

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

In the Matter of)	
)	
AT&T Corp.,)	
Complainant,)	
)	
v.)	File No. EB-04-MD-010
)	
BellSouth Telecommunications, Inc.,)	
Defendant.)	

ORDER ON RECONSIDERATION

Adopted: April 11, 2005

Released: April 11, 2005

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we dismiss a petition that Sprint Communications Co., L.P. (“Sprint”) filed¹ seeking reconsideration of our Memorandum Opinion and Order² resolving a formal complaint filed by AT&T Corp. Inc. (“AT&T”) against BellSouth Telecommunications, Inc. (“BellSouth”) under section 208 of the Communications Act of 1934, as amended (“the Act”).³ We find that Sprint has failed to satisfy one of the two requirements for non-parties to seek reconsideration of a Commission order in an adjudicatory proceeding.⁴

II. BACKGROUND

2. Briefly, and in pertinent part, the *AT&T/BellSouth Order* found that one of BellSouth’s optional tariff discount plans for special access services, the Transport Savings Plan (“TSP”), discriminated in favor of BellSouth’s interexchange affiliate, BellSouth Long Distance, Inc. (“BellSouth Long Distance”), in violation of section 272 of the Act.⁵ The *AT&T/BellSouth Order* directed BellSouth

¹ Petition for Reconsideration of Sprint Communications Co., L.P., File No. EB-04-MD-010 (filed Jan. 10, 2005) (“Sprint Petition”).

² *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278, 2004 WL 2851490 (rel. Dec. 9, 2004) (“*AT&T/BellSouth Order*”).

³ 47 U.S.C. § 208.

⁴ See 47 C.F.R. § 1.106(b)(1). See also, *Matter of Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 20156 (2004) (“*Infinity Broadcasting*”); *Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp.*, Order on Reconsideration, 17 FCC Rcd 6275 (2002) (“*Answer Indiana*”); *AT&T Corp. v. Business Telecom, Inc.*, Order on Reconsideration, 16 FCC Rcd 21750 (2001) (“*AT&T v. BTP*”).

⁵ 47 U.S.C. § 272. See *AT&T/BellSouth Order* at paras. 29-33, 35-42.

to amend the TSP so that (i) TSP customers cannot renew participation in the Plan, and (ii) the TSP will terminate on June 9, 2005.⁶

3. Sprint's petition for reconsideration seeks to modify the remedy for BellSouth's violation of section 272.⁷ Although Sprint is a TSP customer,⁸ Sprint was not a party to the complaint proceeding, and never sought to participate in the complaint proceeding in any way. Both of the actual parties to the complaint proceeding – AT&T and BellSouth – oppose non-party Sprint's petition.⁹

III. DISCUSSION

4. Under section 405(a) of the Act, a non-party to a Commission adjudication may seek reconsideration of the order if the non-party is "aggrieved" or "adversely affected" by the order.¹⁰ To implement section 405(a) of the Act, section 1.106(b)(1) of our rules provides, in pertinent part:

If the petition [for reconsideration] is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, *and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.*¹¹

A failure to demonstrate either of those two requirements set forth in rule 1.106(b)(1) means that a non-party's reconsideration petition will not be considered.¹²

5. Here, petitioner Sprint was not a party to this complaint proceeding. In an attempt to satisfy the two requirements of rule 1.106(b)(1), Sprint argues that, because it is a TSP customer, the Commission's remedy creates a likelihood of harm to Sprint.¹³ Sprint also argues that, because third parties "ordinarily" have no right to participate or intervene in a section 208 complaint proceeding, and because it could not have anticipated that the Commission's resolution of AT&T's complaint against BellSouth would result in the TSP's termination, Sprint could not have participated in this proceeding at an earlier stage.¹⁴

⁶ *Id.* at para. 53.

⁷ Sprint Petition at 3.

⁸ *Id.* at 4.

⁹ Opposition of AT&T Corp. to Petition for Reconsideration of Sprint Communications Co., L.P., File No. EB-04-MD-010 (filed Jan. 18, 2005) ("AT&T Opposition"); BellSouth Telecommunications, Inc.'s Opposition to Petition for Reconsideration of Sprint Communications Co., L.P., File No. EB-010-MD-04 (filed Jan. 18, 2005) ("BellSouth Opposition").

¹⁰ 47 U.S.C. § 405(a).

¹¹ 47 C.F.R. § 1.106(b)(1) (emphasis added).

¹² See, e.g., *Infinity Broadcasting; Answer Indiana; AT&T v. BTI; TSR Wireless, LLC v. US West Communications, Inc.*, Order on Reconsideration, 16 FCC Rcd 11462 (2001); *Heritage Cablevision Associates of Dallas, L.P. v Texas Utilities Electric Co.*, Memorandum Opinion and Order, 7 FCC Rcd 4192, 4192 (1992) ("*Heritage v. Texas Utilities*"); *GTE Telenet Communications Corp. v. AT&T Co.*, Memorandum Opinion and Order, 1 FCC Rcd 367, 367 (Com. Car. Bur. 1986) ("*GTE v. AT&T*").

¹³ Sprint Petition at 3-4; Reply of Sprint Communications Co., L.P. to Comments on Petition for Reconsideration, File No. EB-04-MD-010 (filed Jan. 24, 2005) ("Sprint Reply") at 2-3.

