

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

FCC MAIL ROOM  
FCC-01M-35

00603

In the Matter of	)	
	)	
C. F. Communications Corp., et al.,	)	2001 AUG 13 P 3:13
	)	EB Docket No. 01-99
Complainants,	)	
	)	
v.	)	File Nos. E-93-34, E-93-35, E-93-36,
	)	E-93-37, E-93-38, E-93-40, E-93-41,
	)	E-93-42, E-93-43, E-93-44, E-93-45,
Century Telephone of Wisconsin, Inc., et al.,	)	E-93-46, E-93-47, E-93-48, E-93-49,
	)	E-93-50, E-93-56, E-93-58, E-93-59,
Defendants.	)	E-93-60, E-93-61, E-93-62, E-93-73,
	)	E-93-74, E-93-081

MEMORANDUM OPINION AND ORDER

Issued: August 3, 2001

; Released: August 8, 2001

Under consideration are: (a) a Notice of Deposition (directed to Southwestern Bell Telephone Company), served on July 6, 2001, by New York City Telecommunications Company, Inc. ("Telecom"); (b) Southwestern Bell Telephone Company's Motion Opposing the Taking of Depositions, filed on July 13, 2001, by Southwestern Bell Telephone Company ("SWBT"); (c) a Memorandum of Complainant New York City Telecommunications Company, Inc., in Opposition to Defendant Southwestern Bell Telephone Company's Motion Opposing the Taking of Deposition, filed on July 20, 2001, by Telecom; (d) a (second) Memorandum of Complainant New York City Telecommunications Company, Inc. in Opposition to Defendant Southwestern Bell Telephone Company's Motion Opposing the Taking of Deposition, filed on July 20, 2001, by Telecom; (e) a Notice of Deposition (directed to SWBT), served on July 12, 2001, by Telecom; (f) Southwestern Bell Telephone Company's Motion Opposing the Taking of Depositions, filed on July 17, 2001, by SWBT; (g) a Memorandum of Complainant New York City Telecommunications Company, Inc. in Opposition to Defendant Southwestern Bell Telephone Company's Motion Opposing the Taking of Deposition, filed on July 26, 2001, by Telecom; (h) a Notice of Deposition (seeking to depose SWBT's experts), served on July 12, 2001, by Telecom; (i) Southwestern Bell Telephone Company's Motion Opposing the Taking of Depositions, filed on July 18, 2001, by SWBT; and (j) a Memorandum of Complainant New York City Telecommunications Company, Inc. in Opposition to Defendant Southwestern Bell Telephone Company's Motion Opposing the Taking of Expert Deposition, filed on July 26, 2001, by Telecom. These pleadings relate to the complaint associated with File No. E-93-49.<sup>1</sup>

Telecom seeks to take the deposition of SWBT and any and all experts that SWBT intends to present as a witness, or rely on in any way, at the hearing. Two of the three notices of deposition served by Telecom contain an "Attachment A" which includes a number of "Topics of Inquiry." SWBT seeks an order quashing the notices in their entirety, arguing that Telecom has not sustained any recoverable damages, that the discovery sought is not relevant to any claim or defense in this action, and that Telecom's demands are patently oppressive and unduly burdensome. In the alternative, SWBT requests that the scope of the depositions be limited. Telecom opposes SWBT's

<sup>1</sup> At the time the relevant complaint was filed Telecom was purportedly known as Millicom Services Company.

requests. For the reasons which follow, SWBT's motions will be granted in part and denied in part.<sup>2</sup>

#### July 6, 2001 Notice of Deposition

General Objections. (a) SWBT contends that the notice should be quashed because Telecom has not been damaged. SWBT's objection is overruled. This matter is presently the subject of a Motion for Summary Decision that SWBT filed on July 17, 2001. It would be more appropriate to address SWBT's arguments in that context. As noted in *Memorandum Opinion and Order*, FCC 01M-25, released July 25, 2001 ("*MO&O*"), the fact that a Motion for Summary Decision is pending "provides no legitimate basis for objecting to otherwise proper discovery requests."

(b) SWBT objects to the depositions being taken at the offices of Telecom's counsel. This objection is overruled for the reasons stated in Telecom's Oppositions (pleadings (c) and (d), above).

(c) SWBT objects to the definition of "Complainant," "Plaintiff," and "Southwestern Bell Telephone Company" contained in the Definitions portion of Attachment A. These objections are overruled for the reasons stated in Telecom's Oppositions (pleadings (c) and (d), above).

(d) SWBT objects to the definitions of the terms "identify," "identification," "describe," "description," and "state" contained in the Definitions portion of Attachment A. This objection is sustained for the reasons stated in SWBT's Motion (pleading (b), above).

(e) SWBT objects to providing information for the period before January 1991 and after September 1992. This objection will be sustained in part. The *Hearing Designation Order* in this proceeding, DA 01-1044, released April 24, 2001 ("*HDO*"), at paragraph 18, stated that complainants and defendants may present arguments at the hearing concerning "the issue of whether each formal complaint for damages would qualify under the relating back rules." Given this statement, information pertaining to some of the time period in question may ultimately prove to be relevant to the damages issue. Consequently, inquiry into that period "appears reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules. Thus, the time period to be considered in connection with the complaint against SWBT shall begin two years prior to the filing of the relevant informal complaint. *Id.* at ¶ 17; *Liability Order*, 15 FCC Rcd 8759 (2000), at ¶¶ 36-37. Inquiry before these dates is barred by the statute of limitations. Further, SWBT will not be required to provide information for the period subsequent to the sale of the payphones in question. The post-sale period of time does not "appear[ ] reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules.<sup>3</sup>

Topics of Inquiry 1-2, 9. SWBT's objections are overruled. The information requested "appears reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules.

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<sup>2</sup> According to Telecom, counsel for SWBT never contacted counsel for Telecom to see if their differences could be resolved short of the filing of the motions presently under consideration. Such conduct, if true, appears to be in direct violation of the ground rules the Presiding Judge set forth in the May 24, 2001, prehearing conference in this proceeding. (Tr. 38-39.) Since time is of the essence, the Presiding Judge will rule on, rather than dismiss, SWBT's motions. However, SWBT is admonished to comply with the ground rules in the future.

<sup>3</sup> To the extent that this ruling conflicts with rulings contained in the *MO&O*, the rulings in the *MO&O* are superseded.

Topics of Inquiry 3-4. SWBT's objections are sustained. These areas of inquiry call for opinions and legal conclusions, and such matters are not appropriate subjects of discovery. In addition, for the purposes of this proceeding, the relevant definitions of "public" and "semi-public" are the ones contained in the Commission's orders.

Topic of Inquiry 6. SWBT's objection is overruled. The *HDO*, at paragraph 21, "encourage[d]" the parties to consider the use of "proxies" in determining the number of public and semi-public payphones the complainants owned. The *Liability Order*, at paragraph 34, stated that the ratio of the defendant's public to semi-public payphones "may be an appropriate starting point for the damages inquiry." Therefore, information concerning SWBT's payphones "appears reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules.

Topic of Inquiry 7. SWBT's objection is sustained to the extent that it need not provide information relating to business line subscribers or residential line subscribers. Such information does not "appear[ ] reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules.

#### July 12, 2001, Notices of Deposition

General Objections. SWBT raises the same general objections to Telecom's July 12<sup>th</sup> notices that it raised with respect to the July 6<sup>th</sup> notice. See SWBT's July 17, 2001, Motion (pleading (f), above), at 1-7, and its July 18, 2001, Motion (pleading (i), above), at 2-5. For the reasons recited earlier, SWBT's requests to quash will be denied, and its general objections will be sustained or overruled to the extent reflected in the rulings relating to the July 6<sup>th</sup> notice. In addition, SWBT objects to providing information for the period after April 16, 1997. This objection is sustained. As noted above, the post-sale period of time does not "appear[ ] reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules.

Topics of Inquiry 1-2, 11. Telecom states in its Opposition (pleading (g), above), that it does not seek testimony on these topics. Therefore, SWBT's objections relating to these matters are moot.

Topic of Inquiry 3. SWBT's objection is sustained. This topic seeks information that is outside of the relevant time period.

Topic of Inquiry 4. SWBT's objection is overruled. The *HDO*, at paragraph 21, "encourage[d]" the parties to consider the use of "proxies" in determining the number of public and semi-public payphones the complainants owned. The *Liability Order*, at paragraph 34, stated that the ratio of the defendant's public to semi-public payphones "may be an appropriate starting point for the damages inquiry." Therefore, information concerning SWBT's payphones "appears reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules.

Topics of Inquiry 5-6, 9-10, 13. SWBT's objections are sustained. These areas of inquiry call for opinions and legal conclusions, and such matters are not appropriate subjects of discovery. In addition, for the purposes of this proceeding, the relevant definitions of "public" and "semi-public" are the ones contained in the Commission's orders.

Topics of Inquiry 7-8. SWBT's objections are sustained. The requested information does not "appear[ ] reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules.<sup>4</sup>

Topic of Inquiry 12. SWBT's objection is overruled. The information requested "appears reasonably calculated to lead to the discovery of admissible evidence." Section 1.311(b) of the Commission's Rules.

Topic of Inquiry 14. SWBT's objection is overruled for the reasons stated in Telecom's Opposition (pleading (g), above).

Deposition of Experts. Telecom noticed for deposition any and all experts that SWBT intends to present as a witness, or rely on in any way, at the hearing. SWBT moves to quash this notice because it has not obtained any experts, nor does it expect to call expert witnesses at this time. In response, Telecom seeks leave to depose any expert witnesses offered by SWBT within a reasonable time after such witnesses have been identified.

SWBT's request that the notice of deposition be quashed will be denied. Suffice it to say, should SWBT decide to rely on the testimony of experts at the hearing, Telecom is entitled, and will be permitted, to depose those individuals at an appropriate time.

#### Ordering Clauses

Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company's Motion Opposing the Taking of Depositions, filed by SWBT on July 13, 2001 (in connection with the July 6, 2001, Notice of Deposition), IS GRANTED to the extent discussed above, and IS DENIED in all other respects.

IT IS FURTHER ORDERED that Southwestern Bell Telephone Company's Motion Opposing the Taking of Depositions, filed by SWBT on July 17, 2001 (in connection with the July 12, 2001, Notice of Deposition), IS GRANTED to the extent discussed above, and IS DENIED in all other respects.

IT IS FURTHER ORDERED that Southwestern Bell Telephone Company's Motion Opposing the Taking of Depositions, filed by SWBT on July 18, 2001 (in connection with the July 12, 2001, notice to depose experts), IS GRANTED to the extent discussed above, and IS DENIED in all other respects.

IT IS FURTHER ORDERED that the depositions under consideration SHALL TAKE PLACE on dates and at times that are mutually agreeable to the parties.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg  
Administrative Law Judge

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<sup>4</sup> These rulings are not inconsistent with a ruling previously made in the *MO&O*. The information sought there was different from the information sought from SWBT here and had nothing to do with credit ratings or deposits.