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

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-09-MD-010
	)	
All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom,	)	
	)	
Defendants.	)	
	)	
	)	
Sprint Communications Company, L.P.	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-13-MD-003
	)	
Beehive Telephone Co., Inc., Beehive Telephone Co. Inc. Nevada, and All American Telephone Co.,	)	
	)	
Defendants.	)	

ORDER

Adopted: November 19, 2013 **Released: November 19, 2013**

By the Enforcement Bureau:

I. INTRODUCTION

1. On July 29, 2013, Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada (collectively Beehive) filed an Emergency Motion to Consolidate and Reassign in the above-referenced proceedings.[1] In the Motion, Beehive requests consolidation of its Petition for Reconsideration of the Commission's *Order* in the AT&T proceeding[2] with its Application for Review of a June 21, 2013 Letter Ruling issued by the Enforcement Bureau related to a primary jurisdiction referral in the Sprint/Beehive

[1] Emergency Motion to Consolidate and Reassign, File No. EB-09-MD-010 and File No. EB-13-MD-003 (July 29, 2013) (Motion).

[2] *AT&T Corp. v. All American Telephone Co., E-Pinnacle Communications, Inc., Chasecom,* Memorandum Opinion and Order, 28 FCC Rcd 3477 (2013) (*AT&T Order*).

proceeding.[3] The Motion also asks the Commission to reassign the Petition and Application to so-called "Neutral Staff" within the FCC, and to direct Sprint to file its complaint against Beehive with such staff. For the reasons set forth below, we deny the Motion in its entirety.[4] In reaching this decision, we have consulted with the Commission's Office of General Counsel and the Wireline Competition Bureau.[5]

II. DISCUSSION

A. Reassignment

2. We find no merit to Beehive's arguments that due process requires recusal of the Enforcement Bureau's Market Disputes Resolution Division (Division) from consideration of Sprint's "sham entity" allegations in the Sprint/Beehive complaint proceeding.[6] We therefore deny Beehive's request to reassign the Petition and Application to "Neutral Staff," and we similarly decline to direct Sprint to file its complaint against Beehive with such staff.[7]

3. In its Motion, Beehive relies heavily on dicta in the Supreme Court's decision in *Withrow v. Larkin*.[8] Yet as the Court emphasized in that case, a party claiming an unconstitutional risk of bias in administrative adjudication must "overcome a presumption of honesty and integrity in those serving as adjudicators."[9] Beehive adduces no evidence that might overcome this presumption. For instance, Beehive has identified no statement made by a Division employee indicating that the individual has prejudged the sham-entity issue or is otherwise biased against Beehive.[10] Because Beehive's due process argument is unmoored from any basis in fact, it fails to establish the kind of unconstitutional risk identified in *Withrow*.

---

[3] *See* Petition for Reconsideration (filed Apr. 1, 2013) (Petition); Application for Review (filed July 23, 2013) (Application); Letter dated June 21, 2013 from Christopher Killion, Associate Chief, FCC, Enforcement Bureau to Russell D. Lukas, Counsel for Beehive, Gary R. Guelker, Counsel for All American, Marc Goldman and William Lawson, Counsel for Sprint (Letter Ruling); *Beehive Telephone Co, Inc. and Beehive Telephone Co. of Nevada, Inc. v. Sprint Communications Company L.P. v. All American Telephone Co., Inc.*, Order of Referral to the Federal Communications Commission, Case No. 2:08-cv-00380 DN (D. Utah 2012) (*Referral Order*).

[4] We also generally concur with the arguments set forth by AT&T and Sprint in their oppositions to the Motion. *See* Response of AT&T Corp. to Beehive's "Emergency Motion," File No. EB-09-MD-010 (Aug. 5, 2013) (AT&T Response); Sprint Communications Company LP's Opposition to Beehive's Emergency Motion to Consolidate and Reassign, File No. EB-13-MD-003 (Aug. 5, 2013) (Sprint Opposition).

[5] Beehive served its Motion on the Commission's General Counsel and Chief of the Wireline Competition Bureau. *See* Motion, Certificate of Service.

[6] *See* Motion at 5-8.

[7] As Sprint notes, Beehive's request that the FCC direct Sprint to file its complaint with "Neutral Staff" is moot, because Sprint has already filed its complaint. Sprint Opposition at 5. *See also* Formal Complaint of Sprint Communications Company L.P., File No. EB-13-MD-003 (July 30, 2013) (Sprint Complaint).

[8] Motion at 6-8. *See Withrow v. Larkin*, 421 U.S. 35 (1975).

[9] *Withrow v. Larkin*, 421 U.S. at 47. *See also United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) ("An administrative official is presumed to be objective and 'capable of judging a particular controversy fairly on the basis of its own circumstances.'") (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

[10] *See Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165-66 (D.C. Cir. 1995) (prejudgment based on alleged statements to a party and published statements); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209-10 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (alleged prejudgment based on speech given by a government official); *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 590-91 (D.C. Cir. 1970) (agency chairman's public statements indicated prejudgment).

4. We also find no merit to Beehive's contention that a finding of prejudgment or bias is warranted because "the Division [in the *AT&T Order*] found Beehive guilty of having a sham arrangement" with All American.[11] This statement is doubly erroneous. First, "the Division" did not make any finding in the *AT&T Order*. Rather, it was the Commission that unanimously adopted that order, and therefore the Commission was the decision maker for all findings in the order, including the findings regarding sham entities.[12] Second, the *AT&T Order* did not find Beehive to be "guilty" of anything. Rather, it found that All American and two other carriers—not Beehive (which was not a party to the proceeding)—violated the Act by engaging in sham arrangements.[13]

5. Stripped of hyperbole, Beehive's argument reduces to the unremarkable observation that in the *AT&T Order*, the Commission found entities other than Beehive to have operated as sham CLECs in violation of the Act. This fact does not even remotely suggest that *the Division* has prejudged the sham-arrangement allegations in the entirely separate Sprint/Beehive proceeding,[14] and certainly is not sufficient to satisfy the "difficult burden of persuasion" identified in *Withrow* that might justify recusal of Division staff.[15] Nor is there any basis to infer that the Commission somehow prejudged Sprint's "sham entity" claim when it issued the *AT&T Order*. The statements in that order regarding Beehive were based on record evidence developed in that proceeding, and were therefore the result of proper judgment (and not prejudgment). In the separate Sprint/Beehive proceeding, Beehive will have ample opportunity, consistent with the terms of the Court's *Referral Order*, to mount its defense against Sprint's claims, and the Commission will then issue a decision based on applicable law and the record in that proceeding.[16]

6. Contrary to Beehive's claim,[17] the fact that the *AT&T Order* was "nonadversarial" with respect to Beehive does not mean that the Division's consideration of the sham-entity issue in the Sprint/Beehive proceeding would violate Beehive's due process rights. First, Beehive deliberately chose

[11] Motion at 6; *see also id.* at 8 (claiming that "the Division . . . found against Beehive in the AT&T complaint case" with respect to the allegation that Beehive created "sham" entities).

[12] Once the Commission is acknowledged as the true decision maker in the *AT&T Order*, inconsistences in Beehive's Motion become apparent. For instance, Beehive "recognize[s] Sprint's right to have its complaint decided by the Commission" and, in so doing, effectively concedes that members of the Commission do not need to recuse themselves from the Sprint/Beehive proceeding. Motion at 5. If the sham-entity findings in the *AT&T Order* were truly disqualifying with respect to similar issues in subsequent proceedings, as Beehive claims, then as a matter of logic any member of the Commission who voted on the *AT&T Order* should be precluded from considering sham-entity issues in the Sprint/Beehive proceeding. Beehive provides no explanation as to why Division staff should be recused on due process grounds, while the true decision makers (the Commissioners) should not be recused.

[13] *See*, *e.g.*, *AT&T Order*, 28 FCC Rcd at 3487-88, para. 24, 3492, para. 33.

[14] Perhaps Beehive believes that the mere fact that the Division may have advised the Commission on aspects of the *AT&T Order*, or may have prepared initial drafts of the order, is sufficient to transform the Division into the decision maker for that order. Beehive cites no authority for this remarkable proposition, and relevant precedents indicate that any such claim must fail. In one recent case, for instance, the court considered an argument that "because the . . . technical staff drafted the Order, it is as if the staff issued the Order, and because the Board relies on the technical staff for advice, it is as if the technical staff will make the Board's decision on appeal." In rejecting this argument, the court reasoned that "[t]his theory both attributes more influence to the technical staff than the allegations in the Complaint support and unjustifiably discounts the ability of the Board to fairly assess the reliability and credibility of its advisors." *Mallinckrodt LLC v. Littell*, 616 F. Supp.2d 128, 143 (D. Maine 2009). The same reasoning applies here.

[15] *Withrow v. Larkin*, 421 U.S. at 48.

[16] *See* Letter Ruling at 4, 5.

[17] *See* Motion at 6.

not to seek leave to participate in the AT&T proceeding,[18] and therefore Beehive acquiesced to the very "nonadversarial" process that it now contends is problematic. We doubt that a valid due process claim can arise in these circumstances. Moreover, the *Withrow* court stated that a due process question "would be raised" only if "the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing."[19] We note that the facts set forth in the *AT&T Order* derived from a decidedly adversarial process, and therefore the *Withrow* dicta regarding a "nonadversarial" prior proceeding is not relevant here. Moreover, that dicta would not be applicable even if we were to concede that the AT&T/All American proceeding was non-adversarial with respect to Beehive. Specifically, Beehive's advocacy will not be "foreclosed [from] fair and effective consideration" in the Sprint/Beehive proceeding. To the contrary, Beehive's arguments and evidence regarding sham entities will be fully, fairly, and effectively considered in the Sprint/Beehive proceeding, consistent with the FCC's rules and the terms of the *Referral Order*.[20]

7. As *Withrow* and other courts have made clear, moreover, a tribunal's prior exposure to adjudicative facts does not disqualify it from dealing with the same facts and issues in subsequent proceedings.[21] If it did, the Commission would be unable to fulfill its statutory duty to address petitions for reconsideration or to respond to Court remands of Commission orders resulting from adjudicatory proceedings.[22] Indeed, as the Supreme Court has stated, "opinions held by judges as a result of what they learned in earlier proceedings" are "not subject to deprecatory characterization as 'bias' or 'prejudice,'" and "[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant."[23] Nothing in Beehive's Motion prevents application of this principle here or to overcome "the presumption of honesty and integrity in those serving as adjudicators" in subsequent proceedings.[24]

8. Finally, we find no merit in Beehive's argument that the Division should not take part in considering the Petition or Application "under the principle that 'no man can be a judge in his own case.'"[25] As Beehive concedes, the only reason to consider whether the Division might somehow be "judging its own case" is because Beehive "placed the Division's conduct at issue" by "including

[18] *See* Letter Ruling at 6-7 (explaining that Beehive knew about the AT&T proceeding (and the allegations relating to Beehive) for over two-and-a-half years before adoption of the *AT&T Order*). We also note that during this period, Beehive knew that similar allegations regarding sham arrangements had been asserted by Sprint in the referring court litigation.

[19] *Withrow v. Larkin*, 421 U.S. at 58.

[20] In its complaint against Beehive, Sprint does not argue that Beehive is collaterally estopped from challenging the Commission's conclusions in the *AT&T Order* regarding sham entities. *See*, *e.g.*, Sprint Complaint at 42, para. 93 ("All American is collaterally estopped from challenging this Commission's conclusions that it is a sham CLEC. . . . Beehive is not."); *see also id.* at 88, para. 213; AT&T Response at 4.

[21] *See Withrow v. Larkin*, 421 U.S. at 47-58; *United Steel Workers v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980) (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)); *Liteky v. United States*, 510 U.S. 540, 551 (1994); *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349, 355-58 (1st Cir. 1962). *See also* Charles H. Koch, Jr., *Administrative Law and Practice*, § 6:10, at 366-67 (3d ed. 2010) ("The mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is not enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing.").

[22] 47 U.S.C. § 205.

[23] *Liteky v. U.S.*, 510 U.S. at 551.

[24] *Withrow v. Larkin*, 421 U.S. at 47.

[25] Motion at 7 (citation omitted).

allegations that the Division knowingly deprived Beehive of its due process rights."[26] Since we find no basis for concluding that the Division (knowingly or not) abridged Beehive's due process rights, we decline to mandate recusal based solely on Beehive's decision to "place the Division's conduct at issue." To hold otherwise would be to invite parties to raise spurious allegations of bias or misconduct in an effort to gain a procedural advantage through recusal. The Commission's processes should not be abused in this manner.[27]

B. Consolidation

9. We deny Beehive's request to consolidate its Petition and Application. The Commission has broad authority in how it manages and conducts its proceedings, and we previously rejected Beehive's request to consolidate the AT&T/All American and the Sprint/Beehive complaint proceedings.[28] In support of its Motion, Beehive offers no new arguments from those it previously proffered. Moreover, in repeating its request for consolidation, Beehive maintains that "[t]he fundamental issue presented by the Petition and Application is whether the Commission's adjudication of the sham-arrangement issue abridged Beehive's due process rights to proper notice and an impartial hearing with an opportunity to present a defense to the sham-arrangement allegation." As we find above, the Commission has not abridged Beehive's due process rights.[29]

III. ORDERING CLAUSE

10. IT IS HEREBY 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), and 208, and Sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, and the authority delegated by Sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, that Beehive's Emergency Motion to Consolidate and Reassign is DENIED.

ENFORCEMENT BUREAU

Christopher Killion
Associate Chief, Enforcement Bureau

[26] Motion at 7.

[27] *See*, *e.g.*, *Applications of High Plains Wireless, L.P.*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 4620, 4623, para. 9 (WTB 2000) ("An abuse of process ordinarily involves an intent to gain some benefit by manipulating the Commission's procedures"); *Implementation of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 22497, 22510-11, para. 30 (1997) (declining to adopt separate sets of procedures for certain types of complaints because doing so "would permit parties to exploit our rules by alleging certain violations in order to manipulate the time frame or level of evidentiary support required in a particular complaint.").

[28] *See* Letter Ruling at 5-6.

[29] *See* Motion at 4.