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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 28 1995

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment of 47 C.F.R. § 1.1200)	GC Docket No. 95-21
<u>et seq.</u> Concerning Ex Parte)	
Presentations in Commission)	
Proceedings)	

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AT&T REPLY COMMENTS

Pursuant to Section 1.415(c) of the Commission's Rules, AT&T Corp. ("AT&T") hereby replies to the comments of other parties concerning the Commission's proposed revisions of its ex parte procedures (Notice of Proposed Rulemaking, FCC 95-52, released February 7, 1995).¹

In its Comments, AT&T showed that the Commission should continue to treat formal complaint proceedings under Section 208 of the Communications Act,

¹ In addition to AT&T, comments were filed by Advanced Cordless Technologies, Inc. ("ACT"), The Ameritech Operating Companies ("Ameritech"), Bell Atlantic, BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth"), Consultants, Inc., The Federal Communications Bar Association ("FCBA"), GTE Service Corporation ("GTE"), MCI Telecommunications Corporation ("MCI"), The NYNEX Telephone Companies ("NYNEX"), Pacific Bell and Nevada Bell ("Pacific Companies"), Press Broadcasting Company, Inc. ("Press"), Rochester Telephone Corp. ("Rochester"), SBC Communications Inc. ("SBC"), Sprint Corporation ("Sprint"), Symbol Technologies, Inc. ("Symbol"), and U S WEST Communications, Inc. ("U S WEST").

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47 U.S.C. § 208, as "restricted," in which ex parte contacts are prohibited (AT&T Comments, pp. 2-7). Several other parties agree (FCBA, pp. 5-7; MCI, p. 6; Press, pp. 1-10; U S WEST, pp. 2-3). As these commenters pointed out, the Commission in Section 208 proceedings acts as an adjudicator of private rights. The Commission's proposal to apply a "permit-but-disclose" rule to these proceedings would disserve fundamental principles of fairness that have long been held applicable to such proceedings.

The only commenter specifically defending the Commission's proposal to permit ex parte contacts in formal complaint proceedings is Ameritech.² Ameritech argues (p. 2) that permitting such contacts "would eliminate the confusion that may now exist when issues raised in a formal complaint proceeding are also relevant to a pending rulemaking." There should be no basis for any such confusion, however, because rulemakings and

² Some of the other commenters express general agreement with the Commission's proposal to prohibit ex parte contacts only when required by the Administrative Procedure Act, but do not specifically address the application of that principle to formal complaint proceedings (BellSouth, pp. 1-2; NYNEX, p. 3; Pacific Companies, p. 2; Rochester, p. 1-2; SBC, pp. 1-2). Most of these parties simply defend the Commission's proposal as easy to apply. As AT&T has shown, however (AT&T Comments, p. 7), retaining the current classification of formal complaint proceedings as "restricted" would be equally clear and easy to apply.

complaint proceedings focus on distinctly different matters.

A rulemaking is a quasi-legislative proceeding that determines policies to be followed in the future. It "can affect the conduct of parties only prospectively." See AT&T v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1993) (emphasis in original). A formal complaint proceeding under Section 208, in contrast, is an adjudicative proceeding that "determines the legality of past conduct" under "the law currently applicable." Id. To the extent the same subject matter may be implicated in both types of proceedings, an interested party concurrently engage in ex parte communications with respect to the prospective rules to be adopted, but not with respect to any individual defendant's liability for past actions.

Several parties also urge that the Commission continue to treat informal complaints as exempt from the ex parte rules (Ameritech, pp. 4-5; MCI, pp. 5-6; NYNEX, p. 3; SBC, p. 2). AT&T agrees. In contrast to formal complaint proceedings under Section 208, the Commission's role in resolving informal complaints is not as an adjudicator of private rights, but is more analogous to that of an intermediary in a non-binding mediation. Exemption from the ex parte rules would therefore not

infringe the rights of the parties, and would help maintain the flexibility appropriate to such proceedings.

In its initial comments, AT&T also urged (pp. 7-11) that the Commission continue to treat tariff proceedings that have not been set for hearing as exempt from ex parte rules. Each of the parties commenting on this issue agrees (Ameritech, pp. 3-4; BellSouth, p. 5; GTE, p. 2; MCI, pp. 2-5; NYNEX, pp. 4-5; Pacific Companies, p. 3; Rochester, p. 2; SBC, p. 2). There is no support in the record for applying a "permit-but-disclose" rule to tariff proceedings, and to do so would unnecessarily burden a process that requires expedition and flexibility.

Finally, AT&T also showed (AT&T Comments, pp. 11-12), and several parties agree (Bell Atlantic, pp. 2-3; FCBA, p. 4; MCI, pp. 8-9; Rochester, pp. 2-3; SBC, p. 4), that the Commission's proposed requirement that parties file more detailed (and repetitive) summaries of ex parte presentations would be unnecessary and cumbersome. The current rule, if enforced, can alleviate any perceived problems with inadequate summaries.

Some of the parties support the proposed requirement for more detailed summaries (ACT, pp. 1-2; BellSouth, p. 6; GTE, pp. 4-5; NYNEX, p. 6; Pacific Companies, p. 4; Sprint, p. 4). None of them shows,

however, that a new rule, rather than enforcement of the existing rule, is necessary. For example, ACT argues (p. 2) that it would be more difficult for parties seeking to evade the rules to manipulate the proposed rules. But the putative problem it identifies with the current rules is not any supposed inability to determine whether a party has complied, but rests instead upon claims of inadequate efforts at enforcement. If the summaries are inadequate because parties are currently evading the rules, the best (and only) remedy is to see that those rules are enforced.

CONCLUSION

The Commission should not adopt the proposed ex parte rules, but should continue the current practice, in three respects: (1) Ex parte contacts should continue to be prohibited in Section 208 complaint proceedings; (2) tariff proceedings should continue to be exempt from ex parte rules unless and until those proceedings are

designated for investigation or a hearing; and (3) the rules governing the content of the summaries of oral ex parte communications should not be modified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 28th day of April, 1995, a copy of the foregoing "AT&T Reply Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List.


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