

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

In the Matter of)	
)	
APCC Services, Inc.,)	
)	
Complainant,)	
)	
v.)	File No. EB-09-MD-005
)	
CCI Communications, LLC;)	
CCI Communications, Inc.;)	
Creative Communications, Inc.; and)	
Link Systems, Inc.,)	
)	
Defendants.)	

ORDER ON REVIEW

Adopted: January 10, 2013

Released: January 11, 2013

By the Commission:

I. INTRODUCTION

1. This Order denies an Application for Review filed by CCI Communications, LLC (CCI),¹ which requests modification or reversal of a Memorandum Opinion and Order issued by the Enforcement Bureau (Bureau) on June 29, 2010.² The *June 29 Order* granted in part and denied in part a formal complaint³ that APCC Services, Inc. (APCC) filed against CCI and other defendants under Section 208 of the Communications Act of 1934, as amended (Act).⁴ The *June 29 Order* awarded APCC \$1,868,451, plus interest, for per-call payphone compensation CCI owes as a “Completing Carrier” under Section 64.1300(a) and (b) of the Commission’s payphone compensation rules.⁵ As explained below, we affirm the Bureau’s *June 29 Order*⁶ and dismiss as moot CCI’s request to stay the effect of the *June 29 Order*.⁷

¹ CCI Communications, LLC’s Application for Review and Request for Stay, File No. EB-09-MD-005 (filed July 28, 2010) (Application for Review) or (Application).

² *APCC Services, Inc. v. CCI Communications, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 8224 (Enf. Bur. 2010) (*June 29 Order*).

³ Formal Complaint, File No. EB-09-MD-005 (filed Mar. 26, 2009) (Complaint).

⁴ 47 U.S.C. § 208. Although APCC had named several defendants in the Complaint, by the time of the *June 29 Order*, CCI remained the lone defendant. See Order Dismissing Defendant CCI Network Services, Inc., File No. EB-09-MD-005 (Aug. 13, 2009); Order Dismissing Certain Defendants, File No. EB-09-MD-005 (Apr. 29, 2010).

⁵ *June 29 Order*, 25 FCC Rcd at 8224, para. 1; see also 47 C.F.R. § 64.1300(a), (b).

⁶ See 47 C.F.R. § 1.115.

⁷ The Application for Review included a request that the Commission stay the effect of the *June 29 Order*. Application for Review at 10. CCI subsequently refiled that request in a separate document. CCI Communications, LLC’s Request for Stay, File No. EB-09-MD-005 (filed Aug. 13, 2010) (Request for Stay).

II. BACKGROUND

A. Payphone Compensation Regime under Section 276

2. Section 276(b) of the Act directs the Commission to “establish a per-call compensation plan to ensure that all payphone service providers [(PSPs)] are fairly compensated for each and every completed intrastate and interstate call using their payphone.”⁸ Included among the calls subject to this mandate are “dial-around calls,” where the caller makes a coinless call using a carrier other than the payphone’s presubscribed long distance carrier (e.g., calls to toll-free numbers and calls using access codes to reach a service provider of choice).⁹ The Commission has established a default per-call compensation amount—currently set at \$.494—to be paid to PSPs (in the absence of individual agreements) for each and every completed intrastate and interstate dial-around call.¹⁰

3. Multiple entities may collaborate in the transmission of a coinless payphone call, but the Commission’s rules place the responsibility for paying dial-around compensation on one: the “Completing Carrier,” defined as the “long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call.”¹¹ To ensure that PSPs can identify and locate Completing Carriers that owe them dial-around compensation and to make certain that Completing Carriers accurately calculate the amount of any per-call compensation owed to PSPs, Commission rules impose a number of call tracking, third-party audit, certification, and reporting obligations on Completing Carriers.¹²

B. This Litigation

1. The Formal Complaint Proceeding

4. The *June 29 Order* recites in detail the facts underlying the complaint proceeding.¹³ In brief, APCC serves as a clearinghouse for the billing and collection of dial-around compensation on behalf of certain PSPs (Represented PSPs).¹⁴ CCI provides interexchange telecommunications services and switch-based resale.¹⁵ CCI markets and sells prepaid phone cards to resellers.¹⁶

⁸ 47 U.S.C. § 276(b)(1)(A). The Commission has interpreted the statutory term “completed call” to mean “a call that is answered by the called party.” *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19987, para. 25 (2003) (*Tollgate Order*).

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

¹⁰ 47 C.F.R. § 64.1300(b), (d); see, e.g., *Rate Increase Order*, 19 FCC Rcd at 15638, para. 3 & nn.10–11. The compensation obligations of Section 64.1300(b) do not apply to calls “to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.” 47 C.F.R. § 64.1300(c).

¹¹ 47 C.F.R. § 64.1300(a).

¹² *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 19 FCC Rcd 21457, 21459–60, paras. 4–5 (2004) (*2004 Payphone Order*); see 47 C.F.R. §§ 64.1310, 64.1320.

¹³ *June 29 Order*, 25 FCC Rcd at 8225–27, paras. 3–9.

¹⁴ Joint Statement, File No. EB-09-MD-005, at 2, para. 1 (filed June 22, 2009) (Joint Statement). As an agent of the Represented PSPs for the billing and collection of dial-around compensation, APCC has entered into an agency agreement with each of the Represented PSPs and, in addition, each Represented PSP has executed a Power of Attorney authorizing APCC to act on its behalf. See Complaint at 6.

¹⁵ Joint Statement at 2, paras. 4, 5.

¹⁶ Declaration of Jeff Parson in Support of the Revised Answer of CCI Communications, LLC, File No. EB-09-MD-005 (filed May 21, 2009) (Parson Declaration).

5. The Complaint alleged that CCI violated Sections 201(b) and 276(b) of the Act and Sections 64.1300, 64.1310, and 64.1320 of the Commission's rules by failing to pay per-call compensation for dial-around calls made from the Represented PSPs' payphones during the period beginning July 1, 2004, and ending September 30, 2008, and failed to comply with call tracking, third party audit, certification, and reporting requirements.¹⁷ The Complaint sought damages, based on "Intermediate Carrier" reports,¹⁸ for all dial-around calls reported as delivered to CCI from the Represented PSPs' payphones during the relevant timeframe (i.e., all dial-around calls reported by Intermediate Carriers as delivered, regardless of their duration).¹⁹

6. With respect to the calls at issue in this proceeding, CCI acknowledged that, under the Commission's payphone compensation rules, it is a Completing Carrier.²⁰ Further, CCI stipulated that, using a 120-second timing proxy (i.e., counting as "completed" only those calls lasting 120 seconds or longer), it is the "liable Completing Carrier" for 1,287,026 of the 6,321,578 Intermediate Carrier reported calls that had been placed from the Represented PSPs' payphones.²¹ CCI also admitted that, of the total stipulated calls it received from Intermediate Carriers, 1,991,771 were of 30 seconds duration or longer.²²

7. CCI argued that the calls for which it owes compensation should be calculated using a 120-second timing proxy,²³ because the international nature of most of its calls poses barriers that prevent the calls from connecting quickly and because the termination of some of its international calls using Voice-over-Internet Protocol (VoIP) technology results in a "high percentage of false answer supervision" calls.²⁴ CCI claimed, therefore, that the use of a 30-second timing proxy would allow APCC to receive compensation for calls that were not completed.

8. On February 4, 2010, APCC filed a Request for Resolution on the Pleadings, arguing that no material disputes remain, in either fact or law, and urging the Commission to rule on its Complaint

¹⁷ See, e.g., Complaint at 3, para. 5; 9, paras. 22–23; 10, paras. 28–29; see also 47 U.S.C. §§ 201(b), 276(b); 47 C.F.R. §§ 64.1300, 64.1310, 64.1320.

¹⁸ An "Intermediate Carrier" is "a facilities-based long-distance carrier that switches payphone calls to other facilities-based long-distance carriers." 47 C.F.R. § 64.1310(b). Under the Commission's rules, PSPs are entitled to receive quarterly reports from both Completing Carriers (as noted above) and Intermediate Carriers. 47 C.F.R. § 64.1310(c). The Intermediate Carrier report, which must show all dial-around payphone calls delivered to a Completing Carrier's platform, together with the Completing Carrier report, provide PSPs with verifiable information about compensable calls. *2004 Payphone Order*, 19 FCC Rcd at 21472, para. 25.

¹⁹ Although the Complaint also sought damages for calls carried by CCI for which the 8YY (toll-free) numbers were translated into local POTS numbers before the calls were routed to CCI's network (POTS-Translated Calls), see Complaint at 3–4, para 7; 60, para. 231, APCC subsequently abandoned its claim to compensation for these calls. See Request for Resolution on the Pleadings, File No. EB-09-MD-005, at 2, 6 (filed Feb. 4, 2010) (Request for Resolution).

²⁰ Joint Statement at 2, para. 6.

²¹ *Id.* at 3-4, paras. 11–20.

²² CCI Communications, LLC's Responses to Complainant's (1) Initial Interrogatories and Requests for Production and (2) Second Set of Interrogatories, File No. EB-09-MD-005, at 10 (filed Jan. 19, 2010) (CCI's Interrogatory Responses). In addition to providing the number of calls that would be deemed "completed" using a 30-second timing proxy (i.e., counting as "completed" only those calls lasting 30 seconds or longer), CCI noted that it already had paid compensation to APCC for 374,384 of those calls. *Id.*

²³ CCI Communications, LLC's Revised Answer to Formal Complaint, File No. EB-09-MD-005, at 32–34 (filed May 21, 2009) (Answer).

²⁴ Answer at 33; Parson Declaration at 6. Answer supervision refers generally to the signal that is emitted when a call is answered by its recipient so that billing for the call may commence. See generally *Hi-Rim Communications, Inc. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 1982, 1985, para. 6 n.34 (Com. Car. Bur. 1997).

based on the parties' pleadings.²⁵ APCC explained that it had abandoned all claims against CCI *except for its claim to compensation for those calls as to which CCI had stipulated liability,*²⁶ plus interest.²⁷ According to APCC, the only remaining issue for decision was the number of "completed calls," which it urged the Commission to determine by applying the reasoning of *APCC v. Radiant (Radiant)*.²⁸ CCI did not file an opposition or other response to the Request for Resolution.

2. The June 29 Order

9. In the *June 29 Order*, the Bureau granted APCC's Request for Resolution,²⁹ and granted in part, and denied in part, APCC's Complaint.³⁰ The Bureau ordered CCI to pay APCC unpaid dial-around compensation for completed payphone calls in the amount of \$1,868,451, plus interest,³¹ noting that CCI had admitted to being a Completing Carrier, had stipulated to liability for the 6,321,578 calls it had received from Intermediate Carriers (to the extent those calls were completed), and had provided the number of such calls that were of 30 seconds duration or longer.³² The only issue that had not been stipulated to, from the Bureau's perspective, was how to calculate the portion of the 6,321,578 Intermediate Carrier reported calls that should be deemed completed, thus triggering CCI's compensation obligation to the Represented PSPs.³³

10. The Bureau looked to the Commission's opinion in *Radiant* for guidance.³⁴ In *Radiant*, the Commission used a proxy to establish the number of "completed" calls, because the carrier failed to comply with the Commission's call tracking and audit rules, making it impossible to "ascertain the exact number of calls for which [the Completing Carrier] is liable."³⁵ In the absence of accurate and reliable call completion data, the Commission adopted a "middle view" between complainant's proposal to require compensation for every payphone-originated, dial-around call delivered to the Completing Carrier's switch and the defendant's proposal to require compensation only for those calls lasting at least 30 seconds.³⁶ Specifically, the Commission ordered that the defendant in *Radiant* pay compensation for all dial-around calls of 30 seconds duration or longer, and for half of all dial-around calls of lesser duration.³⁷

11. In the *June 29 Order*, the Bureau observed numerous similarities between *Radiant* and the present case, including that both involved: (1) international prepaid calling card traffic; (2) a defendant that had acknowledged liability for completed Intermediate Carrier reported calls delivered to its switch; (3) a defendant that had admitted noncompliance with Commission rules regarding third party

²⁵ Request for Resolution at 1.

²⁶ *Id.* at 2, 5–6. Thus, APCC abandoned its claims to compensation for calls placed during the first quarter of 2008 through the third quarter of 2008.

²⁷ *Id.* at 2, 7–8.

²⁸ *Id.* at 7–8; see *APCC Services, Inc. v. Radiant Telecom, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 8962 (2008).

²⁹ *June 29 Order*, 25 FCC Rcd at 8228, para. 13.

³⁰ *Id.* at 8228, para. 14.

³¹ *Id.* at 8228, para. 15.

³² *Id.* at 8227, para. 10.

³³ *Id.* at 8227–28, paras. 11–12.

³⁴ *Id.* (citing *Radiant*, 23 FCC Rcd 8962).

³⁵ *Radiant*, 23 FCC Rcd at 8971–72, para. 30.

³⁶ *Id.* at 8971–72, paras. 29–30.

³⁷ *Id.*

audits of its call tracking system and the execution of a Chief Financial Officer certification; and, as a result, (4) the submission of unaudited data concerning the number of completed calls.³⁸ In view of these similarities, and finding unpersuasive CCI's asserted rationale for applying a 120-second timing proxy, the Bureau applied the *Radiant* analysis (including a 30-second timing proxy) to determine the number of completed calls for which CCI is liable.³⁹ Consequently, the Bureau ordered CCI to compensate APCC for all of the 6,321,578 stipulated Intermediate Carrier reported calls that were of 30 seconds duration or longer (i.e., 1,991,771 calls), and for half of the calls that were of less than 30 seconds duration (i.e., half of the difference between the 1,991,771 calls that were 30 seconds or longer and the 6,321,578 stipulated Intermediate Carrier reported calls), minus the calls for which CCI already had paid compensation (i.e., 374,384), for a total of 3,782,290 calls.⁴⁰ At the per-call rate of \$.494, the Bureau determined that CCI owed APCC total compensation of \$1,868,451, plus interest (accrued at an annual rate of 11.25 percent).⁴¹

3. CCI's Application for Review

12. The Application for Review, which APCC opposes,⁴² asks the Commission to review and "vacat[e] or modif[y]" the *June 29 Order*.⁴³ CCI states that such action is needed "to allow [it] to present evidence and argument" as to why the number of calls for which it is ordered to compensate APCC should be reduced,⁴⁴ and so that it can explain the "facts and circumstances to adequately inform the Commission of the applicability, or lack thereof, of *Radiant* to the present case."⁴⁵ The Application for Review also contends that CCI's failure to oppose or otherwise respond to the Request for Resolution should be excused and not bar it from offering evidence and argument now as to what it believes would be a more appropriate call proxy.⁴⁶

III. DISCUSSION

13. The Application for Review does not contest the Bureau's finding that, as a Completing Carrier, CCI was subject to per-call compensation, call tracking, third party audit, and other obligations under the Commission's rules.⁴⁷ Instead, the Application challenges the Bureau's reliance on *Radiant* for purposes of determining the extent of CCI's liability and takes issue with the Bureau's ruling on procedural grounds. We affirm the *June 29 Order* in its entirety and deny the Application for Review.

A. The Bureau Properly Applied the *Radiant* Analysis to the Instant Case

14. CCI argues that the *June 29 Order* failed to take into account certain characteristics of its call traffic that it believes distinguish the traffic from that in *Radiant*.⁴⁸ To begin, CCI contends that the

³⁸ *June 29 Order*, 25 FCC Rcd at 8228, para. 12.

³⁹ *Id.* at 8228, para. 12. The Bureau also described as "noteworthy" CCI's lack of a response to APCC's Request for Resolution. *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 8228, para. 13.

⁴² See Opposition to Application for Review, File No. EB-09-MD-005 (filed Aug. 16, 2010) (Opposition).

⁴³ Application for Review at 1, 10.

⁴⁴ *Id.* at 10.

⁴⁵ CCI Communications, LLC's Reply Memorandum in Support of Application for Review, File No. EB-09-MD-005 (filed Aug. 25, 2010) (Reply Memorandum) at 8.

⁴⁶ Application for Review at 7.

⁴⁷ *Id.*, *passim*.

⁴⁸ *Id.* at 4–6; see also Answer at 32–34; Parson Declaration at 6.

calls at issue in *Radiant* “were more heavily weighted towards domestic traffic” than the calls in this case.⁴⁹ The *June 29 Order* considered and rejected this argument based on evidence in *Radiant* that flatly refutes CCI’s contention.⁵⁰ CCI has not provided any evidence or explanation that warrants revisiting this issue.⁵¹

15. Next, CCI maintains that the *June 29 Order* erred by “lumping all international traffic into one group.”⁵² CCI states that the “vast majority” of its call traffic is “to Central and South America.”⁵³ CCI claims that the call completion rate “in such countries hovers around 40% or below,”⁵⁴ and that, “for more than 90% of its call traffic, the calls do not complete in the first 30 seconds of the call.”⁵⁵ CCI argues that, in contrast, traffic to other international destinations may have a “measurably higher call completion rate.”⁵⁶ Neither the Application for Review nor CCI’s pleadings below, however, includes evidence supporting CCI’s assertions that call completion rates for its traffic differ materially from completion rates for other international calling card traffic.⁵⁷

16. CCI further maintains that the Bureau erred in applying the *Radiant* analysis to the present case without properly taking into account the lower completion rates that it believes result from its high percentage of “VoIP traffic.”⁵⁸ Once again, CCI offers no specific evidentiary support for its assertions that VoIP traffic has a materially lower call completion rate than non-VoIP traffic or that such

⁴⁹ Application for Review at 5.

⁵⁰ *June 29 Order*, 25 FCC Rcd at 8228, para. 12 & n.45 (quoting Revised Answer to Formal Complaint, *APCC Services, Inc. v. Radiant Telecom, Inc., Intelligent Switching and Software, LLC, and Radiant Holdings, Inc.*, File No. EB-05-MD-016, at 2 n.4 (filed Oct. 7, 2005) (“*Radiant* is primarily in the calling card business. The vast majority of its end-user customers use the cards to place international calls.”)).

⁵¹ CCI also challenges the *June 29 Order* on the basis that it “requires CCI to compensate APCC’s PSPs for the same calls for which it has already directly compensated the PSPs.” Application for Review at 1. CCI first raised this issue in paragraph 48 of its Answer, alleging that CCI has paid “some PSPs directly for the same calls for which Complainant now seeks compensation.” Answer at 13, para. 48 (emphasis added). The first time CCI proffered any details regarding these alleged payments, however, was in response to an interrogatory to which it attached a CD purporting to list 82,804 calls that “were part of the APCC claim . . . that have been already paid by CCI.” See CCI’s Interrogatory Responses at 12. CCI fails to provide even the most basic facts concerning these alleged payments, however, and the few details it does provide vary from one pleading to the next. For example, although the Interrogatory response and CD referenced above contained a list of ten PSPs that CCI allegedly paid directly, *see id.*, the Application for Review lists only four such PSPs (including one that did not appear on CCI’s earlier list). Application for Review at 9. Because CCI has not substantiated these allegations of “double payment” or otherwise pleaded them with the specificity required by our rules, they provide no cause for us to modify the ruling below.

⁵² Application for Review at 6.

⁵³ *Id.* at 5.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 6.

⁵⁷ See, e.g., Answer at 33 (asserting without citation or support that calls to Central and South America take longer to connect than other international calls due to “inferior quality of the telecommunications infrastructure,” instructions being presented in “languages different from the users’ native tongue,” and “variable government regulations affecting the telecommunications infrastructure.”); cf. 47 C.F.R. §§ 1.720(a) (“All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.”); 1.720(b) (“Pleadings must contain facts which, if true, are sufficient to constitute . . . a defense” to allegations in a formal complaint); 1.720(c) (“Facts must be supported by relevant documentation or affidavit.”); 1.724(g) (“The answer shall attach copies of all affidavits, documents, data compilations and tangible things in the defendant’s possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer.”).

⁵⁸ Application for Review at 5.

calls take significantly longer to connect than non-VoIP traffic.⁵⁹ Similarly, CCI does not substantiate its contention that, based on these purported differences, a 120-second timing proxy is warranted.⁶⁰

17. As the Bureau noted in the *June 29 Order*, CCI “acknowledges liability for completed calls and admits that it has not complied with the Commission’s requirements regarding audits of its tracking system or submission of a CFO certification.”⁶¹ As in *Radiant*, the approach the Bureau adopted here—although admittedly “not perfect”—was necessary because of the defendant’s “willful failure to comply with rules that, when followed by Completing Carriers, ensure that the mandates of Section 276 are achieved.”⁶² In view of the undisputed facts concerning CCI’s noncompliance with the Commission’s tracking system audit and the resulting lack of audited call data, the numerous material similarities between *Radiant* and the instant case (including the international nature of the call traffic in both cases), and CCI’s failure to provide specific evidentiary support for an alternative call completion analysis, we reject CCI’s contention that the Bureau improperly applied the *Radiant* analysis.

B. The Bureau Properly Rejected CCI’s Belated Request to Garner and Present Evidence, Documents, and Expert Witness Testimony to Support Its Case

18. As noted above, CCI did not file an opposition or other response to the Request for Resolution. In the Application for Review, CCI contends that the Commission should excuse this failure and allow CCI to garner and present evidence supporting its argument that use of a 120-second timing proxy is appropriate.⁶³ We find no valid basis for granting CCI’s request.

1. The Request for Resolution Is a Motion Under Section 1.727 of the Commission’s Rules, Which CCI Failed to Oppose

19. CCI asserts that the Commission’s rules do not provide for a Request for Resolution on the Pleadings and, therefore, that the Bureau should have informed CCI of its obligation to respond to the submission.⁶⁴ The Bureau’s failure to do so, CCI says, constitutes reversible error.⁶⁵ We disagree.

20. Section 1.727(a) of the Commission’s formal complaint rules provides that a “request to the Commission for an order shall be by written motion, stating with particularity the grounds and authority therefor, and setting forth the relief or order sought.”⁶⁶ APCC explicitly filed the Request for Resolution “pursuant to Section 1.727 of the Commission’s rules,”⁶⁷ and it unquestionably was a request

⁵⁹ See, e.g., *id.* at 4 (asserting that, with VoIP calls, “there is a marked increase in false answer supervision. In other words, VoIP calls take longer to connect, sometimes are dropped and are reported as having completed when in fact they have not”).

⁶⁰ Although CCI appended to its Answer the declaration of its chief operating officer, Jeff Parson, in which Mr. Parson stated that the termination of some of its international calls using VoIP technology results in a “high percentage of false answer supervision” calls, and that the use of a 30 second proxy would allow APCC to receive compensation for calls that were not completed, the declaration does not provide any specific evidentiary support for these assertions. Parson Declaration at 6.

⁶¹ *June 29 Order*, 25 FCC Rcd at 8228, para. 12.

⁶² *Id.* at 8228, para. 11 (quoting *Radiant*, 23 FCC Rcd at 8972, para. 30). As the Bureau noted, even a 30-second proxy “undercounts” the number of completed calls to the extent that it would exclude any completed call that lasted fewer than 30 seconds. *Id.* at 8228, para. 12 & n.46 (quoting *Radiant*, 23 FCC Rcd at 8971, para. 29). For this reason, the Commission, in *Radiant*, included half of all calls lasting fewer than 30 seconds.

⁶³ Application for Review at 7.

⁶⁴ *Id.* at 2, 7–9.

⁶⁵ *Id.* at 2.

⁶⁶ 47 C.F.R. § 1.727(a).

⁶⁷ Request for Resolution at 2 n.2; see Opposition at 7.

to the Commission for an order.⁶⁸ Although CCI contends that it was denied “essential notice” of the true nature of the pleading by virtue of the fact that it was not specifically *styled* as a “motion,” Section 1.727 does not, in fact, require that a request to the Commission for an order contain the word “motion” in its title.⁶⁹

21. Section 1.727(e) of the Commission’s rules further provides that any opposition to a motion must be filed “within five business days after the motion is filed and served and not after,” and that “[f]ailure to oppose any motion may constitute grounds for granting of the motion.”⁷⁰ “Any party that chooses not to file an opposition to a motion runs the risk that the motion will be granted without consideration of that party’s views.”⁷¹ CCI neglected to respond to the Request for Resolution, and the Bureau appropriately ruled on the Request.⁷²

22. The Application for Review does not contend—nor is there any evidence—that CCI was not timely served a copy of the Request for Resolution or that it was otherwise unaware of the pleading.⁷³ Instead, CCI asserts that “the course of dealings” in this case prior to the filing of the Request for Resolution led it to believe that the Bureau’s staff would “notify CCI of the filing[,]” and of the corresponding deadline for filing a response.⁷⁴ Parties appearing before the Commission, however, are charged with knowledge of its rules.⁷⁵ Indeed, when transmitting the Complaint, Bureau staff “encourage[d] the parties to read the formal complaint rules . . . fully and carefully.”⁷⁶ As APCC correctly notes, to the extent that CCI was unfamiliar with the Commission’s procedural rules, the burden was on CCI to familiarize itself with the rules or to engage as co-counsel an active practitioner before the Commission.⁷⁷

⁶⁸ APCC requested “a decision on the pleadings before it holding CCI liable as the Completing Carrier for \$1,868,451 in unpaid [dial-around compensation] plus \$839,718 in interest on that amount, for a total of \$2,708,169.” Request for Resolution at 9.

⁶⁹ 47 C.F.R. § 1.27(a).

⁷⁰ 47 C.F.R. § 1.727(e).

⁷¹ *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, 22593–94, para. 233 (1997) (*Formal Complaints Order*). This underscores what the Commission has described as each party’s “burden to represent fully its own interests before the Commission.” *Id.* at 22593, para. 233.

⁷² See *NetworkIP v. FCC*, 548 F.3d 116, 126–28 (D.C. Cir. 2008) (noting that the court of appeals has “repeatedly discouraged” the Commission from entertaining late-filed pleadings in the absence of “extremely unusual circumstances” and holding that the Commission acted arbitrarily and capriciously in waiving a filing deadline absent such circumstances). Any response or opposition to the Request for Resolution would have been due on February 19, 2010. The Bureau did not release the *June 29 Order* for another four months. At no point during that intervening period did CCI’s counsel contact Bureau staff to inquire about the necessity of filing a response.

⁷³ In fact, APCC states that its counsel attempted to contact counsel for CCI by phone and by email concerning its intent to file the Request for Resolution, but, according to APCC, CCI’s counsel did not respond. Request for Resolution at 1–2.

⁷⁴ Application for Review at 7.

⁷⁵ See, e.g., *Profit Enterprises, Inc.*, Forfeiture Order, 8 FCC Rcd 2846, 2846, para. 5 (1993) (stating that, with respect to manufacturer/distributor’s claim that equipment certification and marketing requirements were inapplicable, its “prior knowledge or understanding of the law is unnecessary to a determination of whether a violation existed . . . ignorance of the law is [not] a mitigating factor”).

⁷⁶ See Notice of Formal Complaint, File No. EB-09-MD-005, at 2 (Apr. 2, 2009). The Bureau’s transmittal letter contained the schedule for due dates of the answer, reply, and initial status conference. See 47 C.F.R. § 1.735(e). There is no basis for CCI’s suggestion that this document caused it to believe that the Bureau would notify the parties of every filing deadline.

⁷⁷ Opposition at 9.

23. Although CCI does not dispute that the Request for Resolution was a request for a Commission order (and, thus, a motion under Section 1.727(a)), it asks the Commission to excuse its failure to file an opposition because it was unaware of the “dispositive” nature of APCC’s submission.⁷⁸ Whether or not the Request for Resolution is dispositive, however, has no bearing on CCI’s obligations under Section 1.727(e), because that rule applies to *all* motions, dispositive and non-dispositive alike.⁷⁹ In any event, we find CCI’s contention that it had no “indication” that the Request for Resolution would dispose of the case to be implausible.⁸⁰ The title of APCC’s pleading and the substance of the pleading itself could not have been clearer that APCC was asking the Commission to resolve the case in its entirety by finding CCI liable for per-call payphone compensation totaling over \$2 million.⁸¹ Such a ruling ending the litigation most certainly would be dispositive.

2. Regardless of CCI’s Failure to Oppose the Request for Resolution, the Bureau Appropriately Granted the Request Based on the Record Before It

24. CCI’s failure to file a response to the Request for Resolution was not the exclusive basis for the *June 29 Order*, which contained determinations stemming from a “complete and inclusive pleading cycle.”⁸² Indeed, the Request for Resolution was not even necessary for the Commission to resolve the case. APCC had filed a complaint and reply, CCI had submitted an Answer, and the parties, working together, had developed a Joint Statement containing stipulated facts.⁸³ These documents constitute an adequate written record, on which the Commission can resolve formal complaint proceedings.⁸⁴ Admittedly, the Request for Resolution narrowed the issues before the Commission, because APCC relinquished certain claims against CCI, but this worked only to CCI’s benefit. After

⁷⁸ Reply Memorandum at 2. In particular, CCI points to footnote 2 of the Request for Resolution, where APCC states that it “has not treated this request as a dispositive motion under Section 1.727(b)” insofar as it did not include proposed findings of fact and conclusions of law and a proposed order. Application for Review at 7 (citing Request for Resolution at 2 n.2). APCC asked the Commission instead to “treat the relevant portions of its Complaint and Reply as the proposed findings of fact and conclusions of law” and stated that it did not believe a proposed order was necessary because it was asking that the Commission “merely act to rule on the matters already before it.” *Id.*

⁷⁹ If CCI believed that the Request for Resolution was somehow procedurally infirm because the Commission’s rules do not “specifically provide[]” for Requests for Resolution, Application for Review at 7, it ought to have raised those concerns in an opposition.

⁸⁰ Application for Review at 7.

⁸¹ *See, e.g.*, Request for Resolution at 1 (requesting a ruling “based on the parties’ pleadings” and asserting that the parties’ pleadings “fully briefed” all issues necessary to render a decision); *id.* at 2 n.2 (requesting that the Commission “act to decide this case on the record already before it”); *id.* at 3 (asserting that “the discussion herein is a fully adequate basis for a ruling by the Commission”); *id.* at 5 (asserting that CCI has stipulated or admitted to all material questions of law and fact necessary to resolve this case); *id.* at 6 (asking the Commission to resolve this proceeding on the pleadings); *id.* at 8 (urging the Commission to issue a summary ruling without further briefing given that CCI has stipulated to liability for the completed calls at issue and the parties have fully briefed the issues in their pleadings); *id.* at 9 (requesting a decision on the pleadings holding CCI liable as the Completing Carrier for a total of \$2,708,169).

⁸² *June 29 Order*, 25 FCC Rcd at 8227, para. 10.

⁸³ *Id.*

⁸⁴ *See* 47 C.F.R. § 1.720 (“Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments.”) In this case, the record also contained CCI’s responses to interrogatories. *See June 29 Order*, 25 FCC Rcd at 8227, para. 10 & n.38 (citing CCI Communications, LLC’s Responses to Complainant’s (1) Initial Interrogatories and Requests for Production and (2) Second Set of Interrogatories, File No. EB-09-MD-005, at 10 (filed Jan. 19, 2010)).

carefully considering the written record, the Bureau rejected CCI's substantive arguments that *Radiant* should not apply.⁸⁵

3. CCI Has Provided No Basis to Believe a New Opportunity to Present Evidence Would Be Fair or Meaningful

25. We find no merit to CCI's contentions that it now should be given another opportunity to present factual evidence supporting its case. CCI claims that, in the underlying proceeding, it "expected an opportunity to make its case and support its asserted defenses with documentation, expert witness testimony and other evidence when the case resumed in full, presumably after the Initial Status Conference."⁸⁶ This reflects a fundamental misunderstanding of the Commission's formal complaint processes in at least two important respects. First, discovery is not a matter of right in formal complaint proceedings.⁸⁷ Therefore, CCI could have no reasonable expectation that it was entitled to conduct discovery. Furthermore, CCI's assertion that it intended to obtain additional facts through discovery is belied by its failure to propound any requests for interrogatories with its Answer.⁸⁸ Second, the formal complaint process involves fact-based pleading, as distinguished from notice pleading used in federal courts.⁸⁹ Thus, CCI was required to present in its Answer all facts and supporting evidence relating to the call completion methodology it argued is appropriate (i.e., use of a 120-second timing proxy).⁹⁰ Although CCI contends that, at the time it filed its Answer, it "did not possess" the relevant evidence, it did not explain what information it needed nor did it request discovery to obtain the information.⁹¹ The Bureau properly proceeded to decide the Complaint based on the record before it.

⁸⁵ *June 29 Order*, 25 FCC Rcd at 8226–28, paras. 6–12.

⁸⁶ Reply Memorandum at 4–5.

⁸⁷ *See, e.g.*, 47 C.F.R. §§ 1.729(d) (stating that Commission staff will consider discovery requests and objections thereto at the Initial Status Conference); 1.729(h) (stating that the Commission "may" allow additional discovery); *see also Formal Complaints Order*, 12 FCC Rcd at 22549, para. 115 ("[W]e eliminate the rule authorizing the parties to initiate self-executing discovery."); *id.* at 22550, para 120 ("We disagree with the argument that the Commission should provide discovery as a matter of right . . .").

⁸⁸ *See* 47 C.F.R. § 1.729(a) ("A defendant may file with the Commission and serve on a complainant, during the period starting with the service of the complaint and ending with the service of its answer, a request for up to ten written interrogatories.").

⁸⁹ *Formal Complaints Order*, 12 FCC Rcd at 22529, para. 70 ("The Commission's rules have always required fact-based pleadings. That is, all complaints, answers and related pleadings are required to contain complete statements of fact, supported by relevant documentation and affidavits.").

⁹⁰ *See, e.g.*, 47 C.F.R. §§ 1.720(a) ("All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity."); 1.720(b) ("Pleadings must contain facts which, if true, are sufficient to constitute . . . a defense" to allegations in a formal complaint); 1.720(c) ("Facts must be supported by relevant documentation or affidavit."); 1.724(b) (requiring the answer to "respond specifically to all material allegations of the complaint . . . and state in detail the basis for admitting or denying such averment"); 1.724(d) (stating that "[a]verments in a complaint . . . are deemed to be admitted when not denied in an answer"); 1.724(g) ("The answer shall attach copies of all affidavits, documents, data compilations and tangible things in the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer.").

⁹¹ Reply Memorandum at 5. Even in the Application for Review, CCI provides no documentation or factual support for its contention that the call traffic in *Radiant* is distinguishable. *See, e.g.*, Application for Review at 8 ("While CCI acknowledges that the arguments presented herein are without supporting documentation, cites and expert opinion, it is confident that such could be obtained and presented in the appropriate forum.").

IV. ORDERING CLAUSES

26. Accordingly, **IT IS ORDERED**, pursuant to Sections 1, 4(i), 4(j), 201, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, and Sections 1.44(e) and 1.102(b)(3) of the Commission's rules, 47 C.F.R. §§ 1.44(e), 1.102(b)(3), that the Request for Stay **IS DISMISSED AS MOOT**.

27. **IT IS FURTHER ORDERED**, pursuant to Sections 1, 4(i), 4(j), 201, 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, and Sections 1.115, 1.720–1.736, and 64.1300–64.1320 of the Commission's rules, 47 C.F.R. §§ 1.115, 1.720–1.736, 64.1300–64.1320, that the Application for Review **IS DENIED**.

28. **IT IS FURTHER ORDERED**, pursuant to Sections 1, 4(i), 4(j), 201, 208, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, and Sections 1.115, 1.720–1.736 and 64.1300–64.1320 of the Commission's rules, 47 C.F.R. §§ 1.115, 1.720–1.736, 64.1300–64.1320, that the *June 29 Order* **IS AFFIRMED IN ITS ENTIRETY** as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary