

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

In the Matter of
Operator Communications, Inc.,
Complainant,
v.
Contel of the South, Inc. d/b/a Verizon Mid-States,
Verizon California Inc., The Micronesian
Telecommunications Corporation, Verizon
Delaware Inc., Verizon Florida Inc., Verizon
Maryland Inc., Verizon New England Inc.,
Verizon New York Inc., Verizon New Jersey Inc.,
Verizon North Inc., Verizon Northwest Inc.,
Verizon South Inc., Verizon Pennsylvania Inc.,
GTE Southwest Inc., Verizon Washington, D.C.
Inc., and Verizon West Virginia, Inc.,
Defendants.

File No. EB-05-MD-009

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 2005

Released: December 9, 2005

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we dismiss a formal complaint¹ filed by Operator Communications, Inc. ("OCI") against the Verizon Telephone Companies² pursuant to section

1 Formal Complaint of Operator Communications, Inc., File No. EB-05-MD-009 (filed June 3, 2005) ("Formal Complaint").

2 Contel of the South, Inc. d/b/a Verizon Mid-States, Verizon California Inc., The Micronesian Telecommunications Corporation, Verizon Delaware Inc., Verizon Florida Inc., Verizon Maryland Inc., Verizon New England Inc., Verizon New York Inc., Verizon New Jersey Inc., Verizon North Inc., Verizon Northwest Inc., Verizon South Inc., Verizon Pennsylvania Inc., GTE Southwest Inc., Verizon Washington, D.C. Inc., and Verizon West Virginia, Inc. See Revised Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-05-MD-009 (filed Aug. 8, 2005) ("Revised Joint Statement") at 1, n.1.

208 of the Communications Act of 1934, as amended (“Act”).³ OCI’s Formal Complaint seeks, *inter alia*, a refund of certain presubscribed interexchange carrier charges (“PICCs”) that Verizon billed to OCI from April 1998 to April 2001. OCI did not initiate its claim for refund, however, until July 6, 2004, more than six years after the charges began, and more than three years after the charges ceased. OCI has proffered no valid basis to excuse the delay in initiating its claims. Consequently, OCI’s claim is barred by the two-year statute of limitations in section 415 of the Act.⁴ To promote fairness and finality, a party seeking from the Commission the serious remedy of a monetary damages award against a particular common carrier must do so in strict accordance with the requirements of the Act and our rules.

II. BACKGROUND

A. The Parties

2. At all relevant times, OCI was a presubscribed 0+ interexchange carrier for payphones owned by the Verizon Telephone Companies.⁵ The presubscribed interexchange carrier is selected by either the owner of the payphone or the location provider to provide long distance services for coinless calls made by callers dialing “0” plus the telephone number. OCI provides operator-assisted calling service, primarily from local exchange carrier (“LEC”) pay telephones.⁶ The Verizon Telephone Companies (“Verizon”) are the affiliated incumbent local exchange carriers and wholly owned (directly or indirectly) subsidiaries of Verizon Communications Inc.⁷ Verizon serves territories formerly served by Bell Atlantic entities, NYNEX entities, and GTE.⁸

B. The Notice and Comment Proceeding

3. On May 4, 1998, the Commission issued a Public Notice seeking comments regarding whether and to what extent the Commission’s rules permitted LECs to bill PICCs for lines serving LEC-owned payphones.⁹ The Commission initiated that proceeding (the “Notice-and-Comment Proceeding”) in response to several letters -- including a letter dated April 22, 1998 from OCI to the Chief of the

³ 47 U.S.C. § 208.

⁴ 47 U.S.C. § 415.

⁵ *See, e.g.*, Revised Joint Statement at 2, ¶ 2. OCI was formerly known as Oncor. *See* Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-05-MD-009 (filed July 12, 2005) (“Joint Statement”) at Exhibits JS-15, 17, 20, 22.

⁶ OCI is no longer a going concern. *See Contel of the South, Inc. d/b/a/Verizon Mid-States v. Operator Communications, Inc.*, Answer and Affirmative Defenses of Operator Communications, Inc., File No. EB-05-MD-007 (filed June 23, 2005) Tab D (Legal Analysis) at 1. Its only “assets” appear to be this claim against Verizon and similar claims that it filed in 2005 against SBC Communications, Inc., Qwest Corporation, and Sprint Corporation, all of whom raise the same limitations defense as does Verizon here. *See OCI v. SBC Communications, Inc.*, Informal Complaint of Operator Communications, Inc., File No. EB-05-MDIC-0017 (filed June 17, 2005); *OCI v. Sprint Corp.*, Informal Complaint of Operator Communications, Inc., File No. EB-05-MDIC-0019 (filed June 17, 2005); *OCI v. Qwest Corp.*, Informal Complaint of Operator Communications, Inc., File No. EB-05-MDIC-0018 (filed June 17, 2005).

⁷ *See, e.g.*, Revised Joint Statement at 2, ¶¶ 3-4.

⁸ *See, e.g.*, *Contel of the South, Inc. d/b/a/Verizon Mid-States v. Operator Communications, Inc.*, Revised Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-05-MD-007 (filed Aug. 8, 2005) at 10, ¶¶ 49-50.

⁹ Formal Complaint at Exhibit 2 (Commission Seeks Comment on Specific Questions Related to Assessment of Presubscribed Interexchange Carrier Charges on Public Payphone Lines, CCB/CPD No. 98-34 (rel. May 4, 1998)) (“Public Notice”).

Common Carrier Bureau¹⁰ -- questioning the lawfulness of such PICCs then being billed by LECs.¹¹

4. Later in 1998, Bell Atlantic filed comments and reply comments, and OCI filed comments, in the Notice-and-Comment Proceeding.¹² In 1999, OCI filed in the Notice-and-Comment Proceeding a motion for interim relief -- to which Bell Atlantic filed an Opposition -- and a request to file a supplement to its motion for interim relief.¹³ OCI sought in those filings a Commission order directing Bell Atlantic to refrain from taking adverse action against OCI based on OCI's refusal to pay PICCs on payphone lines.¹⁴ The Commission did not rule on OCI's Interim Request and Supplement Request in the Notice-and-Comment Proceeding, which remains open.¹⁵ The last OCI filing in the Notice-and-Comment Proceeding was its Supplement Request, dated August 20, 1999.¹⁶

5. Between April 1998 and April 2001, in reliance on various tariff provisions, Verizon assessed the PICC on OCI for lines serving Verizon-owned payphones.¹⁷ OCI ultimately paid those charges, protesting to Verizon as it did so.¹⁸

6. On June 25, 2003, in a proceeding other than the Notice-and-Comment Proceeding, the Commission issued an order addressing the questions raised in the Notice-and-Comment Proceeding.¹⁹ Specifically, the *Payphone PICC Order* "establish[ed] that payphone lines are exempted from the PICC on a going-forward basis Therefore, price cap LECs that still assess the PICC on multi-line business lines must adjust their rates in their October 1, 2003 tariff filings to reflect that the PICC no longer applies to payphone lines."²⁰ The *Payphone PICC Order* went on to state that the Commission "ma[d]e no finding with respect to the application of PICCs prior to the effective date of this Order."²¹

¹⁰ Formal Complaint at Exhibit 1 (Letter dated Apr. 22, 1998 to Chief, Common Carrier Bureau, from General Counsel, Oncor, Re: Application of Presubscribed Interexchange Carrier (PICC) Charges to Pay Telephones Owned by Local Exchange Carriers) ("April 1998 Letter").

¹¹ See Public Notice at 3.

¹² Formal Complaint at Exhibit 3 (Comments of Oncor Communications, Inc.); Joint Statement at Exhibit JS-18 (Comments of Bell Atlantic), JS-19 (Reply Comments of Bell Atlantic). Other commenters included SBC, US West, Sprint, Southern New England Telephone, One Call Communications, National Operator Services, GTE Service Corporation, Cleartel Communications, BellSouth, MCI, and the American Public Communications Council. See, e.g., Formal Complaint at 6, n.18.

¹³ See Formal Complaint at Exhibit 4 ("Interim Request"); Joint Statement at Exhibit JS-21; Formal Complaint at Exhibit 7 ("Supplement Request").

¹⁴ Interim Request at 1, 4-5, 10; Supplement Request at 1-2.

¹⁵ See Revised Joint Statement at 9, ¶ 68.

¹⁶ See Formal Complaint at 32-33, ¶ 73.

¹⁷ See Revised Joint Statement at 4-7, ¶¶ 25, 29-53.

¹⁸ See, e.g., *id.* at 4-7, ¶¶ 26-55; 10-12, ¶¶ 75-84.

¹⁹ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, Order on Reconsideration, 18 FCC Rcd 12626 (2003) ("*Payphone PICC Order*").

²⁰ *Payphone PICC Order*, 18 FCC Rcd at 12629-30, ¶¶ 8-9.

²¹ *Id.* at 12629, ¶ 8. The Commission also noted that "[p]rice cap LECs may recover the revenue previously recovered through assessing the PICC on payphone lines by adjusting their multi-line business PICCs." *Id.* at 12629-30, ¶ 9.

C. OCI's Claim for Damages from Verizon

7. On July 6, 2004, pursuant to section 1.716 of our rules,²² OCI filed an informal complaint against Verizon seeking (i) lost profits and (ii) refunds of the PICCs that Verizon assessed OCI from April 1998 to April 2001.²³ OCI contended that the *Payphone PICC Order's* exemption of payphone lines from PICCs applies retroactively and renders Verizon's PICCs unlawful under sections 201(b) and 276 of the Act. After Verizon responded by denying OCI's claim,²⁴ OCI "converted" its informal complaint to a formal complaint pursuant to section 1.718 of our rules.²⁵

8. Verizon asserts three defenses to OCI's claim. First, Verizon argues that the two-year statute of limitations in section 415 of the Act bars OCI's claim, because the claim accrued upon OCI's receipt of each PICC bill, and OCI received the last such bill in April 2001, much more than two years before OCI filed the July 6, 2004 informal complaint.²⁶ Second, in Verizon's view, Verizon's PICCs were lawfully tariffed when assessed on OCI through April 2001, and the Commission's subsequent exemption of payphone lines from PICCs in the 2003 *Payphone PICC Order* applies prospectively only.²⁷ Third, according to Verizon, Verizon assessed most of the PICCs at issue pursuant to tariffs that were filed on a "streamlined" basis pursuant to section 204(a)(3) of the Act,²⁸ so most of the charges are "deemed lawful" and cannot form the basis of a damages award.²⁹

9. For the following reasons, we hold that the two-year statute of limitations in section 415 of the Act bars OCI's claim in its entirety. Consequently, we dismiss OCI's Formal Complaint without reaching Verizon's other affirmative defenses.

III. DISCUSSION

A. Absent Tolling, the Two-Year Statute of Limitations Bars OCI's Claim.

10. The two-year statute of limitations in section 415 of the Act applies to OCI's claim.³⁰

²² 47 C.F.R. § 1.716.

²³ Informal Complaint, File No. EB-04-MDIC-0096 (filed July 6, 2004) ("Informal Complaint").

²⁴ Letter from Kathleen Grillo, Verizon, to Radhika Karmarkar, Enforcement Bureau, File No. EB-04-MDIC-096 (filed Sept. 3, 2004).

²⁵ 47 C.F.R. § 1.718. *See* Formal Complaint. *See also* Letter from Alexander P. Starr, Enforcement Bureau, to Danny Adams, counsel for OCI, and Karen Zacharia, counsel for Verizon, File No. E05-MD-006 (filed May 23, 2005) (extending until June 3, 2005 OCI's deadline to convert its informal complaint into a formal complaint pursuant to rule 1.718).

²⁶ *See, e.g.*, The Verizon Telephone Companies' Supplemental Answer to Operator Communications, Inc.'s Complaint, File No. EB-05-MD-009 (filed June 30, 2005) ("Verizon Answer") at 18-22, ¶¶ 52-64; 31-32; Supplemental Legal Analysis in Support of Verizon's Supplemental Answer, File No. EB-05-MD-009 (filed June 30, 2005) ("Verizon Legal Analysis") at 1, 4-10; Verizon's Initial Brief, File No. EB-05-MD-009 (filed Aug. 25, 2005) at 1, 8; Verizon's Reply Brief, File No. EB-05-MD-009 (filed Sept. 9, 2005) at 1-2.

²⁷ *See* Verizon Answer at 7-9, ¶¶ 18-19, 21-24; 11-12, ¶ 31; 15-16, ¶¶ 42-45; 24, ¶ 71; 26-27, ¶¶ 76-81; 32-33. *See also* Verizon Legal Analysis at 1-3, 9-13; Verizon's Initial Brief at 1; Verizon's Reply Brief at 1.

²⁸ 47 U.S.C. § 204(a)(3).

²⁹ *See* Verizon Answer at 27-28, ¶¶ 82-83; 33. *See also* Verizon Legal Analysis at 1, 3, 13-16; Verizon's Initial Brief at 2, 9.

³⁰ 47 U.S.C. § 415(b) and (c), providing that all complaints against carriers for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues.

That “statute of limitations is a statute of repose, designed to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.”³¹ Consequently, “[s]ection 415 ... must be applied even if to do so produces hardships.”³²

11. It is well established that a customer’s claim challenging the lawfulness of a carrier’s charges accrues when the customer receives the carrier’s bill containing the allegedly unlawful charges.³³ Applying that rule here, a portion of OCI’s damages claim accrued each time OCI received a PICC bill from Verizon from April 1998 to April 2001.³⁴ Accordingly, under the two-year statute of limitations set forth in section 415 of the Act, portions of OCI’s damages claim began to expire in April 2000, and the claim lapsed altogether in April 2003. Consequently, absent some basis for tolling the running of the limitations period, we must dismiss as time-barred OCI’s July 2004 claim for PICC refunds.

12. OCI does not dispute the foregoing operation of the statute of limitations. OCI asserts two grounds, however, for tolling the running of the limitations period: (1) general principles of equity and (2) the pendency of the Notice-and-Comment Proceeding. We consider and reject each of those grounds below.

B. Principles of Equity Do Not Warrant Tolling.

13. OCI argues that principles of equity warrant tolling of the limitations period applicable to its damages claim against Verizon, because (i) OCI had to pay Verizon’s PICC bills in order to avoid serious harm to its business; (ii) Verizon knowingly assumed the risk that the Commission would ultimately find the payphone PICCs unlawful; (iii) Verizon’s payphone PICCs did not serve to reimburse Verizon for any incurred costs; (iv) the Commission’s PICC rules were ambiguous, as applied to payphone lines; (v) OCI actively participated in the Notice-and-Comment Proceeding; (vi) the Commission did not resolve the Notice-and-Comment Proceeding expeditiously; (vii) OCI consistently

³¹ *Bunker Ramo Corp. v. The Western Union Telegraph Co., New York, N.T.*, Memorandum Opinion and Order, 31 FCC 2d 449, 453-4, ¶ 12 (Rev. Bd. 1971) (“*Bunker Ramo v. Western Union*”). See, e.g., *Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Co.*, Memorandum Opinion and Order, 17 FCC Rcd 24201, 24222-23, ¶ 50 (2002) (“*EUCL Order*”), *aff’d*, *Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004) (“*Communications Vending v. FCC*”); *US Sprint Communications Co. v. American Telephone & Telegraph Co.*, Memorandum Opinion and Order, 9 FCC Rcd 4801, 4803, ¶ 10 (1994) (“*US Sprint v. AT&T*”).

³² *Michael J. Valenti and Real Estate Market Place of New Jersey T/A Real Estate Alternative v. American Telephone and Telegraph Co.*, Memorandum Opinion and Order, 12 FCC Rcd 2611, 2621-22, ¶ 24 (1997) (“*Valenti v. AT&T*”), quoting *Municipality of Anchorage d/b/a Anchorage Telephone Utility v. Alascom, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 2472, 2476, ¶ 30 (Com. Car. Bur. 1989) (“*Anchorage v. Alascom*”). See, e.g., *Communications Vending v. FCC*, 365 F.3d at 1075.

³³ See, e.g., *MCI Telecommunications Corp. v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 9328, 9329-30, ¶ 5 (2000); *AT&T Corp. v. Bell Atlantic – Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 565, ¶ 19 (1998); *Aetna Life Insurance Co. v. American Telephone and Telegraph Co.*, 3 FCC Rcd 2126, 2128-29, ¶ 12 (1988); *Tele-Valuation, Inc. v. American Telephone and Telegraph Co.*, Memorandum Opinion and Order, 73 FCC 2d 450, 452, ¶ 4 (1979) (“*Tele-Valuation v. AT&T*”); see also *Communications Vending v. FCC*, 365 F.3d at 1073.

³⁴ We note that OCI’s claims accrued at this time notwithstanding the ongoing Notice-and-Comment proceeding, in which the Commission was evaluating the validity of PICC charges such as those at issue here. See, e.g., *Communications Vending Corp.*, 365 F.3d at 1073-74 (rejecting argument that “a cause of action cannot accrue [under section 415 of the Act] when the controlling law does not recognize its validity”), citing *Atchison, Topeka & Santa Fe Ry. Co. v. ICC*, 851 F.2d 1432 (D.C. Cir. 1988) (reversing ICC conclusion that party’s cause of action did not accrue until agency resolved relevant legal question). Below, we also conclude that the ongoing proceeding does not form a basis for tolling the two-year limitations period. See *infra* Part III.C.

protested to Verizon regarding the payphone PICCs; and (viii) “OCI had no other [remedial] options.... It was stuck in a notice and comment proceeding.”³⁵ Put differently, according to OCI, it would be unfair to enforce the statute of limitations against OCI, given that doing so would harm OCI more than it would benefit Verizon, and OCI did everything it could and should have done to preserve its claim. We reject OCI’s argument, for the following reasons.

14. OCI has not cited any precedent (and we have found none) in which either the Commission or a court has tolled the operation of section 415 on “equitable” grounds like those proffered by OCI here. “The construction of section 415 by the Commission and the federal courts has been strict and exceptions to its application have been confined to narrow circumstances.”³⁶ Indeed, the Commission has identified only one circumstance that warrants equitable tolling of section 415 – fraudulent concealment by the defendant of the facts giving rise to the claim.³⁷ As the Commission has explained:

[Where] there is no allegation of fraud or deceit, having been practiced by the defendant upon complainant to prevent him from becoming aware of the facts which are the basis of its claim, *there is no way of . . . tolling the statute of limitations.*³⁸

15. Applying that standard here, “there is no way of tolling the statute of limitations.” OCI has neither shown nor even alleged that Verizon concealed the fact that Verizon was assessing PICCs on OCI’s payphone lines.³⁹ In fact, Verizon expressly suggested over five years ago that OCI should file a

³⁵ Formal Complaint at 29, ¶ 67. *See, e.g.*, Formal Complaint at 4-9, ¶¶ 8-9, 18-19; 12-17, ¶¶ 28, 30-36, 38-39; 19, ¶¶ 45-47; 29-34, ¶¶ 65-75. *See also* Initial Brief of Operator Communications, Inc., File No. EB-05-MD-009 (filed Aug. 25, 2005) (“OCI Brief”) at 14-15; Letter from Danny E. Adams, counsel for OCI, to Marlene H. Dortch, Secretary, FCC, File No. EB-05-MD-009 (filed Sept. 9, 2005, in lieu of a reply brief).

³⁶ *Anchorage v. Alascom*, 4 FCC Rcd at 2475, ¶ 23. *See, e.g., Communications Vending v. FCC*, 365 F.3d at 1075 (“The Commission has construed [section 415] strictly. . . We too have set a high hurdle for equitable tolling, allowing a statute to be tolled ‘only in extraordinary and carefully circumscribed instances.’”); *Valenti v. AT&T*, 12 FCC Rcd at 2621-22, ¶ 24, quoting *Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania*, 25 FCC 2d 385, 389, ¶ 11 (1971) (“*Armstrong Utilities v. General Telephone*”) (“The construction of Section 415, both by the Commission and the federal courts, has been ‘strict’ . . .”).

³⁷ *EUCL Order*, 17 FCC Rcd at 24222, n.145; *Valenti v. AT&T*, 12 FCC Rcd at 2621-22, ¶ 24; *US Sprint v. AT&T*, 9 FCC Rcd at 4802, ¶ 10; *Anchorage v. Alascom*, 4 FCC Rcd at 2475, ¶ 23; *Tele-Valuation v. AT&T*, 73 FCC2d at 452-3, ¶ 4 and n.7; *U.S. Cablevision v. New York Telephone Co.*, Memorandum Opinion and Order, 46 FCC 2d 704, 706-7, ¶ 5 (1974) (“*Cablevision v. New York Tel*”); *Bunker Ramo v. Western Union*, 31 FCC 2d at 453-4, ¶ 12; *Armstrong Utilities v. General Telephone*, 25 FCC 2d at 390, ¶ 15.

³⁸ *Valenti v. AT&T*, 12 FCC Rcd at 2621-22, ¶ 24, quoting *Armstrong Utilities v. General Telephone*, 25 FCC 2d at 390, ¶ 15 (emphasis added). Although the Commission has implied that there might be some additional basis for equitable tolling, *see, e.g., Bunker Ramo v. Western Union*, 31 FCC 2d at 453-4, ¶ 12, the Commission has never identified or relied upon any basis other than fraudulent concealment. In the *EUCL Order*, the Commission simply assumed, without deciding, that “due diligence” by the plaintiff might warrant tolling, and then demonstrated the absence of such diligence. *See EUCL Order*, 17 FCC Rcd at 24225-26, ¶¶ 57-59.

³⁹ *See, e.g., Cablevision v. New York Tel*, 46 FCC 2d at 706-7, ¶ 5 (“we cannot hold that the statute of limitations was tolled in view of complainant’s failure to allege any facts whatsoever indicating that fraud or deceit was practiced by NYTelco upon complainant to prevent complainant from becoming aware of the basic facts upon which its claim for reimbursement is based”); *Anchorage v. Alascom*, 4 FCC Rcd at 2476, ¶ 30 (denying request for equitable estoppel of section 415, because the complainant “has convincingly shown neither that Alascom fraudulently concealed facts that were relevant and material to the alleged violations of the Act nor that Alascom misrepresented, either intentionally or unintentionally, any such facts. . .”).

complaint if it sought to recover such PICCs.⁴⁰

16. In a short footnote in its final substantive submission -- which concerns an entirely different issue -- OCI suggests for the first time that Verizon committed fraud by twice telling OCI that Verizon would refund paid PICCs if the Commission were to rule that payphone PICCs are unlawful.⁴¹ OCI's suggestion is not only late,⁴² but also erroneous. One Verizon statement was nothing more than a recognition by Bell Atlantic that OCI's agreement to pay disputed charges was not a concession by OCI of the charges' validity; no reference to refunds was made.⁴³ The other Verizon statement was one made merely by a GTE billing specialist that "appropriate" credits would be provided if the Commission were to rule in OCI's favor.⁴⁴ However, OCI could not have reasonably believed that "appropriate" credits would include those sought more than two years after the disputed charges were imposed, especially given that, several months *after* this statement by a GTE billing specialist, attorneys for GTE's imminent purchaser (Bell Atlantic) expressly notified OCI of the need to file a complaint.⁴⁵ Indeed, OCI has presented no argument or evidence that it refrained from filing a complaint in reliance on either of these statements. Thus, OCI has fallen short of meeting the high evidentiary burden of showing fraud.⁴⁶ Consequently, we reject OCI's contention that we should equitably toll the operation of section 415 in this case.

17. In addition, even assuming, *arguendo*, that we could equitably toll the operation of section 415 on some basis other than fraudulent concealment, OCI's proffered bases are not compelling. First, as fully explained *infra*,⁴⁷ OCI's contention that it had no choice but to await the outcome of the Notice-and-Comment Proceeding before filing a complaint for damages against Verizon is unfounded. As Verizon itself pointed out to OCI in 1999, at all relevant times OCI could have filed a complaint for damages against Verizon if OCI had an interest in pursuing that remedy.⁴⁸ Second, even within the context of the Notice-and-Comment Proceeding, OCI did not diligently pursue the remedy it seeks here: OCI's submissions never mentioned a request for refunds or lost profits;⁴⁹ and OCI submitted its last pleading in that Proceeding in 1999,⁵⁰ and then remained silent for almost four years before the Commission answered the payphone PICC questions raised in that Proceeding. Third, even after the

⁴⁰ Specifically, in one of its filings in the Notice-and-Comment Proceeding, Verizon stated: "[I]f [OCI] truly believes the [PICC] charge is unlawful, it may file a complaint." Joint Statement Exhibit JS-21 (Bell Atlantic Opposition to Oncor Motion for Interim Relief, dated June 25, 1999) at 1.

⁴¹ OCI Brief at 14-15, n.6.

⁴² For example, 47 C.F.R. §§ 1.720(b)-(d) and 1.721(a)(5)-(6) required OCI to set forth in its Formal Complaint *all the facts and legal analyses* upon which the claims are based.

⁴³ See Formal Complaint Exhibit 10, Attachment C, at 1.

⁴⁴ See Formal Complaint Exhibit 10, Attachment D, at 2.

⁴⁵ See Joint Statement Exhibit JS-21 at 1.

⁴⁶ See generally *Cablevision v. New York Tel*, 46 FCC 2d at 706-7, ¶ 5; *Anchorage v. Alascom*, 4 FCC Rcd at 2476, ¶ 30.

⁴⁷ See Part III(C), *infra*.

⁴⁸ See Joint Statement Exhibit JS-21 at 1. Indeed, US West made the same point to OCI in one of Qwest's filings in the Notice-and-Comment Proceeding, stating that "Sections 206-209 of the Communications Act provide a mechanism whereby Oncor can challenge any action which it believes contravenes the provisions of the Act." Opposition of US West Communications, Inc. at 8, CCB/CPD No. 98-34 (filed Dec. 14, 1999).

⁴⁹ See Formal Complaint Exhibits 1, 3, 4, 7.

⁵⁰ See, e.g., Formal Complaint at 32-33, ¶ 73.

Commission answered the payphone PICC questions raised in that Proceeding,⁵¹ OCI waited another year before filing its informal complaint for damages against Verizon.⁵²

18. Finally, OCI's assertion that applying the statute of limitations would unfairly allow a large company like Verizon to retain ill-gotten gains at the expense of a small company like OCI similarly provides no basis for tolling section 415. As the Commission has frequently stated, "the fact that application of section 415 of the Act may result in hardship in some instances does not mean Congress intended that the statute be tolled or that a defendant may be estopped from reliance thereon."⁵³ Indeed, statutes of limitations inherently involve the potential for denying otherwise valid claims. In recently affirming the Commission's holding that section 415 barred certain damages claims brought by relatively small independent payphone providers ("IPPs") against relatively large local exchange carriers ("LECs") (including Verizon), the D.C. Circuit observed:

While it is certainly true that the Commission's decision [not to equitably toll section 415] allows the LECs to keep money that ... they collected unlawfully, that is both the nature of a statute of limitations and the consequence of the IPPs' failure to file and pursue their complaints in a timely manner.⁵⁴

That observation is particularly apt in this proceeding, because here, unlike in the D.C. Circuit case, Verizon asserts several defenses that the Commission has not decided; consequently, here, unlike in the D.C. Circuit case, it is not clear that Verizon collected the charges unlawfully.

19. In sum, we reject OCI's contention that we should equitably toll the running of the limitations period under section 415. OCI has shown neither fraudulent concealment by Verizon nor any other basis to warrant such tolling.

C. The Pendency of the Notice-and-Comment Proceeding Does Not Warrant Tolling.

20. OCI also contends that the pendency of the Notice-and-Comment Proceeding tolls the running of the limitations period for OCI's damages claim against Verizon. In OCI's view, once the Commission chose to examine the lawfulness of payphone PICCs in the context of the Notice-and-Comment Proceeding, OCI allegedly had no choice but to await that Proceeding's outcome before filing its damages claim.⁵⁵ According to OCI:

[C]arriers did not have the same options they have today for filing complaints against other carriers. OCI's only option – particularly since the Commission already initiated a proceeding addressing the matter – was to submit pleadings, comments, motions, and form orders in the [Notice-and-Comment Proceeding] [A]ny other initiative at the

⁵¹ See *Payphone PICC Order*.

⁵² See *Informal Complaint*.

⁵³ *Anchorage v. Alascom*, 4 FCC Rcd at 2476-7, ¶ 32. See, e.g., *Valenti v. AT&T*, 12 FCC Rcd at 2621-22, ¶ 24; *Communications Vending v. FCC*, 365 F.3d at 1075.

⁵⁴ *Communications Vending v. FCC*, 365 F.3d at 1076 (internal quotation marks and citations omitted).

⁵⁵ See, e.g., *Formal Complaint* at 16, ¶ 38; 23-28, ¶¶ 54-64. See also *Reply of Operator Communications, Inc.*, File No. EB-05-MD-009 (filed June 30, 2005) ("OCI Reply") *Legal Analysis* at 23-26.

Commission would be duplicative.⁵⁶

21. OCI's fundamental premise is incorrect. It simply is not true that an aggrieved party could not file an adjudicatory complaint for damages against a particular defendant while a general, notice-and-comment proceeding involving similar issues was pending.⁵⁷ No Commission rule or order creates such a bar, and OCI cites to none. Recognizing this, Verizon pointed out to OCI the need to file a complaint in 1999,⁵⁸ as did Qwest,⁵⁹ which OCI failed to do. Indeed, the Commission's rules contemplate the possibility of simultaneous complaint and non-complaint proceedings. Rule 1.721(a)(9) requires a plaintiff to indicate "whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission. . . ."⁶⁰ Thus, the fact that the Notice-and-Comment Proceeding was pending did not bar OCI from filing, at a minimum, an informal complaint to preserve its rights and did not toll the limitations period applicable to OCI's adjudicatory damages claim against Verizon.⁶¹ Indeed, under closely analogous circumstances, the D.C. Circuit recently confirmed that the filing of a petition for declaratory ruling by a trade association does not toll the statute of limitations for damages complaints by individual payphone providers addressing the same underlying conduct.⁶²

22. OCI analogizes the situation here to situations in which courts, invoking the administrative exhaustion doctrine, toll the limitations period for filing a court claim while a party pursues

⁵⁶ Formal Complaint at 16, ¶ 38.

⁵⁷ OCI's repeated reference to 47 U.S.C. § 207 is mystifying. *See e.g.*, Formal Complaint at 15, n.52; 26-7, ¶¶ 60, 62; OCI Reply at 25-26. Section 207 requires parties seeking recovery of damages to file a complaint either with the Commission *or* in federal court, but not both. This provision, however, has nothing to do with filing a complaint with the Commission while a notice-and-comment proceeding is pending at the Commission. Moreover, OCI's unsupported suggestion that the complaint procedures somehow did not exist during the April 1998-April 2001 timeframe (*see, e.g.*, Formal Complaint at 16, ¶ 38) is similarly inexplicable. Rules governing the filing of both informal and formal complaints were in place at the time and virtually identical to those existing today. *See Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997) (subsequent history omitted). *See also Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 8 FCC Rcd 2614 (1993); *Amendment of Rules Governing Procedures to be Followed Where Formal Complaints are Filed Against Common Carriers*, Report and Order, 3 FCC Rcd 1806 (1988).

⁵⁸ Joint Statement Exhibit JS-21 at 1.

⁵⁹ Opposition of US West Communications, Inc. at 8, CCB/CPD No. 98-34 (filed Dec. 14, 1999); *see* n.42, *supra*.

⁶⁰ 47 C.F.R. § 1.721(a)(9).

⁶¹ OCI warns that, if parties can file complaints while related proceedings are pending elsewhere at the Commission, a flood of complaints will be filed whenever an unresolved issue of broad industry concern arises. *See* Formal Complaint at 28, ¶ 64. As stated above, however, our holding here is nothing new; aggrieved parties have always had the option to file complaints under those circumstances, and the Commission has managed its workload accordingly. Moreover, the Commission's informal complaint process provides parties a specific but streamlined option for preserving damages claims while related issues of broad industry concern are addressed in other proceedings. 47 C.F.R. §§ 1.716-1.718. *See e.g., AT&T Corp. v. Virgin Islands Telephone Corp. d/b/a Innovative Telephone*, Order, File No. EB-01-MDIC-0552 (rel. Nov. 21, 2004) (extending time for defendant to respond to the informal complaint until 90 days after the D.C. Circuit ruled on a different case involving substantially similar issues). Indeed, under OCI's theory, any notice and comment proceeding would serve to toll the statute of limitation for any participating party for any claim for damages relating to the subject of the administrative proceeding. Such an outcome would eviscerate section 415.

⁶² *See Communications Vending v. FCC*, 365 F.3d at 1076 ("that petition sought only a declaratory ruling that the LECs' imposition of EUCL charges was unlawful, so it could neither have tolled the statute nor otherwise excused the [independent payphone providers'] failure to pursue complaints for damages").

all available administrative remedies.⁶³ That analogy does not bear out. The administrative exhaustion doctrine addresses the adjudicatory functions of, and the relationships between, agencies and courts and does not apply in this wholly intra-agency context. The question here concerns the complaint and non-complaint functions within the Commission itself, not the complaint functions of the Commission and courts; and, as previously stated, there is no Commission rule or order requiring “exhaustion” of general notice-and-comment procedures before a particular plaintiff may file an adjudicative complaint for damages against a specific defendant.⁶⁴

23. Almost as an aside, OCI cursorily suggests in its Formal Complaint that its submissions in the Notice-and-Comment Proceeding constitute an informal complaint for damages under Commission rules and thereby tolled the running of the limitations period of section 415.⁶⁵ We reject that suggestion. An “informal complaint” filed pursuant to sections 1.716 – 1.718 of the Commission’s rules constitutes a “complaint” within the meaning of section 415 of the Act and thus tolls the running of the limitations period.⁶⁶ Although the Commission’s rules regarding the content of informal complaints are not extensive, they do require the complainant to put a defendant and the Commission on fair notice that the complainant is seeking (i) the initiation of the Commission’s section 208 complaint procedures (ii) regarding a particular defendant and (iii) a specific remedy that may later be sought in a formal complaint.⁶⁷

24. OCI’s submissions in the Notice-and-Comment Proceeding did none of those things. OCI’s April 1998 Letter and subsequent Comments were not styled as complaints, did not reference the complaint provisions of the Act or the Commission’s rules, did not name any Verizon entity as a particular target of their actions, and did not request the specific remedy of monetary damages against a particular defendant, which remedy “can only be obtained from the Commission within the parameters established by Sections 206-209 of the Act and Sections 1.711 through 1.735 of the Commission’s rules.”⁶⁸ The same is true of OCI’s Interim and Supplement Requests (except that those did pertain to Verizon).⁶⁹

25. Because OCI’s submissions lacked the fundamental traits of an informal complaint, the Commission plainly and correctly did not handle OCI’s submissions as an informal complaint under the

⁶³ See, e.g., Formal Complaint at 25-27, ¶¶ 59, 61, 63; OCI Reply, Legal Analysis at 25-26.

⁶⁴ In any event, as OCI acknowledges, the administrative exhaustion doctrine applies only when the second action seeks the same remedy as the first action. That prerequisite is not met here. The first action – the Notice-and-Comment Proceeding – involved declaratory and injunctive relief; the second action – this complaint proceeding – involves retrospective monetary damages (*i.e.*, refunds and lost profits). Therefore, even on its own terms, the administrative exhaustion doctrine does not warrant tolling of the limitations period applicable to OCI’s complaint for damages against Verizon.

⁶⁵ See Formal Complaint at 5, ¶ 11; 22-23, ¶¶ 52 and n.73, 54. See also OCI Reply at 3, ¶ 10; 7-8, ¶¶ 35-36; 15-16; OCI Reply, Legal Analysis at 22-25; OCI Brief at 12-14. OCI’s Formal Complaint focuses almost exclusively on the two other alleged bases for tolling already addressed above: so-called “administrative” tolling (Formal Complaint at 23-28, ¶¶ 54-64) and equitable tolling (Formal Complaint at 28-34, ¶¶ 65-75). Nevertheless, for the sake of completeness, we reach and reject OCI’s suggestion.

⁶⁶ 47 C.F.R. §§ 1.716-1.718.

⁶⁷ See, e.g., *MCI Telecommunications Corp., v. Pacific Telephone Co.*, Memorandum Opinion and Order, 12 FCC Rcd 13243, 13253-54, ¶¶ 17-18 (Com. Car. Bur. 1997) (“*MCI v. Pac Tel*”); 47 C.F.R. §§ 1.716-1.718.

⁶⁸ See, e.g., *MCI v. Pac Tel*, 12 FCC Rcd at 13,253, ¶ 17. See April 1998 Letter; Formal Complaint Exhibit 3 (Comments of Oncor Communications, Inc.).

⁶⁹ See Interim Request; Supplement Request. One submission contains a single footnote citation to 47 C.F.R. § 1.727. See Supplement Request at 2.

Commission's rules. OCI never asked the Commission to treat its submissions as an informal complaint, and never notified the Commission that it believed its submissions constituted an informal complaint that could ultimately entitle it to monetary damages in a formal complaint proceeding against Verizon. Further, Verizon plainly did not view OCI's submissions as a complaint, because Verizon suggested in response to these filings that OCI ought to *file* a complaint.⁷⁰ Even after this explicit invitation, OCI did not respond by saying its submissions already constituted an informal complaint or separately file a complaint. Given these circumstances, we find that OCI's submissions in the Notice-and-Comment Proceeding do not constitute an informal complaint that tolled the operation of section 415.⁷¹

26. The rulings in *MCI v. PacTel* and *Communications Vending v. FCC* support these conclusions. Both of those cases soundly reject belated attempts to re-characterize as complaints submissions closely akin to those of OCI here, *i.e.*, letters that neither referenced any complaint provisions nor sought damages from a particular defendant.⁷² Accordingly, OCI's submissions in the Notice-and-Comment Proceeding did not toll the running of the limitations period set forth in section 415 of the Act.

27. Even if we were to disregard reason and precedent to treat OCI's submissions in the Notice-and-Comment Proceeding as an informal complaint, section 415 would still time-bar OCI's Formal Complaint for two reasons. First, if we were to liberally construe OCI's submissions in the Notice-and-Comment Proceeding as an informal complaint, then we would also have to liberally construe Verizon's submissions in the Notice-and-Comment Proceeding as a "response" to OCI's informal complaint, in which case OCI would have had six months from Verizon's response (or until 2000) to file a formal complaint that would "relate-back" to the filing date of OCI's informal complaint.⁷³ OCI missed that deadline by several years. Second, 47 C.F.R. § 1.716 requires an informal complaint to state "the specific relief or satisfaction sought," and the filing date of a formal complaint relates back to the prior filing date of the informal complaint only if, *inter alia*, the formal complaint "is based on the same cause of action as the informal complaint."⁷⁴ Because OCI's submissions in the Notice-and-Comment Proceeding did not seek the specific relief that OCI seeks in this formal complaint proceeding (*i.e.*,

⁷⁰ See Joint Statement Exhibit JS-21.

⁷¹ We recognize that, when a letter is submitted to the Commission by *pro se* "consumers who have little, if any, familiarity with Commission's rules or practices," the Commission may construe the rules more liberally. *MCI v. Pac Tel*, 12 FCC Rcd at 13253, n.67. However, such an approach has no application where, as here, the submissions are by in-house and outside counsel for a communications company, all with extensive experience with Commission processes.

⁷² See *MCI v. PacTel*, 12 FCC Rcd at 13252-54, ¶¶ 16-18; *Communications Vending v. FCC*, 350 F.3d at 1076. What was said in *MCI v. PacTel* is equally apt here: "MCI could have, at any time after the February 1990 and September 1990 [letters to the Bureau Chief], filed claims for damages with the Commission based on the allegations in those letters if those were its intentions. At the very least, MCI could have acted to put the Bureau, and the defendant LECs, on notice that it viewed the February 1990 and September 1990 Evans letters as informal complaints that might entitle MCI to monetary damages to the extent the alleged violations were ultimately proven. Under these circumstances, it would be contrary to the policies underlying the statute of limitations to permit MCI, years after the fact, to transform the September 1990 [letter to the Bureau Chief] into an informal complaint for purposes of pursuing monetary damages claims against the defendant LECs that could have been filed with the Commission within two years from the time MCI was assessed the charges that form the basis of such claims. . . . Were MCI's characterization of the September 1990 [letter to the Bureau Chief] correct, the Commission would have to treat virtually every letter or written correspondence to any Commission office that raised a question regarding a practice of a common carrier as a claim for damages in applying Section 415 of the Act. Such a result would be inconsistent with Section 415." 12 FCC Rcd at 13254, ¶ 18 and n.70.

⁷³ See 47 C.F.R. § 1.718.

⁷⁴ 47 C.F.R. § 1.718.

retrospective money damages), OCI's formal complaint filed in 2005 is not based on the same cause of action as OCI's Notice-and-Comment submission and thus does not relate back to OCI's 1998-1999 "informal complaint."⁷⁵

IV. CONCLUSION

28. OCI's claim against Verizon for monetary damages accrued no later than April 2001. The applicable statute of limitations is two years. Therefore, absent some basis for tolling of the running of the two-year limitations period, OCI's claim expired in April 2003, well before OCI filed this formal complaint. All of the bases proffered by OCI for such tolling lack merit. Therefore, the statute of limitations bars OCI's formal complaint.

V. ORDERING CLAUSE

29. ACCORDINGLY, IT IS HEREBY ORDERED that, pursuant to sections 1, 4(i), 4(j), 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 415, the formal complaint filed by Operator Communications, Inc. is DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷⁵ See generally *MCI v. PacTel*, 12 FCC Rcd at 13255, n.74 (noting the possibility that a formal complaint seeking monetary damages may not relate back to an informal complaint not seeking monetary damages).