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

RECEIVED

JAN 1 2 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

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

COMMENTS OF USTA

I. INTRODUCTION

The United States Telephone Association ("USTA") respectfully submits these comments in response to the request for comments by the Common Carrier Bureau and the Enforcement Task Force (collectively, the "staff") regarding an accelerated docket for formal complaint proceedings.[1/] USTA's members include approximately 1200 local exchange carriers ("LECs"). Those 1200 members include the five Bell Companies and GTE -- the largest incumbent LECs. USTA's mid-size group includes 26 companies, ranging in size from approximately 2 million access lines to companies who serve 50,000 lines. But the vast majority of USTA's members are small companies, typically serving 5,000 lines or less in a rural area of the country. Indeed, each year USTA publishes a list of the largest 150 LECs.

1/ *See Common Carrier Bureau Seeks Comment Regarding Accelerated Docket For Complaint Proceedings*, Public Notice, DA 97-2178 (Com. Car. Bur. rel. Dec. 12, 1997) (the "Notice").

No. of Copies rec'd 0+4
List A B C D E

This year, the 150th company on that list has just over 9,000 lines, giving an idea of the size of the hundreds of companies that are smaller. All of USTA's members have a substantial interest in the rules of practice and procedure governing complaints involving common carriers.

Earlier in this proceeding, USTA pointed out the tension in the formal complaint process between fair dispute resolution and administrative economy, particularly in light of the time limits imposed by the Telecommunications Act of 1996 (the "1996 Act").[2] Despite this tension, an accelerated docket for certain formal complaints can result in improved dispute resolution if the Commission and the staff use such a docket as an additional way to expedite reasonable settlements between parties. At the same time, an accelerated docket should be designed to minimize the opportunities for any party to manipulate or "game" the complaint process improperly. And of course, the sixty-day accelerated schedule (while a worthy goal) should not interfere with the primary goal of the complaint process. That goal is to achieve a just outcome.

The Notice asks generally whether the rules adopted in the Commission's recent Report and Order on the formal complaint process[3] should govern the accelerated process proposed in the Notice. Recognizing that the rules adopted in the Formal Complaint Order are subject to reconsideration, the measures taken in that Order to expedite the general process should be

---

[2] *See* Comments of USTA, CC Docket No. 96-238 (filed Jan. 6, 1997) at 1-2; Reply Comments of USTA, CC Docket No. 96-238 (filed Jan. 31, 1997) ("USTA Formal Complaint Reply Comments") at 4.

[3] *See Implementation of the Telecommunications Act of 1996, Amendments of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, CC Docket No. 96-238, FCC 97-396 (rel. Nov. 25, 1997) ("Formal Complaint Order").

applicable to the accelerated docket as well. Because the accelerated docket will be instituted to handle a subset of the general formal complaints process, it would be both efficient and fair for the accelerated docket and the general process to use as many of the same rules as possible. Doing so will decrease the potential for confusion among parties and reduce the possibility of parties manipulating procedural rules to their advantage.

In the following, USTA comments on the specific issues raised in the Notice's numbered paragraphs.

II. COMMENTS ON NUMBERED PARAGRAPHS OF THE NOTICE

Numbered Paragraph 1 -- In paragraph 1, the Notice seeks comment on whether there is a need for an accelerated formal complaint process. Certainly there is a need for an efficient, fair, and prompt means for the Commission to resolve formal complaints. As telecommunications competition intensifies and more participants enter the marketplace, the Commission's enforcement procedures will become even more important than at present. Sound complaint resolution will be essential to ensuring that all market participants act in accordance with the Communications Act and the Commission's rules. Rapid complaint resolution will be critical as competition increases, both to prevent unlawful activity and to keep parties from using the complaint process itself as a means of disrupting competition.

Early resolution of disputes through settlements should be the goal of any accelerated complaint docket. For complaints in which all attempts to reach a settlement fail, a expedited hearing on the disputed issues -- the "minitrial" contemplated in the Notice --- could be an effective means for the Commission to understand the factual circumstances and quickly

adjudicate a complaint. However, the Commission must bear in mind that the vast majority of incumbent LECs and new entrants alike are relatively small operations that do not maintain in-house resources for these purposes. Small and mid-size LECs, in particular, incur a disproportionate cost if they must retain counsel, take depositions, and present evidence at a minitrial. Thus, the emphasis of any accelerated docket should be on promoting expeditious and reasonable settlements, not on conducting "hearing-based" proceedings.

As USTA stated in its previous comments in this docket,[4] the early and active involvement of Commission staff is crucial to increase parties' incentives to resolve complaints rapidly. In this regard, USTA believes that for Commission staff assigned to the accelerated docket, training in alternative dispute resolution and settlement management may be even more important than expertise in trial techniques. In sum, the accelerated process and the minitrials described in the Notice can be very useful tools in the enforcement arena, but they should not take the focus away from efforts to reach a speedy resolution via settlement efforts.

Inevitably, there will be disputes concerning the jurisdictional boundaries between the Commission and state regulators on the type of complaints that the staff envisions handling pursuant to an accelerated process. This will be particularly true in the near term, as cases of first impression are presented about many aspects of the 1996 Act. The accelerated process will be most helpful and productive if an effort is made to select cases that are clearly, or at least are as clearly as possible, within the Commission's jurisdiction.

The Commission should institute a coordination process with state regulators so that in no event can a party simultaneously litigate the same complaint before the Commission and a

---

[4] *See* USTA Formal Complaint Reply Comments at 2-3.

state commission. Under the new rules, complainants must state whether they have filed a separate action "with the Commission, any court, or other government agency that is based on the same claim or same set of facts...."[5] Such "other government agency" presumably includes any state regulatory agency. Based on this information, Commission staff should contact the regulators in the relevant states to resolve jurisdictional issues promptly.

The accelerated process must provide for prompt, early rulings on jurisdictional questions. There should be a searching effort to "weed out" complaints very quickly that are obviously within the jurisdiction of the states rather than the Commission.

Numbered Paragraph 2 -- Paragraph 2 requests comment on limiting the duration of the minitrials, giving each side a set amount of time to present its case. It is reasonable to be concerned that hearings in complaint proceedings without such limits will be unnecessarily drawn-out, causing the Commission and the parties to waste time, money, and resources. On the other hand, it is possible that the allotted time for trial in a complaint case will expire and all parties would agree that additional time was needed.

USTA suggests that the staff go forward with the minitrials in which each side is given a limited, and equal, amount of time for the hearing phase, but also allow the parties to submit pre-trial and post-trial briefs. As the Notice points out, today's complaint dockets are "paper proceedings."[6] If parties are still permitted to present their cases in written form, the minitrials will serve as a very useful supplement to the traditional process. After the Commission and the industry gain some experience with the minitrial process, it might well be

---

[5] *See* Formal Complaint Order, Appendix A, Section 1.721(a)(9).

[6] *Cf.* Notice ¶ 2 (discussing "paper record").

appropriate to eliminate or limit the "paper" submissions in cases handled pursuant to the accelerated process.

Numbered Paragraph 3 -- In paragraph 3, the Notice asks for commenters' views on the appropriate discovery process. The process recently announced in the Formal Complaint Order is a very sensible starting point in this regard. As discussed above, for the process to work effectively, there must be active involvement and quick decision making on the part of the Commission staff involved. Thus, the Commission should ensure that the proper amount of authority to manage discovery is delegated to the staff members who are assigned to the accelerated cases. Unless the staff is empowered to issue decisions on discovery essentially "on the spot," the process will become cumbersome.

Because of the short time frames that could be available for discovery, the Commission must prevent frivolous requests for depositions. Under the new rules, both complaints and answers must list the individuals "believed to have firsthand knowledge of the facts alleged with particularity."[7] Individuals without such firsthand knowledge should not be subject to requests for depositions. Of course, parties must make every reasonable effort in the normal course of business to make available for depositions any employees with such knowledge.

Numbered Paragraph 4 -- Paragraph 4 essentially seeks comment on the prerequisites that should exist for acceptance of a particular complaint into the accelerated process. As USTA has emphasized, it is vital that all attempts to settle the complaint be explored, attempted, and exhausted. In this regard, the parties should be required to comply with

---

[7] *See* Formal Complaint Order, Appendix A, Section 1.721(a)(10)(I) (complaints); Section 1.724(f)(1) (answers).

several requirements, including, but not limited to, the certification process contained in the new rules.[8] In addition, there should be a requirement for further settlement discussions to take place under the aegis of the Enforcement Task Force.

Moreover, as the Notice contemplates, there must be a request to the staff that a complaint proceeding be adjudicated under the accelerated process. However, it is absolutely vital that *EITHER* the complainant or the defendant must be able to make that request. If only the complainant has the ability to request expedited treatment, there is significant potential for complainants to game the Commission's complaint processes. Complainants with weak cases would have incentives to stay out of the accelerated process, thereby stretching out the timeframe for disposition, while touting at the Commission and in other public forums the number of complaints they have pending. Conversely, such complainants could well seek to submit their strong cases, if any, to the accelerated process for rapid adjudication.

By permitting either the complainant or the defendant to request inclusion of a proceeding on the accelerated docket, the Commission will acknowledge the increasing diversity of the communications marketplace. In some phases of this proceeding, there has been an implication that particular segments of the industry (*e.g.*, incumbent LECs, CLECs, or IXCs) are more likely to be complainants and other segments are more likely to be defendants. USTA submits that, particularly in the wake of the 1996 Act, the communications industry is fast becoming much more complex than that. USTA anticipates that incumbent LECs, for example, will be both complainants and defendants in these cases, depending on very individualized circumstances.

---

[8] *See id.* Section 1.721(a)(8) (complaints); Section 1.724(h) (answers).

Numbered Paragraph 5 -- In paragraph 5, the Notice asks for comment on "the reasonableness of requiring the answer to be filed within seven calendar days of a complaint..."[9] USTA urges the Commission to increase the filing period for answers to at least 10 calendar days. This will permit the preparation of a more substantive answer than would be possible under the abbreviated period proposed in the Notice. Indeed, if the 10-day period is adopted, the Commission staff should be required to provide guidance to the defendant on the specific topics on which the answer should concentrate.

Numbered Paragraph 6 -- Paragraph 6 asks whether the new rules concerning status conferences in formal complaints are appropriate for the accelerated process. USTA believes that they are, except that in light of the 10 calendar day period for filing an answer recommended above, the initial status conference for an accelerated proceeding should take place 18 to 20 calendar days after a complaint is filed. The pre-trial and post-trial briefs discussed above should be scheduled at the initial status conference.

Numbered Paragraph 7 -- In paragraph 7, the Notice asks whether it is appropriate to bifurcate liability and damages issues. There should be such a bifurcation, with the understanding that, if a party's conduct is found to be in violation of the Communications Act or the Commission's rules, that conduct must cease immediately. The question of monetary or equitable damages for past conduct should be bifurcated from the question of the parties' actions going forward.

---

[9] *See* Notice ¶ 4.

Numbered Paragraph 8 -- Paragraph 8 requests comment on "other issues." USTA's proposals on issues related to, but not specifically raised in, the other numbered paragraphs are discussed with respect to those paragraphs.

Numbered Paragraph 9 -- In paragraph 9, the Notice asks for commenters' views on Commission review of initial staff decisions in the accelerated docket. In order to satisfy the goals of an accelerated docket as well as the various time limits imposed by the 1996 Act, the filing deadlines for applications for review should also be accelerated. USTA suggests that an application for review, if any, should be filed within 10 calendar days of the release of an initial staff decision, with an opposition due within 10 calendar days after the filing of the application, and a reply due within 7 calendar days after the filing of the opposition.

USTA urges the Commission to commit to addressing any applications for review of staff decisions in the accelerated docket within two months after replies are filed. Commission delay in considering such applications would be contrary to the Notice's general goal of resolving accelerated formal complaints as rapidly as possible.

In this regard, USTA opposes the Notice's proposal for *en banc* oral arguments before the Commission for accelerated docket proceedings that are not summarily affirmed. USTA believes that the Commissioners' time and the resources of the staff would be better spent reviewing and resolving the specific legal and factual issues raised by any applications for review and related pleadings. The opportunity to appear at a late point in complaint proceedings before the full Commission would provide incentives to some parties to avoid settlement or other early resolution of a dispute. Moreover, the number of cases that the Commission might be requested to hear is uncertain, but this could impose a substantial

burden that would affect the Commissioners' other important duties. The Commission should not hold out the possibility of *en banc* hearings.

III. CONCLUSION

An accelerated complaint mechanism should be designed as another tool for the Commission to use in resolving disputes involving common carriers. The accelerated docket should be structured to encourage reasonable settlements whenever possible and to minimize the opportunities for any party to manipulate the complaint process.

Accordingly, USTA requests the Commission to adopt the foregoing proposals as it considers this matter.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By: Mary McDermott

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

U.S. Telephone Association
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7249

January 12, 1998

CERTIFICATE OF SERVICE

I, Donna Young, do certify that on January 12, 1998, copies of the accompanying comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

Donna Young

Robert M. Lynch, Durward D. Dupre
Mary W. Marks, J. Paul Walters
Southwestern Bell Telephone Company
One Bell Center - Room 3520
St. Louis, MO 63101

David J. Gudino, HQE02F05
GTE Service Corpoation
PO Box 152092
Irving, TX 75015-2092

Gail L. Polivy
1850 M Street, NW
Suite 1200
Washington, DC 20036

Teresa Marrero
Teleport Communications Group, Inc
Two Teleport Drive
Staten Island, NY 10311

M. Robert Sutherland
Theodore R. Kingsley
BellSouth
Suite 1700
1155 Peachtree Street, NE
Atlanta, GA 30309-3610

Leon M. Kestenbaum
Jay C. Keithly
Michael B. Fingerhut
Sprint Corporation
1850 M Street NW - 11th Floor
Washington, DC 20036

Frank W. Krogh
Mary L. Brown
MCI Telecommunications Corp.
1801 Pennsylvania Avenue NW
Washington, DC 20006

Mark C. Rosenblum
Ava B. Kleinman
Richard H. Rubin
Room 3252I3
295 North Maple Ave
Basking Ridge, NJ 07920

Joseph DiBella
NYNEX Telephone Company
1300 I Street, NW Suite 400 W
Washington, DC 20005

Genevieve Morelli
Competitive Telecommunications Association
1900 M Street, NW
Suite 800
Washington, DC 20036

Danny E. Adams
Kelley Drye & Warren LLP
200 19th St, NW
Suite 500
Washington, DC 20036

Andrew D. Lipman
Russell M. Blau
Melissa B. Rogers
Swidler & Berlin CHTD
3000 K Street, NW - Suite 300
Washington, DC 20007

Douglas E. Hart
Frost & Jacobs LLP
2500 PNC Center
201 E 5th Street
Cincinnati, OH 45202

Thomas E Taylor
Cincinnati Bell Telephone Co
201 E 4th Street, 6th Floor
Cincinnati, OH 45202

Charles C. Hunter
Catherine M. Hannan
Hunter & Mow, PC
1620 I Street, NW
Suite 701
Washington, DC 20006

Albert H. Kramer
Thomas W. Mack
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, NW
Washington, DC 20037

Robert B. McKenna
Coleen E. Helmreich
U S WEST
Suite 700
1020 19th Street, NW
Washington, DC 20036

Lawrence W. Katz
Bell Atlantic Telephone Companies
1320 North Courthouse Road
Arlington, VA 22201

Frank Michael Panek
Ameritech
Room 4H84
2000 W Ameritech Center Dr
Hoffman Estates, IL 60196-1025

Communications Venture Services, Inc
5530 Wisconsin Ave
Suite 703-5
Chevy Chase, MD 20815

Richard C. Bartel
PO Box 70805
Chevy Chase, MD 20813-0805

Frank Moore
Smith, Bucklin & Associates, Inc
Government Affairs Division
1200 19th Street, NW
Washington, DC 20036

J. Scott Bonney
Alaine Miller
Nextlink Communications LLC
155 108th Ave, NE
Bellevue, WA 980004

Davis W. Tremaine
Daniel M. Waggoner
2600 Century Square
1501 4th Avenue
Seattle, WA 98101

Richard L. Cys
1155 Connecticut Ave, NW
Suite 700
Washington, DC 20036

Edward B. Myers
Communications & Energy Dispute Resolution Assoc
International Square
1825 I Street, NW Suite 400
Washington, DC 20006

Charles H. Helein
Helein & Associates PC
8180 Greensboro Drive
Suite 700
McLean, VA 22102

Marlin D. Ard
Lucille M. Mates
Jeffrey B. Thomas
Pacific Telesis
140 New Montgomery Street - Room 1529
San Francisco, CA 94105