

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of )  
GTE CORPORATION, )  
Transferor, )  
and )  
BELL ATLANTIC CORPORATION, )  
Transferee )  
for Consent to Transfer Control )

CC Docket No. 98-184

PETITION FOR RECONSIDERATION OF  
SPRINT COMMUNICATIONS COMPANY L.P.

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March 25, 1999

No. of Copies rec'd 014  
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**ATTACHMENTS**

Declaration of Leon M. Kestenbaum

Declaration of Craig D. Dingwall

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decision-making," and therefore denied access to confidential documents to these in-house attorneys. In doing so, however, the Bureau applied the "competitive decision-making" standard to Sprint's attorneys in a manner contrary to the relevant case law. Specifically, the Bureau's interpretation erroneously suggests that all in-house regulatory attorneys at a "high-level" of seniority would be precluded from reviewing confidential materials. Moreover, notwithstanding the fact that Mr. Kestenbaum and Mr. Dingwall provide only legal -- not business -- advice to Sprint's management, the Bureau apparently misapprehended the nature of the job responsibilities of Mr. Kestenbaum and Mr. Dingwall and erroneously imputed "competitive decision-making" responsibilities to them. The Bureau's failure to follow the precedent informing the "competitive decision-making" standard, and to provide a rationale for such a dramatic departure, constitutes arbitrary decisionmaking in violation of the Administrative Procedures Act.<sup>2</sup> As such, the Bureau should reconsider its denial of access to confidential materials to Mr. Kestenbaum and Mr. Dingwall.

**II. THE BUREAU ERRED IN APPLYING THE GTE/BA "COMPETITIVE DECISION-MAKING" STANDARD TO SPRINT'S IN-HOUSE ATTORNEYS.**

The GTE/BA Protective Order states that

Stamped Confidential Documents may be reviewed by . . . in-house counsel who are actively engaged in the conduct of this proceeding, provided that those in-house counsel seeking access are not involved in competitive decision-making, i.e., counsel's activities, association, and relationship with a client

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<sup>2</sup> See 5 U.S.C. § 706(2)(A) (1998).

that are such as to involve counsel's advice and participation in any or all of the client's business decisions made in light of similar or corresponding information about a competitor.<sup>3</sup>

In adopting the GTE/BA Protective Order, the Bureau noted that it was the same standard used by the federal courts, and adopted by the Bureau for use, *inter alia*, in the WorldCom/MCI proceeding.<sup>4</sup>

Though the Bureau declined to permit blanket access to all in-house attorneys in adopting the GTE/BA Protective Order, the Bureau also made clear that those in-house attorneys not involved in "competitive decision-making" would be permitted access. The standard was neither altered nor clarified in its WorldCom/MCI Ruling.<sup>5</sup>

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<sup>3</sup> See GTE Corp. and Bell Atlantic Corp., For Consent to Transfer of Control, CC Dkt. No. 98-184, Order Adopting Protective Order, Ex. A (CCB rel. Nov. 19, 1998) ("GTE/BA Protective Order").

<sup>4</sup> See GTE Corp. and Bell Atlantic Corp., For Consent to Transfer of Control, CC Dkt. No. 98-184, Order Adopting Protective Order ¶ 5 (CCB rel. Nov. 19, 1998) (citing WorldCom/MCI and SBC/Ameritech Protective Orders); Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., CC Dkt. No. 97-211, Order Adopting Protective Order ¶ 5 (CCB rel. June. 5, 1998) ("Consistent with [the U.S. Steel line of] federal court cases, we define 'competitive decision-making' . . . .").

<sup>5</sup> See Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., CC Dkt. No. 97-211, Order Ruling on Joint Objections (CCB Policy and Program Planning Division rel. July 17, 1998) ("WorldCom/MCI Ruling"). The WorldCom/MCI Ruling did not modify the U.S. Steel "competitive decision-making" standard adopted by the Bureau in the GTE/BA proceeding. See U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984). WorldCom and MCI there offered evidence and established, with only a cursory response from Bell Atlantic, that Edward D. Young III and John Thorne of

As explained at greater length below, the Bureau erred in applying the GTE/BA Protective Order's "competitive decision-making" standard to Mr. Kestenbaum and Mr. Dingwall by attaching a significance to their "high positions" within Sprint.<sup>6</sup> The Bureau stated that

[w]e are unconvinced that, given their high positions within the company and the scope of federal and state regulation over the communications industry, Messrs. Kestenbaum and Dingwall do not provide advice or participate in the formulation of Sprint's business decisions regarding compliance with state and federal regulations.

As precedent demonstrates, involvement in "competitive decision-making" may not be inferred by an in-house attorney having a "high position" or an impressive title. Rather, the actual relationship between the attorney and the client are dispositive.

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Bell Atlantic were involved in "competitive decision-making." WorldCom and MCI quoted Bell Atlantic's web page description of Mr. Young as "actively involved in significant and strategic decisions" of Bell Atlantic. See WorldCom/MCI Joint Objection at 3-4 (filed in CC Dkt. No. 97-211, June 12, 1998). Moreover, WorldCom and MCI cited an article in Corporate Counsel Magazine that described Bell Atlantic's lawyers as active in business decisions, including the setting of prices and activities that "go beyond the law per se." See id. at 4 (citation omitted). Thus, the Bell Atlantic attorneys' unrebutted involvement in these business decisions provided no opportunity or necessity for the Bureau to engage in substantive legal analysis.

<sup>6</sup> GTE/BA Ruling ¶ 2. Indeed, the Bureau's decision appears to be entirely premised upon Mr. Kestenbaum's and Mr. Dingwall's respective "high positions" within the company. As noted *infra* at n.23, Sprint never stated that Mr. Kestenbaum and Mr. Dingwall are involved in "competitive decision-making."

<sup>7</sup> GTE/BA Ruling ¶ 2 (emphasis added).

Sprint's attorneys, as established in Sprint's Opposition and detailed below, are not involved in "competitive decision-making."

**A. Whether In-House Counsel Participate In "Competitive Decision-Making" Must Be Determined On A Case-By-Case Basis, Governed By The Facts Of The Specific Attorney-Client Relationship In Question.**

The federal court decisions establishing and interpreting the "competitive decision-making" standard make clear that an in-house attorney may not be disqualified based simply upon having a high position or title in the company. As stated in U.S. Steel,

[w]hether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined . . . by the facts on a counsel-by-counsel basis . . . .  
[A]ccess should be denied or granted on the basis of each individual counsel's actual activity and relationship with the party represented . . . .<sup>8</sup>

Court decisions since U.S. Steel confirm that a high position or impressive title, cannot establish involvement in "competitive decision-making." This principle was explained in Matsushita Elec. Indus. Co. v. United States,<sup>9</sup> where the court held that "denial of access sought by in-house counsel on the sole ground of status as a corporate officer is error."<sup>10</sup> The court overturned the denial of access to confidential materials

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<sup>8</sup> U.S. Steel at 1468-69 (Fed. Cir. 1984) (emphasis added); see Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir. 1992) (stating that district court must examine factually all risks and safeguards surrounding inadvertent disclosure).

<sup>9</sup> 929 F.2d 1577 (Fed. Cir. 1991).

<sup>10</sup> Id. at 1580.

to Herschel Winn, an in-house attorney with the titles of General Counsel, Senior Vice President and Secretary. The court determined that, notwithstanding holding several impressive titles in the company, Mr. Winn's assertions that he did not participate in "competitive decision-making" were to be believed, absent any contrary evidence.<sup>11</sup> Specifically, the court accepted Mr. Winn's statements at the time that he was not involved in pricing or product design, and that he did not attend the meetings where business policy was established.<sup>12</sup> The court further noted that Mr. Winn's alleged "regular contact" with corporate policymakers was largely irrelevant to the "competitive decision-making" standard enunciated in U.S. Steel.<sup>13</sup>

The cases since U.S. Steel<sup>14</sup> have also established that an attorney may not be disqualified solely on the basis of the fact that he provides legal advice to his employer-client. In Independent Service Organizations Antitrust Litigation, 1995-2 Trade Cas. (CCH) ¶ 71,099, the court determined that Peter Marshall, an in-house attorney for Xerox Corporation, was not involved in "competitive decision-making", notwithstanding the fact that he had previously provided legal advice on a number of issues including prices. The court reasoned that:

[a] memorandum describes Marshall's conduct as providing 'legal advice.' Numerous courts have

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<sup>11</sup> See id.

<sup>12</sup> See id. 1579-1580.

<sup>13</sup> See id. at 1579.

<sup>14</sup> See U.S. Steel at 1468.

held that providing legal advice is not a basis for barring in-house counsel from confidential material.<sup>15</sup>

A contrary rule would effectively deny all in-house attorneys access, because the *sine qua non* of any in-house attorney (just like any attorney) is to provide legal advice. Providing legal advice on regulatory matters, like legal advice on other matters, is not tantamount to involvement in "competitive decision-making." Rather, as discussed below, the factual record here shows unambiguously that Mr. Kestenbaum and Mr. Dingwall are not involved in "competitive decision-making."

**B. Sprint's Attorneys' Job Descriptions Establish That They Are Not Involved In "Competitive Decision-Making".**

The Bureau's conclusion that Mr. Kestenbaum and Mr. Dingwall should not be given access was premised upon their "high positions" in the company. This, as explained above, is contrary to precedent holding that such a "high position" is not dispositive on the question of participation in "competitive decision-making." Rather, the courts have focused their analysis upon "each individual counsel's actual activity and relationship with the party represented . . ." <sup>16</sup> and have made clear that the

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<sup>15</sup> See Independent Service Organizations ¶ 71,099 (citations omitted) (emphasis added). Importantly, the court relied on the fact that Mr. Marshall had complied with the terms of a similar protective order. As discussed *infra* at n.25, Mr. Kestenbaum was subject to, and complied with, the terms of the WorldCom/MCI protective order and its "competitive decision-making standard." This fact should be equally probative in the Bureau's determination whether Mr. Kestenbaum is likely to comply with the GTE/BA Protective Order.

<sup>16</sup> See U.S. Steel at 1468-69.

provision by an in-house attorney of legal advice does not constitute "competitive decision-making."<sup>17</sup> Absent contradictory evidence, the Bureau must rule in favor of Mr. Kestenbaum and Mr. Dingwall based upon evidence establishing their lack of involvement in "competitive decision-making" and their job responsibility to provide only legal -- not business -- advice to Sprint.<sup>18</sup>

Sprint's description of the job responsibilities of Mr. Kestenbaum and Mr. Dingwall, contained in Sprint's Opposition, demonstrates that these in-house attorneys are not involved in "competitive decision-making." First, Sprint stated that neither attorney is involved in "competitive decision-making."<sup>19</sup> Second, Sprint described the work of the attorneys. Sprint stated that "Mr. Kestenbaum's work consists of formulating regulatory positions and conveying them on behalf of Sprint to the FCC and the [DOJ], and reporting the results of such representation."<sup>20</sup> Sprint also stated that "Mr. Dingwall is responsible for formulating regulatory positions, conveying and advocating them on behalf of Sprint to state regulatory agencies, and reporting the results of such representation."<sup>21</sup> Sprint emphasized that

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<sup>17</sup> See Independent Service Organizations ¶ 71,099 (citations omitted).

<sup>18</sup> See Matsushita at 1580.

<sup>19</sup> See Sprint Opposition at 4 (filed in CC Dkt. No. 98-184, Jan. 29, 1999).

<sup>20</sup> See id.

<sup>21</sup> See id.

"Mr. Kestenbaum and Mr. Dingwall function precisely as attorneys for their client."<sup>22</sup>

As the descriptions stated, Sprint's attorneys do provide legal advice to Sprint's management. The fact that Sprint's management actually uses this advice to operate the company within the bounds of the law, however, does not somehow transform the legal advice into participation in the making of business decisions.<sup>23</sup> For example, if Mr. Kestenbaum were to advise Sprint's management that the FCC has prohibited all interexchange carriers from providing a particular type of service, Sprint's management would rely on that legal advice to make the business decision not to provide the prohibited service. Sprint's management might also make the business decision to devote Sprint's resources to lobbying Congress or the FCC to change the rule. In any event, Mr. Kestenbaum would not be, and does not, make these types of business decisions himself as he functions as

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<sup>22</sup> See id. Out of an abundance of caution, the attached declarations document these and additional details concerning these attorneys' roles.

<sup>23</sup> The GTE/BA Ruling discussion suggested otherwise. See GTE/BA Ruling ¶ 2. Bell Atlantic and GTE suggest that Sprint "concede[d]" that its attorneys are involved in "competitive decision-making." See GTE/BA Reply at 2 (filed in CC Dkt. No. 98-184, Feb. 2, 1999). Sprint made no such concession. It is unfortunate that the Bureau may have been swayed by GTE and Bell Atlantic in this regard. The GTE/BA Ruling mistakenly restated a statement made by Sprint as an "acknowledge[ment]" by Sprint that Mr. Kestenbaum and Mr. Dingwall participate in "competitive decision-making." See GTE/BA Ruling ¶ 2. Sprint's statement, however, was part of a longer sentence, and indeed a larger discussion, about the adverse ramifications of denying access to regulatory attorneys who render legal advice, and who do not participate in business decisions.

an attorney only, makes no commercial judgments, and is not involved in "competitive decision-making" for Sprint.

The same is true of Mr. Dingwall.

Sprint's factual demonstration that neither Mr. Kestenbaum nor Mr. Dingwall are involved in "competitive decision-making" is uncontroverted. Indeed, neither Bell Atlantic nor GTE (nor the Bureau) provided any evidence to suggest that either Mr. Kestenbaum or Mr. Dingwall participate in "competitive decision-making". Thus, an analysis of Mr. Kestenbaum's and Mr. Dingwall's actual activity and relationship with Sprint demonstrates that they are not involved in "competitive decision-making" under the meaning of that standard.

The validity of this conclusion is supported by a parallel decision rendered in the GTE/BA Ruling. Specifically, the GTE/BA Ruling does not account for the nearly identical job descriptions of Mr. Kestenbaum and Mr. Dingwall on the one hand, and that of Aryeh Friedman of AT&T on the other.<sup>24</sup> Since "high position" or seniority is not relevant to the Bureau's analysis, there is no reason to treat Sprint's attorneys any differently than AT&T's attorney. Furthermore, the instant situation is factually distinguishable from that prompting the Bureau's WorldCom/MCI Ruling denying access to certain of Bell Atlantic's in-house

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<sup>24</sup> See GTE/BA Ruling ¶ 3 (deeming Mr. Friedman to be acceptable based upon his "'antitrust compliance, antitrust regulation and regulatory work'" and his denial of participation in "'competitive decision-making' or in AT&T's 'business decisions.'" (citation omitted).

counsel.<sup>25</sup> In that decision, the evidence was uncontroverted that Bell Atlantic's attorneys were integrally involved in making business decisions for the company. As noted above, in the instant situation, the evidence that Sprint's attorneys are uninvolved in "competitive decision-making" is uncontroverted.

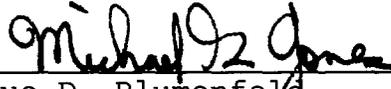
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<sup>25</sup> Indeed, Mr. Kestenbaum operated under the terms of the identical standard contained in the Bureau's WorldCom/MCI Protective Order.

**III. CONCLUSION**

Sprint respectfully urges the Bureau to reconsider its decision in the GTE/BA Ruling and to determine that Mr. Leon M. Kestenbaum and Mr. Craig D. Dingwall of Sprint may review all confidential materials filed by the Applicants pursuant to the GTE/BA Protective Order.

Respectfully submitted,



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Transferee )  
 )  
for Consent to Transfer Control )

**DECLARATION OF LEON M. KESTENBAUM**

1. My name is Leon M. Kestenbaum. My business address is 1850 M Street, N.W. -- 11th Floor, Washington, DC, 20036. I am employed by Sprint Communications Company L. P. ("Sprint") as Vice President, Federal Regulatory Affairs. Sprint Communications Company L.P. is owned and controlled by Sprint Corporation, a publicly-held corporation.
2. I have read, and fully understand, the protective order governing confidential materials filed in the Bell Atlantic Corporation - GTE Corporation merger proceeding at the Federal Communications Commission ("FCC"), CC Dkt. No. 98-184.
3. As Vice President, Federal Regulatory Affairs for Sprint, I am responsible for preparing, assisting in the preparation of, reviewing, and filing written pleadings with the FCC and the United States Department of Justice ("DOJ") concerning regulatory issues that concern Sprint. In addition, I lobby the FCC and the DOJ regarding these same written pleadings. I review agency, court, and other federal decisions and developments that impact Sprint and convey these decisions and developments to Sprint's management.
4. In my fifteen years as an in-house attorney for Sprint, I have not been and am not involved in "competitive decision-making" as defined by the FCC in the protective order in CC Dkt. No. 98-184. Specifically, I have neither been asked, nor have I offered, to participate in setting rates, targeting particular markets, developing new products or product lines, or any similar business decisions.

I, Leon M. Kestenbaum, hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.

*Leon M. Kestenbaum*

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Leon M. Kestenbaum  
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Executed on March 25, 1999

BEFORE THE  
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and ) CC Docket No. 98-184  
 )  
BELL ATLANTIC CORPORATION, )  
Transferee )  
 )  
for Consent to Transfer Control )

**DECLARATION OF CRAIG D. DINGWALL**

1. My name is Craig D. Dingwall. My business address is 1850 M Street, N.W. -- 11th Floor, Washington, DC, 20036. I am employed by Sprint Communications Company L. P. ("Sprint") as Director, State Regulatory/East. Sprint Communications Company L.P. is owned and controlled by Sprint Corporation, a publicly-held corporation.
  2. I have read, and fully understand, the protective order governing confidential materials filed in the Bell Atlantic Corporation - GTE Corporation merger proceeding at the Federal Communications Commission ("FCC"), CC Dkt. No. 98-184.
  3. As Director, State Regulatory/East for Sprint, I am responsible for preparing, assisting in the preparation of, reviewing, and filing written pleadings with the state regulatory agencies and courts in the Bell Atlantic region concerning regulatory issues that concern Sprint. In addition, I lobby the agencies regarding these same written pleadings. I review agency, court, and other state and federal decisions and developments that impact Sprint and convey these decisions and developments to Sprint's management. With respect to the Bell Atlantic - GTE proposed merger, I am the attorney responsible for coordinating Sprint's participation and advocacy before state agencies, and the United States Department of Justice and the FCC.
  4. In my sixteen years as an in-house attorney for Sprint, I have not been and am not involved in "competitive decision-making" as defined by the FCC in the protective order in CC
-

Dkt. No. 98-184. Specifically, I have neither been asked, nor have I offered, to participate in setting rates, targeting particular markets, developing new products or product lines, or any similar business decisions.

I, Craig D. Dingwall, hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.

  
\_\_\_\_\_  
Craig D. Dingwall  
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Executed on March 25, 1999

**CERTIFICATE OF SERVICE**

I, Catherine M. DeAngelis, do hereby certify that on this 25th day of March, 1999, copies of the "Petition for Reconsideration of Sprint Communications Company L.P." were served by first class mail, postage prepaid, or hand delivered as indicated, on the following parties:

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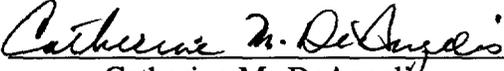
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