

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

In the Matter of)	
)	
ASCOM COMMUNICATIONS, INC.,)	
)	
Complainant,)	
)	
v.)	File Nos.
)	
SPRINT COMMUNICATIONS COMPANY, L.P.)	E-94-73
)	
and)	
)	
NEW YORK TELEPHONE COMPANY,)	E-94-74
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 2000

Released: February 8, 2000

By the Commission:

I. INTRODUCTION

1. In this *Order*, we grant in part a complaint filed by Ascom Communications, Inc. ("Ascom") against Sprint Communications Co., L.P. ("Sprint") and New York Telephone Company ("NYT"), alleging that Sprint violated sections 201(b), 202(a), and 203(c)¹ of the Communications Act of 1934, as amended ("the Act"), by attempting to collect charges for fraudulent international telephone calls that were placed from Ascom's pay telephones in the New York metropolitan area ("New York payphones") and were completed through the Sprint and NYT networks.² We also grant, in part, Ascom's complaint that NYT violated section 201(b) of the Act by not taking financial responsibility for the fraudulent calls.

II. BACKGROUND

2. Ascom provides payphone service in the New York City metropolitan area and in other areas of the United States. Ascom also owns a switch in the New York City metropolitan area. NYT was the local exchange carrier ("LEC") and Sprint was one of the interexchange

¹ 47 U.S.C. §§ 201(b), 202(a), 203(c).

² These were unauthorized calls that were charged to Ascom's account. Ascom Complaint at 3.

carriers ("IXC") for calls originating from Ascom's New York payphones.³

3. During the second half of 1992, Ascom discovered that callers were able to place unauthorized and fraudulent direct-dialed international calls from certain of Ascom's New York payphones. Carriers completing these calls included Sprint and AT&T.⁴ Ascom determined, and Sprint and NYT do not dispute, that at least 352 of its New York payphones were used to make fraudulent calls that were completed through the Sprint network.⁵ Ascom notified NYT in August 1992 of the occurrence of the fraudulent calls and notified Sprint of the fraud in December 1992.⁶ On or about September 23, 1992, NYT advised the New York State Public Service Commission ("New York Commission") of two reasons that callers were able to make the fraudulent payphone calls.⁷ First, some of NYT's switches permitted payphone callers to dial certain non-working 800 numbers owned by another carrier to obtain "secondary dial tone." This secondary dial tone enabled callers to dial fraudulently the access code of an interexchange carrier and the numerical sequence for direct-dial international calls.⁸ The second reason cited by NYT was a programming problem with NYT's Limited InterLATA Dialing ("LID") service, which normally would prevent direct-dialed interLATA and international calls.⁹ NYT stated at

³ Ascom Complaint at 2-3.

⁴ Ascom Brief at 1, 9. According to Ascom, AT&T has not attempted to collect charges from Ascom for the fraudulent calls. *Id.* at 33.

⁵ Ascom determined these facts using billing records supplied by Sprint during discovery. Ascom Brief at 19. As explained below, these billing records do not include information for August 1992, although none of the parties dispute that fraudulent calls occurred during this month also. *See infra* para. 19.

⁶ Ascom's Interrogatories to Defendant New York Telephone Company at Exhibit A (Memorandum from Andrew S. Rosen, Director of Network Operations of Ascom from Feb. 1992 to Oct. 1993 to Dennis Wallach of Ascom, Gary Davidson of Ascom, and John Cocola of Ascom, dated Sept. 8, 1992 ("Rosen Memo of Sept. 8, 1992")); Sprint Brief at 16; *see* Sprint Answer at Exhibit IV (Facsimile from Steven Stanfill, Vice President of Network Services of Ascom during Jan. 1991 to Dec. 1993 to Charlie Rogers of Sprint and Candy Jansen of Sprint, dated Dec. 18, 1992 ("Stanfill Fax")).

⁷ NYT Brief at 4; Ascom Brief at Exhibit 4 (Letter from Robert P. Slevin of NYT to Secretary Kelliher of the New York Commission, dated Sept. 23, 1992 ("NYT Letter to the New York Commission") at 2). NYT provided the NYT Letter to the New York Commission to Ascom during discovery, stating that it was one of the documents which "fully explain[s] the [network] problems that Ascom complains about." NYT Opposition to Motion to Compel Answers to Interrogatories at 4.

⁸ Callers would dial one of two non-working "800" numbers owned by Deluxe Data Systems (Deluxe Data), an interexchange carrier. Instead of providing a recorded announcement stating that the number was not in service, Deluxe Data's equipment responded with a series of "winks" and "tones" to which NYT's DMS-100 switches responded by returning secondary dial tone to the payphone, which allowed another call to be placed. NYT's DMS switches sent the secondary dialtone to the payphone without providing a standard network signal that would have signaled the payphone to close the circuit and prevented the caller from using the secondary dial tone. NYT Brief at 4-5; Ascom Brief at 15-16. We note that Deluxe Data is not a party to this complaint.

⁹ Normally LID should block all direct-dialed international calls by routing the calls to a recorded announcement and blocking them from being completed. NYT Answers to Ascom's Interrogatories at 3.

the time that, in conjunction with the secondary dial tone problem, in "certain limited instances, callers were able to make international calls where there were problems with the LID service."¹⁰ In switches where LID was improperly programmed, NYT's local facilities routed the fraudulent calls via the public switched network to Sprint or AT&T for completion.¹¹

4. Although NYT took certain steps to attempt to correct these malfunctions, these efforts were ineffectual for months. For example, NYT implemented a software correction for the secondary dial tone problem beginning in September 1992; however, NYT's subsequent implementation of certain new calling features invalidated that software correction and callers were again able to obtain secondary dial tone to place fraudulent calls.¹² It was not until mid-December 1992 that NYT finally resolved the secondary dial tone problem by implementing database blocking for the affected 800-numbers.¹³ With regard to the problems with LID service, NYT discovered in mid-July 1992 that, due to "human error," some NYT switches were not programmed to block calls from the payphones subscribed to LID service. In these cases, the Carrier Identification Codes ("CICs") had not been programmed into the switches that served the payphones from which fraudulent calls were made.¹⁴ Although NYT states that the LID problems were corrected in August 1992,¹⁵ fraudulent direct-dialed international calls continued from Ascom's payphones through December 1992.¹⁶

5. Prior to the occurrence of the fraudulent calls at issue, Ascom took measures to prevent unauthorized calling access from its New York payphones. It designated the payphones as "PIC-None" so that the payphones were not presubscribed to any primary interexchange carrier. Ascom also programmed the payphones to reject "1+," "011+," "10XXX+1+" and

¹⁰ NYT Letter to the New York Commission at 3 n.4.

¹¹ Ascom Brief at 15-16.

¹² NYT Brief at 5-6.

¹³ See Attachment C to NYT's Opposition to Motion to Compel Answers to Interrogatories at 2 (Letter from Michael J. Goldey, attorney for NYT to Kathie A. Kneff, Chief, Informal Complaints and Public Inquiries Branch, Enforcement Division, Common Carrier Bureau, Federal Communications Commission, dated Mar. 12, 1993 ("NYT Letter to Kathie Kneff")). See Ascom's Interrogatories to Defendant New York Telephone Company at Exhibit G (Memorandum of Andrew S. Rosen, Director of Network Operations of Ascom from Feb. 1992 to Oct. 1993 to John Cocola of Ascom, dated May 3, 1993 ("Rosen Memo of May 3, 1993")).

¹⁴ NYT Brief at 6; Ascom Brief at Affidavit of Andrew S. Rosen, Director of Network Operations of Ascom, dated June 6, 1996 ("Rosen Affidavit of June 6, 1996") at Exhibit 6 (Memorandum from Andrew S. Rosen, Director of Network Operations of Ascom from Feb. 1992 to Oct. 1993 to Dennis Wallach of Ascom, Gary Davidson of Ascom, and John Cocola of Ascom, dated October 21, 1992 ("Rosen Memo of Oct. 21, 1992")) and Rosen Memo of May 3, 1993.

¹⁵ NYT Brief at 6; NYT Answers to Ascom's Interrogatories at 4.

¹⁶ Ascom Brief at 14.

"10XXX-011+" dialing. Ascom also claims that it subscribed the payphones to both NYT's tariffed LID service and to NYT's High Toll Notifier service, which is used to monitor high or unusual calling activity.¹⁷

6. On August 10, 1992, prior to the occurrence of the fraudulent calls at issue, Ascom entered into a Virtual Private Network ("VPN") agreement with Sprint in which calls from Ascom's payphones for the entire nationwide Ascom network were to be aggregated and delivered to Sprint's network. The VPN contract enabled Ascom to use both "on-net" and "off-net" calling features. "On-net calling" enabled Ascom, in areas where it maintained its own switching capabilities (such as New York) to first route a payphone call to its own switch. At its switch, Ascom would check to make sure the call was authorized before delivering the traffic to Sprint. By contrast, with "off-net calling," calls originating at Ascom's payphones would be delivered directly to Sprint over the public switched network, without first going through screening at Ascom's switch.¹⁸

7. Sprint maintains that Ascom owes Sprint \$818,865.70 for the fraudulent calls placed from Ascom's New York payphones during the relevant time period. Sprint billed and attempted to collect these charges from Ascom. On July 1, 1994, Ascom filed complaints against Sprint and NYT with the Commission, alleging that Ascom was not a customer of Sprint for the international calls and that NYT should have accepted responsibility for its failure to provide blocking services.¹⁹ On July 15, 1994, Sprint filed an action in Florida state court seeking payment from Ascom for the calls at issue. Ascom removed the case to federal court and was granted a stay of the case pending the Commission's resolution of the instant proceeding.²⁰

III. DISCUSSION

8. In its complaints, Ascom requests that the Commission: (1) declare that Ascom is not liable to Sprint for any charges incurred as a result of the fraudulent calling and that NYT and Sprint were at fault for allowing fraudulent calls to be placed from Ascom's New York payphones; (2) prohibit Sprint from taking action against Ascom for non-payment of the disputed charges; (3) award damages plus interest, attorneys' fees, costs, and disbursements to Ascom; and (4) further relief as the Commission deems just and proper.²¹ In its brief, Ascom additionally

¹⁷ Ascom Brief at 8, 31. NYT claims that HTN is only used by NYT personnel and is not a service available to payphone customers. NYT Reply Brief at 3.

¹⁸ Sprint Reply at 2; Sprint Answer at Exhibit 3 (VPN Contract at Art. 13.1(d)) ("VPN Contract"); Sprint Reply at Exhibit A (Sprint F.C.C. Tariff No. 5, § 3.1.1) ("VPN Tariff").

¹⁹ Ascom Complaint at i-ii, 6.

²⁰ *Sprint Communications Co. L.P. v. Ascom Communications, Inc.*, No. CL94-5563AO (Fla. Cir. Ct. Palm Beach Cty. filed July 15, 1994); *Sprint Communications Co. L.P. v. Ascom Communications, Inc.*, Civ. No. 94-8479, Order Granting Defendant's Motion for Stay (S.D. Fla. Nov. 17, 1994).

²¹ Ascom Complaint at 12-13.

requests that if the Commission finds Ascom liable to Sprint for the charges for the fraudulent calls, the Commission find NYT liable to Ascom.²² For the reasons and to the extent stated below, we grant in part and deny in part Ascom's complaint against Sprint and grant in part and deny in part Ascom's complaint against NYT. We also limit our consideration of the issues here to those concerning liability and allow Ascom to file a supplemental complaint for damages.²³

A. Section 201(b) Claim Against Sprint

9. After considering the relevant contract and tariff provisions, the relevant case law, and the record before us, we conclude that Sprint violated section 201(b) when it charged Ascom for certain calls for which Ascom was not a customer.²⁴ As explained below, we find that Ascom was, in fact, Sprint's customer for some, but not all, of the New York payphones that were used to make the fraudulent calls.

10. The key inquiry for the section 201(b) claim against Sprint is whether and to what extent Ascom was a customer that ordered off-net VPN service from Sprint for its New York payphones. If Ascom was an ordering customer, Sprint was entitled - in fact, obligated - to charge Ascom its tariffed rate for the calls at issue.²⁵ If not, the opposite result holds.

11. In making this determination, we are guided by the Commission precedent set forth in *United Artists Payphone Corp. v. New York Telephone Co. and American Telephone and Telegraph Co.*²⁶ In *United Artists*, the Commission found that AT&T had acted unlawfully in attempting to hold the complainant, a public payphone provider, liable for toll fraud charges because the complainant was not a "customer" of AT&T. Under the AT&T tariff in *United Artists*, only a "customer" who ordered "service" could be responsible for charges associated with that service. The Commission determined that the complainant was not a customer of AT&T because the complainant intentionally avoided ordering service by instructing its local exchange carrier not to presubscribe its payphones to AT&T. The Commission also found that

²² Ascom Brief at 36.

²³ See *infra* para. 30. We limit our consideration of the complaint to liability issues pursuant to our authority to conduct Commission proceedings in such manner as is most conducive to the proper dispatch of business and to the ends of justice, and to perform any and all acts, not inconsistent with the Act, as may be necessary in the execution of our functions. 47 U.S.C. § 154(i) - (j); see also 47 C.F.R. § 1.722(b).

²⁴ Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful" 47 U.S.C. 201(b).

²⁵ Section 203(c) provides that "no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation for communication or for any service in connection therewith . . . than the charges specified" in an effective tariff. 47 U.S.C. § 203(c).

²⁶ 8 FCC Rcd 5563 (1993) ("*United Artists*").

the complainant had avoided constructively ordering AT&T's service because it adopted a number of precautions to prevent unauthorized calls, including ordering services from its local exchange carrier that were meant to block long distance calls.²⁷

12. As stated above, we must determine whether Ascom ordered off-net VPN service for its New York payphones. It is clear from the record in this case that all of the fraudulent calls at issue were off-net calls from Ascom's New York payphones.²⁸ That is, such calls went straight from Ascom's New York payphones to Sprint's switch over the public switched network, thereby bypassing the screening mechanisms at Ascom's switch. Sprint's VPN tariff defines a customer as a "person, firm, corporation or other legal entity that orders Virtual Private Network Service from Sprint and therefore is responsible for the payment of charges and compliance with this Tariff."²⁹ Neither the VPN contract nor the VPN tariff specify what steps are necessary to "order" either on-net or off-net VPN service.

13. We find that Ascom was a Sprint customer for some of the fraudulent calls because it intentionally ordered off-net service from Sprint by signing the VPN contract and sending Sprint the ANIs³⁰ for some of the New York payphones at issue.³¹ We are not persuaded by Ascom's argument that it was the intent of both parties that the VPN contract include only on-net calls from Ascom's New York payphones.³² Notwithstanding Ascom's stated intention to screen all New York calls at Ascom's switch for potential fraud problems prior to delivering the calls to Sprint's switch for termination,³³ we find that the plain language of the VPN contract unambiguously includes both on-net and off-net calls delivered to Sprint and makes no exception for off-net calls from the New York payphones.³⁴

14. Furthermore, we find that Ascom has failed to rebut satisfactorily Sprint's

²⁷ *Id.* at 5563-5565.

²⁸ Because Sprint's VPN "on-net" service is not an issue in this case, we discuss only the ordering of Sprint's VPN "off-net" service.

²⁹ VPN Tariff at Art. I.

³⁰ An Automatic Number Identification ("ANI") refers to a particular payphone line.

³¹ As explained below, the payphone ANI list sent by Ascom to Sprint contained only 110 of the 352 New York payphone ANIs associated with the fraudulent calls. *See infra* para. 16.

³² Ascom Brief at 6.

³³ According to Ascom, on-net calls from Ascom's New York payphones went to the LEC tandem and were then delivered to Ascom's switch via feature Group D service. After a screening/authorization process, the call would be routed to Sprint via dedicated T-1 facilities. Affidavit of Steven Stanfill, Vice President of Network Services of Ascom from Jan. 1991 - Dec. 1993, dated June 6, 1996 ("Stanfill Affidavit of June 6, 1996") at 3.

³⁴ *See* VPN Tariff at 3.7.4; VPN Contract at Art. 13.1.d.

assertion that Ascom ordered VPN off-net service for any payphone, including a New York payphone, by giving Sprint the ANI of that payphone. As part of the agreement between Ascom and Sprint, Ascom was obligated to provide ANIs of its payphones to Sprint, although the purpose of furnishing this information is disputed by the parties. Sprint states that after it loaded that ANI into the VPN database, Ascom would deliver traffic from its payphone to Sprint and Sprint would use the ANI information to verify the origin of the call.³⁵ Ascom admits that it sent Sprint a number of payphone ANIs, including some of the New York payphone ANIs,³⁶ but claims that these actions did not constitute "ordering" of service because the ANI information was only used for billing purposes (in order to calculate VPN discounts).

15. Ascom admits, however, that its contentions with regard to VPN off-net service for the New York payphones are largely unsupported by contemporaneous documentary evidence because it does not have most of the relevant documents in its possession.³⁷ Ascom does supply an affidavit from an Ascom employee that states that the VPN contract did not include off-net calls from Ascom's New York payphones.³⁸ Sprint, however, supplies affidavits from two Sprint employees asserting the opposite fact, that the VPN contract was not location specific but rather included traffic from any payphone whose ANI was sent to Sprint by Ascom.³⁹ Ascom also states that proof of Sprint's understanding that off-net New York payphone calls were excluded from the VPN contract is found in a memorandum from an Ascom employee addressed to two Sprint employees. This memorandum states "[a]s you know, Ascom currently places no calls on a switched origination basis to *any* destination originating out of the NY Metro LATA. All legitimate calls out of the metro LATA (132) will originate on the T-1's to Sprint out of our Bronx switching POP."⁴⁰ Although this memorandum is consistent with Ascom's

³⁵ Sprint Brief at 3-4; Sprint Reply at Exhibit D (Affidavit of Ronald D. Havens, Director of Industry Forums at Sprint ("Havens Affidavit") at 1); Sprint Reply at Exhibit E (Affidavit of Charles E. Rogers, Senior National Account Manager for Sprint, dated July 1, 1996 ("Rogers Affidavit of July 1, 1996") at 2); Sprint Answer at Exhibit II (Affidavit of Charles E. Rogers, Senior National Account Manager for Sprint, dated Aug. 29, 1994 ("Rogers Affidavit of Aug. 29, 1994") at 2).

³⁶ Ascom Brief at 5-6. During discovery, Ascom produced evidence to show that the payphone ANI lists transmitted to Sprint contained the ANIs of only 110 of the 352 New York payphones associated with the fraudulent calls. See *infra* para. 16.

³⁷ Ascom states that the business records concerning this dispute were transferred to People's Telephone Company when it purchased Ascom's assets in October 1993. See Ascom's Motion to Compel Defendant Sprint to Answer Interrogatories at 13; Ascom's Answers to New York Telephone Company's Interrogatories at 2-3.

³⁸ Steven Stanfill, Vice President of Network Services of Ascom from Jan. 1991 - Dec. 1993 states that the VPN "covered only traffic originating at Ascom's New York switch and from there sent over T-1 trunks to Sprint." Stanfill Affidavit of June 6, 1996 at 4; Ascom Reply at Exhibit 2 (Affidavit of Steven Stanfill, Vice President of Network Services of Ascom from Jan. 1991 - Dec. 1993, dated June 24, 1996 ("Stanfill Affidavit of June 24, 1996") at 2).

³⁹ See Rogers Affidavit of Aug. 29, 1994 at 2; Rogers Affidavit of July 1, 1996 at 1-2; Havens Affidavit at 1.

⁴⁰ Ascom Brief at 5 (citing the Stanfill Fax, *supra* n. 6).

contentions, there is no proof that Sprint received the document or acknowledged its contents. We are therefore constrained to find that Ascom was Sprint's customer for certain off-net calls from the New York payphones.⁴¹

16. We also find, however, that Ascom was a Sprint customer only for fraudulent calls made from the New York payphones for which ANIs were actually transmitted by Ascom to Sprint. Through discovery, using billing records supplied by Sprint, Ascom found that the payphone ANI lists transmitted to Sprint contained the ANIs of only 110 of the 352 New York payphones used to place the fraudulent calls.⁴² Sprint does not challenge the accuracy of Ascom's findings, but reiterates that, to order off-net VPN service for a particular payphone, Ascom had to provide Sprint with the ANI of that payphone.⁴³ It follows from Sprint's statement that Ascom did not "order" off-net service for any payphones for which ANIs were not supplied to Sprint, and that those payphones should be excluded from the VPN contract. Accordingly, we find that Ascom is not liable to Sprint for charges for fraudulent calls made from the New York payphones for which ANIs were not sent by Ascom to Sprint.

17. We also reject Sprint's argument that Ascom constructively ordered service from Sprint for the New York payphones for which ANIs were not supplied to Sprint. We find that Ascom implemented reasonable fraud prevention measures, similar to those taken by the complainant in *United Artists*,⁴⁴ including designating its payphones as PIC-None and programming its payphones to reject "1+", "011+", "10XXX+1+" and "10XXX-011+" dialing.⁴⁵ We also find below that Ascom ordered LID blocking service from NYT for 310 of the New York payphones associated with the fraudulent calls, although NYT's faulty programming rendered the LID service ineffectual.⁴⁶ Therefore, applying the analysis in *United Artists*, we conclude that because Ascom took extensive precautions to prevent fraudulent calling, Ascom did not constructively order off-net service from Sprint for the New York payphones for which ANIs were not supplied to Sprint.

⁴¹ It is well established that in a formal complaint proceeding pursuant to section 208, the complainant has the burden of proof. See, e.g., *Directel, Inc. v. American Telephone and Telegraph Co.*, 11 FCC Rcd 7554 (1996).

⁴² During discovery Sprint provided Ascom with the following information: a list of the ANIs that Sprint had received from Ascom during the course of the VPN contract and call detail billing information for all calls billed by Sprint to Ascom during the period between September 1992 and December 1992. By cross-referencing the ANI list with the call detail billing information, Ascom determined that, of the New York payphones connected to fraudulent calling, only 110 of those payphones' ANIs were in the database sent to Sprint. Ascom Brief at 19-21. See generally Ascom Complaint at Affidavit of Ginger R. Be Vard, Legal Assistant for Dickstein, Shapiro & Morin ("Be Vard Affidavit") at Exhibit 2 (Report on Lines from Sprint Long Distance Call Detail, Showing Fraud).

⁴³ Sprint Reply at 7.

⁴⁴ *United Artists*, 8 FCC Rcd at 5566.

⁴⁵ Ascom Brief at 8.

⁴⁶ See *infra* paras. 22-23.

18. Because we find that Ascom was not Sprint's customer for the fraudulent calls made from the New York payphones for which ANIs were not sent by Ascom to Sprint, we find that Sprint's actions in charging and attempting to collect charges from Ascom for fraudulent calls from those payphones violate section 201(b), which provides that all charges and practices must be just and reasonable.⁴⁷ We deny Ascom's section 201(b) claim against Sprint, however, with respect to the fraudulent calls made from the New York payphones for which Ascom gave ANIs to Sprint.⁴⁸

19. Although we find that Sprint should not have charged Ascom for fraudulent calls made from some of the New York payphones, we cannot at this time determine the exact amount of these charges.⁴⁹ Ascom states that, at most, it only owes Sprint \$245,764.84, which is the amount of charges for fraudulent calls made from payphones for which ANIs were actually given to Sprint.⁵⁰ This calculation is based, however, on the call detail provided by Sprint, which did not include the month of August 1992. All parties admit that fraudulent calls occurred in that month.⁵¹ Accordingly, call billing information for August 1992 is necessary to determine the amounts properly billed to Ascom during that month. Therefore, although we conclude that Sprint should not have charged Ascom for fraudulent calls made from the payphones for which ANIs were not sent to Sprint by Ascom, we do not reach a conclusion regarding the exact amount of these charges.⁵²

⁴⁷ See 47 U.S.C. § 201(b).

⁴⁸ Ascom also claims that Sprint violated sections 202(a) and 203(c). Section 202(a) prohibits a carrier from making any "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, . . . or [from making] any undue or unreasonable preference or advantage to any particular person. . . ." 47 U.S.C. § 202(a). We decline to consider Ascom's section 202(a) claim because Ascom presented no evidence of actual discrimination or preference in violation of 202(a), and in fact failed to even address this claim in its briefs. Section 203(c) provides that "no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation for communication or for any service in connection therewith . . . than the charges specified" in an effective tariff. 47 U.S.C. § 203(c). Because we have already found that Sprint violated section 201(b) when it charged and attempted to collect charges from Ascom for calls for which Ascom was not a customer, we decline to reach a decision on whether such actions also constitute a violation of section 203(c).

⁴⁹ We are unpersuaded by Sprint's argument that the Commission lacks statutory authority to determine the amount of money owed to Sprint by Ascom under Sprint's tariff. Sprint Reply at 21, citing *Tel-Central v. United*, 4 FCC Rcd 8338, 8340-41 (1989) ("*Tel-Central*"). In *Tel-Central*, the Commission held that it was not to be used as a collection agent for unpaid tariffed charges. *Tel-Central*, 4 FCC Rcd at 8340. In the instant case, however, we have determined that Sprint violated the Act by charging and attempting to charge Ascom for calls for which Ascom was not a customer.

⁵⁰ Ascom Brief at 20; see Be Vard Affidavit.

⁵¹ Ascom Brief at 21, n.11.

⁵² See *infra* para. 30.

B. Section 201(b) Claim Against NYT

20. We further conclude that NYT acted unjustly and unreasonably in violation of section 201(b) when it failed to provide properly functioning LID service to Ascom. We agree with Ascom that the fraudulent calls occurred because: (1) NYT's network failures resulted in the ability of callers to reach a secondary dial tone that permitted bypassing of Ascom's switch, and (2) NYT failed to program properly its switches to provide the LID blocking service ordered by Ascom.⁵³ We also find that NYT's failure to provide LID service to Ascom constituted "willful misconduct" under NYT's own construction of the limited liability provision in its tariff, such that NYT is liable to Ascom for a majority of the charges associated with the fraudulent calls.

21. We first find that NYT's failure to provide LID service, in conjunction with the secondary dialtone problem, was responsible for the ability of callers to make fraudulent international calls from Ascom's New York payphones. NYT has admitted, both on the record and to the New York Commission, that it discovered in August 1992 that fraudulent calls were occurring because some of NYT's switches permitted payphone callers to dial certain non-working 800 numbers (owned by another carrier) to obtain secondary dialtone, which then was used to place the fraudulent calls. NYT admits, on the record and to the New York Commission, that properly functioning LID service would have prevented the direct-dialed international fraudulent calls from occurring.⁵⁴ NYT states that it discovered in July 1992 that some of its switches were not programmed to provide LID service and that it corrected this problem in August 1992, but does not explain why the fraudulent calling continued from Ascom's payphones until December 1992.⁵⁵

22. We also find that Ascom subscribed to NYT's LID service for at least 310 of the New York payphones associated with the fraudulent calling. Ascom states that by examining "NYT's own documentation" (NYT bills for service to Ascom's New York payphones), Ascom was able to verify that NYT billed, and Ascom paid, LID monthly service charges during the relevant time period for almost all of the New York payphones associated with the fraudulent calls. Based on its research, Ascom concludes that 310 of the 352 payphones connected with the fraud were subscribed to LID service during the relevant time period.⁵⁶ NYT does not rebut

⁵³ Ascom Brief at 12-13; 15-16.

⁵⁴ NYT Supplemental Answers to Ascom's Interrogatories at 4; NYT Letter to the New York Commission at 3.

⁵⁵ NYT Brief at 6.

⁵⁶ Ascom Brief at 37; Ascom Brief at Affidavit of William Donnelly, legal assistant at Dickstein, Shapiro and Morin, L.L.P., counsel for Ascom ("Donnelly Affidavit") at 11. The affidavits and exhibits submitted by Ascom describe in detail how Ascom examined its bills from NYT, which are attached as exhibits to the Donnelly Affidavit, to confirm that, for 310 of the 352 New York payphones researched by Ascom, Ascom paid a charge that corresponds exactly with NYT's tariffed rate for LID service. Ascom Brief at 23-24; Donnelly Affidavit at 3-10; *see generally* NYT Bills.

Ascom's research other than to state that Ascom did not supply any letters or service orders to prove that it ordered LID service for its payphones.⁵⁷ We are satisfied from Ascom's research that, of the 352 payphones used to make the fraudulent calls at issue, 310 were subscribed to (and billed for) NYT's LID service during the relevant time period.⁵⁸

23. We find, however, that Ascom has failed to prove that it subscribed to LID for *all* of the New York payphones associated with the fraudulent calls. Neither Ascom's affidavits nor its exhibits sustain Ascom's burden of proof as to 42 of the payphones at issue. While Ascom submitted affidavits of employees stating that it routinely ordered all available blocking services for all of its payphones,⁵⁹ these general statements do not prove that Ascom ordered LID service for all of its New York payphones in this particular instance. Moreover, as noted above, Ascom has produced no evidence that it was billed for LID service for 42 of the payphones at issue. We therefore find the evidence submitted by Ascom to be insufficient to prove that Ascom subscribed to LID service for 42 of the New York payphones used to make the fraudulent calls.

24. Finally, we conclude that NYT is liable to Ascom for the charges for the fraudulent calls made from payphones subscribed to LID service, despite the limited liability provisions in NYT's tariff.⁶⁰ NYT argues that it cannot be held liable for any damages due to fraudulent conduct by others because its tariff limits liability for network or service failures

⁵⁷ NYT Brief at 3.

⁵⁸ In one instance in its brief, Ascom states that LID was on 312 of the 352 lines, *see* Ascom Brief at 32, but elsewhere in its brief, Ascom states that LID was on 310 of the 352 lines associated with the fraud. *See, e.g.,* Ascom Brief at 24. We also note that Ascom conducted its discovery and research on the assumption that only 352 of its New York payphones were associated with the fraudulent calls, although we have concluded that this number may have been different, as Ascom did not include payphones that were billed for fraudulent charges in the month of August 1992. *See supra* para. 19.

⁵⁹ Stanfill June 6, 1996 Affidavit at 4; Rosen June 6, 1996 Affidavit at 2. Ascom also submitted the Rosen Memorandum of Oct. 21, 1992, which documents a meeting in which an NYT employee allegedly admitted that all of Ascom's payphones were subscribed to LID, and Ascom contends that NYT has admitted to the accuracy of many of the Rosen internal memoranda. Ascom Brief at 9, n.3; Ascom Reply at 11, n.9. We note that although NYT did admit to the accuracy of certain of the memoranda submitted by Ascom, NYT did not admit to the accuracy of that particular Rosen Memorandum of Oct. 21, 1992. *See* NYT's Supplemental Answers to Ascom's Interrogatories at 2.

⁶⁰ We find that NYT is not liable to Ascom for fraudulent calls from payphones that were not subscribed to LID service. These fraudulent calls were able to occur solely because of NYT's secondary dialtone problem. We find that NYT's conduct with regard to the secondary dialtone problem was not unjust or unreasonable in violation of section 201(b). We base our conclusion on the fact that NYT attempted to fix the secondary dialtone problem in a timely and responsive manner. After discovering the secondary dialtone problem in August 1992, NYT promptly asked its vendor for a software fix and deployed such fix beginning in September 1992. NYT Brief at 4-5. Even though this software fix eventually failed and NYT's network again permitted secondary dialtone to occur, we find that NYT's failure to correct the secondary dialtone problem on its first attempt does not constitute unjust or unreasonable conduct.

except in instances of its own willful misconduct.⁶¹ NYT's tariff states that

"[t]he Telephone Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a customer or by any others, for damages associated with the installation, provision, preemption, termination, maintenance, repair or restoration of service . . . the Telephone Company's liability, if any, shall not exceed an amount equal to the proportionate charge for the service for the period during which the service was affected." ⁶²

25. NYT's tariff does not define the term "willful misconduct." NYT argues that its actions can only meet that standard if NYT either (1) intentionally and consciously failed to take steps to prevent the allegedly unauthorized calls from occurring with knowledge that its failure to do so would probably result in injury or damage to Ascom; or (2) failed to exercise even the slightest degree of care and its conduct was so careless as to show complete disregard for Ascom's rights.⁶³ We find that, even under NYT's proffered definition, NYT's conduct in this case rose to the level of "willful misconduct." Accordingly, NYT is liable under the terms of its tariff for the charges of the fraudulent calls.⁶⁴

26. We find that NYT committed willful misconduct, according to its own definition of that term, by (1) failing to provide properly functioning LID service; (2) failing to take adequate steps to correct the failure in a reasonably timely manner even after becoming aware of the problem; and (3) failing to notify Ascom of such failure in the LID service until two months after it became aware that Ascom was experiencing fraudulent calling from its payphones as a result of the LID failure. NYT knew that Ascom had ordered and paid for LID service specifically to prevent fraudulent direct-dialed interLATA and international calls.⁶⁵ NYT admits that it realized in July 1992 that LID service was malfunctioning, and by August 1992, NYT knew that Ascom was experiencing fraudulent direct-dialed international calls as a result of LID failure.⁶⁶ NYT further admits that the LID malfunction could have been corrected simply by

⁶¹ NYT Brief at 3.

⁶² NYNEX FCC Tariff No. 1 at § 2.1.3(A).

⁶³ See NYT Brief at 4 (citing *AT&T v. New York City Human Resources Admin.*, 833 F.Supp. 962, 974 (S.D.N.Y. 1993), *Gentile v. Garden City Alarm Co., Inc.*, 541 N.Y.S.2d 505 (App. Div. 1989)).

⁶⁴ We note that while there does not appear to be any consensus in Commission, state, or federal cases, NYT's proffered definition of "willful misconduct" is similar to the definition set forth in one widely-respected treatise. See 57A AmJur 2d *Negligence* § 247 (1989) (stating that willful misconduct "requires an intentional act or an intentional failure to act, either with knowledge that serious injury is a probable result, or with a positive and active disregard for the consequences").

⁶⁵ See generally Rosen Memoranda.

⁶⁶ NYT Brief at 6; Rosen Memorandum of Sept. 8, 1992.

having NYT employees program the proper CIC codes into the switches and, in fact, claims that it had corrected the programming error in the switches by August 1992.⁶⁷ Nonetheless, NYT provides no explanation for the continued occurrence of fraudulent direct-dialed international calling from Ascom's payphones through December 1992. Indeed, NYT offers no rebuttal for Ascom's specific showing that LID failed on at least one of Ascom's payphones in September 1992. We find that the record demonstrates that NYT failed to take reasonable and timely steps to fix the LID problem, despite the fact that NYT knew that LID failure was permitting fraudulent direct-dialed international calls to be made from Ascom's payphones and knew of a relatively simple "fix" for the LID failure problem.

27. Equally important, the record also shows that NYT did not inform Ascom of the nature of the LID problem until October 13, 1992,⁶⁸ even though it became aware in July 1992 that its switches were improperly programmed.⁶⁹ We find this failure to take steps to mitigate injury to Ascom particularly egregious because NYT was, or should have been, aware that Ascom had ordered the LID service to prevent precisely the type of fraud alleged here. Furthermore, Ascom had asked NYT in August 1992 for an explanation for the occurrence of the fraudulent calls.⁷⁰ NYT offers no explanation for why it did not give Ascom warning of the LID problem earlier. In fact, the record shows that in September 1992, NYT representatives told Ascom that Ascom should seek redress from the IXC that was routing the fraudulent calls rather than explaining that LID failure was permitting the fraudulent calls to be routed to the IXC in the first place.⁷¹ By not taking the readily available step of informing Ascom of the exact nature of the LID problem until October 1992, NYT denied Ascom the opportunity to take alternative measures to protect itself from fraud. Thus, applying NYT's own definition of "willful misconduct," we find that NYT "failed to take steps to prevent" the unauthorized calls from occurring "with knowledge that its failure to do so would" likely result in injury to Ascom.⁷²

28. We recognize that, in many instances, limited liability provisions may serve to prevent the costs of unforeseeable and speculative damages from being passed on to ratepayers.⁷³

⁶⁷ NYT Brief at 6; NYT Answers to Ascom's Interrogatories at 4; NYT Letter to the New York Commission at 3 n.4.

⁶⁸ Rosen Memorandum of May 3, 1993. NYT has admitted that this particular memorandum is one of a series of Ascom internal memoranda that "clearly identif[ies] the nature of the problem, and the action that NYT took to correct the problem." NYT Supplemental Answers to Ascom's Interrogatories at 2.

⁶⁹ NYT Brief at 6.

⁷⁰ See Rosen Memorandum of May 3, 1993.

⁷¹ Rosen Memorandum of Sept. 8, 1992.

⁷² See NYT Brief at 4.

⁷³ See *American Telephone and Telegraph Company, Proposed Revisions of Tariff* F.C.C. No. 260, Tariff F.C.C. No. 267, Tariff F.C.C. No. 259, and Tariff F.C.C. No. 263, Memorandum Opinion and Order, 76 F.C.C.2d 195, 197, 199 (1980).

In the instant case, however, the complainant is seeking damages for fraudulent charges incurred because of the failure of the LEC's blocking service, which was ordered specifically to prevent fraudulent calling. Not only was it foreseeable that this failure would result in fraudulent calling, but it is clear that such fraud would be its natural and direct consequence. We note that this Order should not be read as condoning tariff terms limiting liability to willful misconduct. Although we have found it unnecessary to reach the issue in this case, in the future the Commission will not hesitate to exercise authority to investigate the reasonableness of such tariff terms.

IV. CONCLUSION

29. We grant Ascom's complaint to the extent that it seeks relief from Sprint for violations of section 201(b) with respect to the New York payphones for which ANIs were not transmitted to Sprint. We deny Ascom's complaint to the extent it seeks relief for violations of section 201(b) with respect to those New York payphones for which Ascom delivered ANIs to Sprint. We decline to consider Ascom's allegations against Sprint regarding section 202(a) and 203(c). Finally, we grant Ascom's complaint against NYT to the extent that it seeks relief for violations of section 201(b) with respect to the 310 payphones which Ascom has proved were subscribed to LID service.

30. We conclude that further discovery is necessary to determine the actual amounts owed by Ascom to Sprint, and by NYT to Ascom. The record lacks information regarding which payphones were used to make fraudulent calls in August 1992 because Sprint did not provide Ascom with August 1992 billing records. Furthermore, because the record does not establish exactly which payphones were included in the VPN contract during the relevant time period, we cannot determine the exact amount for which NYT is liable to Ascom. We note that, because we are awarding compensatory damages only, the amount of NYT's liability to Ascom should not exceed the amount for which Ascom will be liable to Sprint. The parties are directed to report to the Enforcement Bureau's Market Disputes Resolution Division within sixty (60) days on whether a settlement has been reached or to report on what progress has been made in this regard and the need for any Bureau assistance. Notwithstanding the above, Ascom is free to file a supplemental complaint in pursuit of its damage allegations within sixty (60) days.⁷⁴

31. Ascom has also requested that we order the defendants to pay attorneys' fees, costs and disbursements. We deny this request, as we have no authority to award attorneys' fees and costs.⁷⁵

⁷⁴ This action is consistent with our rules, which provide that damages may be awarded in a supplemental complaint proceeding. 47 C.F.R. § 1.722(b).

⁷⁵ See *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co.*, 11 FCC Rcd 11202, 11208 (1996); *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 100 FCC.2d 1244, 1259 (1985).

V. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 202(a), 203(c), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 202(a), 203(c), 208, that the above-captioned complaints filed by Ascom Communications, Inc. against Sprint Communications Company and New York Telephone Company ARE GRANTED to the extent indicated herein and ARE OTHERWISE DENIED.

33. IT IS FURTHER ORDERED that Ascom, pursuant to section § 1.722 of the Commission's Rules, 47 C.F.R. § 1.722(b), may file a supplemental complaint concerning damages within sixty (60) days after public notice of this decision.

34. IT IS FURTHER ORDERED that the Motions to Strike filed on June 24, 1996 by Sprint Communications Company and New York Telephone Company ARE DENIED.⁷⁶

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁷⁶ In their Reply Briefs, filed June 24, 1996, both Sprint and NYT argue that some or all of the affidavits submitted by Ascom with its brief should be stricken because the information contained in the affidavits should have been submitted earlier in the proceeding. Sprint Reply at 3, n.2; NYT Reply at 2. Sprint also argues that if the Commission accepts Ascom's affidavits, then the Commission should also accept two responsive affidavits from Sprint, which are attached to Sprint's Reply Brief. Sprint Reply at 3, n. 2. In the interest of compiling a more complete record, we accept the affidavits and documentation attached to Ascom's Brief and deny Sprint and NYT's Motions to Strike. For the same reason, we also accept Sprint's responsive affidavits, filed with its Reply Brief, as part of the record.