¹⁴ Sprint Petition at 4; Sprint Reply at 2-3.

6. Applying rule 1.106(b)(1) here, we find that Sprint has failed to demonstrate good reason why it was not possible for Sprint to participate at an earlier stage of this complaint proceeding.¹⁵ First, although third parties rarely participate in formal complaint proceedings, Sprint had every right and opportunity to petition to file an amicus brief or seek to intervene.¹⁶ Sprint did neither.¹⁷ Second, “surprise” at the outcome of a Commission proceeding does not ordinarily excuse a failure to attempt to participate earlier in the proceeding.¹⁸ In any event, Sprint had no reasonable basis to be “surprised” at the remedy provided by the *AT&T/BellSouth Order*. For example, the briefs and other pleadings made clear that termination of the TSP was one potential remedy that the parties foresaw.¹⁹ As BellSouth correctly observes, far from having no reason to anticipate the Commission’s remedy here, “anyone who read AT&T’s complaint . . . was doubtless aware that AT&T was asking the Commission to find the TSP unlawful,” and that any such finding would likely trigger a substantial change in the status quo.²⁰ Indeed, Sprint “needed only to read BellSouth’s briefs to the Commission, in which BellSouth expressly argued that, if it were found liable, ‘the *only* available remedy would be to eliminate the TSP . . . as written in [its] entirety.’”²¹ Thus, the record in this proceeding gave Sprint every reason to understand that one

¹⁵ For purposes of this Order only, we will assume, *arguendo*, that the *AT&T/BellSouth Order* “aggrieves” Sprint. We note, however, that Sprint’s assertions of harm are vague, cursory, conclusory, and speculative. See Sprint Petition at 5-6. See also BellSouth Opposition at 2-3 (urging that Sprint’s claimed injury, far from being set forth “with particularity,” is purely speculative, based on a *possible* worsening of its position, *if* BellSouth fails to develop a successor special access volume discount plan, or *if* such plan provides a less desirable option than was available under the TSP – none of which can be known for several months).

¹⁶ See generally, *AT&T v BTI*, 16 FCC Rcd at 21754, n.21 (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.”) (quoting *Pleading Cycle Established for AT&T Corp. v. Ameritech Corp.*, Public Notice, 13 FCC Rcd 12057, 12058 (Com. Car. Bur. 1998)).

¹⁷ See, e.g., *Heritage v. Texas Utilities*, 7 FCC Rcd at 4192, paras. 6-7 (dismissing a non-party’s petition for reconsideration of an order in an adjudicatory proceeding, where the non-party “failed to participate either as an intervenor or amicus,” though it “could have moved the Commission for leave to participate, either as amicus or intervenor, [even] after the pleading cycle closed.”). We do not imply that, had Sprint attempted to intervene as a party, it would necessarily have been successful. See, e.g., *AT&T v BTI*, 16 FCC Rcd at 21754, n.21, citing *Teleconnect Co. v. The Bell Co. of Pennsylvania*, Memorandum Opinion and Order, 6 FCC Rcd 5202, 5206 at paras. 18-20 (Com. Car. Bur. 1991), *aff’d on review*, 10 FCC Rcd 1626 (1995). Here, however, Sprint made no such effort.

¹⁸ See, e.g., *GTE v. AT&T*, 1 FCC Rcd at 367, para. 6. Cf., *Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984) (“If we were to require the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission’s – and indeed the public’s – interest in the finality of licensing decisions would be eviscerated.”).

¹⁹ See, e.g., AT&T Supplemental Filing in Response to Commission Notice of Formal Complaint of AT&T, File No. EB-04-MD-010 (filed July 13, 2004) (“AT&T Supplement”) at 4-10 (addressing termination as a possible outcome); Complainant AT&T’s Reply to Defendant BellSouth’s Answer, File No. EB-04-MD-010 (filed July 26, 2004) (“AT&T Reply”) at 26-28 (describing breadth of Commission’s authority to fashion a remedy); Complainant’s Initial Brief, File No. EB-04-MD-010 (filed Sept. 22, 2004) (“AT&T Initial Brief”) at 163-67 (same); Complainant’s Reply Brief, File No. EB-04-MD-010 (filed Oct. 4, 2004) (“AT&T Reply Brief”) at 82 n.268 (discussing remedies, including striking of the “evergreen provision”); BellSouth’s Initial Brief, EB-04-MD-010 (filed Sept. 22, 2004) (“BellSouth Initial Brief”) at 5 (stating that, “were the Commission to hold the discount plans unlawful, the *only* available remedy would be to eliminate the TSP and the PSIP as written in their entirety”), 6 (stating, “[f]or example, the Commission could strike the plans completely”), 8 (discussing the impact of terminating these discount plans).

²⁰ BellSouth Opposition at 3.

²¹ *Id.* at 4, quoting BellSouth’s Initial Brief at 5.

option available to the Commission in response to AT&T's complaint was to order the termination of the TSP.

7. For the foregoing reasons, and consistent with substantial Commission precedent, we find that petitioner Sprint has failed to satisfy one of the two requirements set forth in 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. Consequently, we dismiss the Petition.

IV. ORDERING CLAUSE

8. 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(b)(1) of the Commission's rules, 47 C.F.R. § 1.106(b)(1), that the Petition for Reconsideration of Sprint Communications Co., L.P. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary