DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED

AUG 21 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
C.F. Communications Corp., et al.	)	EB Docket No. 01-99
	)	File Nos. E-93-43,
Complainants,	)	E-93-44, and E-93-45
	)	
v.	)	
	)	
Century Telephone of Wisconsin,	)	
Inc., et al.	)	
	)	
Defendants	)	

To: Administrative Law Judge Arthur I. Steinberg

DEFENDANTS' OPPOSITION TO ASCOM HOLDING, INC.'S MOTION TO COMPEL RESPONSES TO REQUESTS FOR ADMISSIONS FROM DEFENDANT SPRINT CORPORATION AND MEMORANDUM IN SUPPORT

Carolina Telephone and Telegraph Company (the Defendant in File No. E-93-43), United Telephone Company of Pennsylvania (the Defendant in File No. E-93-44) and United Telephone Company of Florida (the Defendant in File No. E-93-45) (collectively the "Defendants"), by their attorneys and pursuant to Section 1.294 of the Commission's Rules, hereby oppose "Ascom Holding, Inc.'s Motion to Compel Responses to Requests for Admissions from Defendant Sprint Corporation and Memorandum in Support" ("Motion"), filed by the Complainant, Ascom Communications, Inc. n/k/a Ascom Holding, Inc., on August 10, 2001. In support hereof, the following is shown:

1. In its Motion, the Complainant requests an order compelling the Defendants to provide, what it self-servingly characterizes as "substantive, non-evasive," responses to Request

No. of Copies rec'd 0+6
List A B C D E

Nos. 12, 17-32, 36 and 49 of the Complainant's July 18, 2001 First Set of Requests for Admission of Facts and the Genuineness of Documents (Motion, pg. 1). For the reasons stated below, the Motion should be denied in its entirety.

The Motion Applies The Wrong Legal Standard

2. In support of its Motion, the Complainant relies exclusively on Section 1.311(b) of the Rules as authority for the proposition that its requested relief should be granted. Specifically, the Complainant argues that "[t]he information sought in the Requests is ... 'relevant to the hearing issues' or, at a minimum, 'reasonably calculated to lead to the discovery of admissible evidence,'" citing Section 1.311(b) of the Commission's Rules to the exclusion of all others. This argument applies the wrong legal standard to a request for admissions, and evidences a fundamental misunderstanding of the role of admissions.

3. From all that appears, the Complainant views interrogatories and requests for admissions as interchangeable, a position at odds with both case law and the clear language of Section 1.311 of the Rules. In point of fact, interrogatories and requests for admissions are not interchangeable procedures designed for the same purpose. This is so because requests for admissions are designed to eliminate from the case issues which are not really in dispute between the parties and to limit the case to vital and disputed issues, while interrogatories are broader in scope, being designed to elicit relevant information, which although itself inadmissible, appears reasonably calculated to lead to the discovery of admissible evidence. California v. The Jules

Fribourg, 19 F.R.D. 432, 1955 U.S. Dist. LEXIS 4171 (N.D. Cal. 1955). As such, the facts sought in a request for admissions must actually be admissible at trial, and, accordingly, an admission (unlike an interrogatory) is subject to all pertinent objections to admissibility which may be interposed at trial. Jones v. Piper Aircraft Corp., 18 F.R.D. 181, 1955 U.S. Dist. LEXIS 4023 (M.D. Pa. 1955).

4. This position is confirmed by the express language of Section 1.311 of the Rules. The scope of legitimate inquiry, as framed by Section 1.311(b) of the Rules, relates back to the discovery devices expressly enumerated in the first paragraph of the regulation. The first paragraph of Section 1.311 of the Rules indicates that the entire section is limited to depositions, interrogatories, the production of documents, and entry upon real property. Notably, admissions are not among the category of items expressly enumerated in the first paragraph of Section 1.311 of the Rules, and, accordingly, are beyond the scope of Section 1.311(b).

5. When viewed in the light most favorable to the Complainant, the most that can be said of the arguments advanced in support of the Motion is that the requested admissions appear reasonably calculated to lead to the discovery of admissible evidence. But, as noted, this is not the legal standard governing admissions. The Complainant's Motion should be denied in its entirety for reliance on an incorrect legal standard.

The Requests Contain an Incorrect Definition of the Relevant Time Period

6. Request Nos. 12, 17-32 , 36 and 49 all seek information

for the time period 1987 through April 14, 1997, most of which is outside the time period relevant to a determination of the issues in this case. By Memorandum Opinion and Order, FCC 01M-31, released August 8, 2001 and Memorandum Opinion and Order, FCC 01M-33, released August 8, 2001, the Presiding Judge ruled that the relevant time period in this case commences: (a) on July 20, 1988 in the case of Defendants Carolina Telephone and Telegraph Company and United Telephone Company of Florida; and (b) on August 5, 1988 in the case of Defendant United Telephone Company of Pennsylvania; and that in each case the relevant time period ends on the date the Complainant sold its payphones (which the Complainant has stated occurred in approximately November of 1993). Accordingly, the Motion should be denied in its entirety for seeking information outside the relevant time period.

Request No. 12

7. Request No. 12 seeks an admission that "none of the payphones owned and/or operated by the Complainant in the [relevant jurisdictions] and connected to Sprint payphone access lines were subscribed to telephone service that was 'semi-public' telephone service under the applicable tariff[s] during the time period from 1987 through April 14, 1997." The Defendants properly objected because the "provisions of the Defendant's tariff speak for themselves, and the provisions of the tariff are irrelevant to the issues presented in this case." Contrary to the Complainant's assertions, "Sprint's knowledge of the classifications made under those tariffs" are not properly subject to an admission (Motion, pg. 3).

8. The issues in this case revolve around whether the Complainant's payphones are "public" or "semi-public" under the definitions contained in the Hearing Designation Order, Mimeo DA 01-1044, released April 24, 2001 ("HDO"), not whether the payphones are "public" or "semi-public" under some other definition -- such as a definition contained in a tariff. As such, Request No. 12 seeks information that would not be admissible at trial, and, accordingly, under the standards discussed in Paragraph No. 3 above, is not the proper subject of an admission. Accordingly, the Motion should be denied as to Request No. 12.

Request Nos. 17-32

9. As characterized by the Complainant, Request Nos. 17-32 "seek admissions regarding Sprint's classifications of its own payphones as 'public' or 'semi-public' in the course of Sprint's ordinary business activities based upon such factors as the payphones' location, the payment of a recurring fee by the owner or lessor of the premises, the assignment of a directory listing or the connection of extensions to the payphones" (Motion, pg. 4). According to the Complainant, it "seeks admissions on these alleged criteria because Sprint may urge Your Honor to apply these criteria or to consider some factors in this analysis to the detriment or exclusion of others in determining whether some or all of [Complainant's] payphones should be classified as 'public' or 'semi-public'" (Motion, pg. 3). In other words, the Requests go to a question of law.

10. Initially, eight of the sixteen Requests (i.e., Nos. 17, 18, 19, 20, 21, 22, 23, and 24) call for responses under tariff

definitions of "public" and "semi-public," and the Motion should be denied as to these eight for the reasons stated in Paragraph No. 8, above.

11. In addition, the Motion should be denied as to all sixteen Requests because what criteria are to be used to determine whether a payphone is "public" or "semi-public" under the definitions contained in the HDO is a question of law, and a request which seeks an admission of a conclusion of law rather than of facts is improper and may be refused. Fidelity Trust Co. v. Stickney, 129 F.2d 506, 1942 U.S. App. LEXIS 3408 (7th Cir. 1942).

Request Nos. 36 and 49

12. Request No. 36 asked for an admission that

> during the time period from 1987 through April 14, 1997, it was Sprint's business practice or policy to terminate and/or suspend telephone service, upon appropriate notice and the expiration of the time period referenced in the applicable legal or tariff provisions relating to the termination and/or suspension of service for non-payment, if an independent payphone provider failed to pay the charges billed by Sprint.

In response, the Defendants' quite properly stated as follows: "Generally admitted, although there are exceptions to the general rule" (emphasis added).

13. Request No. 49 asked for an admission that

> during the time period from 1987 through April 14, 1997, it was Sprint's policy or practice to require certain subscribers to pay a deposit to Sprint in connection with Sprint's provision of service to those subscribers based upon those subscribers' credit histories, credit scores, or history of nonpayments or late payments to Sprint.

In response, the Defendants quite properly stated as follows: "Generally admitted, but would not always require a deposit,

depending upon the circumstances" (emphasis added).

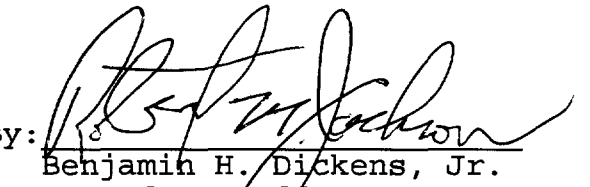
14. Incredibly, the Complainant contends that the responses do not comply with the requirements of Section 1.246 of the Rules. According to the Complainant, "a party that seeks to deny part of an admission must 'specify so much of it as is true and deny only the remainder,'" and contends that "Sprint's denial is too general to permit an assessment of what, if anything Sprint admits to be 'true'" (Motion, pg. 5) (emphasis added).

15. In its apparent zeal to gerrymander issues where none actually exist, the Complainant conveniently overlooks the fact that the Defendants never used the term "deny" or any derivation thereof in their responses to Request Nos. 36 and 49. The term used was "generally admitted," and the last sentence of Section 1.246(b) of the Rules expressly permits a party to qualify its answer to a requested admission. Accordingly, the Motion should be denied as to Request Nos. 36 and 49.

WHEREFORE, the Defendants request that the Complainant's Motion be denied in its entirety.

Respectfully submitted,
Carolina Telephone and Telegraph Company,
United Telephone Company of Pennsylvania and
United Telephone Company of Florida

Blooston, Mordkofsky, Dickens, Duffy & Prendergast
2120 L Street, N.W., Suite 300
Washington, D.C. 20037
Tel: (202)659-0830

By: 
Benjamin H. Dickens, Jr.
Gerard J. Duffy
Robert M. Jackson
Mary J. Sisak
Their Attorneys

Dated: August 21, 2001

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2001 a copy of the foregoing was served by first-class United States mail, postage prepaid, on the following parties:

The Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
445 - 12th Street, S.W.
Room 1-C861
Washington, D.C. 20554
(Hand Delivered)

Magalie Roman Salas, Secretary
Office of the Commission Secretary
Federal Communications Commission
445 - 12th Street, S.W. Room TW-B204
Washington, D.C. 20554
(Hand Delivered)

Tejal Mehta, Esquire
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 - 12th Street, S.W.
Room 5-C817
Washington, D.C. 20554
(Hand Delivered)

Trent B. Harkrader, Esquire
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 - 12th Street, S.W.
Room 3-A440
Washington, D.C. 20554
(Hand Delivered)

David H. Solomon, Chief
Enforcement Bureau
Federal Communications Commission
445 - 12th Street, S.W.
Washington, D.C. 20554
(Hand Delivered)

Albert H. Kramer, Esquire
Katherine J. Henry
Robert S. Felger
Ted Hammerman
Charles V. Mehler III
Dickstein, Shapiro, Morin & Oshinsky, LLP
2101 L Street, N.W.
Washington, D.C. 20037

Michael Thompson, Esquire
Wright & Talisman, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005

John M. Goodman, Esquire
Verizon
1300 I Street, N.W., Suite 400 West
Washington, D.C. 20005

Sherry A. Ingram, Esquire
Verizon
1320 North Court House Road
8th Floor
Arlington, Virginia 22201

William A. Brown, Esquire
Davida M. Grant, Esquire
Southwestern Bell Telephone Company
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005

Angela M. Brown, Esquire
Theodore Kingsley, Esquire
Bell South Telecommunications Inc.
675 West Peachtree Street
Suite 4300
Atlanta, Georgia 30375

Douglas W. Everette

Douglas W. Everette