

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
American Telegram Corporation,)	
Complainant,)	
)	
v.)	File No. E-95-12
)	
New Valley Corporation,)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1996; Released: September 25, 1996

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. American Telegram Corporation (ATC), filed a formal complaint against New Valley Corporation (NVC), formerly known as Western Union Corporation,¹ pursuant to Section 208 of the Communications Act of 1934, as amended (the Act).² ATC contends that NVC violated the Act by not providing it with NVC's tariffed Mailgram service. NVC filed an answer denying any violation. For the reasons set forth below, we deny ATC's complaint.

II. BACKGROUND

2. ATC is a California corporation that provides both domestic and international telegram and telex services.³ At the time of this complaint, NVC was a communications common carrier that provided domestic and international telecommunications services subject to the Commission's jurisdiction under Title II of the Act.⁴ NVC conducted its messaging services through a subsidiary known as Western Union Data Services Company, Inc. (Western Union or

¹ Complaint at 2 n.1. In 1991, Western Union Corporation changed its name to New Valley Corporation.

² 47 U.S.C. § 208. Section 208 gives "[a]ny person ... body politic or municipal organization, or State commission" the right to file a complaint with the Commission if it states facts showing that a common carrier acted or failed to act in contravention of the Act.

³ Complaint at 5.

⁴ *Id.* at 2, 5-6; see also Answer at 22 (noting that not all of NVC's services, such as Custom Letter Services and Priority Letter Services, were regulated by the FCC).

WU).⁵ WU subsequently advised us that it is no longer a telecommunications carrier.⁶ The services at issue are those that were provided by WU.

3. In 1990, Roger Meyers (Meyers) established ATC to provide telegram services independent of, and in competition with, Western Union.⁷ To conduct its telegram services, ATC sought to order communications services and interconnection from WU under the identical rates, terms, and conditions WU provided to other customers and carriers.⁸ In particular, ATC desired: "(1) to purchase WU Mailgram Services; (2) access to WU's "Desk Mail" service which provides PC Mailgram access; and (3) interconnection into WU's telegram and Mailgram system under the terms and conditions of the [Record Carrier Competition Act of 1981 (RCCA)]."⁹

4. According to ATC, between October 1993 and January 1994, it made numerous requests for the above-mentioned services. On May 3, 1994, as a result of ATC's alleged unanswered requests for any of the services requested, ATC filed an informal complaint with the Commission.¹⁰ WU filed a response to ATC's informal complaint on June 10, 1994; subsequently, ATC filed a reply to WU's response on June 24, 1994.¹¹ On November 16, 1994, the Informal Complaints and Public Inquiries Branch of the Common Carrier Bureau stated that it was not prepared to recommend further Commission action. The Branch further advised ATC that it could file a formal complaint within 60 days.¹² ATC's formal complaint, filed in response to the letter from the Informal Complaints and Inquiries Branch, is the subject of this Order.

⁵ Answer at 22.

⁶ Western Union Telegraph Co., Inc. v. Graphnet, Inc. File No. E-87-143, CC Docket No. 78-7 and CC docket No. 82-122, Graphnet Petition for Flow-Through Order at 6 (citing New Valley Form 10Q Report to the Securities and Exchange Commission, March 31, 1993, at 47).

⁷ Complaint at 7.

⁸ *Id.*

⁹ *Id.* The RCCA, codified at former Section 222 of the Act, has been repealed. See n.14, *infra*. Mailgram service was a regulated FCC-tariffed offering and involved sending a message electronically to a Western Union machine located on the property of an independent contractor, hired by Western Union, which printed the message on Western Union letterhead. The independent contractor then placed the message in an envelope and hand-delivered it to a central postal facility for mailing as a first class letter. Desk Mail was an enhanced or unregulated service involving an interconnection arrangement whereby Western Union facilities were utilized to deliver traffic received by it from its agents or from other persons with whom it had entered into a contractual relationship. See New Valley Response to Common Carrier Bureau Letter, filed April 12, 1996 (NVC Response) at 12-13.

¹⁰ Complaint at 8; see FCC File No. IC-94-07339; Notice of Informal Complaint, May 11, 1994.

¹¹ Complaint at 8.

¹² *Id.* at 9.

5. ATC contends that NVC, as a common carrier, was required to furnish ATC with communications services, pursuant to Section 201(a) of the Act, because ATC reasonably requested defendant's Mailgram and Desk Mail services.¹³ ATC further alleges that NVC's refusal to provide interconnection was a violation of former Section 222 of the Act.¹⁴ NVC responded that it was not *required* to provide communications services unless the Commission had ordered the carrier to do so after holding a hearing. NVC further stated that Section 222 of the Act was inapplicable because NVC did not have a significant share of the record communications market.¹⁵ NVC subsequently filed a motion to dismiss.

6. On February 9, 1996, the Common Carrier Bureau, in a letter ruling, denied in part and granted in part NVC's Motion to Dismiss, leaving only one issue for review: whether ATC ever requested WU's tariffed Mailgram service (as distinguished from seeking to enter into a carrier-to-carrier interconnection agreement or a carrier-agent relationship). The letter ruling stated that the complaint was defective insofar as it alleged that NVC's refusal to interconnect constituted a violation of Section 201(a) of the Act, and insofar as it sought regulation of enhanced Desk Mail services.¹⁶ The letter ruling, however, denied NVC's Motion to Dismiss ATC's Section 201(a) claim that NVC's refusal to provide tariffed common carrier Mailgram service to ATC violated Section 201(a) of the Act. The parties were directed to brief the issue and identify: (1) what specific requests, if any, were made for Mailgram service under effective terms and conditions specified in WU's FCC tariff; (2) why any such requests were not

¹³ *Id.* Section 201(a) of the Act, in pertinent part, states, "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor" 47 U.S.C. § 201(a).

¹⁴ Complaint at 14. Section 222 of the Act was repealed by Public Law 103-414, section 304(a)(6), 108 Stat. 4296-7. Section 222(c)(1)(A)(i) provided in pertinent part that, "the Commission shall require each record carrier to make available to any other record carrier, upon reasonable request, full interconnection with any facility operated by such record carrier."

¹⁵ Answer at 31.

¹⁶ Letter from Adrien Auger, Enf. Div., Com. Car. Bur., FCC, to Glenn S. Richards (Feb. 9, 1996). Prior to newly-enacted Section 251 of the Act, which was not in force at the time the complaint was filed, carriers were required to provide interconnection under Section 201(a) only in "cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest." 47 U.S.C. § 201(a). In addition, Desk Mail is an enhanced service, which the FCC has deregulated. *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Tentative Decision, 28 FCC 2d 291 (1970); Final Decision and Order, 28 FCC 2d 267 (1971), *aff'd on recon.* 34 FCC 2d 557 (1972), *aff'd in principal part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973); Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision, 77 FCC 2d 384, *modified on recon.* 84 FCC 2d 50 (1980), *modified on further recon.* 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industrial Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied, sub nom. Louisiana Public Service Commission v. United States*, 461 U.S. 938 (1983), *aff'd on second further recon.* FCC 84-190 (rel. May 4, 1984); Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order, 104 FCC 2d 958 (1986), *clarified on recon.* 2 FCC Rcd. 3035 (1987).

reasonable; and (3) if WU refused to provide service because of potential harm, how WU would be injured and why monetary damages or other remedies or relief would not adequately redress WU.¹⁷

III. CONTENTIONS OF THE PARTIES

7. **ATC's Position** ATC cites Section 201(a) to support its claim that WU was required to provide ATC with WU's tariffed Mailgram service.¹⁸ ATC contends that it made numerous requests for WU's tariffed Mailgram service, which were ignored.¹⁹ Consequently, ATC contends that WU's refusal to furnish ATC communication services, after ATC's reasonable request, constitutes a violation of Section 201(a) of the Act.²⁰

8. ATC contends that, between October 1993 and January 1994, it made numerous requests for WU's tariffed Mailgram service under effective terms and conditions specified in WU's tariff.²¹ ATC relies on a letter from its counsel, Eric M. Epstein (Epstein) to counsel for WU, Richard D. DeLuce (DeLuce), demanding that WU furnish ATC with "Western Union Mailgram Service, upon our clients' reasonable request therefor"²² as well as a "Supplement" to its formal complaint, which allegedly "chronicles ATC's repeated attempts" to purchase WU Mailgrams.²³ ATC's supplement includes a statement from Epstein noting that he left a telephone message for DeLuce asking DeLuce to contact him to discuss WU's supposed refusal to allow ATC to purchase Mailgram services.²⁴ In addition, ATC relies on statements made by its President, Meyers, who alleges that he made over thirty calls to Brenda Williams (Williams), New Valley account representative, in an attempt to obtain service.²⁵ Meyers admits that he never spoke with Williams, but alleges that he left many messages stating his intention to obtain

¹⁷ Letter from Adrien Auger, Enf. Div., Com. Car. Bur., FCC, to Glenn S. Richards (March 8, 1996).

¹⁸ Complaint at 9; ATC Br. at 6.

¹⁹ Complaint at 9; ATC Br. at 6.

²⁰ Complaint at 9.

²¹ *Id.* at 7; ATC Br. at 6 (referring to NVC FCC Tariff No. 2, effective Sept. 2, 1993).

²² Letter from Eric M. Epstein, Counsel for ATC and Roger Meyers, President and CEO of ATC, to Richard D. DeLuce, Counsel for Western Union (Jan. 7, 1994) (copy attached to Complaint as Exh. B) (Epstein letter).

²³ Supplement to Formal Complaint, May 8, 1995.

²⁴ *Id.* at Affidavit of Eric M. Epstein at 1, para. 2.

²⁵ ATC Br. at 6-7.

WU's tariffed Mailgram service.²⁶ Meyers further contends that he attempted to reach Williams' supervisor after the failed attempts to reach Williams herself. Meyers was unable to speak with Williams' supervisor.²⁷

9. **NVC's Position** In answer to the complaint, NVC states that it is unaware of any service orders for WU's tariffed Mailgram service, and that ATC has not provided any evidence to substantiate its claim that it reasonably requested such service.²⁸ NVC contends that the only documents ATC provides to substantiate its claims -- letters from Meyers to various individuals at Western Union -- are not requests for tariffed service. Instead, the letters are either from Meyers, an individual who is not a party to this proceeding, or are requests for interconnection, not for a tariffed service.²⁹

10. NVC contends that the Epstein letter from ATC's counsel to DeLuce, upon which ATC relies, is merely a statement of position -- not a request for service.³⁰ According to NVC, the letter does not document any ATC requests for service, nor specify which tariffed service, by date, rate, service offering, or tariff, that ATC desires;³¹ instead, it demands that NVC supply service once it has been requested. NVC contends that it never received a request for service.³²

11. In addition, NVC contends that despite numerous pleadings and discovery, ATC failed to substantiate its position that it requested tariffed service. Despite ATC's repeated statements that it made over thirty calls to Williams in an attempt to establish service, NVC states that ATC has not produced documentation as to either the substance or the existence of those calls.³³ Even assuming Meyers indeed made calls on behalf of ATC, NVC contends that the alleged calls do not request a specific tariffed service at a specific rate for a specific time or period.³⁴ Instead, NVC notes that Meyers admitted that he wanted access to WU's facilities.³⁵ NVC further states that ATC responded to NVC's interrogatory requesting evidence of requests

²⁶ *Id.*; ATC Reply at 7.

²⁷ ATC Br. at 6; ATC Reply at 7.

²⁸ Answer at 11-12.

²⁹ *Id.* at 11.

³⁰ NVC Response at 11.

³¹ NVC Reply at 4.

³² *Id.* at 2.

³³ *Id.*

³⁴ *Id.* at 2-3.

³⁵ *Id.* at 3 (citing Deposition of Roger Meyers at 115, lines 3-4).

by citing calls and letters that pertain to Desk Mail service, which was not a tariffed WU service.³⁶ NVC contends that it was only after the Commission dismissed ATC's claims pertaining to Desk Mail that ATC suggested that these calls and letters referred to Mailgram service.³⁷ As such, NVC contends that ATC did not make a reasonable request for WU's tariffed Mailgram service.

IV. DISCUSSION

12. It is well established that, in a formal complaint proceeding pursuant to Section 208 of the Act, the complainant has the burden of proof.³⁸ For the reasons discussed below, we conclude that ATC has failed to carry its burden in this case.

13. Under the Commission's general pleading and format requirements, formal complaints against common carriers must, *inter alia*, contain a complete statement of facts, which if true, are sufficient to constitute a violation of the Act or Commission rule or order.³⁹ The rules provide that facts must be supported by affidavit or other relevant documentation.⁴⁰ The rules also encourage complainants to describe "fully and clearly the specific act or thing complained of, together with such facts as are necessary to give a full understanding of the matter, including relevant legal and documentary support."⁴¹ Complainants have the right to respond to affirmative defenses raised by defendants in their answers,⁴² and both complainants and defendants may initiate limited self-executing discovery to develop the information necessary to resolve material questions of fact.⁴³

³⁶ See ATC Answer to Western Union Interrogatory No. 1, paras. A.2-A.4.

³⁷ NVC Reply at 3.

³⁸ 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.

³⁹ See 47 C.F.R. §§ 1.720(b), 1.721(a)(5).

⁴⁰ See 47 C.F.R. §§ 1.720(c), 1.721(a)(5).

⁴¹ 47 C.F.R. § 1.721(b).

⁴² 47 C.F.R. § 1.726.

⁴³ 47 C.F.R. § 1.729. In this proceeding, the parties were offered extraordinary discovery as well. Letter from Adrien Auger, Enf. Div., Com. Car. Bur., FCC, to Glenn S. Richards (Feb. 9, 1996) (granting deposition of Roger Meyers).

14. In the instant case, ATC bases its claim that NVC violated Section 201(a) of the Act because it failed to provide NVC with its tariffed service, on the assertion that ATC made numerous requests for WU's tariffed service. ATC has failed to meet its burden of proof to substantiate its claim that it requested WU's tariffed Mailgram service. ATC relies on the alleged calls to Williams and her supervisor and the Epstein letter in order to substantiate its claim that it reasonably requested WU's tariffed Mailgram service. As discussed more fully below, these are insufficient to support ATC's claim that it requested tariffed service.

15. ATC states in that it "made repeated attempts to order communications services . . . from WU under the same rates, terms and conditions as WU provides to similar customers and carriers,"⁴⁴ yet ATC in its complaint attached only the Epstein letter as evidence of its alleged requests. That letter, written by Epstein on behalf of Myers and ATC, states that "demand is hereby made that your client furnish to our clients both 'Desk Mail' services as well as Western Union Mailgram Services, *upon our clients' reasonable request therefor.*"⁴⁵ We agree with NVC that this letter was not a request for service within the meaning of Section 201(a), but rather a statement of position and threat to sue.⁴⁶

16. Furthermore, even after NVC and the Commission specifically requested ATC to produce evidence to support its allegations that it requested service,⁴⁷ ATC continued to rely on the Epstein letter as well as Meyers' statements that he attempted to call Williams. In his deposition, Meyers contends that he left over thirty messages for Williams indicating his interest in obtaining service for ATC,⁴⁸ but he has not produced any evidence to document the substance or existence of such calls. In addition, during his deposition, Meyers refers to the above-mentioned letters to support his claim that ATC requested tariffed service. The evidence to which ATC points -- Meyers' deposition -- does not support ATC's claim that it specifically requested WU's tariffed service. In ATC's answers to the interrogatories, it merely points to Meyers' letters or phone calls to WU requesting interconnection and Desk Mail, not tariffed Mailgram service.⁴⁹ Nor does ATC's Reply Brief offer any additional evidentiary support. Under these circumstances, we are not persuaded that the alleged calls to Williams and her supervisor constitute requests for tariffed service.

⁴⁴ Complaint at 7.

⁴⁵ Epstein letter (emphasis added).

⁴⁶ DeLuce was not a Western Union employee. Further, according to Western Union, he also was not representing it on any matter at the time Epstein was making these communications with him. NVC Response at 11 n.7.

⁴⁷ See New Valley's First Set of Interrogatories, No. 1A; Letter from Adrien Auger, Enf. Div., Com. Car. Bur., FCC, to parties (Feb. 9, 1996).

⁴⁸ Complaint at 7; Deposition of Roger Meyers at 120, lines 20-21; ATC Br. at 6; ATC Reply at 6-7.

⁴⁹ See ATC Answer to New Valley's First Set of Interrogatories at 1A.

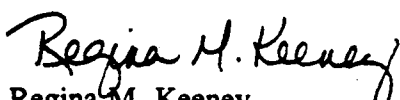
17. Section 201(a) of the Act requires "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor." Although Section 201(a) does not specifically define the term "reasonable," in *MTS and WATS Market Structure Phase III*,⁵⁰ the Commission noted that it will look to the terms of the tariff at issue to determine the definition of reasonable.⁵¹ In this case, NVC states that even if ATC did leave messages for Williams, such messages do not constitute a reasonable request for service as defined by WU's tariffs. We agree. NVC's tariffs set forth the conditions under which service would be provided;⁵² in particular, the customer must select which tariffed service option is desired.⁵³ At Meyers' own admission, assuming he indeed left messages for Williams, the messages stated only that he wanted Mailgram service; he did not leave a message as to the length of time or other particulars. As ATC did not specify the length of time for which service was desired, or other pertinent information, the record does not support the conclusion that Meyers' alleged phone calls to Williams were "reasonable requests" within the meaning of Section 201(a).

V. CONCLUSION AND ORDERING CLAUSE

18. ATC has failed to substantiate its claims that it made a reasonable request for WU's tariffed Mailgram service, and that WU therefore violated Section 201(a) by failing to provide ATC with tariffed service.

19. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201 and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint filed by ATC on January 7, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


Regina M. Keeney
Chief, Common Carrier Bureau

⁵⁰ 100 FCC 2d 860 (1985).

⁵¹ *Id.*

⁵² NVC Reply at 4 n.11.

⁵³ *Id.*