

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1064

GREAT LAKES COMNET, INC. AND WESTPHALIA
TELEPHONE COMPANY,
PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

AT&T SERVICES, INC., AT&T CORP.,
VERIZON, SPRINT COMMUNICATIONS
COMPANY L.P AND CENTURYLINK
COMMUNICATIONS, LLC,

INTERVENORS FOR RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

**Response of Federal Communications Commission and
United States of America To The Court's March 3, 2016 Order**

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

ROBERT J. NICHOLSON
DANIEL E. HAAR
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

THAILA K. SUNDARESAN
COUNSEL

In accordance with the Court's March 3, 2016, Order, respondents respectfully file this response addressing "(1) the effect of the automatic stay on this appeal; and (2) whether [respondents] intend to take a position in the bankruptcy proceeding on the motion of AT&T Corporation filed in the Bankruptcy Court on February 19, 2016." *Order*, at 1.

This morning, the Commission was informed that AT&T and Great Lakes filed a stipulated order in the Bankruptcy Court, on March 4, 2016. In the proposed order, the parties stipulated that to the extent the stay applies to the pending appeal before this Court, the stay should be modified so that the petition for review of the Commission's order can go forward. The Bankruptcy Court has not yet entered the order. Should the Bankruptcy Court issue the proposed order, the stay would no longer apply to the appeal before this Court and the case should proceed accordingly.

However, so long as the Bankruptcy Court has not lifted the stay, respondents believe that the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a), likely applies at the present time to petitioner Great Lakes Comnet, Inc. (Great Lakes), which has now filed a Chapter 11 petition for reorganization. And because the issues on appeal chiefly concern Great Lakes' actions, we do not believe it would be appropriate to proceed with the appeal at this time only with regard to co-petitioner Westphalia Telephone

Company (Westphalia), which has not filed for bankruptcy. As to the second issue identified by the Court, respondents do not intend to take a position on AT&T's motion to lift the stay in the Bankruptcy Court.

INTRODUCTION

This case was commenced by the filing of an administrative complaint at the FCC pursuant to 47 U.S.C. § 208 by AT&T Services Inc. and AT&T Corporation (collectively, AT&T) against Great Lakes and Westphalia. AT&T alleged, among other things, that Great Lakes' tariffed rates for interstate telecommunications services were unlawful under the Commission's rules. The Commission bifurcated the determination of liability and damages, and then granted AT&T's complaint in part, and dismissed the remaining counts. Great Lakes and Westphalia subsequently filed a petition for review of the FCC's order. The parties filed merits briefs and the Court scheduled oral argument for April 1, 2016.

Thereafter, Great Lakes filed a "Notice of Suggestion of Bankruptcy and Application of Automatic Stay," informing the Court that it had filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code and as such the appeal was subject to the Bankruptcy Code's automatic stay. On February 24, 2016, AT&T filed a response to Great Lakes' Notice of Suggestion, stating that AT&T had filed a motion in the bankruptcy court

arguing that the automatic stay is inapplicable to this appeal, or should, in the alternative, be lifted to allow the appeal to proceed to conclusion.

As noted above, the FCC was informed this morning that AT&T and Great Lakes filed in the Bankruptcy Court, on March 4, 2016, an “Order Granting Stipulation Resolving Motion of AT&T Corp. To Determine Automatic Stay Inapplicable, Or In The Alternative, For Relief From The Automatic Stay.” *See* Exhibit 1. In the proposed order, AT&T and Great Lakes stipulated that to the extent the automatic stay applies to the pending appeal before the DC Circuit, the stay should be modified so that the appeal can go forward. The Bankruptcy Court has not yet entered the order.

I. SO LONG AS THE BANKRUPTCY COURT HAS NOT LIFTED THE AUTOMATIC STAY, IT APPEARS THAT THE APPEAL IS SUBJECT TO THE BANKRUPTCY CODE’S AUTOMATIC STAY.

The automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a), provides that the filing of a bankruptcy petition operates as an automatic stay, “applicable to all entities,” of the “commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor.” 11 U.S.C. § 362(a)(1). “The stay of section 362 is extremely broad in scope and, aside from . . . limited exceptions . . . applies to almost any type of formal or

informal action taken against the debtor or the property of the estate.” 3

COLLIER ON BANKRUPTCY ¶ 362.03, at 362-23 (16th ed.).

“Whether a matter is ‘against the debtor’ is generally determined by who initiated the original proceeding.” *Id.* ¶ 6009.04, at 6009-7 to 6009-8.

Here, AT&T initiated the proceeding below by filing an administrative complaint with the Commission against Great Lakes (now the debtor) and Westphalia for damages under section 208 of the Communications Act, 47 U.S.C. § 208, alleging, among other things, that Great Lakes’ tariffed rates for interstate access services were unlawful under the Commission’s rules. (JA 001). In short, that was an action against Great Lakes, the debtor.

Moreover, “[b]ecause an appeal is the continuation of an action, the unanimous view of the courts of appeals is that relief from the automatic stay is needed for anyone, including the trustee or debtor in possession, to take or prosecute an appeal in a case where the debtor is the defendant.” 10 COLLIER

ON BANKRUPTCY ¶ 6009.04.¹ The petition for review filed by Great Lakes is a “continuation,” 11 U.S.C. § 362(a)(1), of the original administrative proceeding against Great Lakes, the debtor, and is therefore subject to the automatic stay.

This Court’s decision in *Carley Capital Grp. v. Fireman’s Fund Ins. Co.*, 889 F.2d 1126 (D.C. Cir. 1989) illustrates this principle. The district court granted Carley, the insured, an award under its insurance policy with Fireman’s Fund for a destroyed building. 877 F.2d 78, 79 (D.C. Cir. 1989). This Court reversed, *id.*, but before its mandate was issued, Carley filed an involuntary bankruptcy petition. 889 F.2d at 1126. The Court then held that the filing of Carley’s bankruptcy petition did not stay the appeal, explaining that Section 362(a)(1) “‘only stays proceedings *against* the debtor,’ and ‘does not address actions brought by the debtor.’” *Id.* at 1127 (quoting *Ass’n of St. Croix Condo. Owners*, 682 F.2d at 448) (emphasis in original).

¹ See *Simon v. Navon*, 116 F.3d 1, 4 (1st Cir. 1997); *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 790 F.2d 206, 207 (2d Cir. 1986); *Ass’n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir. 1982); *Platinum Fin. Servs. v. Byrd (In re Byrd)*, 357 F.3d 433, 439 (4th Cir. 2004); *Marcus, Stowell & Beye Gov’t Sec., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 230 n.4 (5th Cir. 1986); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir. 1983); *Sheldon v. Munford, Inc.*, 902 F.2d 7, 8 (7th Cir. 1990); *Farley v. Henson*, 2 F.3d 273, 275 (8th Cir. 1993); *Parker v. Bain*, 68 F.3d 1131, 1135-36 (9th Cir. 1995); *TW Telecom Holdings, Inc. v. Carolina Internet Ltd.*, 661 F.3d 495, 497 (10th Cir. 2011).

On February 19, 2016, AT&T filed a motion in the Bankruptcy Court arguing that the automatic stay is inapplicable, or in the alternative, that the stay should be lifted. AT&T argues before that court that the case falls within an exception to the automatic stay, 11 U.S.C. § 362(b)(4), which provides that a stay is inapplicable to the “continuation of an action or proceeding by a government unit . . . to enforce [its] police or regulatory power.” But a complaint proceeding under 47 U.S.C. § 208 is unlike a typical proceeding “to enforce [an agency’s] police or regulatory power.” Although a section 208 proceeding serves public purposes to ensure just and reasonable charges under the Communications Act, it is initiated by, and focuses mainly on the rights of, private parties.

In any event, AT&T has itself not asked this Court to proceed with the case in the face of the stay, but has instead requested a resolution from the Bankruptcy Court. Accordingly, neither Great Lakes nor AT&T appears to dispute that the automatic stay currently applies to Great Lakes’ appeal.

We recognize that “an automatic stay of judicial proceedings against one defendant does not apply to proceedings against co-defendants,” *Marcus, Stowell*, 797 F.2d at 230 n.4, and Westphalia, Great Lakes’ co-petitioner, is not in bankruptcy. But little purpose would be served by pursuing the case against Westphalia but not Great Lakes. The case before this Court centers

on the Commission's finding of liability against Great Lakes on Count I of AT&T's complaint (JA 001); petitioners do not challenge the Commission's separate determination against Westphalia in Count III of the complaint. Indeed, the focus of the briefing before this Court has been on the actions of Great Lakes and not Westphalia. To the extent Westphalia's actions are implicated, those actions are intertwined with those of its co-petitioner, Great Lakes.

In short, the case should not go forward against Great Lakes while the automatic stay appears to be in place. If the stay is not lifted, little purpose would be served by letting the appeal proceed against Westphalia alone.

II. THE GOVERNMENT DOES NOT INTEND TO TAKE A POSITION ON AT&T'S MOTION TO LIFT THE STAY IN THE BANKRUPTCY COURT.

As we have explained, it is unclear whether a section 208 complaint proceeding falls within the regulatory exception to the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(b)(4). The government accordingly does not intend to take a position on AT&T's motion to lift the stay in the bankruptcy court.

As noted above, AT&T and Great Lakes have since filed a stipulation order in the Bankruptcy Court agreeing that the stay should be modified and the appeal before this Court be allowed to proceed. Assuming that the

Bankruptcy Court enters the order in a timely manner, respondents do not object to oral argument going forward on April 1, 2016.

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

ROBERT J. NICHOLSON
DANIEL E. HAAR
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

March 7, 2016

Respectfully submitted,

JONATHAN B. SALLET
GENERAL COUNSEL

DAVID M. GOSSETT
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL
COUNSEL

/s/ Thaila K. Sundaresan

THAILA K. SUNDARESAN
COUNSEL

FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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INTERVENORS FOR RESPONDENTS.

No. 15-1064

CERTIFICATE OF COMPLIANCE

Pursuant to the Court's March 3, 2016 Order, I hereby certify that the accompanying filing in the captioned case contains 1613 words and is less than 10 pages.

/s/ Thaila K. Sundaresan
Thaila K. Sundaresan
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (Telephone)
(202) 418-2819 (Fax)

March 7, 2016

Exhibit 1

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

-----X

In re	Chapter 11
GREAT LAKES COMNET, INC., <i>et al.</i> ,	Case No. 16-00290 (JTG)
	(Jointly Administered)
Debtors	Honorable John T. Gregg

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**STIPULATION RESOLVING MOTION OF AT&T CORP. TO DETERMINE
AUTOMATIC STAY INAPPLICABLE, OR, IN THE ALTERNATIVE,
FOR RELIEF FROM THE AUTOMATIC STAY [Docket No. 137]**

The Debtors and AT&T Corp., through their undersigned counsel, stipulate and agree to entry of the Order attached as Exhibit 1 resolving the *Motion of AT&T Corp. To Determine Automatic Stay Inapplicable, Or, In The Alternative, For Relief From The Automatic Stay* [Docket No. 137].

Dated: March 4, 2016

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Stephen S. LaPlante
Timothy A. Fusco (P13768)
Stephen S. LaPlante (P48063)
150 West Jefferson, Suite 2500
Detroit, MI 48226
(313) 963-6420
laplante@millercanfield.com

Attorneys for the Debtors



By: /s/ Michael C. Hammer
Michael C. Hammer (P41705)
Dickinson Wright PLLC
350 S. Main Street
Ann Arbor, MI 48104
(734) 623-1696
mhammer@dickinsonwright.com

and

David A. Rosenzweig
Courtney Slatten Katzenstein
Melanie M. Kotler
Norton Rose Fulbright US LLP
666 Fifth Avenue
New York, NY 10103
(212) 318-3000
david.rosenzweig@nortonrosefulbright.com
courtneyslatten.katzenstein@nortonrosefulbright.com
melanie.kotler@nortonrosefulbright.com

Attorneys for AT&T Corp.

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN**

-----x

In re	Chapter 11
GREAT LAKES COMNET, INC., <i>et al.</i> ,	Case No. 16-00290 (JTG)
	(Jointly Administered)
Debtors	Honorable John T. Gregg

-----x

**ORDER GRANTING STIPULATION RESOLVING MOTION OF AT&T CORP. TO
DETERMINE AUTOMATIC STAY INAPPLICABLE, OR, IN THE ALTERNATIVE,
FOR RELIEF FROM THE AUTOMATIC STAY**

This matter having come before the Court on Stipulation of the Debtors and AT&T Corp. *Resolving Motion of AT&T Corporation to Determine Automatic Stay Inapplicable, or, in the Alternative, For Relief from the Automatic Stay* (the “Motion”, Docket No. 137); while (a) AT&T believes that it could prevail on the Motion on the grounds that the automatic stay does not apply to the Regulatory Proceedings (as defined in the Motion) and/or that relief from the automatic stay should be granted, and (b) the Debtors believe that they could prevail in objecting to the Motion, the Debtors, nonetheless have determined, in the exercise of their business judgment that the appeals related to the Regulatory Proceedings, including the appellate proceedings currently pending before the Michigan Court of Appeals (Case No. 326100) and the United States Court of Appeals for the District of Columbia Circuit (Case No. 15-1064), should proceed to conclusion:

IT IS ORDERED that to the extent, if any, that the automatic stay applies to the Regulatory Proceedings, the stay is modified to allow the appeals related to the Regulatory Proceedings, including the appellate proceedings currently pending before the Michigan Court of

Appeals (Case No. 326100) and the United States Court of Appeals for the District of Columbia Circuit (Case No. 15-1064), to proceed to conclusion, *provided however*, that nothing herein shall permit, as part of such proceedings, the liquidation of the amount of damages or claims by AT&T against the Debtors (the “Reserved Matters”).

IT IS FURTHER ORDERED, that to the extent, if any, that the automatic stay applies to the action captioned Great Lakes Comnet, Inc. and Westphalia Telephone Company, v. AT&T Corp. in the United States District Court for the Western District of Michigan (Case No.1:15-CV-216), and the appeal related thereto in the United States Court of Appeals for the Sixth Circuit (Case No. 16-1256), the stay is modified to allow these matters and all appeals related thereto to proceed to conclusion.

IT IS FURTHER ORDERED, nothing in this Order precludes (a) AT&T from seeking in this Court (i) a determination that the stay is inapplicable to the Regulatory Proceedings or, in the alternative, relief from the stay to allow the Regulatory Proceedings to continue, including, without limitation, in connection with any remands following any appeals, or (ii) relief from the stay to pursue the Reserved Matters, or (b) the Debtors from objecting to any such requests.

IT IS FURTHER ORDERED that AT&T and the Debtors may appear and be heard as may be required in the Regulatory Proceedings and all related appeals in order to address issues presented therein.

IT IS FURTHER ORDERED that this Order is not stayed under the 14-day stay provisions of Federal Rule of Bankruptcy Procedure 4001(a)(3).

END OF ORDER

Prepared by:

Michael C. Hammer
Dickinson Wright PLLC
350 S. Main Street
Ann Arbor, MI 48104
(734) 623-1696
mhammer@dickinsonwright.com

15-1064

**IN THE UNITED STATES COURT OF APPEALS
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Great Lakes Comnet, et al., Petitioners

v.

**Federal Communications Commission
and the United States of America, Respondents**

CERTIFICATE OF SERVICE

I, Thaila K. Sundaresan, hereby certify that on March 7, 2016, I electronically filed the foregoing Response of Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Philip J. Macres
Klein Law Group PLLC
1250 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
*Counsel for: Great Lakes,
et al.*

Michael G. Oliva
Loomis Ewert Parsley Davis
& Gotting, P.C.
124 W. Allegan Street, Suite 700
Lansing, MI 48933
Counsel for: Great Lakes, et al.

John E. Benedict
1099 New York Ave., N.W.
Suite 250
Washington, D.C. 20001
Counsel for: CenturyLink

Robert B. Nicholson
U.S. Department of Justice
Antitrust Division, Appellate Section
Room 3224
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Counsel for: USA

Keith C. Buell
12502 Sunrise Valley Drive
Mailstop VARESA0209
Reston, VA 20196
Counsel for: Sprint

Kathleen M. Grillo
Christopher M. Miller
Dulaney L.O'roark III
1320 North Courthouse Road
Ninth Floor
Arlington, VA 22201
Counsel for: Verizon

Michael J. Hunseder
Paul Zidlicky
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Counsel for: AT&T

Christi Shewman
Gary L. Phillips
Lori A. Fink
AT&T Services, Inc.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
Counsel for: AT&T

/s/ Thaila K. Sundaresan