

**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-003-MD-011
Jaroth, Inc. d/b/a Pacific Telemanagement	)	
Services, and	)	
Intera Communications Corp.,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
NetworkIP, LLC, and	)	
Network Enhanced Telecom, LLP,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 22, 2007**

**Released: February 23, 2007**

By the Commission:

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## I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant a supplemental complaint for damages<sup>1</sup> filed by APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp. (collectively, "Complainants" or "APCC") against NetworkIP, LLC, and Network Enhanced Telecom, LLP (collectively, "Defendants" or "Network") pursuant to section 208 of the Communications Act of 1934, as amended ("the Act"),<sup>2</sup> and section 1.722 of the Commission's rules.<sup>3</sup> Complainants allege that, under the Commission's payphone compensation rules,<sup>4</sup> Network owes Complainants "dial-around" compensation and prejudgment interest for 11,622,941 payphone calls completed during the period October 1, 1999 through November 22, 2001. For the reasons explained below, we agree with Complainants and award damages in the principal amount of \$2,789,505.84, plus prejudgment interest at an annual rate of 11.25%, pursuant to sections 201(b), 208, 209, and 276 of the Act.<sup>5</sup>

## II. BACKGROUND

### A. Factual Background<sup>6</sup>

2. Complainants are billing and collection agents for payphone service providers ("PSPs").<sup>7</sup> Complainant Jaroth, Inc. d/b/a Pacific Telemanagement Services also is itself a PSP.<sup>8</sup> Network is a

<sup>1</sup> Supplemental Complaint for Damages, File No. EB-03-MD-011 (filed Apr. 4, 2005) ("Damages Complaint").

<sup>2</sup> 47 U.S.C. § 208.

<sup>3</sup> 47 C.F.R. § 1.722.

<sup>4</sup> See, e.g., 47 C.F.R. §§ 64.1300, 1310. Unless otherwise indicated, all C.F.R. references to Part 64 of the Commission's rules refer to the rules in effect from October 1, 1999 through November 22, 2001. The parties refer to the relevant period as ending on Nov. 23, 2001, mirroring references made in various letter rulings and orders discussed herein. Because a new payphone compensation methodology had to be in place on November 23, 2001, as discussed below, we believe it is clearer to say that the period under discussion here ran "through November 22, 2001."

<sup>5</sup> 47 U.S.C. §§ 201(b), 208, 209, 276.

<sup>6</sup> We incorporate by reference the facts found during the liability proceeding involving these parties in *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Telecom, LLP*, Memorandum Opinion and Order, 20 FCC Rcd 2073 (Enf. Bur. 2005) ("Bureau Liability Order"), *aff'd*, Order on Review, 21 FCC Rcd 10488 (2006) ("Commission Liability Order").

<sup>7</sup> See, e.g., *Bureau Liability Order*, 20 FCC Rcd at 2074, ¶ 2.

<sup>8</sup> See, e.g., *Bureau Liability Order*, 20 FCC Rcd at 2074, ¶ 2.

telecommunications carrier that owns switches and that offers other companies a package of telecommunications services that enables those companies to provide prepaid calling cards to end-user customers.<sup>9</sup> End-user customers can use those prepaid calling cards to make “coinless” calls from payphones.<sup>10</sup> In this proceeding, Complainants seek compensation from Network for such “coinless” calls involving Complainants’ payphones and a Network-owned switch.

3. The coinless payphone calls at issue here were made by end-user customers with prepaid calling cards. When the card-holder placed a coinless call from one of Complainants’ payphones, the local exchange carrier (“LEC”) serving the payphone transported the call to the interexchange carrier (“IXC”) that Network had engaged to provide transport services.<sup>11</sup> The IXC transported the call to one of three switches owned by Network. That Network switch then routed the call to the terminating LEC (*i.e.*, the LEC serving the call recipient) for completion.<sup>12</sup>

4. The prepaid calling cards used to make the coinless payphone calls at issue here were sold to end-user customers by entities (“Debit Card Providers”) to which Network sold a package of telecommunications services that enabled the Debit Card Providers to offer prepaid calling cards to the public.<sup>13</sup> Network’s business relationship with the Debit Card Providers was set forth in detailed contracts.<sup>14</sup> Network’s contractual package of services sold to the Debit Card Providers included (i) internet access to traffic and billing records specific to the Debit Card Provider, (ii) call routing by Network, and (iii) resold transport services of the underlying IXC.<sup>15</sup> The Debit Card Providers played no role in actually transporting the coinless payphone calls at issue here.<sup>16</sup>

## **B. Procedural History**

5. During the period October 7, 1997 through November 22, 2001, the applicable Commission rules provided that, with respect to each coinless payphone call, the last facilities-based carrier that physically routed the call to the recipient’s LEC had to pay \$.24 (“dial-around compensation” or “payphone compensation”) to the originating PSP.<sup>17</sup> This dispute began when, during the period

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<sup>9</sup> See, *e.g.*, *Bureau Liability Order*, 20 FCC Rcd at 2074, ¶ 2.

<sup>10</sup> See, *e.g.*, *Bureau Liability Order*, 20 FCC Rcd at 2074, ¶ 2. “Coinless” payphone calls are those initiated, not by depositing coins in the payphone, but rather by dialing a special access number that triggers a specific service (which may or may not then require the dialing of additional numbers), such as directory assistance, operator service, toll-free (*e.g.*, “800”) service, and calling card service (either pre-paid or credit card). See, *e.g.*, *Bureau Liability Order*, 20 FCC Rcd at 2075, ¶ 4.

<sup>11</sup> See, *e.g.*, *Bureau Liability Order*, 20 FCC Rcd at 2077, ¶ 9.

<sup>12</sup> See, *e.g.*, *Bureau Liability Order*, 20 FCC Rcd at 2077, ¶ 9.

<sup>13</sup> See, *e.g.*, *Bureau Liability Order*, 20 FCC Rcd at 2077, ¶ 10. Some of the Debit Card Providers did not, in fact, sell calling cards directly to end users, but rather resold Network’s services to other entities, which then sold calling cards directly to end users. Some provided “PIN-based services.” *Id.* Neither party asserts that these nuances have any bearing on the issues here.

<sup>14</sup> See, *e.g.*, *Bureau Liability Order*, 20 FCC Rcd at 2077, ¶ 11.

<sup>15</sup> See, *e.g.*, *Bureau Liability Order*, 20 FCC Rcd at 2077, ¶ 10.

<sup>16</sup> *Id.*

<sup>17</sup> *Bureau Liability Order*, 20 FCC Rcd at 2074-2077, ¶¶ 3-8. See *In the Matter of Request to Update Default*

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October 1, 1999 through November 22, 2001, end users used prepaid calling cards sold by Debit Card Providers to make coinless calls on Complainants' payphones. Upon learning that a Network switch was involved in handling at least some of those calls, Complainants sought per-call dial-around compensation from Network. Specifically, on March 29, 2002, Complainants filed at the Commission an informal complaint regarding coinless payphone calls carried by Network and Sprint;<sup>18</sup> and on September 30, 2002, Complainants filed at the Commission an informal complaint regarding coinless payphone calls carried by Network and any carrier other than Sprint.<sup>19</sup> In those Informal Complaints, Complainants argued that Network owed \$.24 for each payphone call at issue, because for each of those calls Network allegedly was the last identified facilities-based carrier within the meaning of the Commission's rules and orders.

6. Network declined to pay the dial-around compensation sought by Complainants. Network asserted that Complainants should look, instead, to the various Debit Card Providers for compensation. In Network's view, the Debit Card Providers, not Network, were the last identified facilities-based carriers within the meaning of the Commission's rules and orders.<sup>20</sup>

7. Complainants ultimately filed a formal complaint alleging that Network's refusal to pay dial-around compensation violated the Commission rules and orders implementing section 276 of the Act, and thus violated, *inter alia*, section 201(b) of the Act.<sup>21</sup> Pursuant to rule 1.722,<sup>22</sup> Complainants elected to "bifurcate" the matter and have only the issue of Network's liability decided first, prior to and separate from any subsequent proceeding regarding the specific amount of any damages owed.<sup>23</sup>

8. After a full liability proceeding, the *Bureau Liability Order* concluded, *inter alia*, that (i) Network (and not the Debit Card Providers) is liable to Complainants for per-call dial-around compensation under the Commission's payphone compensation rules, and (ii) Network's failure to pay Complainants in accordance with the Commission's payphone compensation rules violated section 201(b)

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*Compensation Rate for Dial-around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, 15659 at n.203 (2004) ("Update Order"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2638 at ¶ 203 (1999) (some subsequent history omitted) ("Third Order"); Third Order on Reconsideration and Order on Clarification, 16 FCC Rcd 20922, 20924 at ¶ 6 (2001) ("Clarification Order"); Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020, 2023 at ¶ 7 (2002) (some subsequent history omitted) ("Fourth Order"); Revised Answer to Formal Complaint, File No. EB-03-MD-011 (filed Sept. 15, 2003) ("Liability Answer") at 5 ¶ 8; Complainants' Initial Brief of Issues Designated by the Commission's Oct. 6, 2005 Letter Ruling, File No. EB-03-MD-011 (filed Oct. 28, 2005) ("Complainants' Initial Brief on Damages") at 2.

<sup>18</sup> Informal Complaint, File No. EB-02-MDIC-0017 (filed Mar. 29, 2002) ("March 2002 Informal Complaint").

<sup>19</sup> Informal Complaint, File No. EB-02-MDIC-0071 (filed Sept. 30, 2002) ("September 2002 Informal Complaint"). See, e.g., Damages Complaint at 3, ¶ 3 and 4, ¶ 6; Answer to Supplemental Complaint for Damages, File No. EB-03-MD-011 (filed May 31, 2005) ("Damages Answer") at 2, ¶ 3 and 3 ¶ 6; Joint Statement, File No. EB-03-MD-011 (filed July 15, 2005) ("Damages Joint Statement") at 5, 7, ¶¶ (1) and (13).

<sup>20</sup> See, e.g., *Bureau Liability Order*, 20 FCC Rcd at 2078-79, ¶ 13.

<sup>21</sup> Formal Complaint, File No. EB-03-MD-011 (filed June 3, 2003) ("Liability Complaint").

<sup>22</sup> 47 C.F.R. § 1.722.

<sup>23</sup> See, e.g., *Bureau Liability Order*, 20 FCC Rcd at 2074, n.6.

of the Act.<sup>24</sup> Accordingly, the *Bureau Liability Order* granted Complainants' Liability Complaint,<sup>25</sup> and the Commission recently affirmed the *Bureau Liability Order*.<sup>26</sup>

9. After the release of the *Bureau Liability Order*, Complainants filed the instant Damages Complaint pursuant to rule 1.722. As stated above, Complainants allege that, under the Commission's payphone compensation rules, Network owes Complainants per-call dial-around compensation for 11,622,941 payphone calls completed during the period October 1, 1999 through November 22, 2001, plus prejudgment interest at an annual rate of 11.25%. For purposes of this proceeding, Network agrees with Complainants about the number of payphone calls at issue.<sup>27</sup> Nevertheless, Network advances numerous grounds why we should fully or partially reject the damages award sought by Complainants.<sup>28</sup> For the reasons explained below, we find Network's arguments and defenses to be meritless, and we award the requested damages in full: \$2,789,505.84 in principal, plus prejudgment interest at an annual rate of 11.25%, pursuant to sections 201(b), 208, 209, and 276 of the Act.<sup>29</sup>

### III. DISCUSSION

#### A. Network Owes Complainants \$2,789,505.84 in Principal, Plus Prejudgment Interest at an Annual Rate of 11.25%.

10. Given the quarterly billing practices of the payphone industry, payment of dial-around compensation for a coinless payphone call becomes due -- and thus a claim for non-payment accrues -- on the first day of the quarter that is one quarter after the one in which the call was made (e.g., compensation for calls made in the first quarter of 1999 became due on July 1, 1999, the first day of the third quarter of 1999).<sup>30</sup> Applying that principle here in conjunction with the two-year limitations period in section

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<sup>24</sup> Supporting these conclusions was a determination that, with respect to the coinless payphone calls at issue, Network (and not the Debit Card Providers) was the last facilities-based carrier within the meaning of the Commission's rules and orders. *Bureau Liability Order*, 20 FCC Rcd at 2080, 2081-82, 2083-85, ¶¶ 8, 9-10, 11-13, 22-26.

<sup>25</sup> *Bureau Liability Order*, *supra*.

<sup>26</sup> *Commission Liability Order*, *supra*.

<sup>27</sup> See ¶ 11, *infra*.

<sup>28</sup> See, e.g., Damages Answer; Defendants' Initial Brief on Unresolved Issues, File No. EB-03-MD-011 (filed Oct. 28, 2005) ("Defendants' Initial Brief on Damages"); Defendants' Reply Brief on Unresolved Issues, File No. EB-03-MD-011 (filed Nov. 14, 2005) ("Defendants' Reply Brief on Damages"); Defendants' Motion and Memorandum of Points and Authorities to Compel Full Response to Interrogatory No. 4, File No. EB-03-MD-011 (filed Nov. 10, 2005) ("Motion to Compel").

<sup>29</sup> 47 U.S.C. §§ 201(b), 208, 209, 276. Note, however, that the prejudgment interest period is to be reduced by fifteen days. See Parts III.A, III.B.1., *infra*.

<sup>30</sup> See, e.g., *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21284-85 at ¶¶ 30-32 (2002) ("*Fifth Order*"); *Fourth Order*, 20 FCC Rcd at 2024 n.28; *Third Order*, 14 FCC Rcd at 2630-31, ¶¶ 187-189; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20598-99 at ¶ 115 (1996) ("*First Order*"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 13 FCC Rcd 7303, 7305 at ¶ 4 (Com. Carr. Bur. 1998) ("*Coding Digit Waiver Order*"); APCC

(continued....)

415(b) of the Act<sup>31</sup> yields the following starting points for damages recovery purposes: regarding the calls addressed in the Informal Complaint filed on March 29, 2002 (*i.e.*, calls carried by Network and Sprint), APCC may recover on all claims accrued on or after March 29, 2000, which includes all calls completed on or after October 1, 1999. Regarding the calls addressed in the Informal Complaint filed on September 30, 2002 (*i.e.*, calls carried by Network and any carrier other than Sprint), APCC may recover on all claims accrued on or after September 30, 2000, which includes all calls completed on or after April 1, 2000. The end point for completed calls subject to APCC's claims is November 22, 2001, which by Commission order is the date on which the compensation regime at issue concluded.<sup>32</sup> Thus, APCC can seek dial-around compensation here for calls completed during the period October 1, 1999 through November 22, 2001 (the "Relevant Period").

11. The parties correctly agree that, during the Relevant Period, the compensation rate established by Commission rule was \$.24 per completed payphone call.<sup>33</sup> For purposes of this proceeding, the parties have stipulated that the number of completed calls involving Complainants' payphones and a Network switch during the Relevant Period is 11,622,941.<sup>34</sup> That number of completed calls (11,622,941) multiplied by the compensation rate per call (\$.24) equals \$2,789,505.84. Accordingly, we hereby award damages to Complainants in the principal amount of \$2,789,505.84. In addition, consistent with past Commission practice,<sup>35</sup> we award prejudgment interest at an annual rate of

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*Services, Inc. v. TS Interactive, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 10456, 10463 at ¶ 18 (Enf. Bur. 2004) ("*APCC v. TSI*").

<sup>31</sup> 47 U.S.C. § 415(b).

<sup>32</sup> See, e.g., *Third Order*, 14 FCC Rcd at 2638, ¶ 203; *Clarification Order*, 16 FCC Rcd at 20924, ¶ 6; *Fourth Order*, 17 FCC Rcd at 2023, ¶ 7; *Bureau Liability Order*, 20 FCC Rcd at 2074-2077, ¶¶ 3-8. Network asserts that, if a payphone compensation claim does not accrue until two quarters after a call is made, then APCC cannot obtain recovery for calls completed in the two quarters preceding November 23, 2001. Defendants' Initial Brief on Damages at 16-17 and n.7. Network's assertion confuses the concepts of liability attachment and claim accrual. Liability for a call attaches when the call is completed; but a claim for non-payment of that liability does not accrue until a carrier fails to pay on the payment due date. See Part III.B.4, *infra*. If it were otherwise, a PSP could sue a carrier on the day after a call was completed, before a bill was even rendered. Thus, Network is liable for all calls completed through November 22, 2001, even though some of APCC's claims for Network's failure to pay on that liability accrued after that date.

<sup>33</sup> See, e.g., n.32, *supra*; Liability Answer at 14, ¶ 16; Complainants' Initial Brief on Damages at 2.

<sup>34</sup> See, e.g., *APCC, Inc. v. NetworkIP, LLC and Network Enhanced Telecom, LLP*, Letter from Alexander P. Starr to Counsel, File No. EB-03-MD-011 (rel. Oct. 6, 2005) ("*ISC Order*") at 3-4; Joint Proposed Order, File No. EB-03-MD-011 (filed Sept. 30, 2005) at 3-4.

<sup>35</sup> See, e.g., *Update Order*, 19 FCC Rcd at 15661, ¶ 79; *Bell Atlantic – Delaware, Inc. v. Frontier Communications Services, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 8112, 8115 at ¶ 17 and n.43 (2001) ("*Bell Atlantic v. Frontier*"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778, 1805-06 at ¶¶ 59-60 (1997) (some subsequent history omitted) ("*Second Order*"); *Third Order*, 14 FCC Rcd at 2630-2631, ¶¶ 187-189; *APCC v. TSI*, 19 FCC Rcd at 10466, ¶ 22; *Illinois Bell Telephone Co., Inc. v. One-Call Communications, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16697, 16703 at ¶ 13, n.43 (Enf. Bur. 2001). See generally *US Sprint Communications Limited Partnership v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 8 FCC Rcd 1288, 1298 (1993); *TeleDial America, Inc. v. Michigan Bell Telephone Co.*, Order, 8 FCC Rcd 1171 (1993); *MCI Telecommunications Corp. v. AT&T Co.*, Memorandum Opinion and Order, 94 F.C.C. 2d 332 (1983).

11.25%.<sup>36</sup> Moreover, because payphone industry practice is that compensation for a dial-around call becomes due on the first day of the quarter that is one quarter after the one in which the billed call was made,<sup>37</sup> prejudgment interest shall begin to accrue on that day.<sup>38</sup>

12. Network observes, correctly, that the Commission has discretion *not* to award prejudgment interest on equitable grounds,<sup>39</sup> and argues that we should refrain from doing so here, because (i) Complainants refused to heed Network's advice to seek recovery from the Debit Card Providers, and (ii) Complainants delayed in seeking recovery from Network.<sup>40</sup> We reject Network's argument. The Commission has already held that Complainants were correct in seeking recovery from Network rather than from the Debit Card Providers.<sup>41</sup> Moreover, the two-year statute of limitations in section 415 of the Act addresses Network's argument as to delay.<sup>42</sup> Thus, Network has not shown the extraordinary circumstances necessary to warrant a departure from the Commission's usual practice – in both payphone complaint cases and non-payphone complaint cases – of awarding prejudgment interest in order to promote fairness and to make the complainant whole.<sup>43</sup>

13. Network further argues that, if we do award prejudgment interest, it should not be at the rate of 11.25%, but rather at the IRS rate for tax underpayments by large corporations, which is much

<sup>36</sup> Although Network disputes the use of the 11.25% rate, *see* para. [13], *infra*, the parties agree that interest should be computed annually. Complainants' Initial Brief on Damages at 6; Defendants' Reply Brief on Damages at 3, n.5. *See, e.g., Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996: AT&T Request for Limited Waiver of the Per-Call Compensation Obligation*, Memorandum Opinion and Order, 13 FCC Rcd 10893, 10895 at ¶ 3 (Com. Carr. Bur. 1998) ("Coding Digit Waiver Grant Order").

<sup>37</sup> *See, e.g.,* n.30, *supra*.

<sup>38</sup> *See, e.g., Coding Digit Waiver Grant Order*, 13 FCC Rcd at 10895, ¶ 3. Our award of prejudgment interest excludes the period May 19, 2003 to June 3, 2003, however. *See* Part III.B.1., *infra*.

<sup>39</sup> *See* Damages Answer at 14-15, ¶¶ 39-40; Defendants' Initial Brief on Damages at 22-25 (citing *General Communication, Inc. v. Alaska Communications Systems Holding*, Memorandum Opinion and Order, 16 FCC Rcd 2834, 2862 at ¶ 72 (2001) ("*GCI v. Alaska*"), and *Starpower Communications, LLC v. Verizon South, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 23625, 23635 at ¶ 19 (2003) ("*Starpower v. Verizon*").

<sup>40</sup> *See, e.g.,* Damages Answer at 14-15, ¶¶ 39-40; Defendants' Initial Brief on Damages at 22-25; Defendants' Reply Brief on Damages at 2, n.3.

<sup>41</sup> *Commission Liability Order*, 21 FCC Rcd at 10490, ¶ 6; *Bureau Liability Order*, 20 FCC Rcd at 2085, ¶ 26.

<sup>42</sup> 47 U.S.C. § 415.

<sup>43</sup> *See, e.g.,* nn.35, 36, *supra*; *see also Bell Atlantic-Delaware, Inc. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 8112, 8120 at ¶ 17 and n.43 (2001); *Rainbow Programming Holdings, Inc. v. Bell Atlantic-New Jersey, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11754, 11763 at ¶ 26 (Enf. Bur. 2000); *Mile Hi Cable Partners, LP v. Public Service Company of Colorado*, Order, 15 FCC Rcd 11450, 11458-59 at ¶ 14 (Cable Ser. Bur. 2000). Our research reveals that the Commission awards prejudgment interest in the vast majority of cases. In fact, the failure to award prejudgment interest, absent some compelling reason, may constitute an abuse of discretion. *See, e.g., National Communications Ass'n, Inc. v. AT&T Co.*, 1999 WL 258263 (S.D.N.Y. Apr. 29, 1999) (citations omitted). It may be that denying prejudgment interest is appropriate only if either the complainant has itself acted unlawfully, or the principal amount of damages is uncertain, or the complainant will be made whole through some other mechanism, such as statutory treble damages. None of those circumstances exists here.

lower than 11.25%.<sup>44</sup> To support this argument, Network points out, again correctly, that the Commission has applied IRS rates for prejudgment interest in a variety of payphone and non-payphone contexts.<sup>45</sup> What Network overlooks, however, is that the Commission has repeatedly applied and affirmed the 11.25% prejudgment interest rate in the specific payphone context at issue here, *i.e.*, the late payment of per-call dial-around compensation accrued in 1999-2001.<sup>46</sup> Accordingly, although we have discretion to apply a different rate, we decline to depart from the precedent applied to this context, and we award prejudgment interest at an annual rate of 11.25%.

**B. All of Network's Grounds for Eliminating or Reducing the Damages Award Lack Merit.**

**1. The Enforcement Bureau did not err in granting APCC's Motion for Waiver of rule 1.718.**

14. During the course of this formal complaint proceeding, the Enforcement Bureau issued an order granting an APCC motion for waiver and extension of rule 1.718's "relation-back" filing deadline.<sup>47</sup> Network then sought Commission reconsideration of the *Waiver Order* on three grounds: the *Waiver Order* (i) exceeds the Commission's authority by essentially waiving a statutory limitations period;<sup>48</sup> (ii) applies the wrong legal standard;<sup>49</sup> and (iii) misjudges the facts favoring and disfavoring waiver.<sup>50</sup> For the following reasons, we deny Network's Petition.<sup>51</sup>

<sup>44</sup> See, e.g., Damages Answer at 14-15, ¶ 39; Defendants' Initial Brief on Damages at 23-24; Defendants' Reply Brief on Damages at 3, n.5.

<sup>45</sup> See, e.g., Damages Answer at 14-15, ¶ 39 (citing *Starpower v. Verizon*, 18 FCC Rcd at 23635 ¶ 19 (2003)); Defendants' Initial Brief on Damages at 23-24 (citing *Fourth Order*, 17 FCC Rcd at 2033, ¶¶ 32-33; *Fifth Order*, 17 FCC Rcd at 21307, ¶¶ 99-101; *GCI v. Alaska*, 16 FCC Rcd at 2863, ¶ 74)).

<sup>46</sup> See, e.g., *Update Order*, 19 FCC Rcd at 15661, ¶ 79; *Fifth Order*, 17 FCC Rcd at 21283-85, 21307, ¶¶ 28-31, 99-100; *Fourth Order*, 17 FCC Rcd at 2033, ¶ 33 (stating that, "while that approach [of using the 11.25% rate] *remains fitting in its context*, in the very different context of one-time ... true-up payments, a commercially-oriented rate is most suitable") (emphasis added); *Bell Atlantic v. Frontier*, 16 FCC Rcd at 8120, ¶ 17 n.43 (ordering the computation of prejudgment interest at 11.25% and noting that the "use of the 11.25 percent interest rate is unique to cases in which IXCs are late in making payments to PSPs, and is not necessarily applicable in other contexts"); *Third Order*, 14 FCC Rcd at 2630-31, ¶¶ 187, 189; *APCC v. TS Interactive*, 19 FCC Rcd at 10466-67, ¶¶ 20-21; *Illinois Bell v. OneCall*, 16 FCC Rcd at 16703, ¶ 13 n.43 (stating that "[t]he Commission has previously determined that an 11.25% interest rate is appropriate when IXCs are late in making payments to PSPs").

<sup>47</sup> *APCC Services, Inc. v. Network IP, LLC and Network Enhanced Services, LLP*, Order, 20 FCC Rcd 16727 (Enf. Bur. 2005) ("*Waiver Order*").

<sup>48</sup> Petition for Reconsideration, File No. EB-03-MD-011 (filed Nov. 22, 2005) ("Petition") at 5-7; Reply to Complainants' Opposition to Defendants' Petition for Reconsideration, File No. EB-03-MD-011 (filed Dec. 16, 2005) ("Petition Reply") at 3-4.

<sup>49</sup> Petition at 7-9; Petition Reply at 9.

<sup>50</sup> Petition at 8-17; Petition Reply at 5-10.

<sup>51</sup> Our rules permit us to adjudicate a petition for reconsideration of an order issued pursuant to delegated authority. 47 C.F.R. § 1.106(a)(1). Doing so makes sense here, given that this Order resolves all other outstanding issues. See generally 47 U.S.C. §§ 154(i), (j); 47 C.F.R. § 1.1. Moreover, by adjudicating the Petition in conjunction with resolving all other outstanding issues, we render moot APCC's otherwise compelling objection that the Petition

(continued....)



15. Pursuant to section 208 of the Act, the Commission's rules establish an "informal" complaint process that provides a relatively simple and streamlined mechanism for seeking resolution of a dispute with a common carrier.<sup>52</sup> If a complainant is not satisfied with the results of the informal complaint process, the complainant can then commence a "formal" complaint process, which resembles commercial litigation in court.<sup>53</sup>

16. Under section 415(b) of the Act, a "complaint" against a carrier seeking recovery of damages must be filed within two years from the time the damages claim accrues.<sup>54</sup> It is well established that "[a]n 'informal complaint' filed pursuant to sections 1.716-1.718 of the Commission's rules constitutes a 'complaint' within the meaning of section 415 of the Act and thus tolls the running of the two-year limitations period."<sup>55</sup> Under rule 1.718, for purposes of continuing the tolling of the limitations period, 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.<sup>56</sup>

17. Here, on September 30, 2002, APCC filed an informal complaint against Network<sup>57</sup> seeking recovery of payphone compensation for the period September 30, 2000 (two years before the filing date, the limitations period under section 415 of the Act) through November 22, 2001 (the regulatory cut-off date for the kind of compensation at issue).<sup>58</sup> Network filed its response to APCC's Informal Complaint on November 19, 2002.<sup>59</sup> 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

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improperly seeks interlocutory relief. *See* Opposition to Defendants' Petition for Reconsideration, File No. EB-03-MD-011 (filed Dec. 9, 2005) ("Opposition to Recon.") at 6-7 (citing 47 C.F.R. § 1.106(a)(1) (stating that "[p]etitions for reconsideration of ... interlocutory actions will not be entertained"))).

<sup>52</sup> 47 C.F.R. §§ 1.716-1.718.

<sup>53</sup> 47 C.F.R. §§ 1.720-1.736.

<sup>54</sup> 47 U.S.C. § 415(b).

<sup>55</sup> *See, e.g., Operator Communications, Inc. v. Contel of the South, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 19783, 19792 at ¶ 23 (2005).

<sup>56</sup> 47 C.F.R. § 1.718 (stating, 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 . . .").

<sup>57</sup> September 2002 Informal Complaint. In Network's view, the *Waiver Order*'s statement that APCC's informal complaint effectively named Network Enhanced Telecom, LLP, as a defendant is incorrect. Petition at 3 n.2. We reject Network's assertion elsewhere in this Order. *See* Part III.B.3., *infra*.

<sup>58</sup> *See, e.g.,* September 2002 Informal Complaint. As explained previously, due to certain unique characteristics of payphone billing and payment cycles, payphone compensation claims accrue on the first day of the quarter following the quarter after the quarter in which the call was made. Thus, an informal complaint filed on September 30, 2002 allows recovery for calls made from April 1, 2000 forward. *See, e.g.,* Part III.A, *supra*. Network points out that APCC's September 2002 Informal Complaint purports to seek recovery back to October 7, 1997. Petition at 3 n.2. It has subsequently become clear, however, that APCC is seeking recovery for only the shorter period described above. *See, e.g., ISC Order* at 3-4, ¶¶ 12-13; Complainants' Initial Brief on Damages at 2-3.

<sup>59</sup> Response to Informal Complaint, File No. EB-02-MDIC-0071 (filed Nov. 19, 2002).

recovery period of April 1, 2000 through November 22, 2001.<sup>60</sup>

18. On May 19, 2003, the filing deadline under rule 1.718, APCC attempted to file a formal complaint against Network.<sup>61</sup> That day, APCC delivered the formal complaint to Mellon Bank and served Network.<sup>62</sup> APCC submitted the wrong filing fee, however: \$165 per defendant instead of the \$170 required by Commission rules at that time.<sup>63</sup> In addition, APCC 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.<sup>64</sup> As a result, the formal complaint was not officially “filed” on May 19, 2003, and APCC missed the six-month deadline under rule 1.718.<sup>65</sup>

19. According to APCC, it submitted the wrong filing fee (and thus missed the six-month deadline under rule 1.718) because it 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.<sup>66</sup>

20. On June 3, 2003, APCC filed a revised version of the formal complaint, along with the correct filing fee.<sup>67</sup> That same day, APCC also filed its motion for waiver and extension of rule 1.718’s six-month relation-back deadline from May 19, 2003 to June 3, 2003.<sup>68</sup> APCC’s Waiver Motion essentially sought to preserve the full potential recovery period of April 1, 2000 through November 22, 2001, and to avoid the loss of approximately nine months of potential recovery (*i.e.*, April 1, 2000 to

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<sup>60</sup> As discussed elsewhere herein, prior to the September 2002 Informal Complaint, APCC had submitted a different informal complaint on March 29, 2002. *See* Parts II.B, III.B.2-3. The September 2002 Informal Complaint seeks recovery of per-call dial-around compensation for payphone calls involving Network and all carriers other than Sprint, whereas the March 29, 2002 informal complaint seeks such recovery only for payphone calls involving Network and Sprint. *See* Part II.B, *supra*.

<sup>61</sup> *See, e.g.*, Supplemental Complaint for Damages [rejected], File No. EB-03-MD-011 (served May 19, 2003) (“Attempted Damages Complaint”) at 31 (Certificate of Service); Damages Joint Statement at 9, ¶ (9); *Waiver Order*, 20 FCC Rcd at 16729, ¶ 5.

<sup>62</sup> Attempted Damages Complaint at 31; Opposition to Complainants’ Motion for a 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”) at 2; Damages Joint Statement at 9 (stating that Complainants “submitted” a formal complaint on May 19, 2003); *Waiver Order*, 20 FCC Rcd at 16729, ¶ 5; *but see* Damages Answer at 2, ¶ 7 (stating that Defendants never received the May 19, 2003 complaint).

<sup>63</sup> 47 C.F.R. § 1.1106. *See* 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”) at 4-5.

<sup>64</sup> *See generally* 47 C.F.R. § 1.1116(a). *See, e.g.*, Waiver Motion at 5; Opposition to Waiver Motion at 2; Damages Answer at 4; Damages Joint Statement at 9.

<sup>65</sup> *See, e.g.*, 47 C.F.R. § 1.1116(a)(2).

<sup>66</sup> *See Waiver Order*, 20 FCC Rcd at 16729, ¶ 6; Waiver Motion at 4-5, 7-9.

<sup>67</sup> *See Waiver Order*, 20 FCC Rcd at 16729, ¶ 7; Liability Complaint, *supra*.

<sup>68</sup> Waiver Motion.

January 2, 2001) that would otherwise occur if the relation-back feature of rule 1.718 was denied.<sup>69</sup>

21. In assessing APCC's Waiver Motion, the Bureau applied the following well-established standards:

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 appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.<sup>70</sup>

22. Over Network's opposition,<sup>71</sup> the *Waiver Order* largely granted APCC's Waiver Motion because (i) APCC attempted in good faith to file its formal complaint by the six-month deadline of rule 1.718; (ii) APCC's filing errors were not an attempt to "game" the system to obtain some undue advantage; (iii) denying a waiver would allow a \$5.00 fee error to jeopardize the statutory right of numerous independent payphone service providers to substantial sums of per-call compensation;<sup>72</sup> and (iv) through many communications between the parties before the six-month deadline of rule 1.718, Network was fully aware that APCC would file a formal complaint in the absence of a settlement, and thus Network had little expectation of finality and repose on May 19, 2003. Accordingly, the *Waiver Order* waived and extended rule 1.718's six-month relation-back deadline from May 19, 2003 to June 3, 2003.<sup>73</sup> Because APCC's mistakes were "easily avoidable," however, the *Waiver Order* excluded from

<sup>69</sup> See, e.g., *Waiver Order* at 5, 15-17. The financial differential between the two recovery periods (i.e., April 1, 2000 through November 22, 2001 with the waiver, versus January 2, 2001 through November 22, 2001 without) is over one million dollars in principal amounts owed. See *Waiver Order* at 4, n.23; *ISC Order* at 3-4, ¶¶ 12, 13.

<sup>70</sup> *Waiver Order*, 20 FCC Rcd at 16730-31, ¶ 9 (quoting *Application for Review by Information Technology Dept. of State of North Dakota*, Order, 18 FCC Rcd 21521, 21524 at ¶ 9 (2003) ("North Dakota Order"), rev'd on other grounds, *In the Matter of Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA*, Order, 21 FCC Rcd 5316 (2006) ("Schools and Libraries Waiver Order"). 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." *Id.* (quoting *Application of Winstar Broadcasting*, Memorandum Opinion and Order, 17 FCC Rcd 6126, 6128 at ¶ 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).

<sup>71</sup> Opposition to Waiver Motion.

<sup>72</sup> See n.69, *supra*.

<sup>73</sup> *Waiver Order*, 20 FCC Rcd at 16730-33, ¶¶ 8-14 (relying upon, *inter alia*, *Metricom, Inc. Request for Waiver of Section 27.208(A) of the Commission's Rules*, Order, 13 FCC Rcd 890 (Wireless Tel. Bur. 1998) ("Metricom Waiver Order") (granting two-day waiver of payment deadline, because delay was 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) ("SCS Waiver Order") (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*

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the scope of the waiver any prejudgment interest accrued during the 15-day period between the date on which APCC should have filed its formal complaint with the correct fee (May 19, 2003) and the date on which APCC effectively filed its formal complaint with the correct fee (June 3, 2003).<sup>74</sup>

23. Based on this record, we conclude that the Bureau's determination in the *Waiver Order* was correct. We agree with the *Waiver Order* that, at bottom, a \$5.00 fee error by APCC's counsel -- as negligent as it may have been -- should not deprive APCC and its numerous PSP principals of their right under section 276 of the Act and our rules to substantial sums of dial-around compensation, where the formal complaint was otherwise submitted and served on time and in good faith, with advance notice to Network. Put simply, under these specific circumstances, strict enforcement of our six-month relation-back deadline would unduly conflict with the public interest in ensuring the payment of compensation necessary to "promote the widespread deployment of payphone services to the benefit of the general public...."<sup>75</sup>

24. In its multifaceted challenge to the *Waiver Order*, Network first argues that, in allowing APCC to re-file its formal complaint after the relation-back deadline of rule 1.718 had passed, the *Waiver Order* exceeded the Commission's authority by effectively waiving the statutory limitations period in section 415(b) of the Act.<sup>76</sup> We disagree. Network mischaracterizes the *Waiver Order*. As stated above, APCC's filing of the informal complaint on September 30, 2002 -- not APCC's submission of the formal complaint on May 19 or June 3, 2003 -- tolled the running of the limitations period under section 415(b) of the Act. Thereafter, the question whether APCC's subsequent formal complaint was sufficiently timely so as to benefit from that preexisting tolling was a matter purely of the Commission's rules regarding the internal management of its complaint proceedings. Consequently, the *Waiver Order* had no effect on the statutory limitations period, and pertained only to the Commission's relation-back rules. Accordingly, the *Waiver Order* falls squarely within the Commission's authority.<sup>77</sup>

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*Commission's Rules*, Order, 12 FCC Rcd 1540 (Wireless Tel. Bur. 1997) ("*MFRI Waiver Order*") (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) ("*Longstreet Waiver Order*") (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) ("*Farley Waiver Order*") (granting three-day waiver of filing deadline, because improper filing on due-date was caused by clerical error)).

<sup>74</sup> *Waiver Order*, 20 FCC Rcd at 16732, ¶¶ 12-13. 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.

<sup>75</sup> 47 U.S.C § 276(b)(1). See generally, *Schools and Libraries Waiver Order*, *supra*.

<sup>76</sup> Petition at 5-7; Petition Reply at 3-4. Network inexplicably failed to raise this issue in its Opposition to APCC's Waiver Motion; consequently, we could have declined to address this issue here. See, e.g., *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24617 n.16, 24624 (2003) ("*Knology v. Georgia Power*") (and cases cited therein) (declining to consider belatedly raised issues).

<sup>77</sup> See, e.g., *In the Matter of Meredith/New Heritage Strategic Partners, L.P.*, Memorandum Opinion and Consolidated Order, 9 FCC Rcd 6841, 6842 at ¶ 6 (1994) ("*Meredith*") (stating that, "[w]here the time limit is not

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25. Network next argues that the Bureau erred in the *Waiver Order* by applying the Commission's general waiver standard rather than a stricter waiver standard applied "in connection with filing deadlines for pleadings which initiate adjudicatory proceedings."<sup>78</sup> According to Network, where, as here, a waiver request concerns "a filing deadline for an adjudicatory pleading, a party 'must cite the intervention of something beyond the control of the party which could not have been foreseen, and for which no corrective action could have been taken.'"<sup>79</sup> In Network's view, under that standard, APCC's Waiver Motion should be denied, because the failure to pay the correct fee and the decision to file on the last day of the six-month period were foreseeable, correctable, and within APCC's control.<sup>80</sup>

26. This argument, too, fails for two reasons.<sup>81</sup> First, by its own terms, the strict *Meredith* waiver standard applies only to filing deadlines for pleadings that "initiate adjudicatory proceedings."<sup>82</sup> Applying a different waiver standard to filing deadlines for pleadings that initiate adjudications makes sense, because the initiation deadline is when the defendant's interest in certainty, finality, and repose, and the Commission's interest in resource management, are most acute.<sup>83</sup> Here, the deadline at issue -- when a formal complaint must be filed in order to "relate back" to a cognate informal complaint -- does

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set by statute, but is regulatory in nature, the Commission may exercise its discretion and accept late-filed materials in appropriate circumstances, upon a showing of good cause").

<sup>78</sup> Petition at 8-9 (quoting *Meredith*, 9 FCC Rcd at 6843, ¶ 9).

<sup>79</sup> Petition at 9 (quoting *Meredith*, 9 FCC Rcd at 6843, ¶ 10, and also citing *In the Matter of Time Warner Entertainment/Advance-Newhouse Partnership v. Florida Power & Light Co.*, Order on Reconsideration, 14 FCC Rcd 18899, 18901 at ¶ 5 (Cable Serv. Bur. 1999) ("*Time Warner*"); *In Re Applications of Clifford Stanton Heinz Trust*, Memorandum opinion and Order, 11 FCC Rcd 5354, 5358 at ¶ 20 (Wireless Tel. Bur. 1996) ("*Heinz Trust*"). See Petition at 7-9, 11-12; Petition Reply at 9.

<sup>80</sup> *Id.*

<sup>81</sup> Like the statute of limitations issue discussed above, Network inexplicably failed to raise this waiver standard issue in its Opposition to APCC's Waiver Motion; consequently, we could have declined to address this issue here. See, e.g., *Knology v. Georgia Power*, 18 FCC Rcd at 24617 n.16, 24624.

<sup>82</sup> *Meredith*, 9 FCC Rcd at 6843, ¶ 9 (emphasis added). See *In the Matter of Northeast Gwinnett Cablevision*, Memorandum Opinion and Order, 13 FCC Rcd 10282, 10284 at ¶ 6 (Cable Serv. Bur. 1998) ("*Northeast Gwinnett Cablevision*") (stating that "[t]he Commission made it clear in its decision in [*Meredith*] that it will strictly apply the good cause standard in connection with filing deadlines *initiating* adjudicatory proceedings....") (emphasis added). Network implicitly acknowledges that the *Meredith* standard applies only to deadlines for pleadings that initiate an adjudicatory proceeding. See Petition at 2 (stating that, "[i]n cases involving pleadings that *initiate* adjudications, deadlines may be waived only if Complainants had a legitimate reason ....") (emphasis added); Petition Reply at 9 n.6.

<sup>83</sup> See generally *In the Matter of: Continental Cablevision of Massachusetts, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 13782 (1998) (applying *Meredith* standard to a deadline for filing a complaint initiating a proceeding); *In the Matter of Falcon Cablevision*, Memorandum Opinion and Order, 16 FCC Rcd 8845 (Cable Serv. Bur. 2001) (same); *In the Matter of Falcon Cablevision*, Consolidated Memorandum Opinion and Order, 16 FCC Rcd 4633 (Cable Serv. Bur. 2001) (same); *Northeast Gwinnett Cablevision*, *supra* (same); *Falcon Classic Cable v. McCreary County, KY*, Memorandum Opinion and Order, 13 FCC Rcd 6489 (Cable Serv. Bur. 1998) (same); *In the Matter of Falcon Cablevision*, Memorandum Opinion and Order, 12 FCC Rcd 4190 (Cable Serv. Bur. 1997) (same); but see *Time Warner*, *supra*; *Heinz Trust*, *supra*; *In the Matter of: Telenois, Inc.*, Order, 10 FCC Rcd 9530 (Cable Serv. Bureau 1995) (applying *Meredith* standard to deadlines for filing application for review, opposition to reconsideration petition, and opposition to rate complaint, respectively).

not concern a pleading that initiated the instant proceeding. It is the informal complaint filed on September 30, 2002 that initiated the proceeding (and, as stated above, that tolled the running of the limitations period), not the subsequent formal complaint. Put differently, the Informal Complaint initiated this proceeding, whereas the formal complaint simply continued it. Consequently, the Bureau correctly applied the general waiver standard, rather than the *Meredith* waiver standard, in the *Waiver Order*.<sup>84</sup>

27. Second, in each of the cases relied upon by Network, the movant failed to submit and serve the pleading at issue within the deadline period, and thereby failed to satisfy any of the public interests in enforcing deadlines.<sup>85</sup> Here, by contrast, APCC did submit its formal complaint to the Commission, and did serve the formal complaint on Network, before the six-month deadline expired. For this reason, too, the Bureau was correct in applying the general waiver standard, rather than the *Meredith* waiver standard, in the *Waiver Order*.

28. Network last argues that, even under the Commission's general waiver standard, the Bureau should not have granted a waiver of the six-month relation-back deadline. Specifically, Network contends that the *Waiver Order* misapplies the general waiver standard to the operative facts in several respects. Network's contention lacks merit, for the reasons described below.

29. Network's principal argument is that the Bureau erred in relying at all on the substantial financial harm to APCC and its PSP principals that would likely result from denying the Waiver Motion. In Network's view, the analysis should have focused solely on the circumstances of APCC's failure to perfect a filing on time. Network observes that a denial of a waiver request will always harm the requesting party, so reliance on such harm in the waiver analysis would provide no "limiting principle," leading the Commission to engage improperly in *ad hoc* decision-making, and skewing the balance inherently and unfairly towards waiver grants. Network further states that, under a properly limited analysis focusing exclusively on the circumstances of APCC's failure to perfect a filing on time, the Waiver Motion should have been denied because, as the *Waiver Order* concluded, the failure stems from APCC's mistakes, which do not qualify as good cause.<sup>86</sup>

30. Network's argument is unpersuasive. As stated above, the Commission has repeatedly held that, in determining the propriety of waiving a Commission rule, the Commission may evaluate "the public interest" and "considerations of hardship, equity, or more effective implementation of overall policy on an individual basis."<sup>87</sup> Those factors plainly encompass consideration of the potential harm to the requesting party. Indeed, the Commission has frequently and recently assessed such harm in

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<sup>84</sup> We note that, in the most recent Commission-level reference to *Meredith*, the Commission implied that the *Meredith* standard might not materially differ from the general waiver standard. *In re Application of Independent Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7080, 7082 at ¶ 8 (1999) (stating that, "[i]n demonstrating good cause [for a deadline waiver] in connection with adjudicatory pleadings, a party need only provide a legitimate reason for not being able to file pleadings within the time specified as opposed to 'unusual or compelling circumstances'....").

<sup>85</sup> See *Meredith*, *supra*; *Time Warner*, *supra*; *Heinz Trust*, *supra*.

<sup>86</sup> Petition at 10-12; Petition Reply at 9.

<sup>87</sup> *North Dakota Order*, 18 FCC Rcd at 21524, ¶ 9.

evaluating the propriety of waiver.<sup>88</sup> Thus, the *Waiver Order* did not err by considering the potential harm to APCC and its PSP principals.

31. Network next argues that, even if it were appropriate to consider the potential harm to APCC and its PSP principals, the *Waiver Order* erroneously exaggerated the harm by failing to recognize that (i) denying a waiver would not deprive APCC of its entire recovery, and (ii) APCC can seek damages from its attorneys in a malpractice suit.<sup>89</sup> We disagree with Network's characterization of the *Waiver Order*. The *Waiver Order* recognized that denial of the Waiver Motion would reduce, but not eliminate, APCC's potential recovery.<sup>90</sup> Moreover, as Network implicitly concedes, the reduction in potential recovery would diminish APCC's total potential recovery by a substantial sum, even though a part of the recovery would remain. Finally, that APCC and its PSP principals might recover any lost potential damages in a malpractice suit is too speculative and remote to be dispositive of whether the Bureau properly weighed the public interest. Consequently, we find that the *Waiver Order* did not misjudge the potential harm facing APCC and its PSP principals.

32. Network also asserts that the *Waiver Order* erred by considering favorably the absence of bad faith or gamesmanship by APCC.<sup>91</sup> The *Waiver Order*'s consideration of that factor, however, has ample precedent,<sup>92</sup> and in any event was not dispositive standing alone.

33. Network concludes by contending that the *Waiver Order* erred by failing to consider Network's interest in *not* paying millions of payphone compensation dollars more than would be owed

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<sup>88</sup> See, e.g., n.73, *supra*; *Schools and Libraries Waiver Order*, 21 FCC Rcd at 5321, 5323, 5324, 5326-27, ¶¶ 11, 14, 16, 20, 22; *In the Matter of Federal-State Joint Board on Universal Service, North River Telephone Cooperative, Order*, 2006 WL 3814766, \_\_\_ FCC Rcd \_\_\_, DA 06-2584 (Wireline Comp. Bur. Dec. 28, 2006) at ¶ 6; *In the Matter of Requests for Review and Waiver of the Decision of the Universal Service Administrator by Alaska Gateway School District et al.*, Order, 21 FCC Rcd 10182, 10186 (Wireline Comp. Bur., Sept. 14, 2006) ("Alaska Gateway Order") at ¶ 7; *In the Matter of Federal-State Joint Board on Universal Service: Cellular South Licenses, Inc. Petition for Waiver of Section 54.802(a) of the Commission's Rules*, Order, 21 FCC Rcd 9165, 9168-69 (Wireline Comp. Bur., Aug. 14, 2006) at ¶¶ 8-9; *In the Matter of Federal-State Joint Board on Universal Service; Dixon Telephone Co., Lexcom Telephone Co., Citizens Telephone Co. of Higginsville, Missouri Petitions for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date*, Order, 21 FCC Rcd 1717 (Wireline Comp. Bur. 2006); *In the Matter of Federal-State Joint Board on Universal Service; Fibernet, LLC Petition for Waiver of FCC Rule 54.307(c)(4)*, Order, 20 FCC Rcd 20316, (Wireline Comp. Bur. 2005); *In the Matter of Federal-State Joint Board on Universal Service; Alliance Communications Cooperative, Inc. and Hills Telephone Co., Inc., East Ascension Telephone Co., LLC, Columbus Telephone Co. Petitions for Waiver of Section 54.301 Local Switching Support Data Submission Reporting Date*, Order, 20 FCC Rcd 18250 (Wireline Comp. Bur. 2005); *In the Matter of Federal-State Joint Board on Universal Service; Citizens Communications and Frontier Communications Petition for Waiver of Section 54.802(a) of the Commission's Rules*, Order, 20 FCC Rcd 16761 (Wireline Comp. Bur. 2005).

<sup>89</sup> Petition at 12-14.

<sup>90</sup> *Waiver Order*, 20 FCC Rcd at 16727-28, 16730, 16733, ¶¶ 1, 8, 15.

<sup>91</sup> Petition at 11-12.

<sup>92</sup> See, e.g. *Schools and Libraries Waiver Order* at ¶¶ 11 ("applicants' errors could not have resulted in an advantage for them"), 14, 16, 20, 22; *Metricom Waiver Order*, 13 FCC Rcd at 891, ¶ 6; *SCS Waiver Order*, 12 FCC Rcd at 1534, ¶ 8; *MFRI Waiver Order*, 12 FCC Rcd at 1542, ¶ 7; *Longstreet Waiver Order*, 12 FCC Rcd at 1551, ¶ 7. See also *Alaska Gateway Order*, 21 FCC Rcd at 10185-86, ¶ 7; *Request for Waiver Filed by Utica City School District*, Order, 21 FCC Rcd 8758 (Wireline Comp. Bur. 2006).

without a waiver. Network points out that Defendants, like APCC's PSP principals, are small companies, and they structured their operations in good faith in a manner that they believed would result in the Debit Card Providers, not Defendants, owing and paying any payphone compensation due.<sup>93</sup> We do not doubt that Network has a strong interest in having APCC's error reduce Network's exposure to damages here. It was Network's own mistaken view of the Commission's payphone compensation regime, however, that gave rise to those damages. Moreover, unlike APCC, Network has a potential contractual basis for mitigating the effect of its error: indemnification actions against the Debit Card Providers.<sup>94</sup> Thus, for all of the reasons previously discussed, the public interest favors grant of the waiver, rather than strict application of the rule that would relieve Network of a substantial part of its legal liability due to the purely administrative error of APCC.<sup>95</sup>

34. In sum, we conclude that the Bureau did not err in granting APCC's Waiver Motion. Accordingly, Network's Petition for Reconsideration of the *Waiver Order* is denied.

## 2. APCC's March 2002 Informal Complaint was effectively served.

35. With respect to informal complaints under section 208 of the Act, the Commission acts much like a process server. A complainant files with the Commission an informal complaint containing, *inter alia*, "the name of the carrier against which the complaint is made,"<sup>96</sup> and then "[t]he Commission will forward [the] informal complaint[ ] to the appropriate carrier for investigation."<sup>97</sup> To facilitate that procedure (among other reasons), the Commission's rules require "[e]very common carrier ... [to] designate an agent *in the District of Columbia* ... upon whom service of all notices, process, orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding before the Commission."<sup>98</sup> Service can be effectuated "by mailing a copy [of the informal complaint] to the last known address."<sup>99</sup>

36. Here, on March 29, 2002, several months prior to the September 2002 Informal Complaint discussed above, APCC filed with the Commission and mailed to the putative defendant a

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<sup>93</sup> Petition at 15-17.

<sup>94</sup> *Bureau Liability Order*, 20 FCC Rcd at 2077-78, ¶ 11. Many, if not all, of Network's contracts with Debit Card Providers might be construed to require the Debit Card Providers to hold Network harmless for payphone compensation due on calls made with the Debit Card Providers' products. See *Liability Answer* at Att. B.

<sup>95</sup> See generally, *Schools and Libraries Waiver Order*, 21 FCC Rcd at 5321, 5323, 5324, 5326-27, ¶¶ 11, 14, 16, 20, 22 (granting waivers to prevent substantial financial harm that would otherwise result from minor, good-faith procedural mistakes). Network also asserts that APCC's failure to prosecute its claims diligently counsels against waiver of rule 1.718. Petition at 15-16. To the extent that Network is referring to APCC's failure to sue the Debit Card Providers, Network's argument mischaracterizes the proper targets of APCC's collection efforts. See *Commission Liability Order*, *supra*; *Bureau Liability Order*, *supra* (both holding that Network, and not the Debit Card Providers, are liable to APCC). To the extent that Network is referring to APCC's failure to sue Network until September 30, 2002, the two-year statute of limitations in section 415(b) of the Act adequately addresses any concerns arising from the timing of APCC's action.

<sup>96</sup> 47 C.F.R. § 1.716.

<sup>97</sup> 47 C.F.R. § 1.717.

<sup>98</sup> 47 C.F.R. § 1.47(h) (emphasis added).

<sup>99</sup> 47 C.F.R. § 1.47(d).



different informal complaint seeking recovery of per-call dial-around compensation.<sup>100</sup> As previously explained, the March 2002 Informal Complaint concerns calls carried by Network and Sprint, whereas the September 2002 Informal Complaint concerns calls carried by Network and all carriers other than Sprint.<sup>101</sup>

37. As of the time that APCC filed the March 2002 Informal Complaint, NetworkIP, LLC had not designated an agent for service of process in the District of Columbia, in violation of Commission rules.<sup>102</sup> Nevertheless, the Commission attempted to effectuate service by mail on Network's "last known address" by using the following contact information provided by APCC in the March 2002 Informal Complaint, which was also the address to which APCC itself mailed the March 2002 Informal Complaint: "Mr. Doug Williams, Network, IP, Inc., 1950 Stemmons Freeway, Suite 2045, Dallas, TX 75207."<sup>103</sup> APCC had obtained that contact information from Sprint during the discovery phase of certain federal court litigation, in response to APCC's request for identification of all switch-based resellers to which Sprint had routed coinless payphone calls originated from APCC payphones.<sup>104</sup> No response to the March 2002 Informal Complaint was ever filed.<sup>105</sup>

38. In September 2002, having received no response to the March 2002 Informal Complaint, APCC sent to NetworkIP, LLC -- and NetworkIP, LLC received -- a letter referencing the March 2002 Informal Complaint and suggesting Commission-supervised mediation regarding the dispute.<sup>106</sup> Shortly thereafter, APCC filed and successfully served on NetworkIP, LLC the September 2002 Informal

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<sup>100</sup> See, e.g., March 2002 Informal Complaint; Damages Joint Statement at 6; APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Complainants' Initial Brief on Issues Designated by the Commission's June 21, 2005 Letter Ruling, File No. EB-03-MD-011 (filed July 1, 2005) ("Complainants' Initial Brief on Service"), Attachment 10 at 2, ¶ 4.

<sup>101</sup> See, e.g., March 2002 Informal Complaint; September 2002 Informal Complaint.

<sup>102</sup> See Forms 499-A for 2001 and 2002 for NetworkIP, LLC, contained in a database maintained by the Universal Service Administrative Co. and accessible through the Enforcement Bureau listing on the Commission's website, [www.fcc.gov](http://www.fcc.gov). Network does not deny APCC's allegation that NetworkIP, LLC lacked a designated agent in the District of Columbia as of March 29, 2002. See Damages Complaint at 3 n.2.

<sup>103</sup> APCC Services, Inc. v. NetworkIP, LLC, Official Notice of Informal Complaint, File No. EB-02-MDIC-0017 (April 17, 2002) ("First Notice") (directing a response within 30 days); Complainants' Initial Brief on Service, Attachment 4; March 2002 Informal Complaint; Damages Joint Statement at 5-6; Complainants' Initial Brief on Service at 7 and Attachment 10 at 2, ¶ 4.

<sup>104</sup> See, e.g., March 2002 Informal Complaint at 4; Damages Joint Statement at 6.

<sup>105</sup> See, e.g., Damages Answer at 3; Defendants' Brief Regarding Complainants' [sic] Failure to Serve the March 29, 2002, Informal Complaint, File No. EB-03-MD-011 (filed July 1, 2005) ("Defendants' Initial Brief on Service") at 7, n.5; Defendants' Reply Brief Regarding Complainants' Failure to Serve the March 29, 2002 Informal Complaint, File No. EB -03-MD-011 (filed July 11, 2005) ("Defendants' Reply Brief on Service") at 8; Damages Joint Statement at 7 ¶ (16).

<sup>106</sup> See, e.g., Complainants' Initial Brief on Service at Attachment 3; Damages Answer at 3; Damages Joint Statement at 6 ¶ (9). In addition, in October 2002, the Commission sent another notice -- to the same address as the First Notice -- directing a response to the March 2002 Informal Complaint. APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Official Notice of Informal Complaint, Notice of Possible Enforcement Action, File No. EB-02-MDIC-0017 (Oct. 9, 2002) ("Second Notice"); Complainants' Initial Brief on Service at Attachment 5; Damages Joint Statement at 7.

Complaint;<sup>107</sup> and in that Informal Complaint APCC again referenced the March 2002 Informal Complaint.<sup>108</sup> On November 15, 2002, APCC faxed to NetworkIP, LLC's counsel -- and NetworkIP, LLC's counsel received -- a copy of the March 2002 Informal Complaint and the Commission's First Notice.<sup>109</sup> Nevertheless, as stated above, NetworkIP, LLC never filed a response to the March 2002 Informal Complaint.<sup>110</sup>

39. Network asserts here that the March 2002 Informal Complaint was never properly served and that Network received no actual notice of the March 2002 Informal Complaint until November 2002.<sup>111</sup> Network argues, therefore, that the filing of the March 2002 Informal Complaint did not toll the running of the limitations period, and the filing date of the June 2003 Damages Complaint does not relate back to the filing date of the March 2002 Informal Complaint.<sup>112</sup> Accordingly, in Network's view, the recovery period regarding calls carried by Network and Sprint should extend back only to June 2001 (two years before the June 2003 Damages Complaint) rather than to October 1, 1999.<sup>113</sup>

<sup>107</sup> See, e.g., September 2002 Informal Complaint, *supra*; Damages Joint Statement at 7, ¶ (13); Defendants' Initial Brief on Service at 6. APCC mailed the September 19, 2002 letter and the September 2002 Informal Complaint to a different address than it mailed the March 2002 Informal Complaint. Compare March 2002 Informal Complaint with September 2002 Informal Complaint and Complainants' Initial Brief on Service at Attachment 3.

<sup>108</sup> September 2002 Informal Complaint at 2 n.3.

<sup>109</sup> See, e.g., Complainants' Initial Brief on Service, Attachment 8 at 2; Damages Joint Statement at 7.

<sup>110</sup> NetworkIP, LLC also never responded in writing to APCC's September 19, 2002 letter. See Complainants' Initial Brief on Service at 4.

<sup>111</sup> See, e.g., Liability Answer at 7, ¶ 25, 15; Damages Answer at 27, ¶ 94, 30, ¶¶ 101-102; Defendants' Initial Brief on Service at 2-7; Defendants' Reply Brief, File No. EB-03-MD-011 (filed July 11, 2005) ("Defendants' Reply Brief on Service") at 1-6.

<sup>112</sup> See, e.g., Liability Answer at 14-16; Damages Answer at 14; Petition at 3 and n.2, 16 and n.23 Defendants' Initial Brief on Service at 4-5, 7, n.5; Defendants' Reply Brief on Service at 2, 4-6.

<sup>113</sup> See, e.g., Liability Answer at 14-16; Damages Answer at 14; Petition at 3 and n.2, 16 and n.23; Defendants' Initial Brief on Damages at 12; Defendants' Initial Brief on Service at 4-5, 7, n.5; Defendants' Reply Brief on Service at 2, 4-6. Network also contends that the filing date of the June 2003 Damages Complaint cannot relate back to the filing date of the March 2002 Informal Complaint, because the time between those two filings exceeded the six-month period specified in rule 1.718. See Damages Answer at 27; Petition at 3, 16; Defendants' Initial Brief on Damages at 13-14. To support that contention, Network suggests that where, as here, no response to an informal complaint is filed, the six-month relation-back period should be deemed to start running from the filing date of the informal complaint (or thereabouts), rather than from a non-existing response; otherwise, the dispute could linger indefinitely in the informal complaint phase, undermining the rule's goal of promoting speed and finality. Defendants' Initial Brief on Damages at 13-14. Network's contention lacks merit. As previously explained, the rule's plain language clearly provides that the six-month period runs from the date of the defendant's response, not from the date of the informal complaint. 47 C.F.R. § 1.718. Moreover, a defendant has the power to prevent undue lingering of claims by simply filing a response. Finally, the Commission has ample authority to manage the informal complaint docket so as to prevent claims from becoming stale. See, e.g., 47 U.S.C. §§ 154(i)-(j); *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, 22501, 22539, 22559, at ¶¶ 5, 95, 128, 144 (1997) ("Formal Complaints Order") (subsequent history omitted). Here, Network never filed a response to the March 2002 Informal Complaint, so the six-month period applicable to that Informal Complaint (as opposed to the September 2002 Informal Complaint) had not even begun to run when APCC filed the June 2003 Damages Complaint.

40. To support its assertion that the March 2002 Informal Complaint was not properly served, Network points out that (i) the individual addressee, Doug Williams, did not work for NetworkIP, LLC; (ii) the business addressee, “Network IP, Inc.”, did not exist; (iii) the address was not of NetworkIP’s headquarters; (iv) APCC had previously known of NetworkIP, LLC’s correct name and address via prior correspondence; (v) NetworkIP, LLC had a registered agent in Texas, which APCC could have found; (vi) NetworkIP, LLC’s website listed its headquarters’ address, which APCC could have found; (vii) APCC did not re-send (or ask the Commission to re-send) the March 2002 Informal Complaint when APCC learned of NetworkIP, LLC’s correct name and address in September 2002.<sup>114</sup>

41. Network is correct that the filing date of the June 2003 Damages Complaint relates back to the filing date of the March 2002 Informal Complaint only if the March 2002 Informal Complaint was filed *and served* properly. For the reasons explained below, however, we reject Network’s arguments regarding service and conclude that the March 2002 Informal Complaint was effectively served by mail in the Spring of 2002.

42. First, as stated above, NetworkIP, LLC failed to designate an agent for service of process in the District of Columbia and thereby violated a Commission rule designed to avoid precisely the kind of service problem alleged here by NetworkIP, LLC. Thus, Network cannot complain about the Commission’s attempts to work around NetworkIP LLC’s rule violation and provide Network actual notice of the informal complaint.<sup>115</sup> Moreover, especially in light of the absence of a registered agent, the address used to serve the March 2002 Informal Complaint qualifies as the “last known address” under rule 1.47(d), because (i) the individual addressee, Doug Williams, worked for a closely related affiliate of NetworkIP, LLC;<sup>116</sup> (ii) the business addressee, “Network IP, Inc.”, is so close to “NetworkIP, LLC” that any reasonable person would have suspected that NetworkIP, LLC was the intended recipient;<sup>117</sup> (iii) though not of NetworkIP’s headquarters, the address used *was* of a NetworkIP, LLC office containing collocation space, manned by several NetworkIP, LLC employees;<sup>118</sup> (iv) the previous correspondence between the parties did not clearly identify NetworkIP, LLC;<sup>119</sup> (v) APCC obtained the contact

<sup>114</sup> See, e.g., Defendants’ Initial Brief on Service at 2-7; Defendants’ Reply Brief on Service at 1-6.

<sup>115</sup> Indeed, rather than attempt to provide Network actual notice of the informal complaint via U.S. mail, the Commission could have simply “posted” the informal complaint in the Commission Secretary’s Office. 47 U.S.C. § 1.47(h).

<sup>116</sup> NetworkIP, LLC and the affiliate for which Mr. Williams worked had common officers, a common address (including suite number), and a common phone number. Liability Answer at 18; Complainants’ Reply Brief of Issues Designated by the Commission’s June 21, 2005 Letter Ruling, File No. EB-03-MD-011 (filed July 11, 2005) (“Complainants’ Reply Brief on Service”) at 2-3 and Attachment 1. Further, that affiliate was named in several of the contracts submitted in the record by Network as guarantor of NetworkIP and NET obligations to customers. See, e.g., Liability Answer at Attachment B-30. In addition, Mr. Williams, at the Dallas address, had been Sprint’s contact for its business relationship with NetworkIP for at least a year. Complainants’ Initial Brief on Service at 3 and Attachment 3.

<sup>117</sup> See n.142, *infra*.

<sup>118</sup> Opposition to Motion for Waiver at 4; Defendants’ Initial Brief on Service at 2-3; Complainants’ Reply Brief on Service at 4; Damages Joint Statement at 6; [www.networkip.net](http://www.networkip.net). Further, the telephone at that address (a number provided for NetworkIP by local directory assistance) was answered “NetworkIP,” and the receptionist confirmed the Dallas address as NetworkIP’s address. Complainants’ Initial Brief on Service, Attachment 10 at 2.

<sup>119</sup> See Initial Brief on Service at Attachment 13.

information from a credible source, Sprint;<sup>120</sup> and (vi) neither APCC's mailing nor the Commission's was ever returned as "undeliverable,"<sup>121</sup> and the Commission never received any inquiry about the nature or import of the mailings. Given all of these circumstances, we find that service of the March 2002 Informal Complaint was effectively made to Network's "last known address" under rule 1.47(d) in the Spring of 2002.<sup>122</sup>

43. Even assuming, *arguendo*, that the March 2002 Informal Complaint was not effectively served by mail in the Spring of 2002, we conclude that it *was* effectively served in November 2002, for the following reasons. Neither the Act nor the Commission's rules specify a deadline for effectuating service of a previously filed informal complaint. Consequently, we look to federal court procedures for guidance.<sup>123</sup> Under federal court procedures, a plaintiff has at least 120 days from the complaint's filing date to effectuate service, and a court has broad discretion to permit even more time if circumstances warrant.<sup>124</sup> The factors courts usually consider most relevant are whether the plaintiff made reasonable efforts to effectuate service, and whether the delay in service has prejudiced the defendant's ability to defend against the claims.<sup>125</sup>

44. Applying those principles here, we conclude that, in November 2002, APCC made effective and sufficiently timely service of the March 2002 Informal Complaint. First, Network concedes

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<sup>120</sup> March 2002 Informal Complaint at 4.; Liability Complaint at 12, ¶ 24 and Attachment 10; Damages Joint Statement at 6, ¶ (3); Complainants' Initial Brief on Service at 2 and Attachment 1.

<sup>121</sup> Complainants' Initial Brief on Service at 6-7 and Attachment 10. Further, as APCC notes, complainants in the dial-around compensation context often do not have nearly as much useful identifying information (or access to such information) as does a typical plaintiff in court serving process on a typical defendant. *See* Complainants' Reply Brief on Service at Attachment 4. Unlike a typical plaintiff in court, dial-around complainants "are obliged by law to allow calls from payphones that will be routed to any carrier for completion, including calls that during the period covered by this dispute were completed by FBRs [facilities-based resellers] who were unknown to Complainants and whom Complainants had no means of identifying and tracking." Complainants' Reply Brief on Service at 7. *See, e.g., Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 18 FCC Rcd 11003, 11107 at ¶ 7 (2003); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996: Petitions for Clarification*, Third Order on Reconsideration and Order on Clarification, 16 FCC Rcd 20922, 20924 at ¶ 6 (2001); *Second Order*, 16 FCC Rcd at 8103, ¶ 8; *Coding Digit Waiver Grant Order*, 13 FCC Rcd at 10915-16, ¶ 38.

<sup>122</sup> *See generally State of Wisconsin – Educational Communications Board v. DirecTV*, Memorandum Opinion and Order, 18 FCC Rcd 20261 (Media Bur. 2003) (finding service to be adequate under circumstances analogous to those here).

<sup>123</sup> *See, e.g., In the Matter of Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Order on Reconsideration, 16 FCC Rcd 5681, 5685 at ¶ 33 (2001); *Formal Complaints Order*, 12 FCC Rcd at 22503, 22530, ¶ 20 and n.48, ¶ 73 and n.204; *In the Matter of 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, 3 FCC Rcd 1806, 1811-12 at ¶ 47 (1988).

<sup>124</sup> *See, e.g., Fed.R.Civ.P. 4(m)* (and Advisory Committee Notes thereto); Wright & Miller, 4B *Federal Practice & Procedure*, § 1137 (3d ed. 2002). More precisely, the court *must* extend the service deadline beyond 120 days if "good cause" to do so exists, and the court has broad discretion to extend the service deadline beyond 120 days even in the absence of good cause. *See, e.g., id.*

<sup>125</sup> *See, e.g., id.*

that, on November 15, 2002, NetworkIP, LLC's counsel received from APCC a copy of the March 2002 Informal Complaint and of the Commission's First Notice.<sup>126</sup> Such actual notice perfects service.<sup>127</sup> Moreover, although the substantial delay in perfecting service is far from ideal, it was completed within acceptable time limits under the specific circumstances of this case. In particular, as described above, reasonable service efforts were made in the Spring of 2002, especially given NetworkIP, LLC's failure to comply with our rule requiring the designation of an agent for service of process in the District of Columbia. Moreover, in September 2002, APCC made additional reasonable attempts to draw NetworkIP, LLC's attention to the March 2002 Informal Complaint. Furthermore, Network has not shown – or even attempted to show – any relevant prejudice arising from the delay, such as the loss or destruction of evidence or the inability to locate key witnesses.<sup>128</sup>

45. In sum, we hold that the March 2002 Informal Complaint was effectively served. Therefore, with respect to calls carried by Network and Sprint, the filing date of the June 2003 Damages Complaint relates back to the filing date of the March 2002 Informal Complaint.

**3. The informal complaints effectively named Network Enhanced Telecom, LLP (NET) as a defendant.**

46. APCC's March 2002 Informal Complaint named "Network IP, Inc." as the sole defendant.<sup>129</sup> APCC's September 2002 Informal Complaint named "NetworkIP, LLC" as the sole defendant.<sup>130</sup> Neither the March 2002 Informal Complaint nor the September 2002 Informal Complaint named "Network Enhanced Telecom, LLP" -- one of the two defendants named by the formal Damages Complaint resolved in this order -- as a defendant. Based on these facts, Network argues that the claims in the Damages Complaint against Network Enhanced Telecom, LLP cannot relate back to the filing date of either Informal Complaint.<sup>131</sup> In Network's view, because Network Enhanced Telecom, LLP is an independent legal entity separate and distinct from the entities named in the Informal Complaints, we cannot link Network Enhanced Telecom, LLP to the claims alleged in the Informal Complaints.<sup>132</sup> We

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<sup>126</sup> Defendants' Reply Brief on Service at 2; Damages Joint Statement at 7, ¶ (15).

<sup>127</sup> See, e.g., *International Telecharge, Inc. v. Southwestern Bell Telephone Co.*, Memorandum Opinion and Order, 11 FCC Rcd 10061, 10077 at ¶ 43 (Com. Car. Bur. 1996); *Cellular Marketing, Inc. v. Houston Cellular Telephone Co.*, Order, 10 FCC Rcd 8897, 8898 at ¶ 6 (Wireless Tel. Bur. 1995); *Telecable Associates, Inc. v. South Central Bell Telephone Co.*, 6 FCC Rcd 6850, 6850 at ¶ 5 (Com. Car. Bur. 1991); *UACC Midwest, Inc. v. South Central Bell Telephone Co.*, Order, 6 FCC Rcd 6847, 6848 at ¶ 7 (Com Car. Bur. 1991). Network maintains that we cannot consider the November 15, 2002 delivery to NetworkIP, LLC's counsel to be sufficient service, because doing so would apply retroactively an unprecedented "actual notice" standard that can be adopted only through a notice-and-comment rulemaking and applied only prospectively. See Defendants' Reply Brief on Service at 6. Our ability to cite the multiple authorities referenced earlier in this footnote amply refutes Network's contention.

<sup>128</sup> See, e.g., *Husowitz v. American Postal Workers Union*. 190 F.R.D. 53, 58 (E.D.N.Y. 1999). Network asserts that some Debit Card Providers have gone out of business, which hinders Network's ability to seek indemnification. See, e.g., Defendants' Initial Brief on Damages at 17-19, 25, Attachment 5. Network does *not* assert, however, that those events occurred between March and November 2002.

<sup>129</sup> March 2002 Informal Complaint.

<sup>130</sup> September 2002 Informal Complaint.

<sup>131</sup> Defendants' Initial Brief on Service at 2-9; Defendants' Reply Brief on Service at 2-6.

<sup>132</sup> Liability Answer at 15-16; Defendants' Reply Brief on Service at 7.

disagree.

47. It is well established that, if the following test is met, the Commission may “pierce the corporate veil” and hold one entity liable for the acts and omissions of a different entity:

‘[S]eparate corporate structures may be ignored where the purpose of a statutory scheme or regulation would otherwise be frustrated. The critical question, therefore, is whether the conduct of the [two] corporations in light of the relationship which exists among them requires that the legal concept of separate corporate identities be disregarded in order to preserve the integrity of [the Act] and to prevent the [corporations] from defeating the purpose and objective of the statutory provisions....’ Other criteria include: (1) a common identity of officers, directors and shareholders; (2) sharing the same principal offices; [and] closeness of relationship between entities.<sup>133</sup>

48. Applying that test here, we can and should pierce the corporate veil and treat Network Enhanced Telecom, LLP as if it had been specifically named as a defendant by the Informal Complaints. First, Network Enhanced Telecom, LLP and NetworkIP, LLC are, at a minimum, close affiliates.<sup>134</sup> Second, Network Enhanced Telecom, LLP and NetworkIP, LLC have common officers, common offices, and common phone numbers.<sup>135</sup> Third, the two entities hold themselves out as being interchangeable. For example, many of the contracts with Debit Card Providers expressly identify the Network entity as “Network Enhanced Telecom d/b/a NetworkIP.”<sup>136</sup> And on the website [www.networkip.net](http://www.networkip.net), NetworkIP, LLC identifies itself as “NetworkIP (Network Enhanced Telecom, LLP).”<sup>137</sup> Furthermore, in written communications with APCC, correspondence on “NetworkIP” letterhead referred to the sender as “NET” (an acronym for Network Enhanced Telecom) and “NetworkIP (NET),”<sup>138</sup> and information labeled as

<sup>133</sup> *Publix Network Corporation*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 11487, 11504 at ¶ 39 (2002) (finding that five interrelated companies were, “for legal purposes, one and the same”) (“*Publix*”) (quoting *Petition of Telecable to Stay*, Decision, 19 F.C.C. 2d 574, 585 at ¶ 36 (1969) (finding that two affiliated companies “must be treated as a single operation”) (“*Telecable*”)) (footnotes omitted). See, e.g., *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14898, n.825 (1999); *Petition by Dimension Cable TV, Inc. to Stay*, Memorandum Opinion and Order, 27 F.C.C. 2d 43, 46 at ¶ 7 (Rev. Bd. 1971) (finding that two affiliated entities would be treated as one entity for purposes of the proceeding) (“*Dimension*”).

<sup>134</sup> See [www.networkip.net](http://www.networkip.net) and Complainants’ Initial Brief on Service at Attachment 12 (the former identifying NetworkIP as a privately held company, and the latter establishing NET as NetworkIP’s “initial member”). APCC asserts that NetworkIP is solely owned by NET. Liability Reply at 15.

<sup>135</sup> Damages Reply at Att. 5; Complainants’ Initial Brief on Service at 9, n.22, Attachment 10; Complainants’ Reply Brief on Service at 2-3; [www.networkip.net](http://www.networkip.net); Defendants’ Initial Brief on Service at Attachments A and E; Defendants’ Reply Brief on Service at Attachments A and B; Damages Joint Statement at 6 ¶ (10).

<sup>136</sup> See, e.g., Liability Answer at Attachment B-18.

<sup>137</sup> Reply to Defendants’ Answer to Formal Complaint, File No. EB-03-MD-011 (filed Sept. 24, 2003) (“Liability Reply”) at 15-16; Complainants’ Initial Brief on Service at Attachment 16; [www.networkip.net](http://www.networkip.net).

