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

In the Matter of	)	
	)	
American Cellular Corporation and Dobson Cellular Systems, Inc.,	)	
	)	
Complainants,	)	**File No. EB-05-MD-01**
	)	
v.	)	
	)	
BellSouth Telecommunications, Inc.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2007 **Released: January 31, 2007**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we dismiss with prejudice a formal complaint[1] filed by American Cellular Corporation and Dobson Cellular Systems, Inc. (collectively "Dobson") against BellSouth Telecommunications, Inc. ("BellSouth")[2] pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[3] The Complaint asserts three claims against BellSouth. First, Dobson alleges that BellSouth over-billed Dobson for certain shared facilities in Georgia, Kentucky, and Tennessee, in violation of section 251(c)(2)(D) of the Act and sections 51.703(b) and 51.709(b) of the Commission's rules ("Count 1").[4] Second, Dobson alleges that BellSouth over-billed for reciprocal compensation in Georgia, Kentucky, and Tennessee, in violation of sections 251(b)(5) and 251(c)(2)(D) of the Act and section 51.703(a) of the Commission's rules ("Count 2").[5] Third, Dobson alleges that BellSouth refused to lower certain reciprocal compensation rates in Georgia

[1] Amended Formal Complaint of American Cellular Corporation and Dobson Cellular Systems, Inc., File No. EB-05-MD-01 (filed Jan. 31, 2005) ("Complaint"). Dobson's filed the original version of its Complaint on January 10, 2005. Formal Complaint, File No. EB-05-MD-01 (filed Jan. 10, 2005).

[2] On December 29, 2006, the Commission approved the merger of AT&T Inc. and BellSouth Corporation. *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269275A1.pdf, *FCC Approves Merger of AT&T Inc. and BellSouth Corporation*, News Release, Docket 06-74 (rel. Dec. 29, 1996). Notwithstanding the merger, the Defendant in this order will be referred to as "BellSouth."

[3] 47 U.S.C. § 208.

[4] 47 U.S.C. § 251(c)(2)(D); 47 C.F.R. §§ 51.703(b), 51.709(b); *see*, *e.g.*, Complaint at 2, 7-11.

[5] 47 U.S.C. §§ 251(b)(5), 251(c)(2)(D); 47 C.F.R. § 51.703(a); *see*, *e.g.*, Complaint at 2, 11-12. For purposes of this order only, we will assume, without deciding, that a violation of section 251(b)(5) is cognizable under section 208 of the Act.

and Tennessee to the rates established in the Commission's *ISP Order*, and consequently BellSouth charged Dobson excessive reciprocal compensation rates ("Count 3").[6] For the reasons explained below, we hold that each of the claims in Dobson's Complaint is time-barred under the two-year statute of limitations in section 415(b) of the Act,[7] and must be dismissed.

II. BACKGROUND

A. The Parties

2. During the period relevant to this dispute, Dobson was a telecommunications carrier that owned or managed commercial mobile radio service networks in Georgia, Kentucky, and Tennessee.[8] BellSouth is an incumbent local exchange carrier ("incumbent LEC") providing service in Georgia, Kentucky, and Tennessee.[9] During the relevant period, Dobson and BellSouth exchanged telecommunications traffic, as defined in section 51.701(b)(2) of the Commission's rules, pursuant to interconnection agreements in Georgia, Kentucky, and Tennessee.[10]

B. Facts Relevant to Counts 1 and 2

3. The parties' interconnection agreements provided that each party would bear the costs of using shared facilities to deliver traffic.[11] The interconnection agreements also provided that each party would pay reciprocal compensation at stated rates for traffic originated by one party and terminated by the other party.[12] Accordingly, under the interconnection agreements, each party was to periodically bill the other party only for the other's use of the shared facilities, and only for traffic terminated by the billing party.[13]

4. Although the interconnection agreements required each party to pay only for its respective portion of the shared facilities and for the telecommunications traffic terminated on the other's

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[6] *In the Matter of Implementation of the Local Competition Provisions in The Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (subsequent history omitted) ("*ISP Order*"); *see*, *e.g.*, Complaint at 2, 12-14. For purposes of this order only, we will assume, without deciding, that a violation of the *ISP Order* constitutes a violation of the Act cognizable under section 208 of the Act.

[7] 47 U.S.C. § 415(b).

[8] Joint Statement, File No. EB-05-MD-01, at 2, ¶ 1 (filed Apr. 19, 2005) ("Joint Statement"); Complaint at 3.

[9] Joint Statement at 2, ¶ 2; Complaint at 4; BellSouth Telecommunications, Inc.'s Answer to the Amended Formal Complaint of American Cellular Corporation and Dobson Cellular Systems, Inc., File No. EB-05-MD-01, at 7 (filed Feb. 15, 2005) ("Answer").

[10] 47 C.F.R. § 51.701(b)(2); Joint Statement at 2 ¶ 3.

[11] Joint Statement at 3, ¶ 4; Complaint at 7; Complaint Exhibit A at 4, ¶ V.B (Georgia Interconnection Agreement); Complaint Exhibit B at 4, ¶ V.B (Kentucky and Tennessee Interconnection Agreements); Answer at 9.

[12] Joint Statement at 3, ¶ 4; Complaint at 4-5; Complaint Exhibit A at 3, ¶ IV.B; Complaint Exhibit B at 3, ¶ IV.B; Answer at 9.

[13] Joint Statement at 3, ¶ 4; Complaint Exhibit A at 3-4, ¶¶ IV.B, V.B; Complaint Exhibit B at 3-4, ¶¶ IV.B, V.B. *See*, *e.g.*, Complaint at 5 (stating that the parties' interconnection agreements provided that "BellSouth would not charge for interconnection facilities to the extent such facilities are used to carry traffic originated by customers of BellSouth"); *id*. at 6 (stating that BellSouth's bills "made no provision for credits on account of BellSouth traffic terminated by [Dobson] or for that portion of the facilities that was utilized to carry BellSouth originated calls").

network, BellSouth periodically billed Dobson, and Dobson ultimately paid, for the *entire* cost of the shared facilities and for the telecommunications traffic terminated by both parties.[14] That is, BellSouth's bills to Dobson did not include deductions for BellSouth's use of the shared facilities, or for traffic originated by BellSouth and terminated by Dobson.[15] Although the record is unclear when BellSouth sent Dobson these bills, the record reflects that on June 3, 2002, after having received, and paid in full, all of BellSouth's bills, Dobson sent BellSouth several invoices requesting refunds to account for (1) BellSouth's use of the shared facilities, and (2) telecommunications traffic originated by BellSouth and terminated by Dobson.[16]

5. Dobson's June 3, 2002 Refund Requests listed July 3, 2002 as the "due date" for payment of the refunds by BellSouth.[17] BellSouth, however, did not pay the June 3, 2002 Refund Requests on the due date. Instead, BellSouth's first payment on the June 3, 2002 Refund Requests occurred on January 7, 2003, when BellSouth sent Dobson several letters stating that BellSouth was making a partial payment on the June 3, 2002 Refund Requests and disputing the balance of the refunds allegedly due.[18] In March 2003, BellSouth made additional partial payments on the June 3, 2002 Refund Requests, but sought a repayment of some of the amounts that BellSouth had refunded to Dobson in January 2003.[19] The parties continued to exchange communications concerning payments on the June 3, 2002 Refund Requests through the Spring of 2003, but failed to reach agreement concerning amounts owed on those Requests.[20]

C. Facts Relevant to Count 3

6. The Commission's *ISP Order*, which became effective on June 14, 2001, permitted an incumbent local exchange carrier to take advantage of reduced compensation rates for "ISP-bound" traffic[21] if it offered to exchange all traffic subject to section 251(b)(5) of the Act at that same lower

[14] Joint Statement at 3, ¶ 4; Complaint at 7-11; Reply at 8-9.

[15] *See*, *e.g.*, Complaint Exhibit U, Declaration of Andrea Metcalf ("Metcalf Decl.") at 1, ¶ 4; Joint Statement at 3, ¶ 5.

[16] Complaint Exhibit E (refund requests from Dobson to BellSouth dated June 3, 2002 ("June 3, 2002 Refund Requests" or "Refund Requests")); Joint Statement at 3, ¶¶ 4-5; Answer at 37 (describing BellSouth's bills submitted to Dobson). BellSouth's bills covered periods from December 2000 to January 2002 in Georgia, October 2000 to February 2002 in Tennessee, and October 2000 to March 2002 in Kentucky. Metcalf Decl. at 1-2, ¶¶ 4-5; June 3, 2002 Refund Requests. The record does not explain why Dobson did not send its Refund Requests to BellSouth until as much as 19 months after the traffic at issue occurred.

[17] June 3, 2002 Refund Requests; Metcalf Decl. at 1, ¶ 4. The interconnection agreements pursuant to which Dobson issued these Refund Requests to BellSouth provided that charges for local interconnection were to be billed and paid monthly, and that late charges could be assessed on the invoiced amounts if the interconnection charges were not paid within thirty days of the due date. Complaint Exhibit A at 3, ¶ IV.B; Complaint Exhibit B at 3, ¶ IV.B.

[18] Metcalf Decl. at 2, ¶ 5; Complaint Exhibit F (letters dated Jan. 7, 2003, from Gloria Orr of BellSouth to Andrea Metcalf of Dobson regarding the June 3, 2002 Refund Requests); Joint Statement at 4, ¶ 7.

[19] Complaint Exhibit O (Letters from Gloria Orr of BellSouth to Andrea Metcalf of Dobson, dated March 27, 2003); Metcalf Decl. at 2, ¶ 6; Joint Statement at 4, ¶ 7.

[20] Joint Statement at 3-4, ¶¶ 5-7. Dobson alleges that BellSouth owes Dobson a refund of $293,202 for the claims underlying Counts 1 and 2. *Id.* at 4, ¶ 7.

[21] *See ISP Order*, 16 FCC Rcd at 9151, ¶ 1 (describing "ISP-bound" traffic as "telecommunications traffic delivered to Internet service providers (ISPs)").

rate.[22] BellSouth chose to take advantage of the reduced rates for ISP-bound traffic established in the *ISP Order*, but did not unilaterally implement those new rates in its agreements with interconnecting carriers, including Dobson.[23] Rather, BellSouth's policy was to make the new rates available via negotiated amendments to interconnection agreements, upon request.[24] Dobson made such a request in September 2001, and the parties engaged in negotiations to amend their interconnection agreements in Georgia, Tennessee, and Kentucky over the next several months.[25] During this negotiation period, BellSouth continued to bill Dobson, and Dobson continued to make reciprocal compensation payments, at the higher, pre-*ISP Order* rates specified in the existing interconnection agreements.[26]

7. On February 8, 2002, Dobson transferred its operations in Georgia and Tennessee to Verizon Wireless.[27] Shortly thereafter, Dobson informed BellSouth on February 15, 2002 that, in view of the transfer of the Georgia and Tennessee markets, Dobson's request for a new or amended interconnection agreement would "now be limited to Kentucky."[28] The parties eventually negotiated a new interconnection agreement for Kentucky that incorporated the *ISP Order*'s lower rates, retroactive to the *ISP Order*'s effective date of June 14, 2001.[29] The parties failed, however, to negotiate new or amended agreements for Georgia and Tennessee.[30] BellSouth stopped billing Dobson in Georgia and Tennessee after February 2002,[31] but never adjusted its past charges to Dobson in those states to conform to the lower reciprocal compensation rates in the *ISP Order*.[32]

8. On June 3, 2002, Dobson sent BellSouth cover letters, along with the June 3, 2002 Refund Requests, stating, *inter alia*, that Dobson was entitled to an adjustment of BellSouth's past

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[22] *ISP Order*, 16 FCC Rcd at 9193, ¶ 89. According to Dobson, once an incumbent LEC, such as BellSouth, elected to take advantage of those rates, it became obligated to offer the same lower rates to interconnecting carriers such as Dobson. Supplemental Joint Statement, File No. EB-05-MD-01, at 11-13 (filed May 27, 2005) ("Supplemental Joint Statement"). At that point, Dobson contends, the two carriers were supposed to implement the new rates through an amendment to an existing interconnection agreement, or by entering into a separate, stand-alone agreement. Supplemental Joint Statement at 10-13; Supplement to Reply of American Cellular Corporation and Dobson Cellular Systems, Inc. to Answer of BellSouth Telecommunications, Inc., File No. EB-05-MD-01, at 9 (filed Apr. 26, 2005) ("Reply Supplement").

[23] Joint Statement at 5, ¶ 9. The record does not reflect the exact date when BellSouth elected to take advantage of the *ISP Order*'s lower compensation rates for ISP-bound traffic.

[24] *Id.*

[25] *Id.* The record does not reflect the exact date in September 2001 when Dobson first requested the reduced rates. Complaint Exhibit S (Amended Declaration of David M. Wilson) ("Wilson Decl.") at ¶ 5.

[26] Joint Statement at 6, ¶ 9.

[27] *Id*. at 4, ¶ 8.

[28] Complaint Exhibit W (Memorandum from David Wilson, counsel for Dobson, to Langley Kitchings, counsel for BellSouth, dated Feb. 15, 2002).

[29] Joint Statement at 5-6, ¶ 9.

[30] *Id*.

[31] Wilson Decl. at 2-3, ¶¶ 5-7; Complaint Exhibit V (spreadsheet prepared by Dobson); Supplemental Joint Statement Exhibit B (Letter from David Wilson, counsel for Dobson, to Randy Ham of BellSouth, dated Oct. 1, 2002).

[32] Reply at 31-32; Joint Statement at 5-6, ¶¶ 9-10.

reciprocal compensation charges based on the *ISP Order*.[33] Communications between the parties attempting to resolve this issue continued through the Spring of 2003.[34] The parties, however, failed to reach an agreement.[35]

D. Facts Relevant to All Counts

9. On May 14, 2003, Dobson notified BellSouth that it was invoking the alternative dispute resolution ("ADR") provisions in the parties' interconnection agreements.[36] Under the ADR provisions, the parties agreed to "initially" refer disputed issues to certain company representatives, and if no resolution was reached within thirty days, either party was permitted to pursue other remedies.[37] The ADR process failed to produce settlement of the disputed issues within 30 days after Dobson initiated the process.[38]

10. On June 24, 2003, Dobson filed an informal complaint at the Commission pursuant to section 1.716 of the Commission's rules raising each of the three claims that it asserts in the instant formal Complaint.[39] Specifically, Dobson alleged that BellSouth: (1) failed to pay refunds owed due to BellSouth's use of shared facilities; (2) failed to pay refunds owed to Dobson for reciprocal compensation; and (3) failed to retroactively offer Dobson the *ISP Order*'s rates in Georgia and Tennessee.[40] On August 8, 2003, BellSouth filed a response to the Informal Complaint disputing all three claims, and declining to satisfy Dobson's demands for payment of the amounts in issue.[41] On August 22, 2003, pursuant to rule 1.718, the Market Disputes Resolution Division of the Enforcement Bureau sent a letter to Dobson's counsel stating that Dobson had exhausted all remedies under the informal complaint process, and that the Division was closing the informal complaint file.[42] The Informal Complaint Closure Letter explained that, under section 1.718 of the Commission's rules, Dobson had the right to file a

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[33] Metcalf Decl. at 2, ¶ 7; June 3, 2002 Refund Requests. Dobson's cover letters did not specify the amount of the requested adjustments. *Id.* According to Dobson, the amount of the requested adjustments was set forth in a spreadsheet that Dobson's counsel attached to an October 1, 2002 letter to BellSouth requesting a "true-up" of amounts billed and collected by BellSouth in Tennessee, Georgia, and Kentucky during the period between the effective date of the *ISP Order* and the dates when the Tennessee and Georgia markets were transferred to Verizon Wireless. *See*, *e.g.*, Wilson Decl. at 2, ¶ 5; Supplemental Joint Statement Exhibit B; Complaint Exhibit V.

[34] Complaint at 8-11; Reply at 17-18; Joint Statement at 3-5; Supplemental Joint Statement at 5-8. These communications also concerned the parties' other outstanding disputes, described above. *See supra* para. 5.

[35] Dobson alleges that BellSouth owes Dobson a refund of $30,753.62 for the claims underlying Count 3. Joint Statement at 8, ¶ 1.

[36] Complaint Exhibit A at 15, ¶ XIX; Complaint Exhibit B at 15, ¶ XVIII; Wilson Decl. at 3, ¶ 8; Complaint Exhibit Y at 3 (E-mail from David Wilson, counsel for Dobson, to Rhona Reynolds of BellSouth, dated May 14, 2003).

[37] Complaint Exhibit A at 15, ¶ XIX; Complaint Exhibit B at 15, ¶ XVIII.

[38] Wilson Decl. at 3, ¶ 8; Reply at 19-20; Supplemental Joint Statement at 7-8.

[39] Letter from David Wilson, counsel to Dobson, to Suzanne Tetreault, Enforcement Bureau, File No. EB-03-MDIC-0019 (filed Jun. 23, 2003) ("Informal Complaint"); 47 C.F.R. § 1.716.

[40] Informal Complaint at 2-5.

[41] Letter from Lisa Spooner Foshee and Theodore C. Marcus, BellSouth, to Alexander Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, File No. EB-03-MDIC-0019 (filed Aug. 8, 2003).

[42] Letter from Christopher Olsen, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, to David Wilson, counsel to Dobson, File No. EB-03-MDIC-0019 (Aug. 22, 2003) ("Informal Complaint Closure Letter").

formal complaint against BellSouth at the Commission, and for statute of limitations purposes the filing date of the formal complaint would be deemed to "relate back" to the filing date of the Informal Complaint, provided Dobson filed the formal complaint within six months of BellSouth's response to the Informal Complaint.[43] The Informal Complaint Closure Letter further advised Dobson that, under rule 1.718, if Dobson did not file a formal complaint within this six-month period, *i.e.*, by February 8, 2004, it would "be deemed to have abandoned the unsatisfied informal complaint."[44]

11. Dobson did not file a formal complaint at the Commission within the six-month window provided under rule 1.718. Instead, on February 4, 2004, Dobson filed a complaint in the United States District Court for the Western District of Kentucky that raised the same claims presented in Dobson's Informal Complaint.[45] On October 16, 2004, the District Court dismissed Dobson's complaint for lack of subject matter jurisdiction, concluding that "section 207 [of the Act] precludes a complainant from filing suit in federal court once she has initiated the administrative complaint process with the FCC either by filing a formal or informal complaint."[46] Dobson then filed the original version of the instant Complaint with the Commission on January 10, 2005.[47]

III. DISCUSSION

A. Dobson's Claims are Governed by the Statute of Limitations in Section 415(b) of the Act

12. Section 415(b) of the Act provides a two-year limitations period applicable to "[a]ll complaints against carriers for the recovery of damages…."[48] All three counts of Dobson's Complaint against BellSouth seek the recovery of damages.[49] Thus, the two-year limitations period of section 415(b) governs all counts of Dobson's Complaint.[50]

13. We find unpersuasive Dobson's argument that the four-year limitations period in 28

[43] 47 C.F.R. § 1.718; Informal Complaint Closure Letter at 1-2.

[44] Informal Complaint Closure Letter at 2; 47 C.F.R. § 1.718.

[45] Answer Exhibit E ("District Court Complaint"); Joint Statement at 6, ¶ 12; Answer Exhibit H ("District Court Opinion") at 1.

[46] District Court Opinion at 2 (quoting *Stiles v. GTE Southwest Inc*., 128 F.3d 904, 907 (5th Cir. 1997) ("*Stiles v. GTE*")). *See* 47 U.S.C. § 207 (providing that a person may file a complaint at the Commission or in District Court, but that the person "shall not have the right to pursue both remedies").

[47] Dobson attempted to file a formal complaint on December 27, 2004, but that complaint was dismissed without prejudice because Dobson failed to comply with several of the Commission's formal complaint rules. Letter from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, to David Wilson, counsel to Dobson (Dec. 30, 2004).

[48] 47 U.S.C. § 415(b).

[49] *See*, *e.g.*, Complaint at 1-2.

[50] Section 415(b) does not apply to claims seeking damages based on "overcharges" as that term is defined in section 415(g) of the Act. *See* 47 U.S.C. § 415(g) (defining "overcharges" as "charges for services in excess of those applicable thereto under the schedule of charges lawfully on file with the Commission"). None of the charges at issue in Dobson's Complaint meets the limited definition of "overcharges" set forth in section 415(g), and neither party contends that Dobson's claims seek recovery of "overcharges" within that definition.

U.S.C. § 1658(a) applies to Dobson's claims.[51] Section 1658(a) is a "fallback" provision that applies only where no specific statute of limitations governs the particular claim at issue.[52] Because claims (like Dobson's) for recovery of damages from carriers are specifically governed by the limitations period set forth in section 415(b) of the Act, the default statute of limitations set forth in 28 U.S.C. § 1658(a), and cases applying it, are inapposite.[53] Accordingly, the limitations period set forth in 28 U.S.C. § 1658(a) has no application here.[54]

B. The Two-Year Limitations Period of Section 415(b) Bars Dobson's Claims

14. We note at the outset that "the purpose of Section 415 is 'to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.'"[55] Section 415 serves as an absolute, non-discretionary bar to the Commission's consideration of tardy complaints against carriers seeking the recovery of damages for violations of the Act.[56] The Commission and the federal courts strictly construe section 415, and have consistently held

[51] Reply Supplement at 7-8 (citing *E.spire Communications, Inc. v. Baca*, 269 F. Supp. 2d 1310 (D.N.M. 2003); *Verizon Maryland, Inc. v. RCN Telecom Services, Inc*., 232 F. Supp. 2d 539 (N.D. Md. 2002); *Bell-Atlantic-Pennsylvania v. Pennsylvania Public Utilities Commission*, 107 F. Supp. 2d 653 (E.D. Pa. 2000)).

[52] 28 U.S.C. § 1658(a) (providing that, "*except as otherwise provided by law*, a civil action arising under an Act of Congress … may not be commenced later than 4 years after the cause of action accrues") (emphasis added). *See, e.g*., *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 n.1 (1995) (describing section 1658 as a "general, 4-year limitations period for any federal statute [enacted after Dec. 1, 1990] without one of its own"); *Campbell v. Amtrak*, 163 F. Supp. 2d 19, 22 (D.D.C. 2001) (describing section 1658 as the "federal default statute of limitations").

[53] None of the cases cited by Dobson involved claims brought against carriers for the recovery of damages under section 208 of the Act. Rather, these cases involved claims against state commissions for injunctive relief, claims for which federal law provides no specific limitations period. *See supra* note 50.

[54] Dobson also argues that we should apply a variety of lengthy state limitations periods, if we were to regard Counts 1 and 2 as arising under state contract law. Reply Supplement at 2, 8; Reply of American Cellular Corporation and Dobson Cellular Systems, Inc. to Answer of BellSouth Telecommunications, Inc., File No. EB-05-MD-01, at 17 n.11 (filed Mar. 2, 2005) ("Reply"). We reject Dobson's suggestion that state statutes of limitation apply to Dobson's Complaint, because Dobson's Complaint does not (and could not here) assert state law claims.

[55] *Bunker Ramo Corp. v. The Western Union Telegraph Co., New York, N.T.*, Memorandum Opinion and Order, 31 FCC 2d 449, 453-54, ¶ 12 (Rev. Bd. 1971) ("*Bunker Ramo v. Western Union*"). *See*, *e.g.*, *Operator Communications, Inc. v. Verizon Telephone Companies*, Memorandum Opinion and Order, FCC 05-207, 2005 WL 3069906, ¶ 14 (rel. Dec. 9, 2005) ("*OCI v. Verizon*"), ¶ 10; *Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Co.*, Memorandum Opinion and Order, 17 FCC Rcd 24201, 24222-23, ¶ 50 (2002) ("*Communications Vending Corp. v. Citizens*"), *aff'd, Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004); *Aetna Life Ins. Co. v. AT&T Co*., Memorandum Opinion and Order, 3 FCC Rcd 2126, 2129, ¶ 13 (Com. Car. Bur. 1988) ("*Aetna v. AT&T*"), *aff'd sub nom. US Sprint Communications Co. v. AT&T Co.*, Memorandum Opinion and Order, 9 FCC Rcd 4801 (1994) ("*US Sprint v. AT&T*"), *aff'd, Sprint Communications Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996) ("*Sprint v. FCC*").

[56] *See*, *e.g.*, *Michael J. Valenti and Real Estate Market Place of New Jersey t/a Real Estate Alternative v. AT&T*, Memorandum Opinion and Order, 12 FCC Rcd 2611, 2621-22, ¶ 24 (1997) ("*Valenti v. AT&T*"); *MCI Telecommunications Corp. v. Pacific Tel. Co. of PA*, Memorandum Opinion and Order, 12 FCC Rcd 13243, 13252, ¶ 15 (Com. Car. Bur. 1997) ("*MCI v. Pacific Tel*"); *Armstrong Utilities, Inc. v. General Telephone Co. of Pennsylvania*, Memorandum Opinion, Order, and Temporary Authorization, 25 FCC 2d 385, 389, ¶ 11 (1970) ("*Armstrong v. General Telephone*").

that it must be applied even if to do so produces hardship.[57] Thus, exceptions to section 415's application have been confined to narrow circumstances, such as fraudulent concealment.[58]

15. Under section 415(b), a claim accrues on the date of the injury.[59] If the injury is not readily discoverable, the claim accrues, and the limitations period begins to run, when the complainant "'discovers, or with due diligence should have discovered, the injury that is the basis of the action.'"[60] A complainant has "an affirmative obligation to 'exercise due diligence in preserving [its] legal rights,'"[61] and it is "required to make a diligent inquiry into the facts and circumstances that would support that claim" as soon as it receives notice "that it might have a claim."[62]

1. All Three of Dobson's Claims Accrued More Than Two Years Before Dobson Filed Its Complaint, And Thus Are Time-Barred

16. Dobson argues that it "could not have even arguably been aware that it had a potential claim" against BellSouth under Counts 1 and 2 until it received letters from BellSouth on January 7, 2003 partially disputing the June 3, 2002 Refund Requests.[63] Dobson contends, moreover, that BellSouth did not "unequivocally notif[y]" Dobson that it disputed the Refund Requests until BellSouth informed Dobson in a June 4, 2003 e-mail message that BellSouth would make no further payments on Dobson's Refund Requests.[64] To support this contention, Dobson asserts that BellSouth's position changed materially in March 2003, when BellSouth made additional payments on some Refund Requests and sought repayment of some of the refunds it had made to Dobson.[65]

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[57] *See*, *e.g.*, *OCI v. Verizon* at ¶ 14; *Communications Vending Corp. v. Citizens*, 17 FCC Rcd at 24222, ¶ 50; *Valenti v. AT&T*, 12 FCC Rcd at 2621-22, ¶ 24; *Municipality of Anchorage d/b/a/ Anchorage Telephone Utilities v. Alascom, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 2472, 2476, ¶ 30 (Com. Car. Bur. 1989) ("*Anchorage v. Alascom*"); *Armstrong v. General Telephone*, 25 FCC 2d at 389, ¶ 11 (stating, in applying the then one year limitations period, that "[t]he construction of Section 415, both by the Commission and the federal courts, has been 'strict' and claims for damages based upon violations accruing more than one year before filing, are clearly foreclosed").

[58] *See*, *e.g.*, *OCI v. Verizon* at ¶ 14; *Communications Vending Corp v. Citizens*, 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, Inc. v. AT&T*, Memorandum Opinion and Order, 73 FCC 2d 450, 452-53, ¶ 4, n.7 (1979) ("*Tele-Valuation v. AT&T*"); *U.S. Cablevision v. New York Telephone Co*., Memorandum Opinion and Order, 46 FCC 2d 704, 706-07, ¶ 5 (1974); *Bunker Ramo v. Western Union*, 31 FCC 2d at 453-54; *Armstrong v. General Telephone*, 25 FCC 2d at 390, ¶ 15.

[59] *See*, *e.g.*, *Sprint v. FCC*, 76 F.3d at 1226; *MCI Telecommunications Corp. v. Teleconcepts*, 71 F.3d 1086, 1091 (3rd Cir. 1995) ("*MCI v. Teleconcepts*"); *OCI v. Verizon* at ¶ 11; *Communications Vending Corp v. Citizens*, 17 FCC Rcd at 24222-23, ¶ 51; *MCI Telecommunications Corp. v. U S West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 9328, 9330, ¶ 5 (2000).

[60] *Sprint v. FCC*, 76 F.3d at 1226 (citations omitted). *See*, *e.g.*, *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1428 (D.C. Cir. 1995); *Communications Vending Corp. v. Citizens,* 17 FCC Rcd at 2422-23, ¶ 51.

[61] *Communications Vending Corp. v. Citizens*, 17 FCC Rcd at 24222, ¶ 50.

[62] *Sprint v. FCC*, 76 F.3d at 1228. *See*, *e.g.*, *Communications Vending Corp. v. Citizens*, 17 FCC Rcd at 24222-23, ¶ 51.

[63] Reply at 18. *See* Reply Supplement at 10-11.

[64] Reply at 18.

[65] *Id.*

17. Dobson focuses on the wrong events. Under the "discovery" rule described above, where, as here, a claim asserts that a bill overstates the claimant's true debt, the claim accrued when the claimant received the allegedly erroneous bill.[66] Whether and when the billing party insists that the bill is correct is irrelevant. Here, the record does not reflect exactly when Dobson received BellSouth's bills containing the alleged overcharges for the shared facilities and reciprocal compensation. The record does indicate, however, that Dobson did receive all such bills by June 3, 2002.[67] Consequently, Dobson's claims accrued no later than June 3, 2002, which is much more than two years before Dobson filed the original version of this instant Complaint on January 10, 2005. Accordingly, absent some basis for tolling, section 415(b) bars Counts 1 and 2.[68]

18. Turning to Count 3, we find that Dobson's claim that BellSouth failed to charge the reduced rates established in the *ISP Order* accrued in September 2001, when Dobson admits it first requested that BellSouth bill Dobson at the lower *ISP Order* rates.[69] At that point, Dobson knew that BellSouth had elected to implement the *ISP Order*'s lower rates with other carriers, and that BellSouth was neither charging Dobson the lower rates nor offering to provide the lower rates to Dobson through an amendment to the parties' existing interconnection agreements, or through a separate agreement, as Dobson contends BellSouth was required to do.[70] Dobson thus knew by September 2001 that it had been injured by BellSouth's failure to implement the new, reduced *ISP Order* rates in its interconnection relationship with Dobson.[71]

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[66] *See*, *e.g.*, *OCI v. Verizon* at ¶ 11; *Communications Vending Corp. v. Citizens*, 17 FCC Rcd at 24222-23, ¶ 51; *Aetna v. AT&T*, 3 FCC Rcd at 2129, ¶ 13; *Tele-Valuation v. AT&T*, 73 FCC 2d at 452, ¶ 4 ("[T]he point of accrual should be fixed as the time the customer receives a bill for services. At this point the customer may review the charges … question the carrier, or take any other steps necessary to detect and remedy errors. This places a burden of prompt detection of overcharges on the party with the greatest incentive to do so and penalizes dilatory detection, thereby guarding against later attempts to recover for stale claims. Through the exercise of diligence the customer may prevent loss; he therefore is held knowledgeable at the time he is notified of his charges.").

[67] June 3, 2002 Refund Requests; Metcalf Decl. at 1-2, ¶¶ 4-5; Answer at 37; Joint Statement at 3, ¶¶ 4-5.

[68] The record can plausibly be read to suggest that BellSouth was *supposed* to "over-bill" Dobson in the first instance, whereupon Dobson would, as a matter of course, bill BellSouth back for the overcharge amount. *See generally* Complaint Exhibit C at 6, ¶ IV.A.4 (new Kentucky interconnection agreement). Such a reading would not save Dobson's claims, however. The accrual date would move only from June 3, 2002 to July 3, 2002, the day on which the Refund Requests became due; and July 3, 2002 is still well more than two years before January 10, 2005. Moreover, the claims then might constitute "collection actions" that fail at the threshold under well-established Commission precedent. *See*, *e.g.*, *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc*., Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555, ¶ 8 (2004).

[69] Joint Statement at 5, ¶ 9; Supplemental Joint Statement at 5; Wilson Decl. at ¶ 5.

[70] Joint Statement at 5, ¶ 9; Supplemental Joint Statement at 10-13. *Cf. Airtouch Cellular v. Pacific Bell*, Memorandum Opinion and Order, 16 FCC Rcd 13502, 13504, ¶ 6 (2001) ("*Airtouch*") (holding that a claim for violating a Commission rule accrued on the rule's effective date, even though the parties had to implement the rule by amending their interconnection agreement).

[71] Even assuming, *arguendo*, that Dobson's claim under Count 3 did not accrue in September 2001, we would still conclude that section 415(b) bars the claim based on two alternative accrual dates, both of which pre-date the Complaint by more than two years. First, we agree with BellSouth that the claim in Count 3 had accrued by at least February 2002, when Dobson received BellSouth's last invoices for Georgia and Tennessee. *See* Joint Statement at 3-4, ¶ 6-8; Wilson Decl. at 2-3, ¶ 5-7; Complaint Exhibit V (spreadsheet prepared by Dobson); Supplemental Joint Statement Exhibit B (Letter from David Wilson, counsel for Dobson, to Randy Ham of BellSouth, dated Oct. 1, 2002). By that time, Dobson knew, or should have known, that BellSouth had failed to bill Dobson at the new ISP

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19. We reject Dobson's suggestion that Count 3 did not accrue until June 4, 2003, when BellSouth "unequivocally notified Dobson" in an e-mail communication that BellSouth intended to dispute Dobson's request for ISP rate adjustments in Tennessee and Georgia.[72] Again, a claim accrues under section 415(b), not when a defendant explicitly disputes the claim, but when the complainant discovers, or with due diligence should have discovered, the injury that forms the basis of the claim.[73] Here, Dobson knew, or should have known, in September 2001 that BellSouth was not billing Dobson at the reduced rates to which Dobson believed it was entitled under the *ISP Order*. Consequently, Dobson's claim in Count 3 accrued in September 2001, far more than two years before January 10, 2005. Accordingly, absent some basis for tolling, section 415(b) bars Count 3.

2. The Interconnection Agreements' ADR Provisions Provide No Basis for Delayed Accrual of the Claims or Tolling of the Limitations Period

20. Dobson argues that section 415(b)'s two-year limitations period did not begin to run on all three counts in the Complaint until the parties had exhausted the 30-day procedure set forth in the ADR provisions of the parties' interconnection agreements.[74] The ADR provisions provided:

> Except as otherwise stated in this Agreement, the parties agree that if any dispute arises as to the interpretation of any provision of this agreement or as to the proper implementation of this Agreement, the parties will initially refer the issue to the individuals in each company that negotiated the Agreement. If the issue is not resolved within 30 days, either party may petition the [state commission] for a resolution of the dispute, and/or pursue any other remedy available to it at law or in equity.[75]

Dobson maintains that, because it did not invoke the ADR procedures until May 13, 2003, it did not have the "present ability to bring legal action" until 30 days later, on June 13, 2003.[76] Dobson contends that the two-year limitations period thus did not begin to run until June 13, 2003, when Dobson acquired a "right to sue" under the terms of the ADR provisions.[77]

21. We reject this argument for delayed accrual of Dobson's claims. As discussed above, where, as here, the claim alleges over-billing, the claim accrues upon receipt of the allegedly erroneous bill.[78] There is no legal basis for finding that an over-billing claim (such as the claims in Counts 1 and 2), or a claim that a party charged excessive reciprocal compensation rates (such as the claim in Count 3),

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rates in those markets. Second, Dobson's cover letters to its June 3, 2002 Refund Requests, which expressly request an adjustment to BellSouth's ISP charges, affirm that Dobson knew, as of June 2002, that it had been injured by BellSouth's failure to charge Dobson the new ISP rates. The claim in Count 3 therefore accrued, at the latest, by June 3, 2002.

[72] Reply at 18 (citing Complaint Exhibit K); Reply Supplement at 9.

[73] *See*, *e.g.*, *Sprint v. FCC*, 76 F.3d at 1226.

[74] Reply at 16-21; Joint Statement at 11-12, ¶ 2.

[75] Complaint Exhibit A at 15, ¶ XIX; Complaint Exhibit B at 15, ¶ XVIII; Reply at 19-20.

[76] Reply at 18-19. *See* Complaint at 14-15.

[77] *Id*.

[78] *See supra* Part III(B)(1).

accrues under section 415(b) on the date when the complainant acquires a "right to sue" under a private agreement.

22. Moreover, we reject Dobson's suggestion that the parties' reliance on the ADR process provides a basis for tolling the limitations period for two reasons. First, the text of the ADR provisions does not reflect any intent by both parties to toll the limitations period. The ADR provisions state only that, once the procedure is invoked, the parties will seek to resolve the dispute internally for thirty days, and may then pursue other appropriate remedies.[79] If anything, the swiftness of the ADR process reflects an intent *not* to toll the limitations period.

23. Second, and more importantly, even if we were to interpret the ADR provisions as an agreement by the parties to toll the limitations period until completion of the ADR process, as Dobson urges us to do,[80] we would nonetheless conclude that the limitations period in section 415(b) was not tolled by such an agreement. As noted above, the Commission and the federal courts have allowed tolling of the limitations period of section 415 only in very limited circumstances, such as instances of fraudulent concealment.[81] Indeed, the Commission has observed that where "there is no allegation of fraud or deceit having been practiced by the defendants 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."[82] Thus, a private agreement to toll the limitations period, without more, simply does not meet these narrow grounds for tolling.[83]

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[79] *See* Complaint Exhibit A at 15, ¶ XIX; Complaint Exhibit B at 15, ¶ XVIII.

[80] Reply at 19.

[81] *See supra* Part III(B)(1).

[82] *Valenti v. AT&T*, 12 FCC Rcd at 2621-22, ¶¶ 24-25. This also explains why Dobson's reliance on labor law cases is misplaced. *See* Reply at 18-19 (citing *Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 782 F.2d 674, 681 (7th Cir. 1986) ("*Frandsen v. Brotherhood*") and *Volkman v. United Transport Union*, 73 F.3d 1047, 1054-55 (10th Cir. 1996) ("*Volkman v. United Transport*")). Those cases hold that the six-month limitations period applicable to unfair representation claims is tolled pending an employee's mandatory exhaustion of union remedies. That holding stems from the unique attributes of national labor laws and policies regarding the complex interrelationships of unions, employees, and employers. *Frandsen*, 782 F.2d at 681 (discussing the "national labor policy of encouraging workers to pursue internal union remedies, while ensuring them a judicial forum in which to resolve disputes"); *Volkman*, 73 F.3d at 1054-56; *see BalSavage v. Ryder Truck Rental*, 712 F. Supp. 461, 471 (D.N.J. 1989) (discussing the "federal policy of encouraging private resolution of labor disputes"). In any event, unlike the six-month period applicable in *Frandsen v. Brotherhood* and *Volkman v. United Transport*, the two-year limitations period under section 415(b) provides parties ample time to pursue ADR without the need for tolling, especially where, as here, the agreements require only 30 days of ADR procedures.

[83] *See*, *e.g.*, *Midstate Horticultural Co. v. Pennsylvania Railroad Co*., 320 U.S. 356, 365-67 (1943) (holding that parties cannot, by agreement, waive the limitations period of section 16 of the Interstate Commerce Act, on which section 415 of the Communications Act is based); *Anchorage v. Alascom*, 4 FCC Rcd at 2474, 2476, ¶¶ 20, 27 (noting that section 415(b) of the Act is based on section 16 of the Interstate Commerce Act). Nor was the limitations period tolled, as Dobson has suggested (Reply at 17-18), by the parties' on-going correspondence and discussions concerning the disputed matters that gave rise to Dobson's Complaint. *See*, *e.g.*, *Anchorage v. Alascom*, 4 FCC Rcd at 2475-76, ¶¶ 22, 28 (observing that "[i]f a written agreement is ineffective in tolling the statute, certainly oral discussions which contained no agreement to toll the statute are insufficient" to do so, and that "pursuit of negotiations looking toward a possible settlement of outstanding differences does not, in and of itself, generally stay or toll operation of the statute of limitations"). That said, we strongly encourage parties to make vigorous settlement efforts before invoking the Commission's formal complaint procedures. *See*, *e.g.*,

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24. Our conclusion that tolling is unavailable here is underscored by the record evidence showing that Dobson failed diligently to pursue the ADR procedures available under the interconnection agreements.[84] Under these agreements, initiation of the dispute resolution procedures was entirely within Dobson's control.[85] Dobson failed promptly to invoke these procedures, however, and instead waited over eleven months from the time it sought refunds from BellSouth in June 2002 to initiate the ADR process on May 14, 2003.[86] Thus, we cannot conclude that the limitations period should be equitably tolled in Dobson's favor, where Dobson delayed triggering the ADR procedures.[87]

3. The Statute of Limitations Was Not Tolled During the Pendency of the District Court Case

25. We also reject Dobson's contention that the two year limitations period was tolled during the 278-day pendency of Dobson's District Court case.[88] Dobson asserts that, under the allegedly controlling test referenced in *Irwin v. Department of Veteran's Affairs*, "once a cause of action has accrued, the limitations period may be suspended or tolled where the claimant has actively pursued his judicial remedies by filing a defective complaint during the statutory period."[89] Applying that standard here, Dobson argues that its filing of the District Court Complaint constitutes an active pursuit of judicial remedies sufficient to toll section 415(b).

26. Dobson's reliance on *Irwin* is misplaced. The *Irwin* court, in refusing to toll the limitations period in that case, determined that such equitable relief should be granted only "sparingly," where the claimant exercised "due diligence in preserving his legal rights."[90] In this case, the record shows that Dobson failed to act with due diligence, for two reasons.[91]

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Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22507, 22519-20, 22582, ¶¶ 21, 48, 198 (1997) (subsequent history omitted). The limitations period of two years provides plenty of time to do so; and the Commission's informal complaint rules provide a relatively inexpensive procedure for creating additional time for settlement negotiations, if necessary. *See*, *e.g.*, 47 C.F.R. §§ 1.716-1.718; *OCI v. Verizon* at ¶ 23.

[84] Joint Statement at 11-12, ¶ 2.

[85] Complaint Exhibit A at 15, ¶ XIX; Complaint Exhibit B at 15, ¶ XVIII.

[86] Joint Statement at 11-12, ¶ 2. Indeed, Dobson's counsel expressly opted to delay invoking the ADR procedures. In a communication with BellSouth on January 17, 2003, Dobson's counsel stated Dobson "hope[d] to avoid the dispute resolution procedures of the various agreements" between the parties. Complaint Exhibit J (Letter from David Wilson, counsel for Dobson, to Bill Mealer of BellSouth, dated Jan. 17, 2003); Wilson Decl. at 3, ¶ 8.

[87] Moreover, under Dobson's rationale, it could have waited an indefinite period of time to invoke the dispute resolution provision, then filed a timely complaint with the Commission thirty days later.

[88] Joint Statement at 12, ¶ 3; Reply at 21-22.

[89] Reply at 21 (quoting *Irwin v. Department of Veteran's Affairs*, 498 U.S. 89, 96 (1991)). *See* Reply Supplement at 13 (citing *Herb v. Pitcairn*, 325 U.S. 77 (1945), *Burnett v. New York Central Railroad Co*., 380 U.S. 424 (1965) ("*Burnett v. NYC Railroad*"), and *Fox v. Eaton Corp*., 615 F.2d 716 (6th Cir. 1980) ("*Fox v. Eaton*")).

[90] *Irwin v. Department of Veteran's Affairs*, 498 U.S. at 96 (noting that the "principles of equitable tolling … do not extend to what is at best a garden variety claim of excusable neglect").

[91] We also reject Dobson's reliance on *Crown, Cork & Seal Co. Inc. v. Parker*, 462 U.S. 345 (1983) ("*Crown, Cork & Seal v. Parker*") and *Pavlak v. Church*, 727 F.2d 1425 (9th Cir. 1984), both of which involved tolling a limitations

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27. First, Dobson's commencement of an action in a clearly inappropriate forum reveals the *absence* of the kind of due diligence required for equitable tolling under *Irwin*.[92] Specifically, Dobson should have known when it filed its action in federal court that, under section 207 of the Act and unanimous precedent, its earlier filing of the Informal Complaint with the Commission would very likely be deemed to constitute an election of forums that barred Dobson from pursuing identical claims in federal court.[93] Indeed, in dismissing Dobson's complaint for lack of subject matter jurisdiction, the District Court noted that Dobson had failed to provide any authoritative support for its assertion that prior cases applying section 207 in a manner that would bar Dobson's court action were "simply wrong."[94] Moreover, following the District Court's dismissal, Dobson waited over three months before filing the instant Complaint with the Commission.[95]

28. Second, the Informal Complaint Closure Letter that Commission staff sent to Dobson on August 22, 2003 specifically advised Dobson that it could file a formal complaint with the Commission that would relate back to the June 23, 2003 filing date of Dobson's Informal Complaint under section 1.718 of the Commission's rules, so long as Dobson filed its formal complaint "within six months of the date" of BellSouth's August 8, 2003 response.[96] Thus, Dobson knew that it could preserve its claims against BellSouth by filing a formal complaint with the Commission on or before February 8, 2004. Dobson inexplicably failed to file a formal complaint with the Commission within this six-month window, however, and instead, in an apparent attempt at "forum shopping," filed a complaint in the

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period applicable to an individual class member's claim pending a ruling on class certification motions. In brief, these decisions relied on certain unique complexities of class actions that are not present in this relatively straightforward complaint proceeding.

[92] *See*, *e.g.*, *Gibson v. American Bankers Insurance Co.*, 289 F.3d 943, 948 (6th Cir. 2002); *Shofer v. Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. 1992). *See generally Fox v. Eaton*, 615 F.2d at 721 ("[A]s a general matter, the filing of an action in a court that clearly lacks jurisdiction will not toll the statute of limitations.").

[93] *See* 47 U.S.C. § 207; *Mexiport, Inc. v. Frontier Communications Services, Inc.*, 253 F.3d 573 (11th Cir. 2001); *Digitel, Inc. v. MCI WorldCom, Inc.*, 239 F.3d 187, 190 (2nd Cir. 2001) (stating "a party that has filed an informal complaint may not also sue in district court"); *Stiles v. GTE*, 128 F.3d at 906-07; *Cincinnati Bell Telephone Co. v. Allnet Communication Services, Inc.*, 17 F.3d 921 (6th Cir. 1994); *Bell Atlantic Corp. v. MFS Communications Co.*, 901 F. Supp. 835 (D.Del. 1995); *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24556-57, ¶ 10 (2004). *See generally Premiere Network Services, Inc. v. SBC Communications, Inc.*, No. 04-41574, 2006 WL 350064 (5th Cir. Feb. 16, 2004); *Valenti v. AT&T*, 12 FCC Rcd at 2622, ¶ 26 (holding that the complainant's delay in filing a complaint at the Commission was not reasonable "because it was or should have been aware of the possibility that the Commission had primary or exclusive subject matter jurisdiction and that there might be associated statute of limitations problems").

[94] District Court Opinion at 2. In this regard, we find Dobson's reliance on *Fox v. Eaton* to be misplaced. Reply Supplement at 13. In *Fox v. Eaton*, the court held that commencement of an employment discrimination action in state court, which was later dismissed for lack of subject matter jurisdiction, was sufficient to toll the limitations period, where the lack of state court jurisdiction was "far from clear" due to conflicting case law on the question. *Fox v. Eaton*, 615 F.2d at 719-20. By contrast, Dobson has not cited, nor have we found, any conflicting precedent under section 207 of the Act that supports Dobson's decision to file a complaint in federal court raising the same issues as its earlier Informal Complaint before the Commission.

[95] Similarly, in *Anchorage v. Alascom*, the Common Carrier Bureau held that the complainant could not "deduct from the period of the statute of limitations the time during which a prior action ultimately dismissed without prejudice was pending." *Anchorage v. Alascom*, 4 FCC Rcd at 2474, ¶ 26.

[96] 47 C.F.R. § 1.718; Informal Complaint Closure Letter at 2.

District Court on February 4, 2004.[97] In failing to file by February 8, 2004, Dobson forfeited its entitlement to the relation-back privileges of rule 1.718. Moreover, based on this record, Dobson cannot show that it exercised "due diligence in pursuing [its] legal rights,"[98] and thus it cannot satisfy the narrow grounds for equitable tolling.[99]

IV. CONCLUSION

29. Dobson's claims for refunds in Counts 1 and 2 accrued no later than June 3, 2002. Dobson's claim for refunds in Count 3 accrued no later than September 2001. Section 415(b) of the Act applies to all of Dobson's claims, and provides a limitations period of two years. Therefore, absent some basis for tolling of the two-year limitations period, Dobson's claims in Counts 1 and 2 expired by June 3, 2004, and Dobson's claim in Count 3 expired in September 2003, well before Dobson filed this formal complaint on January 10, 2005. All of the bases proffered by Dobson for such tolling lack merit. Therefore, the two-year statute of limitations of section 415(b) of the Act bars Dobson's formal complaint.[100]

V. ORDERING CLAUSE

30. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 415(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208 and 415(b), that the formal complaint filed by American Cellular Corporation and Dobson Cellular Systems, Inc. is DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

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[97] Answer Exhibit E.

[98] *Irwin v. Department of Veteran's Affairs*, 498 U.S. at 96.

[99] *See supra* Part III(B)(1).

[100] We note that, during this proceeding, we orally denied a motion by BellSouth to strike from the record Dobson's references in the Complaint to settlement discussions between the parties. Motion to Strike Material Related to Confidential Settlement Negotiations, File No. EB-05-MD-01 (filed Feb. 15, 2005) ("Motion to Strike"); Letter from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, to David Wilson, counsel to Dobson, and Theodore Marcus, counsel to BellSouth, File No. EB-05-MD-01 (May 5, 2005). BellSouth's Motion to Strike was premised on Federal Rule of Evidence 408, which provides that "[e]vidence of (1) furnishing or offering ... to furnish, or (2) accepting or offering ... to accept, a valuable consideration in compromising or attempting to compromise a [disputed] claim … is not admissible to prove liability for or invalidity of the claim or its amount." Federal Rules of Evidence Rule 408 ("FRE 408"). Nothing in the language of FRE 408 requires exclusion of all references to the fact that settlement negotiations have occurred; it bars only such references that are proffered to prove or disprove liability and/or damages. Here, Dobson did not attempt to rely on any of the purported references to the parties' settlement discussions to establish that BellSouth is liable for damages. In other words, BellSouth failed to show that the material it moved to strike reflected an offer of compromise upon which Dobson sought to rely to prove liability or damages. Consequently, BellSouth's Motion to Strike lacks merit. In any event, because we do not rely on any of Dobson's references to settlement discussions, BellSouth's Motion to Strike is moot.