

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

In the Matter of)	
)	
Dr. Bonnie O’Day,)	File No. EB-03-TC-F-004
)	
Complainant,)	
)	
v.)	
)	
Audiovox Communications Corporation,)	
)	
Defendant.)	

ORDER

Adopted: December 30, 2003

Released: January 5, 2004

By the Chief, Telecommunications Consumers Division, Enforcement Bureau:

1. In this Order, we grant the Joint Motion to Dismiss with Prejudice (“Joint Motion”) filed on December 17, 2003, by Complainant Dr. Bonnie O’Day and Defendant Audiovox Communications Corporation.¹ With the mediation assistance of Commission staff, O’Day and Audiovox have settled the first formal complaint filed with the Commission pursuant to Section 255 of the Communications Act of 1934, as amended, (the “Act”).² We find that granting the parties’ Joint Motion to dismiss the formal complaint, in the manner described herein, will ensure the most efficient use of the parties’ and the Commission’s resources without materially prejudicing either party.

¹ See Notice of Settlement and Joint Motion to Dismiss Formal Complaint with Prejudice, Dr. Bonnie O’Day & Audiovox Communications Corporation, File No. EB-03-TC-F-004, filed Dec. 17, 2003.

² See 47 U.S.C. § 255. Section 255 provides, in pertinent part, that manufacturers of telecommunications equipment or customer premises equipment, as well as providers of telecommunications services, must make their products and services “accessible” to and usable by individuals with disabilities, if “readily achievable.”

I. BACKGROUND

2. On February 21, 2003, pursuant to Section 255 of the Act and the Commission's implementing rules and orders,³ Dr. Bonnie O'Day ("O'Day") filed a formal complaint against defendant Audiovox Communications Corporation ("Audiovox").⁴ In her complaint, O'Day contends that Audiovox violated Section 255 of the Act by, among other things, failing to make features of the wireless telephone handset that Audiovox manufactured accessible to O'Day, a visually-impaired user. O'Day requests that the Commission require Audiovox to make available for downloading into O'Day's wireless telephone the software needed to deploy "text to speech" capability. O'Day contends that such software would allow the essential functions and services available through a wireless telephone's visual menu to be accessible to her through audio prompts.⁵

3. On April 1, 2003, Audiovox filed a Motion to Dismiss the formal complaint and an Answer denying the allegations in O'Day's complaint.⁶ O'Day filed a Reply to the Answer and an Opposition to Audiovox's Motion to Dismiss.⁷ In her Reply, O'Day proposed that the Commission hold a technical conference at which the parties, together with their engineering and legal personnel, could discuss accessibility issues at length.⁸ Commission staff convened such a conference on June 12, 2003. The parties, their attorneys, and their respective engineers and technical experts attended the conference. Commission staff facilitated the discussion and encouraged participants to discuss potential settlement opportunities.

4. Since the technical conference, O'Day and Audiovox have engaged in extensive settlement discussions, with assistance from Commission staff, to resolve the disputed issues

³ Sections 6.1 – 7.23 of the Commission's rules, 47 C.F.R. §§ 6.1 – 7.23, implement Section 255. *See also In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order, 16 FCC Rcd 6417 (1999) ("Section 255 Order"). In the *Section 255 Order*, the Commission noted that "[p]rompt and efficient enforcement of Section 255 and the rules adopted in this Order is a crucial component of successful implementation of the accessibility requirements" *Section 255 Order*, 15 FCC Rcd at 6441.

⁴ O'Day's formal complaint was supported by the American Council for the Blind, a national advocacy organization for blind and visually-impaired persons. At the same time, O'Day filed a similar formal complaint against Verizon Wireless, File No. EB-03-TC-F-001. This Order deals only with O'Day's formal complaint against Audiovox.

⁵ *See* O'Day Formal Complaint, File No. EB-03-TC-F-004, filed Feb. 21, 2003.

⁶ *See* Audiovox, Answer and Motion to Dismiss O'Day Formal Complaint, File No. EB-03-TC-F-004, filed April 1, 2003.

⁷ *See* O'Day Reply to Audiovox Answer, File No. EB-03-TC-F-004, filed April 18, 2003 ("O'Day Reply"); O'Day Opposition to Audiovox Motion to Dismiss, File No. EB-03-TC-F-004, filed April 18, 2003.

⁸ *See* O'Day Reply.

raised in O'Day's formal complaint. As a result of these discussions, the parties recently executed a settlement agreement and filed the above-referenced Joint Motion for dismissal of O'Day's formal complaint against Audiovox.

II. DISCUSSION AND ORDERING CLAUSES

5. The Commission has broad discretion to conduct complaint proceedings "in a manner that will best conduce to the proper dispatch of business and to the ends of justice."⁹ Although the Commission does not have a specific rule relating to the dismissal of formal complaints, we generally follow the well-established principle that dismissal should be allowed unless it will materially prejudice either party.¹⁰

6. Under the circumstances of this case, dismissing the complaint with prejudice is appropriate and does not materially prejudice either O'Day or Audiovox. Dismissal is in the public interest because it ensures the efficient use of the Commission's formal complaint process and eliminates the need for further litigation and expenditure of additional time and resources of the parties and the Commission. Hence, we find that the parties have shown good cause for us to dismiss O'Day's formal complaint with prejudice.

7. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and section 1.727 of the Commission's rules, 47 C.F.R. § 1.727, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the Joint Motion to Dismiss Formal Complaint with Prejudice filed by the parties to this proceeding IS GRANTED.

8. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and section 1.727 of the Commission's rules, 47 C.F.R. § 1.727, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that O'Day's formal complaint is hereby DISMISSED WITH PREJUDICE and that the above-captioned formal complaint proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Colleen K. Heitkamp
Chief, Telecommunications Consumers Division
Enforcement Bureau

⁹ 47 U.S.C. § 4(i), *see also* 47 U.S.C. § 4(j).

¹⁰ *See* Wright & Miller, Federal Practice & Procedure: Civil 2d § 2364.