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November 30, 2004

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Ex Parte Presentation, *Unbundled Access to Network Elements*, WC
Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

Enclosed for filing in connection with the above referenced matter is a letter from David W. Carpenter and James F. Bendernagel to David Solomon, Jeffrey Carlisle and John Rogovin.

Please contact me if you have any questions.

Very truly yours,

/s/ C. Frederick Beckner III
Counsel for AT&T Corp.

Encl.

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November 30, 2004

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Re: *AT&T Corp. v. BellSouth Telecommunications, Inc.*, File No. EB-04-MD-010

Dear Messrs. Solomon, Carlisle, and Rogovin:

This letter responds to the November 24, 2004 letter from BellSouth Telecommunications, Inc. We request your *immediate action* to stop BellSouth potentially imminent flagrant and massive violations of the *ex parte* rules and procedures applicable to this restricted § 208 complaint proceeding.

In its letter, BellSouth nominally asserts that AT&T violated the *ex parte* rules applicable to this § 208 complaint case when AT&T recently made a filing *in the Triennial Review Remand Proceeding*. As detailed below, this allegation is frivolous. AT&T's *Triennial Review Remand* filing did nothing more than respond to arguments that BellSouth and the other Bell companies made in *that* proceeding, and, in so doing, AT&T merely repeated the same legal contentions that it had previously made in its Comments and Reply Comments in the *Triennial Review Remand* proceeding.

Nevertheless, BellSouth has seized on this innocuous and perfectly lawful AT&T filing not only to make baseless allegations against AT&T, but also as a pretext to justify BellSouth's own flagrant violations of the *ex parte* rules. In particular, purportedly in "response" to AT&T's

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letter, BellSouth has now filed in the *Triennial Review Remand* proceeding an unauthorized sur-reply that it simultaneously filed with Enforcement Bureau officials directly responsible for the § 208 complaint case and that discusses evidence from the § 208 case that is confidential, that is the subject of a separate protective order in that case, and that has no pertinence to the *Triennial Review Remand* proceeding. BellSouth's apparent agenda is now to use this latter filing as a pretext to justify discussing the issues in the § 208 complaint case in meetings with Commissioners and their staffs in connection with the *Triennial Review Remand* proceeding. That would be a flagrant violation of the *ex parte* rules, and because this § 208 complaint case must be decided by December 8, 2004, immediate action must be taken to stop BellSouth and to impose appropriate sanctions on it for any such misconduct that has occurred to date.

I. AT&T'S TRIENNIAL REVIEW REMAND FILING DID NOT VIOLATE THE § 208 EX PARTE RULES.

In its letter,¹ BellSouth nominally asserts that AT&T violated the *ex parte* rules applicable to the § 208 proceeding when AT&T recently filed an authorized *ex parte* letter in the *Triennial Review Remand* proceeding.² But this AT&T filing responds to specific arguments that were made in the *Triennial Review Remand* proceeding by several Bell companies, including BellSouth, regarding the propriety of their special access tariffs.³ Under *USTA II*, the Commission is supposed to examine whether Bell special access tariffs provide the same "opportunities and risks" as unbundled network elements ("UNEs").⁴ AT&T (and other carriers) in their comments in the *Triennial Review Remand* proceeding had contended that Bell special access tariffs could not be considered in unbundling determinations because, *inter alia*, they contained "lock-up" provisions that required competitive carriers to commit to the Bells the lion's share of their historical traffic in order to obtain the Bells' best rates,⁵ and, more generally, that these provisions were manifestly anticompetitive and violated numerous Commission

¹ Letter from Bradford M. Berry to David Solomon and Jeffrey Carlisle (dated November 24, 2004) ("BellSouth Letter").

² Letter from C. Frederick Beckner III to Marlene Dortch (filed in WC Docket No. 04-313, CC Docket No. 01-338, Nov. 12, 2004) (attaching "Bell OPP Tariffs Both Impede Facilities-Based Competition And Increase The Risk Of Providing Local And Long Distance Services") (hereinafter "TR Response").

³ AT&T's TR Response was filed only in WC Docket Nos. 04-313 and 01-338, and not in the § 208 proceeding. As required by the Commission's rules, the TR Response was filed with the Secretary of the FCC for inclusion in the record in the *Triennial Review Remand* proceeding and was thus generally available to the public and to all parties that regularly monitor such filings, presumably including BellSouth. No other Commission personnel were served with the filing.

⁴ *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 577 (D.C. Cir. 2004).

⁵ See, e.g., NuVox at 45-49; Time Warner Telecom at 14; ALTS at 31-32.

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precedents.⁶ AT&T also argued that those tariffs should be unenforceable,⁷ because carriers currently bound by Bell lock-up tariffs are effectively precluded from leasing UNEs or from deploying their own facilities – the policy goal at the heart of the *Triennial Review Remand* proceeding.⁸

BellSouth and the other Bell companies, of course, disputed AT&T's claims. They argued that their "lock-up" tariffs were pro-competitive because they supposedly allowed carriers to obtain special access at lower prices.⁹ They also contended that, to the extent that lock-up special access tariffs could be viewed as anticompetitive, the Commission should "address those concerns directly."¹⁰ The Bells nonetheless defended their tariffs as "just and reasonable" under the Communications Act,¹¹ and nondiscriminatory under Commission precedent.¹²

AT&T's TR Response did nothing more than respond to these arguments. It explained the facts that demonstrate that these tariffs are anticompetitive, unreasonable and discriminatory, and thus unlawful. It thus merely repeated arguments first made in AT&T's comments and reply comments and responded directly to the Bells' claims.

BellSouth now contends that AT&T's TR Response violates the Commission's *ex parte* rules because it "really" sought to affect the § 208 complaint proceeding by addressing issues analogous to those at issue in the complaint proceeding.¹³ That is nonsense. AT&T's TR Response addresses no issue peculiar to BellSouth's tariffs and raises no issue not initially raised in AT&T's comments and reply comments. Indeed, BellSouth previously tacitly acknowledged this point, for it obviously had full knowledge of the claims raised in AT&T's *Triennial Review Remand* comments (filed in early October 2004), and BellSouth then raised no claim whatsoever that those filings were impermissible *ex parte* presentations in the § 208 complaint case. Rather, BellSouth responded to these contentions in the *Triennial Review Remand* proceeding, demonstrating that it understood that discussion of these issues in the *Triennial Review Remand* proceeding is not a violation of the § 208 *ex parte* rules. In particular, BellSouth's reply comments contended directly that BellSouth's OPPs are not anticompetitive but are "just and

⁶ AT&T at 149-69; AT&T Reply at 88-95.

⁷ AT&T at 149-69; AT&T Reply at 93 & n.34.

⁸ AT&T at 153-56.

⁹ See, e.g., BellSouth Reply at 53-54; SBC Reply at 47-49; Verizon Reply at 88-94.

¹⁰ Verizon at 91.

¹¹ BellSouth Reply at 53 n.163.

¹² Verizon Reply at 91; see also SBC Reply at 49 n.153.

¹³ BellSouth Letter at 1-2.

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reasonable.”¹⁴ Those reply comments were filed by two of BellSouth’s lead lawyers in the § 208 proceeding, who by their actions treated AT&T’s filing as entirely appropriate under the *ex parte* rules.

AT&T’s (and BellSouth’s prior) reading of the Commission’s rules is clearly correct. The restricted proceeding rules prohibit a party from making an *ex parte* “presentation” “to . . . Commission decision-making personnel” in the restricted proceeding.¹⁵ A “presentation” is a “communication directed to the merits or outcome of [the restricted] proceeding.”¹⁶ AT&T’s TR Response is clearly not a “presentation” in the restricted proceeding.

First, AT&T’s filing was not made “in” the restricted proceeding or “directed to the merits or outcome of [the restricted] proceeding.” AT&T’s filing was directed solely to issues previously raised in the *Triennial Review Remand* proceeding. As explained above, the TR Response reiterated arguments made in previous AT&T filings in the *Triennial Review Remand* proceeding on these issues – filings never objected to by BellSouth – and responded directly to contentions made by BellSouth itself and other Bell companies that their special access tariffs were pro-competitive and lawful. AT&T challenged aspects of the Bell special access tariffs that were generic and not just unique to BellSouth. AT&T’s TR Response mentioned BellSouth’s tariff only to the extent relevant to issues already raised in the *Triennial Review Remand* proceeding – and only directly mentioned BellSouth’s tariff in passing when AT&T addressed other Bell tariffs.¹⁷

Thus, AT&T’s filing, unlike BellSouth’s reply comments, did not mention the § 208 complaint proceeding or advocate that the Commission grant any relief in that proceeding. Likewise, the AT&T TR Response did not address the many issues raised in the restricted proceeding that were not relevant to the *Triennial Review Remand* proceeding. Nor, again unlike BellSouth, did AT&T use, refer to, or rely upon any of the information that AT&T (or BellSouth) produced in the § 208 proceeding.

The Commission has made clear that when arguments are made in a general rulemaking proceeding, filed only in that rulemaking proceeding, and that are clearly within the scope of the rulemaking proceeding, those arguments clearly not “directed to” another proceeding – much less made “in” the proceeding – just because they address overlapping or related issues and arguments. In particular, in promulgating its current *ex parte* rules, the Commission has expressly held that the rules are not “intended to prohibit such a party in a non-restricted

¹⁴ BellSouth Reply at 53 n.163, 54. BellSouth further sponsored a reply declaration that “refuted” AT&T’s “allegations.” *Id.*, Starcher Reply Aff. ¶¶ 7-11.

¹⁵ 47 C.F.R. § 1.1208.

¹⁶ *Id.* § 1.1202(a).

¹⁷ *See, e.g.*, AT&T TR Response at 2, n. 8 (noting that BellSouth’s tariff was “similar” to OPP tariffs of other Bell companies).

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proceeding from engaging in communications regarding ‘general industry problems’” and do not preclude “discussions about an entire industry which do not *directly* relate to *specific* agency adjudications.”¹⁸ As the Commission has stated, “interested persons [as to a particular proceeding] are entitled to pursue other legitimate interests before the Commission.”¹⁹ This commonsense reading of the *ex parte* rules is the only one that makes sense in this context. Otherwise, a party involved in a restricted proceeding that raised issues overlapping with a general rulemaking proceeding would be unable to engage in effective advocacy before the Commission in the rulemaking proceeding.

BellSouth’s proposed interpretation of the *ex parte* rules, on the other hand, would make nonsense of the careful distinctions the Commission’s rules draw among different types of proceedings.²⁰ If, as BellSouth would have the Commission hold, any filing in the rulemaking proceeding could be deemed “directed” at the restricted proceeding if the issues were at all related, the party in the rulemaking proceeding would then need to serve the parties and staff in the restricted proceeding with all of its filings. But restricted complaint proceedings typically have strict briefing schedules that do not permit unauthorized “sur-replies.”²¹ In this regard, the Commission can be quite sure that if AT&T did exactly what BellSouth said it should have done – served Enforcement Bureau staff and other § 208 decisionmakers – BellSouth would have contended that AT&T was violating the briefing schedule in that proceeding and moved to strike.

¹⁸ *Amendment of Subpart H, Part 1 of the Commission’s Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, Report and Order, 2 FCC Rcd. 3011, ¶ 21 (1987) (emphasis added); see also *Rules Governing Ex Parte Communications In Hearing Proceedings*, Report and Order, 1 F.C.C. 2d 49, ¶¶ 22, 24 (1965) (“the term presentation” in Rule 1.1202(a) “does not include pleadings or testimony submitted openly in other proceedings pending before the Commission,” even if the filing is “related to” the restricted proceeding) (addressing prior FCC *ex parte* rules).

¹⁹ *Amendment of Section 703.202(b), Table of Allotments*, Memorandum Opinion and Order, 18 FCC Rcd. 10333, ¶ 25 (2003); see also *Smaller Market UHF Television Stations Group*, Memorandum and Order, 81 F.C.C.2d 429, ¶ 14 n.26 (1980) (same); *Carolina Radio of Durham, Inc.*, Memorandum Opinion and Order, 74 F.C.C. 2d 571, 576-77 (1979) (same); *American Television Relay, Inc.*, Memorandum Opinion and Order, 9 F.C.C. 2d 1004, ¶ 11 (1967) (same); *Petition of Multi Vision Northwest, Inc.*, Memorandum Opinion and Order, 8 F.C.C. 2d 1151, ¶ 25 (1967) (same); *Tele-Vue Systems, Inc.*, Memorandum Opinion and Order, 8 F.C.C. 2d 1134, ¶ 25 (1967) (same); *Rules Governing Ex Parte Communications In Hearing Proceedings*, Report and Order, 1 F.C.C. 2d 49, ¶ 22 (1965) (“The rules are not intended to interfere with the participation by parties to a restricted proceeding in other proceedings of a general or specific nature pending before the Commission.”).

²⁰ See 47 C.F.R. §§ 1.1200-1208.

²¹ See generally 47 C.F.R. § 1.732.

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Knowing that its principal interpretation is unsustainable, BellSouth suggests that AT&T's filing must be directed to the merits of the § 208 case because AT&T asks that Bell lock-up tariffs (including BellSouth's) be declared "unlawful and unenforceable" and that such relief is somehow outside the scope of "a rulemaking proceeding involving unbundling issues."²² This too is nonsense. The legality and enforceability of the Bells' special access tariffs has been an issue in the *Triennial Review* proceedings from day one and, as applied to related tariffs, in the original phase of the proceeding itself, long before the § 208 complaint proceeding was initiated.²³ Further, AT&T's TR Response is directly responsive to arguments BellSouth itself made in the *Triennial Review Remand* proceeding, and as such, cannot be considered "directed" to another proceeding in which the TR Response was not even filed. If the law were otherwise, BellSouth would have violated the *ex parte* rules when argued, in its *Triennial Review Remand* comments, that its tariffs were "just and reasonable," and thus lawful.

Additionally, AT&T's TR Response was not submitted "to" "Commission decision-making personnel" in the restricted proceeding. It was attached to a letter addressed to the Secretary of the FCC, asking her to place it in the record in the *Triennial Review Remand* proceeding.²⁴ AT&T's expectation was that the filing would be reviewed by Wireline Competition Bureau staff that were tasked with reviewing the many thousands of pages of comments and reply comments that AT&T and other parties submitted in the proceeding. Further, contrary to BellSouth's insinuations,²⁵ the TR Response was *not* sent to any personnel involved in the restricted proceeding.²⁶ This contrasts starkly with BellSouth's letter, which was

²² BellSouth Letter at 2.

²³ The Commission's unbundling rules are bound up with the enforceability of the Bells' lock-up tariffs. Even should the Commission retain unbundled access to high capacity loops and transport, such unbundling is an empty gesture so long as the lock-up tariffs remain in effect. Carriers bound by those tariffs are effectively denied access to UNEs, because the terms of the tariffs will cause many carriers to incur onerous shortfall liabilities if they attempt to shift special access traffic to UNEs. Likewise, lock-up tariffs directly thwart the central goal of the Commission's proceeding – deploying bypass network facilities. Just as competitive carriers subject to lock-up OPPs cannot shift traffic to UNEs, they cannot shift traffic to their own or other competitors' facilities.

²⁴ See *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, NPRM, 1986 WL 292050, ¶ 14 (1986) ("the term *ex parte* presentation would be limited to presentations made to decision-making personnel").

²⁵ BellSouth Letter at 2.

²⁶ In identifying potential *ex parte* violations, the Commission has focused on whether the submission was "presented to those Commission personnel before whom the other proceedings lay." *Smaller Market UHF Television Stations Group*, Memorandum and Order, 81 F.C.C. 2d (. . . continued)

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sent directly to key personnel in the restricted proceeding. Indeed, the fact that BellSouth believed it necessary to file its submission directly addressing § 208 with the Chief of the Enforcement Bureau and with the Bureau's staff shows that *BellSouth* knows that a filing in the *Triennial Review Remand* proceeding is unlikely to reach the relevant § 208 decisionmakers.

Finally, it is absurd for BellSouth to claim that that the AT&T TR Response must have been intended to influence the § 208 proceeding because it was timed to "coincide with the Bureau's circulation to the full Commission of its proposed decision in the § 208 case."²⁷ The AT&T TR Response covered matters that had been set forth in greater detail in prior TR Remand filings by AT&T and other parties in early October, and which the Bells, including BellSouth, had ample opportunity, which they exercised, to respond to thereafter. It was prepared expeditiously following the filing of thousands of pages of reply comments in the proceeding and was one of three AT&T filings pertaining to Bell special access services filed that week.

II. THE COMMISSION SHOULD TAKE IMMEDIATE ACTION TO STRIKE BELL SOUTH'S IMPROPER FILING AND PREVENT POTENTIAL FLAGRANT VIOLATIONS OF THE *EX PARTE* RULES.

But BellSouth has done more than make frivolous allegations against AT&T. Purportedly in response to AT&T's filing, BellSouth has filed confidential information from the § 208 complaint case in the *Triennial Review Remand* proceeding. On the basis of the existence of this filing, BellSouth has now put in place a pretextual basis for arguing the merits of its § 208 complaint case in the meetings that it has with the Commissioners and their staffs in the *Triennial Review Remand* proceeding. Needless to say, such communications would constitute flagrant violations of the *ex parte* rules applicable to restricted § 208 proceedings. Because the § 208 case must be decided by December 8, 2004, immediate action is necessary to ensure that such violations do not occur (and the Commission should also impose harsh sanctions for those violations that may have occurred to date).

First, the Commission should strike BellSouth's purported "merits" filing in the *Triennial Review Remand* proceeding. The filing of this material in the *Triennial Review Remand* proceeding was flagrantly improper. BellSouth is using *ex parte* filings in the *Triennial Review Remand* proceeding to seek to influence the § 208 decisionmaking process less than two weeks prior to the statutory deadline. BellSouth is here asserting that the Commission should dispose of the § 208 proceeding in a particular manner. BellSouth is here relying upon information

(... continued)

429, ¶ 14 n.26 (1980); see also *Carolina Radio of Durham, Inc.*, Memorandum and Order, 74 F.C.C. 2d 571, 576-77 (1979) (finding no violation of *ex parte* rules because the submitted pleading "was part of open testimony involving a proceeding not before these other Commission personnel" who directed the restricted proceeding).

²⁷ BellSouth Letter at 2.

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concerning its tariffs and conduct, the conduct of its customers, and facts produced (indeed, proprietary information) in the § 208 proceeding. And BellSouth did so by waiting until the eleventh hour before the § 208 statutory deadline to make these prohibited communications based on the slimmest of pretexts. By immediately striking the filing that BellSouth made in the *Triennial Review Remand* proceeding, the Commission will eliminate the pretext under which BellSouth may be attempting to lobby Commission officials on the merits of the § 208 Complaint.²⁸ The Commission should also investigate the full extent to which BellSouth has addressed issues in the § 208 complaint case in improper *ex parte* communications and should impose severe sanctions for each violation that has occurred to date.

The Commission should also make clear that the BellSouth filing is not part of the § 208 complaint case record. BellSouth's baseless accusation that AT&T has violated the *ex parte* rules was also a pretext to file an unauthorized sur-reply in the § 208 complaint proceeding after the record in that proceeding had closed. Worse yet, BellSouth's eleventh hour, Thanksgiving Eve submission seeks to go over the heads of the Enforcement Bureau staff and the processes they had established for resolving the particulars of the complaint lodged against BellSouth.

²⁸ This remedy is particularly appropriate because BellSouth's filing in the *Triennial Review Remand* proceeding contains confidential information that BellSouth designates as subject to the protective order entered in the § 208 proceeding. Other than BellSouth and AT&T, no other party to the *Triennial Review Remand* proceeding has the right to access BellSouth confidential information in the § 208 complaint proceeding. Further, even if such entities were permitted to sign the § 208 protective order, the § 208 protective order permits use of confidential information only in the § 208 proceeding itself. Protective Order § 11 (File No. EB-04-MD-010). Alternatively, should the Commission not strike the BellSouth White paper, it should modify the Protective Order so that all parties can have access to BellSouth confidential data filed in the § 208 complaint proceeding and thereby provide a meaningful response to BellSouth's claims regarding those data.

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We appreciate your prompt attention to this matter, which requires immediate action. Please contact either of us if you have any questions.

Very truly yours,


David W. Carpenter


James F. Bendernagel, Jr.

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