

Federal Communications Commission

DA 01-1829

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Before the
Federal Communications Commission
Washington, D.C. 20554

2007 AUG -3 P 1: 30 2007 AUG -3 P 1: 23

In the Matter of)
)
AT&T CORP.,)

EB Docket No. 01-173

Complainant,)

File No. E-97-28s

v.)

U S WEST COMMUNICATIONS, INC.,)

Defendant.)

In the Matter of)

EB Docket No. 01-173 ✓

MCI TELECOMMUNICATIONS)
CORPORATION,)

File No. E-97-40s

Complainant,)

v.)

U S WEST COMMUNICATIONS, INC.,)

Defendant.)

HEARING DESIGNATION ORDER

Adopted: July 30, 2001

Released: August 1, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. Pursuant to the Commission's rules,¹ we issue this consolidated Hearing Designation

¹ 47 C.F.R. § 1.722(d)(1) ("Issues concerning the amount, if any, of damages may be either designated by the Enforcement Bureau for hearing before, or, if the parties agree, submitted for mediation to a Commission Administrative Law Judge."). See *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Report and Order*, 12 FCC Rcd 22497, 22555 (1997) ("*Formal Complaint Rules Report and Order*"), Order on Reconsideration, 2001 WL 288197, FCC 01-78 (rel. Mar. 7, 2001).

Order (“HDO”) to initiate hearings to resolve the supplemental complaints for damages filed by complainants AT&T Corp. (“AT&T”) and MCI Telecommunications, Inc. (“MCI”) pursuant to 47 C.F.R. §1.722.² We have previously ruled that U S WEST Communications, Inc. (“U S WEST”)³ violated section 271 of the Communications Act of 1934, as amended (“Act”),⁴ by offering its 1-800-4USWEST calling platform service (the “Service”).⁵ This HDO refers to an Administrative Law Judge (“ALJ”) the issue of the extent to which AT&T and MCI are entitled to damages from U S WEST for the violation of section 271 found in the *Liability Order*.

II. BACKGROUND

2. AT&T’s initial complaint against U S WEST alleged that U S WEST’s 1-800-4USWEST Service violated sections 202, 251(g), 271, and 272 of the Act.⁶ MCI’s initial complaint challenged the same U S WEST Service that was the subject of AT&T’s complaint. MCI alleged that the Service violated sections 201(b) and 271 of the Act.⁷

3. In our *Liability Order*, we partially granted AT&T’s and MCI’s complaints, concluding that U S WEST’s Service violated section 271 of the Act. We relied principally on the Commission’s earlier decisions involving a similar calling platform service offered by Ameritech,⁸ and “teaming arrangements” employed by Ameritech and U S WEST that included a long distance service component.⁹ Because we concluded that the Service violated section 271, we did not reach,

² Effective September 14, 1998, MCI Telecommunications Inc. merged with WorldCom, Inc. to form MCI WorldCom, Inc. See *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025 (1998). This HDO uses “MCI” to refer to the complainant in File No. E-97-40s.

³ On June 30, 2000, U S WEST merged with Qwest Corporation (“Qwest”), and Qwest is now the legal successor to U S WEST. See *Qwest Communications International, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 11909 (2000). This Order refers to the defendant company in the two proceedings as “U S WEST.”

⁴ 47 U.S.C. § 271.

⁵ *AT&T Corp. v. U S WEST Communications, Inc.*, File No. E-97-28, and *MCI Telecommunications, Inc. v. U S WEST Communications, Inc.*, File No. E-97-40A, Memorandum Opinion and Order, 2001 WL 128249, DA 01-418 (Enf. Bur. Feb. 16, 2001) (“*Liability Order*”) at ¶ 30.

⁶ Complaint of AT&T Corp., File No. E-97-28 (May 22, 1997) at 9-10 (citing 47 U.S.C. §§ 202, 251(g), 271, and 272).

⁷ Complaint of MCI Telecommunications, Inc., File No. E-97-40 (July 21, 1997) at 7-10 (citing 47 U.S.C. §§ 201(b) and 271).

⁸ *MCI Telecommunications, Inc. v. Illinois Bell Tel. Co., et al.*, Memorandum Opinion and Order, 15 FCC Rcd 23184 (2000) (“*1-800-AMERITECH Order*”).

⁹ *AT&T Corp. v. U S WEST Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998) (“*Qwest Teaming Order*”), *aff’d sub nom.*, *U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied*, 120 S.Ct. 1240 (2000).

and therefore did not decide, the remaining claims that MCI and AT&T alleged. Accordingly, those claims are not at issue in this referral.

4. None of the parties to the two proceedings filed a petition for reconsideration or an application for review of the *Liability Order*, and the time for seeking such reconsideration or review of the *Liability Order* has expired. AT&T and MCI each filed a supplemental complaint for damages on April 17, 2001.¹⁰ AT&T and MCI seek to recover damages allegedly caused by U S WEST's violation of section 271 described in the *Liability Order*.

III. DISCUSSION

5. The Commission has concluded that referral of damages proceedings for hearing before an ALJ is generally appropriate.¹¹ As the Commission acknowledged, "the question of damages is largely a factual one," and "ALJs are expert triers of fact well suited to conduct fact-finding proceedings."¹² This case presents the type of fact-specific issues that an ALJ is well suited to resolve. The determination of the extent of injury suffered by AT&T and MCI will be a fact-intensive inquiry and will require, *inter alia*, the weighing of testimonial evidence concerning the damages to the complainants allegedly caused by U S WEST's unlawful Service. Each party to the two proceedings has already designated an expert witness to opine on the extent of monetary injury, or lack thereof, suffered by complainants due to U S WEST's unlawful conduct.¹³ Thus, the fact-finder may well be called upon to judge the credibility and persuasiveness of the testimony of these experts, and perhaps other witnesses, in reaching his conclusion. Accordingly, we conclude that it is appropriate to refer the two damages proceedings to the ALJ for resolution.

6. In its answers to the supplemental complaints for damages, U S WEST challenges the adequacy of MCI's and AT&T's supplemental complaints, and argues that we should dismiss the complaints with prejudice for failing to meet the pleading requirements set forth in our formal complaint rules.¹⁴ In particular, U S WEST contends that complainants have failed to demonstrate that they were actually injured by U S WEST's violation and that U S WEST's violation of section

¹⁰ MCI's Supplemental Complaint Concerning Damages, File No. E-97-40 (Apr. 17, 2001) ("MCI Supplemental Complaint"); Supplemental Complaint of AT&T Corp., File No. E-97-28 (Apr. 17, 2001) ("AT&T Supplemental Complaint").

¹¹ *Formal Complaint Rules Report and Order*, 12 FCC Rcd at 22584, ¶ 202 (discussing § 1.722(d)(1) of the Commission's rules).

¹² *Id.*

¹³ See AT&T Supplemental Complaint at Exhibit A, Declaration of David I. Toof; MCI Supplemental Complaint at Exhibit 2, Declaration of David W. Sosa; Answer of Qwest Corporation, File No. E-97-28 (May 7, 2001) ("U S WEST Answer in AT&T Case") at Exhibit 1, Affidavit of Gregory K. Leonard; Answer of Qwest Corporation, File No. E-97-40A (May 7, 2001) ("U S WEST Answer in MCI Case") at Exhibit 1, Affidavit of Gregory K. Leonard.

¹⁴ U S WEST Answer in AT&T Case at 5-9; U S WEST Answer in MCI Case at 5-9.

271 caused any such injury.¹⁵

7. Based on the pleadings filed to date, we decline to dismiss the supplemental complaints. We have concluded that MCI and AT&T have met their initial burden of production under the Commission's formal complaint rules governing supplemental complaints for damages. MCI correctly points out that U S WEST marketed its unlawful Service as a superior alternative to the long distance services offered by the complainants, and the complainants both observe that they have historically been substantial competitors in the market for calling card services.¹⁶ Complainants also allege that, as significant competitors in this market, they have suffered injury in the form of lost revenues due to U S WEST's unlawful entry.¹⁷ As further support for its allegations, AT&T offers a report authored by a proposed expert witness who relies on, *inter alia*, AT&T market share data and profitability evidence and estimates of U S WEST revenues and pricing to calculate a proposed damages figure.¹⁸ Similarly, MCI proffers the declaration of a proposed expert who supports the reasonableness and appropriateness of the damages methodology set forth in MCI's complaint.¹⁹

8. Further, we note that in this instance, the defendant possesses much of the information that complainants may need to fully support their damages claims. For example, U S WEST has information concerning the success of its unlawful Service that may help complainants demonstrate the extent of the injury they suffered.²⁰ Accordingly, for the reasons described herein and above, we find that the supplemental complaints for damages satisfy section 1.722 of the Commission's formal complaint rules.

9. Notwithstanding our conclusion that complainants have satisfied their initial pleading requirements, we emphasize that the complainants still bear the burden of proving the extent of their injury and the causal connection between their injury and the violation described in the *Liability Order*.²¹ We do not proffer an opinion in this Order as to the likelihood of complainants being able to meet their burdens of proof in the hearing process.

¹⁵ U S WEST Answer in AT&T Case at 5-11; U S WEST Answer in MCI Case at 5-11.

¹⁶ MCI Supplemental Complaint at ¶¶ 6-8; AT&T Supplemental Complaint at ¶¶ 16-21 and accompanying Declaration of David I. Toof; Reply of AT&T Corp. to Qwest Affirmative Defenses, File No. E-97-28s (May 10, 2001) at 7-11.

¹⁷ MCI Supplemental Complaint at ¶¶ 6-8; AT&T Supplemental Complaint at ¶¶ 16-21.

¹⁸ AT&T Supplemental Complaint at Exhibit A, Declaration of David I. Toof.

¹⁹ MCI Supplemental Complaint at Exhibit 2, Declaration of David W. Sosa.

²⁰ AT&T Supplemental Complaint at ¶ 18; MCI Supplemental Complaint at ¶¶ 13-15. Our determination as to the adequacy of complainants' supplemental complaints for damages depends on the specific circumstances presented here. The rules impose a significant burden of production on complainants filing supplemental complaints for damages. See 47 C.F.R. § 1.722. We will continue to evaluate on a case by case basis whether complainants have satisfied their burden.

²¹ *Formal Complaint Rules Report and Order*, 12 FCC Rcd at 22577-78, ¶ 186.

10. After release of the *Liability Order*, U S WEST reformulated its calling platform service, allegedly to address the unlawful aspects of the Service described in the *Liability Order*.²² AT&T argues that the changes U S WEST implemented do not cure the Service's legal deficiencies under section 271.²³ It would not be appropriate to determine the lawfulness of the recently reformulated U S WEST calling platform service as part of this damages proceeding and without the benefit of a complete record concerning the reformulated service.²⁴ Because we are not determining the lawfulness of the post-*Liability Order* changes to the Service, this referral is limited to determining damages caused by the U S WEST Service as it is described in the *Liability Order*.

IV. PROCEDURAL DESIGNATIONS

A. Procedural and Evidentiary Rules

11. The hearings before the ALJ shall be governed by sections 1.201 through 1.364 of the Commission's rules of practice for hearing proceedings, to the extent those rules are practicable for the adjudication of these issues.²⁵ The ALJ may, in his discretion, require that the parties submit all or any portion of their case in writing, if he determines that such written submission would contribute significantly to the disposition of the proceeding.²⁶

B. Consolidation

12. We do not decide in this Hearing Designation Order whether the hearings in the two proceedings should be consolidated. We leave it to the discretion of the ALJ to decide whether and to what extent the hearings should be consolidated (*e.g.*, consolidated for all purposes, including the hearing, or consolidated for only certain purposes, such as discovery or briefing).²⁷

C. Discovery

13. Discovery shall be conducted in accordance with sections 1.311-1.325 of the

²² Letter from Richard H. Bush, Vice President – Voice Products, Qwest, to Magalie Roman Salas, Secretary, FCC, File Nos. E-97-28 and E-97-40A (July 3, 2001). *See also* Letter from Richard H. Bush, Vice President – Voice Products, Qwest, to Magalie Roman Salas, Secretary, FCC, File Nos. E-97-28 and E-97-40A (March 21, 2001). The July 3 letter indicates that, as of that date, U S WEST had completed the reformulation of its calling platform service.

²³ AT&T Supplemental Complaint at ¶¶ 11-13.

²⁴ Because resolution of the lawfulness of the reformulated calling platform service would depend on a review of the totality of the circumstances relating to the service, a complete record concerning those circumstances is essential. *See Qwest Teaming Order*, 13 FCC Rcd at 21465-66, ¶ 37; *1-800-AMERITECH Order*, 15 FCC Rcd at 23189-90, ¶ 10. AT&T is free to file a separate complaint on this matter.

²⁵ 47 C.F.R. §§ 1.201- 1.364.

²⁶ *See* 47 U.S.C. §§ 154(i), 154(j), and 1.732(g).

²⁷ *See* 47 C.F.R. § 1.243(f).

Commission's rules.²⁸ We note that the parties already have each served discovery requests and objections in accordance with section 1.729 of the Commission's rules.²⁹ We have not ruled on these pending discovery requests and leave to the discretion of the ALJ the manner and extent of discovery.

D. Bureau Participation

14. The Enforcement Bureau shall be a party to the proceedings before the ALJ and, subject to specific requests from the ALJ, will determine its level of participation as to each issue in the case. Pursuant to section 1.47(c) of the Commission's rules, the Bureau shall be served with documents in the same manner as other parties.³⁰

V. DAMAGES INSTRUCTIONS

15. The parties correctly agree that the ultimate issues in dispute are whether complainants are entitled to damages for U S WEST's violation of section 271, and if so, what is the appropriate amount of such damages.³¹ Accordingly, the scope of the hearing is limited to determining the proper amount of damages to which complainants are entitled for the violation of section 271 set forth in the *Liability Order*, including the applicable amount of interest due on any amount of damages established. The time period to consider for assessing damages appears to extend from approximately April 1997, when U S WEST began offering its Service,³² to approximately the end of June 2001, when U S WEST allegedly completed implementation of its reformulated calling platform service.³³

VI. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 206, 207, 208, and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 (i), 154 (j), 206, 207, 208, and 271, and sections 0.111, 0.311, and 1.722(d)(1) of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, and 1.722(d)(1), that the above-captioned supplemental complaints for damages ARE DESIGNATED FOR HEARING before an Administrative Law Judge, at a time and place to be specified by the Administrative Law Judge in a subsequent Order, upon the following issues:

²⁸ 47 C.F.R. §§ 1.311-1.325.

²⁹ 47 C.F.R. § 1.729.

³⁰ 47 C.F.R. § 1.47(c).

³¹ Joint Statement of the Parties Pursuant to 47 C.F.R. § 1.733, File No. E-97-28s (May 25, 2001) ("AT&T and U S WEST Joint Statement") at 6; Joint Statement of Complainant and Defendant, File No. E-97-40s (May 25, 2001) at 4. Although the parties articulate numerous other specific issues in their Joint Statements, the specific issues are largely, if not completely, subsumed within the broader issue set forth above.

³² See, e.g., AT&T and U S WEST Joint Statement at 8 (Stipulated Fact Number 3).

³³ See *supra* at ¶ 10.

(1) To determine, in light of the evidence adduced during the hearings, the amount of compensatory damages, if any, to which each Complainant is entitled as a result of each violation of law found in the *Liability Order*; and

(2) To determine the amount of interest, if any, that each Complainant shall be awarded.

17. IT IS FURTHER ORDERED that, to avail themselves of the opportunity to be heard and the right to present evidence, AT&T, MCI, and U S WEST, pursuant to section 1.221(c) of the Commission's rules, 47 C.F.R. § 1.221(c), SHALL FILE in triplicate, within twenty (20) days of the mailing of this Order, a WRITTEN NOTICE OF APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED that the hearing will be conducted in accordance with the rules of practice and procedure governing hearing proceedings, 47 C.F.R. §§ 1.201 – 1.364, subject to the Administrative Law Judge's discretion to regulate the hearing.

19. IT IS FURTHER ORDERED that all discovery shall be conducted in accordance with 47 C.F.R. §§ 1.311 – 1.325, subject to the Administrative Law Judge's discretion.

20. IT IS FURTHER ORDERED that Complainants shall have both the burden of proceeding with the introduction of evidence and the burden of proof on all issues.

21. IT IS FURTHER ORDERED that the Enforcement Bureau shall be a party to the proceeding.

22. IT IS FURTHER ORDERED that the Secretary of the Commission shall cause to have this Order published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION



David H. Solomon
Chief, Enforcement Bureau