

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

In the Matter of)
)
APCC Services, Inc.,)
)
Complainant,) File No.: EB-10-MD-002
)
v.)
)
Intelco Communications, Inc.,)
)
Defendant.)

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 2013

Released: March 5, 2013

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we grant in part an unopposed Motion for Default Judgment¹ against Intelco Communications, Inc. (Intelco), thereby resolving a formal complaint filed by APCC Services, Inc. (APCC)² against Intelco pursuant to section 208 of the Communications Act of 1934, as amended (Act).³ The Complaint alleges that Intelco violated sections 201(b) and 276(b) of the Act⁴ by failing to comply with the Commission's rules that require Intelco to pay dial-around compensation to APCC for calls originating from APCC's payphones.⁵ For the following reasons, we grant APCC's Motion for Default Judgment and order Intelco to pay APCC damages in the amount of \$1,026,267.84, plus interest.

II. BACKGROUND

A. Per-Call Payphone Compensation

2. Section 276 of the Act directed the Commission to establish a per-call compensation plan to ensure that all payphone service providers (PSPs) are fairly compensated for "each and every

¹ Motion for Default Judgment with Supporting Memorandum of Law, File No. EB-10-MD-002 (filed June 7, 2010) (Motion for Default Judgment).

² Formal Complaint, File No. EB-10-MD-002 (filed Mar. 12, 2010) (Complaint).

³ 47 U.S.C. § 208.

⁴ 47 U.S.C. §§ 201(b), 276(b).

⁵ 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.

completed intrastate and interstate call using their payphone.”⁶ Included among the calls subject to this payment mandate are certain categories of coinless payphone calls—known as “dial-around calls”—during which the caller makes a coinless call using an access code or toll-free number to reach a carrier other than the payphone’s presubscribed long distance carrier.⁷ The Commission’s implementing rules place the responsibility for paying such “dial-around compensation” on the “Completing Carrier,” which is the “long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call.”⁸ From April 21, 1999, to September 26, 2004, the default compensation per-call rate for these calls, to be paid by the Completing Carrier to the PSP, was \$.24, and after September 27, 2004, the default compensation rate is \$.494.⁹

B. The Parties

3. APCC is an agent for certain PSPs for the billing and collection of dial-around call compensation.¹⁰ According to APCC, Intelco was at all relevant times a common carrier that provided interexchange telecommunications service in the United States as a switch-based reseller of long distance calls, including calls originating from payphones owned by PSPs represented by APCC, and was the Completing Carrier with respect to the calls at issue.¹¹

4. On March 12, 2010, APCC filed the instant Complaint against Intelco seeking to recover unpaid dial-around compensation allegedly due under section 276 of the Act and the Commission’s rules.¹² Specifically, APCC alleges that Intelco failed to pay dial-around compensation from July 1, 2004, to September 30, 2009 (the Complaint Period) for calls originating from APCC’s PSPs’ payphones and completed by Intelco.¹³ APCC also alleges that Intelco has violated Commission rules requiring payphone call tracking systems, quarterly reports, financial certification, and annual audits and audit reports.¹⁴

⁶ 47 U.S.C. § 276(b)(1)(A).

⁷ See, e.g., *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, 15638, para. 3 & n.9 (2004) (*Rate Increase Order*) (subsequent history omitted).

⁸ 47 C.F.R. § 64.1300(a)-(b), (d). “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. §§ 64.1300-64.1310.

⁹ See, e.g., *Rate Increase Order*, 19 FCC Rcd at 15637, 15640-41, paras. 1, 8-13 (modifying the default compensation rate from \$.24 to \$.494); 47 C.F.R. § 64.1300(d).

¹⁰ Complaint at 4; Complaint, Exhibit 4, Declaration of Ruth Jaeger (Jaeger Decl.) at paras. 5-6. Because APCC is the agent for the PSPs at issue, APCC is referred to herein as if it were the relevant PSP. The list of the represented PSPs is attached to the Complaint as Exhibit 1.

¹¹ See, e.g., Complaint at 5, paras. 9-10; Jaeger Decl. at paras. 8-11; Complaint, Exhibit 7, Intermediate Carrier Report Data (Intermediate Carrier Reports).

¹² See, e.g., Complaint at 2; 47 C.F.R. §§ 64.1300-64.1310; 47 U.S.C. § 276.

¹³ Under Commission rule 1.718, 47 C.F.R. § 1.718, the Complaint relates back to the filing date of the two informal complaints to establish the “Complaint Period.”

¹⁴ See, e.g., Complaint at 2-3; 47 C.F.R. §§ 64.1310-64.1320.

C. Procedural History

5. In June 2006, pursuant to section 208 of the Act, and sections 1.711-1.718 of the Commission's rules,¹⁵ APCC filed two informal complaints against Intelco¹⁶ alleging that Intelco had violated sections 201(b) and 276 of the Act, and sections 64.1300-64.1320 of the Commission's rules,¹⁷ by failing to pay payphone dial-around compensation allegedly due to PSPs represented by APCC. Intelco responded to the second informal complaint,¹⁸ thus establishing a six-month period within which the parties could try to resolve the dispute without the need for APCC to file a formal complaint.¹⁹ On March 12, 2010, after both parties had jointly sought and received numerous extensions of the deadline for APCC to "convert" the unresolved informal complaints to a formal complaint under rule 1.718,²⁰ APCC filed the instant Complaint against Intelco.²¹

6. On March 26, 2010, pursuant to section 1.735 of the Commission's rules,²² the Commission sent a copy of the Complaint to Intelco, with April 16, 2010, as the deadline for filing an answer.²³ Intelco did not, however, file an answer to the Complaint, as required by the Commission's formal complaint rules.²⁴ Consequently, on April 23, 2010, the Commission notified Intelco in writing that the Commission has authority to impose penalties for failure to respond to a Commission request for information or for a violation of Commission rules, and that the Commission may also enter a default judgment against a defendant that fails to participate in a formal complaint proceeding.²⁵ The

¹⁵ 47 U.S.C. § 208; 47 C.F.R. §§ 1.711-1.718.

¹⁶ See Informal Complaint for Collection of Unpaid Payphone Compensation, File No. EB-06-MDIC-0038 (filed June 26, 2006); Informal Complaint for Collection of Unpaid Payphone Compensation, File No. EB-08-MDIC-0044 (filed June 30, 2008).

¹⁷ 47 U.S.C. §§ 201(b), 276; 47 C.F.R. §§ 64.1300-64.1320.

¹⁸ Response to Informal Complaint of APCC Services, Inc., File No. EB-08-MDIC-0044 (filed Aug. 15, 2008).

¹⁹ See, e.g., 47 C.F.R. § 1.718 (providing that an informal complaint complainant must file a formal complaint within six months of the defendant's response in order for the filing date of the formal complaint to "relate back" to the filing date of the informal complaint for purposes of the statute of limitations).

²⁰ See, e.g., Request for Waiver, File No. EB-08-MDIC-0044 (filed Feb. 6, 2009); Request for Waiver, File No. EB-08-MDIC-0044 (filed Jan. 5, 2010).

²¹ This formal complaint proceeding includes the claims from both of APCC's informal complaints.

²² 47 C.F.R. § 1.735.

²³ Letter from Alexander P. Starr, Market Disputes Resolution Division, FCC, to Bassim Kano and Serge Farman, Intelco, File No. EB-10-MD-002 (dated Mar. 26, 2010) (Notice of Formal Complaint). The Commission sent the Notice of Formal Complaint by U.S. Mail and by e-mail on March 26, 2010. When it became clear that the e-mail transmission was incomplete, staff contacted Intelco's former counsel and ascertained a valid e-mail address and fax number, and the Commission again emailed and faxed the Notice of Formal Complaint on April 23, 2010.

²⁴ See 47 C.F.R. §§ 1.720, 1.724.

²⁵ Letter from Jacqueline Spindler, Market Disputes Resolution Division, FCC, to Bassim Kano and Serge Farman, Intelco, File No. EB-10-MD-002 (dated Apr. 23, 2010) (April 23 Notification Letter) (citing 47 U.S.C. §§ 502, 503(b)(1)(B) and *APCC Services, Inc. v. TS Interactive, Inc.*, Order, 17 FCC Rcd 25523 (Enf. Bur. 2002)). The Commission sent the April 23 Notification Letter to Intelco by U.S. Mail, e-mail, and facsimile.

Commission also directed Intelco to indicate, by April 29, 2010, whether it intended to respond to the Complaint.²⁶

7. On April 27, 2010, Intelco informally indicated in a facsimile to Commission staff, i.e., not in a pleading properly filed with the Secretary's office or in conformance with any other Commission procedural rule, that Intelco would "not be filing a response to the formal complaint" because, as a purported Canadian company, Intelco believed the Commission lacked personal jurisdiction over it.²⁷ Notably, the Intelco Fax acknowledged that Intelco was "in receipt of" Commission staff's April 23 Notification Letter, thus showing that Intelco received actual notice of the Complaint.²⁸

8. In a letter ruling dated May 14, 2010,²⁹ Commission staff weighed the consequences of Intelco's failure to submit an answer, and determined that, on or before June 7, 2010, APCC should either withdraw the Complaint (in order to file an informal complaint against Intelco alleging identical claims) or file a motion for default judgment.³⁰ Commission staff also stated that a failure to take either of these steps could result in a dismissal for failure to prosecute.³¹ On June 7, 2010, APCC filed a Motion for Default Judgment.³² Intelco did not file an opposition to APCC's Motion for Default Judgment.

9. Because the record lacked information regarding damages (that is, the only information regarding the number of calls *completed* by Intelco was information provided by intermediate carriers regarding the number of calls *delivered* to Intelco), on August 5, 2010, Commission staff directed the parties to "supplement the record with information that would provide a basis for calculating or estimating the number or percentage of total calls that were completed."³³ On August 20, 2010, APCC

²⁶ *Id.*

²⁷ Letter sent via facsimile from Adrian Grad Deleanu, Chief Financial Officer, Intelco, to Jacqueline Spindler, Market Disputes Resolution Division, FCC (dated Apr. 27, 2010) (Intelco Fax). Notably, the Intelco Fax includes no evidentiary support (e.g., declarations or affidavits), no legal analysis, and no reference to the File Number of this proceeding. Accordingly, as addressed below, the Intelco Fax is not a pleading in this proceeding and is only mentioned to illustrate Intelco's conscious failure to file an answer to the Complaint. The full text of the Intelco Fax is as follows: "Inteleco Communication, Inc., as a corporate citizen of Canada, with neither retail customers, nor assets, in the United States will not concede personal jurisdiction in a formal adjudicatory proceeding. If the FCC still seeks a more detailed explanation of why it lacks jurisdiction to regulate Intelco, please refer to our responses to the informal complaints filed against it, which you reference on page two of your letter." Although Intelco implies that it has filed multiple responses to APCC's informal complaints against Intelco, we have received only one. Intelco submitted a response to APCC's 2008 related informal complaint. *See supra* note 18. Intelco did not respond to APCC's other related 2006 informal complaint, *APCC v. Intelco*, File No. EB-06-MDIC-0038 (filed June 26, 2006).

²⁸ Commission staff transmitted a copy of Intelco's statement to APCC by e-mail the next day. E-mail from Jacqueline Spindler, FCC, to Daniel Collins, APCC, File No. EB-10-MD-002 (dated Apr. 29, 2010).

²⁹ Letter from Alexander P. Starr, Market Disputes Resolution Division, FCC, to Daniel Collins, APCC, and Adrian Grad Deleanu, Serge Farman, and Bassim Kano, Intelco, File No. EB-10-MD-002 (dated May 14, 2010) (May 14 Letter).

³⁰ May 14 Letter at 1-2.

³¹ May 14 Letter at 2.

³² APCC served a copy of the Motion for Default Judgment on Intelco by overnight courier and fax. *See* Motion for Default Judgment at 20, Certificate of Service.

³³ Letter from Jacqueline Spindler, Market Disputes Resolution Division, FCC, to Daniel Collins, APCC, and Adrian Grad Deleanu, Serge Farman, and Bassim Kano, Intelco, File No. EB-10-MD-002 (dated Aug. 5, 2010)

provided a summary of data that could be used to calculate the number of calls that Intelco completed.³⁴ Again, Intelco failed to file a response that complied with the Commission’s rules. Rather, on August 24, 2010, Intelco sent a letter to APCC, copying Commission staff (but not filed with the Commission’s Secretary) that (1) acknowledged receipt of Commission staff’s August 2010 Letter, and (2) objected to the disclosure of certain information in the APCC Data Letter.³⁵ Subsequently, on September 8, 2010, APCC proposed a proxy for estimating the number of completed calls.³⁶

III. DISCUSSION

10. The key facts of this proceeding are not in dispute because Intelco purposefully chose not to participate in this proceeding. We therefore need only address two threshold issues before addressing damages: first, we discuss the Commission’s personal jurisdiction over Intelco; and second, we consider APCC’s request for a default judgment. As explained below, we find the Commission has personal jurisdiction over Intelco, and based on APCC’s unopposed submissions, we grant the request for default judgment.

A. The Commission Has Personal Jurisdiction Over Intelco.

11. Under section 1.724 of the Commission’s rules, a defendant in a formal complaint proceeding, unless otherwise directed by the Commission, must file an answer within twenty days of service of the formal complaint, and “[t]he answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint.”³⁷ Section 1.724 also provides that “[a]verments in a complaint . . . are deemed to be admitted when not denied in the answer.”³⁸ Thus, in an ordinary case, a defendant in a formal complaint proceeding must raise the affirmative defense of lack of personal jurisdiction in the answer (or

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(August 2010 Letter). Staff suggested that such supplementation might include data regarding the use of proxies, industry best practices, evidence provided in other cases, or other persuasive documentation or arguments.

³⁴ Letter from Daniel Collins, APCC, to Jacqueline Spindler, Market Disputes Resolution Division, FCC, File No. EB-10-MD-002 (dated Aug. 20, 2010) (APCC Data Letter). APCC served a copy of the APCC Data Letter on Intelco by hand delivery and fax. *See* APCC Data Letter at 2, Certificate of Service.

³⁵ In a letter to APCC (not filed with the Commission (e.g., the Secretary), but only copied to Commission staff), Intelco objected to the APCC Data Letter, arguing that it violated a non-disclosure agreement between the parties. Letter from Jonathan Lee, Counsel for Intelco, to Daniel Collins, APCC (dated Aug. 24, 2010) (Intelco August 24, 2010 Letter). Because this letter was not filed pursuant to the Commission’s rules, it is not part of the record in this proceeding. Nonetheless, we note that APCC responded, in a letter filed with the Secretary, stating that throughout this proceeding Intelco “seeks to maintain the fiction” that it is not “before” the Commission by writing directly to APCC, and only copying Commission staff. Letter from Daniel Collins, APCC, to Jacqueline Spindler, Market Disputes Resolution Division, FCC, File No. EB-10-MD-002, at 4 (dated Sep. 8, 2010). In addition, on August 23, 2010, Commission staff assigned to this case received a facsimile letter from Intelco’s Controller advising that Adrian Grad Deleanu no longer worked for Intelco. This facsimile further shows that Intelco had been receiving the Commission’s correspondence. *See* Facsimile from Nancy Toroyan, Controller, Intelco, to Jacqueline Spindler, Market Disputes Resolution Division, FCC (dated Aug. 23, 2010) (Intelco August 23, 2010 Letter).

³⁶ Letter from Daniel Collins, APCC, to Jacqueline Spindler, Market Disputes Resolution Division, FCC, File No. EB-10-MD-002 (dated Sep. 8, 2010).

³⁷ 47 C.F.R. § 1.724(b).

³⁸ 47 C.F.R. § 1.724(d).

alternatively seek to make a limited appearance for purposes of contesting jurisdiction), or it waives this defense.³⁹

12. But this is not the ordinary case of a domestic defendant filing an answer and failing to raise in the answer a defense of lack of personal jurisdiction. Instead, here, a putatively foreign defendant has failed to file any answer or otherwise officially participate at all in this formal complaint proceeding. And the complainant is now seeking a default judgment as a result. These circumstances are not directly addressed by our formal complaint rules. Accordingly, it is appropriate for us to consult federal court procedural law for guidance.⁴⁰

13. Under similar circumstances, federal courts have ruled that, before entering a default judgment against a foreign defendant, a court should determine, *sua sponte*, whether the court has personal jurisdiction over the foreign defendant who may not have technically appeared in a case, and whether adequate notice has been provided.⁴¹ The plaintiff's burden of proving personal jurisdiction, however, is relatively low: the plaintiff need only make a *prima facie* showing, and such showing may rest on documentation only, such as pleadings, affidavits and other written materials.⁴² We believe that approach makes sense and apply it here.

14. Therefore, although Intelco failed to appear in this proceeding and, under normal circumstances, would have waived the defense of lack of personal jurisdiction, in the interest of fairness we consider *sua sponte* whether the Commission has personal jurisdiction over this (apparently) foreign defendant.⁴³ As discussed below, in response to Commission staff's May 14 Letter requiring APCC to withdraw the complaint or seek default judgment, APCC describes how Intelco's activities support specific personal jurisdiction, which can be justified by a single significant contact – also known as the

³⁹ This requirement parallels Federal Rule of Civil Procedure (Fed. R. Civ. P.) 12, which provides that the defense of lack of personal jurisdiction is waived unless it is raised in the defendant's responsive pleading, or by motion. Fed. R. Civ. P. 12(b)(2), (h); *see, e.g., e360 Insight v. The Spamhaus Project*, 500 F.3d 594 (7th Cir. 2007). As discussed below, where appropriate, we look to the Federal Rules of Civil Procedure for procedural guidance in Commission adjudicatory proceedings. *See, e.g., APCC Services, Inc. v. TS Interactive, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 10456, 10460, para. 10 (Enf. Bur. 2004) (*APCC v. TS Interactive Damages Order*).

⁴⁰ *See, e.g., APCC Services, Inc. v. TS Interactive, Inc.*, Order, 17 FCC Rcd 25523, 25526-27, para. 7 (Enf. Bur. 2002) (*APCC v. TS Interactive*); *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22535, para. 85 (1997) (subsequent history omitted) (*Formal Complaints Order*) (adopting a rule similar to Fed. R. Civ. P. 26(a)(1) for section 208 formal complaint proceedings). *See Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018, 17052, para. 60 (1998) (subsequent history omitted) (*Formal Complaints Second Report and Order*) (adopting a rule similar to Fed. R. Civ. P. 26(a)(2)(B) for Accelerated Docket proceedings).

⁴¹ *See, e.g., Mwani v. Bin Laden*, 417 F.3d 1, 6-14 (D.C. Cir. 2005); *Dennis Garberg & Associates, Inc. v. Pack-Tech International Corp.*, 115 F.3d 767, 772 (10th Cir. 1997) (*Garberg v. Pack-Tech*); Fed. R. Civ. P. 4(k)(2).

⁴² *See, e.g., Mwani v. Bin Laden*, 417 F.3d at 7; *Garberg v. Pack-Tech*, 115 F.3d at 773.

⁴³ *See, e.g., Garberg v. Pack-Tech*, 115 F.3d at 772. Intelco has not appeared in this formal complaint proceeding and the procedurally deficient April 27, 2010, Intelco Fax states without support that Intelco is a "corporate citizen of Canada." Nonetheless, the record indicates that certain Intelco employees are in Canada. *See Motion for Default Judgment* at 5. Consequently, in the interest of fairness, we consider *sua sponte* the Commission's jurisdiction over Intelco as a foreign defendant that has technically not entered an appearance.

“minimum contacts doctrine.”⁴⁴ We agree and conclude that the Commission has jurisdiction here because Intelco had more than sufficient “minimum contacts” with the United States such that the exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.”⁴⁵

15. In *International Shoe*, the Supreme Court recognized that jurisdiction over a defendant corporation not physically present in the forum state would exist where that defendant had availed itself of that forum’s benefits, such that it would be reasonable to require it to defend a suit related to those activities.⁴⁶ Applying that standard here, we find that Intelco could reasonably have anticipated defending an action involving calls it completed from APCC’s payphones, i.e., calls that Intelco purposefully received and from which it benefitted. In particular, the record reflects that Intelco had arrangements with telecommunications carriers to carry 3,414,812 calls⁴⁷ over several years⁴⁸ from APCC’s United States-based payphones to Intelco’s calling card platform, and that these arrangements, and the Intermediate Carrier Reports that resulted from (and provide evidence of) them, show substantial continuous contacts with the United States and the PSPs’ payphones.⁴⁹ Further, APCC provides uncontested testimony indicating that Intelco marketed calling cards in the United States—cards that were used to make dial-around calls from APCC’s payphones.⁵⁰ APCC’s President and General Manager, with extensive experience dealing with Intermediate Carriers and Completing Carriers, describes in detail how APCC collected data and determined Intelco was the Completing Carrier for the calls at issue.⁵¹ We are persuaded that APCC’s evidence shows Intelco purposefully sought to reap the benefits of calls originating from APCC’s United States-based payphones, i.e., Intelco directed its business activities towards the United States. Further, we note that Intelco could have requested to appear in this proceeding for the limited purpose of addressing jurisdiction; it did not, however, submit such a request.⁵²

⁴⁴ Motion for Default Judgment at 7-10. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (*Burger King*); *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

⁴⁵ *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (*International Shoe*); see also *Burger King*, 471 U.S. at 476 (“Jurisdiction ... may not be avoided merely because the defendant did not physically enter the forum State.”) (emphasis in original). See Motion for Default Judgment at 7-10 (describing Intelco’s contacts with the United States in light of *International Shoe*).

⁴⁶ *International Shoe*, 326 U.S. at 316-18; see also *21st Century Fax(es) Ltd.*, Forfeiture Order, 17 FCC Rcd 1384, 1386-87, para. 6 (2002) (stating, in applying *International Shoe*, that “[c]ontrary to 21st Century’s suggestion, its status as a foreign-registered and controlled company with its principal place of business in the UK does not preclude a finding that the company also is ‘within the United States.’”).

⁴⁷ See Jaeger Decl. at para. 11; see also Intermediate Carrier Reports.

⁴⁸ Complaint at 2 (describing the “Complaint Period”); Jaeger Decl. at paras. 8-11.

⁴⁹ Complaint at 5, 9-10; Intermediate Carrier Reports; Jaeger Decl. at 8-11; Motion for Default Judgment, Declaration of Ruth Jaeger (Jaeger Motion Decl.) at paras. 5-10. We note that because specific information regarding Intelco’s practices would largely be in Intelco’s possession, and because Intelco purposefully failed to respond to APCC’s interrogatories, see Complainant’s Initial Interrogatories, File No. EB-10-MD-002 (filed Mar. 12, 2010), we give significant weight to the Intermediate Carrier Reports submitted by APCC and the two Jaeger declarations.

⁵⁰ Jaeger Motion Decl. at paras. 7-10.

⁵¹ See Jaeger Decl. at paras. 1-22; Jaeger Motion Decl. at 1-10.

⁵² See, e.g., *In the Matter of Telerent Leasing Corp.*, Memorandum Opinion and Order, 43 FCC 2d 487 (1973) (granting a request by the North Carolina Utilities Commission to participate in a proceeding for the limited

16. Lastly, as discussed above, we note again that the record shows that Intelco had adequate notice of this proceeding at each stage.⁵³ For example, the record shows that:

- Intelco actively participated in the related informal complaint process;⁵⁴
- Intelco was served with, and responded to, the Complaint (albeit not with an answer as required by the Commission's rules);⁵⁵
- Intelco was served with, and responded to, several Complaint-related communications from Commission staff;⁵⁶ and
- Intelco was served with, and acknowledged, the Motion for Default and APCC's subsequent supplementation regarding damages.⁵⁷

17. Accordingly, based on the record evidence showing that Intelco purposefully directed, and benefitted from, its substantial contacts with APCC's payphones in the United States, we find that the Commission has personal jurisdiction over Intelco.

B. Request for Default Judgment

18. In connection with the requirement in section 1.724(a) of the Commission's rules, described above, to file an answer,⁵⁸ 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.”⁵⁹ If the defendant fails to file an answer, the Commission has at its disposal “a wide range of sanctions to address violations or abuses of [its] formal complaint rules, including summary grant or dismissal of a complaint.”⁶⁰ Although the Commission's formal complaint rules do not specifically address default judgments, when a defendant knowingly fails 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.⁶¹

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purpose of addressing the Commission's jurisdiction) (subsequent history omitted). Because the record reflects that Intelco purposefully directed its activities at the United States, Intelco has the burden of presenting a “compelling case” that other considerations of fair play would render jurisdiction unreasonable. *Burger King*, 471 U.S. at 477. Because it affirmatively chose not to appear in this proceeding, if only for the purpose of addressing jurisdiction, and therefore provided no basis for concluding jurisdiction over Intelco is not proper, Intelco has not met its burden.

⁵³ See *supra* paragraphs 6-7.

⁵⁴ See, e.g., *supra* note 18.

⁵⁵ See, e.g., *supra* note 27.

⁵⁶ See, e.g., *supra* notes 25, 27, 28, 32, and 35.

⁵⁷ See, e.g., *supra* note 35.

⁵⁸ 47 C.F.R. § 1.724(a).

⁵⁹ 47 C.F.R. § 1.724(d).

⁶⁰ *Formal Complaints Order*, 12 FCC Rcd at 22610, para. 278. See *Formal Complaints Second Report and Order*, 13 FCC Rcd at 17054, para. 65.

⁶¹ See, e.g., *APCC v. TS Interactive*, 17 FCC Rcd at 25526, para. 6.

19. In determining whether to issue a default judgment, the Commission has considered Federal Rule of Civil Procedure 55 for guidance.⁶² Rule 55 states that, when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, a default judgment may be entered against it.⁶³ In *APCC v. TS Interactive*, we utilized the courts' approach to applying Rule 55, and considered the following factors: whether the facts alleged in the complaint state a valid claim; whether the defendant has clearly failed to defend; whether the defendant's failure to defend has continued for a significant period of time; whether the defendant's failure to defend derives from excusable neglect or a good faith mistake; whether the defendant's failure to defend has substantially prejudiced the plaintiff's rights; whether the plaintiff has prosecuted the matter properly; whether the claim concerns important matters of public policy; and whether the claim seeks substantial monetary damages.⁶⁴ We find it appropriate here to again consider these factors, and for the reasons described below, we conclude that APCC is entitled to a default judgment on liability.

20. First, the alleged facts, if true, constitute a violation of law.⁶⁵ As stated previously, for payphone traffic during the Complaint Period, the Commission's rules and orders required a long distance carrier or switch-based reseller to pay compensation to a PSP for every dial-around call originated from the PSP's payphones and completed by that long distance carrier or switch-based reseller.⁶⁶ In this case, the unopposed Complaint and Motion for Default Judgment credibly allege that Intelco was the Completing Carrier for the calls described in the Intermediate Carrier Reports, as modified below in the damages discussion.⁶⁷ Specifically, the unrebutted testimony and evidence submitted by APCC shows that Intelco purposefully carried, and benefitted from, well over 3 million calls from APCC's U.S.-based payphones over several years.⁶⁸ Thus, applying the alleged facts to the applicable law, we conclude that the Complaint states a valid basis for requiring Intelco to pay dial-around compensation to APCC for dial-around calls pertaining to the Complaint Period.

21. Next, we conclude that Intelco has clearly failed to defend the Complaint; that Intelco's failure to defend has continued for a significant period of time; and that Intelco's failure to defend does not derive from excusable neglect or a good faith mistake. First, we note that Intelco actively participated in the informal complaint process and only later chose to refrain from further participation in our proceedings.⁶⁹ The Intelco Fax shows that Intelco received notice of the Complaint and of the deadline for filing the answer. Also, as evidenced by the Intelco Fax, Intelco consciously elected to not file an answer, or to respond to subsequent correspondence sent by Commission staff⁷⁰ setting forth procedures for APCC to move for a default judgment, i.e., Intelco's failure to respond was clearly not due to excusable neglect or a good faith mistake. This failure to participate or otherwise defend the Complaint

⁶² See, e.g., *APCC v. TS Interactive*, 17 FCC Rcd at 25526-27, para. 7.

⁶³ Fed. R. Civ. P. 55.

⁶⁴ *APCC v. TS Interactive*, 17 FCC Rcd at 25526-29, paras. 7-13.

⁶⁵ Consistent with section 1.724(d) of the Commission's rules, we consider the facts alleged by APCC to be admitted.

⁶⁶ See *supra* paragraph 2.

⁶⁷ See, e.g., Complaint at 9-10, para. 25; Intermediate Carrier Reports; Jaeger Decl. at 8-9; Motion for Default Judgment at 6-10.

⁶⁸ See *supra* paragraph 15.

⁶⁹ See, e.g., Intelco Response to Informal Complaint, File No. EB-08-MDIC-0044 (filed Aug. 15, 2008).

⁷⁰ See *supra* notes 27, 33.

has continued for over two years, and Intelco has not offered a legitimate rationale for its failure to participate or indicated that it will change its position. We therefore find that Intelco clearly, knowingly, and repeatedly failed to defend against the Complaint for a significant period of time.

22. We also conclude that APCC has been substantially prejudiced by the delay caused by Intelco's failure to defend the Complaint. As described above, the unopposed Complaint demonstrates that APCC is entitled to dial-around compensation, and Intelco's failure to participate in this proceeding has significantly delayed the payment of this compensation. We further find that APCC has properly prosecuted this case. APCC complied with the Commission's formal complaint rules (including the rules regarding service and filing),⁷¹ and has been responsive to staff's requests for additional information. Moreover, the record reflects that APCC entered into settlement negotiations with Intelco during the initial stage of this proceeding.⁷² Only when further settlement talks appeared fruitless, and Intelco failed to participate in this proceeding, did APCC file its Motion for Default Judgment.

23. Finally, the claim presented here is not an important matter of public policy, such as a constitutional or statutory construction issue, but rather is a straightforward, private payment dispute under the Commission's payphone rules. Moreover, we find that the amount of damages—as described below and based on APCC's submission provided at staff's request (and unopposed by Intelco)—is not so large as to preclude a default judgment.⁷³

24. For all of the foregoing reasons, we find that Intelco is in default regarding the liability alleged in the Complaint. Thus, we grant APCC's Motion for Default Judgment on liability.

C. Damages

25. In accordance with *APCC v. Radian*,⁷⁴ we estimate the number of completed calls and determine that APCC is entitled to per-call compensation from Intelco in the amount of \$1,026,267.84, plus interest. As discussed above, APCC is entitled to be paid for completed calls. While certain key facts regarding the calls at issue are not in dispute, the Complaint and the Motion for Default Judgment are unclear regarding the number of completed calls. That is, the record does not contain a set of audited data to calculate completed calls, and because Intelco apparently failed to comply with the Commission's call tracking rules, we cannot ascertain the exact number of calls for which Intelco is liable.

26. In *APCC v. Radian*, the Commission recognized that it would be “implausible” for every call delivered to the defendant carrier to have been actually completed.⁷⁵ Moreover, as the Commission explained in *APCC v. Radian*, to accept a damages proposal “for all calls regardless of whether they are actually completed would contravene section 276’s directive that compensation be paid only for ‘completed intrastate and interstate call[s].’”⁷⁶ Thus, the Commission endeavored to find an appropriate

⁷¹ See, e.g., *supra* paragraphs 6-9.

⁷² Complaint at 25-26, paras. 105-10.

⁷³ Section 1.727(e) of the Commission's rules provides that a “[f]ailure to oppose any motion may constitute grounds for granting of the motion.” 47 C.F.R. § 1.727(e). Here, Intelco failed to respond to APCC's Motion for Default Judgment. Thus, section 1.727(e) further supports our decision to grant APCC's motion.

⁷⁴ *APCC Services, Inc. v. Radian Telecom, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 8962 (2008) (*APCC v. Radian*).

⁷⁵ *APCC v. Radian*, 23 FCC Rcd at 8971, para. 29.

⁷⁶ 47 U.S.C. § 276(b)(1)(a) (emphasis added).

proxy “to ensure that the represented PSPs collect the monies they are owed and that [the defendant] is not unjustly enriched.”⁷⁷ In *APCC v. Radiant*, however, as here, the defendant failed to comply with the Commission’s rules regarding implementing an audited and certified call tracking system.⁷⁸

27. Nonetheless, APCC requested in the Complaint and the Motion for Default Judgment that the Commission assume 100% of the calls delivered to Intelco were completed.⁷⁹ That is, APCC originally calculated its damages amount by “multiplying the FCC-prescribed compensation rate by the number of dial-around calls reported by Intermediate Carriers in their respective Intermediate Carrier Reports as delivered to [Intelco]” for the period in question, plus accrued interest.⁸⁰ Previously, when similarly faced with unaudited/uncertified payphone data, the Commission sought to arrive at a proxy for calculating completed calls.⁸¹ Accordingly, on August 5, 2010, in light of the lack of information in the record regarding the actual number of completed calls, Commission staff directed the parties to supplement the record, stating that “[s]uch supplementation might include data regarding the use of proxies for call completion calculations, and might involve industry standards or practices, expert opinion, evidence provided in other cases, or other persuasive documentation.”⁸²

28. APCC submitted a supplement; Intelco did not.⁸³ Based on the approaches taken in *APCC v. Radiant* and *APCC v. CCI*, where the Commission recognized not every call would have been “completed,”⁸⁴ APCC proposes the Commission average the results from those cases, with the proposed completion percentage here as 63.64% of the delivered calls to Intelco.⁸⁵ We find this proposal reasonable, and due in large part to Intelco’s failure to provide audited data, otherwise comply with the Commission’s call tracking rules, or to respond to the Commission’s request or to APCC’s proposal, we believe this estimate provides a sufficient basis to meet the requirements of section 276. Therefore, applying this percentage to APCC’s original damages figure of \$1,612,614.46, we find that Intelco must compensate APCC, before interest, in the amount of \$1,026,267.84. Regarding the interest calculation, as we stated in *APCC v. Radiant*, interest in unpaid dial-around compensation cases during the period in

⁷⁷ *APCC v. Radiant*, 23 FCC Rcd at 8972, para. 30.

⁷⁸ *APCC v. Radiant*, 23 FCC Rcd at 8970, para. 25. Jaeger Decl. at paras. 15-17.

⁷⁹ Complaint at 21-23, paras. 75-78; Motion for Default Judgment at 16-17.

⁸⁰ Complaint at 3, para. 3.

⁸¹ *APCC Services, Inc. v. CCI Communications, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 8224, 8227-28, paras. 10-13 (Enf. Bur. 2010) (*APCC v. CCI*).

⁸² August 2010 Letter.

⁸³ Letter from Daniel Collins, APCC, to Jacqueline Spindler, Market Disputes Resolution Division, FCC, File No. EB-10-MD-002 (dated Sep. 8, 2010) at 5 (noting that the Commission’s methodology first articulated in *APCC v. Radiant* and followed in *APCC v. CCI* resulted in the defendants being liable for 61.53% of the Intermediate Carrier reported calls and 65.75% of the Intermediate Carrier reported calls, respectively, and asking the Commission to utilize in this case the average of those percentages – i.e., 63.64%). Because the record does not contain any credible evidence regarding the duration of calls, we cannot use the precise formula that the Commission employed in *APCC v. Radiant*, i.e., calculating the number of “completed” calls by adding all of the calls lasting 30 seconds or longer and half of the calls lasting less than 30 seconds.

⁸⁴ *APCC v. Radiant*, 23 FCC Rcd at 8971, para. 29; *APCC v. CCI*, 25 FCC Rcd at 8227-28, paras. 10-13.

⁸⁵ Letter from Daniel Collins, APCC, to Jacqueline Spindler, Market Disputes Resolution Division, FCC, File No. EB-10-MD-002, at 5-6 (dated Sep. 8, 2010).

question accrues at an annual rate of 11.25%, starting on the first day of the quarter that is one quarter after the one in which the billed call was made.⁸⁶ Intelco must also pay APCC this interest.

IV. ORDERING CLAUSES

29. 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 Motion for Default Judgment **IS GRANTED** to the extent indicated herein.

30. **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 Defendant in this proceeding **IS IN DEFAULT** and the factual averments contained in the Complaint **ARE DEEMED ADMITTED** to the extent indicated herein.

31. **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 above-captioned Complaint **IS GRANTED** to the extent indicated herein.

32. **IT IS FURTHER ORDERED**, pursuant to sections 1, 4(i), 4(j), 201, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, and 209, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that, within ninety (90) days of the release of this Order, Intelco Communications, Inc. shall pay APCC Services, Inc. damages in the amount of \$1,026,267.84, together with interest on such damages at the rate of 11.25%, accruing on the first day of the quarter that is one quarter after the one in which the billed call was made.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

⁸⁶ *APCC v. Radiant*, 23 FCC Rcd at 8974, para. 34.