

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

In the Matter of

NATIONAL TELEPHONE SERVICES, INC.,
Complainant,

v.

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| BELL TELEPHONE COMPANY OF PENNSYLVANIA, | File No. E-91-49 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, | File No. E-91-50 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, | File No. E-91-51 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, | File No. E-91-52 |
| THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, | File No. E-91-53 |
| NEW JERSEY BELL TELEPHONE COMPANY, | File No. E-91-54 |
| SOUTHWESTERN BELL TELEPHONE COMPANY, | File No. E-91-57 |
| SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, | File No. E-91-58 |
| SOUTH CENTRAL BELL TELEPHONE COMPANY, | File No. E-91-59 |
| PACIFIC BELL TELEPHONE COMPANY, | File No. E-91-60 |
| NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, and | File No. E-91-61 |
| NEW YORK TELEPHONE COMPANY, | File No. E-91-62 |

Defendants.

ORDER

Adopted: June 12, 1992;

Released: June 22, 1992

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

¹ 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).

² 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).

³ The complainants relied, as does NTS in the instant com-

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, National Telephone Services, Inc. (NTS) may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that NTS presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*¹ and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*² 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 period³ 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.⁴

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.⁵ We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable

plaints, 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.

⁴ 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).

⁵ 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.

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.⁶

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. NTS' damages claims rest primarily on the contention that the proper measure of the damages 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 January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.⁷

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI and AT&T Liability Orders*.⁸ The defendants argue in unison that any damages 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 the complainant. Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that an award of damages based on the measure advocated by the complainant would result in the same consequences as the automatic refund rule found unlawful in *AT&T v. FCC*.¹⁰

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 NTS may have suffered actual damage as a consequence of defendants' alleged violations of the Com-

mission's rate of return, prescription. We tend to agree with NTS 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 damages 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 complainants suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that NTS' 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 NTS' 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 NTS' 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.

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 the complainant information necessary to compute the difference between the amount complainant actually paid

⁶ 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.

⁷ NTS also seeks interest on this amount. We note that some 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 proceedings will depend on the particular facts established by the parties.

⁸ The issues and arguments raised by defendants in response to NTS' claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

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. 11,033 (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.

¹⁰ See, e.g., New England Telephone and Telegraph Company Motion to Dismiss at 4; New York Telephone Company Motion to Dismiss at 4.

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 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, the complainant may direct to the defendants written requests 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.

9. 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 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

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.