

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

In the Matter of)
)
 AT&T Corp. Petition for Order)
 Requiring Advance Production)
 of Documents in Section 271)
 Proceedings)

ORDER

Adopted: October 23, 1996 **Released:** October 23, 1996

By the Chief, Common Carrier Bureau:

I. Introduction

1. This Order addresses AT&T's "Petition for an Order Requiring Advance Production of Motion to Vacate Documents," which was filed by AT&T on August 23, 1996. AT&T requests that the Commission direct Bell Atlantic, BellSouth, NYNEX, SBC, Ameritech, U S WEST, and Pacific Telesis ("the Bell companies") to make available to interested third parties, subject to a protective order, all documents and other materials that were produced to the Department of Justice in 1994 and 1995 in connection with the Bell companies' Motion to Vacate the Modification of Final Judgment and related requests. For the reasons stated below, we deny AT&T's Petition.

II. Background

2. In July 1994, Bell Atlantic, BellSouth, NYNEX, and SBC filed with the United States District Court for the District of Columbia a motion to vacate the Modification of Final Judgment ("Motion to Vacate").¹ Among other things, the Modification of Final Judgment barred the Bell companies from providing interexchange telecommunications services.² In August 1994, the court authorized the Department of Justice to undertake discovery in order to respond to the

¹ See Motion of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, and Southwestern Bell Corporation to Vacate the Decree, *United States v. Western Electric Co.*, No. 82-0192 (D.D.C. July 6, 1994).

² See *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982) (*subsequent history omitted*).

Motion to Vacate.³ The court also noted that it was unnecessary at that time to grant discovery rights to parties other than the Department of Justice.

3. Pursuant to the court's order, the Department of Justice requested documents and took depositions relevant to the competitive issues raised in the Motion to Vacate. Ultimately, the Bell companies that joined the Motion to Vacate produced millions of pages of documents on a confidential basis ("Motion to Vacate materials").⁴

4. Because of the enactment of the Telecommunications Act of 1996 ("the 1996 Act") last February,⁵ the Department of Justice did not file reports on the Motion to Vacate or the separate related motions, and each of these motions was dismissed as moot.⁶ The Bell companies that joined the Motion to Vacate subsequently filed a motion requesting that the Department of Justice be ordered to return the Motion to Vacate materials.⁷ The Department of Justice opposed the motion and sought permission to retain the documents and to use them as appropriate in relevant proceedings under the 1996 Act, in particular, proceedings under new section 271⁸ that allows the Bell companies to provide in-region, interLATA services if the Commission finds that certain conditions have been met.⁹

³ See Order, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Aug. 18, 1994).

⁴ According to AT&T, the Department of Justice may also have obtained discovery of similar kinds of materials from other Bell companies that made separate attempts to remove the interexchange services restriction. See Petition for an Order Requiring Advance Production of Motion to Vacate Documents at 3 (filed Aug. 23, 1996).

⁵ See Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et. seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

⁶ See Order, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Feb. 8, 1996).

⁷ See Response of Bell Atlantic, BellSouth, NYNEX, and SBC to this Court's Invitation to Address the Status of Previously Filed Motions, *United States v. Western Electric Co.*, No. 82-0192 (D.D.C. Feb. 28, 1996).

⁸ See 47 U.S.C. § 271.

⁹ See Memorandum of the United States in Support of Motion for an Order Terminating the Decree and Confirming the Department of Justice's Continuing Rights with Respect to Decree Documents Now in its Possession, *United States v. Western Electric Co.*, No. 82-0192 (D.D.C. Feb. 28, 1996). This Commission filed an *amicus* memorandum in support of the motion by the Department of Justice, stating that the public interest would be served if the court allowed the Department of Justice to retain the materials and make use of them in the course of the Commission's implementation of the 1996 Act. See Memorandum of Federal Communications Commission as *Amicus Curiae* in Support of Motion by Department of Justice for Order Confirming Department's Right to Retain and Use Certain Decree Documents, *United States v. Western Electric Co.*, No. 82-0192 (D.D.C. Mar. 7, 1996).

5. In April 1996, the court ruled that the Department of Justice has the legal authority to retain the documents and to share them with the Commission to the extent they are relevant to Commission proceedings under the 1996 Act.¹⁰ The court also ruled that, if the Bell company that submitted a document has asserted a claim of protection for that document under Rule 26(c)(7) of the Federal Rules of Civil Procedure, the Department must advise the Commission of such claim and request that the document be handled by the Commission in accordance with the Commission's rules on confidentiality.

6. As of the date of this order, no Bell company has filed a section 271 application with the Commission. Moreover, the Commission has not taken possession of any Motion to Vacate materials in connection with a possible future section 271 application.

7. In the AT&T Petition currently at issue, AT&T requests that the Commission direct the Bell companies to make the Motion to Vacate materials available to interested third parties. AT&T argues that the materials are categorically relevant to the issues that will be raised by section 271 applications when they are filed, and that interested persons should be granted access to the documents now, in light of the short, 90-day time frame for section 271 proceedings under the 1996 Act. To protect the confidentiality of the documents, AT&T suggests that they be released subject to a standard protective order modeled on one the Commission used in its *AT&T-McCaw Merger* investigation.¹¹

8. Several Bell companies filed a joint opposition arguing that the AT&T Petition should be denied for two reasons: granting the petition would eviscerate the district court's order governing use of these same documents, and the petition is not supported by any basis for discovery under Commission rules and precedent.¹² Pacific Telesis also filed an opposition, maintaining that AT&T has no legal right to the materials and has not demonstrated their relevance to future section 271 proceedings.¹³

9. AT&T filed a reply memorandum.¹⁴ AT&T counters that the Commission plainly

¹⁰ See Opinion and Order, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Apr. 11, 1996).

¹¹ See American Tel. and Tel. Co. and Craig O. McCaw (Applications for Consent to Transfer Control of Radio Licenses), *Protective Order*, 9 FCC Rcd 2613 (1994).

¹² See Opposition of Bell Atlantic, BellSouth, NYNEX, SBC, and U S WEST to AT&T's Petition for Public Disclosure of the Bell Companies' Confidential Business Documents (filed Sept. 5, 1996).

¹³ See Opposition of Pacific Telesis Group to AT&T's Petition for an Order Requiring Advance Production of Motion to Vacate Documents (filed Sept. 3, 1996). In the event that the AT&T petition were granted, Pacific Telesis also urges revisions to the protective order submitted by AT&T.

¹⁴ See AT&T's Reply Memorandum in Support of its Petition for an Order Requiring Advance Production of Motion to Vacate Documents (filed Sept. 13, 1996).

has authority to grant AT&T's request under section 4(i) of the Communications Act of 1934,¹⁵ and there is nothing in the district court's order that undermines that authority. In addition, it argues that any suggestion that AT&T should wait until a section 271 application is filed before making a request for the Motion to Vacate materials ignores the fact that once an application is filed, it will be difficult (given the short, 90-day time frame) for the Commission to decide the request, for the Bell companies to deliver the documents, and for AT&T meaningfully to review and comment upon them.¹⁶

III. Discussion

10. AT&T's request is akin to a discovery request, but unlike an ordinary discovery request: (1) it has been made before the applicable proceeding (or proceedings) has commenced; and (2) it seeks documents without regard to any individualized assessment of their relevance to the applicable proceeding (or proceedings). With respect to the latter point, we note the assertion in the joint Bell company opposition, not controverted by AT&T, that the Motion to Vacate materials are as many as ten years old, and none was created after 1995.¹⁷ In light of these facts, we decline to grant AT&T's Petition.

11. We note, however, that our disposition of this request does not preclude interested third parties from seeking access to those Motion to Vacate materials that the Department of Justice deems relevant and transfers to us in the course of an actual section 271 proceeding. Where confidential treatment is requested for these documents and such treatment is appropriate, access may be afforded subject to a protective order. In this regard, we are requesting public comment on a proposed standard protective order to be used in section 271 proceedings.¹⁸

¹⁵ See 47 U.S.C. § 154(i).

¹⁶ As to Pacific Telesis's criticisms of AT&T's proposed protective order, AT&T notes that the order is almost identical to the one the Commission found adequate in the context of its *AT&T-McCaw Merger* investigation. AT&T states, however, that it would not oppose Pacific Telesis's proposal to modify the protective order to restrict use of the documents to section 271 proceedings.

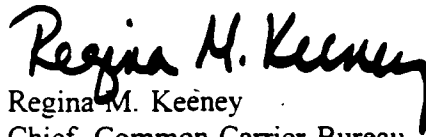
¹⁷ See Opposition of Bell Atlantic, BellSouth, NYNEX, SBC, and U S WEST to AT&T's Petition for Public Disclosure of the Bell Companies' Confidential Business Documents at 2 (filed Sept. 5, 1996).

¹⁸ See Comment Sought on Standard Protective Order to be Used in Connection with Section 271 Applications, DA 96-1751 (rel. Oct. 23, 1996).

IV. Ordering Clauses

12. Accordingly, **IT IS ORDERED**, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j), that AT&T's Petition for an Order Requiring Advance Production of Motion to Vacate Documents is **DENIED** for the reasons discussed above.

FEDERAL COMMUNICATIONS COMMISSION



Regina M. Keeney
Chief, Common Carrier Bureau