainants may recover damages only on claims that accrued on or after April 19, 2000. Nevertheless, Complainants seek to recover damages for every completed call routed through TS Interactive's switch from Complainants' payphones for the period *February 28, 1999* through November 23, 2001.⁵⁴ Despite several requests from Commission staff to explain why Complainants' recovery period should go beyond the two year period outlined in section 415(b) of the Act,⁵⁵ Complainants declined to do so.⁵⁶ Thus, we

⁴⁸Pace Declaration at 1-2, ¶ 3; October 3 Additional Damages materials at 6, n.9.

⁴⁹Pace Declaration at 1-2, ¶ 3.

⁵⁰*Id.* at 2, ¶ 4.

⁵¹*Id.*

⁵²*Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2632, ¶ 191 (1999) (subsequent history omitted).

⁵³47 U.S.C. § 415(b).

⁵⁴Supplemental Complaint at 22-23, ¶ 48.

⁵⁵47 U.S.C. § 415(b).

⁵⁶See *APCC Services, Inc., et al., v. TS Interactive*, Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, to Albert H. Kramer, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (July 31, 2003); *APCC Services, Inc., et al., v. TS Interactive*, Letter from Radhika V. Karmarkar, Deputy Chief, Market Disputes Resolution Division,

find no basis in this record to extend the recovery period beyond the statutory two year limitations period. Accordingly, we conclude that only claims for damages that accrued on or after April 19, 2000 are timely.

18. For purposes of this case only, we accept Complainants' assertion that the obligation of carriers to compensate payphone owners for dial-around calls arises quarterly, on the first day of the quarter "that is one quarter after the one in which those calls were made (*e.g.*, calls made in the first quarter of 1999 became due on the first day of the third quarter of 1999)."⁵⁷ According to Complainants, this is because, under standard industry practices, dial-around compensation is paid quarterly.⁵⁸ Accordingly, a claim for a failure to pay payphone dial-around compensation does not accrue until the date by which such compensation is ordinarily due.⁵⁹

19. Applying that standard here to determine which claims accrued on or after April 19, 2000, we conclude that Complainants are entitled to damages only for completed calls made after January 1, 2000. Specifically, compensation for completed calls made during the first quarter of 2000—from January 1 to March 31—was due on July 1, 2000, within the two-year statute of limitations period; however, compensation for completed calls made during the fourth quarter 1999—from October 1 to December 31—was due on April 1, 2000, outside (by eighteen days) the two-year statute of limitations period. Accordingly, the following damages calculation performed by Commission staff reflects the fact that Complainants are entitled to damages only for completed calls made after January 1, 2000.

D. Summary of Damages

20. After carefully reviewing the data submitted by Complainants, we find that TS Interactive owes Complainants the following amounts for dial-around compensation:

Enforcement Bureau, FCC, to Allan C. Hubbard and Gregory D. Kwan, Counsel for Complainants, and Douglas R. Hirsch, Counsel for TS Interactive, File No. EB-02-MD-012 (March 16, 2004). Complainants simply stated that the statute of limitations "is an affirmative defense which needs to be raised by the Defendant" pursuant to the Commission's formal complaint rules. October 3 Additional Damages Materials at 11. According to Complainants, since TS Interactive has failed or refused to file an answer to either the formal complaint or the supplemental complaint for damages, "the statute of limitations issue has not been appropriately raised." *Id.* See *APCC Services, Inc., et al., v. TS Interactive*, Letter from Albert H. Kramer, Counsel for Complainants, to Marlene Dortch, Secretary, FCC, File No. EB-02-MD-012 (filed March 29, 2004) (arguing that the Commission "should act on the basis of the record before it."). As explained above, however, in a default judgment context, we have an independent obligation to ensure that the damages awarded are reasonable. This obligation includes investigating defenses that seem obvious and clear in the record.

⁵⁷Additional Materials to Complainants' Supplemental Complaint for Damages at 11 n. 23 (citing *APCC Services, Inc. v. WorldCom, Inc.*, 35 F.Supp.2d 1, 9 (D.D.C. 2001)).

⁵⁸See October 3 Additional Damages Materials at 9 n.19; *APCC Services, Inc. v. WorldCom, Inc.*, 35 F.Supp.2d 1, 9 (D.D.C. 2001); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 13 FCC Rcd 7303, 7305, ¶ 4 (Enf. Div., Com. Car. Bur. 1998) (subsequent history omitted).

⁵⁹See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 13 FCC Rcd 7303, 7305, ¶ 4 (Enf. Div., Com. Car. Bur. 1998) (subsequent history omitted).

Damages Calculation for Compensation Owed Complainant APCC Services, Inc.:

<u>Year</u>	<u>Quarter</u>	<u># of Calls</u>	<u>Compensation</u>
2000	1 st	64,814	\$ 7,777.68
	2 nd	242,554	\$ 29,106.48
	3 rd	401,847	\$ 48,221.64
	4 th	400,627	\$ 48,075.24
2001	1 st	448,371	\$ 53,804.52
	2 nd	863,064	\$103,567.68
	3 rd	896,314	\$107,557.68
	4 th	401,836	\$48,220.32 ⁶⁰
TOTAL		3,836,812	\$460,417.44

Damages Calculation for Compensation Owed Complainant Data Net Systems, LLC:

<u>Year</u>	<u>Quarter</u>	<u># of Calls</u>	<u>Compensation</u>
2000	1 st	1,052	\$ 126.24
	2 nd	1,563	\$ 187.56
	3 rd	2,313	\$ 277.56
	4 th	1,208	\$ 144.96

⁶⁰The data obtained from the National Payphone Clearinghouse website indicates that 151,220 calls were placed from Data Net Systems' payphones during November, 2001 using Global Crossing's services that were resold by TS Interactive, and that 11,903 calls were placed during December, 2001. As described in the *Liability Order*, however, switch-based resellers such as TS Interactive were required to pay dial-around compensation to a PSP between October 7, 1997 and November 23, 2001, when, as here, the switch-based reseller contractually assumed responsibility for the dial-around payments from the first facilities-based IXC. See *Liability Order* at 25527, ¶ 8. Consistent with the Commission's orders, the *Liability Order* imposed liability for calls placed until November 23, 2001. To account for this discrepancy, we multiplied the total number of calls placed in November, 2001 by a factor of .7333, which represents the percentage of the month of November that passes during its first 22 days, and subtracted the calls placed during December, 2001. This approximation rests on an assumption that there were roughly an identical number of calls placed each day during the month of November. Due to the holiday of Thanksgiving, this may not be accurate, but without any evidence in the record to the contrary, we will use this simple ratio.

2001	1 st	978	\$ 117.36
	2 nd	1,933	\$ 231.96
	3 rd	2,316	\$ 277.92
	4 th	955	\$ 114.60 ⁶¹
TOTAL		12,318	\$ 1,478.16

Damages Calculation for Compensation Owed Complainant Intera Communications Corp.⁶²

<u>Year</u>	<u>Quarter</u>	<u>Representing</u>	<u># of Calls</u>	<u>Compensation</u>
2000	1 st	Pacific Coin	15,635	\$ 1,876.20
		GoldenTel	1,142	\$ 137.04
		TOTAL	16,777	\$ 2,013.24
	2 nd	Pacific Coin	39,864	\$ 4,783.68
		GoldenTel	2,165	\$ 259.80
		TOTAL	42,029	\$ 5,043.48
	3 rd	Pacific Coin	58,450	\$ 7,014.00
		GoldenTel	4,893	\$ 587.16
		TOTAL	63,343	\$ 7,601.16
	4 th	Pacific Coin	67,764	\$ 8,131.68
		GoldenTel	5,348	\$ 641.76
		TOTAL	73,112	\$ 8,773.44

⁶¹The data obtained from the National Payphone Clearinghouse website indicates that 367 calls were placed from Data Net Systems' payphones during November, 2001 using Global Crossing's services that were resold by TS Interactive. As described in footnote 60, *supra*, these figures must be prorated to limit liability to calls placed until November 23, 2001. We used the monthly data contained on the National Payphone Clearinghouse to perform this calculation. To reach the results summarized here, we removed the calls placed in December, 2001, and multiply the number of calls placed in November, 2001 by .7333, which represents the proportion of the month of November that falls within the period for calculating damages. This approximation rests on an assumption that there were roughly an identical number of calls placed each day during the month of November. It appears that Complainants estimated that 245 compensable calls were placed during November, 2001. Compare October 3 Additional Damages Materials at 7-8 with October 3 Additional Damages Materials at Exhibit G. Furthermore, Complainants appear to have used the incorrect 367-call figure when calculating interest due on the past-due dial-around compensation. See October 3 Additional Damages Materials at Exhibit L. We caution Complainants to recalculate the interest due based upon the number of calls adopted in this order.

⁶²On October 22, 2002, Intera purchased Pacific Coin and GoldenTel. See October 3 Additional Damages Materials at Exhibit H (Declaration of M. Sean Venezia), ¶ 4. For clarity, the damages calculation has been broken up according to the payphones owned by those two former entities.

2001	1 st	Pacific Coin	83,210\$	9,985.20
		GoldenTel	3,598\$	431.76
		TOTAL	86,808\$	10,416.96
	2 nd	Pacific Coin	163,268\$	19,592.16
		GoldenTel	3,674\$	440.88
		TOTAL	166,942\$	20,033.04
	3 rd	Pacific Coin	162,878\$	19,545.36
		GoldenTel	3,428\$	411.36
		TOTAL	166,306\$	19,956.72
	4 th	Pacific Coin	72,602\$	8,712.24
		GoldenTel	1,201\$	144.12
		TOTAL	73,803\$	8,856.36 ⁶³
TOTAL		689,120\$	82,694.40	

E. Calculation of Interest

21. Complainants request that the Commission award interest on the late payments at an annual rate of 11.25 percent, accruing from “the date the amount owing for each quarter initially was due until the date paid.”⁶⁴ Complainants further allege (as previously described) that compensation for dial-around calls “is due 90 days from the end of the calendar quarter for which dial-around compensation is being billed,”⁶⁵ and that such schedule should be utilized to calculate the applicable interest.⁶⁶

22. The Commission has previously stated that an 11.25 percent interest rate is appropriate for late payment of dial-around compensation, and we therefore will allow 11.25 percent interest here.⁶⁷

⁶³The data obtained from the National Payphone Clearinghouse website indicates that 83,952 calls were placed from Pacific Coin’s payphones, and 1,446 calls were placed from GoldenTel’s payphones, during the fourth quarter of 2001 using Global Crossing’s services that were resold by TS Interactive. As described in footnote 60, *supra*, these figures must be prorated to limit liability to calls placed until November 23, 2001. We used the monthly data contained on the National Payphone Clearinghouse to perform this calculation. Using the data submitted by Complainants, we have concluded that, using GTI’s payphones, 688 calls were placed in October, 2001; 700 calls were placed in November, 2001; and 58 calls were placed in December, 2001. Using PCCI’s payphones, we calculate that 48,654 calls were placed in October, 2001; 32,658 calls were placed in November, 2001; and 2,640 calls were placed in December, 2001. To reach the results summarized here, we removed the calls placed in December, 2001, and multiply the number of calls placed in November, 2001 by .7333, which represents the proportion of the month of November that falls within the period for calculating damages.

⁶⁴Supplemental Complaint at 14, ¶ 26.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778, 1805-06 at ¶¶ 59-60 (1997) (subsequent history omitted); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second

Interest shall begin to accrue 90 days from the end of the calendar quarter for which dial-around compensation is being billed. The parties shall calculate the applicable interest using the base damages amounts set forth in section III.D, *supra*.⁶⁸

IV. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the Complainants' Supplemental Complaint for Damages IS GRANTED to the extent indicated herein as to Complainants APCC Services, Inc., Data Net Systems, LLC, and Intera Communications Corp.

24. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that TS Interactive shall pay APCC Services, Inc., within 90 days of release of this Order, damages in the amount of \$460,417.44, plus interest at an annual rate of 11.25 percent, computed beginning 90 days from the end of the calendar quarter for which dial-around compensation was initially billed and continuing through the date of payment.

25. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that TS Interactive shall pay Data Net Systems, LLC, within 90 days of release of this Order, damages in the amount of \$1,478.16, plus interest at an annual rate of 11.25 percent, computed beginning 90 days from the end of the calendar quarter for which dial-around compensation was initially billed and continuing through the date of payment.

26. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that TS Interactive shall pay Intera Communications Corp., within 90 days of release of this Order, damages in the amount of \$82,694.40, plus interest at an annual rate of 11.25 percent, computed beginning 90 days from the end of the calendar quarter for which dial-around compensation was initially

Report and Order, 14 FCC Rcd 2545, 2631 at ¶ 189 (1999) (subsequent history omitted); *Bell-Atlantic-Delaware, Inc. et al. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 8112, 8120 at ¶ 17 n.43 (2001) ("*Bell-Atlantic-Delaware*").

⁶⁸See *General Communication, Inc. v. Alaska Communications Systems Holdings, Inc. et al.*, Memorandum Opinion and Order, 16 FCC Rcd 2834, 2864 at ¶ 77 (2001), *reversed on other grounds*, *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002); *Bell-Atlantic-Delaware*, 16 FCC Rcd at 8120, ¶ 17.

billed and continuing through the date of payment.

27. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the complaint against TS Interactive IS DENIED with respect to claims asserted by Davel Communications, Inc., and with respect to any claims asserted by Jaroth, Inc. that have not been transferred or assigned to Intera Communications Corp.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau