

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

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APR 21 1992

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

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CC Docket No. 92-26

COMMENTS OF THE  
NYNEX TELEPHONE COMPANIES

New York Telephone Company  
and  
New England Telephone and  
Telegraph Company

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## TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| SUMMARY                                      | i           |
| I. INTRODUCTION                              | 1           |
| II. PROPOSED CHANGES TO THE PLEADING RULES   | 2           |
| III. PROPOSED CHANGES TO THE DISCOVERY RULES | 4           |
| IV. CONCLUSION                               | 10          |

## SUMMARY

The Commission instituted this proceeding to solicit comments on proposed changes to its rules regarding the procedures applied in formal complaints against common carriers.

Several of the changes to the formal complaint rules proposed by the Commission, particularly those limiting discovery, should assist in streamlining the complaint resolution process. Many of the other proposals, such as those shortening many of the pleading cycles, will not help the Commission resolve complaints more quickly, and in fact may result in increased delays resulting from an increased number of motions. Furthermore, the Commission's proposed rule precluding objections to discovery based on relevance will not speed the complaint resolution process, and should not be adopted by the Commission. Rather, if discovery is to be permitted in formal complaint proceedings, the traditional objections, including relevance, must also be retained. If parties are unable to resolve disputes concerning discovery, as will inevitably occur no matter what discovery rules the Commission adopts, the companies must exercise its responsibility as arbiter, and intervene to resolve such disputes.

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COMMENTS OF THE  
NYNEX TELEPHONE COMPANIES

New York Telephone Company ("NYT") and New England Telephone and Telegraph Company ("NET") (collectively, the "NYNEX Telephone Companies" or "NTCs") hereby file their comments in Response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released March 12, 1992 in the above-captioned proceeding.

I. INTRODUCTION

The Commission instituted this proceeding to solicit comments on proposed changes to its rules regarding the procedures applied in formal complaints against common carriers.<sup>1</sup> The Commission proposes to "modify filing deadlines, eliminate certain pleading opportunities which do not appear useful or necessary, and modify and consolidate the

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<sup>1</sup> These rules are found at 47 C.F.R. §§ 1.720-1.734.

discovery process."<sup>2</sup> The Commission suggests that the proposed rule changes will "facilitate timelier resolution of formal complaints by eliminating procedures and pleading requirements that have caused unintended and unnecessary delays."<sup>3</sup> Following are the NTCs' comments on the Commission's proposed changes to the (1) pleading rules; and (2) discovery rules.

## II. PROPOSED CHANGES TO THE PLEADING RULES

The Commission proposes to modify the filing deadlines for a variety of pleadings, and to eliminate certain other pleading opportunities. Some of the proposed rule revisions, such as the elimination of most replies to answers to complaints, and replies to oppositions to motions, could help to streamline the formal complaint process. Also potentially helpful is the proposed rule revision to prohibit the filing of any motions until the time an answer is due. Other proposed changes, however, will not likely produce the positive results desired by the Commission.

For example, the Commission has proposed reducing the time for a defendant to file an answer to a complaint from thirty days to twenty days. In support of its proposal, the Commission cites the Federal Rules of Civil Procedure, Rule 12(a), which provides for service of an answer by defendants within twenty days in actions brought in federal court. There

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2 NPRM, ¶ 1.

3 Id.

are, however, significant differences between the Commission's procedures and the rules applicable in federal court which militate against the rule change proposed by the Commission. While the Federal Rules provide for answers to complaints within twenty days, extensions of time are routinely granted in federal practice. The Commission's policy, however, is that "extensions of time shall not be routinely granted."<sup>4</sup> It is critical that defendants be given adequate time to prepare answers to complaints and, if warranted, motions to dismiss. Reducing the time to answer complaints by ten days will not assist the Commission in resolving complaints more quickly. On the other hand, providing defendants with an adequate opportunity to produce pleadings which properly frame the issues in dispute, should produce significant time savings later in the proceeding.<sup>5</sup>

The Commission's proposal to introduce time limits for filing briefs, as well as the proposed page limits for those briefs will help to assure uniformity and consistency. The Commission should, however, reconsider its proposal to eliminate reply briefs in all cases in which discovery has not been conducted. There may be instances when reply briefs may be helpful to the Commission in completing the record, and the

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<sup>4</sup> 47 C.F.R. § 1.46.

<sup>5</sup> It should be noted that another of the proposed rule changes would require that motions seeking dismissal of a complaint must in almost all cases be filed with the answer. Given this proposed additional requirement on defendants, it is even more important that defendants be provided with a full thirty days to prepare their responsive pleadings, as provided under current rules.

rules should, therefore, permit reply briefs either upon application by either party, or upon the Commission's own motion.

### III. PROPOSED CHANGES TO THE DISCOVERY RULES

The Commission has also proposed a number of significant changes to the discovery rules. These changes include (1) shortening the time available to initiate discovery, as well as to file and respond to motions to compel discovery; (2) prohibiting discovery on damages until after a finding of liability; and (3) elimination of "relevance" as a ground for opposing an interrogatory or document request.

First, the Commission has proposed rule changes to shorten the time to serve requests for discovery, including interrogatories, so that no discovery may be initiated before an answer is due, or more than 20 days after that date.<sup>6</sup> The NTCs agree that the proposed rule change prohibiting discovery until after an answer is filed should encourage more focused discovery, particularly on the part of plaintiffs, since the defendant's answer should help to narrow the issues in dispute and, thus, the necessary scope of discovery. On the other hand, the proposal to require that all discovery requests be filed within 20 days after an answer is due, rather than 30 days after a reply is due as under current rules, will not materially speed the complaint resolution process. Shortening the time for discovery may, in fact, have precisely the

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<sup>6</sup> NPRM, ¶ 14.

opposite effect as parties with less time to file discovery requests may be more likely to serve broad, ill-focused discovery, resulting in the need for increased Commission intervention to resolve the disputes between the parties which will inevitably arise. The NTCs therefore propose that the time for initiating discovery commence no earlier than the time that an answer is due, and expire 35 days after an answer is due.<sup>7</sup>

The Commission's second proposed change in the time limits for pleadings, to require that objections to the breadth of discovery be made within 10 days of service rather than the currently allowed 30 days, is also unlikely to speed the complaint resolution process. Responding to discovery, even relatively limited discovery, is a time consuming process. Typically, a decision as to whether an objection to an interrogatory or document request is warranted, including an objection based on breadth, cannot be made until a significant amount of preparatory work has been completed. In most cases it would be difficult, if not impossible, to complete this preparatory work and, if necessary, file the appropriate objections within 10 days. Shortening this time limit so dramatically will more likely result in a large number of motions, as parties that are unable to determine whether a discovery request is overbroad will likely file objections to

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<sup>7</sup> The Commission has proposed the elimination of replies in most instances. The NTCs' proposal to permit discovery within 35 days of the time an answer is due corresponds to the time permitted under the current rule.

preserve their rights, rather than risk losing the right to object. Such a practice will create more work for the Commission, and increase delays in resolving complaints, rather than expediting the process.

The proposal to shorten the time for filing motions to compel from 15 days to 5 days suffers from similar infirmities. It will be virtually impossible in such a short time period for parties to review fully responses to discovery and, if necessary, draft motions to compel. Given such a short period in which to file motions, it is likely that the Commission will be required to deal with either a significant number of unnecessary motions to compel, or motions for extension of time. The Commission's goal of simplifying and expediting the discovery process will not be met in either event.

The Commission has proposed that "unless otherwise directed by the staff, no discovery regarding alleged damages be permitted until after an initial finding of liability by the Commission..."<sup>8</sup> The Commission indicates that its experience has shown that a significant amount of the time spent on discovery involves questions of damages, and this time is wasted if no liability is found. The NTCs agree that there may be significant benefits from this approach. Discovery can be an expensive, time consuming process and parties should not be required to respond to discovery requests on damage issues until liability is established. Furthermore, the Commission's

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<sup>8</sup> NPRM, ¶ 13.

proposal that, following a finding of liability, a limited time period should be permitted during which the parties can engage in settlement negotiations prior to discovery, should also assist in resolving complaints in an expeditious fashion.

The Commission should, in fact, consider a further limitation on discovery. In cases where a defendant has filed a motion to dismiss, no discovery should be permitted until the Commission rules on the motion. As with the proposed limitation on discovery relating to damages, defendants should not be required to expend the resources necessary to respond to discovery on the issue of liability prior to a Commission decision on the motion to dismiss.

The Commission also seeks comment on "whether issues regarding relevance should continue to be grounds for opposing an interrogatory or document request."<sup>9</sup> The Commission suggests that:

One possible change to our current framework governing discovery could be to preclude objections to discovery based on relevance. Under such an approach, refusal to answer an interrogatory or an objection based on relevance would be deemed an admission of allegations contained in the interrogatory.

The Commission suggests that this rule would provide a respondent with strong incentives to answer all arguably pertinent questions, yet presumably would not subject the

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<sup>9</sup> NPRM, ¶ 15.

respondent to any prejudice from the "admission" arising from failure to answer irrelevant questions.<sup>10</sup>

This Commission proposal is contrary to standard, long-standing state and federal court discovery rules. For example, the Federal Rules in Civil Procedure permit broad discovery through use of a wide range of discovery devices. Furthermore, under the Federal Rules, a party need not show that the information sought through discovery will be admissible at trial, only that information sought "appears reasonably calculated to lead to the discovery of admissible evidence."<sup>11</sup> While the Federal Rules are quite liberal, the scope of discovery permissible under the Rules is not, however, unlimited. Rather, the Federal Rules provide that:

Parties may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.<sup>12</sup>

Thus, parties are entitled to discovery only of matters relevant to the subject matter of the action.<sup>13</sup>

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<sup>10</sup> Id.

<sup>11</sup> Fed. Rules Civ. Proc. 26(b)(1), 28 U.S.C.A.

<sup>12</sup> Id. (emphasis supplied).

<sup>13</sup> Discovery rules in most state jurisdictions are similar to the Federal Rules. For example, the rules governing practice in the New York State courts provide for disclosure of all "material and necessary" evidence. Civil Practice Law and Rules, §3101(a).

Even more importantly, traditional discovery rules provide a process for objecting to discovery requests, including objections based on relevance and the resolution of any objections by an impartial arbiter. A party is not forced, as the Commission's proposed rule would require, to make a final judgment as to whether particular information requested by another party is relevant to the proceeding, with the possibility of a potentially damaging "admission" if the Commission later determines that the party's judgment was incorrect. Rather, unresolved questions concerning the relevance of discovery requests are resolved by the court.

Furthermore, questions will arise as to what was admitted through a failure to answer an interrogatory. For example, what, if anything, will be deemed admitted if a party fails to answer an interrogatory that contains no allegations, such as "State the amount of federal income taxes paid by defendant in 1991?"

Finally, the proposed rule change appears to conflict with the proposed change to Rule 1.729(c) of the Commission's Rules.

Any objection to the breadth of an interrogatory shall be made within 10 days after service of the interrogatory. Other objections based on legally recognized grounds (e.g. attorney-client) may be submitted in lieu of an answer.

The Commission's Rules thus contain provisions permitting parties to object to interrogatories on the ground that they are overbroad. In many cases, an objection to the breadth of an interrogatory would be based, at least in part, on the

relevance of the information. If, as is suggested by amended Rule 1.729(d), that "Failure to answer or an evasive answer will be deemed an admission for purposes of resolving the complaint", the right of a party to object to the breadth of an interrogatory will be rendered essentially meaningless.

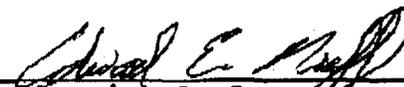
In sum, this proposed rule precluding objections to discovery based on relevance should not be adopted by the Commission. Rather, if discovery is to be permitted in formal complaint proceedings, the traditional objections, including relevance, must also be retained. If parties are unable to resolve disputes concerning discovery, as will inevitably occur no matter what discovery rules the Commission adopts, the Commission must exercise its responsibility as arbiter. When the parties are unable to move the discovery process forward, the Commission must intervene to resolve such disputes.

#### IV. CONCLUSION

Several of the changes to the formal complaint rules proposed by the Commission, particularly those limiting discovery, should assist in streamlining the complaint resolution process. Many of the other proposals, such as those shortening many of the pleading cycles, will not help the Commission resolve complaints more quickly, and in fact may result in increased delays resulting from an increased number of motions. Furthermore, the Commission's proposed rule

concerning the "relevance" of discovery requests will not improve the current process. Disputes between parties concerning discovery are inevitable. When such disputes arise, the Commission must intervene and issue appropriate orders to resolve those disputes to move the proceeding toward resolution.

Respectfully submitted,  
New York Telephone Company  
and  
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Dated: April 21, 1992