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

In the Matter of	)	
	)	
Sprint Communications Company, L.P.,	)	
	)	
Complainant,	)	
	)	File No. EB-00-MD-002
v.	)	
	)	
MGC Communications, Inc.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 2000 **Released:** June 9, 2000

By the Commission:

1. In this order, we deny Sprint's claim that the exchange access rates charged by MGC Communications, Inc. are unjust and unreasonable, and violate section 201(b) of the Communications Act of 1934, as amended (the Act).[1] As discussed below, we find that, by relying solely on the rates of MGC's incumbent competitors to establish a benchmark for reasonableness, Sprint has failed to meet its burden in this proceeding.

I. FACTS

2. MGC Communications is a facilities-based competitive local exchange carrier (CLEC) with operations in Nevada, California, Illinois, Georgia and Florida.[2] It offers both terminating and originating switched access service to interexchange carriers (IXCs) under its Tariff FCC No. 1.[3] Sprint Communications Company L.P. (Sprint) operates as a non-dominant

[1] 47 U.S.C. § 201(b).

[2] Complaint at 3, ¶ 6.

[3] *See* Complaint at 4, ¶ 9 & Exh. 3. MGC's tariff states that its access service "provides a two-point communications path between [an IXC] designated premises and an end user's premises" and "provides for the ability to originate calls from an end user's premises to [an IXC] designated premises, and to terminate calls from [an IXC] designated premises to an end user's premises in the LATA where it is provided." MGC Tariff FCC No. 1, ¶ 6.1.

interexchange carrier (IXC) throughout the United States and receives interstate access services from MGC in the five states in which MGC operates.[4]

3. In July 1997, MGC began both sending originating access traffic onto Sprint's network and providing terminating access service by completing calls from Sprint's network.[5] For each category of MGC's tariffed access service, its rates are substantially higher than those charged by the incumbent local exchange carriers (ILECs) with which MGC competes in its various service areas.[6] Once Sprint began receiving MGC's access-charge bills, it began recalculating the bills, applying the ILEC's tariffed rate and paying only that amount.[7] On January 11, 2000, Sprint filed its complaint, alleging that MGC's tariffed access rates are unreasonably high, in violation of section 201(b).[8]

II. DISCUSSION

4. Sprint argues that MGC's tariffed access rates are unjust and unreasonable under section 201(b)[9] because they exceed the rates charged by the ILECs in the areas where MGC operates. Sprint bases its argument on language from our access charge reform docket stating, "terminating rates that exceed those charged by the incumbent LEC serving the same market *may suggest* that a competitive LEC's terminating access rates are excessive."[10] From this passage, Sprint apparently seeks to create a *per se* rule, applicable to both terminating *and* originating access, under which *any* access rate that exceeds the competing ILEC rate would violate section 201(b). Thus, in its prayer for relief, Sprint requests that we declare that MGC's tariffed access rates are unjust and unreasonable "to the extent that they have exceeded the tariffed rates of the

[4] Complaint at 3, ¶ 5.

[5] *See* MGC Complaint at 5, ¶ 12, admitted, in relevant part, in Sprint Answer at 5, ¶ 12.

[6] According to evidence that Sprint submitted with its complaint, the average ILEC rate for local switching in MGC's service areas is approximately $0.004747, while MGC's tariffed rate is $0.0700. This amounts to a difference of approximately 1400%. Similarly, MGC's rates for local transport exceed the average ILEC rate by approximately 260%; its rates for an inquiry of the 800-number database exceed the average ILEC rate by approximately 150%. *See* Complaint at 5-6. *See also* Exhs. 1 & 2 to Complaint (providing side-by-side rate comparisons for different categories of service).

[7] MGC challenged Sprint's refusal to pay the tariffed rates for access service in a complaint filed on December 3, 1999. *See MGC Communications Co. v. Sprint Communications Co., L.P.*, File No. EB-99-MD-033. That proceeding will be the subject of a subsequent order.

[8] *See* Complaint at 7.

[9] Section 201(b) provides, in relevant part that "[a]ll charges, practices, classifications and regulations for and in connection with [interstate] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b).

[10] *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16142, ¶ 364 (1997) (emphasis added). *See* Sprint Opening Brief at 3.

former monopoly ILECs providing access services in the same areas as MGC."[11] Similarly, in its proposed conclusions of law, Sprint argues that, "[b]ecause MGC's tariffed interstate access rates exceed[] those of the former incumbent LECs providing access in the same areas as MGC," they violate section 201(b).[12] Sprint also asserts that its reliance on the ILEC rate is supported by a series of decisions stretching back to 1938, in which the Commission set rates for international telegraph carriers to allow a fair rate of return to the lowest-cost, bellwether provider.[13]

5. As an initial matter, the parties disagree on which side bears the burden of proof with respect to Sprint's 201(b) claims. Sprint argues that, in this proceeding, MGC must justify the reasonableness of its rates because Sprint has requested that, if we find MGC's rates to be unreasonable under section 201(b), we then exercise our authority under section 205(a) of the Act and prescribe a reasonable rate to be charged on a prospective basis.[14] The difficulty with Sprint's argument on this point is that it presupposes a finding favorable to Sprint on the threshold question that it has raised in this complaint proceeding: whether MGC's rates are reasonable. Section 205(a) empowers the Commission to prescribe a just and reasonable charge "[w]henever, after full opportunity for hearing, upon a complaint . . . the Commission shall be of opinion that a charge" violates the Act.[15] On Sprint's complaint, however, the first question that we must address is whether MGC's rate is unreasonable. This question is presented in the context of a section 208 complaint challenging the rate under section 201(b). In such circumstances, it is well settled that the complainant bears the burden of establishing that the challenged rate is unreasonable.[16]

6. Relying, as it does, solely on the competing ILEC rate as a benchmark for what is just and reasonable, Sprint has failed to meet its burden in this action. We decline Sprint's invitation to hold that any access rate that is higher than the ILEC's is necessarily unjust and unreasonable under section 201(b). Nothing in the Commission's existing rules or orders supports Sprint's legal position. In particular, Sprint's reliance on our access charge reform order

[11] Sprint Complaint at 7, ¶ 20.

[12] Complaint, Appendix A at 1. *See also* Complaint at 7, ¶ 18 ("MGC violates Section 201(b) of the Act by seeking to impose charges for access elements that exceed those of the former monopoly ILECs providing access services in the same areas as MGC."); *id.* at 5, ¶ 11 ("MGC's tariffed rates . . . exceeded those of the former monopoly incumbent local exchange carriers providing access services in the same areas as MGC. As such, they violate the requirements of Section 201(b) . . . .") (citation omitted).

[13] Sprint Opening Brief at 4-5 (citing, *inter alia*, *Postal Telegraph-Cable Co.*, 5 FCC 524, 527 (1938)).

[14] *See* Sprint Opening Brief at 9; Sprint Reply Brief at 6. In both of its briefs, Sprint relies on our order in *Resale and Shared Use of Common Carrier Facilities and Services*, Report and Order, 60 FCC2d 261, 284-85, ¶ 42 (1976).

[15] 47 U.S.C. § 205(a).

[16] *See AT&T Corp. v. Bell Atlantic Corp.*, 14 FCC Rcd 556, 594, 602, ¶¶ 88, 108 (1998); *Infonxx, Inc. v. New York Tel. Co.*, FCC 97-359, File No. E-96-26, 1997 WL 621592, ¶ 16 (1997); *Beehive Tel., Inc. v. Bell Operating Companies*, 10 FCC Rcd 10562, 10566, ¶¶ 23-24 (1995), *affirmed after voluntary remand*, 12 FCC Rcd 17930 (1997).

is misplaced. There, we noted only that CLEC terminating access rates higher than the competing ILEC rates "may suggest" that the CLEC rates are excessive; in no way did we announce a *per se* rule of the sort for which Sprint now contends. As a CLEC, MGC is not subject to our part 69 access-charge rules,[17] nor is it required to file tariffs under part 61 of our rules.[18] Indeed, to the extent a review of the reasonableness of a CLEC's rates depends on a carrier-specific review of the costs of providing service, it is impossible to be categorical on this point since a CLEC's costs may not be comparable to those of an ILEC.[19] None of the rate-making decisions that Sprint cites is to the contrary.

III. CONCLUSION AND ORDERING CLAUSES

7. We deny Sprint's complaint because we reject its argument that any access rate greater than that charged by an incumbent LEC is necessarily unjust and unreasonable within the meaning of section 201(b).

[17] *See* 47 C.F.R. § 69.1, *et seq.*

[18] *See* 47 C.F.R. § 61.1, *et seq.*

[19] In the Access Charge Reform Docket, we acknowledged that CLEC access rates may "be higher due to the CLECs' high start-up costs for building new networks, their small geographical service areas, and the limited number of subscribers over which CLECs can distribute costs." *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14343, ¶ 244 (1999). However, we noted that requiring IXCs to bear these costs may "impose unfair burdens on IXC customers that pay rates reflecting these CLEC costs even though the IXC customers may not subscribe to the CLEC." *Id.*

As Sprint notes, staff denied it discovery into the question of whether MGC may cross-subsidize certain portions of its operations with its access revenues. *See* Sprint Opening Brief at 8. *See also* February 17, 2000, letter of Jeffrey Dygert (FCC) to counsel for the parties. However, that decision was not based on the conclusion that such information necessarily would be irrelevant to the reasonableness of CLEC access rates. Rather, the discovery request was denied because it was irrelevant to the claim as Sprint pleaded it – that MGC's rates were *per se* unreasonable because they exceeded the competing ILEC rates – and, under our rules, complainants are bound by the manner in which they plead their claims. Under rule 1.721, complaints are required to include citation to the portion of the Act alleged to have been violated, a "complete statement of facts which, if proven true, would constitute such a violation," and "[p]roposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint." 47 C.F.R. § 1.721(a)(4) - (6). *See also, e.g., Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report & Order, 12 FCC Rcd 22497, 22534, ¶ 82 (1997). By requiring parties to engage in fact pleading, rather than the notice pleading permitted in federal court, our rules require that the full basis for a claim be set out in a complaint. Having failed adequately to plead its cross-subsidy argument, Sprint was barred from seeking to raise it, or seeking discovery on it, later in the action.

8. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 201 and 208 of the Act, as amended, 47 U.S.C. §§ 154(i), 201 and 208, Sprint's formal complaint filed in this proceeding IS DENIED.

9. IT IS FURTHER ORDERED that both of the above proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary