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

In the Matter of

TELECOM*USA, INC.,
and its subsidiaries,
Complainant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-362
NORTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-90-363
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-90-364
Defendants.	

ORDER

Adopted: June 5, 1992; Released: June 17, 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, Telecom*USA, Inc. and its subsidiaries (Telecom*USA), may be entitled to recover damages as a result of defendants'[1] alleged violation of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Telecom*USA presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] 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[4] 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.[5]

3. Because the operative facts and questions of law involved in the instant cases 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.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings 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.[7]

III. DISCUSSION

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. Telecom*USA's damage claim rests 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

[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, were filed prior to the consolidation. Accordingly, we shall refer to the defendant carriers as they were named in the complaints.

[2] 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, 951 F.2d 1259 (10th Cir. 1991) .

[3] 5 FCC Rcd 143 (1990) *(AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does Telecom*USA in the instant complaint, 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.

[5] *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).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] 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.

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 defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendants raise a number of challenges to complainant's damage claim, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders.* 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*[9] 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 complainant when their overall interstate rate of return was below the authorized level.[10] Defendants also contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC.*

6. 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 Telecom*USA may have suffered actual damage as a consequence of defendants' alleged violation of the Commission's rate of return prescription. We tend to agree with Telecom*USA, 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 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 its claim that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by defendants that would tend to show that Telecom*USA'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 Telecom*USA's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute Telecom*USA'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 defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. 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 complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if 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 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[11]

V. ORDERING CLAUSES

8. 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, within 10 days of the release date of this order, complainant may direct to defendants a written request for the information necessary to perform the computation discussed in paragraph 7 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.

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[8] Telecom*USA also seeks interest on this amount. We note that the defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] 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. 11,034 (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.

[10] Additionally, the defendants contend that the relevant overall interstate rate of return is that of their parent holding company, U S West. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders. See, e.g.,* 5 FCC Rcd at 146 and 148 (1990).

[11] 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.

9. IT IS FURTHER ORDERED THAT complainant and 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 6 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.

10. 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