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

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	)	

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To: The Commission

COMMENTS OF BECHTEL & COLE, CHARTERED

1. The principals of Bechtel & Cole, Chartered, have practiced telecommunications law dating back to 1958 and wish to offer comments regarding the proposed rule changes based on experience representing clients before the Commission and in the courts.

2. Broad authority of the Commission regarding complaint proceedings (notice at ¶5). We concur that the Commission has broad authority in this area. Many of the proposed rule changes are driven by the time constraints under the Telecommunications Act of 1996 for some, but not all, formal complaint proceedings. In the text of the notice, the Commission has referred to its residual authority regarding complaint proceedings which are not governed by the 1996 Act. In the text of the proposed rules themselves, when the timetables and other provisions are intended to be responsive to the statutory time limits, but not necessarily applicable to other complaint proceedings, they should be clearly so delineated. This allows flexibility in dealing with other complaint proceedings as the circumstances may

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require in the Commission's judgment wholely apart from the 1996 Act.

3. Complaints based solely on information and belief (notice at ¶38). In some instances, complainants may be required to initiate a proceeding based largely, if not solely, upon information and belief. While they can attest to personal knowledge of the grievances leading them to file the complaints, much of the first hand evidence in the matter may reside in the private knowledge, files and possession of the respondents. A hard and fast rule against reliance on information and belief would unduly handicap complaining parties and unduly protect responding parties. This is particularly the case where individuals, small businesses and public organizations file complaints against major, established telecommunications entities involving details of their activities which are not available to the public without the benefit of some form of compulsory discovery mechanism. Non-captious complaints albeit based largely, if not solely, on information and belief should be accepted and given consideration. The complaining parties should be required to provide full information concerning the facts and circumstances including the need for, and basis of, reliance on information and belief (notice at ¶40). Abuses of the process can be addressed and guarded against in sanctions such as summary dismissal of a complaint that has not been filed in good faith or with reasonable justification (notice at ¶¶84-84).

4. Need for compulsory discovery (notice at ¶¶49 et seq.).

Provisions should be made for discovery by the parties as a matter of right. Without discovery, the parties are in a position to frustrate the proper and effective adjudication of complaint proceedings. They have the power and ability to protect information in their private possession to which neither the opposing parties nor the Commission has any access. Formal complaint proceedings are a form of litigation which does not work based on voluntary cooperation and unilaterial disclosure decisions by each party.[1] Without at least some compulsory discovery rights and duties, responding parties can avoid, limit or shape disclosures to serve their private interests without any effective opportunity to test and evaluate the completeness or accuracy of their disclosures.

5. Exchange of all relevant documents and materials (notice at ¶51 et seq.). For the reasons just stated, complainants and respondents should be required to identify and exchange or otherwise make available for inspection all relevant documents and materials in their possession. These documents and materials should thusly be identified and furnished both to the opposing parties and to the agency staff assigned to the proceeding.

6. Use of Administrative Law Judges (notice at ¶56). The

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[1] Indeed, where a party refuses to produce relevant records within its private possession, in appropriate litigation circumstances the tribunal may presume those records are adverse to the that party's interests. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1938); Mid-Continent Petroleum Corporation v. Keen, 157 F.2d 310, 315 (8th Cir. 1946); Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953 (Rev.Bd. 1988); cases cited in Eloignment of Witness or Evidence, 31 C.J.S. §§ 154 et seq.

use of Administrative Law Judges to resolve disputes over material fact issues can be a useful tool in the formal complaint process, based on the court practices referred to in the notice as well as such specialized uses of ALJ's at this and other federal (and state and local) agencies. Time deadlines and a clear definition of the role and responsibilty of the ALJ should be established in each individual case where this form of referral is employed.

7. Cease and desist orders (notice at ¶61). The four-part test referred to in the notice is appropriate where cease and desist orders are interim steps pending final adjudications of the underlying issues, as in the case of temporary restraining orders and preliminary injunctions in the courts. However, the four-part test is not relevant to the final adjudication of the underlying issues on the merits, as to which the cease and desist order arises from that decision itself and is subject to enforcement by its terms without limitation or need for any additional or special showing by the prevailing party.

8. Joint statements by the parties (notice at ¶80). The proposed joint statement of stipulated facts and key legal issues should be employed and perhaps enlarged. Joint pretrial statements may embrace outlines of factual claims and legal arguments by the contending parties in a broader context than merely identifying facts which may be stipulated or simply identifying the issues in the case. This would force conferences by the parties and their counsel in which the parties share, and

jointly disclose to the tribunal, the detailed nature of their factual cases and their legal positions with citations supporting those positions. This is the practical effect, for example, of the conferences and joint pretrial statement required under subparts (c) and (e) of Rule 16 of the Superior Court for the District of Columbia, copy attached.

Respectfully submitted,

Gene A. Bechtel

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January 6, 1997

COMMENT: Identical to Federal Rule of Civil Procedure 15 except for additions to paragraph (a) which specify a time limit within which an amended pleading must be filed, a requirement that the movant seek to obtain the consent of affected parties and an addition to the last sentence of paragraph (c) that refers to amendments which seek to change party designations so as to bring in the District of Columbia or an officer or agency thereof as a defendant. See Rule 54(c). (7/1/93)

RULE 16

PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) **APPLICABILITY.** With the exception of cases assigned to the hearing commissioner calendar under Rule 40-III or, unless otherwise ordered by the judge to whom the case is assigned, the provisions of this Rule shall apply to all civil actions and to all small claims actions and landlord-tenant actions certified to the Civil Division for jury trial. (7/1/93)

(b) **INITIAL SCHEDULING AND SETTLEMENT CONFERENCE.** In every case assigned to a specific calendar or a specific judge, an initial scheduling and settlement conference shall be held as soon as practicable after the complaint is filed. At that conference the judge will ascertain the status of the case, explore the possibilities for early resolution through settlement or alternative dispute resolution techniques, and determine a reasonable time frame for bringing the case to conclusion. After consulting with the attorneys for the parties and with any unrepresented parties, the judge will place the case on one of several alternative time tracks and will enter a scheduling conference order which will set dates for future events in the case. The order will generally include dates for the following events: (1/1/91)

(1) **DEADLINE FOR DISCOVERY REQUESTS:** No interrogatories, requests for admission, requests for production or inspection, or motions for physical or mental examinations may be served after this date. Only party depositions ad testificandum and non-party depositions duces tecum or ad testificandum may be noticed after this date. (1/1/91)

(2) **EXCHANGE LISTS OF FACT WITNESSES:** On or before this date, each party must file and serve a listing, by name and address, of all fact witnesses known to that party, including experts who participated in, and will testify about, pertinent events. No witness may be called at trial, except for rebuttal or impeachment purposes, unless he or she was named on the list filed by one of the parties on or before this date or the calling party can establish that it did not learn of the witness until after this date. (1/1/91)

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(3) **PROPONENT'S RULE 26(b)(4) STATEMENT:** By this date a statement comporting with Rule 26(b)(4) must be filed and served by any proponent of an issue (a party asserting a claim or an affirmative defense) who will offer an expert opinion on such an issue (1/1/91)

(4) **OPPONENT'S RULE 26(b)(4) STATEMENT:** By this date a statement comporting with Rule 26(b)(4) must be filed and served by any opponent who will offer an expert opinion on such an issue. (1/1/91)

(5) **ALL DISCOVERY CLOSED:** After this date, no deposition or other discovery may be had, nor motion relating to discovery filed, except by leave of court. (1/1/91)

(6) **DEADLINE FOR FILING MOTIONS:** All motions must be filed by this date, except as provided in paragraphs (b)(5) and (d)(6) of this Rule. (1/1/91)

The scheduling conference order may also set dates for the joinder of other parties and amendment of pleadings, the completion of certain discovery, the filing of particular motions and legal memoranda, and any other matters appropriate in the circumstances of the case. The order will also ordinarily specify a date by which dispositive motions will generally be decided, a time period in which mediation or other alternative dispute resolution proceedings will be held, and a time period in which the final pretrial and settlement conference will be held. (1/1/91)

All counsel and all parties must take the necessary steps to complete discovery and prepare for trial within the time limits established by the scheduling order. The scheduling order may not be modified except by leave of court upon a showing of good cause; stipulations between counsel shall not be effective to change any deadlines in the order without court approval, provided, however, that any date in the scheduling order except for the date of court proceedings (e.g. status hearings, ex parte proffs, ADR sessions, pretrials and trials) may be extended once for up to 14 days upon the filing and delivery to the assigned judge of a praecipe showing that all parties who have appeared in the action consent to such extension. Any motion to further modify a date so extended must recite that the date in question was previously extended by consent and must specify the length of that extension. (6/8/92)

(c) **MEETING THREE WEEKS PRIOR TO PRETRIAL CONFERENCE** Not less than three weeks prior to the pretrial conference, at least one of the attorneys who will conduct the trial for each of the parties, and any unrepresented parties, shall meet. If such persons are unable to agree on other arrangements, the meeting shall be held at 9:00 a.m. at the Courthouse on that day which is three weeks prior to the date of the pretrial conference. The participants in the meeting shall spend sufficient time together to thoroughly discuss the case and shall ~~endeavor~~ make a good faith effort to reach agreement on the following matters.

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(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; (1/1/91)

(2) the necessity or desirability of amendments to the pleadings; (1/1/91)

(3) the possibility of obtaining admissions of facts and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence; (1/1/91)

(4) the avoidance of unnecessary proof and of cumulative evidence; (1/1/91)

(5) the identification of witnesses and documents; (1/1/91)

(6) the advisability of referring matters to a commissioner or master; (1/1/91)

(7) settlement of the case or the use of ~~extrajudicial~~ alternative dispute resolution procedures to resolve the dispute;

(8) the form and substance of the pretrial order; (1/1/91)

(9) the disposition of pending motions; (1/1/91)

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and (1/1/91)

(11) such other matters as may aid in the disposition of the action. (1/1/91)

At this meeting each party shall provide to all other parties copies of all documentary exhibits which that party may offer at trial; affixed to each exhibit shall be a numbered exhibit sticker and the exhibits shall be identified, by exhibit number, on an index provided with the exhibits. Each party also shall make all non-documentary exhibits available for examination by other parties at or before this meeting.

(d) ~~SERVICE~~ **TWO WEEKS PRIOR TO PRETRIAL CONFERENCE.** Two weeks before the pretrial conference, each party shall ~~serve on all other parties copies of all documentary exhibits which that party may offer at trial; affixed to each exhibit shall be a numbered exhibit sticker and the exhibits shall be identified, by exhibit number, on an index served with the exhibits. By this date, each party shall also make non-documentary exhibits available for inspection by other parties and shall~~ file with the Court, ~~and~~ serve on all other parties and deliver to the assigned judge in accordance with the provisions of SCR Civil 5(e) ~~the following:~~

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~~(1) A pretrial statement which shall be in a form prescribed by the Court and shall include a certification of the date and place of the meeting held pursuant to section (c) of this rule. The parties shall file a joint pretrial statement or separate pretrial statements as the judge assigned to the case may direct. Where a joint pretrial statement is required, the plaintiff shall, unless otherwise ordered, be responsible for the delivery of the chambers copy thereof.~~

~~(2) A list of any questions which a party desires to propound, or have propounded, on voir dire.~~

~~(3) A listing by number of those instructions contained in Standardized Civil Jury Instructions for the District of Columbia which a party wishes the Court to give.~~

~~(4) The complete text of any jury instruction not found in Standardized Civil Jury Instructions for the District of Columbia which a party wishes to have given.~~

~~(5) Any verdict form, other than a general verdict, which a party wishes the Court to utilize, including any special interrogatories to be answered by the jury.~~

~~(6)~~ ~~A~~ any motion in limine, motion to bifurcate, or other motion respecting the conduct of the trial which a party wishes to have the Court consider.

~~Except for rebuttal or impeachment purposes, no party may offer at trial the testimony of any witness not listed in the pretrial statement of that party, nor any exhibit not served as required by this Rule, without leave of court.~~

(e) ~~SERVICE~~ **ONE WEEK PRIOR TO PRETRIAL CONFERENCE.** One week prior to the pretrial conference, ~~each party~~ the parties shall file ~~and serve a statement of~~ with the Court and deliver to the assigned judge in accordance with the provisions of SCR Civil 5(e) a joint pretrial statement which shall include a certification of the date and place of the meeting held pursuant to paragraph (c) of this Rule, shall be in a form prescribed by the Court, and shall also include the following item:

(1) A list of any questions which the parties desire to propound, or have propounded, on voir dire;

(2) A list, by number, of those instructions contained in Standardized Civil Jury Instructions for the District of Columbia which the parties wish the Court to give;

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(3) The complete text of any jury instruction not found in Standardized Civil Jury Instructions for the District of Columbia which the parties wish to have given;

(4) Any verdict form, other than a general verdict, which the parties wish the Court to utilize, including any special interrogatories to be answered by the jury; and

(5) Any objections and suggestions for alternative language that party may have to the voir dire questions, jury instructions, verdict form, or SCR Civ. 16(d) pretrial motions, submitted by any other party. Objections, if any, by a party to the ~~or~~ exhibits submitted by any other party also must be made at this time as part of the joint pretrial statement. A party raising an objection to an exhibit of another party shall attach to the statement of objection a copy of the exhibit to which the objection is made. ~~If separate pretrial statements were filed, each party shall also file and serve by this date any objections that party may have to any part of the pretrial statement of any other party. If a joint pretrial statement was filed, each party shall file a memorandum setting forth the basis for that party's position concerning any disagreement reflected in the statement regarding the law applicable to the case.~~ The Court will not consider any objection or alternative language which is filed beyond the time frames prescribed by this Rule unless the party making the objection or suggestion can establish that the objection or suggestion could not, for reasons beyond that party's control, be timely filed.

Except for plaintiff's rebuttal case or for impeachment purposes, no party may offer at trial the testimony of any witness not listed in the pretrial statement of the parties, nor any exhibit not served as required by this Rule, without leave of court.

(f) **PRETRIAL AND SETTLEMENT CONFERENCE.** The lead counsel who will conduct the trial for each of the represented parties, and, unless excused by the judge for good cause shown, all parties shall attend the pretrial and settlement conference. Such counsel and unrepresented parties must bring to the conference their trial exhibits, copies of which were served on other parties pursuant to paragraph (d) of this Rule. If any party proposes to offer more than 15 exhibits at trial, that party's exhibits shall be arranged as follows:

(i) In non-jury trials, the original exhibits, with numbered exhibit stickers affixed, shall be placed in a looseleaf, three-ring notebook with tabbed divider pages. At the front of the notebook shall be an Exhibit Summary Form (copies of which are available in the Clerk's Office)

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(ii) In jury trials, the notebook shall contain copies of all the exhibits; the original exhibits, with stickers affixed, shall be placed in a folder, in numerical order, along with the original Exhibit Summary Form.

The conference will generally be held by the judge who will preside at trial and will not be recorded unless the judge orders that the conference be recorded in chambers or conducted and recorded in open court. If settlement of the case cannot be achieved within a reasonable time, the judge will discuss with those attending the conference the pretrial filings of the parties and such of the matters set forth in paragraph (c) hereof as may be pertinent and will set a trial date for the case. (1/1/91)

(g) **PRETRIAL ORDER.** After the pretrial conference, an order shall be entered reciting the action taken. Insofar as possible, the Court will resolve all pending disputes in the pretrial order. With respect to some matters, it may be necessary to reserve ruling until the time of trial or to require additional briefing by the parties prior to trial. Exhibits, the authenticity of which are not genuinely in dispute, will be deemed authentic and the offering party will not be required to authenticate these exhibits at trial. The pretrial order may set limits with respect to the time for voir dire, opening statement, examination of witnesses, and closing argument and may also limit the number of lay and expert witnesses who can be called by each party. The pretrial order shall control the further course of the action unless modified by a subsequent order. The pretrial order may be modified at the discretion or the Court for good cause shown and shall be modified if necessary to prevent manifest injustice. (1/1/91)

(h) **ESTABLISHMENT OF TRIAL DATES.** On any date for which the case has been set for trial, the parties and their counsel must be prepared to commence the trial on that date or on any of the two succeeding court days in the event that their case must trail completion of the preceding trial on the judge's calendar. (1/1/91)

(i) **OTHER SCHEDULING OR STATUS CONFERENCES.** In addition to the initial scheduling and settlement conference and the pretrial and settlement conference, the Court may in its discretion order the attorneys for the parties and any unrepresented parties to appear before it for other conferences for such purposes as

(1) Expediting the disposition of the action; (1/1/91)

(2) Establishing continuing control so that the case will not be protracted because of lack of management; (1/1/91)

(3) Discouraging wasteful pretrial activities; (1/1/91)

(4) Improving the quality of the trial through more thorough preparation; (1/1/91)

(5) Facilitating the settlement of the case; and (1/1/91)

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