<sup>138</sup> Liability Reply at 15-16; Complainants’ Initial Brief on Service at Attachment 13; Defendants’ Reply Brief on Service at Attachment B.

pertinent to “NET” was produced in response to inquiries regarding NetworkIP.<sup>139</sup> Indeed, in certain comments filed with the Commission, the first page identified the commenter as “Network Enhanced Telecom, LLP d/b/a Network IP (‘NET’).”<sup>140</sup>

49. The foregoing facts show a common identity between NetworkIP, LLC and Network Enhanced Telecom LLP. Given this operational overlap, “the conduct of [Network Enhanced Telecom, LLP and NetworkIP, LLC] in light of the relationship which exists among them requires that the legal concept of separate corporate identities be disregarded in order to preserve the integrity of [section 276 of the Act] and to prevent the [Defendants] from defeating the purpose and objective of the statutory provisions....”<sup>141</sup> In other words, for all purposes relevant here, we should treat these two entities as one and the same. Thus, we consider the Informal Complaints’ naming of NetworkIP, LLC as a defendant to be tantamount to naming Network Enhanced Telecom, LLP as a defendant.<sup>142</sup> Accordingly, the Damage Complaint’s claims against Network Enhanced Telecom, LLP relate back to the filing dates of the Informal Complaints. In that way, APCC’s PSP principals will receive the level of per-call, dial-around compensation contemplated by sections 276 and 415 of the Act and our payphone compensation rules.

#### 4. The statute of limitations does not bar APCC’s damages claims.

50. According to Network, on January 26, 2000, it notified APCC unequivocally and in writing that it would not agree -- then or ever -- to pay dial-around compensation for payphone calls handled by Network-owned switches.<sup>143</sup> In Network’s view, therefore, APCC’s claims for payment of dial-around compensation accrued on January 26, 2000 under the Commission’s “discovery” rule;<sup>144</sup> in turn, the two-year limitations period under section 415(b) of the Act lapsed on January 26, 2002, two months before APCC filed any of the damages claims at issue here.<sup>145</sup> Consequently, Network argues

<sup>139</sup> Complainants’ Initial Brief on Service at 9-10 and Attachment 14; Defendants’ Reply Brief on Service at Attachment B.

<sup>140</sup> Complainants’ Initial Brief on Service at Attachment 15 (Comments in CC Docket No. 96-128, Implementation of Payphone Classification and Compensation Provisions of the Telecommunications Act of 1996 (filed Oct. 9, 2001)).

<sup>141</sup> *Publix*, 17 FCC Rcd at 11504, ¶ 39.

<sup>142</sup> We recognize that the March 2002 Informal Complaint did not name “NetworkIP, LLC” as the defendant, but rather “Network IP, Inc.,” which was not the correct name of any relevant entity. We consider that to be a trivial, immaterial error, however. Under the well-established “misnomer doctrine,” we find “Network IP, Inc.” and “NetworkIP, LLC” to be interchangeable for purposes of initiating the complaint proceeding. *See, e.g., Roberts v. Michaels*, 219 F.3d 775, 777-779 (8<sup>th</sup> Cir. 2000); *Morrel v. Nationwide Mutual Fire Insurance Co.*, 188 F.3d 218, 224 (4<sup>th</sup> Cir. 1999); *Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1301 (2<sup>nd</sup> Cir. 1990); *Miller v. Northwest Region Library Board*, 348 F.Supp.2d 563, 567 (M.D.N.C. 2004); *Shoap v. KIWI S.A.*, 149 FRD 509 (M.D. PA 1993).

<sup>143</sup> *See, e.g.*, Liability Complaint at Attachments 4, 6; Liability Answer at 3; APCC Services, Inc. et al. v. NetworkIP, LLC and Network Enhanced Telecom, LLP, Brief of Network, File No. EB-03-MD-011 (filed Dec. 19, 2003) (“Network Liability Brief”) at 3-6, 9-12, nn.9, 18, 24; Opposition to Motion for Waiver at 4.; Damages Reply at Exh. 5, ¶ 6; Petition at 16; Defendants’ Initial Brief on Damages at 6-9 and Exh. 2; Defendants’ Reply Brief on Damages at 4-5, 9 and Attachments E and H.

<sup>144</sup> *See, e.g.*, Defendants’ Initial Brief on Damages at 4-9 (citing *First Payphone Order*, 11 FCC Rcd at 20598, ¶ 114).

<sup>145</sup> *See, e.g.*, Damages Answer at 27; Defendants’ Initial Brief on Damages at 17.

that the statute of limitations in section 415(b) of the Act bars all of APCC's damages claims.<sup>146</sup>

51. Network's argument rests on a flawed understanding of the Commission's discovery rule. Contrary to Network's assertion, it is well-established that when a complaint concerns periodic continuing conduct, such as overbilling or underpaying, a new claim accrues (or is "discovered") each time an additional instance of the allegedly unlawful conduct occurs.<sup>147</sup> Applying that standard here, APCC's claims did not accrue once and for all on January 26, 2000; instead, a new claim accrued each time dial-around compensation became due and Network failed to pay. Thus, the Damages Complaint is timely under section 415(b) of the Act with respect to every instance in which payment of dial-around compensation became due, and Network failed to pay, during the two years before March 29, 2002 regarding calls carried by Network and Sprint, and during the two years before September 30, 2002 regarding calls carried by Network and carriers other than Sprint.

#### 5. No equitable grounds warrant barring APCC's claims.

52. Network argues that, even if timely under section 415(b) of the Act, APCC's claims are "barred by the doctrines of waiver, estoppel, and/or laches."<sup>148</sup> According to Network, because Network definitively told APCC on January 26, 2000 that Network would not pay dial-around compensation for calls handled by Network's switches, APCC should have either (i) promptly sued the Debit Card Providers, or (ii) sued Network before March 2002. Moreover, APCC's failure to take either of those actions has allegedly prejudiced Network, because as of October 2005 many of the Debit Card Providers have ceased to exist, diminishing Network's ability to seek indemnification.<sup>149</sup> Thus, in Network's view, equity precludes APCC's belated attempt to recover from Network here.

53. Network's argument has no merit. First, as the *Bureau Liability Order* and the *Commission Liability Order* have held, it is Network who owes dial-around compensation, not the Debit Card Providers. Thus, APCC never had any duty, equitable or otherwise, to seek recovery from the Debit Card Providers.

54. Second, to obtain an equitable remedy for an opponent's alleged lack of diligence, a party must have been scrupulously diligent itself. Network falls short in that regard. As early as August 2000, APCC notified Network that APCC intended to hold Network, and not the Debit Card Providers,

<sup>146</sup> See, e.g., Defendants' Initial Brief on Damages at 4-9, 12.

<sup>147</sup> See, e.g., *Operator Communications, Inc. v. Contel of the South, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 19783, 19785 at ¶ 11 (2005); *MCI Telecommunications Corp. v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 9328, 9329-30 at ¶ 5 (2000); *AT&T Corp. v. Bell Atlantic-Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 565 at ¶ 16 (1998); *Aetna Life Ins. Co. v. AT&T Co.*, 3 FCC Rcd 2126, 2128-29 at ¶ 12 (1988); *Tele-Valuation, Inc. v. AT&T Co.*, Memorandum Opinion and Order, 73 FCC 2d 450, 452 at ¶ 4 (1979). Nothing in the *First Payphone Order* is to the contrary. In the *First Payphone Order*, the Commission held that, "for purposes of bringing a complaint before the Commission concerning a carrier's payment of payphone compensation, the time period for the statute of limitations does not begin to run until after the carrier-payor considers a compensation claim and issues a final denial of the claim." 11 FCC Rcd at 20598, ¶ 114. Read in context, that conclusion (i) applies only where, unlike here, the dispute concerns ANI verification, and (ii) was designed to liberalize, not restrict, the time within which a PSP may bring a compensation claim.

<sup>148</sup> Liability Answer at 16; Damages Answer at 30, ¶ 103. See Defendants' Initial Brief on Damages at 9-12, 17-19.

<sup>149</sup> See, e.g., Defendants' Initial Brief on Damages at 17-18 and Attachment 5.



responsible for dial-around compensation.<sup>150</sup> Notwithstanding this notice, Network's contractual relationships with the Debit Card Providers, and the filing of APCC's March 2002 Informal Complaint, September 2002 Informal Complaint, and June 2003 Formal Complaint, the record contains no evidence that Network has taken any steps to (i) ensure that the Debit Card Providers were paying dial-around compensation to APCC, or (ii) seek indemnification from the Debit Card Providers, even after the *Bureau Liability Order* was released in February 2005. Therefore, Network's present inability to obtain full satisfaction via indemnification processes is a dilemma of its own making. Accordingly, we reject Network's equitable arguments against APCC's damages claim.

**6. Network has failed to meet its burden of proving that APCC's damages should be reduced to avoid double recovery.**

55. The parties agree that APCC received some dial-around compensation from some of the Debit Card Providers for payphone calls made during the Relevant Period.<sup>151</sup> Network maintains, therefore, that any damages award here should be reduced by some amount in order to avoid the possibility that APCC might recover dial-around compensation from both Network and the Debit Card Providers for the same payphone calls.<sup>152</sup> We disagree, for the following reasons.

56. Both parties acknowledge that, at this point, neither APCC nor Network can determine the extent, if any, to which the compensation paid by Debit Card Providers to APCC was for payphone calls at issue here, *i.e.*, calls that were made using a Debit Card Provider's calling card and were handled by a Network switch. Only the Debit Card Providers might have the call payment information needed to permit such a determination.<sup>153</sup> The lack of direct evidence about whether the Debit Card Providers' payments were for the calls at issue here would not present a problem had the Debit Card Providers contracted exclusively with Network to handle coinless payphone calls. We could then readily infer that all of the Debit Card Providers' payments to APCC were for calls handled by a Network switch, and reduce the damages award on a dollar-for-dollar basis.

57. Network provides no evidence, however, that the Debit Card Providers could not and did not contract with facilities-based carriers other than Network to handle coinless payphone calls made with their calling cards. And a review of Network's contracts with the Debit Card Providers reveals no facial bar on Debit Card Providers' ability to contract with facilities-based carriers other than Network. In fact, virtually all of the contracts specifically state that the arrangements between the Debit Card Providers and Network are not exclusive.<sup>154</sup> Thus, as far as the direct evidence in the record shows,

<sup>150</sup> See, *e.g.*, Liability Complaint at 9-11 and Attachments 4, 6; Damages Reply at Exh. 5, ¶ 6; Complainants' Reply Brief on Damages at 24-26.

<sup>151</sup> See, *e.g.*, Complainants' Answer to Defendant's Interrogatories 4 and 5 (filed Oct. 12, 2005), with Supplement (filed Nov. 10, 2005), Further Supplement (filed Nov. 15, 2005), and Further Supplement (filed Dec. 13, 2005) (together, "Complainants' Rog. Responses"); Damages Reply at 26-27 and Attachment E; Damages Joint Statement at 12; Complainants' Initial Brief on Damages at 8.

<sup>152</sup> See Liability Answer at 17; Damages Answer at iv, 31; Defendants' Initial Brief on Damages at 20-22; Defendants' Reply Brief on Damages at 6-10.

<sup>153</sup> See, *e.g.*, Damages Joint Statement at 12; Damages Reply at 26-27; Defendants' Initial Brief on Damages at 17-19, 25 and Att. 5; Defendants' Reply Brief on Damages at 9, Attachment B (directing Debit Card Providers to maintain call information).

<sup>154</sup> See, *e.g.*, Liability Answer at Attachment B-11, part 2.1.

some, most, or even all of the payments made by Debit Card Providers to APCC could have been for coinless payphone calls *not* at issue here, *i.e.*, calls *not* handled by a Network switch. Consequently, the record does not permit a definitive conclusion about the extent, if any, to which the Debit Card Providers' payments to APCC were for calls handled by a Network switch and thus should reduce the damages award to APCC.

58. Because neither party can provide definitive information about whether any of the dial-around compensation paid by Debit Card Providers to APCC was for payphone calls handled by a Network switch, the outcome here turns heavily on who bears the burden of proof regarding that fact. According to Network, because APCC is the complainant, APCC bears the burden of proving not only liability and damages generally, but also the precise dollar amount of harm arising from Network's failure to pay. And in Network's view, providing damages with such precision requires APCC to, *inter alia*, ascertain and net out an appropriate amount for sums already received by APCC from Debit Card Providers.<sup>155</sup> We disagree, for the following reasons.

59. Network is correct that, in complaint proceedings under section 208 of the Act, the complainant bears the burden of proving liability and damages. APCC satisfied that burden, however, by showing that (i) Network was the last facilities-based carrier to handle the 11,622,941 payphone calls at issue, and (ii) Network failed to pay any dial-around compensation to APCC for those calls. Having thereby demonstrated that the party legally responsible for payment failed to pay, APCC has no additional burden to prove further that some third parties who were *not* legally responsible for payment also failed to pay. Instead, if Network wants us to reduce its legal obligation to pay damages to APCC to account for payments allegedly made to APCC by some collateral sources, it is Network's burden to prove that such a reduction is warranted. Thus, Network bears the burden of proving how much (if any) of the payments made by Debit Card Providers to APCC were for payphone calls handled by a Network switch.

60. Assigning the burden of proof to Network comports with substantial precedent holding that the assertion of setoffs for collateral source payments is an affirmative defense for which the defendant bears the burden of proof.<sup>156</sup> Indeed, Network implicitly acknowledged that precedent by *twice* pleading this issue as an affirmative defense, before shifting gears late in the proceeding and arguing that APCC has the burden of proof.<sup>157</sup> Moreover, assigning the burden of proof to Network is fair and sensible, because Network had (and still has) the greater access to pertinent evidence.<sup>158</sup> In particular, unlike APCC, Network had a contractual relationship with the Debit Card Providers regarding the

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<sup>155</sup> Defendants' Initial Brief on Damages at 20-22 (citing *C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc.*, Hearing Designation Order, 16 FCC Rcd 8801, 8808 at ¶ 21 (Enf. Bur. 2001); *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5134 at ¶ 14 (2000); *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000)); Defendants' Reply Brief on Damages at 9-10.

<sup>156</sup> See, e.g., 5 Wright & Miller, *Federal Practice & Procedure*, § 1271; *Giles v. General Electric Co.*, 245 F.3d 474, 494 n.36 (5<sup>th</sup> Cir. 2001); *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11<sup>th</sup> Cir. 1988); *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 304 F.Supp.2d 1, 6-7 (D.D.C. 2004). Cf., *AT&T Communications v. Northwestern Bell Telephone Co.*, Memorandum Opinion and Order, 8 FCC Rcd 1014, 1021 at ¶¶ 21-22 (1993) (stating that "AT&T has made a claim for specific damages, and NWB, in turn, may properly argue that it is entitled to certain offsets against those damages").

<sup>157</sup> Compare Liability Answer at 17 and Damages Answer at iv, 31 with Defendants' Initial Brief on Damages at 20-22.

<sup>158</sup> See, e.g., 5 Wright & Miller, *Federal Practice & Procedure*, § 1271.

payphone calls at issue. Thus, unlike APCC, Network had a significant opportunity to obtain payment information from the Debit Card Providers, either during the Relevant Period or soon after APCC notified Network (in 2000, 2002, and 2003) of its intention to hold Network (and not the Debit Card Providers) responsible for dial-around compensation.<sup>159</sup> Moreover, APCC has no independent basis for developing payment information, because during the Relevant Period the Debit Card Providers -- like all payors of dial-around compensation -- were not required to and did not itemize their payments to APCC according to call-paths.<sup>160</sup> Thus, as stated above, Network bears the burden of proving how much (if any) of the payments made by Debit Card Providers to APCC were for payphone calls handled by a Network switch.

61. The record evidence supplied by Network falls short of meeting that burden. Specifically, having failed to produce evidence that it had exclusive contractual arrangements with the Debit Card Providers, Network proffers, instead, only two bases for offsetting any damages award by amounts paid by the Debit Card Providers to APCC: (i) Network alleges that its contracts with the Debit Card Providers obligated the Debit Card Providers to pay dial-around compensation; and (ii) Network references a letter it sent to the Debit Card Providers reminding them of their alleged contractual obligation to pay dial-around compensation.<sup>161</sup> Based on only these two pieces of evidence, combined with the absence of direct, contrary evidence from APCC, Network argues that “the only logical assumption” to draw is that all of the Debit Card Providers’ payments to APCC were for payphone calls carried by a Network switch.<sup>162</sup>

62. We reject Network’s argument, for several reasons. First, the contractual language on which Network relies does not appear in many of its contracts with the Debit Card Providers.<sup>163</sup> Second, even where it does appear, the contractual language is ambiguous about whether a Debit Card Provider must pay dial-around compensation to PSPs.<sup>164</sup> Third, standing alone, Network’s single letter

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<sup>159</sup> Network again faults APCC for declining Network’s purported offer in 2000 to “assist” APCC in seeking compensation from the Debit Card Providers, which Network asserts is the real reason for the present lack of available information. See, e.g., Brief of Network, File No. EB-03-MD-011 (filed Dec. 19, 2003) (“Network Liability Brief”) at 3-6, 9-10; Petition at 16; Defendants’ Initial Brief on Damages at 6-8, 9 and Exh. 2. As we have explained previously, see Part III. B. 4., *supra*; *Bureau Liability Order*, 20 FCC Rcd at 2084, ¶¶ 24-25, regardless of any attempt by Network to help APCC, APCC had no obligation or right to seek information and compensation from the Debit Card Providers, as it was Network (and not the Debit Card Providers) who was the last facilities-based carrier responsible for paying compensation to APCC.

<sup>160</sup> Complainants’ Initial Brief on Damages at 9; *Bureau Liability Order*, 20 FCC Rcd at 2076-77, ¶ 8 (and orders cited therein).

<sup>161</sup> Defendants’ Reply Brief on Damages at 8-10, Exs. F, G.

<sup>162</sup> Defendant’s Reply Brief on Damages at 8.

<sup>163</sup> See Liability Answer at Att. B.

<sup>164</sup> A typical version of the contractual language states, in pertinent part: “Customer shall be responsible for payment of all applicable taxes or assessments *due to local, state, federal, and international taxing authorities*, including income, sales, use, other excise taxes or assessments (including Universal Service Fund and Dial-around Compensation), resulting from Customer’s resale of the Services to Card Holders unless customer provides appropriate tax exempt certificate.” Liability Answer at Attachment B-1, p. 2 (emphasis added). Here, the payments at issue are “due to” a private party – APCC – not to any “local, state, federal, [or] international taxing authority”. Thus, the contracts do not plainly obligate the Debit Card Providers to make such payments. In addition, the contractual language applicable to the largest Debit Card Provider is similarly ambiguous. It provides, in pertinent part: “[Debit Card Provider] is responsible for any fees and sales or use taxes levied by any taxing or  
(continued....)

“reminding” Debit Card Providers to pay dial-around compensation directly to PSPs cannot support an inference that any or all of the dial-around compensation paid by Debit Card Providers to APCC was for calls handled by Network’s switches, in the absence of evidence of other admonishments and reminders. Indeed, given the contractual language’s ambiguity, it is equally if not more reasonable to assume that the Debit Card Providers simply ignored Network’s letter because the letter conflicted with their interpretation of the contract.<sup>165</sup>

63. Finally, even if Network were correct that the contracts obligated Debit Card Providers to pay compensation to APCC for the calls at issue here, the contracts’ lack of exclusivity would still fatally undermine Network’s position. In particular, Network would still have to prove which payments (if any) were for calls handled by a Network switch rather than for any other kinds of calls. And despite urging from Commission staff,<sup>166</sup> Network failed to offer any such proof – or even an arguably reasonable proxy for allocating the Debit Card Providers’ payments between Network-switched calls and non-Network switched calls. Network seems to assume that, if it can provide any evidence suggesting that some of the Debit Card Providers’ payments might be for Network-switched calls, then we will simply infer that *all* of the payments were, in fact, for Network-switched calls. Network’s assumption is incorrect.<sup>167</sup>

64. To summarize, Network has the burden of proving that payments made by Debit Card Providers to APCC were for payphone calls at issue here, *i.e.*, calls handled by a Network switch, as opposed to calls handled by facilities-based carriers other than Network. Network has failed to meet that burden. Therefore, the payments made by Debit Card Providers to APCC provide no basis for reducing the amounts owed by Network to APCC.<sup>168</sup>

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regulatory authority (including universal service fees and dial around compensation) upon the compensation paid by [Debit Card Provider] for Services and Deliverables. [Network] will itemize any such fees or sales or use taxes levied on [Network] by listing them separately on its invoices.” Liability Answer Attachment B-10. The better reading of that provision is that *Network* – and not the Debit Card Provider -- was obligated to pay dial-around compensation directly to PSPs, and then Network could invoice the Debit Card Provider for the dial-around compensation that Network had paid to PSPs on the Debit Card Provider’s behalf.

<sup>165</sup> Network also points out that, during pre-complaint settlement discussions, APCC indicated that it would deduct from its claim against Network sums paid by Debit Card Providers. *See* Defendant’s Reply Brief on Damages at 7, Ex. E. Even if admissible, *see generally* Fed. R. Evid. 408, APCC’s statement cannot reasonably be interpreted to mean that APCC was willing to reduce Network’s liability by amounts received from the Debit Card Providers for payphone calls having nothing to do with APCC’s claim, *i.e.*, calls not handled by a Network switch.

<sup>166</sup> *See ISC Order* at 5 (stating that “the primary purpose of the briefs is to provide a calculation of damages (dial-around compensation and interest) owed by Defendants to Complainants, if any, together with a full explanation of how the amount was calculated,” and making specific mention of the “double recovery issue”).

<sup>167</sup> The weakness of Network’s assertion is highlighted by the fact that one of the Debit Card Providers paid APCC almost \$30 million in dial-around compensation for payphone calls made during the Relevant Period. Supplement to Complainants’ Answer to Defendant’s Interrogatory No.4, File No. EB-03-MD-011 (filed Nov. 10, 2005) (“Supplemental Data”) at 3 and App. A. Thus, if we were simply to assume, as Network would have it, that all of the Debit Card Providers’ payments were for payphone calls handled by a Network switch, then APCC’s damages would be wiped out many times over, just by this one Debit Card Provider.

<sup>168</sup> At the eleventh hour of this proceeding, Network belatedly revealed the existence of additional Debit Card Providers, some of which paid dial-around compensation to APCC. *See, e.g., APCC v. NetworkIP*, Letter from

(continued....)

#### IV. CONCLUSION

65. Because Network was the last facilities-based carrier for 11,622,941 completed calls from APCC's payphones from October 1, 1999 through November 22, 2001, Network owes APCC \$.24 for each of those calls, which amounts to \$2,789,505.84, plus prejudgment interest at an annual rate of 11.25% (to be calculated by the parties). All of Network's asserted grounds for eliminating or reducing the amount it owes APCC lack merit. Specifically, the Enforcement Bureau was correct to waive rule 1.718's six-month deadline for filing a formal complaint that relates back to the filing date of the September 2002 Informal Complaint; APCC's March 2002 Informal Complaint was effectively served; both the March 2002 Informal Complaint and the September 2002 Informal Complaint effectively named Network Enhanced Telecom, LLP as a Defendant; neither the statute of limitations nor any equitable doctrine bars or reduces APCC's claims on tardiness grounds; and the record does not demonstrate that the damages award should be reduced by amounts received by APCC from collateral sources. Consequently, APCC's Damages Complaint is granted in its entirety.

#### V. ORDERING CLAUSES

66. **ACCORDINGLY, IT IS ORDERED**, pursuant to sections 1, 4(i), 4(j), 201(b), 208, 209, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 208, 209, 276, and sections 1.106, 1.716-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.716-1.736, 64.1300-64.1320, that the petition of Defendants NetworkIP, LLC and Network Enhanced Telecom, LLP for reconsideration of the Bureau's order granting the Complainants' motion for a waiver of section 1.718 of the Commission's rules, 47 C.F.R. § 1.718, **IS DENIED**.

67. **IT IS FURTHER ORDERED**, pursuant to sections 1, 4(i), 4(j), 201(b), 208, 209, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 208, 209, 276, and sections 1.716-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.716-1.736, 64.1300-64.1320, that the above-captioned formal complaint is hereby **GRANTED** in its entirety, and this proceeding **IS TERMINATED**.

68. **IT IS FURTHER ORDERED**, pursuant to sections 1, 4(i), 4(j), 201(b), 208, 209, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 208, 209, 276, and sections 1.716-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.716-1.736, 64.1300-64.1320, that defendants Network IP, LLC and Network Enhanced Telecom, LLP **SHALL PAY** to Complainants APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp., within 90 days of release of this Order, damages in the amount of \$2,789,505.84, plus interest at an annual rate of 11.25%, computed

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Alexander P. Starr to Counsel, File No. EB-03-MD-011 (released Dec. 6, 2005) ("December 6 Letter Ruling"). This raised the question of how to respond to Network's tardy revelation of evidence. *See* December 6 Letter Ruling; Complainants' Initial Brief on the Issue of Defendant's Late-Produced Evidence, File No. EB-03-MD-011 (filed Jan. 13, 2006); Defendants' Brief, File No. EB-03-MD-011 (filed Jan. 13, 2006); Complainants' Reply Brief on the Issue of Defendant's Late-Produced Evidence, File No. EB-03-MD-011 (filed Jan. 27, 2006); Defendants' Reply Brief, File No. EB-03-MD-011 (filed Jan. 27, 2006). That issue is now moot, given our determination that Debit Card Providers' payments of dial-around compensation to APCC are irrelevant to the calculation of damages owed to APCC by Network.

beginning on the first day of the quarter following the quarter after the quarter in which the billed call was made, continuing through the date of payment, excluding the period May 19, 2003 to June 3, 2003.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary