

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

In the Matter of

ALLNET COMMUNICATION  
SERVICES, INC.,  
Complainant,

v. File No. E-89-38

US WEST, INC., and ITS OPERATING  
SUBSIDIARIES,  
Defendants.

**ORDER**

Adopted: June 8, 1992;

Released: June 16, 1992

By the Deputy Chief, Enforcement Division, Common  
Carrier Bureau:

**I. INTRODUCTION**

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Allnet Communication Services, Inc. (Allnet) may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

**II. BACKGROUND**

2. The case that Allnet presents against the defendant local exchange carriers (LECs)<sup>1</sup> is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*<sup>2</sup> and *American Tele-*

*phone & Telegraph Co. v. Northwestern Bell Telephone Co.*<sup>3</sup> In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period<sup>4</sup> and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.<sup>5</sup>

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.<sup>6</sup> We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.<sup>7</sup>

**III. CONTENTIONS OF THE PARTIES**

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Allnet's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's

<sup>1</sup> The subject complaint was filed against U S West, Inc and its operating subsidiaries Mountain States Telephone and Telegraph Company, (MTN) Northwestern Bell Telephone Company (NWB) and Pacific Northwest Bell Telephone Company (PNB). U S West, Inc. filed consolidated pleadings on behalf of MTN, NWB and PNB. For the sake of convenience and clarity, we will refer to the defendants collectively as U S West.

<sup>2</sup> 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al. v. FCC*, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (*per curiam*).

<sup>3</sup> 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al. v. FCC*, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (*per curiam*).

<sup>4</sup> The complainants relied, as does Allnet in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

<sup>5</sup> *See MCI Telecommunications Corporation v. Pacific Bell Tel.*

*Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

<sup>6</sup> Complainant and defendants, should they choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

<sup>7</sup> We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

prescribed rate of return, plus interest on that amount. In addition, Allnet has propounded interrogatories to the defendants that ask for "a complete rate of return analysis for U S West (including its holding company)... employing standard accounting methods approved by the FCC..." The interrogatories also request defendants to provide a complete rate of return analysis for each switched and special access rate element contained in the defendants' interstate access tariffs. The defendants have filed objections to the interrogatory requests. Allnet, in turn, has filed a motion to compel.

5. The defendants also raise a number of threshold challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI and AT&T Liability Orders*. The defendants argue that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*<sup>8</sup> and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.<sup>9</sup>

6. Defendants also advance a number of arguments in opposition to complainant's discovery requests. U S West states that the rate of return analysis for the U S West holding company requested by Allnet does not exist since the holding company does not provide regulated services. Further, U S West contends, the U S West companies do not collect rate of return information for each switched and special access rate element in the detailed format that Allnet requests. U S West argues that they should not, in any event, be required to create information which is not developed in the ordinary course of business. According to U S West, the rate of return information requested for MTN, NWB and PNB is contained in the Form 492 prepared by the defendants and submitted to the Commission, copies of which were attached to the defendants' responses to Allnet's interrogatories.

7. In reply, Allnet asserts that U S West must compute its rate of return at the holding company level since U S West has maintained throughout the various rate of return complaint proceedings that a finding of unlawful overearnings should be based upon the overall earnings of U S West at the holding company level. Allnet argues that U S West's failure to provide information in its possession imposes an undue burden on Allnet to develop information necessary to a full resolution of the case.

#### IV. DISCUSSION

8. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Allnet may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Allnet, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 8 herein. We will, for example, consider any evidence submitted by the defendants that would tend to show that Allnet's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Allnet's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

9. We will deny complainant's motion to compel in so far as it seeks rate of return information computed on an aggregate company-wide basis. The Commission has previously rejected U S West's contention that the relevant overall interstate rate of return is that of U S West in the aggregate, not each of its component operating companies.<sup>10</sup> For this reason, we find that Allnet's interrogatory requests, as propounded, are irrelevant to a proper determination of the damages Allnet seeks in this proceeding. We will, however, consistent with the guidelines set

<sup>8</sup> 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

<sup>9</sup> Additionally, U S West contends that the relevant overall interstate rate of return is that of U S West in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument. *See e.g.*, *AT&T Liability Order* 5 FCC Rcd at 146 and 148 (1990).

<sup>10</sup> In the *AT&T Liability Order*, the Commission stated that

Under the Act, carriers have substantial flexibility in formulating rates. Indeed, our rules permit companies to choose the level of geographic aggregation for purposes of developing and tariffing their rates, as well as for reporting their earnings on such rates. NWB could have chosen to develop its rates together with its affiliated U S West Companies but did not exercise its option to do so. Hav-

forth herein, require defendants to make available to the complainant information necessary to compute on an individual operating company basis, the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return.

#### V. CONCLUSION

10. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 8 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.<sup>11</sup>

#### VI. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that complainant's Motion to Compel IS GRANTED to the extent indicated herein and otherwise, IS DENIED. Within 10 days of the release date of this order, the complainant may direct the defendants written requests for the information necessary to perform the computation discussed in paragraph 8 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

12. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 8 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

13. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period

and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss  
Deputy Chief (Operations)  
Enforcement Division  
Common Carrier Bureau

---

ing chosen to file rates specifically tailored to its own revenue requirement, and thereby choosing to subject itself to a separate rate of return constraint, NWB cannot now be permitted to evade that constraint and force its customers to bear the burden of unlawful rates.

5 FCC Rcd 148 (footnotes omitted) (1990).

<sup>11</sup> Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.