

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

In the Matter of)	
)	
APCC Services, Inc.,)	
Data Net Systems, LLC,)	
Davel Communications, Inc.,)	File No. EB-03-MD-011
Jaroth, Inc. d/b/a Pacific Telemanagement)	
Services, and)	
Intera Communications Corp.,)	
)	
Complainants,)	
)	
v.)	
)	
Network IP, LLC, and)	
Network Enhanced Telecom, LLP,)	
)	
Defendants.)	

ORDER

Adopted: October 26, 2005

Released: October 27, 2005

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, pursuant to sections 1.3 and 1.727 of the Commission's rules,¹ we grant in substantial part a motion² filed by Complainants (collectively, "APCC") for waiver of the six-month filing deadline set forth in section 1.718 of the Commission's rules.³ For statute of limitations purposes,

¹ 47 C.F.R. §§ 1.3, 1.727.

² APCC Services, *et. al.*, v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Complainants' Motion for Partial Waiver of Section 1.718 of the Commission's Rules, File No. EB-03-MD-011 (filed June 3, 2003) ("Waiver Motion"). Defendants (collectively, "NET") opposed the motion, and APCC replied. *See* APCC Services, *et. al.*, v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Opposition to Complainants' Motion for Partial Waiver of Section 1.718 of the Commission's Rules, File No. EB-03-MD-011 (filed June 9, 2003) ("Opposition to Waiver Motion"); APCC Services, *et. al.*, v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Complainants' Reply to Defendants' Opposition to Complainants' Motion for Partial Waiver of Section 1.718, File No. EB-03-MD-011 (filed June 17, 2003) ("Reply"). Because rule 1.727(h) precludes a reply to an opposition to a motion, 47 C.F.R. § 1.727(h), APCC filed a motion for leave to file a reply along with their Reply. APCC Services, *et. al.*, v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Complainants' Conditional Motion for Leave to File a Reply, File No. EB-03-MD-011 (filed June 17, 2003). NET opposed the motion. APCC Services, *et. al.*, v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Defendants' Opposition to Complainants' Conditional Motion for Leave to File a Reply, File No. EB-03-MD-011 (filed June 23, 2003). Because we do not rely on any submission other than the Waiver Motion and the Opposition to Waiver Motion, we dismiss as moot APCC's motion for leave to file a reply.

³ 47 C.F.R. § 1.718.

rule 1.718 allows the filing date of a formal complaint to “relate back” to the filing date of a prior informal complaint regarding the same claim, but only if, *inter alia*, the formal complaint is filed within six months of the defendant’s response to the informal complaint. Here, APCC’s counsel attempted to file APCC’s formal complaint on the very last day of the applicable six-month period. The formal complaint was automatically rejected, however, because APCC’s counsel submitted the wrong filing fee. Consequently, absent a waiver and brief extension of the six-month filing deadline in rule 1.718, the statute of limitations will bar a significant portion of APCC’s damages claim, perhaps amounting to a potential loss of millions of dollars.

2. For the reasons stated below, we conclude that the hardship APCC would suffer as a result of their counsel’s administrative errors outweighs the need to enforce our procedural rules strictly, especially given that NET’s and the Commission’s interest in finality would not be materially undermined by a brief extension of the deadline. Thus, under the unique circumstances here, we find that the public interest is better served by granting the waiver to allow some small flexibility in the deadline established by rule 1.718.

II. BACKGROUND

3. Complainants are, *inter alia*, billing and collection agents for numerous independent payphone service providers (“PSPs”).⁴ NET is a switch-based reseller.⁵ On behalf of Complainants’ PSP principals, the Formal Damages Complaint seeks recovery of “dial-around” payphone compensation from Defendants under rule 64.1300,⁶ which implements (along with other rules) section 276 of the Communications Act of 1934, as amended (the “Act”).⁷

4. Under rule 1.718, for purposes of tolling the statute of limitations, the filing date of a formal complaint can “relate back” to the filing date of a prior informal complaint involving the same parties and the same matter, but only if the formal complaint is filed within six months after the defendant’s response to the informal complaint.⁸ Here, on September 30, 2002, APCC filed an informal complaint against NET⁹ seeking recovery of payphone compensation from one quarter before the quarter ending on September 30, 2000¹⁰ (two years before the filing date, the limitations period under section 415

⁴ See, e.g., APCC Services, *et al.*, v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Supplemental Complaint for Damages, File No. EB-03-MD-011 (filed Apr. 4, 2004) (“Formal Damages Complaint”) at 2. Although the Formal Damages Complaint does not specify the number of PSPs represented by Complainants, it is clear that such PSPs are quite numerous. See, e.g., Formal Damages Complaint at Attachments 16, 21, 25 and 29.

⁵ Formal Damages Complaint at 2; APCC Services, *et al.*, v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Answer to Damages Complaint, at 2, File No. EB-03-MD-011 (filed May 31, 2005) (“Answer”).

⁶ 47 C.F.R. § 64.1300. See Formal Damages Complaint, *supra*.

⁷ 47 U.S.C. § 276.

⁸ 47 C.F.R. § 1.718 (providing, in pertinent part, that a formal complaint “will be deemed to relate back to the filing date of the informal complaint: *Provided*, That the formal complaint: (a) Is filed within six months from the date of the carrier’s [*i.e.*, the defendant’s] report . . .”).

⁹ APCC Services, *et al.*, v. NetworkIP, LLC, Informal Complaint, File No. EB-02-MDIC-0071 (filed Sept. 30, 2002).

¹⁰ Due to certain unique characteristics of payphone billing and payment cycles, payphone compensation claims can extend back a quarter of a year farther than most other kinds of claims. Thus, an informal complaint filed on September 30, 2002 allows recovery back to April 1, 2000. See generally *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, 14 FCC Rcd 2545, 2631 at paras. 187-190 (1999) (subsequent history omitted); see also, *APCC Services et al. v. TS Interactive*, Memorandum Opinion and Order, 19 FCC Rcd 10456, 10459 at para. 18 (Enf. Bur. 2004); *APCC Services, et al. v.*

of the Act¹¹) to November 23, 2001 (the regulatory cut-off date for the kind of compensation at issue¹²). NET filed its response to APCC's informal complaint on November 19, 2002.¹³ Therefore, pursuant to the six-month deadline under rule 1.718, May 19, 2003 was the last date on which APCC could file a formal complaint that would relate back to September 30, 2002 (the filing date of the informal complaint) and thereby retain the full potential recovery period of April 1, 2000 – November 23, 2001.

5. On May 19, 2003, the filing deadline under rule 1.718, APCC's counsel attempted to file a formal complaint against NET. APCC's counsel submitted the wrong filing fee, however: \$165 per defendant instead of the \$170 required by Commission rules at that time.¹⁴ In addition, APCC's counsel submitted a single check rather than a check for each defendant. Because APCC submitted an inadequate filing fee, Mellon Bank automatically rejected and returned the formal complaint.¹⁵ As a result, the formal complaint was not "filed" on May 19, 2003, and APCC missed the six-month deadline under rule 1.718.¹⁶

6. According to APCC, it submitted the wrong filing fee (and thus missed the six-month deadline under rule 1.718) because its counsel consulted only the hard-copy version of the Code of Federal Regulations ("CFR"), dated October 1, 2002, which contained a filing fee amount -- \$165 per defendant -- that had been superseded by the time APCC filed its formal complaint in May 2003. The new fee of \$170 per defendant, although adopted in July 2002, did not become effective until after publication of the October 1, 2002 CFR, and so was not reflected therein.¹⁷

7. On June 3, 2003, APCC filed a revised version of the formal complaint, along with the correct filing fee.¹⁸ That same day, APCC also filed the instant motion for waiver and extension of rule 1.718's six-month relation-back deadline from May 19, 2003 to June 3, 2003.¹⁹ APCC argues that we should waive and extend the filing deadline because (i) APCC's counsel made a good faith effort to file on time; (ii) the fee error was *de minimis* and administrative; and (iii) denying a waiver would impose a

(...continued from previous page)

NetworkIP, LLC and Network Enhanced Telecom, LLP, Letter from Commission Staff to Counsel, File No. EB-03-MD-011 (rel. Oct. 6, 2005) ("ISC Order").

¹¹ 47 U.S.C. § 415.

¹² See, e.g., Formal Damages Complaint at 6, n.8; 8-9, paras. 11-12. See generally *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19983-86 at paras. 16-24 (2003) (subsequent history omitted); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 FCC Rcd 8098, 8105 at para. 16 (2001) (subsequent history omitted).

¹³ Answer at 3.

¹⁴ 47 C.F.R. § 1.1106.

¹⁵ See generally 47 C.F.R. § 1.1116(a).

¹⁶ 47 C.F.R. § 1.1116(a)(2).

¹⁷ Waiver Motion at 4-5, 7-9.

¹⁸ APCC Services, *et al.* v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Formal Complaint, File No. EB-03-MD-011 (filed June 3, 2003) ("Formal Liability Complaint"). See APCC Services, *et al.* v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Defendants' Answer to Formal Complaint, File No. EB-03-MD-011 (filed July 28, 2003) ("Liability Answer"); APCC Services, *et al.* v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Complainants' Reply to Defendants' Answer, File No. EB-03-MD-011 (filed Sept. 24, 2003) ("Liability Reply").

¹⁹ Waiver Motion, *supra*.

severe and undue penalty on Complainants' small PSP clients.²⁰ NET vehemently opposes the Motion, arguing, *inter alia*, that (i) APCC has not met its heavy burden of showing "special circumstances" warranting a waiver of the Commission's filing deadline, and (ii) the errors of APCC's counsel here are precisely the kind of negligent acts that the Commission has repeatedly refused to excuse, despite the prospect of harsh consequences.²¹

III. DISCUSSION

8. Our resolution of APCC's Waiver Motion will affect the amount of payphone compensation damages to which Complainants' PSP clients may be entitled.²² Specifically, the potential recovery period will be about nine months shorter if we deny the Waiver Motion than if we grant the Waiver Motion.²³ Although the record does not yet permit us to ascribe a precise dollar value to that time differential, that differential may well amount to millions of dollars.²⁴

9. The standards governing our assessment of APCC's request to waive rule 1.718 are well established:

Generally, the Commission may grant a waiver for good cause shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Waiver is therefore

²⁰ Waiver Motion at 5, 7-9, 12, 15-17.

²¹ Opposition to Waiver Motion at 5-15. NET also argues that APCC's Waiver Motion actually seeks dispositive rulings on three issues, thus bringing the Motion under rule 1.727(b), whose pleading requirements the Motion does not meet. *Id.* at 15-18. We reject NET's assertion, because it is clear that the Waiver Motion seeks merely a waiver of the rule in question, 47 C.F.R. § 1.718, and the dispositive issues mentioned by NET are argued not in the Waiver Motion but in the Formal Liability Complaint.

²² In its formal complaint filed on June 3, 2003, APCC asked that the issue of liability be addressed first, and that the issue of damages be decided in a subsequent phase of the proceeding if APCC prevailed in the first phase. Formal Liability Complaint at 1-2. *See* 47 C.F.R. § 1.722 (providing for such "bifurcation" of liability and damages determinations). During the liability phase of this proceeding, we deferred ruling on the instant Waiver Motion until the damages phase (if any), because the outcome of the Motion would affect only the amount of damages, not NET's liability. APCC Services, *et al.* v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Notice of Formal Complaint, File No. EB-03-MD-011 (rel. July 8, 2003). We then ruled in APCC's favor on liability on February 1, 2005, *APCC Services, et al. v. NetworkIP, LLC and Network Enhanced Telecom, LLP*, Memorandum Opinion and Order, 20 FCC Rcd 2073 (Enf. Bur. 2005) ("*Bureau Liability Order*"), whereupon APCC filed a supplemental complaint for damages on April 4, 2005. APCC's Waiver Motion is now ripe for decision, because such decision will determine the length of the potential damages recovery period. We note further that NET filed an application for review of the *Bureau Liability Order* on March 1, 2005, which is pending. APCC Services, *et al.*, v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Application for Review of Liability Order, File No. EB-03-MD-011 (filed March 1, 2005).

²³ With the waiver, the relevant period for damages is April 1, 2000 to November 23, 2001; without the waiver, it is January 3, 2001 to November 23, 2001. *See, e.g.*, ISC Order at 2; APCC Services, *et al.* v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Letter from Commission Staff to Counsel, File No. EB-03-MD-011 (rel. June 21, 2005) ("June 21 Letter") at 3; APCC Services, *et al.* v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Letter from Commission Staff to Counsel, File No. EB-03-MD-011 (rel. Oct. 6, 2005). *See supra*, n.10.

²⁴ *See* Formal Damages Complaint at Attachment 22; APCC Services, *et al.* v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Defendants' Call Completion Data, File No. EB-03-MD-011 (filed Sept. 2, 2005); ISC Order at 4.

appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.²⁵

Put differently, “[w]hile an applicant for a waiver faces a heavy burden of persuasion, the Commission must give a ‘hard look’ to meritorious waiver requests and may grant such requests where the waiver will not undermine the policy of the general rule and where public interest considerations require the waiver.”²⁶ Applying those standards to the facts here, we largely grant but partially deny APCC’s Waiver Motion, for the reasons described below.

10. APCC missed the six-month filing deadline under rule 1.718 because its counsel made two easily avoidable mistakes: (i) consulting only the hard-copy version of the CFR to learn the filing fee, rather than also consulting readily available, and more frequently updated, on-line versions of the CFR (*e.g.*, Westlaw, LEXIS); and (ii) waiting until the last day to file the formal complaint. NET contends that we should not relieve Complainants of the consequences of their counsel’s negligence, just as the Commission has refrained from doing so in numerous, allegedly analogous circumstances.²⁷ For the following reasons, we disagree with NET.

11. “Considerations of hardship, equity, [and] more effective implementation of overall policy” support waiver of rule 1.718 under the particular facts here.²⁸ Denying a waiver could deprive APCC’s principals – numerous independent payphone service providers -- of the right to millions of dollars in compensation. That would cause APCC’s principals to bear substantial hardship due to the lack of reasonable care taken by APCC’s counsel. Moreover, that would allow APCC’s counsel’s failures to impinge upon an overall policy of section 276 of the Act -- “to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone....”²⁹ Given these unique circumstances, this case is a situation where the “Commission may

²⁵ *Application for Review by Information Technology Dept. of State of North Dakota*, Order, 18 FCC Rcd 21521, 21524 at para. 9 (2003) (“*North Dakota Order*”).

²⁶ *Application of Winstar Broadcasting*, Memorandum Opinion and Order, 17 FCC Rcd 6126, 6128 at para. 9 (2003) (“*Winstar Order*”). See, *e.g.*, *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 900-901 (D.C. Cir. 2004); *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512, 517-522 (D.C. Cir. 1999); *Northeast Cellular Telephone v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁷ Opposition to Waiver Motion at 5-15. See, *e.g.*, *North Dakota Order*, 18 FCC Rcd 21521 (denying one-day waiver of USF filing deadline, even though mere administrative errors caused applicant’s day-late postmark); *Application for Review of Denial of Vista Communications, Inc.’s Request for Waiver*, Memorandum Opinion and Order, 18 FCC Rcd 16957 (2003) (denying waiver of installment payment deadlines, because applicant’s confusion and uncertainty over its installment payment schedule, and its lack of knowledge regarding the grace period provisions, did not amount to good cause), *aff’d*, *Vista Communications, Inc. v. FCC*, 2004 WL 1171431 (D.C. Cir. 2004); *Southern Communications Systems, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 25103 (2000) (denying four-day waiver of payment deadline, because employee’s illness, lack of internal coordination, and sloppy record-keeping did not amount to good cause) (Furchtgott-Roth dissenting), *aff’d*, Second Memorandum Opinion and Order, 16 FCC Rcd 18357 (2001); *Inforum Communications, Inc. Waiver Request for Late Acceptance of BTA Installment Payment*, Order, 19 FCC Rcd 83 (ASA Div., Wireless Tel. Bur. 2004) (denying 2-day waiver of payment deadline, because absence of officers authorized to make payment did not amount to good cause); *Request for Review of the Decision of the Universal Service Administrator by School District of Durand*, Order, 18 FCC Rcd 9697 (TAP Div., Wireline Comp. Bur. 2003) (denying waiver of USF filing deadline, because confusion about complicated requirements does not amount to good cause).

²⁸ *North Dakota Order*, 18 FCC Rcd at 21524, para. 9.

²⁹ 47 U.S.C. § 276(b)(1)(A).

exercise its discretion to waive a rule ... [because] the particular facts make strict compliance inconsistent with the public interest.”³⁰

12. We recognize that the errors by APCC’s counsel are difficult to excuse, given that they were easily avoidable, and APCC’s law firm is highly experienced, resourceful, and knowledgeable in communications law, and therefore should be expected to know and closely adhere to Commission processes. On the other hand, APCC’s counsel did *try* to file the formal complaint on time, and they corrected their error and filed another formal complaint 15 days later. There is no evidence of any attempt to “game” the system to obtain some undue advantage. During the weeks leading up to the deadline, APCC was in frequent contact with NET, discussing the status of the dispute and the prospects for pre-complaint settlement.³¹ NET knew all along that, in the absence of a settlement, APCC planned to file a formal complaint; and APCC attempted in good faith to do just that, finally succeeding shortly after the deadline passed. For all these reasons, waiving the filing deadline would not materially undermine a primary purpose of rule 1.718 at stake here, which is to ensure finality, certainty, and repose for prospective defendants.

13. We cannot completely overlook, however, the fact that the efficient and effective functioning of the Commission’s complaint processes, both informal and formal, requires close attention and adherence to the Commission’s procedural rules, including filing fees and deadlines like that established in rule 1.718. Thus, we will consider the carelessness of APCC’s counsel in crafting the scope of our waiver.³²

14. In light of all of the specific facts previously described, we conclude that the public interest would best be served by waiving and extending rule 1.718’s filing deadline – and thereby allowing the formal complaint’s filing date of June 3, 2003 to relate back to the informal complaint’s filing date of September 30, 2002 – for all aspects of APCC’s compensation claim, *except* for prejudgment interest accrued during the 15-day period between when APCC should have filed its formal complaint with the correct fee (May 19, 2003) and when APCC did file its formal complaint with the correct fee (June 3, 2003).³³ This substantial, but not complete, grant of APCC’s Waiver Motion

³⁰ *North Dakota Order*, 18 FCC Rcd at 21524, para. 9. See, e.g., *Metricom, Inc. Request for Waiver of Section 27.208(A) of the Commission’s Rules*, Order, 13 FCC Rcd 890 (Wireless Tel. Bur. 1998) (granting two-day waiver of payment deadline, because delay caused by applicant’s bank’s error in transmitting payment to Mellon Bank); *Southern Communications Systems, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission’s Rules*, Order, 12 FCC Rcd 1532 (Wireless Tel. Bur. 1997) (granting one-day waiver of payment deadline, because of applicant’s prior record of compliance, prompt remedial action, and good faith effort to pay on time); *MFRI, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission’s Rules*, Order, 12 FCC Rcd 1540 (Wireless Tel. Bur. 1997) (granting one-day waiver of payment deadline, because applicant attempted to pay on time and failed only due to administrative errors); *Longstreet Communications Int’l, Inc. Request for Waiver of Section 24.711(a)(2) of the Commission’s Rules*, Order, 12 FCC Rcd 1549 (Wireless Tel. Bur. 1997) (granting nine-day waiver of payment deadline, because of applicant’s prior record of compliance, prompt remedial action, and good faith effort to pay on time); *Application of Fred Farley for Authority to Construct and Operate a Domestic Public Cellular Radio Telecommunications Service*, Memorandum Opinion and Order, 4 FCC Rcd 4670 (Com. Car. Bur. 1989) (granting three-day waiver of filing deadline, because improper filing on due-date caused by clerical error).

³¹ Waiver Motion at 4, n.5; Opposition to Waiver Motion at 4-5; Liability Answer at 17.

³² See n. 27, *supra*.

³³ In other words, the calculation of prejudgment interest on APCC’s award of payphone compensation in this damages proceeding will exclude the period from May 19, 2003 to June 3, 2003.

achieves an appropriate balance of the public interests in avoiding undue hardship, promoting the Act's substantive policy objectives, and discouraging disregard of the Commission's procedural requirements.³⁴

IV. CONCLUSION

15. The Commission has discretion in granting or rejecting waiver requests, and in fashioning any grant of a waiver. In the unique circumstances here, we find that the errors that APCC's counsel committed should not deprive Complainants' PSP principals of the chance to recover compensation for the period in question, especially because allowing the waiver does not materially detract from NET's and the Commission's interest in finality. Further, APCC's counsel did make a good faith effort to comply with the filing deadline, and promptly corrected the failure to do so. As described above, we have crafted a grant that serves the public interest in this case, while admonishing APCC's counsel to pay appropriate regard to the Commission's procedural rules.

V. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 208, and 276, and sections 1.3, 1.711-1.736, and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.711-1.736, 64.1300-64.1320, and the authority delegated pursuant to sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Complainants' motion for partial waiver of section 1.718 of the Commission's rules IS GRANTED to the extent set forth above, and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith
Chief, Enforcement Bureau

³⁴ Cf., e.g., *Metricom*, *supra*; *Southern Communications*, *supra*; *MFRI*, *supra*; *Longstreet Communications*, *supra* (all four orders waiving deadlines, but denying movants a "complete waiver" and requiring movants to pay penalties for missing deadlines). NET also argues that we should deny the Waiver Motion because, even had APCC made appropriate fee payments, the formal complaint would have been dismissed for failure to comply with the Commission's pleading requirements. Opposition to Waiver at 10-12. We decline to engage in such *post-hoc* speculation here. It is possible that supplementation rather than dismissal would have been ordered. Thus, NET's argument does not counsel against waiver here.