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

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment to Rules Governing)
Procedures to Be Followed When)
Formal Complaints are Filed Against)
Common Carriers)

CC Docket No. 96-238

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WASHINGTON, D.C. 20554

REPLY COMMENTS OF AT&T CORP.

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Notice of Proposed Rulemaking released November 27, 1996 (FCC 96-460) ("NPRM"), AT&T Corp. ("AT&T") hereby replies to the comments submitted on the Commission's proposals to modify the rules applicable to formal complaints against common carriers.¹

Introduction and Summary

This reply focuses on several key issues that have the greatest impact on parties' ability to obtain a fair and prompt resolution of their claims and defenses, as required by the Communications Act. Part I below shows that the Commission's proposal to "condition" a party's right to file a formal complaint on the fulfillment of specific pre-filing activities will impose costs and inefficiencies that exceed

¹ A list of commenters and the abbreviations used to refer to each is appended as Attachment 1.

the anticipated benefits. In all events, such conditions may well contravene parties' unqualified statutory right to file (and the Commission's duty to resolve) formal complaints.

Part II addresses the confusion that has arisen in connection with parties' right to rely upon allegations that are pleaded "on information and belief." AT&T shows that the commenters' fears are largely overstated and that a reasonable interpretation of the proposed requirement will not injure any party that seeks to litigate in good faith.

Part III shows that defendants would be unfairly harmed by the newly proposed rule that would force them to litigate "compulsory" counterclaims in the context of the expedited proceedings required by the new statutory deadlines. Part IV, in contrast, shows that no party could be harmed by rules that place all discovery within the control of the Commission staff, especially if the Commission adopts the "meet and confer" requirement proposed by some commenters.

Part V demonstrates the near-unanimous view of the commenters that due process requires that briefs must be permitted in every case, subject to reasonable page and timing requirements. Finally, Part VI responds to numerous specific points raised by various commenters.

I. **The Pre-Filing Procedures Proposed in the NPRM Should Not Be Adopted.**

AT&T (p. 6) has already shown that the NPRM's proposed pre-filing requirements are an impermissible restriction on a party's unconditional statutory right to file (and the Commission's duty to resolve) a formal complaint.² Moreover, the proposal to require pre-filing settlement discussions between the parties has already caused significant confusion and the comments show that it would likely generate numerous possibilities for extraneous disputes. Therefore, the proposal should not be adopted.

AT&T agrees, however, with the goal of the Commission's proposal, i.e., to encourage parties to resolve disputes on their own and as promptly as possible. Therefore, AT&T supports the adoption of reasonable post-filing requirements directed to that purpose.³ AT&T opposes, however, the numerous proposals that would make the pre-filing requirements even more time consuming and

² The statutory restrictions not only bar the Commission's proposal to require pre-filing settlement discussions, they also prohibit any attempts to compel pre-filing discovery (see SWBT, p. 6). Such a discovery requirement would also impermissibly constrain a party's unqualified prerogative under Section 208 to initiate a formal complaint.

³ For example, settlement discussions could be made a mandatory part of the "meet and confer" process discussed in Part IV below.

failures to comply more costly to the litigants.⁴ These proposals are exactly what the settlement process is designed to avoid.

Several commenters share AT&T's concerns about pre-filing requirements⁵ and express "serious reservations" about such proposals, noting that complainants have an incentive to resolve disputes on their own and that "this new requirement would [only] provide another basis for procedural disputes within the complaint proceeding."⁶ Sprint (p. 5) adds that the proposed rule is vague and could "provide a vehicle for the defendant to delay the filing of a complaint." CompTel (p. 4) also notes that proposed Rule 1.721(a)(8) does not even mirror the textual discussion in the NPRM (§ 28), which only references certification of "attempts" to discuss settlement.⁷ All of these concerns

⁴ See, e.g., Pacific, p. 2 (proposing minimum 30 days notice to the defendant prior to filing); Cedra, p. 2 (minimum 14 days notice); Bell Atlantic, p. 3 ("reasonable" negotiated pre-filing period). See also NYNEX, p. 3 (suggesting complainants should be required to seek intervention of a "Commission-certified mediator" before filing a complaint); *id.* p. 17 (suggesting that the Commission should dismiss with prejudice complaints that do not satisfy the Commission's pleading requirements).

⁵ See AT&T, p. 6.

⁶ CompTel, p. 3.

⁷ See also ICG, p. i (Commission must assure that pre-filing procedures do not become a time-consuming process that allows defendants to interpose additional delay);

show that the proposed pre-filing rules will not provide the benefits the NPRM anticipates.

II. Complaints Based on Information and Belief.

Numerous commenters appear to have exaggerated the impact of the NPRM's proposal (§ 38) to "prohibit complaints that rely solely on assertions based on 'information and belief'" (emphasis added).⁸ As AT&T (n.4) showed, a complaint based solely on such allegations generally would not fulfill the complainant's obligation to plead a prima facie case. However, there are few legitimate claims that rely entirely on information outside of the complainant's knowledge. Thus, the proposed rule would have minimal practical application.⁹

In all events, AT&T agrees with the numerous commenters¹⁰ who suggest that the prohibition not be applied when a complainant can demonstrate in the complaint (or accompanying papers) that (i) it does not have reasonable

(footnote continued from previous page)

ATSI, p. 5. In addition, pre-filing requirements cannot be used as a tool to require parties to compromise their substantive rights (see ICG, pp. 7-8).

⁸ See, e.g., ACTA, p. 4; APCC, p. 4; CompTel, p. 6; GST, p. 6.

⁹ See, e.g., NYNEX, p. 5.

¹⁰ E.g., ICG, p. 12, ATSI, p. 10; GTE, pp. 6-7; MCI, pp. 12-14. See also NYNEX, p. 5.

access to information that would substantiate an allegation; (ii) the necessary information is in the possession of the defendant or a third party and the complainant has been unable to obtain it; and (iii) there is a reasonable factual basis for its belief that the assertion is true.

III. No Counterclaims Should Be Compulsory.

Several commenters recognize the harsh timing difficulties that would be imposed on defendants if the Commission adopts its tentative conclusion to establish, for the first time, a compulsory counterclaim rule for formal complaint proceedings.¹¹ NYNEX (p. 14) specifically concurs with AT&T (pp. 11-12) that it is more appropriate to allow all counterclaims to be treated as permissive, just as they are under current Commission practice, so that "the Commission should not bar counterclaims under any circumstances if the statute of limitations has not run on such claims."¹²

¹¹ See AT&T, pp. 11-12; NYNEX, pp. 13-14; CBT, pp. 14-15; GST, pp. 19; KMC, pp. 19.

¹² CBT's proposal (pp. 14-15) that defendants should be allowed to provide a lower level of evidentiary support for compulsory counterclaims and GST's proposal (p. 19) to allow defendants to plead compulsory counterclaims solely on the basis of information and belief are inadequate. Both would make it more difficult for the parties and the Commission to assure that a case will be decided within the statutory time limits and with appropriate due process safeguards.

IV. All Discovery Should Be Under the Control of The Commission Staff.

Many commenters urge the Commission to maintain some form of "self-executing" discovery.¹³ However, given the time constraints imposed on all complaint proceedings -- and the general acknowledgment that discovery can be the most "contentious and protracted" part of the complaint process¹⁴ -- this is not practical.¹⁵ Thus, AT&T (pp. 15-17) supports the NPRM's effort to maximize Commission control over all discovery.¹⁶

AT&T's proposal would be complemented by adoption of the "meet and confer" requirement proposed by several

¹³ E.g., Bechtel, p. 3; CBT, p. 10; CompTel, p. 6; MCI, p. 18.

¹⁴ NPRM, ¶ 49.

¹⁵ See NYNEX, pp. 9-10; Sprint, pp. 8-9.

¹⁶ See AT&T, pp. 16-17 and its proposed revision to Section 1.730(a). AT&T's proposal is far from a complete ban on all discovery (see SWBT, p. 6), which would significantly impair the parties' due process rights and the Commission's ability to make an informed decision. Pacific (p. 3) also concurs with AT&T (p. 7) that the proposed requirement that parties attach or identify documents relevant to the disputed facts should apply only to cases with a 90-day decision period. Limiting this requirement to a narrow group of cases will avoid the potential problems cited by many commenters regarding the application of this obligation and the numerous difficulties that it could create (see, e.g., MCI, p. 15; MFS, p. 12; NYNEX, p. 7).

other commenters.¹⁷ Under that proposal, the parties would be required to meet before the initial status conference and discuss a broad range of issues relating to the case, including all anticipated discovery matters. The parties' agreements regarding discovery should be reduced to writing and presented to the Commission in the form of a consent order.¹⁸ Disputed issues should be identified for presentation to the Commission staff at the conference.¹⁹ This should save the parties and staff numerous hours that might otherwise be devoted to the preparation and resolution of objections to, or motions to compel, specific discovery

¹⁷ MFS, p. 10-12; GST, pp. 10-12; KMC, pp. 10-12. AT&T does not support these parties' request to prohibit interrogatories entirely.

¹⁸ The consent order could be presented in conjunction with the Joint Statement of Stipulated Facts and Key Legal Issues. Given the brief period of time the parties have to prepare such statements, several commenters correctly note that there is likely to be little difference between the joint statement and the positions articulated in the pleadings (see CBT, pp. 15-16). Thus, it should not cause any significant delays if the parties were allowed to submit the statement two days before the scheduled conference (see AT&T, p. 19).

¹⁹ If, as MCI (p. 20) suggests, the Commission believes it would be "too ambitious" to hold an initial status conference that includes a discussion of all discovery issues 10 days after the answer is filed, the Commission might consider moving the conference date by a few days, e.g., to 15 days after the answer. However, the accelerated timing demands imposed by the new statute do not allow for the 20-30 day period MCI proposes.

requests, and will thus make the entire complaint process more efficient.²⁰

V. Briefs Must Be Allowed in Every Case.

With very few exceptions,²¹ the commenters strongly agree with AT&T (pp. 17-19) that the parties should be given an opportunity to file briefs in every case.²² This is not only an issue of due process,²³ it is consistent with the normal course of any litigation. Several commenters correctly note that complainants cannot be expected to foresee in their initial filings every fact or argument in the defendant's answer, and defendants cannot anticipate every aspect of the complainant's response to its affirmative defenses or counterclaims.²⁴ Indeed initial pleadings -- even as amplified by the requirements of the new rules -- are not designed to create a complete record.

²⁰ Contrary to some commenters' claims, AT&T's proposal, especially as amplified by the "meet and confer" process, is not a denial of due process (ACTA, p. 6; TCG, p. 3), nor does it "allow Commission personnel to essentially undertake discovery on behalf of the parties" (TRA, p. 17). Rather, it ensures that legitimate discovery can be concluded more expeditiously.

²¹ E.g., Bell Atlantic, p. 4, NYNEX, p. 16.

²² E.g., CBT, p. 16; Pacific, p. 31; SWBT, p. 13; U S West, p. 12; ACTA, p. 9; CompTel, p. 11; GST, p. 22; MCI, p. 25.

²³ AT&T, p. 18.

²⁴ E.g., CBT, p. 16; Pacific, p. 31-32; Sprint, pp. 9-10.

Rather, they are intended to support (or challenge) the complainants' obligation to make a prima facie showing on its claims. Accordingly, parties must be given the opportunity to file briefs in order to assure that their claims and defenses are fully presented. AT&T (p. 18) and the other commenters recognize that the Commission staff may place reasonable limits on the length and timing of briefs in formal complaint cases, just as in any other litigation.²⁵

AT&T also supports the suggestion that briefs should be filed sequentially, rather than simultaneously, as under the current practice.²⁶ Simultaneous briefing often causes the parties to argue past each other, rather than focus on the specific issues in dispute. In contrast, sequential briefing better focuses each party on its specific need to meet its burdens of proof in the particular case.

VI. Other Issues.

AT&T replies below to a number of points raised by the commenters on a variety of issues.

A. Identification of Potential Witnesses.

Several commenters correctly note that parties should only

²⁵ E.g., Pacific, p. 33-34; CompTel, p. 11.

²⁶ E.g., U S West, p. 13; MCI, p. 26.

be required to provide the business address of any persons who are likely to have discoverable information.²⁷ Contrary to Bell Atlantic's (p. 5) suggestion, however, there should be no arbitrary limit on the number of individuals who must be identified.²⁸ Parties must be required to identify in good faith each person who has discoverable knowledge of material facts. The Commission should of course require parties to provide updated information after their initial good faith efforts to supply the required information.²⁹

B. Status Conferences

The comments overwhelmingly support the Commission's proposal to hold an initial status conference shortly after issue is joined.³⁰ However, a number of commenters question whether the parties should be required to submit joint orders summarizing oral rulings made at

²⁷ E.g., MFS, p. 7; KMC, p. 7; AT&T, p. 8. Pacific (p. 12) also agrees with AT&T (pp. 8-9) that phone numbers of potential witnesses should not be required if they are represented by counsel. All such contacts should be made through their counsel.

²⁸ NYNEX's complete opposition to this requirement (p. 7) should also be rejected.

²⁹ See SWBT, p. 5.

³⁰ AT&T also supports requests for a specific rule allowing parties to attend status conferences telephonically (see, e.g., CBT, p. 13; U S West, p. 15). This is especially important if the Commission proposes to take adverse action against parties who do not appear.

status conferences.³¹ AT&T does not oppose the proposal in the NPRM (at least in cases where there is no stenographic record to rely upon),³² but agrees with commenters who urge that the rules make some accommodation for the existence of honest disagreements among counsel.³³

C. Damage Calculations

The commenters generally agree that bifurcation of damages issues should be encouraged. Several commenters are concerned, however, with the NPRM's proposal that the Commission would only establish a damages methodology, rather than establishing damages in a specific amount.³⁴ The statute entitles all parties to a full resolution of their disputes, including a firm assessment of the amount of any damages. Thus, even if the Commission adopts its proposal, it must be available to provide a final resolution of the damages amount if the parties cannot agree within a reasonable time.³⁵

³¹ E.g., KMC, p. 15 (urging the Commission staff to perform this function).

³² AT&T, pp. 20-21.

³³ See GTE, p. 12; ACTA, p. 7. AT&T also notes that other commenters agree that the 24-hour deadline proposed in the rule is unreasonably short. See, e.g., Pacific, p. 22; AT&T, Attachment A, proposed rule 1.733(c).

³⁴ See, e.g., MFS, p. 17; SWBT, pp. 10-11.

³⁵ See AT&T, p. 10.

D. Cease and Desist Orders

A number of commenters discuss the NPRM's tentative conclusion (§ 60) that Section 312 does not apply to formal complaints brought under Section 208.³⁶ The language of Section 312(b), however, unambiguously applies to any claim that a party "has violated or failed to observe any of the provisions of [the Communications] Act . . . or any rule or regulation of the Commission." Therefore, Section 312, including its requirement for notice and hearing, applies to Section 208 cases. In addition, the Commission should reject some commenters' efforts to water down the standards applicable to requests for interim relief. In particular, it should not reduce the "likelihood of success" requirement or eliminate the requirement to demonstrate irreparable harm, as proposed by ICG (pp. 17-18).

³⁶ Section 312 authorizes the Commission to issue cease and desist orders after issuance of an order to show cause and an appropriate hearing.

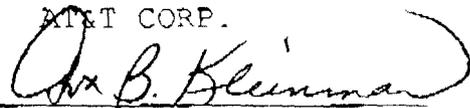
Conclusion

For the reasons stated above and in AT&T's comments, the Commission should modify its rules for formal complaint proceedings in the manner suggested by AT&T.

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American Public Communications Council ("APCC")
Ameritech
Association of Telemessaging Services International ("ATSI")
Bechtel & Cole
Bell Atlantic Telephone Companies ("Bell Atlantic")
Cincinnati Bell Telephone Company ("CBT")
Communications and Energy Dispute Resolution Associates ("CEDRA")
Communications Venture Services, Inc. and Richard C. Bartel
Competitive Telecommunications Association ("CompTel")
GST Telecom, Inc. ("GST")
GTE Service Corporation ("GTE")
ICG Telecom Group, Inc. ("ICG")
KMC Telecom, Inc. ("KMC")
MCI Telecommunications Corporation ("MCI")
MFS Communications Co., Inc. ("MFS")
NEXTLINK Communications L.L.C. ("NEXTLINK")
NYNEX Telephone Companies ("NYNEX")
Pacific Telesis Group ("Pacific")
Southwestern Bell Telephone Company ("SWBT")
Sprint Corporation ("Sprint")
Telecommunications Resellers Association ("TRA")
Teleport Communications Group, Inc. ("TCG")
United States Telephone Association ("USTA")
U S WEST, Inc. ("U S West")

CERTIFICATE OF SERVICE

I, Rena Martens, do hereby certify that on this 31st day of January, 1997, a copy of the foregoing "AT&T Reply Comments" was mailed by U.S. first class mail, postage prepaid, to the parties on the attached service list.



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