

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

In re Liability of

Elkhart Telephone Company

File No. GC-95-1

Notice of Apparent Liability  
for Forfeiture for Violation  
of Section 1.1210 of the  
Commission's Rules Prohibiting  
the Solicitation of Presentations

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: November 13, 1995; Released: November 13, 1995

By the Commission:

1. In this *Notice of Apparent Liability*, we find Elkhart Telephone Company, Inc. ("Elkhart") apparently liable for a forfeiture in the amount of \$5,000 for willful violation of the prohibition on soliciting *ex parte* presentations in restricted proceedings. See 47 C.F.R. §1.1210.

2. On August 9, 1995, the Commission's Managing Director received a letter from Mr. Durward D. Dupre, Vice-President-Associate General Counsel, Southwestern Bell Telephone Company ("Southwestern Bell"), in which he alleged that Mr. Bob Boaldin, Elkhart's President, solicited a prohibited *ex parte* presentation relating to Elkhart's formal complaint filed against Southwestern Bell, in violation of Section 1.1210 of the Commission's Rules, 47 C.F.R. §1.1210. That section prohibits any person from soliciting or encouraging others to make any presentation which he or she is prohibited from making. On August 10, 1995, Elkhart filed a response to that letter. On August 18, 1995, Southwestern Bell filed a response to Elkhart's letter and, on August 28, 1995, Elkhart filed a letter responsive to Southwestern Bell's August 18 letter.

3. We have reviewed the matter and it appears that a prohibited solicitation under Section 1.1210 of the Commission's Rules did occur. When Elkhart filed a formal complaint against Southwestern Bell on July 16, 1993, the proceeding became "restricted" and, under Sections 1.1208 and 1.1210 of the Rules, no *ex parte* presentations, or solicitations thereof, were permitted. Although a June 12, 1995 letter from Senator Nancy Landon Kassebaum addressed to Chairman Hundt merely expressed concern "about the apparent delay in this case" and requested "an update on its status," it was accompanied by two enclosures -- an April 4, 1995 letter addressed to Senator Kassebaum from Mr. Boaldin, Elkhart's president, and an undated, unsigned draft letter (prepared by Mr. Boaldin and sent by

him to Senator Kassebaum) addressed to FCC Chairman Hundt from Senator Kassebaum. Both enclosures addressed the merits or outcome of the complaint proceeding.<sup>1</sup>

4. Section 1.1210 provides that "[n]o person shall solicit or encourage others to make any presentation which he or she is prohibited from making under the provisions of this subpart." The April 4 letter to Senator Kassebaum stated "we wanted to be sure you are aware of how Southwestern Bell (SWB) is denying rural customers access to advanced services." It then described the formal complaint pending before the Commission. This letter, even though it discussed the merits of the complaint proceeding, was clearly not a prohibited *ex parte* presentation because it was not addressed to Commission decision-makers and, by itself, merely asked Senator Kassebaum "to send a letter to Chairman Hundt to expedite the resolution of the complaint. . . ."

5. However, when Elkhart included as an attachment to its April 4 letter to Senator Kassebaum the undated, unsigned draft of a letter from Senator Kassebaum to Chairman Hundt, it appears that Elkhart was seeking to provide Senator Kassebaum with a draft letter to be used to support at the Commission Elkhart's concerns about the pending complaint. Elkhart should have anticipated that this unsigned, undated letter might be used by the Senator to communicate to the Commission; indeed, it presumably was Elkhart's intent that it be so used. Although not signed, the letter was, in fact, sent as drafted by Elkhart.

6. The draft contained statements regarding the merits that Elkhart itself would have been prohibited from making on an *ex parte* basis to Commission decision-making personnel. For example, the draft letter states "I [Senator Kassebaum] strongly support expeditious and *favorable* action on Elkhart's formal complaint." (Emphasis added.) Elsewhere, in describing the complaint, the draft letter states "Southwestern Bell Telephone Company ('Southwestern Bell') is *unlawfully* refusing to provide long distance telephone companies with access to Elkhart's common channel signalling facilities" and Southwestern Bell is "*unlawfully* degrading telephone service to rural Kansas." (Emphasis added.) No indication is provided in this correspondence of an expectation or request on Elkhart's part that, if such a letter was sent, as in fact occurred, Southwestern Bell, the other party to the proceeding, would be served with a copy. This absence of a request for service is particularly troubling given that Elkhart itself had previously made allegations that Southwestern Bell had violated the *ex parte* rules in this proceeding, see Elkhart's "Motion to Strike and Request for Sanctions," dated October 4, 1993, thus indicating that Elkhart was well aware of the restricted nature of the proceeding under the *ex parte* rules.

7. Elkhart's explanation for this apparent solicitation is that the correspondence was directed at administrative delay and Elkhart's request to Senator Kassebaum was for a status inquiry and, as such, the correspondence did not address the merits of the complaint proceeding. See, e.g., Letter from James U. Troup, Counsel for Elkhart, to Andrew Fishel, dated August 10, 1995. This is patently incorrect. Indeed, Elkhart's statement that it "did not ask

<sup>1</sup> Indeed, for this reason, William F. Caton, Acting FCC Secretary, on behalf of the Managing Director, by letter dated July 24, 1995, notified Senator Kassebaum that the proceeding was restricted and that, because her letter was not served on the

other party to the proceeding, it (including the enclosures) would be associated with, but not made a part of the record of, the proceeding.

Senator Kassebaum to seek favorable disposition of Elkhart's complaint," see Letter to from James U. Troup, Counsel for Elkhart, to Andrew Fishel, dated August 28, 1995, is plainly contradicted by the language of the draft letter it provided Senator Kassebaum.

8. In view of these facts and circumstances, it appears that Elkhart violated the prohibition on solicitation of presentations under Section 1.1210 of the Rules. While Elkhart is not prohibited from soliciting assistance from members of Congress with respect to the status of a particular proceeding before the Commission, particularly where administrative delay is concerned, or from seeking substantive intervention from members of Congress in accordance with the *ex parte* rules, it may not ask members of Congress to make an *ex parte* presentation to the Commission that Elkhart itself is prohibited from making.

9. Section 503(b) of the Communications Act states in pertinent part:

Any person who is determined by the Commission in accordance with paragraph (3) or (4) of this subsection to have --

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that Elkhart's actions described herein constitute willful conduct within the terms of the statute.<sup>2</sup>

10. Section 503(b) of the Communications Act, 47 U.S.C. §503(b)(2)(B), in relevant part, provides that the amount of any forfeiture penalty determined under this section for a violation by a common carrier shall not exceed \$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act. Although the aforementioned violation constituted a single act of soliciting a prohibited *ex parte* presentation, it was a serious and apparently blatant violation of the Commission's rules. When a person who is prohibited from making an *ex parte* presentation attempts to have another make the prohibited presentation, it threatens the integrity and independence of the Commission's decision-making processes in adjudicatory proceedings. Moreover, the Commission has repeatedly warned and admonished parties against such conduct. See, e.g., *Thomas C. Harper*, 3 FCC Rcd 6605 (1988); *Charles S. Lutz*, 56 FCC 2d 385, 386 (1975). Because such warnings and admonishments appear to have been less than fully successful, we believe that more serious sanctions are appropriate. See generally *Press Broadcasting Company, Inc. v. FCC*, 59 F.3d

1365(D.C. Cir. July 21, 1995). For this reason, we believe that an assessment of a forfeiture in the amount of \$5,000 for the violation appears appropriate.

11. While the violation was serious and apparently blatant, we do not, however, believe it was so egregious as to warrant dismissal of Elkhart's complaint, as requested by Southwestern Bell. Such action might unfairly harm the ratepayers on behalf of whom Elkhart is ultimately seeking relief. We warn parties and the public, however, that if issuance of forfeitures is insufficient to deter *ex parte* violations in proceedings such as this, more serious sanctions may be imposed.

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, Elkhart Telephone Company IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Five Thousand Dollars (\$5,000) for willful violation of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

13. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3), that Elkhart Telephone Company may within 30 days of the date of this notice pay the full amount of forfeiture in the manner stated below, or may file a response showing why a forfeiture should not be imposed or should be reduced. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above-captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

14. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability shall be sent by certified mail, return receipt requested, to Elkhart Telephone Company.

#### FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

<sup>2</sup> Section 312(f) of the Communications Act provides:

The term "willful" when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this

Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).