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

In the Matters of	)	
	)	
AT&T Corp.,	)	
Complainant,	)	EB-01-MD-001
v.	)	
	)	
Business Telecom, Inc.,	)	
Defendant.	)	
	)	
	)	
Sprint Communications Company, L.P.,	)	
Complainant,	)	
	)	EB-01-MD-002
v.	)	
	)	
Business Telecom, Inc.,	)	
Defendant.	)	

ORDER ON RECONSIDERATION

Adopted: September 27, 2001 **Released: September 27, 2001**

By the Commission: Commissioner Martin dissenting and issuing a separate statement.

I. INTRODUCTION

1. In this Order on Reconsideration, we dismiss the Joint Petition for Reconsideration[1] of our Memorandum Opinion and Order in *AT&T Corp. and Sprint Communications Co., L.P. v. Business Telecom, Inc.*[2] The Petition was filed by five competitive local exchange carriers ("CLECs") and a CLEC trade association, none of which was a party to the complaint proceedings resolved by the *BTI Order*.[3] As explained below, we dismiss the Petition because Petitioners have failed to satisfy the two requirements for

[1] Joint Petition for Reconsideration, File Nos. EB-01-MD-001, 002 (filed June 29, 2001) ("Petition").

[2] *AT&T Corp. v. Business Telecom, Inc.; Sprint Communications Company, L.P. v. Business Telecom, Inc.*, Memorandum Opinion and Order, FCC 01-185, 2001 WL 575527 (rel. May 30, 2001) ("*BTI Order*").

[3] The Joint Petitioners are Association for Local Telecommunications Services, Intermedia Communications, Inc., Mpower Communications, Inc., NuVox Communications, Inc., Winstar Communications, Inc., and XO Communications, Inc. (collectively, "Petitioners").

non-parties to seek reconsideration of a Commission order in an adjudicatory proceeding.[4]

II. BACKGROUND

2. In the *BTI Order*, the Commission partially granted formal complaints filed by AT&T Corp. ("AT&T") and Sprint Communications Company, L.P. ("Sprint") against Business Telecom, Inc. ("BTI"), a CLEC, pursuant to section 208 of the Communications Act of 1934, as amended ("Act")[5] and a primary jurisdiction referral from the United States District Court for the Eastern District of Virginia.[6] The Commission held, *inter alia*, that BTI's access rates during the relevant period were unjustly and unreasonably high, in violation of section 201(b) of the Act.[7] Moreover, in order to permit the court to calculate the damages caused by BTI's violation of section 201(b), the Commission determined what access rates would have been just and reasonable during the relevant period.[8]

3. None of the parties filed petitions for reconsideration of the *BTI Order*. Instead, each of them filed a petition for review of the *BTI Order* in the United States Court of Appeals for the District of Columbia Circuit.[9]

4. Petitioners argue that they have standing to seek reconsideration of the *BTI Order* under section 1.106 of our rules, because (1) certain interexchange carriers ("IXCs") have stated to certain of the Petitioners that the IXCs may attempt to use the *BTI Order* as precedent in future complaints concerning the reasonableness of the Petitioners' access rates;[10] and (2) Petitioners had no reason to believe that the Commission might reach a result in the *BTI Order* that was adverse to their economic interests.[11]

III. DISCUSSION

5. In order to seek reconsideration of a Commission order in an adjudicatory proceeding to

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4 *See* 47 C.F.R. § 1.106(b)(1). In fact, Petitioners purported to file their Petition pursuant to the wrong rule, 47 C.F.R. § 1.429, which applies to rulemaking proceedings, not adjudications. Petition at 1. This error apparently led to violations of our service rules. *See* n.30, *infra*. *Compare* 47 C.F.R. § 1.106(f) (stating that petitions for reconsideration in adjudications "shall be served upon parties to the proceeding") *with* 47 C.F.R. § 1.429(e) (stating that petitions for reconsideration in rulemakings "need not be served on parties to the proceeding"). We note, however, that even in rulemaking proceedings, the Commission encourages service of reconsideration petitions on the parties, where, as here, the number of parties is small. *See* 47 C.F.R. § 1.429(e).

5 47 U.S.C. § 208.

6 *Advamtel LLC, et al. v. AT&T Corp.*, 105 F. Supp.2d 507 (E.D. Va. 2000); *Advamtel LLC, et al. v. Sprint Communications Company, L.P.*, 105 F. Supp.2d 476 (E.D. Va. 2000).

7 47 U.S.C. § 201(b). *See BTI Order* at ¶¶ 17-50.

8 *See BTI Order* at ¶¶ 53-59.

9 *AT&T Corp. v. FCC*, No. 01-1261 (D.C. Cir. filed Jun. 8, 2001).

10 Petition at 3; Joint Reply to Oppositions to Petition for Reconsideration, File Nos. EB-01-MD-001, 002 (filed July 19, 2001), at 2, 5-6 ("Reply").

11 Reply at 5-6.

which it was not a party, a petitioner must demonstrate that (1) the petitioner's "interests are adversely affected" by the order, *and* (2) the petitioner has "good reason why it was not possible for [the petitioner] to participate in the earlier stages of the proceeding."[12] For the reasons explained below, we conclude that Petitioners have failed to demonstrate that they meet either of those requirements.

A. Petitioners Have Not Demonstrated That the *BTI Order* "Adversely Affects" Them Within the Meaning of Section 405(a) of the Act and Section 1.106 of the Commission's Rules.

6. Petitioners allege that the *BTI Order* "adversely affects" them within the meaning of section 405(a) of the Act and section 1.106 of the Commission's Rules, solely because certain IXCs have stated that they may attempt to use the *BTI Order* as precedent in future complaints concerning the reasonableness of the Petitioners' access rates.[13] We disagree.

7. Petitioners have not directed us to any Commission or court case law suggesting that the precedential value of an adjudicatory order in a section 208 complaint proceeding can "adversely affect" a non-party to the adjudication within the meaning of section 405(a) of the Act and section 1.106 of the Commission's rules. Although the Commission has not previously addressed this issue in a section 208 complaint proceeding, in construing the phrase "adversely affected" in other adjudicatory proceedings, the Commission has required a far more direct and concrete interest in the proceeding than that stated by Petitioners.[14] In adjudicatory licensing proceedings, for example, the Commission has applied the same test that courts employ in determining whether a person has standing under Article III to appeal a court order: the person must show (1) a personal injury "in fact"; (2) that the injury is fairly traceable to the challenged action; and (3) that it is likely, not merely speculative, that the requested relief will redress the injury.[15]

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[12] 47 C.F.R. § 1.106(b)(1). *See* 47 U.S.C. § 405(a) (stating that a reconsideration petition may be filed by a non-party who is "aggrieved or whose interests are adversely affected " by a Commission order).

[13] Petition at 3 ("[S]everal of the Petitioners were recipients of threats from the three major interexchange carriers . . . , who indicated that they intend to use the precedent established in the [BTI] Order as a sword…."); Reply at 2 ("The day the [BTI] Order was released, AT&T contacted one of the Petitioners, and made a thinly veiled threat to sue for retroactive refunds of its tariffed access charges."); Reply 5-6 ("AT&T obviously views the [*BTI*] *Order* as establishing new precedent allowing it to pursue formal complaints to seek retroactive refunds from any local carrier."). To support this assertion, Petitioners submitted only scant evidentiary support, and did so belatedly. *See* Reply at Ex. 1.

[14] *See, e.g., In the Matter of Edison Cellular Station KNKN 281*, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2736, 2737 at ¶ 7 (Com. Car. Bur. rel. Apr. 19, 1993)("*Edison Reconsideration Order*")("Adversely affected has been analogized to a direct economic injury."); *In the Matter of Chris C. Hudgins*, Order on Reconsideration, 16 FCC Rcd 7941 (WTB PSPWD rel. Apr. 12, 2001) ("*Hudgins Reconsideration Order*") (stating that a non-party petitioner to license renewal "must allege sufficient facts to demonstrate that failure to grant the requested relief would cause the petitioner to suffer a direct injury"); *In the Matter of the Application of City of Compton Police Department*, Order on Reconsideration, 15 FCC Rcd 16563, 16566 at ¶ 8 (WTB PSPWD rel. Apr. 7, 2000) ("*Compton Reconsideration Order*") (same as *Hudgins Reconsideration Order*).

[15] *See In the Matter of Daniel R. Goodman, Receiver; Dr. Robert Chan*, Order on Reconsideration, 14 FCC Rcd 20547, 20549 at ¶ 4 (1999); *Edison Reconsideration Order*, 8 FCC Rcd at 2737, ¶ 7; *Hudgins Reconsideration Order*, 16 FCC Rcd at 7944, ¶ 8; *Compton Reconsideration Order*, 15 FCC Rcd at 16566, ¶ 8. *Cf., In re the Application of MCI Communications Corp. and Southern Pacific Telecommunications Company*, (continued….)

Applying that test in the Article III standing context, courts have consistently held that the mere precedential effect of an adjudicatory order within an agency is not enough to confer standing.[16] Indeed, as the D.C. Circuit has stated, "we have said before, and we say again, that the mere precedential effect of [an] agency's rationale in later adjudications is not an injury sufficient to confer standing on someone seeking judicial review of the agency's ruling."[17] In accordance with those decisions, the Common Carrier Bureau has held that the adverse impact of a Commission action on a person's litigation strategy in another Commission proceeding does not meet the "adversely affected" test.[18] Moreover, to grant non-party requests to reconsider Commission adjudicatory orders based upon the limited interest asserted by Petitioners here would open the "floodgates" to non-party participation in adjudicatory proceedings, and thus effectively convert every adjudicatory proceeding into a rulemaking proceeding.[19] Thus, we conclude

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Memorandum Opinion and Order, 12 FCC Rcd 7790, 7794 at ¶ 11 (1997) (applying Article III test to determine whether an entity was a "party-in-interest" under section 309(d)(1) of the Act); *In the Matter of Americatel Corporation*, Memorandum Opinion, Order, Authorization and Certificate, 9 FCC Rcd 3993, 3995 at ¶ 9 (1994) (applying Article III test to determine whether an entity was an "interested party" under rule 63.52(c)); *In the Matter of the Applications of Lawrence N. Brandt and Krisar, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 4082, 4082-83 at ¶¶ 5-8 (Com. Car. Bur. Dom. Fac. Div. rel. June 24, 1998)(same as *MCI/Southern Pacific*).

[16] *See Airtouch Paging v. FCC*, 234 F.3d 815, 818 (2d Cir. 2000)("Even if the Commission were to view footnote 700 as binding in future proceedings, we would have no jurisdiction to consider the issue unless and until such future proceedings result in a cognizable injury to Airtouch."); *Sea-Land Service, Inc. v. Department of Transportation*, 137 F.3d 640, 648 (D.C. Cir. 1998)("[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation."); *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995)("a litigant's interest in [an agency's] legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is uncoupled from any injury in fact caused by the substance of the [agency's] adjudicatory action.")(citations and quotation marks omitted); *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 674 (D.C. Cir. 1994)(same as *Shell Oil*); *Telecommunications Research and Action Center v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990)(same as *Shell Oil*); *Shipbuilders Council of America v. United States*, 868 F.2d 452, 456 (D.C. Cir. 1989)("we know of no authority recognizing that the mere potential precedential effect of an agency action affords a bystander to that action a basis for complaint"); *Radiofone, Inc. v. FCC*, 759 F.2d 936, 938-39 (D.C. Cir. 1985) ("*Radiofone v. FCC*")(separate opinion of Scalia, J.)(stating that, in order for a non-party to have standing to challenge an agency's adjudicatory order, its "injury must still arise from the particular activity which the agency adjudication approved … and not from the mere precedential effect of the agency's rationale in later adjudications"); *American Public Power Association v. FERC*, 2000 WL 1946584 (D.C. Cir. 2000)("Petitioners base their standing on the potential precedential effect of an agency action; this by itself does not suffice to confer Article III standing.").

[17] *AFLAC of Columbus v. FCC*, 129 F.3d 625, 629 (D.C. Cir. 1997)(citation and quotation marks omitted).

[18] *Edison Reconsideration Order*, 8 FCC Rcd at 2737, ¶ 7.

[19] *See generally Radiofone. v. FCC*, 759 F.2d at 938-39 (observing that an adjudicatory order "affects" non-parties differently than a rulemaking order). Petitioners' reliance on *Shell Oil v. FERC* and *Sea-Land v. DOT* is misplaced. In Petitioners' view, those cases stand for the proposition that, if an adjudicatory order increases the prospect of future litigation for a non-party to the order, the non-party has standing to seek review of the order. Reply at 5-6. Petitioners' view is erroneous. The parts of those cases on which Petitioners mistakenly rely (*Sea-Land v. DOT*, 137 F.3d at 648; *Shell Oil v. FERC*, 47 F.3d at 1202) suggest merely that a party may appeal an agency's decision to exercise *jurisdiction* over a matter, even if the agency ruled in favor of the party on the merits, but only if the agency's decision will trigger an "'inevitable and repeating' course of litigation, between the same parties, all based on a single *jurisdictional* issue." *City of Cleveland, Ohio v. U.S. Nuclear Regulatory* (continued….)

that Petitioners have not shown that the *BTI Order* adversely affects them within the meaning of section 405(a) of the Act and section 1.106(b)(1) of our rules.[20]

B. Petitioners Have Not Shown Good Reason Why They Failed to Participate Earlier in the Proceeding.

8. Petitioners did not participate, nor did they seek to participate, earlier in this proceeding.[21] Petitioners allege that they had "good reason" within the meaning of section 1.106(b)(1) of our rules for failing to seek participation earlier in the proceeding: they had no way to foresee that the Commission would reach the result that it did.[22] Again, we disagree.

9. As explained in the *BTI Order*, ample court and Commission precedent indicates that the Commission may award damages in a section 208 complaint proceeding based on the difference between the rate charged and a just and reasonable rate under section 201(b).[23] Consistent with that longstanding

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Commission, 68 F.3d 1361, 1370 (D.C. Cir. 1995)(emphasis added). Those circumstances do not exist here. The *BTI Order* did not decide a jurisdictional issue; any future litigation would not involve the same parties as in the BTI proceedings, *i.e.*, BTI; and the Commission has recently adopted rules that should prevent the onset of any repeating course of litigation regarding the reasonableness of CLECs' future access rates. *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC No. 01-146, 2001 WL 431685 (rel. Apr. 27, 2001)("*CLEC Access Charge Order*").

[20] We note that, although the *BTI Order* will serve as precedent in any future case involving the reasonableness of a CLEC's access rates, any such case will be decided on the specific facts in that case's record.

[21] That is not to say that, had Petitioners attempted to intervene as a party, they would have been successful. *See, e.g.*, *Teleconnect Co. v. The Bell Company of Pennsylvania*, Memorandum Opinion and Order, 6 FCC Rcd 5202, 5206 at ¶¶ 18-20 (Com. Car. Bur. 1991), *aff'd on review*, 10 FCC Rcd 1626 (1995). We note that Petitioners failed even to seek leave to file an *amicus* brief or supporting memorandum of law. *See generally*, *Pleading Schedule Established for AT&T Corp. et al. v. Ameritech Corp.*, Public Notice, 13 FCC Rcd 12057 (Com. Car. Bur. 1998) (stating that, in a formal complaint proceeding, "[w]e will … consider on a case-by-case basis motions by non-parties wishing to submit amicus-type filings addressing the legal issues raised in this proceeding").

[22] Reply at 5-6. Petitioners asserted this argument for this first time in their Reply. In their initial Petition, Petitioners made no attempt to satisfy the "good reason" requirement. As a result, Petitioners deprived AT&T and Sprint of an opportunity to respond. This alone might have been sufficient basis for us to dismiss the Petition for failure to show satisfaction of the "good reason" requirement. Nevertheless, as described above, we consider Petitioners' "good reason" argument on the merits.

[23] *BTI Order* at ¶¶ 9-12. *See Global Naps, Inc. v. FCC*, 247 F.3d 252, 259 (D.C. Cir. 2001); *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 786 (D.C. Cir. 2000); *CLEC Access Charge Order*, 2001 WL 431685; New *Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133 (2000); *Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22573 (1998), *recon. denied*, 14 FCC Rcd 21092 (1999); *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2181-82 (1997); *AT&T v. Telephone Utilities Exchange Carrier Association*, Memorandum Opinion and Order, 10 FCC Rcd 8405, 8414-15 (1995); *ACC Long Distance Corp. v. New York Tel. Co.*, Memorandum Opinion and Order, 9 FCC Rcd 1659, 1661-62 (1994); *Allnet Communications Services, Inc. v. U S West, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 3017, 3021-22 (1993); *Communications Satellite Corporation*, Memorandum Opinion and Order, 3 FCC Rcd 2643, 2647 (1988); *National Exchange Carrier Association, Inc.*, Memorandum Opinion (continued….)

authority, the Commission clearly stated in 1997 that formal complaints filed pursuant to section 208 of the Act to enforce the "just and reasonable" standard of section 201(b) of the Act could be used to constrain and discipline CLEC access rates.[24] Moreover, the Commission has on several occasions awarded damages for violations of section 201(b), even in the absence of specific rules applicable to the conduct at issue.[25] Finally, the court's referral to the Commission of the IXCs' rate-reasonableness claims signaled that questions concerning whether and to what extent the CLECs' access rates caused compensable harm were hardly "open-and-shut."[26] Thus, contrary to Petitioners' assertion otherwise, Petitioners should have known that AT&T and Sprint might prevail in this proceeding.[27] Accordingly, we conclude that Petitioners have not shown that they had "good reason," within the meaning of section 1.106(b)(1) of our rules, to refrain from seeking to participate earlier in this proceeding.[28]

IV. CONCLUSION

10. For the foregoing reasons, consistent with our recent decision in an analogous case,[29] we find that Petitioners have failed to show satisfaction of the two requirements set forth in section 405(a) of the Act and section 1.106(b)(1) of our rules for a non-party to a complaint proceeding to seek reconsideration of the order resolving such proceeding. Each failure, standing alone, is sufficient to

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and Order, 2 FCC Rcd 3679 (1987). *See generally MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1415 (D.C. Cir. 1995).

[24] *BTI Order* at ¶ 24. *See Access Charge Reform*, Notice of Proposed Rulemaking, 11 FCC Rcd 21354, 21472, at ¶ 271 (1996); *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16140, at ¶ 363 (1997); *Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order, 12 FCC Rcd 8596, 8609, at ¶ 25 (1997).

[25] *See, e.g., Ascom Communications, Inc. v. Sprint Communications Company, L.P.*, 15 FCC Rcd 3223 (2000); *Rainbow Programming Holdings, Inc. v. Bell Atlantic-New Jersey, Inc.*, 15 FCC Rcd 11754 (Com. Car. Bur. rel. July 6, 2000); *Hi-Rim Communications, Inc. v. MCI Telecommunications Corp.*, 13 FCC Rcd 6551 (Com. Car. Bur. rel. Mar. 30, 1998); *People's Network, Inc. v. AT&T Telephone and Telegraph Company*, 12 FCC Rcd 21081 (Com. Car. Bur. rel. Apr. 10, 1997).

[26] Indeed, the IXCs' claims that the court referred to the Commission expressly requested an award of damages based on a determination of a past reasonable rate. Answer to Second Amended Complaint and Counterclaims of AT&T Corp., *Advamtel, LLC v. AT&T Corp. et al*., Civil Action No. 00-643-A (E.D. Va. filed Aug. 18, 2000) at pp. 36-37; Counterclaim of Sprint Communications Company, L.P., *Advamtel, LLC v. AT&T Corp., et al*., Civil Action No. 00-643-A (E.D. Va. filed Aug. 18, 2000) at ¶ 19 and p. 4.

[27] Although Petitioners do not explicitly assert that they lacked awareness of the pendency of this proceeding, we note that two of the Petitioners are parties to the court litigation from which this proceeding derives, and were part of the process that led to the BTI complaint being chosen as the lead complaint regarding the issues referred by the court. We also note that Petitioners' counsel represents BTI and all of the other parties to the court litigation.

[28] *See generally Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984) (rejecting "surprise" as a basis for failing to participate earlier); *The Seven Hills Television Company*, Memorandum Opinion and Order, 3 FCC Rcd 826, at ¶ 2 (1988) (same); *Press Broadcasting Company and Silver King Broadcasting of Vineland, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 6640, at ¶ 5 (1988) (same).

[29] *TSR Wireless v. U S West Order*, 2001 WL 536914 (2001).

warrant dismissal of the Petition. Consequently, we dismiss the Petition for lack of standing.[30]

V. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Joint Petitioners' Petition for Reconsideration IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[30] Continuing a pattern of service rule violations, *see* Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to James F. Bendernagel, Counsel for AT&T, Jonathan E. Canis, Counsel for BTI, and Cheryl A. Tritt, Counsel for Sprint, File Nos. EB-01-MD-001, 002 (Feb. 16, 2001); Response of the FCC to Petitioners' Emergency Motion for Stay, *Mpower Comm. Corp. et al v. FCC*, No. 01-1280 (D.C. Cir. filed Jun. 26, 2001) at 8 n.8, Petitioners' counsel improperly failed to serve the parties (or Commission counsel) on the same day that they submitted the Petition to the Commission, and failed to include a proper proof of service. *See* 47 C.F.R. §§ 1.47(b), (c), (g), 1.106(f), 1.735(f); Letter from Anthony J. DeLaurentis, Attorney, Market Disputes Resolution Division, Enforcement Bureau, to James F. Bendernagel, Counsel for AT&T, Jonathan E. Canis, Counsel for BTI, and Cheryl A. Tritt, Counsel for Sprint, File Nos. EB-01-MD-001, 002 (Jan. 18, 2001). Because Petitioners submitted the Petition to the Commission Secretary on the last day for filing permitted by the Act and our rules, *see* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106 (f), these service rule violations might have provided another independent basis for dismissing the Petition. *See generally Charter Communications*, Memorandum Opinion and Order, 14 FCC Rcd 13511, 13512 (1999). We need not reach that question, however, because we dismiss the Petition on the other grounds discussed above.

DISSENTING STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: *AT&T Corp. v. Business Telecom, Inc.; Sprint Communications Company, L.P. v. Business Telecom, Inc.*, Order on Reconsideration, File Nos. EB-01-MD-001 & EB-01-MD-002.

I respectfully dissent from this Order. I have concerns with the original *BTI Order*'s approach to the lawfulness of CLEC access charges in the past. I also have concerns with the lack of guidance the Commission has provided on related issues, such as whether and under what circumstances IXCs could refuse access services. In my opinion, these issues should have been addressed in a more comprehensive fashion. At this point, however, my main concern is that the Commission move quickly to resolve these uncertainties, which have had a detrimental impact on the marketplace.

To be fair, this item was not my preferred forum for addressing these issues. I would rather have considered them in declaratory rulings responding to the primary jurisdiction referrals made by the United States District Court for the Eastern District of Virginia. That court months ago asked us to weigh in on these issues by July, and we have yet to offer any response. And, at this point, it is unclear whether we will do so at all. Accordingly, a reconsideration of the *BTI Order* may be our best and only opportunity to address these issues. Although there are legitimate policy reasons not to allow non-parties standing here, as the Order makes clear, we plainly have discretion to hear these non-parties' petitions. Given the unique circumstances, I would have chosen to do so, or to reconsider the *BTI Order* sua sponte.