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CORRECTED

May 1, 2018

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room 4C-224
Washington, D.C. 20554

Re: Ex Parte re: Amendment of Procedural Rules Governing Formal Complaint Proceedings
Delegated to the Enforcement Bureau: EB 17-245

Ms. Dorch:

The Federal Communications Commission (“FCC” or “Commission”) has recently released a Notice of Proposed Rulemaking (“NPRM”) seeking comment on creating a uniform set of procedural rules for certain formal complaint proceedings delegated to the Enforcement Bureau.¹ In the NPRM, the Commission proposes several changes to its procedural rules that will modernize its enforcement processes. AT&T commends the Commission for proposing new rules that will streamline its procedures and supports the Commission’s suggestions to harmonize the procedural rules that apply to Section 208 formal complaints, Section 224 pole attachment complaints, and disability access complaints.

In addition to the rule changes proposed in the NPRM, the Commission asks “whether any additional procedural rules should be included in the proceeding.”² The answer to that question is yes. In particular, the Commission should adopt a rule setting forth processes for the filing and consideration of pre-answer Motions to Dismiss for all kinds of formal complaints.³ Although the Commission already has authority to entertain and grant such motions,⁴ adopting a rule specifying procedures for doing so would provide Commission staff and formal complaint parties with useful guidance and certainty.

¹ *Amendment of Procedural Rules Governing the Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Notice of Proposed Rulemaking, EB Docket 17-245, 32 FCC Rcd 7155 (2017).

² NPRM at 7156, para 7.

³ Given that the Commission has already acknowledged – correctly – that no NPRM at all was necessary as a predicate for adopting formal complaint procedural rules, the lack of any specific reference in the NPRM to motions to dismiss does not preclude the Commission for adopting rules regarding such motions. NPRM at 7155, n.5.

⁴ See, e.g., 47 CFR §§ 1.727(b)(providing requirements for “dispositive motions”); 1.728(a)(providing that “[a]ny document purporting to be a formal complaint which does not state a cause of action under the Communications Act will be dismissed.”); *Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22592, para. 229 (1997)(stating that the Commission “do[es] not intend to prohibit the filing of motions to dismiss a complaint for failure to state a claim or failure to comply with procedural

Such a rule would allow for more efficient adjudication of certain formal complaints, conserving the resources and time of Commission staff as well as formal complaint parties. In AT&T's experience, many formal complaints raise threshold legal questions that, if decided at early stages of the proceedings, would significantly narrow or eliminate entirely the litigation, minimizing or avoiding the need for potentially costly, lengthy, and onerous discovery, non-dispositive motions practice, and fact-finding. Providing an opportunity to reduce such burdens would plainly serve the public interest.

A properly crafted new rule could specify that a defendant may file, *before the deadline for submitting an answer*, a motion for leave to file a motion for partial or complete dismissal of the complaint. Enforcement Bureau staff would have discretion to grant or deny the motion for leave. If Enforcement Bureau staff grants leave to file a motion to dismiss, the defendant will have thirty calendar days to file its motion to dismiss, complete with a detailed explanation and analysis of the legal foundations for why the motion should be granted. Such grounds for pre-complaint dismissal would resemble those set forth in Rule 12(b) of the Federal Rules of Civil Procedure and would include (but not be limited to) failure to state a claim upon which relief can be granted; lack of jurisdiction; expiration of the statute of limitations; and enforcement of an alternative dispute resolution agreement between the parties. The plaintiff will then have twenty calendar days to file an opposition to the motion to dismiss, including a detailed explanation and analysis of the legal foundations for why the motion to dismiss should be denied. No further pleadings regarding the motion to dismiss would be expressly permitted, but Enforcement Bureau staff would retain discretion to direct, *sua sponte*, the filing of such further pleadings. Enforcement Bureau staff also could retain discretion to alter the pleading cycle to suit the case before it. For example, if the motion to dismiss was likely to present only narrow issues, staff might shorten the pleading cycle. During the pendency of the motion to dismiss, all other processes that would otherwise occur under the rules would be automatically stayed.

Proposed S.1.729, which governs Motions, can be modified to allow for Motions to Dismiss explicitly by an addition of new part (f):

* * *

(f) A defendant may file, before the deadline for submitting an answer, a motion for leave to file a motion for partial or complete dismissal of the complaint. Enforcement Bureau staff has discretion to grant or deny the motion for leave. If Enforcement Bureau Staff grants leave to file a motion to dismiss, the defendant will have thirty (30) calendar days to file its motion to dismiss, complete with an explanation and analysis of the legal foundations for why the motion should be granted. The plaintiff will then have twenty (20) calendar days to file an opposition to the motion to dismiss, including an explanation and analysis of the legal foundations for why the motion to dismiss should be denied. During the pendency of the motion to dismiss, all other processes that would otherwise occur under applicable rules would be automatically stayed. Grounds for pre-complaint dismissal would include (but not be limited to) failure to state a claim upon which relief can be granted; lack of jurisdiction; expiration of the statute of limitations; and enforcement of an alternative dispute resolution agreement between the parties. Furthermore, all facts alleged in the complaint are accepted as true, but solely for purposes of deciding the motion to dismiss.

* * *

requirements.”).

Please contact me at (202) 457-2042 if you have any questions about this proposal. We look forward to working with the Commission on modernizing the Enforcement Bureau rules for the 21st century.

Sincerely,

A handwritten signature in black ink that reads "Jeanine Poltronieri". The signature is fluid and cursive, with "Jeanine" on top and "Poltronieri" below it.

Jeanine Poltronieri

Copies:

Rosemary Harold
Christopher Killion
Rosemary McEnery