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

In the Matters of	)	
	)	
CURT HIMMELMAN,	)	
Petitioner,	)	
	)	
v.	)	EB-00-TC-F-003
	)	
MCI COMMUNICATIONS CORPORATION,	)	
Respondent.	)	
	)	
	)	
	)	
YOUNG SOON OH and BERNICE SCHATZ,	)	
Petitioners,	)	
	)	
v.	)	EB-00-TC-F-004
	)	
AT&T CORPORATION,	)	
Respondent.	)	

DECLARATORY ORDER

Adopted: March 12, 2002 **Released: March 19, 2002**

By the Commission:

I. INTRODUCTION

1. In this Declaratory Order, we grant Requests for Declaratory Ruling ("Petitions") filed by Curt Himmelman, and Young Soon Oh and Bernice Schatz (collectively "Petitioners'). [1] The Petitions arose out of class action lawsuits filed in federal district courts against MCI Communications Corporation (MCI) and AT&T Corporation (AT&T) (collectively "Respondents") alleging that the Respondents fail to provide consumers with a second listing during Area Code Directory Assistance ("directory assistance") calls in accordance with their tariffs.[2] Pursuant to the doctrine of primary jurisdiction, the district courts asked the Commission to determine whether the practices described by the Petitioners in their Petitions

[1] *Curt Himmelman v. MCI Communications Corporation*, File No. EB-00-TC-F-003 (filed June 12, 2000) (Himmelman Petition); *Young Soon Oh and Bernice Schatz,* File No. EB-00-TC-F-004 (filed June 12, 2000) (Oh Petition).

[2] Himmelman Petition at Ex. 1, *Curt Himmelman, on behalf of himself and all others similarly situated, v. MCI Communications Corporation,* Case No. 1:99CV01705 (D.D.C. 1999); Oh Petition at Ex. 1, *Young Soon Oh and Bernice Schatz on behalf of themselves and all similarly situated, v. AT&T Corp.,* Civil Action No. 99-2161 (D.N.J. 1999).

are unjust and unreasonable within the meaning of section 201(b) of the Communications Act. [3] As described below, we find that the MCI and AT&T practices are unjust and unreasonable under section 201(b).[4]

II. BACKGROUND

2. As class representatives, the Petitioners filed lawsuits in the U.S. District Court for the District of Columbia and the U.S. District Court for the District of New Jersey. [5] In each of these actions, the court found that the central claims were within the primary jurisdiction of this Commission. The U.S. District Court for the District of Columbia dismissed the case without prejudice.[6] The U.S. District Court for the District of New Jersey stayed the action pending a ruling by the Commission.[7]

3. On June 12, 2000, the Petitioners concurrently filed Requests for Declaratory Ruling with the Commission.[8] The Petitioners asked the Commission to issue a declaratory ruling that the manner in which MCI and AT&T provided directory assistance service violated their tariffs and constituted unjust and unreasonable practices under section 201(b).[9] The filed tariffs of MCI and AT&T, in effect during the period covered by the Petitions,[10] stated that up to two listings would be provided per call.[11] The Petitioners allege, however, that consumers are not given a reasonable opportunity to make two requests. Specifically, the Petitioners contend that because the Respondents use the singular-form prompts, "What city, please? and "What listing, please?", the Respondents' customers wanting to get two listings at once pursuant to the tariff expect another opportunity to request a second listing, but are not given such an opportunity.[12] As a result, the Respondents' customers are required to make a subsequent directory assistance call to get a second listing, and the Petitioners assert that the Respondents refuse to provide a credit for the service fee charged for that second call.[13]

III. DISCUSSION

A. Statute of Limitations

4. The Respondents contend that under section 415(b) of the Act, the Petitioners are barred from seeking relief for any portion of the claim that occurred before June 12, 1998.[14] Section 415(b)

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[3] Himmelman Petition at Exhibit 1; Oh Petition at Exhibit 2.

[4] Although the Petitions include a claim that the Respondents' practices violate their tariffs, because we find that the carriers' practice is unjust and unreasonable in violation of section 201(b) of the Act, we need not reach the question of whether they violated their tariffs.

[5] Himmelman Petition at Exhibit 1; Oh Petition at Exhibit 1.

[6] Himmelman Petition at Exhibit 2.

[7] Oh Petition at Exhibit 2.

[8] *See* Himmelman and Oh Petitions.

[9] Himmelman Petition at 2; Oh Petition at 2.

[10] On July 31, 2001, the Commission's detariffing order became effective. The order provided that carriers are no longer permitted to file tariffs related to consumer domestic long distance services.

[11] MCI FCC Tariff No. 1, 18.12 at Section 3 stated, "The Directory Assistance operator will search for up to two numbers per call." Similarly, AT&T F.C.C. Tariff No. 1, §6.20.2.A stated, "Up to two requests for listings within the area code dialed may be made on each call to Directory Assistance."

[12] Himmelman Petition at 2-3; Oh Petition at 2-3.

[13] Himmelman Petition at 3-4; Oh Petition at 4.

[14] MCI Answer at 3; AT&T Opposition at 10.

provides, in pertinent part, that "[a]ll complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after . . ."[15] The matter referred to us by the district courts involves whether the Respondents have engaged in unjust and unreasonable practices in providing listings during a directory assistance call. The Petition did not include any claims related to damages, nor did it challenge whether the crediting practices represented unjust and unreasonable practices. Hence, section 415(b) is not applicable to the issues raised herein.

B. Alleged Section 201(b) Violations

5. The Petitioners contend that the procedures chosen by the Respondents are unjust and unreasonable practices in violation of section 201(b) of the Act[16] because they are designed to mislead customers and prevent them from requesting and obtaining a second listing as provided for in the Respondents' tariffs.[17] In response, MCI and AT&T contend that the Petitioners have failed to demonstrate that the carriers are violating section 201(b) because their procedures do allow customers to request and obtain a second listing.[18] As discussed below, we find that the practices of MCI and AT&T violate section 201(b).

1. The Parties' Contentions

6. The Petitioners argue that the Respondents' use of singular-form prompts during directory assistance calls misleads customers into believing that they will be provided another opportunity later in the call to request a second listing.[19] When no such opportunity is provided, customers have to make a subsequent call and incur an additional charge to obtain a second listing.[20] The Petitioners allege that in past years, customers were allowed to make additional requests and specifically told to stay on the line to receive further assistance.[21] The Petitioners maintain that the Respondents' practice of using the singular-form prompts manipulates customers based on their expectations and past experiences. Therefore, they argue, the practices are unjust and unreasonable within the meaning of section 201(b).[22]

7. The Petitioners suggest that it would be simple for the Respondents to modify their procedures so that customers are readily provided the means for requesting up to two listings per call. The Petitioners maintain that the Respondents could modify the initial prompts to the plural forms, "What cities, please?" and "What listings, please?", thus indicating that customers should request both listings up front in the call.[23] The Petitioners also contend that the Respondents could provide an opportunity after

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15 47 U.S.C. § 415(b).

16 Section 201(b) of the Act states, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with such 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 . . . . " *Id.* § 201(b).

17 Himmelman Petition at 2; Oh Petition at 2.

18 MCI Answer at 2; AT&T Opposition at 3.

19 Himmelman Petition at 2-3; Oh Petition at 3.

20 Himmelman Petition at 3; Oh Petition at 3.

21 Himmelman Petition at 3; Oh Petition at 3.

22 Himmelman Petition at 2; Oh Petition at 2.

23 Himmelman Petition at 4; Oh Petition at 4.

the first request for customers to make a second request.[24]

8. The Respondents deny the Petitioners' allegations that the singular-form prompts mislead customers and prevent them from requesting a second listing.[25] MCI maintains that contrary to the Petitioners' claims, its customers are provided several opportunities to request two listings during a directory assistance call.[26] AT&T asserts that if a caller makes a second request at the outset of the call, its operator will respond to the request.[27]

9. The Respondents also argue that the singular-form prompts are consistent with those used throughout the industry.[28] As a result, they maintain that customers are very familiar with their use,[29] know that the singular form includes the plural,[30] and know how to make a request for a second listing.[31] Even so, they reason, customers are presumed to know the provisions of the relevant tariffs.[32]

10. The Respondents also contend that the Petitioners have no basis for arguing that it would be a simple matter to change how requests for second listings are elicited from customers. They assert that it would be expensive to modify the manner in which customers request a second listing.[33] They also argue that the technological means do not exist to have quality loopback functionality, thus allowing customers to request the second listing at the back end of the call.[34] There simply is no basis, they maintain, for requiring a change in the manner listings are offered when neither the tariff nor the Act requires the service to be provided in a specific manner.[35]

11. The Petitioners reply that the Respondents cannot simply claim that because their practices conform to a standard industry practice, the practices are therefore just and reasonable.[36] They maintain that whether practices are just and reasonable must be assessed on a case-by-case basis.[37] In the case of the Respondents, because their practices mislead customers and prevent them from requesting a second listing during a call as described in the tariffs, their practices must be found to violate section

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24 Himmelman Petition at 4; Oh Petition at 4.

25 MCI Answer at 2; AT&T Opposition at 3.

26 MCI Answer at 2. They contend that their service allows customers to: 1) request two listings during the initial prompts; 2) remain silent at the initial prompts; or 3) press "0" at any time during the automated recording. MCI asserts that each option will lead to a live operator joining the call, because its operators are always present during a directory assistance query.

27 AT&T Opposition at 3. The front-end of AT&T's directory assistance calls are handled by live operators. The remainder of the call is automated. Because the front-end is handled by a live operator, they contend that consumers can readily seek additional assistance if two listings are sought.

28 MCI Answer at 3; AT&T Opposition at 10.

29 AT&T Opposition at ii.

30 AT&T Brief at 7-8.

31 MCI Answer 3-4; AT&T Opposition at ii.

32 MCI Reply Brief at 6; AT&T Brief at 7.

33 AT&T Opposition at 5, 7.

34 AT&T Opposition at 7.

35 AT&T Brief at 16.

36 Himmelman Brief at 3; Oh Brief at 4.

37 Himmelman Brief at 3; Oh Brief at 4.

201(b).[38]

2. Decision

12. In this declaratory ruling, we are responding to the courts' requests that the Commission address whether AT&T and MCI violated section 201(b) of the Act in the way they provided directory assistance listings. Although the Act did not require AT&T and MCI to offer two listings per call, they chose to do so through their tariffs. Once these offers were made, they were obligated to provide the listings in a just and reasonable manner.[39] In assessing whether there has been a violation of section 201(b), we look at the record to determine whether a reasonable customer would understand how to request up to two listings given the Respondents' practices.[40] Here, the Respondents' use of singular-form prompts combined with their failure to disclose the procedures for customers to request and obtain up to two listings per call served to hide the availability of the offering. Therefore, we find that the Respondents have violated section 201(b) of the Act.

13. Under section 201(b) of the Act, carriers' practices in providing service must be "just and reasonable." In its tariff, MCI stated, "The Directory Assistance operator will search for up to two numbers per call for a charge of $1.40 per call."[41] Similarly, AT&T's tariff stated, "Up to two requests for listings within the area code dialed may be made on each call to Directory Assistance for a charge of $1.40."[42] Here, we must decide whether the singular-form prompts are just and reasonable when viewed in light of the services offered by the tariffs, and we conclude that they are not. The audible prompts used by the Respondents explicitly stated, "What city, please?" and "What listing, please?" The singular form of these audible prompts is inconsistent with the language contained in the Respondents' tariffs. We believe that it is reasonable for customers hearing a singular-form prompt to infer that they are being limited to requesting a single listing. Without being provided specific information on how to get a second listing, it is unreasonable to believe that customers would "naturally" know how and when to make the request for a second listing. The presumed general familiarity with the singular-form prompts does not mean customers are familiar with the individual procedures established by the carriers to actually request a second listing. It is simply misleading for a carrier to use a singular-form prompt when it is offering consumers an opportunity to request multiple listings.

14. The misleading nature of the singular-form prompts is not remedied by the fact that the prompts may conform to standard industry practice. Conformance with an industry practice does not automatically make a practice just and reasonable within the meaning of section 201(b) of the Act, because violations of section 201(b) are determined based on the specific circumstances of a case.[43] AT&T cites *Erdman Technologies Corporation v. US Sprint Communications Company*, for the

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[38] *See generally* Himmelman and Oh Briefs.

[39] *See Telecommunications Research and Action Center and Consumer Action v. Central Corp. et al.,* 4 FCC Rcd. 2,157, 2,159 (Com. Car. Bur. 1989) (finding that the carriers' practice of call blocking, coupled with the failure to provide adequate consumer information, is unjust and unreasonable in violation of section 201(b)).

[40] *See e.g.*, *Business Discount Plan, Inc.,* Notice of Apparent Liability for Forfeiture, 14 FCC Rcd. 340, 356 (1998).

[41] Himmelman Petition at 3 (stating that the current charge per call is $1.40, while in prior periods the charge was $1.10 or $0.95 per call); *see also* Himmelman Brief at Exhibit A (citing MCI FCC Tariff No. 1, 18.12 at Section 3).

[42] Oh Petition at 2 (stating that the current charge per call is $1.40, while in prior periods the charge was $1.10 or $0.95 per call); *see also* Oh Reply Brief at Exhibit B (citing AT&T F.C.C. Tariff No. 1, §6.20.2.A).

[43] *Southwestern Bell Mobile Systems, Inc., Petition for Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 FCC Rcd. 19,898, 19,905 (1999).

proposition that industry guidelines may be relevant in determining whether practices comply with section 201(b).[44] In *Erdman*, an industry group had established specific guidelines.[45] In the present case, however, there are no established industry guidelines or standards. It is not even clear from the record that there is a standard industry practice beyond the use of the singular-form prompts. For example, MCI asserts that customers have three options, available at different points during the call, to request a second listing.[46] AT&T, however, insists that customers must make their request for two listings to the live operator at the outset of a call.[47] Thus, rather than eliciting the requests for two listings based on a standard industry practice, it appears that the Respondents have individually tailored their directory assistance service offerings. In a competitive marketplace such as this one, service providers freely determine the terms of their service offerings.[48]

15. While the Respondents have great latitude in the manner in which they choose to offer a service, the Commission has consistently encouraged service providers to furnish customers with information that enhances their ability to understand and utilize a service.[49] Without such information, customers will be unable to make informed choices and benefit from the competitive marketplace.[50] The record supports the Petitioners' claim that they were not fairly on notice of the procedures required to get additional listings. In this case, notice cannot be deemed to have been provided based on a standard industry practice. Nor is notice provided by the Respondents' tariffs, because they do not provide customers with any specifics concerning the method or timing of making additional requests.[51]

16. Neither MCI nor AT&T provided any evidence indicating that the procedures required to obtain the second listing are proactively communicated to a customer either during the call or through some other means. In fact, the record indicates that customers are only provided this information if they ask or seek credit for a second directory assistance call made specifically to get an additional listing that they were unable to request in a prior call.[52] AT&T insists that if customers did not understand how to make the request for two listings from the live operator the first time they heard the prompts, they would certainly realize what was needed to get the second listing the next time a call was made.[53] We find this argument unpersuasive. It is unreasonable to expect consumers to determine a workable procedure wholly through trial and error. For the reasons discussed above, we grant the Petitioners requests' and

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44 AT&T Reply Brief at 6.

45 15 FCC Rcd 7232, 7244-46, ¶¶22-24 (1999).

46 MCI Answer at 2.

47 AT&T Opposition at 7-8.

48 *Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd. at 19,905.

49 *See, e.g., Billed Party Preference for InterLATA 0+ Calls*, Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122, 6124 (1998) (asserting that disclosure rules for Operator Service Providers are pro-consumer and pro-competitive); *see also Truth-In-Billing and Billing Format*, 14 FCC Rcd 7492, 7497-7499 (1999) (ensuring that consumers are provided with the basic information they need to make informed choices in a competitive telecommunications marketplace).

50 *See supra* note 48.

51 The filed tariff doctrine provides that customers are presumed to have knowledge of the tariffs. *See Marcus v. AT&T*, 138 F.3d 46, 56 (2d Cir. 1998). In the context of this proceeding, this doctrine does not help the Respondents. The Petitioners have established that they knew the terms and conditions contained in the tariffs, i.e., that they were legally entitled to request up to two listings per directory assistance call. Because the tariffs did not disclose the procedures or requirements for requesting a second listing, however, knowledge of the filed tariff did not provide the Petitioners with the means for obtaining the described service.

52 MCI Brief at 4.

53 AT&T Opposition at 7-8.

find that the carriers' failure to disclose the procedures required to request up to two listings during a directory assistance call is an unjust or unreasonable practice within the meaning of section 201(b), and otherwise deny the Petition. [54]

C. Other Matters

17. We reject the respondents' suggestions that the issue referred by the courts as to the lawfulness of their practices can only be decided in a formal complaint (AT&T) or rulemaking (MCI) proceeding. Deciding the issue in the context of a declaratory ruling proceeding is well within the Commission's broad discretion.[55]

IV. ORDERING CLAUSE

18. Accordingly, pursuant to sections 4(i), 4(j), and 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), and section 1.2 of the Commission's Rules, 47 C.F.R. §1.2, IT IS ORDERED, that the Requests for Declaratory Ruling filed by Curt Himmelman, Young Soon Oh, and Bernice Schatz are GRANTED to the extent described herein.

19. IT IS FURTHER ORDERED that the Petitioner's Motion to Strike New Assertion by MCI or, in the Alternative, to Supplement Record, filed by Petitioner Himmelman on May 25, 2001, IS GRANTED.[56]

20. IT IS FURTHER ORDERED that the Petitioner's Motion to Supplement Record, filed by Petitioners Oh and Schatz on October 19, 2001, IS DENIED.[57]

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[54] We do not set out to prescribe a specific method of disclosure to the Respondents. AT&T has pointed to the fact that adding loopback functionality would result in significant costs, although they provided no information on what the costs would be for implementing loopback functionality on the wireline network. Absent compelling circumstances, we allow carriers flexibility in determining how they will provide customers with the information required to utilize the service offered.

[55] *See* 47 U.S.C. §154(i), (j); 5 U.S.C. § 554(e), 47 C.F.R. §1.2.

[56] MCI introduced a claim in its Reply Brief that had not been introduced in previous filings. The information at the heart of the new claim should have been accessible to MCI based on its records. As a result, this claim should have been raised in earlier filings. Therefore, we grant the Petitioner's Motion to Strike New Assertions.

[57] The Petitioners sought to supplement the record to refute AT&T's claim on the feasibility of adding loopback functionality. Because we make no decision here on whether the Respondents must implement such a functionality, there is no need to supplement the record on this point. Therefore, we deny the Petitioners' Motion to Supplement the Record.

21. IT IS FURTHER ORDERED that the Chief of the Telecommunications Consumers Division of the Enforcement Bureau shall forward a copy of this Memorandum Opinion and Order to the Clerk, U.S. District Court for the District of Columbia and to the Clerk, U.S. District Court for the District of New Jersey.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary