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

DA 96-1443

In the Matter of	)	
	)	
INTERNATIONAL TELECHARGE, INC., Complainant,	)	
	)	
v.	)	File Nos.
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	E-92-64
	)	
UNITED TELEPHONE COMPANY OF FLORIDA,	)	E-92-67
	)	
UNITED TELEPHONE COMPANY OF MINNESOTA,	)	E-92-68
	)	
UNITED TELEPHONE COMPANY OF OHIO,	)	E-92-69
	)	
CENTRAL TELEPHONE COMPANY OF FLORIDA,	)	E-92-70
	)	
CENTRAL TELEPHONE COMPANY OF NEVADA,	)	E-92-71
	)	
CENTRAL TELEPHONE COMPANY OF ILLINOIS,	)	E-92-72
	)	
NYNEX CORPORATION.	)	E-92-76
	)	
U S WEST COMMUNICATIONS, INC.,	)	E-92-78
	)	
BELLSOUTH TELECOMMUNICATIONS INC.,	)	E-92-81
	)	
CONTEL OF TEXAS,	)	E-92-82
	)	
GTE NORTH INCORPORATED,	)	E-92-83
	)	
GTE SOUTH INCORPORATED,	)	E-92-84
	)	
GTE FLORIDA,	)	E-92-85
	)	
GTE CALIFORNIA,	)	E-92-86

GTE SOUTHWEST,) E-92-87
Defendants.)

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1996; Released: August 29, 1996

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. International Telecharge, Inc. (ITI) filed formal complaints against the sixteen above-captioned local exchange carriers (LECs). ITI alleges that from 1987 through 1991, the LECs assessed it, through MCI, the higher terminating carrier common line (CCL) charges to originate calls using ITI's operator service, even though ITI also paid the higher terminating CCL charge assessed by the LECs on MCI's service used to terminate calls using ITI's operator service. This, ITI claims, violates Section 69.105 of the Commission's rules,[1] the *Teleconnect* order[2] and the *ReadyLine Clarification* order.[3] The substance of each complaint is essentially the same except for the amount of damages sought. We grant ITI's complaints insofar as ITI seeks a ruling that the defendants violated Section 69.105 of the Commission's rules and Commission orders, but deny the complaints as to damages.

II. BACKGROUND

A. Carrier Common Line Charges

2. Carrier common line charges recover the portion of a local exchange carrier's non-traffic sensitive costs of providing local switched access to interstate long distance carriers that are not recovered through subscriber line charges.[4] Originally, local exchange carriers

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[1] 47 C.F.R. § 69.105.

[2] Teleconnect Company v. The Bell Telephone Company of Pennsylvania, 6 FCC Rcd 5202 (Com. Car. Bur. 1991), *recon. denied*, 10 FCC Rcd 1626 (1995), *appeal docketed*, No. 96-1112 (D.C. Cir. Apr. 10, 1996).

[3] *See* AT&T Communications Revisions to Tariff F.C.C. No. 2 (800 ReadyLine Service), 2 FCC Rcd 78 (1986) (hereinafter *ReadyLine Order;* 2 FCC Rcd 5939 (1987) (hereinafter *ReadyLine Clarification Order)*; (together *ReadyLine Orders*).

[4] In addition to recovering the non-traffic sensitive costs of the local exchange carriers, the CCL charges include Long Term and Transitional Support payments, which are used to mitigate the effects of the CCL depooling that commenced on April 1, 1989. *See* MTS and WATS Market Structure, CC Docket No. 78-72 and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, *Report and Order*, 4 FCC Rcd 5048 (1988). The subscriber line charge is a flat per-line charge, billed to the end user, that is designed to recover for the LECs a portion of the costs of LEC plant ("local

(LECs) recovered these costs at each end of a call through a charge assessed equally on both originating and terminating switched access minutes. In the CC Docket No. 86-1 proceeding, however, the Commission created a bifurcated CCL rate system to prevent uneconomic bypass at the originating end.[5] Under this system, the CCL revenue requirement was to be recovered through a fixed rate at the terminating end and a varying but lower rate at the originating end, with the terminating rate initially fixed at $0.0433 per minute beginning on June 1, 1986.[6] The originating and terminating rates were periodically modified following implementation of the bifurcated approach. In 1987, upon the recommendation of the Federal/State Joint Board, the Commission extended the bifurcated approach to CCL charges through November 30, 1988.[7] The Commission later postponed the expiration date for the bifurcated system of CCL charges until March 31, 1989.[8] Effective April 1, 1989, section 69.105 of the Commission's rules required the LECs to set their originating CCL rates at no more than one cent ($0.01) per minute and to set their terminating CCL rates to recover the remaining interstate CCL revenue requirement.[9]

3. Calls using conventional 800 services presented a particular problem for the assessment of CCL charges. Because such services normally use special access circuits on the terminating end, and thus do not use common line plant to terminate the call, no CCL charge would be assessed on this "closed" end.[10] Hence, the 800 service carrier would be assessed and

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loops") used in the origination and termination of interstate calls. As of July 1, 1987, the maximum allowable residential and single-line business subscriber line charge was $2.60. This amount was increased to $3.20, effective December 1, 1988, and to $3.50, effective April 1, 1989. *See* MTS and WATS Market Structure, CC Docket No. 78-72 and Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket 80-286, *Report and Order,* 2 FCC Rcd 2953 (1987).

5 WATS-Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1 (hereinafter *WATS Access Charge Rulemaking*): Notice of Proposed Rulemaking, FCC 86-1 (released Jan. 6, 1986) (*WATS NPRM*); Report and Order, FCC 86-115, (released Mar. 21, 1986) (*WATS Access Charge Order*), *reconsideration denied,* FCC 86-577 (released Jan. 15, 1987) (*Reconsideration Order*), *further reconsideration denied,* 3 FCC Rcd 496 (1988) (*Second Reconsideration Order*); Supplemental Notice of Proposed Rulemaking, FCC 86-116 (released Mar. 25, 1986) (*Supplemental WATS NPRM*); Second Report and Order, FCC 86-377 (released Aug. 26, 1986) (*Second WATS Access Charge Order*).

6 *WATS Access Charge Order,* para. 27, App. B at para. 12. For the purposes of this order, the terms "originating CCL charge" and "lower CCL charge" will be used interchangeably, as will the terms "terminating CCL charge" and "higher CCL charge." We use these terms in this manner to prevent the confusion that may result when the terminating CCL charge is assessed on the originating end.

7 *MTS/WATS Reconsideration Order,* 3 FCC Rcd at 4548.

8 *Id.* at 4549.

9 MTS and WATS Market Structure, 4 FCC Rcd 5048, 5048 (1988).

10 The "closed end" of a call refers to the origination or termination of a call that does not use a common or subscriber line. An "open end" of a call utilizes exchange carrier common line plant to originate or terminate the call. The Commission has found that a call may have no, one, or two open ends. 47 C.F.R. § 69.105(b)(1)(ii); *see also MTS/WATS Reconsideration Order,* 3 FCC Rcd at 4555-56 (citing 47 C.F.R. § 69.207).

pay only the lower, originating CCL charge, which at one point was set at zero. To prevent a situation in which a carrier would avoid most or all of its CCL obligation, the Commission required that calls with only one open end would be assessed the higher CCL charge on the open end.[11]

B. ReadyLine Service

4. Applying CCL charges to AT&T's "800 ReadyLine" service created a different problem. AT&T's "800 ReadyLine" service provided toll-free inward calling, but differed from conventional 800 services by having two open ends.[12] Because a call using ReadyLine service appeared to the originating LEC to be a conventional 800 call, the LEC would assess the higher CCL charge on the open originating end, as apparently required by section 69.105(b)(1)(iii). The LEC, at the terminating end, assessed another higher CCL charge because the call was terminating on an open end. Addressing this situation in the *ReadyLine Clarification Order*, the Bureau said that it is "unlawful for LECs to assess [higher] CCL charges at both the originating and terminating ends on a single call."[13] The Bureau directed originating LECs to calculate settlements of the overcharges in cooperation with the affected interexchange carriers, using customer-provided lists of 800 calls for which billing adjustments were due.[14]

C. Teleconnect ACA Service

5. The Commission was again presented with the issue of CCL overcharges in *Teleconnect*.[15] Applying the *ReadyLine* holding that it is unlawful to assess the higher CCL charge at both the originating and terminating ends of a single call, the Commission upheld the Bureau's finding that defendant LECs were liable for improper assessment of the higher carrier common line charge on the originating end of calls using Teleconnect's nationwide 800 travel service, even though Teleconnect resold the services of other carriers, and the originating CCL charges may have been assessed on the underlying, facilities-based carrier.[16] Recognizing that the end-to-end nature of the involved communications is more significant than the facilities used, the Commission affirmed the Bureau's finding that a call using the Teleconnect All-Call America ("ACA") 800 Service configuration constitutes a single, end-to-end call, regardless of

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[11] 47 C.F.R. § 69.105(b)(1)(iii); *see also* MTS and WATS Market Structure, 4 FCC Rcd 5048 (1988).

[12] ReadyLine service used its "customers' existing switched access local exchange lines at the terminating end rather than the dedicated access lines used to terminate AT&T's regular 800 service," thereby providing a way for customers to obtain 800 service without incurring the cost of installing dedicated lines. *See ReadyLine Order*, 2 FCC Rcd at 78.

[13] *ReadyLine Clarification Order*, 2 FCC Rcd at 5943.

[14] *Id.* at 5942-43.

[15] Teleconnect Co. v. Bell Tel. Co. of Pa., 10 FCC Rcd 1626 (1995).

[16] *Id.*

Teleconnect's intermediate routing switch.[17] Further, because the record did not suggest any practical means by which Teleconnect could identify the actual originating LECs for the calls at issue, the Commission affirmed the Bureau's acceptance of a surrogate method for apportioning liability.[18]

III. THE PLEADINGS

A. The Complaints

6. Between 1987 and 1991, ITI provided operator services by reselling MCI's 800 services to provide customers a means to access its network. A typical ITI call was initiated by an end user from a common line open end, was routed through a LEC to an MCI 800 line where it was transferred to an ITI switch and operator service center. Once the call reached the ITI operator service center, it was processed, then transported to its destination using open-end resold services such as MCI's PRISM outWATS service, other WATS-like services or feature group services to the LEC serving the local exchange area of the called party. Once received by the terminating LEC, the call was routed to the called party over the LEC's common lines. In each instance, the call would originate and terminate on an open end.

7. In its complaints, ITI claims that its services "are the same as" the services at issue in *Teleconnect,* and "similar to" AT&T's *ReadyLine* Service.[19] ITI maintains that it was assessed the higher terminating charge twice for calls having two open ends, once by a LEC at the originating end and again by a LEC at the terminating end, in violation of Section 69.105 and the *Teleconnect* and *ReadyLine* orders.[20]

8. Subsequent to filing its complaints, and on its own motion, ITI filed what are essentially amendments to its complaints but which it captioned "Supplemental Complaints." These amendments identify requested damages totaling $2,253,220.71 from the LECs that handled the terminating end of ITIs calls.[21] This amount is the alleged difference between the

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[17] *Id.* at 1629-30.

[18] *Id.* at 1631-32.

[19] Complaint at 2.

[20] *Id.* at 3.

[21] ITI's amended complaints identify the following damage amounts attributed to each defendant LEC: Southwestern Bell Telephone Company - $346,786.27; United Telephone Company of Florida - $60,928.40; United Telephone Company of Minnesota - $824.78; United Telephone Company of Ohio - $765.44; Central Telephone Company of Florida - $5392.75; Central Telephone Company of Nevada - $289.52; Central Telephone Company of Illinois - $2881.18; NYNEX Corporation - $335,904.51; U S WEST Communications, Inc. - $175,158.87; BellSouth Telecommunications, Inc. - $954,566.23; GTE North Incorporated, GTE South Incorporated, GTE Florida, GTE California, GTE Southwest and Contel of Texas, a total of $369,722.76. *See* ITI "Supplemental Complaints" at 3. ITI's brief, however, identifies $1,714,675.31 in damages sought from defendants. *See* ITI brief at Appendix A. ITI's brief also requests damages associated with a complaint against Ameritech Corporation. Subsequent to the filing of the brief,

higher CCL charges that ITI claims were assessed for originating ITI's operator service for the period 1987 through 1991, and the amount ITI would have paid if the defendants had properly assessed the lower CCL charges on the originating end of the calls. ITI also seeks interest on the refunds and asks the Commission to order the defendant LECs to pay attorney's fees.[22]

9. In requesting partial refunds of charges assessed on the originating end of its operator service calls, ITI seeks a remedy similar to the remedy adopted in the *Teleconnect Order*. As was the case in *Teleconnect*, ITI asks us to accept the use of a surrogate in apportioning damages, because, it claims, it is impossible to identify the originating LEC that imposed the higher CCL charge.[23]

B. The Responses of the LECs

10. Virtually all defendants answered that ITI failed to introduce evidence that the named defendant was an originating LEC for any of the calls in question, offered no proof that ITI had any contractual or tariff relationship with the defendant, and that portions of ITI's claims are barred by the statute of limitations. Some defendants also argue that, unlike the service at issue in *ReadyLine*, ITI's call configuration involves more than two ends. Accordingly, defendants deny levying any unlawful charges and claim that refunds are not warranted.

11. Southwestern Bell Telephone ("SWBT") claims that ITI failed to state a claim for which relief may be granted, in that ITI neither alleged nor offered any proof that SWBT was an originating LEC for any of the calls in question.[24] Further, SWBT denies that it sold any services to or had a contract with ITI.[25] SWBT argues that the decisions in *Teleconnect* and *ReadyLine* are not applicable to the facts alleged by ITI, because, according to the complaint, ITI provides no transport.[26] Finally, SWBT argues that if SWBT had been an originating LEC for any of the calls in question, which SWBT denies, SWBT had a credit mechanism in place for IXCs who qualified for such credits.[27] SWBT argues that if the intermediary IXC failed to pass along those credits to ITI, then ITI's cause of action is against the IXC.[28]

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however, on July 5, 1995, Ameritech and ITI filed a joint motion to dismiss the complaint stating that the parties had negotiated a settlement. We granted that motion. International Telecharge, Inc. v. Ameritech Corporation, 10 FCC Rcd 7749 (1995).

[22] Complaint at 4.

[23] ITI brief at 13-14.

[24] SWBT answer at 2.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

12. United Telephone Company of Florida, United Telephone Company of Minnesota and United Telephone Company of Ohio (hereinafter referred to collectively as "United") answered separately, but each makes the following arguments. Each argues that ITI is not entitled to relief because the underlying IXC may have already received a credit for the higher terminating CCL charge at the originating end.[29] Hence, United argues, ITI's claim, if there is one, lies with the intermediary IXC.[30] In addition, United argues that ITI's request for damages is barred because ITI fails to identify the amount of damages for which recovery is sought.[31] Further, United argues that ITI failed to mitigate its damages by requesting a credit for payment of the higher terminating CCL charge on the originating end pursuant to United's FCC tariff No. 5 and failed to file a claim against the intermediary IXC.[32] United also argues that if ITI is entitled to relief, its claim is barred in part by the statute of limitations.[33] Finally, United argues that there is no statutory or contractual basis for an award of prejudgment interest or attorney's fees.[34]

13. Central Telephone Company of Florida, Central Telephone Company of Nevada and Central Telephone Company of Illinois (hereinafter referred to collectively as "Centel") also answered separately, but each makes the following arguments. Each claims that ITI failed to allege facts that state a claim for relief[35] and that ITI is not entitled to relief because Centel complied with Commission rules in assessing the higher CCL charge on the originating end of the 800 service resold by ITI.[36] Centel argues that ITI's call configuration is materially different from the configuration involved in *ReadyLine*, therefore, Centel argues, the decision in *ReadyLine* does not apply.[37] Moreover, Centel maintains that it has no privity of contract or tariff with ITI,[38] and that a portion of ITI's claim is barred by the statute of limitations.[39] Centel asserts that even if ITI is entitled to damages, the Commission has no power to award attorney's fees.[40]

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[29] United answer at 3.

[30] *Id.*

[31] *Id.* at 2-3.

[32] *Id.* at 3.

[33] *See, e.g.*, United Telephone Company of Florida answer at 2.

[34] *Id.*

[35] Centel answer at 2.

[36] *Id.* at 3-4.

[37] *Id.* at 6.

[38] *Id.* at 4.

[39] *Id.*

[40] *Id.*

14. NYNEX claims that ITI failed to allege specific conduct sufficient to constitute a violation of the Communications Act or Commission rules or orders.[41] NYNEX argues that ITI's service is unlike the service at issue in *ReadyLine* in that ITS's service involves more than two ends.[42] NYNEX argues that any refunds for overcharges, if appropriate, would be due from the intermediary IXC, not NYNEX. NYNEX also asserts that ITI's claims prior to May 1, 1990 are barred by the statute of limitations.

15. U S WEST argues that ITI is not entitled to relief, that ITI failed to join a party or entity needed for the just adjudication of ITI's claim, and that any request for relief for charges prior to May 1990 is barred by the statute of limitations.[43] Further, U S WEST argues that ITI failed to plead or establish that ITI was ever a customer of U S WEST or one of its affiliates for the services at issue or that ITI ever paid U S WEST or one of its affiliates originating CCL charges for those originating interstate access services.[44] Moreover, U S WEST claims that on or about July 1, 1990, the originating and terminating CCL charges of U S WEST's indirect subsidiaries, MTN, NWB and PNB, were equalized, and have been equalized ever since.[45] Hence, U S WEST argues, ITI could not have been damaged by U S WEST or its indirect subsidiaries since July 1, 1990. Finally, U S WEST argues that the ITI call configuration represents a multiple call arrangement to which the decision in *ReadyLine* does not apply.[46]

16. BellSouth asserts that ITI's claims are barred by the statute of limitations.[47] BellSouth argues that ITI failed to plead or establish that BellSouth provided originating access to ITI, assessed the terminating CCL charges for the originating access, or that BellSouth failed to adjust such charges in accordance with its tariff.[48] BellSouth argues that ITI is not entitled to relief because the complaint seeks to challenge the lawfulness of terminating CCL charges assessed to entities other than ITI.[49] BellSouth maintains that only the originating access customer is entitled to seek that credit, and only from the originating LEC.[50]

17. GTE North Incorporated, GTE South Incorporated, GTE Florida Incorporated, GTE

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[41] NYNEX answer at 4.

[42] *Id.* at 3.

[43] U S WEST answer at 4.

[44] *Id.* at 4-5.

[45] *Id.* at 5.

[46] *Id.*

[47] BellSouth answer at 3.

[48] *Id.*

[49] *Id.* at 4.

[50] *Id.*

California Incorporated, GTE Southwest Incorporated and Contel of Texas (hereinafter referred to collectively as "GTE") deny that they have improperly charged a higher terminating carrier CCL charge at the terminating end of a call and maintain that have charged in accordance with Commission rules and GTE's tariff.[51] GTE also argues that damages sought by ITI prior to May 7, 1990 are barred by the statute of limitations.[52]

C. ITI's Reply

18. ITI replies that the decision in *Teleconnect* controls this proceeding and as such, ITI is entitled to recover damages despite the absence of a direct relationship with the originating LEC. ITI argues that its cause of action did not accrue until the Bureau released the *Teleconnect* decision and that it could not have known until then that it had a right to seek damages from defendants for CCL overcharges. Therefore, ITI argues, the statute of limitations does not bar ITI's claim.

IV. DISCUSSION

19. First, we must decide whether ITI's call configuration represents a single call. If so, we must next determine whether ITI's configuration is sufficiently similar to AT&T's 800 ReadyLine service to warrant application of our *ReadyLine Orders*. Finally, if ITI's service is indeed a ReadyLine-type service, we must determine whether ITI is entitled to recover past CCL overcharges and whether any portion of ITI's claim is barred by the statute of limitations. For the reasons discussed below, we find that: (1) an ITI operator service call is a single call; (2) ITI's operator service is a ReadyLine-type service subject to our *ReadyLine Orders*; (3) a portion of ITI's claim is barred by the statute of limitations; and (4) ITI failed to meet its burden of proof with respect to damages.

A. Number of Calls

20. Several LECs argue that ITI's calls are in fact two calls, one over MCI's 800 lines to ITI's switch, and the other from ITI's switch by MCI to ITI's customer, the end user. ITI replies that its calls are like an AT&T ReadyLine call, similar to a Teleconnect call, and that an ITI operator service call constitutes one call. ITI argues that the existence of an intermediate switch does not change the nature of the call, and maintains that *Teleconnect* established the right of a carrier to recover damages caused by assessing higher CCL terminating access service charges twice, even though the carrier resold the service of other carriers.

21. In *Teleconnect* the Bureau stated that "[c]ourts and this Commission have consistently emphasized that they consider the end-to-end nature of communications rather than the various facilities used."[53] In a parallel case the Bureau determined that an 800 service credit card call

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[51] GTE answer at 3.

[52] *Id.*

[53] *Teleconnect*, 6 FCC Rcd at 5206 (citing National Ass'n of Regulatory Utility Comm'rs v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984)).

that is routed through an interexchange carrier's switch should not be viewed as two calls and that the switch was merely an intermediate step in a single, end-to-end communication.[54] "Interstate wire communication is regulated from its inception to its completion by the Communications Act and, within the meaning of the Act, does not end at an intermediate switch."[55]

22. Hence, there is an assumption that interstate communication extends from the inception of a call to its completion.[56] The Commission was guided by that principle in *Teleconnect*, and we are guided by that principle here. After being carried over MCI's 800 line to ITI's switch, an ITI call continues to its destination, regardless of any intermediate switch or transmission facility. Thus, we find that ITI's calls, in the configuration presented to us in this proceeding, are single, end-to-end calls, unaffected by ITI's intermediate routing switch.

B. Applicability of ReadyLine

23. Most of the defendants argue unpersuasively that ITI's operator service is not similar to AT&T's 800 ReadyLine service in any material way. While not identical in every respect, we find that these services do share such significant characteristics as two open ends and the use of an 800 line for the first leg of the call. Just as the Commission determined in *Teleconnect*, we find here that the ownership of the 800 leg of the call by an entity other than the complainant is not sufficient to make the services materially different. Similarly, we conclude that the handling of the second leg of the call by an entity other than the complainant does not alter our view that ITI's operator service is similar to the ReadyLine service configuration. We therefore find that ITI's call configuration is similar to AT&T's ReadyLine configuration, except that the latter is a reseller of IXC service, rather than a direct provider.

24. Because we find that ITI's operator service is a ReadyLine-type service, the defendants' assertion that our *ReadyLine Orders* do not apply to ITI's operator service is unavailing. In our *ReadyLine Clarification Order*, we specifically avoided focusing exclusively on AT&T's 800 ReadyLine service. The use of language such as "all calls that have two open ends"[57] clearly indicates that the orders apply generally to all similar services using 800 lines, including ITI's operator service.

25. We are also unpersuaded by defendants' argument that *Teleconnect* is not applicable to these facts. In *Teleconnect*, like here, defendants argued that the call configuration involved more than two ends, that the higher CCL charge on the originating end was justified and that *ReadyLine* did not apply. The Commission disagreed, noting that "the user of ACA service intends to make a single call terminating not at the Teleconnect intermediate switch . . . but at

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[54] Southwestern Bell, 3 FCC Rcd 2339, 2341 (1988).

[55] *Teleconnect*, 6 FCC Rcd at 5206 (citing National Ass'n of Regulatory Utility Comm'rs v. FCC, 746 F.2d at 1498).

[56] *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 699 (1st Cir. 1977).

[57] *ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

the telephone line of the called party."[58] While recognizing that Teleconnect's ACA service was not identical to ReadyLine service, the Commission determined that the two services shared significant characteristics, including two open ends and the use of an 800 leg for the first portion of the call.[59] The Commission found that any differences were immaterial to the matter before it, and concluded that the *ReadyLine* decision applied to the Teleconnect call configuration. Here, ITI's call configuration embodies the same characteristics discussed by the Commission in *Teleconnect*, namely, two open ends and the use of an 800 leg for the first portion of the call. Further, callers using ITI's operator service intend to make a single call, which terminates with the called party, not at the intermediate switch. As defendants have not presented evidence that persuades us that ITI's call configuration is materially different from *ReadyLine* and *Teleconnect*, we conclude that those decisions are applicable here.

C. Charges Assessed

26. In its *WATS Access Charge Order*,[60] the Commission addressed whether resellers "should be required to make two carrier common line contributions -- one directly to the exchange carrier through the payment of the carrier common line charge and a second indirectly through the inclusion of that charge in the rates for the services it resells."[61] The Commission decided that, although exemption from all switched access charges for WATS resellers would be unfair, "resellers should not have to make a 'double contribution' toward recovery of common line costs."[62]

27. The same basic issue of double charges raised in the *WATS Access Charge Order* gives rise to ITI's complaints. In the present case, a higher CCL charge is assessed against MCI at the beginning of ITI's operator service call over MCI 800 lines, and that charge is presumably included in MCI's rates for service to ITI. Then, a higher CCL charge is levied at the open terminating end of the operator service call, again directly against MCI as IXC, but indirectly against ITI. Hence, it appears clear that ITI pays two higher CCL charges, one indirectly at the originating end and the other indirectly at the terminating end. This payment of two higher CCL charges for a single call is squarely contrary to the Commission's prior determination that such "a 'double' contribution [of access payments] is not appropriate."[63]

28. Section 69.105 contemplated that calls with two open ends were to be assessed only one higher CCL charge and that the charge was to be assessed on the terminating end.[64] Hence,

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[58] *Teleconnect*, 10 FCC Rcd at 1630.

[59] *Id.*

[60] *WATS Access Charge Order*, FCC 86-115, Section IV.

[61] *WATS NPRM*, FCC 86-1, para. 12 n.29.

[62] *WATS Access Charge Order*, FCC 86-115, para. 19.

[63] *WATS NPRM*, FCC 86-1, para. 12 n.29.

[64] *ReadyLine Clarification Order*, 2 FCC Rcd at 5942.

in the *ReadyLine Clarification Order*, the Commission concluded that it was unlawful to assess the higher CCL charge at both the originating and terminating ends of a single call, and directed the LECs so doing to settle any overcharges with the appropriate IXCs. The Commission decided that credit for the second charge should come from the originating end. In *Teleconnect*, the Commission applied the *ReadyLine Order* and reiterated that it is unlawful to assess two higher CCL charges on a call with two open ends.

29. In the instant case, the originating LEC would know only that the call is using 800 service and would assume that the call has only one open end, as is the case with most 800 service calls. Consequently, the originating LEC would assess the higher CCL charge.[65] Viewed independent of the remainder of the ITI operator service call configuration, it would appear that the 800 service call originates on an open end and terminates on a closed end.[66] Here, however, the call also terminates on an open end, resulting in a configuration having two open ends. Accordingly, the lower CCL charge should have been assessed by the originating carrier.[67] Hence, we conclude that defendant LECs did wrongfully assess the higher CCL charge on the originating end of the MCI 800 portion of an ITI operator service call.

D. Privity

30. Several defendants argue that they are not liable for refunds of the higher originating fees to ITI, because ITI failed to establish privity of contract or tariff between ITI and the defendant LECs. Defendants also argue that ITI fails to prove that the originating LECs assessed a higher CCL charge on MCI's 800 service and that MCI passed this charge on to ITI. Because only MCI had a direct relationship with the originating LEC, defendants contend that MCI is an essential party to these proceedings. In its opposition, ITI responds that unless the defendants notify ITI that each has granted the intermediary IXC an appropriate credit, ITI has the right to seek recovery from the defendants.[68]

31. Section 69.105(c) of the Commission's rules states that "[a]ny interexchange carrier shall receive a credit for Carrier Common Line charges to the extent that it resells services for which these charges have already been assessed."[69] Section 69.105(c) does not distinguish between facilities and non-facilities based resellers. Therefore, a reseller, whether facilities based or non-facilities based, is entitled to partial refunds from defendants who assessed higher CCL charges on the originating ends of a single call with two open ends, pursuant to Section 69.105(c). Thus, SWBT's argument that the decisions in *Teleconnect* and *ReadyLine* are not

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65 *See* 47 C.F.R. § 69.105(b)(1)(iii) ("All open end minutes on calls with one end (e.g., an 800 or FX call) shall be treated as terminating minutes.").

66 *See also Teleconnect* at 1630.

67 *See supra* para. 3-4.

68 *See, e.g.*, ITI v. Southwestern Bell Tel. Corp., ITI Reply and Opposition to Motion to Dismiss at 4-5 n.10.

69 47 C.F.R. § 69.105

applicable to this complaint because ITI provides no transport,[70] is unavailing.

32. Moreover, the Commission has already addressed this issue in its *Teleconnect* order.[71] There, the defendant LECs maintained that the underlying IXCs, rather than the complainant, were the proper parties either to claim credit from the defendants or bear liability to the complainants because those IXCs had privity with both the defendants and with the complainants, respectively. The Commission disagreed and found that, despite the lack of privity between them, the complainants were the proper parties to request credit and that the defendants were the proper parties to bear liability for the refunds. The Commission stated that the underlying IXCs could not bear liability because the IXCs had not acted unlawfully in passing through the higher CCL charges to the complainants. The Commission also stated that the underlying IXCs could not have themselves obtained credit because a higher CCL charge on the originating end of the underlying IXC's portion of the call alone would be proper. When the originating end portion was resold by an IXC as part of a single interstate call with two open ends, however, a partial refund of the CCL charges on the originating end became necessary because our rules do not permit two higher CCL charges to be assessed on a single call. Here, ITI is the only party that has, directly or indirectly, paid both CCL charges. As such, ITI is entitled to a partial refund.

E. Statute of Limitations

33. Virtually all defendants argue that a portion of ITI's claim is barred by the two-year limitations period contained in Section 415 of the Communications Act.[72] Section 415(c) of the Act requires that complaints for the recovery of overcharges be filed within two years from the time the cause of action accrues.[73] Hence, defendants argue, the two-year statute of limitations began to run from the time ITI was allegedly billed the higher CCL charge at the originating end of its calls. Therefore, defendants argue, ITI's claim for damages is limited to the two-year period prior to May 1992, the date on which ITI filed the complaints. ITI contends that the two-year limitations period does not bar any portion of its claim, because its cause of action did not accrue until the Commission's release of the *Teleconnect* order. ITI argues that its cause of action for damages incurred during the period from 1987 through 1991, accrued on September 5, 1991, which is the date that the Commission released its decision in *Teleconnect*. ITI maintains that it was the release of the *Teleconnect* order that apprised it of its right to seek damages and commenced the running of the statutory period.

34. Defendants argue that from 1987 on, when the *ReadyLine* decision was affirmed, ITI was on notice that Commission rules precluded assessment of the higher CCL charge on the originating end of a call configured with two open ends.[74] Moreover, defendants argue that ITI

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[70] SWBT answer at 2.

[71] *Teleconnect*, 10 FCC Rcd at 1631.

[72] 47 U.S.C. § 415(c).

[73] *Id.*

[74] *See* BellSouth brief at 13.

has not presented any circumstances that would have tolled the statute of limitations.[75] Therefore, defendants argue, any claim for damages prior to May 1990 is barred by the statute of limitations.

35. The U.S. Court of Appeals for the District of Columbia Circuit recently addressed the statute of limitations issue in *US Sprint Communications Co. v. FCC.*[76] There, the court affirmed a Commission order[77] dismissing a complaint filed in January 1987, by Sprint against AT&T which alleged, *inter alia*, that AT&T's rates for 56 kilobits per second ("kbps") Dataphone Digital Service ("DDS") between 1982 and 1984 were excessive. The court held that Sprint's action was barred by the statute of limitations because Sprint had "inquiry notice" of its possible claim for more than two years before Sprint filed its complaint[78] and because Sprint failed to satisfy its burden of showing specific facts that would justify tolling the limitations period.[79] The court pointed out that another user of 56 kbps DDS had sufficient notice to file a complaint against AT&T, similar to the one filed by Sprint, as early as 1981.[80]

36. Here, ITI filed its complaints in May 1992. Teleconnect, however, filed a similar complaint in July 1988. ITI argues that "[u]ntil the *Teleconnect* decision, no authority . . . had addressed the issue of whether the particular system configuration and rate assessment scheme in *Teleconnect* was unlawful, and, thus, gave rise to liability for overcharges."[81] We disagree. In *Teleconnect* the Commission applied the *ReadyLine* holding that it is unlawful to assess two higher CCL charges for a single call having two open ends. Having applied the *ReadyLine* holding to Teleconnect's call configuration, the Commission found defendants liable for CCL overcharges. We conclude that just as Teleconnect was on notice as early as 1988 that it had a potential claim based on *ReadyLine*, so was ITI.

37. Therefore, we conclude that ITI's claim for damages accruing prior to May 1990 (two years prior to the date ITI filed these complaints),[82] is untimely pursuant to Section 415(c). Accordingly, we find that ITI's claim for damages from the period 1987 through May 1990, is

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[75] *See, e.g.*, BellSouth brief at 14.

[76] 76 F.3d 1221 (1996).

[77] U.S. Sprint Comm. Co. v. AT&T, 9 FCC Rcd 4801 (1994).

[78] 76 F.3d 1221, 1229.

[79] *Id.* at 1228.

[80] *Id.* at 1229.

[81] ITI brief at 10.

[82] ITI filed complaints against Southwestern Bell Telephone Corporation, United Telephone Company of Florida, United Telephone Company of Minnesota, United Telephone Company of Ohio, U S West, Inc., NYNEX Corporation, Central Telephone Company of Florida, Central Telephone Company of Nevada and Central Telephone Company of Illinois on May 4, 1992; and against Bellsouth, GTE North, Inc., GTE South, Inc., GTE Florida, GTE California, GTE Southwest and Contel of Texas on May 7, 1992.

barred by the statute of limitations.

F. Damages

38. We conclude that the defendant LECs are liable to ITI for the difference between the amounts actually paid by ITI for originating ITI's operator services calls and the amounts ITI would have paid if the defendants had properly assessed the lower CCL charges to originate these calls, for the period May 1990 through December 1991. It is well established that, in a formal complaint proceeding pursuant to Section 208 of the Act, the complainant has the burden of proof.[83] We must now determine whether ITI has met its burden of proof with respect to damages during that period.

39. In its original complaints, ITI identified the defendants as originating LECs. In its briefs, however, ITI claims that, similar to the situation in *Teleconnect*, ITI cannot identify the originating LEC from which to receive a refund.[84] ITI therefore purports to have used a surrogate to determine damages.[85] ITI claims that its surrogate reflects the difference between the higher terminating CCL charges that were assessed on the originating end and the lower originating CCL charges that ITI claims should have been assessed. In *Teleconnect*, the Commission accepted that a surrogate could be used to apportion damages. That decision is consistent with the Commission's prior views on the issue.[86] When, in its *Bifurcation Order*, the Commission determined that the bifurcated CCL charge structure should be extended, it recognized, *inter alia*, the administrative problem of implementing new 800 Readyline-type services because of the inability of the originating LECs to distinguish these 800 services from 800 services with just one open end. Acknowledging that these 800 services are more difficult to bill properly, the Commission observed that several credit mechanisms developed to address the situation were apparently working acceptably.[87] The Commission stated that it expected "that most of these problems will be resolved as the credit mechanisms are improved and as the carriers involved become accustomed to the new service arrangements."[88]

40. While we acknowledge that the use of a surrogate may be acceptable in a variety of contexts, in this instance ITI has failed to provide data sufficient for us to conclude that the surrogate used by ITI is an appropriate mechanism for apportioning damages in this case. In

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[83] *See, e.g.*, Amendment of Rules concerning Procedures to be Followed When Formal complaints are Filed Against Common Carriers, 8 FCC Rcd 2614, 2616-17 (1993); Connecticut Office of Consumer Counsel v. AT&T Communications, 4 FCC Rcd 8130, 8133 (1989), *aff'd sub nom. Connecticut Office of Consumer Counsel v. FCC*, 915 F. 2d 75 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991); *see generally*, 47 C.F.R. §§ 1.720-1.735.

[84] ITI brief at 13.

[85] *Id.* at 13-14.

[86] *See* MTS and WATS Market Structure, 4 FCC Rcd 5048 (1988) (*Bifurcation Order*).

[87] *Id.* at 5053.

[88] *Id.*

its brief, ITI lays out the five step process that it claims to have used in developing the damage estimates attributed to each defendant.[89] ITI states that it:

1) first compiled monthly total switched access originating minutes from call detail reports which were generated by ITI's switches;
2) next calculated the percentage of originating minutes attributable to each defendant by dividing the total originating minutes for each defendant by the total originating minutes from step 1;
3) then applied the percentage calculated in step 2 to total 800 minutes to arrive at "Orig. Minutes" column of Appendix A to its brief;
4) applied a monthly originating-to-terminating minute ratio to the originating minutes in order to determine the originating minutes that were actually terminated, which resulted in the "Term. Minutes" column of Appendix A to its brief; and
5) calculated the refund by multiplying the difference between the defendants' lower and higher interstate CCL charges by the minutes calculated in step 4 which is the "Variance" column of Appendix A to its brief.[90]

ITI did not provide any further information regarding the source of the numbers used. Despite extensive discovery and repeated requests for clarification, ITI has failed to substantiate its estimates. During a status conference held April 6, 1995, ITI was directed by Commission staff to submit factual support for the numbers used in its calculations and to give defendants all reliable probative evidence upon which it bases its claims.[91] Nonetheless, the exhibit attached to ITI's brief consists entirely of an unverified chart explained only in counsel's argument in the brief. We agree with U S WEST that counsel's argument cannot substitute for evidence. Furthermore, the chart seems to suggest that ITI would be entitled to damages from at least one defendant, U S WEST, after U S WEST equalized its originating and terminating CCL charges, demonstrating that the chart cannot be accurate. Moreover, the damage estimates included as an appendix to ITI's brief differ from the damages requested in the amendment to its complaints that ITI filed on January 13, 1993.[92] ITI offers no explanation for the discrepancy. We conclude that ITI has failed to meet its burden of proof with respect to damages.

41. In August 1992, United filed a motion to bifurcate these proceedings into two phases. United requested that we address the issue of liability in the first phase, then establish a separate phase to address damages. This is similar to the approach we adopted in *Teleconnect.* However, as distinct from *Teleconnect*, the complainant here, ITI, opposed the defendant's motion, arguing

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[89] ITI brief at 14.

[90] *Id.*

[91] *See* letters from Thomas Wyatt, Chief, Formal Complaints Branch, Enforcement Division, to all counsel of record (April 14, 1995, and May 5, 1995), memorializing staff rulings.

[92] *See supra* note 21.

that the motion was groundless and "conceivably a poor use of the Commission's resources."[93] After considering the arguments, we decided that the parties and Commission's interests in obtaining the earliest practicable resolution to this matter would be better served by requiring the parties to develop a full record on the issues of both liability and damages.[94] Here, also, unlike in *Teleconnect*, ITI filed amendments to its complaints[95] indicating the amount of damages sought from each defendant. We therefore denied United's motion to bifurcate these proceedings.

42. Having found that ITI has failed to meet its burden of proof with respect to damages, ITI's request for prejudgment interest is moot. Further, we deny ITI's request that we award it attorney's fees. We do not have the authority to award attorney's fees.[96]

G. Miscellaneous Pleadings

43. U S WEST filed a Motion to Dismiss ITI's complaint and supplemental complaint, challenging the Commission's jurisdiction to adjudicate the complaint.[97] U S WEST argues that U S WEST is not a common carrier under the Communications Act and does not provide common carrier services.[98] U S WEST acknowledges that Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company are predecessors in interest to U S WEST Communications, Inc., which is a common carrier provider of interstate services regulated by the Commission.[99] U S WEST also acknowledges that U S WEST Communications, Inc. is an indirect subsidiary of U S WEST, but maintains that ITI named the wrong party as defendant.[100] During the April 6, 1995, conference regarding this proceeding, Commission staff directed ITI to acknowledge in its briefs the proper defendant, that is, the local exchange carrier subsidiary of the holding company, and noted that the proper defendant had been given actual notice and would suffer no prejudice as a result of ITI's oversight.[101] ITI complied with this request. Accordingly, U S WEST's Motion to Dismiss is denied.

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[93] United Motion for Extension and Objection at 1.

[94] *See* letter from Thomas Wyatt, Chief, Formal Complaints Branch, Enforcement Division, to all counsel of record (April 14, 1995) memorializing staff rulings.

[95] *See supra* para. 8.

[96] Comcark Cable Fund III v. Northwestern Indiana Telephone company, 100 FCC 2d 1244, 1257 n.51 (1985).

[97] U S WEST answer at 1-2 and supplemental answer at 1-2.

[98] U S WEST answer at 1-2.

[99] *Id.* at 2.

[100] *Id.*

[101] *See* letter from Thomas Wyatt, Chief, Formal Complaints Branch, Enforcement Division, to all counsel of record (April 14, 1995), memorializing staff rulings.

44. Centel and GTE also filed motions to dismiss ITI's complaint. SWBT, United and NYNEX filed motions to dismiss ITI's complaint and supplemental complaint. ITI opposed each motion. These motions generally allege that ITI failed to present a cause of action as required by the Commission's rules. Section 1.721(a) of the Rules requires that a formal complaint contain "[c]itation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated"[102] as well as a "complete statement of facts which, if proven true, would constitute such a violation."[103] Thus, a complaint is not required to prove a violation conclusively.[104] Here, ITI alleges that the LECs violated the relevant Part 69 rules by assessing two higher CCL charges on each of its operator service calls. A statement of supporting facts accompanies the allegations. We conclude, therefore, that ITI has met its burden under Sections 1.721(a) and 1.728(a) of the Commission's rules. Accordingly, we deny the defendants' motions to dismiss the complaints.

45. In addition, United filed a Motion to File Errata to Answer on June 18, 1992. SWBT filed a Motion for Leave to Amend Answer on July 16, 1992 and Centel filed a Motion for Leave to File Out of Time on April 23, 1993. In the interest of compiling a more complete record, these motions are granted and ITI's Motion to Strike Supplemental NYNEX, U S WEST and BellSouth Answers as Untimely filed on February 24, 1993 are denied. Again, in the interest of compiling a complete record, ITI's Motion for Leave to File Late Reply to Answer of United filed on February 24, 1993 and GTE on February 14, 1993 are granted. As we have reached this decision on the merits, ITI's Motion for Leave to File Consolidated Motion for Summary Judgment and its Consolidated Motion for Summary Judgment filed on July 28, 1993 are denied.[105]

V. CONCLUSION

46. For the reasons stated above, we conclude that the defendants unlawfully charged ITI for the higher CCL charge on the originating end of ITI's operator service calls. We further conclude that ITI has failed to prove that it is entitled to damages and the amount of its damages. Accordingly, insofar as ITI seeks a ruling that defendants violated Section 69.105 of the rules and Commission orders, we grant ITI's complaints but deny the complaints as to damages.

VI. ORDERING CLAUSES

47. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the

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[102] 47 C.F.R. § 1.721(a)(4).

[103] 47 C.F.R. § 1.721(a)(5).

[104] American Satellite Corp., 64 FCC 2d 503, 508 (1977).

[105] Commission staff ruled on numerous discovery motions during the status conference held on April 6, 1995. *See* letter from Thomas Wyatt, Chief, Formal Complaints Branch, Enforcement Division, to all counsel of record (April 14, 1995), memorializing staff rulings.

complaints filed by International Telecharge, Inc. on May 4, 1992 and May 7, 1992, and the amendments to its complaints filed by International Telecharge, Inc. on January 13, 1993, ARE GRANTED to the extent indicated above, and otherwise ARE DENIED.

48. IT IS FURTHER ORDERED, that the Motions to Dismiss filed by U S WEST, Central Telephone Company of Illinois, Central Telephone Company of Florida, Central Telephone Company of Nevada, GTE North, Inc., GTE South, Inc., GTE Florida, GTE California, GTE Southwest, Contel of Texas, Southwestern Bell Telephone, United Telephone Company of Florida, United Telephone Company of Minnesota, United Telephone Company of Ohio, and NYNEX ARE DENIED.

49. IT IS FURTHER ORDERED, that the Motions to File Errata to Answer filed by United Telephone company of Florida, United Telephone Company of Minnesota and United Telephone Company of Ohio on June 18, 1992 ARE GRANTED.

50. IT IS FURTHER ORDERED that the Motion for Leave to Amend Answer filed by Southwestern Bell Telephone Company on July 16, 1992 IS GRANTED.

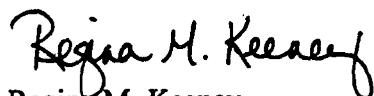
51. IT IS FURTHER ORDERED that the Motions for Leave to File Out of Time filed by the Central Telephone Company of Florida, Central Telephone Company of Nevada and Central Telephone Company of Illinois on April 23, 1993 ARE GRANTED.

52. IT IS FURTHER ORDERED that ITI's Motion for Leave to File Late Reply to the Answers of United Telephone Company of Florida, United Telephone Company of Minnesota and United Telephone Company of Ohio on February 24, 1993 and GTE North Inc., GTE South, Inc., GTE Florida, GTE California and GTE Southwest on February 14, 1993 ARE GRANTED.

53. IT IS FURTHER ORDERED, that ITI's Motion for Leave to File Consolidated Motion for Summary Judgment and its Consolidated Motion for Summary Judgment on July 28, 1993 ARE DENIED.

54. IT IS FURTHER ORDERED, that ITI's requests for an award of prejudgment interest and attorney's fees ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Regina M. Keeney
Chief, Common Carrier Bureau