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

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Amendment of Rules Governing)
Procedures to be Followed When)
Formal Complaints are Filed Against)
Common Carriers.)

CC Docket No. 92-26

COMMENTS OF THE AMERITECH OPERATING COMPANIES

The Ameritech Operating Companies (Companies),¹ pursuant to §1.415 of the Federal Communications Commission's (Commission) Rules, 47 C.F.R. § 1.415, respectfully submit the following comments on the Commission's proposals regarding its formal complaint process.² While the Companies are sympathetic to the Commission's goal of seeking new ways to expedite the complaint process, the Commission also must ensure that the process results in the fair resolution of facts and liability. The Commission must properly balance the interests of the complainants and the defendants without giving either party the ability to manipulate the process to their benefit. With these concerns in mind, the Companies submit the following comments.

I. Background

On March 12, 1992, the Commission released a Notice of Proposed Rulemaking recommending changes to its rules governing formal complaint proceedings. Specifically, the Commission recommends that filing deadlines

¹ The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

² *Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Dkt. No. 92-26, Notice of Proposed Rulemaking, FCC 92-59, 7 FCC Rcd. (1992)(hereinafter Notice).

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for pleadings, motions and discovery be shortened and that certain filings be eliminated.

With regard to complaints and answers, the Commission recommends that answers to complaints be filed 20 days after service of the complaint rather than 30 days. In addition, the Commission proposes that replies to answers should not be permitted, unless the defendant includes new facts in its affirmative defenses to which the complainant needs to respond.

The Commission also proposes that briefs ordered by the staff be filed 15 days from the date of the order, in cases in which no discovery has taken place. Both the complainant and defendant will be required to file their briefs concurrently, and no reply briefs will be permitted. In cases in which discovery has occurred, briefs will be due 20 days after the briefs were ordered to be submitted, and reply briefs will be due ten days after the filing of the briefs.³ In addition, the Commission proposes that motions to dismiss or motions for summary judgment be filed concurrently with the answer to the complaint, unless the motion is based on information discovered after the filing of the answer. And, in cases in which motions are filed after the answer, the party must identify the new information which prompted the motion and when it was discovered. Oppositions to motions would be filed ten days after the motion, as is currently provided under the Commission's rules, but replies would not be permitted.

With regard to the discovery mechanisms, the Commission proposes several changes. Specifically, the Commission proposes to prohibit any discovery regarding damages until after the Commission has determined

³ The Commission also recommends that briefs be limited to 25 pages unless discovery has been conducted and then briefs may be 35 pages. Reply briefs will be limited to 20 pages.

liability. Once liability has been established, the Commission proposes that parties be given time to engage in settlement discussions before a second proceeding begins. Alternatively, the Commission requests comments on a proposal that *all* discovery be prohibited, except when explicitly ordered by the staff, until liability is determined. The Commission requests comments on whether such a plan would serve to expedite the complaint process.

The Commission also proposes to shorten the time periods for conducting discovery. The Commission recommends that interrogatories or requests for production of documents be served no sooner than the date for filing the answer and no later than 20 days after the filing of the answer. Answers and objections to interrogatories or document requests would be due 20 days after service of the interrogatories. The time period for filing motions to compel answers or production of documents would be shortened to five days from the current 15 day schedule.

The Commission also proposes in the *Notice* that objections to interrogatories or document requests based on relevance would not be permitted. The Commission submits that refusals to answer interrogatories or document production requests based on relevance would be deemed an admission of the allegations contained in the interrogatory or document request. The Commission believes that the proposal would create less manipulation of the discovery process because defendants would be encouraged to respond to the interrogatories. The Commission concludes that if the interrogatory was irrelevant then an admission against that interest would not affect the determination of liability.

The Commission also proposes to add rules regarding the confidential and proprietary treatment of information sought pursuant to discovery. The Commission submits that, if such rules are codified in its rules, parties would

not have to negotiate these agreements which currently take a considerable amount of time.⁴ And, the Commission proposes that answers to interrogatories and documents produced during discovery not be routinely filed with the Commission. The Commission submits that any information of decisional value will be included in the briefs that are filed arguing the case. Moreover, under such a proposal, parties would not be required to request confidential treatment until such time as the information is filed with the Commission, thus protecting much information from Freedom of Information Act requests.

Finally, the Commission submits that the proposed expedited pleading and discovery schedules will improve the processing for formal complaints without imposing any new major burdens on the parties or Commission staff. It also believes that the proposed rules strike the appropriate balance between protecting the interests of the parties and ensuring an adequate record is compiled for Commission resolution.

II. Discussion

The Ameritech Operating Companies support the Commission's goal of expediting the complaint process while continuing to ensure full and fair resolution of the issues. Consequently, the Companies support many of the changes proposed by the Commission which shorten the filing schedules of pleadings, motions, briefs and discovery documents.

⁴ The Commission proposes that proprietary materials could only be viewed by certain individuals employed by the recipient; duplication would be restricted and the recipient would be required to maintain a log recording all the production and distribution of all copies made; upon termination of the complaint proceeding all copies of the proprietary materials and related logs would be provided to the producing party; and any notes or work product based on proprietary material would be destroyed. *Notice, supra* n.2, at 9 n.13.

However, there are some changes suggested by the Commission for which the Companies propose alternatives. Specifically, the Companies submit that the Administrative Procedures Act (APA), 5 U.S.C. §§ 500-576, requires that either the Commission or an administrative law judge (ALJ) conduct a hearing when factual issues are in dispute in a complaint case. Consequently, as more fully explained below, the Companies propose that the Commission determine as soon as possible whether contested issues of fact exist in a complaint. If there are disputed issues of fact, the Commission should refer those cases to an ALJ to preside over the fact finding inquiry. In cases in which no factual issues are disputed, the Commission may resolve the remaining legal and regulatory issues based on the pleadings and briefs filed by the parties.

With regard to the changes in pleading schedules, the Companies generally support the Commission's proposals. Specifically, the Companies support the Commission shortening the filing schedule for answers, briefs, and motions. In most instances, the shortened filing schedule still permits sufficient time for a complete and comprehensive response and should not impose a significant burden on either the complainant or defendant. The Companies also support the Commission's proposal to limit the ability to file replies to answers. In most instances, the replies merely reiterate information and arguments already in the record. Moreover, the inability to file replies should force complainants to include factual support for their allegations in the complaint and not rely on replies to set forth their facts.

On the other hand, the Companies do not support the Commission's proposed limitation on filing replies to briefs and oppositions to motions. Replies are often necessary to clarify issues or correct misstatements included in opponents' oppositions or briefs. In addition, replies are essential for a full

and fair discussion of the issues in complex cases or cases of first impression.⁵ Thus, replies to briefs and oppositions serve an important function in ensuring a complete record and should not be eliminated.

The Companies also do not support the Commission's proposal to have Commission staff orally issue orders on briefing schedules. The Companies submit that oral orders can lead to confusion and misunderstandings. Without written orders, parties are forced to rely on their memories and notes as to what issues must be addressed in briefs or pleadings and when they must be filed. Although the Commission states that written orders will be issued soon after the oral order, the Companies are concerned that the written order will not be released in sufficient time before the filing deadline to ensure that the brief addresses the correct issues. The consequences of not addressing the issues or filing the brief late are too harsh not to have the written order by the Commission before filing briefs.

As an alternative, the Companies propose that, while the staff continue to issue oral orders requiring the submission of briefs, the time period for filing briefs should be calculated from the time the written order is released. This proposal would still allow staff to expedite the process of ordering briefs to be filed, but also would give the Commission staff the incentive to issue the orders as soon as possible. Parties would then have a written order to consult to assure themselves of meeting the Commission's requirements.

⁵ There may be instances in which there is an extraordinary amount of complaints based on the same cause of action through which the issues already have been fully addressed. In those circumstances, the Commission could impose specific filing requirements, such as restrictions on filing replies to briefs and oppositions, applicable to those complaints based on the same cause of action.

As an alternative to the proposed changes in the discovery mechanisms, the Companies propose that discovery be supervised by an ALJ in cases in which there are contested issues of fact. Specifically, a complaint filed under §§ 206-208 of the Communications Act of 1934, 47 U.S.C. §§ 206-208, starts an adjudicatory proceeding under the APA. When there are contested factual issues in an adjudicatory proceeding, a hearing must be held to resolve those issues.⁶ Under Section 7(b) of the APA, 5 U.S.C. § 556(b), unless the Commission itself is to sit at a hearing, an ALJ must be appointed. Since an ALJ or the Commission must preside over the hearing, it would expedite the process if an ALJ also supervised discovery.

To determine which cases to refer to an ALJ, the Companies propose that the Commission determine as soon as possible whether there are any contested factual issues raised in a complaint. The Commission should require parties to submit Requests for Admission of Facts to their opponent. See Fed. Rules Civ. Proc. rule 36, 28 U.S.C.A. Under Rule 36, parties to the complaint are required to state in simple format the *facts* which they believe support their positions. The opponent then agrees or disagrees with the statement. Consequently, using admissions of fact, the Commission would be able to determine whether there are contested issues of fact and which facts are in dispute.

If there are disputed issues of fact, since the APA requires a hearing, the Commission staff should then refer the complaint to an ALJ to supervise discovery as well. A significant aspect of an ALJ's duties is to supervise discovery. 5 U.S.C. § 556(c). This is so embedded in the fabric of agency

⁶ See *Radiofone, Inc. v. FCC*, 759 F.2d 936 (D.C. Cir. 1985); *Alaska Airlines, Inc. v. CAB*, 545 F.2d 194, 200 (D.C. Cir. 1976).

adjudication that the Administrative Conference's recommendation on "Discovery in Agency Adjudication" simply assumed that the officer who presides at a hearing would supervise discovery.⁷

There are several compelling reasons why the Commission should appoint an ALJ to supervise discovery. First, ALJs tend to be experienced in handling discovery disputes. Second, the ALJ will be able to conduct hearings much more efficiently if he or she has become familiar with the issues and factual background through overseeing discovery and disposing of other preliminary matters.

Such a proposal will expedite the complaint process because the Commission determines at the beginning of a complaint whether the complaint can be decided on the pleadings, or whether discovery needs to be conducted. Therefore needless discovery is not used to unnecessarily delay resolution of the case. If parties agree to the facts as delineated in the admission of facts then only the regulatory and legal issues need to be resolved. At that point, the Commission and staff can expedite their decision on the merits of the complaint.

Notwithstanding the above proposal, if the Commission continues to supervise discovery, the Ameritech Operating Companies submit these comments regarding the proposed changes in discovery procedures. The Companies generally support the Commission's proposal to shorten the filing deadlines. As with the pleading cycle, a shortened schedule should not adversely affect the parties. However, the Companies propose that the deadline for filing motions to compel be extended to seven days from the

⁷ Recommendations and Reports of the Administrative Conference of the United States, Recommendation No. 21, Vol. 1, 541 (1968-70); *see also* Tomlison, *Discovery in Agency Adjudication*, 1971 Duke L.J. 89 (1971).

Commission's proposed five day deadline. An additional two days is necessary to permit parties enough time to review the objections to interrogatories and draft a sufficient response.

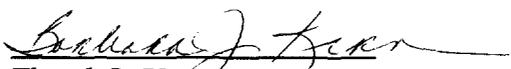
The Companies also support the Commission's proposal to codify the rules for treatment of confidential and proprietary information. It would eliminate the time now spent negotiating these agreements. The Companies, however, recommend that the Commission provide some remedy if the agreement is breached by an opponent. This would serve to ensure that such agreements will be followed.

The Companies do not support the Commission's proposal to prohibit objections to interrogatories or requests for production of documents based on relevance, or its proposal that refusal to answer because of relevance will be deemed an admission of allegations. Specifically, interrogatories are designed to elicit factual information and should not contain allegations. This proposal would give complainants the incentive to draft misleading or manipulative questions in order to force the opponent to admit allegations. Moreover, in most cases, the Commission has not enunciated the standard on which it will base liability. Consequently, parties will be forced to guess what issues the Commission would deem relevant to resolution of the case and be penalized later if they guess incorrectly. Clearly this proposal will not assist in building a complete and accurate record, and could result in findings of liability not supported by the *facts* in the record.

III. Conclusion

Based on the foregoing, the Companies generally support the Commission's proposals to shorten the filing schedules for pleadings, motions, and discovery documents. However, the Companies propose that when a complaint raises contested issues of fact the Commission refer that complaint to an ALJ to supervise discovery and resolve the issues.

Respectfully submitted,

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