

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

In the Matters of
AT&T Corp.,
Complainant,
v.
Business Telecom, Inc.,
Defendant.
Sprint Communications Company, L.P.,
Complainant,
v.
Business Telecom, Inc.,
Defendant.
EB-01-MD-001
EB-01-MD-002

ORDER

Adopted: September 27, 2001

Released: October 1, 2001

By the Commission:

I. INTRODUCTION

1. In this Order, we deny the Joint Motion to Change [the] Ex Parte Status of [this] Proceeding ("Motion") filed by non-parties The Association for Local Telecommunications Services, Intermedia Communications, Inc., Mpower Communications, Inc., NuVox Communications, Inc., and Winstar Communications, Inc. (collectively, "Petitioners"). As explained below, the public interest does not support changing the ex parte status of this adjudicatory proceeding from "restricted" to "permit-but-disclose". In particular, Petitioners have not shown that the public interest would benefit from the exclusion of the three parties to these formal complaint proceedings from any meetings that Petitioners may wish to have with Commission decision-making personnel. We emphasize, however, that Petitioners are (and always have been) free to schedule meetings with Commission decision-making personnel to discuss the BTI Order, as long as the three parties to these formal complaint proceedings have notice of and reasonable opportunity to participate in such meetings.

II. BACKGROUND

2. In the BTI Order, the Commission partially granted formal complaints filed by AT&T Corp. ("AT&T") and Sprint Communications Company, L.P. ("Sprint") against Business Telecom, Inc.

(“BTI”), a CLEC, pursuant to section 208 of the Communications Act of 1934, as amended (“Act”)<sup>1</sup> and a primary jurisdiction referral from the United States District Court for the Eastern District of Virginia.<sup>2</sup> The Commission held, *inter alia*, that BTI’s access rates during the relevant period were unjustly and unreasonably high, in violation of section 201(b) of the Act.<sup>3</sup> Moreover, in order to permit the court to calculate the damages caused by BTI’s violation of section 201(b), the Commission determined what access rates would have been just and reasonable during the relevant period.<sup>4</sup>

3. None of the parties filed petitions for reconsideration of the *BTI Order*. Instead, each of them filed a petition for review of the *BTI Order* in the United States Court of Appeals for the District of Columbia Circuit.<sup>5</sup>

4. None of the Petitioners is a party to these formal complaint proceedings, which the Commission adjudicated in the *BTI Order*. Nevertheless, on June 29, 2001, Petitioners submitted to the Commission Secretary a Joint Petition for Reconsideration of the *BTI Order*.<sup>6</sup> Five weeks later, on August 3, 2001, Petitioners filed the instant motion seeking alteration of the *ex parte* status of these complaint proceedings from “restricted” to “permit-but-disclose.”<sup>7</sup> Petitioners assert that the public interest requires such a change, because “[t]he *BTI Order* necessarily has wide ramifications for the entire competitive telecommunications industry”,<sup>8</sup> and “as long as the proceeding remains restricted, no party [or non-party] may schedule meetings with Commissioners and staff to explain first hand how the [*BTI Order*] affects it and the entire industry.”<sup>9</sup> AT&T and Sprint oppose the Motion, arguing, *inter alia*, that changing the *ex parte* status of this proceeding could prejudice their rights.<sup>10</sup> BTI has taken no position on the Motion.

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<sup>1</sup> 47 U.S.C. § 208.

<sup>2</sup> *Advantel LLC, et al. v. AT&T Corp.*, 105 F. Supp.2d 507 (E.D. Va. 2000); *Advantel LLC, et al. v. Sprint Communications Company, L.P.*, 105 F. Supp.2d 476 (E.D. Va. 2000).

<sup>3</sup> 47 U.S.C. § 201(b). *See BTI Order* at ¶¶ 17-50.

<sup>4</sup> *See BTI Order* at ¶¶ 53-59.

<sup>5</sup> *AT&T Corp. v. FCC*, No. 01-1261 (D.C. Cir.).

<sup>6</sup> Joint Petition for Reconsideration, File Nos. EB-01-MD-001, 002 (filed June 29, 2001).

<sup>7</sup> Petitioners waited 35 days (five weeks) to file their motion, which in itself suggests the lack of need to change the *ex parte* status of these proceedings.

<sup>8</sup> Motion at 3. *See id.* at 6-7.

<sup>9</sup> Motion at 4. *See id.* at 8-9.

<sup>10</sup> Opposition of AT&T Corp. to Joint Motion To Change *Ex Parte* Status of Proceeding, File Nos. EB-01-MD-001, 002 (filed Aug. 9, 2001) at 4 (stating that “such *ex parte* presentations could only taint the record in this case”); Opposition of Sprint to Joint Motion, File Nos. EB-01-MD-001, 002 (filed Aug. 10, 2001) at 2 (noting that “[a]ll three parties to this proceeding have elected to seek judicial review of the [*BTI Order*] in the U.S. Court of Appeals for the District of Columbia Circuit”).

### III. DISCUSSION

5. Under the Commission's rules, a "presentation" is a "communication directed to the merits or outcome of a proceeding...."<sup>11</sup> An "*ex parte* presentation" is "[a]ny presentation which: (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties and without opportunity for them to be present."<sup>12</sup> In a "permit-but-disclose" proceeding, a person may make an *ex parte* presentation to Commission decision-making personnel, as long as the person promptly places in the public record the substance of the presentation.<sup>13</sup> In a "restricted" proceeding, by contrast, no one may make an *ex parte* presentation to Commission decision-making personnel (with certain exceptions not applicable here).<sup>14</sup>

6. Proceedings in which the Commission adjudicates formal complaints brought against common carriers pursuant to section 208 of the Communications Act of 1934, as amended ("Act"),<sup>15</sup> are "restricted."<sup>16</sup> Accordingly, these complaint proceedings in which the Commission released the *BTI Order* are restricted.<sup>17</sup> This means that no person may make to any Commission decision-making personnel any communication directed to the merits or outcome of the *BTI Order*, unless the communication, if written, is served on the parties to the proceeding, or unless the communication, if oral, is made with advance notice to the parties and with opportunity for them to be present.<sup>18</sup> The Commission makes its formal complaint proceedings "restricted" to ensure, *inter alia*, that it conducts its adjudications in a manner that preserves fairness and the appearance of fairness to the parties.<sup>19</sup>

<sup>11</sup> 47 C.F.R. § 1.1202(a).

<sup>12</sup> 47 C.F.R. § 1.1202(b).

<sup>13</sup> 47 C.F.R. §§ 1.1202(c), 1.1206.

<sup>14</sup> 47 C.F.R. §§ 1.1208, 1.1204.

<sup>15</sup> 47 U.S.C. § 208.

<sup>16</sup> 47 C.F.R. §§ 1.1208, 1.1206, 1.1204.

<sup>17</sup> See, e.g., Letter from Alexander P. Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, to James F. Bendernagel, Counsel for AT&T, Jonathan E. Canis, Counsel for BTI, and Cheryl A. Tritt, Counsel for Sprint, File Nos. EB-01-MD-001, 002 (Jan. 18, 2001).

<sup>18</sup> 47 C.F.R. §§ 1.1202, 1.1208. See, e.g., Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to James F. Bendernagel, Counsel for AT&T, Russell M. Blau, Counsel for BTI, Cheryl Tritt, Counsel for Sprint, and Jonathan E. Canis, Counsel for Informal Complaint Defendants, File Nos. EB-01-MD-001, 002; EB-01-MDIC-0002-0016 (June 12, 2001); Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to James F. Bendernagel, Counsel for AT&T, Russell M. Blau, Counsel for BTI, Cheryl Tritt, Counsel for Sprint, Richard Juhnke, Counsel for Sprint, Jonathan E. Canis, Counsel for Informal Complaint Defendants, and Richard Metzger, Counsel for Focal Communications, File Nos. EB-01-MD-001, 002; EB-01-MDIC-0002-0016 (July 30, 2001); Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to James F. Bendernagel, Counsel for AT&T, Russell M. Blau, Counsel for BTI, Cheryl Tritt, Counsel for Sprint, Richard Juhnke, Counsel for Sprint, Jonathan E. Canis, Counsel for Informal Complaint Defendants, and Richard Metzger, Counsel for Focal Communications, File Nos. EB-01-MD-001, 002; EB-01-MDIC-0002-0016 (Aug. 3, 2001).

<sup>19</sup> *In the Matter of Amendment of 47 C.F.R. § 1.1200 Et Seq. Concerning Ex Parte Presentations In Commission Proceedings*, Report and Order, 12 FCC Rcd 7348, 7351-52 at ¶ 11 (1997).

However, “[w]here the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules....”<sup>20</sup> Petitioners bear the burden of demonstrating that the standard is met by the preponderance of the evidence.

7. Petitioners have failed to meet the burden of demonstrating that the public interest requires modification of the applicable rules from “restricted” to “permit-but-disclose.” First, Petitioners have not shown that they cannot fully present their position within the parameters of a restricted proceeding. Contrary to Petitioners’ assertion otherwise, Petitioners may schedule meetings with Commission decision-making personnel to discuss their concerns about the *BTI Order*. They simply must ensure that all of the parties to these proceedings have fair notice of and reasonable opportunity to attend such meetings. Given the relatively small number of parties involved (*i.e.*, three), such scheduling should not be unduly difficult.

8. Second, as AT&T and Sprint point out, Petitioners have not shown how the public interest would benefit by excluding the parties – the two plaintiffs and the defendant – from meetings with Commission decision-makers. We note that all of the parties have petitioned for review of the *BTI Order* in the D.C. Circuit. While they are litigating the *BTI Order* in court, and absent any persuasive countervailing public interest basis for making this matter a “permit-but-disclose” proceeding, we believe the parties should continue to have advance notice of and the opportunity to participate in any communications at the Commission about the *BTI Order*.

9. Petitioners rely on four decisions in proceedings in which the applicable *ex parte* rules were switched from restricted to permit-but-disclose.<sup>21</sup> Two of those decisions did not involve formal complaint adjudications under section 208 of the Act.<sup>22</sup> The other two of those decisions did involve formal complaints, but the complaints closely related to pending non-complaint proceedings governed by the permit-but-disclose rules.<sup>23</sup> That is not the situation here.<sup>24</sup> Moreover, all four of those decisions pre-

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<sup>20</sup> 47 C.F.R. § 1.1200(a). *See id.* at § 1.1208, Note 2.

<sup>21</sup> Motion at 5 n.5, 8 (citing “Permit But Disclose” *Ex Parte* Status Accorded to Proceeding Involving Applications Filed by Airtouch Communications, Inc. and Vodafone Group, P.L.C. for Consent to Transfer Control of Airtouch Communications, Inc. to Vodafone Group, P.L.C., Public Notice, DA 99-304, 1999 WL 317594 (Com. Car. Bur. rel. May 20, 1999) (“Airtouch Applications”); *Ex Parte* Procedures Established for Formal Complaint filed by MCI Telecommunications Corp. and MCI Metro Access Transmission Services, Inc., Against Bell Atlantic Corp., File No. E-98-12, Public Notice, DA 98-89, 13 FCC Rcd 887 (Wireless Tel. Bur. rel. Jan. 16, 1998) (“MCI v. Bell Atlantic”); *Beehive Telephone, Inc., et al. v. The Bell Operating Companies*, Memorandum Opinion and Order, 12 FCC Rcd 17930 (1997) (“Beehive v. Bell Operating Companies”); *Commission Applies “Permit But Disclose” Ex Parte Rules to Reconsideration of United Artists Cable of Baltimore*, Public Notice, DA 95-1366, 10 FCC Rcd 13743 (Cab. Serv. Bur. rel. June 19, 1995) (“United Artists”).

<sup>22</sup> *See Airtouch Applications, supra; United Artists, supra.*

<sup>23</sup> *See MCI v. Bell Atlantic, supra; Beehive v. Bell Operating Companies*, 12 FCC Rcd at 17931-36.

<sup>24</sup> Although these formal complaint proceedings arise from the same court litigation as a pending, permit-but-disclose declaratory ruling proceeding, *see AT&T and Sprint File Petitions for Declaratory Ruling on CLEC Access Charge Issues*, CCB/CPD File No. 01-02, Public Notice, DA-01-301, 2001 WL 92220 (Com. Car. Bur. rel. Feb. 5, 2001), the declaratory ruling petitions do not address the contested subject here, *i.e.*, the reasonableness of past CLEC access rates. Thus, Petitioners correctly do not contend that the pendency of the declaratory ruling petitions pertains to the propriety of changing the *ex parte* status of these formal complaint proceedings.

date the creation of the Enforcement Bureau, which the Commission designed, *inter alia*, to enhance the fairness, objectivity, and transparency of its adjudicatory processes. Consistent with that design, since the Enforcement Bureau began, every formal complaint proceeding has remained restricted for *ex parte* purposes. Thus, the authorities cited by Petitioners do not indicate that the public interest requires changing the applicable *ex parte* rules in this case. Accordingly, Petitioners' Motion is denied.

#### IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and sections 1.727 and 1.1200-1.1216 of the Commission's rules, 47 C.F.R. §§ 1.727, 1.1200-1.1216, that Petitioners' Joint Motion to Change [the] *Ex Parte* Status of [this] Proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary