

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

In the Matter of	)	
	)	
Southern California Pay Phone Co.,	)	
Complainant	)	File No. E-99-29
	)	
v.	)	
	)	
Pacific Bell Telephone Company and	)	
GTE California, Inc.	)	
Defendants	)	
	)	
And	)	
	)	
Total Communications Services, Inc.	)	
Complainant	)	
	)	
v.	)	File No. E-99-30
	)	
Central Telephone Company of Illinois, Inc.,	)	
Continental Telephone of Indiana, Inc.,	)	
GTE North of Michigan, Inc.,	)	
GTE Indiana Operations, Inc.,	)	
GTE Service Corporation,	)	
Illinois Bell Telephone Company, and	)	
Illinois Bell Telephone Company	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 2, 2000**

**Released: May 3, 2000**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this order, we deny two petitions for reinstatement.<sup>1</sup> Southern California Pay Phone Company (SCPPC) and Total Communications Services, Inc. (Total) filed petitions to have their respective formal complaints reinstated after failing to file an appeal of a Commission decision denying their

<sup>1</sup> See Petition for Reinstatement of Southern California Pay Phone Company to reinstate File Nos. E-94-67 and E-94-68 (filed Mar. 30, 1999); Erratum, Petition for Reinstatement of Total to reinstate File Nos. E-94-86, 87, 88, 89, 90, 91, 92, and 93 (filed Apr. 6, 1999). We have accorded the proceedings associated with these petitions the following file numbers: 1) Petition for Reinstatement of Southern California Pay Phone Company, File No. E-99-29; Petition for Reinstatement of Total, File No. E-99-30.

complaints.<sup>2</sup> Petitioners allege that their failure to appeal in a timely manner was due to the Commission's failure to serve them personally with a copy of the order denying their complaints. As a result, the complainants aver, they are entitled to have their petitions reinstated. For the reasons stated below, we deny the petitions for reinstatement.

## II. BACKGROUND

2. The formal complaints filed by SCPPC and Total, which are independent payphone providers, were part of a group of fifty-nine similar formal complaints filed against a number of local exchange carriers. All of these formal complaints alleged that the defendant LECs violated sections 201(b) and 202(a) of the Communications Act of 1934, as amended (Act), and Part 69 of the Commission's rules, by improperly assessing end user common line (EUCL) charges on the complainants.<sup>3</sup>

3. In 1995, the Commission issued its *Denial Order* in which it rejected all fifty-nine of the formal complaints. Several of the complainants in those cases filed timely appeals to the U.S. Court of Appeals for the District of Columbia Circuit. In October of 1997, the D.C. Circuit issued an order reversing the Commission's findings in the *Denial Order*, and remanding the appealed cases to the Commission for further consideration consistent with the court's opinion.<sup>4</sup> The Commission has recently issued an order resolving the cases remanded by the court and finding in favor of the complainants.<sup>5</sup>

4. SCPPC and Total did not file appeals of the Commission's denial of their formal complaints and, accordingly, their complaints were not included in the remand proceeding. In their petitions for reinstatement, which were filed on March 30, 1999, they assert that they did not file timely appeals because the Commission failed to serve them personally with copies of the *Denial Order*, as required by the Commission's rules.<sup>6</sup> Petitioners assert that, in light of this failure, the Commission must reinstate their complaints as part of the remand proceeding.<sup>7</sup>

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<sup>2</sup> See *C.F. Communications Corp., et al., v. Michigan Bell Telephone Co., et al.*, 12 FCC Rcd 2134 (1997) (*Denial Order*).

<sup>3</sup> See 47 U.S.C. §§ 201(b) and 202(a); 47 C.F.R. §§ 69.1 *et seq.*

<sup>4</sup> *C.F. Communications Corporation v. FCC*, No. 97-1202, slip. op. (D.C. Cir. 1997). The Commission subsequently took voluntary remand of several other cases raising the same issues that were the subject of appeals of a separate order and consolidated the cases from both proceedings for purposes of the remand proceeding. See *C.F. Communications Corporation v. FCC*, 128 F.3d 735 (D.C. Cir. 1997).

<sup>5</sup> *C.F. Communications, et al. v. Century Telephone of Wisconsin, Inc., et al.*, FCC 00-133 (rel. Apr. 13, 2000) ("*Remand Order*").

<sup>6</sup> SCPPC Petition at 2; Total Petition at 2. See 47 C.F.R. §0.445(a).

<sup>7</sup> SCPPC Petition at 9-16; Total Petition at 9-16.

### III. DISCUSSION

5. Petitioners do not allege that the Commission failed to provide public notice of the *Denial Order* at the time it was issued. Nonetheless, they assert that because the Commission failed to mail to them copies of the order, as required by the Commission's rules, they did not receive actual notice of the *Denial Order* when it mattered -- when the order was released or before the time for an appeal of the order expired.<sup>8</sup> They concede, however, that executives for SCPPC and Total learned that the Commission had denied their claims from a "member notice" issued by the American Public Communications Council (APCC) in late 1997, and that this could reasonably be construed as actual notice.<sup>9</sup> Petitioners assert that whether or not they had actual notice of the *Denial Order* in 1997 is not determinative in this proceeding.<sup>10</sup> Rather, they argue that the Commission should grant their petitions because reinstatement of their complaints will not prejudice the defendants or the Commission.<sup>11</sup>

6. Even taking all of petitioners' factual assertions as true,<sup>12</sup> we still find that they are not entitled to the relief requested. Our analysis here is guided by the D.C. Circuit's opinion in *Gardner v. FCC*.<sup>13</sup> In that case, the Commission had denied a petition for reconsideration on the grounds that the petitioner had filed four days after the 30-day statutory period. As here, petitioner claimed that this late-filing was caused by the Commission's failure to mail to him copies of the decision.<sup>14</sup> In granting relief, the court first noted that the statutory period for filing reconsideration runs from the date of "public notice," which occurs when the full text of a decision becomes publicly available.<sup>15</sup> Nonetheless, the court went on

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<sup>8</sup> SCPPC Brief at 2-3. Total filed a letter on May 28, 1999 indicating that it was adopting all of the arguments contained in the SCPPC brief.

<sup>9</sup> SCPPC Brief at 3. Given this admission, Commission staff directed the parties to brief two specific issues: first, whether SCPPC and Total had actual notice of the Commission's *Denial Order*; and, second, if the petitioners had actual notice, whether their petitions are prejudiced by the fact that they were filed almost 18 months after such notice. *See* Letter from Angel M. Cartagena, Jr., Staff Attorney, Common Carrier Bureau, to Albert H. Kramer, Esq., Counsel for SCPPC; William A. Brown, Esq., Counsel for SBC Communications, Inc., and Andre J. Lachance, Esq., Counsel for GTE Services Corporation, dated May 4, 1999; *see also* Letter from Angel M. Cartagena, Jr., Staff Attorney, Common Carrier Bureau, to Albert H. Kramer, Esq., Counsel for Total, Andre J. Lachance, Esq., Counsel for GTE Services Corporation, and Linda Morrison, Esq., Counsel for Ameritech Operating Companies, dated May 17, 1999.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> We note that the parties opposing the petition have not had an opportunity to conduct discovery on these claims and, therefore, have had no real opportunity to challenge the factual claims offered in petitioners' affidavits. In particular, GTE reserved the right in this proceeding to pursue inquiry into whether petitioners had or should have had actual notice at the time the *Denial Order* was issued in light of the fact that the counsel representing SCPPC in its complaint was the same counsel that filed timely appeals of the *Denial Order* on behalf of other parties. Brief of GTE California, Inc. at 5.

<sup>13</sup> 530 F.2d 1086 (D.C. Cir. 1976) (*Gardner*). Both parties rely on *Gardner* to support their claim. *See* Reinstatement Petition at 11-13; GTE Brief at 6.

<sup>14</sup> *Gardner*, 530 F.2d at 1088-89.

<sup>15</sup> *See* 47 U.S.C. §405(a).

to explain that where personal notice is required by the agency's rules, but is not given within a reasonable time (or at all), "fairness considerations may indicate that the thirty day filing requirement should be waived or extended."<sup>16</sup> The court concluded that such fairness considerations favored the requested relief where, as in that case, the petitioner received actual notice 9 days before the 30-day period expired and mailed his petition with one day remaining—even though it was received by the Commission four days late. The court concluded that, given these facts, "it appears highly likely that reasonably prompt personal notice . . . would have allowed for the petition to be mailed well before the expiration of the period."<sup>17</sup>

7. In reaching its conclusion, the court in *Gardner* emphasized that:

a defect in mailing notification will have legal consequence only where the delay in notification in fact makes it impossible reasonably for the party to comply with the filing statute. A petitioner has a burden to show (a) when and how he received notice in fact, (b) that the time remaining was inadequate to allow him reasonably to meet the 30-day requirement . . . , and (c) that he moved for reconsideration promptly on receiving actual notice. . . . [I]t will be an extraordinary case, such as the one before us, where petitioner can meet that burden.<sup>18</sup>

We conclude that petitioners have clearly failed to meet the third prong of this test. In stark contrast to the petitioner in *Gardner* who filed a petition for reconsideration 8 days after receiving actual notice, petitioners here admit to having chosen not to pursue any remedy for at least 18 months after receiving actual knowledge that the Commission had issued an order resolving their complaints. SCPCC and Total both specifically concede in affidavits that they became aware that their respective formal complaints had been dismissed when officers of the two companies "received a member bulletin from the American Public Communications Council in September or October 1997 discussing the oral argument" in the D.C. Circuit appeal.<sup>19</sup> Petitioners finally filed their petitions for reinstatement in March of 1999. Petitioners argue that the Commission should not be concerned by this delay because reinstatement at this time will not prejudice defendants.<sup>20</sup> This simply is not so. As the D.C. Circuit has stated, "private parties . . . must be able to rely upon, and make substantial expenditures on the basis of, the finality of Commission action determined through the application of some objective and publicly knowable criteria – which 'public notice,' as defined in the Commission's rules, assuredly is."<sup>21</sup> In a case such as the one before us, we must balance this right of the defendants to finality with the right of the petitioners to procedural fairness. In light of the substantial delay by petitioners, we conclude that the equities clearly lie in denying the requested relief.

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<sup>16</sup> *Gardner* at 1091.

<sup>17</sup> *Id.* at 1092.

<sup>18</sup> *Id.* at 1091-92 n.24 (emphasis added).

<sup>19</sup> SCPCC Petition, Affidavit of James DeArkland, para 5.; Total Petition, Affidavit of Martin S. Segal, para. 5.

<sup>20</sup> SCPCC Brief at 4.

<sup>21</sup> *National Black Media Coalition v. FCC*, 760 F.2d 1297, 1300 (D.C. Cir. 1985). Petitioners cite to a number of employment cases arising from the Merit System Protection Board to support their argument on this point. We find these cases to be inapposite in that the other interested party in each case was the government agency itself, rather than another private party. See SCPCC Brief at 5-11.

8. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 201(b), 208, and the authority delegated by Sections 0.111 and 0.311 of the Commission's Rules, 47 C.F.R. §§ 0.111, 0.311, that the petitions for reinstatement filed by Southern California Pay Phone Company and Total Communications Services, Inc. ARE DENIED.

9. IT IS FURTHER ORDERED that this Order is effective immediately upon release thereof.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau