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June 13, 2001

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JUN 13 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

***Ex Parte***

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: In the Matter of Access Charge Reform, CC Docket 96-98; Petitions of AT&T Corp. and Sprint Communications Company for Declaratory Ruling, CCB/CPD 01-02**

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, enclosed please find four copies of a June 13, 2001 letter and attachment from David A. Konuch, Kelley, Drye & Warren, to Dorothy T. Attwood, Chief, Common Carrier Bureau, Federal Communications Commission for inclusion in the record of the above-captioned dockets.

Please contact me at (202) 955-9871 if you have any questions regarding this filing.

Sincerely,



David A. Konuch

Enclosures

cc: Dorothy Attwood James Bendernagel (Counsel for AT&T)  
Alex Starr Frank Krogh (Counsel for Sprint)  
A.J. DeLaurentis

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AFFILIATED OFFICES  
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June 13, 2001

***EX PARTE  
VIA COURIER AND FACSIMILE***

Ms. Dorothy Attwood  
Chief, Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: In the Matter of Access Charge Reform, CC Docket 96-98; Petitions of AT&T Corp. and Sprint Communications Company for Declaratory Ruling, CCB/CPD 01-02**

Dear Dorothy:

Enclosed is a copy of the Plaintiffs' brief that we filed last week in *Advantel et al v. AT&T Corp.*, CA No. 00-643-A, currently pending before Judge Ellis in the United States District Court for the Eastern District of Virginia. The brief responds to Judge Ellis's request that the parties analyze the effect of recent Federal Communications Commission actions on the resolution of the federal district court lawsuits in which we are seeking to compel payment of access charges withheld by AT&T and Sprint and owed to 14 Competitive Local Exchange Carriers ("CLECs").

Sincerely,



David A. Konuch  
Counsel for Plaintiffs

cc: Alex Starr  
A.J. DeLaurentis  
Jeffrey Dygert  
Glenn Reynolds  
James Bendernagel (AT&T)  
Frank Krogh (Sprint)

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
(Alexandria Division)

RECEIVED  
JUN 18 2001  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

\_\_\_\_\_)  
ADVAMTEL, LLC *et al.*, )  
)  
)  
Plaintiffs, )  
)  
v. ) Civil Action No. 00-643-A  
)  
AT&T CORP., )  
)  
Defendant. )  
\_\_\_\_\_)

**PLAINTIFFS' RESPONSE TO  
THE COURT'S JUNE 4 ORDER**

On June 4, 2001, the Court entered an Order directing the parties to file a memorandum setting forth the proper resolution of the case at bar in light of the FCC's May 30, 2001 Memorandum Opinion and Order<sup>1</sup> (the "*BTI Rate Case Order*"), which addressed the reasonableness, on a retrospective basis, of the access rates charged by Plaintiff Business Telecom, Inc. ("BTI"). The *BTI Rate Case Order* did not address the issues related to constructive ordering that this Court referred to the FCC. On April 27, 2001, the Commission released its *CLEC Access Charge Order*,<sup>2</sup> which *did* consider explicitly issues relating to constructive ordering, *albeit* on a prospective basis. The *CLEC Access Charge Order* is scheduled to take effect on June 20, 2001, unless stayed by the FCC or by a court. The *CLEC*

<sup>1</sup> *AT&T v. Business Telecom, Inc.*, EB-01-MD-001, consolidated with *Sprint Corp. LP v. Business Telecom, Inc.*, EB-01-002, FCC 01-185 (rel. May 30, 2001) ("*BTI Rate Case Order*").

<sup>2</sup> *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (April 27, 2001) ("*CLEC Access Charge Order*"), attached hereto at Exhibit 1.

*Access Charge Order* outlines a framework for how the FCC believes these lawsuits should be resolved.

Approximately one month remains before the Court's six-month stay of this action will be lifted, but it is unclear if, prior to the July 19 deadline set by this Court, the FCC will issue an order explicitly addressing constructive ordering under tariffs effective prior to the date the *CLEC Access Charge Order* takes effect. As Plaintiffs have previously advised the Court, FCC representatives indicated in informal meetings and discussions with counsel that the FCC intended to address these questions. Since the issuance of the *CLEC Access Charge Order* on April 27, 2001, however, it is unclear whether the FCC believes that order is adequate to address the Court's referral, or whether it will issue another order to do so. Indeed, in recent informal discussions between Plaintiff's counsel and FCC personnel, the FCC personnel have pointedly refused to commit to the issuance of a further order.

Plaintiffs urge the Court to take the case back immediately, and to schedule trial as expeditiously as possible. The *CLEC Access Charge Order* provides the Court with more than adequate guidance as to the proper interpretation of the Communications Act,<sup>3</sup> and fully supports a judgment in Plaintiff's favor. Moreover, continued delay in this case – even the additional five weeks between now and the July 19 deadline – causes irreparable harm to Plaintiffs. When this Court initially stayed the case for six months pending referral to the FCC, Plaintiffs argued that such delay would prove disastrous to Plaintiffs. This statement was accurate to a tragic degree: in the five months since this case was stayed, two of the Plaintiffs – Advantel and WinStar – have declared bankruptcy. The millions of dollars in lawfully tariffed

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<sup>3</sup> Plaintiffs and Defendants will be meeting with the FCC on June 11, 2001 to discuss issues relating to the FCC complaints pending against BTI and the other Plaintiffs, at which time the FCC may provide additional information concerning the FCC's intentions.

access charges that AT&T has withheld from these carriers for more than two years contributed materially to these developments. Because the immediate resumption of this case would not prejudice any party, and continued delay would be highly prejudicial to Plaintiffs, the case should be reactivated without delay.<sup>4</sup>

As discussed herein, the FCC Orders already released provide ample guidance for the Court on the issues referred in the Court's Stay Order. More specifically, the *CLEC Access Charge Order* stands for two propositions: first, that existing law "require[s] IXCs to pay the published rate for tariffed access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable," *CLEC Access Charge Order* at ¶ 28; and second, that IXCs may *never* terminate or decline access services ordered or constructively ordered by CLECs whose rates are equal to or below the benchmark rates established by the FCC under 47 U.S.C. § 201(a). As such, the *CLEC Access Charge Order* strips AT&T and Sprint of any defense against Plaintiffs' claim of constructive ordering, and compels judgment for Plaintiffs.

## **BACKGROUND**

### **I. THIS COURT'S ORDERS**

On July 17 and July 21, 2000, the Court entered Orders referring Sprint and AT&T's rate reasonableness claims to the FCC under the doctrine of primary jurisdiction. *See Advantel, LLC v. Sprint Communications Co.*, 105 F. Supp. 2d 476 (E.D. Va. 2000); *Advantel, LLC v. AT&T Corp.*, 105 F. Supp. 2d 507 (E.D. Va. 2000).

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<sup>4</sup> If the Court seeks certainty as to the FCC's intention to issue an additional order or not, Plaintiffs are prepared to work cooperatively with Defendants to request that the FCC clarify its intention in writing to this Court, in order to avoid pointless delay in the completion of this case.

On January 5, 2001, the Court ordered a stay of the instant case pending referral to the FCC, under the primary jurisdiction doctrine, of two specific constructive ordering questions:

- (i) whether any statutory or regulatory constraints prevent Sprint [or AT&T], as an IXC, from terminating or declining services ordered or constructively ordered, and if not,
- (ii) what steps IXCs must take either to avoid ordering or to cancel service after it has been ordered or constructively ordered.

*Advantel, LLC v. Sprint Communications Co., L.P.*, 125 F. Supp. 2d 800, 807 (E.D. Va. 2001).

## II. THE FCC'S CLEC ACCESS CHARGE ORDER

On April 27, 2001, the FCC issued the *CLEC Access Charge Order*, which set a “bright-line” benchmark, or “safe harbor” rate, for determining presumptively reasonable CLEC access charges (initially 2.5 cents per minute or the rate charged by the competing ILEC, whichever is higher). *See CLEC Access Charge Order* at ¶¶ 41-46. The FCC set a higher rate for CLECs serving rural areas.<sup>5</sup> The *CLEC Access Charge Order* established that, on a going-forward basis, “CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff.” *Id.* ¶ 3. For CLECs with tariff rates above the FCC benchmark, unless specifically negotiated higher with the IXC, “the CLEC must charge the IXC the appropriate benchmark rate.” *Id.*

The *CLEC Access Charge Order* further made clear that 47 U.S.C. § 201(a) “obligates IXCs to serve the end users of a CLEC that is charging rates at or below the

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<sup>5</sup> *See id.* at ¶ 73, 80. The FCC did not set a specific numeric benchmark, but rather set this rate roughly equal to the highest rate band tariffed by National Exchange Carrier Association (NECA). *See id.* at 80. By way of comparison, the retroactive rates set by the FCC in the *BTI Rate Case Order* were based on the *lowest* rate band for NECA carriers. *BTI Rate Case Order* at ¶ 57. The average rate for all NECA carriers is approximately 3.5 cents per minute.

benchmark.” *Id.* ¶ 89. In other words, it is unlawful for AT&T and Sprint to block calls to or from CLECs. The FCC made this finding because:

an IXC’s refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

*Id.* ¶ 5. When a “customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a).” *Id.* ¶ 94. In short, “since the benchmark rate is conclusively presumed reasonable, an IXC cannot refuse to provide service to an end user served by the CLEC without violating section 201.” *Id.* ¶ 97.

In the *CLEC Access Charge Order*, the FCC criticized the IXCs’ willful flouting of CLEC tariff rates for access service in an improper attempt to coerce CLECs to lower their access service rates – the very conduct by AT&T and Sprint giving rise to the instant lawsuit:

[T]he major IXCs have begun to try to force CLECs to reduce their rates. The IXCs’ primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. ***We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system.***

*Id.* ¶ 23 (footnotes omitted) (emphasis added). Similarly, the *CLEC Access Charge Order* criticized the IXCs’ threats to stop delivering traffic to, or accept traffic from, certain CLECs they may unilaterally view as “high-priced”:

AT&T has notified a number of CLECs that it refused to exchange originating or terminating traffic. In some instances, AT&T has terminated its relationship with CLECs and is blocking traffic, thus raising various consumer and service quality issues. These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion. . . . ***If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through. . . . [This] would represent a serious problem, and, in certain circumstances, it could be life-threatening.***

*Id.* ¶ 24 (footnotes omitted) (emphasis added). Finally, the *CLEC Access Charge Order* made it clear that the conduct of AT&T and Sprint was wholly improper and that no further impediment exists to Plaintiffs' straightforward collections actions against AT&T and Sprint pursuant to their filed tariffs:

CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established. Accordingly, an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate.

*Id.* ¶ 60.

### III. THE FCC'S BTI RATE CASE ORDER

The FCC issued the *BTI Rate Case Order* on May 30, 2001, and expressly addressed the necessarily backward-looking access service charge rate reasonableness claims referred by the Court in July 2001. *See AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, No. EB-01-MD-001, FCC 01-185, ¶¶ 6-7 (rel. May 30, 2001):

These complaint proceedings arise from primary jurisdiction referral orders in . . . the *Advantel Litigation*. . . . Specifically, the court referred Complainants' claims that BTI and other CLECs charged unreasonably high access rates, in violation of section 201(b) of the Act.

The *BTI Rate Case Order* defined “a just and reasonable rate” on which to base damage calculations for past access service charges received by AT&T and Sprint. *Id.* ¶ 1. The retrospective *BTI Rate Case Order* expressly references and adopts the approach of the prospective *CLEC Access Charge Order*:

We find substantial guidance in the *CLEC Access Charge Order*’s determination that, for a year after its issuance, a rate of up to 2.5 cents per minute will be presumptively reasonable for CLEC access. Nothing in this record indicates that the considerations bearing on rate reasonableness during the retrospective period at issue here were markedly different from the circumstances the Commission considered in setting prospective tariff benchmarks.

*Id.* ¶ 55. Nonetheless, because access charges tariffed by most local carriers – CLEC as well as ILEC – were higher in the past than they are currently, the FCC concluded that it was reasonable for BTI to charge considerably higher rates in the past than the 2.5 cent rate prescribed prospectively in the *CLEC Access Charge Order*:

[W]e find that the just and reasonable rates for both originating and terminating access services during the relevant time period are as follows:

- July 1, 1998 through June 30, 1999      3.8 cents per minute
- July 1, 1999 through June 30, 2000      3.0 cents per minute
- July 1, 2000 through [May 30, 2001]      2.7 cents per minute

*Id.* ¶ 58.

## **DISCUSSION**

The FCC’s *CLEC Access Charge Order* provides the Court with all the guidance it requires on the issues referred in its Stay Order. The *CLEC Access Charge Order* has, in fact, substantively answered the first question referred in the Court’s Stay Order in the affirmative: Indeed, “*statutory or regulatory constraints [do] prevent . . . an IXC[] from terminating or*

*declining services ordered or constructively ordered . . .*” *Advantel*, 125 F. Supp. 2d at 807 (emphasis added).<sup>6</sup>

The FCC has conclusively determined, in its *CLEC Access Charge Order*, that IXCs “*may not refuse*” to provide service to a CLEC end user customer who “attempts to place a call either from or to a local access line . . . served by a CLEC with presumptively reasonable rates” and that “CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable.” *CLEC Access Charge Order*, ¶¶ 94, 3 (emphasis added). The FCC has also definitively ruled that the Communications Act “obligates IXCs to serve the end users of a CLEC that is charging rates at or below the benchmark” and that “an IXC’s refusal to serve the customers of a CLEC . . . constitutes a violation” *Id.* ¶¶ 89, 5. Finally, the FCC has given the Court the benefit of its specialized agency expertise on the ultimate issues in this lawsuit. In the FCC’s view: (1) “IXCs appear routinely to be flouting their obligations under the tariff”; and (2) “an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff . . . .” *Id.* ¶¶ 23, 60.

These findings are dispositive of the issues pending before the Court. As the citations from the *CLEC Access Charge Order* above make clear, it is a violation of Section 201 of the Communications Act for IXCs to block CLEC traffic that is priced at presumptively lawful rates. As Plaintiffs have demonstrated previously, the Communications Act requires, and the FCC has found, that rates filed on a streamlined basis – as all CLEC rates are – “shall be deemed lawful” unless and until the FCC finds otherwise and uses its prescriptive authority to change the rates. 47 U.S.C. § 204(a)(3); *see also* Second Amended Complaint (July 28, 2000) at

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<sup>6</sup> In light of the FCC’s affirmative answer to the first question, it is unnecessary to reach the second question, which the Court expressly conditioned on a negative response to the first question.

¶ 30 (“Under the Communications Act, the rates of ‘non-dominant’ carriers such as Plaintiffs are presumed reasonable when validly filed in Tariffs, as Plaintiffs’ have been”). As the FCC recently confirmed, “[t]ariffs require IXCs to pay the published rate for tariffed access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable.” *CLEC Access Charge Order* at ¶ 28.

These unequivocal statements of the law allow only one conclusion: because all of the Plaintiffs’ tariffed rates were deemed lawful at the time they were filed, AT&T and Sprint would have violated Section 201 of the Communications Act if they had refused to provide service to any of the Plaintiffs’ customers by blocking traffic. If the FCC subsequently decides that the rates were excessive, it may be able to change the rates going forward.<sup>7</sup> but this does not change the fact that AT&T and Sprint were prohibited at all times from terminating or declining services ordered or constructively ordered. This finding prevents AT&T and Sprint from contending that they did not constructively order service, and triggers their obligation to pay the lawfully tariffed rate under the filed rate doctrine.

AT&T’s counsel recognized in open court that if the FCC made such a finding, this case was effectively over:

ATTORNEY BENDERNAGEL: . . . Our basic position is we want [the FCC to clarify] the legal issue [of] whether . . . we have the right to say, ‘We are not accepting your service,’ or ‘We are declining your service,’ . . . . I mean, *if [the FCC] come back and they say, ‘AT&T, you don’t have that right,’ we are finished here. I mean, it’s over to the 208 rate case, and there is nothing to decide here.*

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<sup>7</sup> In the *BTI Rate Case Order*, the FCC ordered retroactive adjustments to BTI’s rates. Any reference to the *BTI Rate Case Order* should not be taken as an endorsement of the FCC’s ruling in that case. Indeed, the FCC’s Order is wrongly decided and is profoundly flawed as a matter of fact and law, and unlikely to withstand appellate review if challenged in court. See *BTI Rate Case Order* at p. 29 (Dissenting Statement of Commissioner Harold Furchtgott-Roth).

Transcript of Motions Hearing (Dec. 22, 2000) at 33, attached hereto as Exhibit 2 (emphasis added).

Indeed, the only issue left in the case is for the FCC to decide whether the rates tariffed by the Plaintiffs prior to the effective date of the *CLEC Access Charge Order* were reasonable. Such a finding can and should be made independently of a ruling by this Court. The Court should immediately award payment of the filed rates. The FCC can then determine whether any refunds to Defendants will be necessary. As the *BTI Rate Case Order* demonstrates, AT&T and Sprint are not helpless victims of the filed rate doctrine. If they believe CLEC access charges are excessive, relief is – and always has been – available to them through the formal complaint process before the FCC, pursuant to Section 208 of the Communications Act. This has been Plaintiff's position throughout the course of this lawsuit.

#### CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court immediately reactivate the instant case, and proceed to trial on the issue of damages.

Respectfully submitted,



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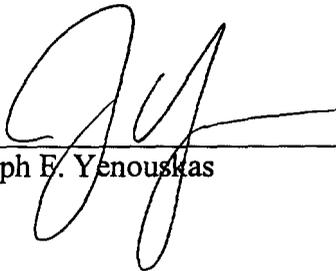
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Dated: June 8, 2001

**CERTIFICATE OF SERVICE**

I hereby certify that I have, this 8th day of June 2001, served Plaintiffs' Response to The Court's June 4 Order by causing copies of same to be delivered by United States mail, first-class postage prepaid, to (1) James Bendernagel, Esq., Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, counsel for AT&T Corp., and (2) J. William Boland, McGuire Woods, One James Center, 901 East Cary Street, Richmond, VA 23219

  
\_\_\_\_\_  
Joseph E. Yenuskas