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

In the Matter of	)		
	)		
Metro Communications, Inc.,	)		
Complainant,	)		
	)		
v.	)	File Nos.	WB/ENF-F-95-012
	)		WB/ENF-F-95-013
Ameritech Mobile Communications,	)		
Inc. and Detroit SMSA Limited	)		
Partnership,	)		
Defendants	)		

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1996 **Released: August 16, 1996**

By Chief, Wireless Telecommunications Bureau.

I. INTRODUCTION

1. The above-captioned formal complaint was filed by Metro Communications, Inc. ("Metro") on March 14, 1995, against Ameritech Mobile Communications, Inc. (hereinafter, "Ameritech") and Detroit SMSA Limited Partnership ("Partnership"), as joint defendants.[1] Ameritech and Partnership, filed a joint answer thereto as well as separate motions to dismiss the complaint on June 9, 1995. On June 25, 1995, Metro filed its response to the motions to dismiss. For the reasons set forth subsequently, we have concluded that Metro's complaint does not state a cause of action under the Communications Act of 1934, as amended.. We will therefore dismiss the complaint with prejudice and terminate this proceeding.

[1] The complaint is an amended version of a complaint previously filed by Metro on January 26, 1995, which did not comply with the procedural requirements of Section 1.720 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.720 *et seq.*, and, accordingly, was rejected by the Enforcement Division on March 3, 1995.

II. THE COMPLAINT AND ANSWER

A. The Facts

2. The material facts alleged in the complaint, as opposed to the conclusions to be drawn from those facts, are for the most part not in dispute. Where Metro and the defendants differ with respect to any facts, we have, in considering the motions to dismiss, accepted Metro's version.

3. Co-defendant, Partnership, a limited partnership, holds the wireline or "Block B" cellular radio license for the Detroit, Michigan, Standard Metropolitan Statistical Area (SMSA) and it provides cellular radio telephone services in the Detroit area. Metro alleges that co-defendant, Ameritech, is Partnership's general partner[2] and it is undisputed that Ameritech provides marketing, engineering, financial, managerial and other services to Partnership. Metro's principal business is the retail sale and installation of cellular radio telephone equipment.

4. During the period between April 1984 and December 31, 1993, Metro was a sales agent of Partnership for its cellular telephone services in the Detroit area. During its existence, the agency relationship was subject to several written and unwritten agreements. The last agreement specifying the terms of the agency was a written contract entered into on November 1, 1988 between Metro and Ameritech, "as general partner of and on behalf of the Detroit SMSA Limited Partnership" ("Agency Agreement"). By its terms the Agency Agreement was effective through December 31, 1993. Each party, however, had the option to extend the agreement for another year, subject to certain conditions, including that Metro "has substantially complied with all provisions of [the] Agreement."

5. The Agency Agreement specified in detail the rights and obligations of the parties. Among other things, it required Metro to act exclusively as Partnership's agent for the provision of cellular services and Metro was specifically prohibited, any time during the term of the agency and for a period of one year after the termination of the agency, from acting as a sales agent for another cellular radio service provider. Moreover, Metro was not permitted during this period, to "induce, influence or suggest" any subscriber which Metro had solicited for Partnership to purchase cellular telephone services from a reseller of Partnership or from another service provider. See paragraphs 4a and 4j of the Agency Agreement, the full text of which are set forth subsequently in footnotes 11 and 12.

[2] Ameritech denies that it is the general partner of Partnership. It alleges in its separate motion to dismiss that it, rather, is the 100% owner of another business corporation, Ameritech Mobile Phone Service of Detroit, Inc., which is the 90.731% owner and Partnership's sole general partner.

6. The sales agency relationship was, initially at least, mutually beneficial. Metro alleges that it had over the years built up a customer base for Partnership's services of approximately 24,000 users and that it had expended considerable sums of money to develop clientele for the Partnership.

7. However, the relationship between the parties deteriorated and a number of disputes arose between them. Metro alleges that the defendants discriminated in favor of affiliated agents (i.e., agents in which Ameritech had an ownership interest) and other preferred agents to Metro's disadvantage. In this regard, Metro alleges that the defendants offered a number of sales promotions through preferred agents which were not available to Metro and they paid preferred agents larger commissions than they were willing to pay to Metro. Metro and two other of Partnership's agents, on January 23, 1990, initiated litigation in a U.S. District Court challenging the alleged discrimination among their agents by the defendants. This legal action was unsuccessful. See paragraph 13, subsequently herein.

8. Metro in a number of instances assisted customers to switch from Partnership's services to the services of Partnership's competitors. Although Metro believed that this was permitted under the Agency Agreement, the defendants contended this was a violation of the agreement. As set forth following, the defendants also took the position that Metro had not complied with its obligations under the Agency Agreement in a number of other respects.

9. Metro on April 28, 1993 attempted, under the terms of the Agency Agreement, to extend the agency relationship for an additional one year period ending December 31, 1994. The defendants, on July 21, 1993, notified Metro that they would not permit an extension of the agreement because Metro had, in defendants' view, breached the agreement's provisions. The defendants stated that Metro had violated the exclusivity provisions of the contract by soliciting customers for the Partnership's competitor[3]; that it had breached the exclusive remedies provision[4] by filing the law suit against them previously mentioned in paragraph 7, above; that it had failed to use its best efforts to enroll customers for Partnership; that it had circumvented and thwarted defendants' marketing efforts; and that it had failed generally to carry out its fiduciary duties to the Partnership. The agency relationship between Metro and Partnership accordingly terminated on December 31, 1993.

10. Thereafter, Metro attempted to become a reseller of the Partnership's services and requested in early February of 1994 that defendants provide it with an application form for this purpose. After substantial delay in supplying Metro with an application form, defendants informed Metro on September 26, 1994, that they were denying its request, because Metro's

[3] See paragraphs 4a and 4j of the Agency Agreement, the terms of which are set forth in footnotes 11 and 12, subsequently.

[4] Paragraph 14 of the Agency Agreement provides in part as follows: "In the event of the failure of either party to fulfill any of its obligations hereunder, the exclusive remedy of the other party shall be to request that such obligation be fulfilled and, if that does not occur promptly thereafter, to terminate this AGREEMENT . . ."

application to become a reseller was inconsistent with the provisions of the agency agreement precluding Metro from soliciting the customers it had enrolled for the partnership for a one year period after the termination of the agency relationship.[5] Defendants stated further that they also denied Metro's application because Metro proved itself to be unreliable in that it had violated the prior Agency Agreement in numerous respects and that Metro was a "poor credit risk" that had failed to make all payments required by the Agency Agreement.[6]

11. Metro has denied that the defendants had a reasonable basis to refuse its requests to extend the Agency Agreement and to become a reseller.[7] In this regard, Metro denies that it is a "poor credit risk" and alleges that, to the contrary, defendants owe it over $1 million for commissions and equipment overpayments due under the Agency Agreement. Moreover, Metro alleges that at the time it took action in the Michigan courts, described in paragraph 13, subsequently herein, it deposited with the court $250,000, the full amount of the money which the defendants have claimed is owed to them. Metro contends that it did not violate the "exclusivity" provision of the Agency Agreement because it only assisted customers to switch from Partnership's cellular service to the competing service when specifically requested to do so by customers which were dissatisfied with Partnership's service. Such switching of customers to the non-wireline cellular carrier was, Metro asserts, the normal practice of Partnership's agents and was previously accepted by defendants without objection. Finally, Metro alleges that it was previously recognized by the defendants as one of their most effective agents.

12. Metro further alleges that after the termination of the agency agreement, the defendants informed customers which Metro had solicited for the Partnership that Metro was no longer their agent, and directed these customers to other agents. The defendants, without the consent of Metro, also sold the list of customers solicited by Metro to a competitor of Metro, who was also an agent of the Partnership. Metro alleges that it incurred substantial damages in lost profits because of its inability, in light of restrictive covenants in the Agency Agreement and defendants' actions purporting to enforce those covenants, to provide cellular services during the one year period after the termination of the Agency Agreement.

13. Disputes relating to the agency relationship between the parties have resulted in multiple litigation, of which the instant FCC complaint proceeding is the latest. On January 23, 1990 Metro and two other agents of defendants filed a complaint in U.S. District Court for the Eastern District of Michigan alleging that defendants, by the discriminatory treatment of its

[5] See paragraph 4j of the Agency Agreement, the text of which is set forth in footnote 11.

[6] Defendants claimed that Metro was required to reimburse them for the attorneys' fees incurred by them in defending the law suit initiated against them by Metro and other dissatisfied agents on January 23, 1990, pursuant to paragraph 14 of the Agency Agreement, which provides in part as follows: "Agent and Ameritech Mobile agree to pay the prevailing party in any such actions for reasonable Attorneys' fees and costs of litigation between them."

[7] These allegations are set forth in Metro's Response To Defendants' Motions To Dismiss, filed by on June 25, 1995.

agents, had violated the agency contracts between plaintiffs and defendants as well as Sections 13(a), (d) and (e) of the Robinson-Patman Act, 15 U.S.C. § 13(a), (d), (e). In this case, the Court granted summary judgment to the defendants and dismissed the complaint with prejudice. *Metro Communications Company v. Ameritech Mobile Communications, Inc.*, 788 F. Supp. 1424 (E.D. Mich. 1992); *aff'd, Metro Communications Company v. Ameritech, Inc.*, 984 F.2d 739 (6th Cir. 1993). Metro also filed a complaint in a Michigan state court on July 15, 1993, seeking a declaration that Metro was not obligated to reimburse defendants for their attornies' fees incurred in defending the law suit in the U.S. District Court, described above, and that, in spite of Metro's refusal to pay these attornies' fees, it had a right under the Agency Agreement to extend the agency for an additional year. On December 15, 1993, summary judgment was granted to defendants.[8]

14. Ameritech initiated two related law suits against Metro. On February 14, 1994, it filed suit in the Michigan state courts seeking an order directing Metro to return defendants' subscriber lists and other related subscriber information.[9] Finally, on June 24, 1994, Ameritech filed suit in the U.S. District Court for the Eastern District of Michigan against Metro for trademark infringement, unfair competition and related claims (No. 94-CV-72433-DT). On August 24, 1995, the Court granted partial summary judgment to Ameritech, ruling that Metro had violated Section 11 of the Agency Agreement, relating to its obligations upon termination of the agency, and had infringed upon Ameritech's trademarks. Further, Metro was enjoined *inter alia* from offering for sale Ameritech's cellular service and from using Ameritech's trademarks. In making its ruling the Court rejected Metro's argument that Section 11 of the Agency Agreement is in violation of Sections 201(b) and 202(a) of the Communications Act. In this regard, the Court held that "the terms of a carrier's relationship with its agents are not communication services or common carrier services subject to regulation by the FCC."[10]

[8] The trial court's decision was appealed by Metro to the Michigan Court of Appeals. The parties have not informed the Commission of the current status of the appeal.

[9] The parties also have not informed the Commission of the current status of this proceeding.

[10] On September 6, 1995, the defendants submitted a copy of the District Court's August 24, 1995 order for inclusion in the record, herein, with an accompanying "Motion to Lodge." On September 14, 1995, Metro filed an opposition in which it argues that defendants' motion is an improper reply to its opposition to defendants' motions to dismiss; that the District Court's order is irrelevant to the issues herein and, in any event, is in error. We have determined to grant defendants' motion and to include the proffered Court order in the record of this proceeding. The August 24, 1995 order updates court litigation, which has been described in defendants' answer and in the Partnership's motion to dismiss previously filed in this proceeding. Defendants' motion to lodge is consistent with Section 1.720(g) of the Commission's Rules, 47 C.F.R. § 1,720(g), specifically requiring parties in formal complaint proceedings to update previously submitted information and supporting authority at any time before a decision is rendered, and is therefore proper.

B. Claimed Bases of Liability

15. Metro's complaint contains seven counts. In Count I, Metro contends that paragraph 4a of the Agency Agreement, requiring Metro to act as Partnership's exclusive agent,[11] is "unjust and unreasonable" in violation of Section 201(b) of the Communications Act and is "unjust and unreasonably discriminatory" in violation of Section 202(a) of the Act. Similarly, in Count II, Metro contends that paragraph 4j and Exhibit B to the Agency Agreement, which restrict Metro's activities in competition with Partnership during the term of the agency and for a one-year period after the termination of the agency,[12] are violative of these sections of the Communications Act. Metro also argues that the defendants have violated Sections 201(b) and 202(a) of the Communications Act by their refusal to extend the term of the agency for an additional year at Metro's request (Count III); by directing customers solicited by Metro to other sales agents and selling the list of customers solicited by Metro to other agents (Count IV); by discriminating against "non-affiliated" agents, such as Metro, with respect to compensation and opportunities to participate in sales promotions (Count V); and by their failure to grant Metro's application to become a reseller (Count VII).[13]

[11] This paragraph provides that Metro must: "Solicit Subscribers for AMERITECH MOBILE CRS [i.e. cellular service] exclusively and maintain a trained and capable sales and support organization to solicit Subscribers for and otherwise support AMERITECH's CRS exclusively and to assure customer satisfaction."

[12] Paragraph 4j further prohibits Metro as follows: "Not either directly or through a third party, at any time during the term of this AGREEMENT, any extension thereof, or at any time within one year after the term of the AGREEMENT (or such shorter time within one year required at law), induce, influence or suggest to any Subscriber of PARTNERSHIP's CRS solicited as PARTNERSHIP customer by AGENT to purchase CRS from a Reseller of PARTNERSHIP's CRS or to switch to and/or contract with another CRS provider. The clause shall survive the termination of this AGREEMENT by either party for one year (or such shorter time as may be required by law), which AGENT acknowledges to be a reasonable period of time necessary to protect AMERITECH MOBILE's relationship with its Subscribers, goodwill, confidential business information, and other legitimate interest."

Exhibit B to the Agreement further provides: "For the twelve months immediately following termination and/or expiration of this AGREEMENT for any reason whatsoever, AGENT agrees that neither it nor its employees and/or agents will act as a sales representative for any other provider of CRS in any part of the Area or within a radius of seventy-five (75) miles from any city in which AMERITECH MOBILE provides CRS."

[13] Count VI in Metro's complaint does not set forth a separate basis of liability. Rather, in Count VI Metro alleges that it suffered damages as a result of the alleged unlawful acts of the defendants which are set forth in other counts.

III. MOTIONS TO DISMISS AND OPPOSITION THERETO

16. On June 9, 1995 separate motions to dismiss were filed by Partnership and by Ameritech. Partnership argues that the complaint should be dismissed on two grounds: first, it contends that the matters complained of are not subject to Title II of the Communications Act, relying in this regard principally on *International Telecharge, Inc. v. American Telephone and Telegraph Company*, 8 FCC Rcd 7305 (CCB 1993); second, it contends that Metro had an opportunity in prior court litigation to litigate the issues raised by the complaint and, accordingly, in accordance with principles of *res judicata*, it is precluded from raising them in the instant complaint. Ameritech in its separate motion argues, in addition, that the complaint should be dismissed against it because it is not a common carrier subject to Section 208 of the Act.

17. On June 25, 1995, Metro filed a single response to both motions to dismiss. In response to Ameritech's motion, Metro contends that Ameritech has held itself out to be the general partner of Partnership and, in accordance with the Uniform Limited Partnership Act as enacted in both Michigan and Illinois, a general partner has unlimited liability for all obligations of the limited partnership and should be named as a party in all actions against the limited partnership.

18. Metro argues in response to Partnership's contention that the matters complained of are beyond the Commission's jurisdiction, that the Commission has broad authority to enforce the Communications Act, including ancillary jurisdiction over matters that effect the provisions of service. Metro contends that the restrictive covenants in the Agency Agreement and defendants' actions to enforce these covenants are not only unlawful under the Act, because they are discriminatory, but they are "contrary to the public policy underlying the Act, which is intended to promote vigorous and fair competition by carriers." It argues that, since the Commission has jurisdiction to compel performance by agents of a carrier and since the primary purpose of the Agency Agreement is the provision of service, the Commission has jurisdiction over the disputes between the parties to that contract, as they pertain to provision of service under the Act, citing *Illinois Bell Telephone Company v. F.C.C.*, 883 F.2d 104 (D.C. Cir. 1984).

19. Metro contends that it is not precluded, as a result of prior court litigation between the parties, from bringing the claims asserted in its complaint before the Commission. It argues that it was not required to make any of the claims in its complaint in any other forum and therefore it is not precluded from bringing them to the Commission. In this regard, it argues that it could not have asserted claims under the Communications Act in the prior state court litigation and it was not required to do so in the prior litigation between the parties in federal courts.

IV. DISCUSSION

20. Metro's complaint relates to disputes concerning the rights and obligations of a principal and its agent, as specified in a contract between them. These are matters which are generally subject to the jurisdiction of the courts rather than this Commission. "This Commission does not regulate the contracts arrived at between a reseller such as NewVector Retail and its sales agents." *Application of NewVector Communications, Inc.*, File No. 27010-CL-L-84, Mimeo No. 6047, at ¶ 17 (released August 20, 1984), 1984 FCC LEXIS 2114. *See also International Telecharge, Inc. v. American Telephone and Telegraph, supra.* As the District Court concluded with respect to the same Agency Agreement which is the subject of Metro's instant FCC complaint, "the terms of a carrier's relationship with its agents are not communications services or common carrier services subject to regulation by the FCC." *Ameritech Corp. and Ameritech Mobile Communications, Inc. v. Metro Communications Company and Peter Siavrakas*, Order Granting Partial Summary Judgement To Plaintiffs and Granting Permanent Injunction, at 7, Case No. 94-CV-72443-DT (E.D. Mich. Aug. 24, 1995).[14]

21. Metro contends that, nevertheless, the Commission has ancillary jurisdiction over the disputes between it and the defendants. It argues that, since the "primary purpose" of the Agency Agreement is the provision of communications services, "the Commission has jurisdiction over the disputes between these parties [to the Agency Agreement] as they pertain to the provision of service under the Act." (Metro's Response to Motions to Dismiss, p. 9). However, the logical implication of this expansive argument is that the Commission, rather than the courts, has jurisdiction over all or nearly all contractual disputes between communications common carriers and other parties. The Commission's ancillary or Title I authority is, of course, not so all encompassing.

22. The Commission is authorized by Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Metro cites *Illinois Bell Telephone Company v. F.C.C.*, 883 F.2d 104 (D.C. Cir. 1989), *Audio Communications, Inc.*, 8 FCC Rcd 8697 and *American Information Technologies Corp. et al. (Sales Agency Order)*, 98 FCC 2d 943, to illustrate that the Commission has in the past asserted its ancillary jurisdiction to place restrictions on the provision of customer premise equipment by communications common carriers and to prescribe corporate structure requirements for the Bell Operating Companies. However, those actions were taken only after the Commission had conducted extensive rule making proceedings in which it found that such regulations were necessary to protect against the possibility that those monopoly carriers would impose excessive rates for their regulated services to subsidize their non-regulated, competitive activities.

[14] Unpublished order submitted for the record in this proceeding with Defendants' Motion To Lodge, dated September 6, 1995.

23. In contrast, "[t]he Commission has never adopted any specific requirements governing the relationship between a carrier's retail distribution entity and that entity's sales agents." *Application of NewVector Communications, Inc., supra.* Metro in this proceeding clearly has not made a showing which would support a finding by the Commission that such regulation of agency contracts, pursuant to Section 4(i) of the Act, is "necessary in the execution of its functions." In this regard, complainant merely makes unsupported conclusionary assertions that certain of the terms of the agency agreement between it and the defendants tended to limit competition and degrade service to customers. *(See* Complaint, ¶¶ 23, 33, 40, 45 , 50.)

24. Count III (relating to the defendants' refusal to extend the Agency Agreement for an addition year), Count IV (relating to the sale of Metro's customer list to another agent) and Count V (discriminatory treatment among their agents by defendants) are entirely questions of contract interpretation. These are matters over which this Commission does not have jurisdiction.

25. In Counts I and II of its complaint, Metro contends that the provisions in the Agency Agreement, requiring Metro to act as Partnership's exclusive agent and prohibiting it from competing with Partnership for cellular services in the Detroit area (¶¶ 4a, 4j and Exhibit B), are violative of Sections 201(b) and 202(a) of the Act. Metro requests the Commission to strike these provisions from the Agency Agreement and to enjoin defendants from relying on them in the future.

26. In *TRAC Communications Inc. v. Detroit Cellular Telephone Co.*, 4 FCC Rcd 3769 (1989) *aff'd,* 5 FCC Rcd 4649 (1990), the Common Carrier Bureau ruled that restrictions imposed by a cellular carrier on its resellers, prohibiting them from reselling competing cellular services, violated the Commission's Cellular Resale Policy.[15] However, the ruling in that case is clearly not applicable to an exclusive agency agreement, such as is at issue here. *TRAC* did not address the applicability of the Commission's resale policy to agents, which under common law owe a duty of loyalty to their principals, including a duty not to compete with their principals concerning the subject matter of the agency. *Restatement (Second) of Agency* § 393. Moreover, the Commission in *TRAC* has pointed out that, even in the resale context, exclusive distribution arrangements are permissible as long as the distributor has the option of becoming an unrestricted reseller. *TRAC,* 5 FCC Rcd at 4649 n. 3.

27. The Agency Agreement, which is the subject of Metro's complaint, is typical of the "exclusive" agency agreements utilized by cellular carriers to market their services. The principal, Partnership, pays commissions to the agent, Metro, for the sales generated by it and the agent owes a duty to the principal to market the principal's cellular services exclusively and to refrain from competing with the principal during the term of the agency and for a period after the

[15] The Commission's Cellular Resale Policy has now been codified in Section 22.901(e) of the Rules, 47 C.F.R. § 22.901(e), which provides as follows: "Each cellular system licensee must permit unrestricted resale of its services, except that a licensee may apply resale restrictions to licensees of cellular systems on the other channel block in its market after the five year build-out period for licenses on the other channel block has expired."

termination of the agency. These terms were voluntarily agreed to by the parties. For whatever reasons, Metro determined it should become a sales agent of Partnership under these terms, rather than pursuing other business alternatives, such as becoming an unrestricted reseller of cellular services.

28. The Commission has recognized that cellular carriers should be free to choose the most efficient means of distribution for their services. *Bundling of Cellular Customer Premises Equipment and Cellular Services,* 7 FCC Rcd 4028, 4031-32, ¶¶ 21 and 28 (1992); *Cellular Communications Systems*, 86 FCC 2d 469, 511 (1981). The use of exclusive agents by cellular carriers has been recognized by the Commission as one of the distribution options available to carriers. *See Application of NewVector Communications, supra,* at ¶¶ 4, 11, 16-17. Accordingly, we conclude that Commission's cellular resale policy is not intended to preclude cellular carriers from distributing their services through exclusive agents, which have voluntarily agreed to sell their principals' services exclusively and not to compete with their principals. We therefore also dismiss Counts I and II of Metro's complaint.

29. In Count VII of its complaint, Metro alleges that the defendants' refusal to grant its application to become a reseller was violative of the Commission Cellular Resale Policy, which requires cellular carriers to offer its services for resale, generally without restrictions. This policy, however, does not prohibit carriers from establishing reasonable, non-discriminatory qualifications for its reseller customers. Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, Cellular Resale NPRM), 6 FCC Rcd 1719, 1725 n. 71 (1991); Report and Order, 7 FCC Rcd 4006, 4008 (1992); and *Resale and Shared Use of Common Carrier Services and Facilities,* 60 FC 2d 261, 281-83.

30. Defendants state that they denied Metro's application for a number of reasons. In light of Metro's history of using Defendants' trademarks without permission, and its numerous breaches of the Agency Agreement, defendants considered Metro unreliable. Defendants also considered Metro a poor credit risk because it already owed them a substantial debt. Also, defendants considered Metro's application to become a reseller inconsistent with its covenant in the Agency Agreement not to compete for the customers it had enrolled for defendants' services for a one year period after the termination of the agency. (*See* Answer at ¶ 76.) Although Metro has denied that it is a poor credit risk and, in spite of judicial rulings to the contrary, that it had violated the Agency Agreement, Metro does not deny that it sought to become a reseller to serve some of the same customers which it had enlisted for defendants' services, in violation of Paragraph 4j of the Agency Agreement. Accordingly, we do not believe that it was unreasonable for the defendants to refuse to grant Metro reseller status and thus to facilitate Metro's violation of its contractual obligations to them. Under these circumstances, we do not find any violation of the Commission's Cellular Resale Policy and we find that Count VII of the complaint also fails to state a claim under the Communications Act.

V. CONCLUSION

31. WHEREFORE, we have concluded that Metro's complaint does not state a cause of action under the Communications Act and should be dismissed. In light of this ruling, it is not necessary for us to rule on defendants' additional arguments that the complaint should be dismissed with respect to Ameritech because it is not a communications common carrier and that the complaint also should be dismissed in its entirety on the basis of *res judicata.*

VI. ORDERING CLAUSES

32. Accordingly, 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), 208, and Sections 0.321 and 1.728(a) of the Commission's Rules, 47 C.F.R. §§ 0.321, 1.728(a), IT IS ORDERED that Metro's complaint IS DISMISSED WITH PREJUDICE.

33. IT IS FURTHER ORDERED that this proceeding is HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Michele C. Farquhar
Chief, Wireless Telecommunications Bureau