

Federal Communications Commission  
Washington, D.C. 20554

In reply refer to:  
DA 96-1947

November 21, 1996

Released: 11/21/96

Mr. David Walker  
Direct Dial Audio Corporation  
5754 Duck Lane  
Whitehall, Michigan 49441

Re: Informal Complaint No. 96-07892.

Dear Mr. Walker:

The Enforcement Division of the Common Carrier Bureau has completed its review of your complaint filed with the Federal Communications Commission (Commission) on February 13, 1996, the Amendment to the Complaint filed on March 6, 1996, and the Supplementary Brief to the Complaint filed on June 4, 1996. As you were informed in a telephone conversation with this Division on June 21, 1996, the complaint will be treated as an Informal Complaint because it does not meet the requirements of a Formal Complaint. See 47 C.F.R. §§ 1.720-1.735.

Regardless of the substance of your claim, your complaint is outside of the limitations period established by the Communications Act of 1934, as amended (the Act). Section 415(b) of the Act requires that complaints for the recovery of damages be filed within two years from the time the cause of action accrues. 47 U.S.C. § 415(b). Your complaint, which requests damages, was filed on February 13, 1996; therefore, your cause of action must have accrued on or after February 13, 1994. Although your complaint does not state a specific date on which Michigan Bell refused to provide service to Direct Dial Audio Corporation (Direct Dial), your first complaint that raised this matter against Michigan Bell was filed in October 1990 in the Muskegon County Circuit Court. You also filed an action against both Michigan Bell and GTE in federal court in October 1991. Your cause of action against these two defendants, therefore, accrued well before February 1994. Accordingly, your complaint must be dismissed because it falls outside of the limitations period in the Act.

Moreover, the Act does not permit Direct Dial to pursue a cause of action both in federal court and at the Commission. Section 207 of the Act provides the following:

[a]ny person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as

which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; *but such person shall not have the right to pursue both such remedies.*

47 U.S.C. § 207 (emphasis added). You filed an action against Michigan Bell and GTE in the Federal District Court for the Western District of Michigan in October 1991. Complaint at 9. Because Direct Dial has already filed a complaint in federal court regarding essentially the same cause of action, Section 207 of the Act precludes it from seeking relief from the Commission.

Even if the Act permitted the Commission to rule formally on your substantive allegations, it is unlikely that it could grant your complaint.

For purposes of brevity, we have attempted to summarize the allegations contained in your complaint. You allege that Direct Dial was engaged in planning, developing, constructing, and operating "a State wide 976 telecommunication information network designed to provide, on a common carrier basis, 976 telecommunication services to the public consumers and business." Complaint at 3. You further allege that Direct Dial obtained a contract with GTE to become an "information provider", and "GTE was to provide and obtain service for the 616 LATA, 517 LATA, and 313 LATA." *Id.* at 4. You state that Direct Dial was restrained through the system established by Michigan Bell and GTE to provide service only to GTE customers in the 616 LATA, and that this restriction has forced Direct Dial out of business. *Id.* You claim that Michigan Bell has refused to provide, as a tariffed service, exchange access in the 616 LATA. *Id.* at 24-36. With respect to GTE, you claim that it breached its contractual obligations with Direct Dial by its failure to require Michigan Bell to furnish access service to Direct Dial. *Id.* at 37-42. You also point out errors made by the Michigan Public Service Commission (MPSC) and the Department of Justice in complaints by Direct Dial before those agencies. *Id.* at 43-69.

The MPSC and the Department of Justice cannot be defendants with respect to your complaint. Pursuant to section 208 of the Act, complaints before this Commission must concern acts done or omitted to be done in contravention of the Act or this Commission's rules or orders by common carriers. Neither MPSC nor the Department of Justice are common carriers. Our review of your complaint will only address those alleged acts done or omitted to be done in contravention of the Act or this Commission's rules or orders by Michigan Bell and GTE, which are the only common carriers named as defendants. *See* 47 U.S.C. § 208.

After a thorough review of the materials you provided to the Commission, we have concluded that neither GTE nor Michigan Bell has violated section 251 of the Act. Section 251 of the Act requires telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers..." 47 U.S.C. § 251(a). The Act further requires local exchange carriers to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access." *Id.* § 251(c)(2)(A).

Direct Dial does not provide "telecommunications" service, which is defined as "the

transmission between or among points specified by the user, of information of the user's choosing without change in form or content of the information as sent and received." *Id.* § 153(43). Consequently, Direct Dial is not a telecommunications carrier, *i.e.*, "any provider of telecommunications services." *Id.* § 153(44). Instead, the service Direct Dial provides, as described in your filings with the Commission, is an "information service," which is defined in the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.* § 153(20). Because Direct Dial is not a telecommunications carrier, other telecommunication carriers, such as GTE and Michigan Bell, are not required to provide interconnection service pursuant to section 251.

Moreover, the Commission, in adopting rules to implement the interconnection provisions of the Act, made it clear that an information service provider would not be able to avail itself of the interconnection requirements of section 251 of the Act. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325, released August 6, 1996; *see also* 47 C.F.R. § 51.00 (1996). Pursuant to these rules, information service providers may take advantage of the interconnection provisions of the Act only to the extent that they also provide telecommunications services. The *Report and Order* provides the following:

We conclude that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of Section 251, and is subject to the obligations under section 251(a), to the extent that it is acting as a telecommunications carrier. We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, *so long as they are offering telecommunications through the same arrangement as well.*

FCC 96-325, para. 995 (emphasis added). Your complaint does not show that you are providing both information and telecommunications services.

Your complaint would also require a retroactive application of the Commission's rules implementing section 251. You seek relief under Section 251 of the Act, which became law when the Telecommunications Act of 1996 was signed into law in February 1996. As already noted, our implementing rules were adopted in August 1996. Your allegations with respect to Michigan Bell and GTE occurred prior to the date on which our implementing rules were adopted. Administrative rules do not have retroactive effect absent express authority from Congress. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). The Telecommunications Act of 1996 does not contain language that permits retroactive application.

Because we have determined that you are not a telecommunications carrier under section 251 of the Act, we need not address your request for preemption under sections 252 and 253.

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This ruling is issued pursuant to sections 4(i) and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 208, and authority delegated by section 0.291 of the Commission's rules, 47 C.F.R. § 0.291.

Sincerely,

A handwritten signature in black ink, appearing to read "John B. Muleta". The signature is fluid and cursive, with the first name "John" and last name "Muleta" clearly distinguishable.

John B. Muleta  
Chief, Enforcement Division  
Common Carrier Bureau