Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C. 20554

In the Matter of	)	
	)	
TELESERVICES INDUSTRY ASSOCIATION,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-25
	)	
AT&T CORP.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 2000 **Released:** October 31, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we dismiss the above-referenced complaint filed by Teleservices Industry Association (TSIA) against AT&T Corp. (AT&T) pursuant to section 208 of the Communications Act of 1934, as amended (Communications Act or Act).[1] TSIA contends that AT&T unlawfully tied its unregulated 900 number billing service with its tariffed 900 number transport service, in violation of sections 201(b) and 203 of the Communications Act.[2] A federal district court action raising similar issues was previously brought by an entity under the control of David L. Kahn, the individual who controls TSIA in this proceeding. Accordingly, we dismiss this complaint under the doctrine of res judicata.

II. BACKGROUND

2. TSIA is an incorporated, not-for-profit trade organization representing some seventy domestic and international companies engaged in the pay-per-call industry.[3] In this action, TSIA challenges the manner in which AT&T provides service to

[1] 47 U.S.C. § 208.

[2] 47 U.S.C. §§ 201(b), 203.

[3] Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. E-97-25 (filed Sept. 2, 1999) (Joint Stipulation) at 1. TSIA states that, as of August 1997, it represented approximately 80 active members, *i.e.*, members with voting rights, and approximately 900 "associate members" without voting rights. The latter typically are associated through a "service bureau" that is itself

its information provider (IP) customers to support the customers' pay-per-call information services. At issue here is the manner in which AT&T offers two of its services: (1) transport service, by which AT&T delivers voice and data traffic between the IP and its end users; and (2) billing service, by which AT&T, on behalf of its IP customer, bills and collects fees from the customers who use the IPs' pay-per-call services. The charges and conditions for AT&T's transport service during the relevant period were set forth in its tariff on file with the Commission.[4] The charges and conditions for AT&T's billing services appear in contracts that it enters into with IP customers.[5]

3. Between approximately July 1991 and October 1992, AT&T terminated the billing services for certain of its IP customers' 900 numbers, later stating that the advertising for the associated information services contained explicit sexual references that were detrimental to AT&T's reputation.[6] When it terminated the IPs' billing services, AT&T also withdrew their existing 900 numbers and assigned them new numbers. As justification for this practice, AT&T asserted that it used different prefixes for its 900 numbers, depending on whether or not it provided billing service for the number. Furthermore, when it changed an IP's 900 number in this way, AT&T declined to provide a referral message on the old number to give callers the newly assigned 900 number.[7]

4. TSIA asserts that AT&T's practices unlawfully deprive TSIA's members of their primary income-generating asset, the 900 number through which their customers reach them and in which TSIA avers they have invested heavily through advertising.[8] TSIA complains that these AT&T practices relating to 900-number billing and transport services violate sections 201(b) and 203 of the Act, and it seeks an order requiring AT&T

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an active TSIA member. Response of Teleservices Industry Association to AT&T's First Set of Interrogatories to Teleservices Industry Association, File No. E-97-25 (filed August 14, 1997) at 2.

[4] AT&T Tariff F.C.C. No. 1, Section 5.4. *See* Verified Answer of AT&T Corp., File No. E-97-25 (filed June 13, 1997) (AT&T Answer) at Exhibit 1.

[5] AT&T's billing services are not subject to tariff regulation under Title II of the Act and are currently unregulated, although they remain subject to the Commission's authority under Title I of the Act. *AT&T 900 Dial-It Services and Third Party Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3433 (Com.Car.Bur. 1989) (AT&T third party billing is not a communications service and should be provided on a non-tariffed basis). *See Audio Communications, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 8697, 8702 n.64 (Com.Car.Bur. 1993) (because third-party billing practices for IPs by a carrier's affiliate were found reasonable, FCC "need not specifically address what actions would warrant the exercise of jurisdiction under Title I.").

[6] *See* Report and Recommendation of Roger L. Hunt, U.S. Magistrate Judge at 6, *adopted by* U.S. District Court for the District of Nevada, March 20, 1996 (*Hunt Report on Alleged Act Violations*), in *MRO Communications, Inc. v. American Tel. & Tel.* Co., CV-S-95-503-PMP (D. Nev. 1998), *aff'd mem.*, 205 F.3d 1351, 1999 WL 1178964 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1995 (2000) (*MRO Action*). The *Hunt Report on Alleged Act Violations* is attached as Exhibit 9 to AT&T's Answer.

[7] Joint Stipulation at 4.

[8] *See* Verified Complaint, File No. E-97-25 (filed April 21, 1997) (Complaint) at 5.

to cease future bundling of any service with existing 900 telephone numbers.[9] TSIA does not seek damages in this complaint proceeding.

5. AT&T denies that it has acted unlawfully and argues that TSIA's complaint should be dismissed as barred by res judicata.[10] To support its res judicata argument, AT&T relies on an action that MRO Communications, Inc. (MRO) brought against AT&T in the U.S. District Court for the District of Nevada. MRO was an IP in its own right, and it was a service bureau through which other IPs could obtain AT&T's 900 transport and billing services.[11] MRO's parent company, Bellatrix International, Inc. (Bellatrix), was a member of TSIA when TSIA filed its complaint before the Commission.[12]

6. In federal district court, MRO alleged that AT&T's above-described practices with respect to 900 numbers violated the Act and the applicable AT&T tariff.[13] Specifically, MRO asserted that: (1) AT&T's termination of billing service for certain numbers violated the parties' billing agreement and constituted a violation of the Act or AT&T's tariff, and (2) AT&T's use of different prefixes for 900 numbers, depending on whether or not it provided billing service, violated the Act or AT&T's tariff. MRO also claimed that AT&T's unilateral change of the 900 numbers violated a proprietary interest in the numbers. The district court denied these claims, finding that MRO had not shown AT&T's actions to be unlawful, and dismissed MRO's claim for damages based on the two-year statute of limitations in section 415 of the Act.[14]

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[9] *Id*. at 39. Section 201(b) declares any unjust or unreasonable charge, practice, classification, or regulation of a carrier for and in connection with interstate or foreign communication by wire or radio to be unlawful. Section 301 prohibits any carrier from enforcing any classifications, regulations, or practices affecting its charges for such communication except as specified in its published FCC tariff schedules.

[10] AT&T contends that the complaint also is barred under the issue preclusion doctrine, or collateral estoppel. Because we find that the complaint is barred by claim preclusion, we do not reach the issue whether the complaint also is barred by collateral estoppel.

[11] *MRO Communications, Inc. v. AT&T*, No. BK-S-92-25253-LBR (Bankr. D. Nev.), First Amended and Supplemental Complaint for Breach of Contract, Tortious Breach of Implied Covenant of Good Faith Dealing, Negligent Misrepresentation, Interference with Prospective Economic Advantage, Violation of Antitrust Laws, Violation of Federal Communications Act, Turnover, Accounting, Breach of Implied Covenant of Good Faith and Fair Dealing, Violation of the Automatic Stay, and Promissory Estoppel (filed Feb. 6, 1995) (*MRO Bankruptcy Complaint*) at 3; AT&T Answer, Exhibit 6 at 3.

[12] Response of Teleservices Industry Association to the Federal Communications Commission's Request to Supplement Certain Portions of the Record, File No. E-97-25 (filed Oct. 14, 1999) (TSIA Supplement of Record) at 1. TSIA has advised that Bellatrix no longer was a member of its trade association after September 1997. *Id.*

[13] *See Hunt Report on Alleged Act Violations* at 21; AT&T Answer, Exhibit 9 at 21.

[14] 47 U.S.C. § 415. *See* AT&T Answer, Exhibit 9 at 29. The district court also granted a separate AT&T motion for judgment on the pleadings on MRO's claims that AT&T had unlawfully tied its billing service to its transport service, or vice-versa, in violation of federal antitrust law. *See* AT&T Answer, Exhibit 11 at 8.

7. One of the attorneys for both TSIA and MRO, David L. Kahn, is the supermajority shareholder of Bellatrix.[15] It also appears that Mr. Kahn and his co-counsel, Richard J. Archer, have advanced TSIA's costs of prosecuting this complaint proceeding.[16]

III. DISCUSSION

8. The United States Supreme Court set forth the classic formulation of res judicata, or claim preclusion, more than a century ago:

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.[17]

Three elements must be present before a claim will be barred by a judgment in a prior action. The prior action must have: (1) shared a common nucleus of operative facts with the subsequent action; (2) resulted in a final judgment on the merits; and (3) involved the same parties or their privies.[18] If these elements are present, res judicata operates to bar the subsequent litigation not only of the claims actually litigated in the earlier action, but also of any claims that *could have been* litigated in the earlier action. Below, we conclude that all of the requirements for res judicata are satisfied in this case. Accordingly, that doctrine bars litigation of the claims presented in TSIA's complaint.

A. Common Nucleus of Operative Facts

9. To determine whether the substance of two actions is the same for claim preclusion purposes, courts have asked: Is the same right allegedly being infringed by the

[15] Joint Stipulation at 4.

[16] Supplemental Response of Teleservices Industry Association to the Federal Communications Commission's Request to Supplement Certain Portions of the Record, File No. E-97-25 (filed Nov. 29, 1999) at 2.

[17] *Cromwell v. Sac County*, 94 U.S. 351, 352 (1876). *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"); Restatement (2d) of Judgments, §§ 19, 24, 25.

[18] *See* Restatement (2d) of Judgments, § 19, 24, 25; 18 Moore's Federal Practice § 131.01 at 131-11, 12 (3rd ed. 1997) (collecting cases). *See, e.g., Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984). Courts have also required that a court of competent jurisdiction has rendered judgment in the prior action. 18 Moore's Federal Practice § 131.01 at 131-12. In this action, neither party argues that the district court lacked jurisdiction to decide the *MRO Action*. Accordingly, we do not address that issue in this order.

same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?[19]

10. Although TSIA's claims before the Commission may be dressed in somewhat different clothing than those it asserted before the district court, that fact does not, in itself, prevent the application of res judicata. It is "the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies."[20] Moreover, the fact that MRO sought damages in the district court, while TSIA does not seek damages here, does not bar application of the claim preclusion doctrine.[21]

11. It requires little inquiry here to conclude that the *MRO Action* and the instant complaint proceed from a common nucleus of operative facts. Both actions challenge the manner in which AT&T offers billing and transport services to its 900-number subscribers. Thus, both cases rely on the following central factual assertions: (1) AT&T terminated its billing service contract, apparently for some reason other than the subscriber's failure to comply with the billing services agreement; (2) upon termination of billing service, AT&T assigned its IP transport service subscriber a new 900 number; (3) AT&T does not provide a referral message on the old number to give callers the newly assigned 900 number; and (4) without such a referral, it is more difficult for the IP's customers to reach the provider's information services. The similarity between the two cases is made even clearer by the fact that TSIA relied almost exclusively on the record of the *MRO Action* as providing the evidentiary basis for its claims before the Commission.[22] Accordingly, we conclude that the two cases share the requisite common nucleus of operative facts.

B. Final Judgment on The Merits

12. The district court orders denying and dismissing claims in the *MRO Action* were final judgments for purposes of claim preclusion, notwithstanding any pending appeals. A pending appeal does not "detract from . . . decisiveness and finality" of judgment for purposes of claim preclusion.[23] Nor does the fact that the district court dismissed MRO's claims, in part, based on the statute of limitations detract from the finality of the judgment. For res judicata purposes, a dismissal based on the statute of

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[19] *See, e.g., Aerojet-General Corp. v. Askew*, 511 F.2d 710, 718 (5th Cir. 1975). *See generally* Restatement (2d) of Judgments, § 24.

[20] *Page v. United States*, 729 F.2d at 820 (quoting *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir. 1977)). *See* Restatement (2d) of Judgments, § 24, comment c, § 25, comment d, § 19, comment a.

[21] *See, e.g.*, Restatement (2d) of Judgements, §§ 24(1), 25(2).

[22] *See* paragraph 18, *infra*.

[23] *See* 18 Moore's Federal Practice § 131.12[3] at 131-97 (3rd ed. 1997) (citing *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941)); Restatement (2d) of Judgments, § 13, comments a, f.

limitations, unless designated as being without prejudice, is a judgment on the merits that will bar a subsequent action on the same claim.[24]

13. The district court found that the 2-year statute of limitations in section 415 of the Act precluded recovery of damages that were based on acts that occurred prior to February 7, 1993.[25] Nevertheless, before the district court, MRO could have pursued its statutory claims arising from AT&T's continuing conduct for the period of time not barred by any statute of limitation (*i.e.*, claims concerning post-February 7, 1993 conduct). In addition, because section 415 deals only with actions for the recovery of charges (*i.e.*, damages), MRO could have sought injunctive relief of the sort that TSIA now seeks through the instant complaint. Had MRO prevailed in the district court litigation on a claim for injunctive relief, AT&T presumably would have been barred from engaging in the practices that are the subject of this action. Where a party has failed to bring claims that were available to it in an earlier action, res judicata precludes the assertion of those claims in a subsequent case.[26] Moreover, the district court did rule on the merits of most of the claims asserted by MRO and found no violations of the Act or AT&T's tariff.[27]

C. The Same Parties or Their Privies.

14. The final portion of the above res judicata inquiry asks whether the party to be barred in the subsequent litigation is either the same party as in the prior action, or is in privity with the party to the prior action.[28] Courts addressing the issue have held that the "issue is one of substance rather than the names in the caption of the case; the inquiry is not limited to a traditional privity analysis."[29] A series of federal court decisions has

[24] *See* Moore's Federal Practice at § 131.30[3][g] at 131-111 (citing Fed.R.Civ.P. 41(b); *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 228 (1995) ("The rules of finality treat a dismissal on statute-of-limitations grounds in a federal court action . . . as a judgment on the merits."); *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1916) (A plea of the statute of limitations is a plea to the merits)). *See also Murphy v. United States*, 2000 WL 274200 at *2 (D.C. Cir. Feb. 2, 2000); *PRC Harris, Inc. v. Boeing Co*., 700 F.2d 894, 896-97 n. 2 (2d Cir.1983); *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 561 (5th Cir.1983) (*en banc*).

[25] *See Hunt Report on Alleged Act Violations* at 21.

[26] *See generally Montana v. United States*, 440 U.S. 147 (normal rules of preclusion should relieve parties of redundant litigation); *Jeffree v. Wallace*, 837 F.2d 1461, 1469 (11th Cir. 1988) (claim preclusion doctrine found applicable when events arose from same operative nucleus of facts involving the same primary right and duty); *Waldman v. Village of Kiryas Joel*, 39 F. Supp. 2d 370, 379, 381 (S.D.N.Y. 1999) (and cases cited therein) (pleading subsequent act will not defeat *res judicata* when additional facts arise from same core of operative facts, overwhelming bulk of evidence remains the same, and additional facts pertain to same pattern and practice); Restatement (2d) of Judgments §§ 17, 19, 24, 25.

[27] *See* AT&T Answer, Exhibit 9 at 28-30, Exhibit 10.

[28] *See, e.g., Russell v. SunAmerica Securities, Inc*., 962 F.2d 1169 (5th Cir. 1992); 18 Moore's Federal Practice (3rd ed.) § 131.40[3][a] at 131-135.

[29] *Alpert's Newspaper Delivery, Inc. v. New York Times Co.*, 876 F.2d 266, 270 (2d Cir. 1989). *See, e.g., Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996) ("the term 'privity' is now used to

applied res judicata where a single entity, although not a named party, was "behind both lawsuits."[30] In making this determination, courts have examined a variety of factors, including whether a single entity controlled the litigation strategy in both actions, whether a single entity or group of individuals financed both actions, whether the same lawyers brought both actions, whether both actions appear to have been part of a coordinated, industry-wide strategy, and whether the party to be barred appears to have engaged in deliberate maneuvering to avoid the effects of the first action.

15. For example, in *Alpert's Newspaper Delivery, Inc. v. New York Times Co.*, the court ruled that an earlier action by a newspaper distributor barred a later suit by a different group of distributors, because the plaintiffs in both actions belonged to the same industry association, the association had committed itself to pay the costs of both actions, and the association provided strategic assistance in both actions.[31] Similarly, in *Ruiz v. Commissioner of Transportation*,[32] the court held that an earlier state court action barred a subsequent federal action, because the same attorneys represented both sets of plaintiffs, an industry association was financing both actions, and there were indications of an industry-wide strategy coordinated by counsel for the industry association.[33] In these cases, courts found privity when a person, although not a party, had his interests adequately represented by someone with the same interests who is a party.[34]

16. We conclude that, under the reasoning set out in the above cases, TSIA and MRO are in privity for purposes of res judicata. As explained below, the record indicates that Mr. Kahn, the lawyer for both MRO and TSIA, has controlled the plaintiff's prosecution of both the *MRO Action* and this action.

17. There is no question that Mr. Kahn controlled MRO in its conduct of the *MRO Action*. In addition to serving with Richard Archer as co-counsel for MRO, Mr. Kahn was the company's only officer and director.[35] He also owned a supermajority

describe various relationships between litigants that would not have come within the traditional definition of that term"); *Russell v. SunAmerica*, 962 F.2d at 1173-75.

[30] *See, e.g., Alpert's Newspaper Delivery*, 876 F.2d at 270 (and cases cited therein).

[31] *Id.* at 269-70. *See also id.* at 270 ("Despite the fact that the [industry association] was not a named party in either action, it was the admitted mastermind and financier of the [prior] litigation and it is providing similar tactical and financial help in the instant case.").

[32] 858 F.2d 898, 903 (2d Cir. 1988).

[33] *See also Ellentuck v. Klein*, 570 F.2d 414, 425 (2d Cir. 1978) (finding privity where two separate sets of plaintiffs all belonged to property owners' association that had coordinated litigation strategy in both actions); *Katz v. Blum*, 460 F. Supp. 1222,1224 (S.D.N.Y. 1978) (in dicta, finding privity where, *inter alia*, "counsel for both sets of plaintiffs is the same").

[34] *See Martin v. Wilks*, 490 U.S. 755, 762 (1989) (citing cases). *See also Alpert's Newspaper Delivery*, 876 F.2d at 270. Here, TSIA and its IP and service bureau members, including MRO's parent company (Bellatrix), generally had the same interests as MRO and Mr. Kahn. Further, MRO, which is both an IP and service bureau, had a strong incentive to protect the interests of at least two other IPs that Mr. Kahn controlled and the interests of similarly situated IP and service bureau companies.

[35] Joint Stipulation at 4.

interest in Bellatrix, MRO's parent corporation, and served as the sole officer and director of that corporation as well.[36] As counsel for, and officer, director, and majority owner of, the plaintiff corporation and its parent, Mr. Kahn substantially controlled MRO's conduct of the litigation before the district court.[37]

18. Mr. Kahn exercises similar control over TSIA's prosecution of this action. First, he is supporting the instant proceeding by providing legal services and advancing the expenses of the litigation.[38] Further, Mr. Kahn relied almost exclusively on evidence developed in the *MRO Action* in prosecuting the current matter. During discovery, AT&T sought extensive information regarding specific TSIA members from which AT&T had withdrawn billing service in the manner challenged in this action. TSIA objected to producing the requested information, arguing instead that the "major source" of the "information upon which [TSIA] intends to rely in this proceeding" was disclosed in documents previously submitted to the Commission in a rulemaking proceeding relating to 900-number portability.[39] These documents were comments of, and an attached declaration by, Mr. Kahn, which relied almost exclusively on the evidence developed in the *MRO Action*.[40] The failure of TSIA to develop any substantial factual support for its complaint other than its reliance on a record compiled in litigation that Mr.

[36] *Id*.; TSIA Supplement of Record at 1-2.

[37] We note that Mr. Kahn also used his ownership and control over at least two other entities to mount at least two other court actions that attempted unsuccessfully to raise the same matters at issue in the *MRO Action* and here. *See M.C. Products, Inc. v. AT&T*, 205 F.3d 1351, 1999 WL 1253223 (9th Cir. Dec. 22, 1999), *cert. denied*, 120 S.Ct. 2025 (2000); *Audio Entertainment Network, Inc. v. AT&T*, 205 F.3d 1350, 1999 WL 1269329 (9th Cir., Dec, 28, 1999), *cert. denied*, 120 S.Ct. 2025 (2000). Mr. Kahn's actions led one court to observe that "David Kahn and his two companies can be treated as the same entity," and that Mr. Kahn "cannot rely on tweaked pleadings and empty distinctions between named plaintiffs to preserve a duplicative action . . . ." *M.C. Products v. AT&T*, 1999 WL 1253223 at 2-3. Our conclusion here comports with those observations.

[38] The record of this proceeding supports the finding that Mr. Kahn and Mr. Archer are financing TSIA's complaint before the Commission and are thus in the position to control TSIA's litigation strategy. In particular, during the briefing on AT&T's res judicata motion, TSIA filed a supplemental response to staff's request for additional information regarding the relationship between TSIA and Mr. Kahn. Even though TSIA understood that any atypical fee arrangement between itself and Mr. Kahn could support the merit of AT&T's motion, TSIA's response failed to clearly state that TSIA was paying Mr. Kahn for legal services or planned to reimburse costs to Mr. Kahn on a timely basis. Instead, TSIA stated: "Neither David Kahn nor Richard Archer has provided any support to TSIA for the prosecution of this proceeding, other than legal services and advancing costs, to be repaid by TSIA." Supplemental Response of TSIA to Commission's Request to Supplement Certain Portions of the Record, File No. E-97-25 (filed Nov. 30, 1999) at 2 ¶4. Given the particular circumstances in which it was made, we find that TSIA's statement indicates that, more likely than not, Mr. Kahn and his co-counsel are financing the instant action by providing legal services without requiring payment. It also appears that they are advancing the costs of litigation without any firm repayment schedule. This supports our conclusion that Mr. Kahn is controlling TSIA's conduct of the case before the Commission.

[39] *See* TSIA's Opposition to Motion of AT&T for Order Compelling Complainant to Answer Defendant's First Set of Interrogatories, File No. E-97-25 (filed Sept. 4, 1997) at 12.

[40] Comments of David L. Kahn, filed September 11, 1995, *In the Matter of Telephone Number Portability*, CC Docket No. 95-116 (*Telephone Number Portability*).

Kahn admittedly controlled, provides additional support for our conclusion that Mr. Kahn was also the controlling force behind this complaint proceeding.

19. Finally, our finding that Mr. Kahn controls this action also draws support from the fact that TSIA's strategy here changed noticeably when he became involved, in much the same way that MRO's strategy changed when Mr. Kahn's involvement in the *MRO Action* began. For example, after Bellatrix (owned by Mr. Kahn) acquired MRO, MRO amended its district court complaint, originally filed in 1992 as a bankruptcy action, to allege violations of both the antitrust laws and the Communications Act.[41] Similarly, before the Commission, TSIA's strategy for challenging AT&T's practices changed once Mr. Kahn took over the representation. In a 1994 rulemaking petition originally filed by a different law firm, TSIA merely sought to make 900 numbers portable.[42] It did not assert that AT&T's practices with respect to 900 numbers violated the Act until Mr. Kahn began representing TSIA. Once he assumed TSIA's representation, however, TSIA began alleging the same violations of the Act here at issue, allegations that Mr. Kahn, "who owns and/or controls several 900 information provider and/or service bureau companies,"[43] first had asserted in the *Telephone Number Portability* proceeding.[44] Moreover, TSIA initiated proceedings at the Commission immediately after Mr. Kahn learned that his *MRO Action* would fail.[45] Although TSIA

[41] *MRO Bankruptcy Complaint*; AT&T Answer, Exhibit 6; *see* AT&T's Initial Brief in Support of Judgment Dismissing TSIA's Complaint on Grounds of Res Judicata, File No. E-97-25 (filed Nov. 12, 1999) at 24, n.109.

[42] Petition for Rulemaking by Teleservices Industry Association, RM No. 8355 (filed October 18, 1994); *see Telephone Number Portability*, Notice of Proposed Rulemaking, 10 FCC Rcd 12350, 12373 n.58 (1995).

[43] September 11, 1995 comments of David L. Kahn at 2, *Telephone Number Portability*, CC Docket No. 95-116.

[44] In October 1998, the Commission asked the North American Numbering Council (the NANC) for a recommendation concerning the feasibility of number portability of 500 and 900 numbers. *Telephone Number Portability*, Second Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 21204, 21224-25 (1998). The NANC subsequently recommended that the Commission suspend consideration of the issue of implementation of 500 and 900 number portability, because "a strong demand for such a capability does not exist at this time and to design, develop, implement and operate such as system would be costly." Letter from Alan C. Hasselwander, Chairman, North American Numbering Council, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, June 11, 1999. On December 15, 1999, the NANC's recommendation was deemed adopted pursuant to the *Second Report and Order*, 12 FCC Rcd 12281, 12352-53 (1997) in the *Telephone Number Portability* proceeding.

[45] TSIA first brought this dispute before the Commission as a petition for declaratory ruling. Teleservices Industry Association Petition for Rulemaking, dated February 23, 1996 and filed March 6, 1996 (arguing that until 900 portability is fully implemented, the FCC should declare, *inter alia*, that notwithstanding anything to the contrary in AT&T's billing service agreement, 900 carriers are prohibited by the Act from terminating an IP's 900 number upon termination, by either party, of billing services for that 900 number). Mr. Kahn executed that petition only three days after a February 20, 1996 hearing before the magistrate judge in the *MRO Action* on AT&T's motion for summary judgment. Mr. Kahn then filed that petition – involving the same issues as this complaint proceeding – on March 6, 1996, five days after the district court adopted the magistrate judge's recommendations and denied or dismissed all of MRO's claims of alleged violations of the Act. Then, on April 21, 1997, Mr. Kahn again raised the same issues before the Commission by filing the instant complaint proceeding.

states that its "decision to file this proceeding was made by its board of directors,"[46] that fact, even if true, is insufficient to overcome the evidence that Mr. Kahn has substantially controlled TSIA's conduct of this action.[47]

20. Under the facts of this case, no single factor is determinative on our finding that, for res judicata purposes, TSIA was in privity with MRO. However, having considered all of the factors discussed above, we are convinced that Mr. Kahn substantially controlled both actions such that MRO, Bellatrix, and TSIA are all in privity with respect to those actions. TSIA has not shown any manner in which its interest was not protected by the litigation in the *MRO Action*. It points to no inadequacy in MRO's presentation on the issues that were also of concern to similarly situated TSIA members.[48]

21. Mr. Kahn's eleventh-hour offer to withdraw as counsel of record in this action[49] does not undermine our finding. First, a withdrawal by Mr. Kahn after most, if not all, of the work has been done would not materially diminish Mr. Kahn's control over TSIA's prosecution of this proceeding. Second, a withdrawal by Mr. Kahn would still leave Richard Archer as TSIA's counsel of record, and the professional ties between Messrs. Kahn and Archer regarding the matters at issue here are close, as evidenced by Mr. Archer's involvement as Mr. Kahn's co-counsel in the *MRO Action*. Finally, given Mr. Kahn's pervasive and long-standing involvement in the matters at issue on behalf of both MRO and TSIA, we do not believe that merely the removal of Mr. Kahn as counsel of record would, as a practical matter, reduce his influence over TSIA's conduct here.

IV. CONCLUSION

22. We conclude that the requirements for application of res judicata are present in this proceeding and that TSIA is therefore barred from further litigating its claims in this proceeding. We therefore dismiss the complaint.

V. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203, 208, and the authority delegated in sections 0.111 and 0.311 of the

[46] *See id.* ¶ 3.

[47] *See Boston Scientific Corp. v. Schneider (Europe) AG*, 983 F.Supp. 245, 258 (D. Mass. 1997); *Crane v. Department of Agriculture, Food & Rural* Resources, 602 F.Supp. 280, 288 (D. Me. 1985) (*quoting* 18 Charles A. Wright, Federal Practice & Procedure § 4457, at 502 (West 1981)).

[48] *See Martin v. Wilks*, 490 U.S. at 762 n.2 (and cases there cited).

[49] *See* TSIA Supplement of Record at 2.

Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau