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

In the Matter of	)	
	)	
BEEHIVE TELEPHONE, INC., and	)	
BEEHIVE TELEPHONE NEVADA, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	File No. E-94-57
	)	
THE BELL OPERATING COMPANIES,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 21, 1997 Released: October 27, 1997

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address, on voluntary remand from the United States Court of Appeals for the D.C. Circuit,[1] claims by Beehive Telephone, Inc. and Beehive Telephone of Nevada, Inc. (collectively "Beehive") asserting that the Commission staff improperly changed the *ex parte* procedures governing this formal complaint proceeding, and violated Beehive's due process rights by engaging in allegedly impermissible *ex parte* contacts in the course of the Commission's consideration of Beehive's formal complaint.[2] We also address certain other arguments asserted by Beehive in the course of this proceeding. For the reasons set forth below, we find Beehive's arguments without merit.

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[1] *Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc. v. Federal Communications Commission and United States of America*, D.C. Cir. No. 95-1479, Per Curiam Order (Dec. 27, 1996) ("*Remand Order*").

[2] *See* Brief of Petitioners, D.C. Cir. No. 95-1479 (Mar. 25, 1996) ("Beehive Brief"); *see also* Application for Review, File No. E-94-57 (filed July 5, 1994) ("Beehive Application").

II. BACKGROUND

2. This matter involves the interrelationship between two separate proceedings. The first is a tariff investigation initiated by Commission staff concerning the reasonableness of tariffs filed by various local exchange carriers ("LECs") in relation to the provision of subscriber 800 service and 800 number portability. The second is the instant formal complaint proceeding in which Beehive, a local exchange common carrier under the Communications Act of 1934, as amended ("Act"), challenged one of the tariffs under review in the aforementioned investigation.

A. History of the Commission Proceedings

3. On April 28, 1993, the Commission's Common Carrier Bureau ("Bureau") initiated an investigation into 47 tariffs filed by various LECs governing the terms and conditions upon which customers may obtain 800 database access services.[3] This investigation also addressed issues relating to the Service Management System ("SMS") Tariff that had been filed jointly by the Bell Operating Companies ("BOCs").[4]

4. The origin of this tariff proceeding was the Commission's order requiring all LECs to provide access services to interexchange carriers ("IXCs") that would permit customers to change IXCs, but retain their telephone numbers with 800 prefixes ("800 number portability").[5] In order to implement access services to accommodate 800 number portability, the LECs deployed new technology that could route 800 calls to each customer's preferred IXC by consulting a data base containing IXC routing information for all 800 subscribers.[6] In furtherance of this scheme, two types of tariffs were required to be filed.[7] First, LECs were required to file tariffs to govern their offering of access services using the 800 data base system. Additionally, because the Commission determined it to be a common carrier service, the BOCs filed a joint tariff to offer access to the SMS centralized

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[3] *Bell Operating Companies' Tariff for the 800 Service Management System*, Order, 8 FCC Rcd 3242 (Com. Car. Bur. 1993) ("*Investigation Order*").

[4] *Id.*

[5] *See Provision of Access for 800 Service*, Report and Order, 4 FCC Rcd 2824 (1989); Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991).

[6] *See 800 Data Base Tariffs and the 800 Service Management System Tariff*, Report and Order, 11 FCC Rcd 15227 (1996) ("*800 Tariff Order*").

[7] *See Provision of Access for 800 Service*, Order, 8 FCC Rcd 1423 (1993) ("Comptel Declaratory Ruling") (finding, *inter alia*, that access to the 800 SMS by Responsible Organizations (RespOrgs) is a Title II common carrier service and shall be provided pursuant to tariff).

database containing customer records and routing instructions.[8] The LECs' offerings of 800 data base access service and the BOCs' joint offering of services through the central data base were proposed in tariffs filed in March 1993. In the *Investigation Order*, the Bureau suspended these tariffs for one day and initiated an investigation into the reasonableness of the terms and conditions of these tariffs and the adequacy of the cost support for many of the carriers' rates.[9]

5. Pursuant to Commission rules, the investigation was designated a non-restricted, or "permit but disclose," proceeding under the *ex parte* rules, meaning that written and oral contacts with Commission staff were allowed so long as the substance of such presentations are provided for inclusion in the docket.[10] The Bureau directed that the investigation be conducted as a notice and comment proceeding in which the carriers bore the burden of demonstrating that their rates were just and reasonable.[11] At the time Beehive filed its complaint, the Bureau's Tariff Division, which had primary responsibility for the investigation, had issued an order directing interested parties to submit oppositions or comments on April 15, 1994, with rebuttals to such comments due April 28, 1994.[12]

6. On March 10, 1994, Beehive filed its formal complaint in this matter pursuant to Section 208 of the Act.[13] In its 53-page complaint, Beehive challenged the lawfulness of the BOCs' 800 SMS Tariff which, as detailed above, was one of the tariffs being reviewed in the investigation.[14]

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[8] *Id*. at 1426. The SMS is managed by Database Services Management, Inc., a wholly owned subsidiary of Central Services Organization, Inc. (Bellcore), which is itself jointly owned by the BOCs. Entities known as Responsible Organizations ("RespOrgs") are responsible for entering information into and maintaining the accuracy of the information in the SMS database. Any entity that meets certain financial, technical, and service-related eligibility criteria set forth in the SMS tariff may be a RespOrg. RespOrgs are permitted access to the SMS under the terms and at the rates contained in the SMS tariff. This tariffed service permits the RespOrgs to reserve 800 numbers, create and modify customer records in the main database, and obtain various reports. *See Beehive Telephone, Inc. v. The Bell Operating Companies*, 10 FCC Rcd 10562 (1995) ("*Beehive Order*").

[9] *Investigation Order*, 8 FCC Rcd at 3245; *800 Data Base Access Tariffs and the 800 Service Management System Tariff*, 8 FCC Rcd 5132 (Com. Car. Bur. 1993) ("*Designation Order*").

[10] *Investigation Order*, 8 FCC Rcd at 3245; *see* 47 C.F.R. 1.1200 *et seq.*

[11] *Designation Order*, 8 FCC Rcd at 5138; *see* 47 U.S.C. § 204(a).

[12] *See 800 Data Base Access Tariffs and the 800 Service Management System Tariff*, 9 FCC Rcd 974 (Com.Car.Bur. Tariff Div. 1994). This schedule was subsequently modified by one week. 9 FCC Rcd 1881 (Com.Car.Bur. Tariff Div. 1994).

[13] *See* Complaint, File No. E-94-57; *see also* 47 U.S.C. § 208.

[14] *Beehive Order*, 10 FCC Rcd at 10562. Beehive's complaint asserted the following claims: (i) that the SMS access service is not a common carrier service and is, therefore, not subject to the tariff or other provisions

In accordance with its rules, the Commission served copies of Beehive's complaint on the defendant BOCs by mail on April 21, 1994.[15] Pursuant to the Commission's *ex parte* rules, this notice designated the complaint proceeding as restricted, meaning that *ex parte* contacts were generally not allowed.[16]

7. In a letter dated May 2, 1994, Beehive first notified the Commission of its concern that the existence of issues common to the tariff investigation and its complaint in this proceeding could lead to inadvertent violations of the *ex parte* rules in the restricted complaint proceeding.[17] Beehive requested that Commission staff ensure that *ex parte* presentations not be made on the common issues.[18] After reviewing the matter, the Bureau's Enforcement and Tariff Divisions jointly issued a Public Notice redesignating the complaint proceeding as non-restricted, or "permit but disclose."[19] Thus, the same *ex parte* rules that had already been designated for the tariff investigation were also to apply to the complaint proceeding. In making the decision to modify the standard rules applicable to formal complaint proceedings, the staff explained:

> In conjunction with the investigation, and consistent with the Commission's e*x parte* rules providing for the disclosure of permissible presentations, the staff has been engaged in discussions with certain parties for the purpose of obtaining information and exploring possible resolutions of the issues raised in the investigation. . . . We

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of Title II of the Act; (ii) that even if SMS access may properly be tariffed, the tariffed rates were unjust and unreasonable under Section 201(b) of the Act because they were revenue based rather than cost-based rates; (iii) that the BOCs unreasonably discriminated in violation of Section 202(a) of the Act by offering SMS access to different parties on different terms; (iv) that the BOCs should not be permitted to file the SMS tariff under Section 203(a) of the Act because they are not the "carrier" with respect to the SMS; and (v) that the BOCs did not have proper authorization from the Commission before constructing the SMS in violation of Section 214(a) of the Act. *Id.* at 10563.

[15] *See* Notice of Formal Complaint, File No. E-94-57 (Com. Car. Bur. Enf. Div., Apr. 21, 1994); 47 C.F.R. § 1.735(d).

[16] Notice of Formal Complaint, *supra*; 47 C.F.R. § 1.1208.

[17] Letter from Russell D. Lukas to William F. Caton, Acting Secretary, FCC, dated May 2, 1994, File No. E-94-57 ("Lukas Letter"). The docket indicates that this letter was served on the Commission by mail, and was received on May 6, 1994. This letter also indicates that it was served by mail on the parties to the tariff investigation and the BOC defendants in the complaint proceeding. *Id.*; *see* Application at 2.

[18] Lukas Letter; Application at 2.

[19] *See Public Notice*, Commission Applies "Permit But Disclose" Ex Parte Rules to Formal Complaint Filed by Beehive Telephone, Inc. Against The Bell Operating Companies, 9 FCC Rcd 2751 (Com. Car. Bur. Enf. Div, Tar. Div. 1994) ("*Public Notice*").

> believe that the public interest in resolving the issues raised by the tariff investigation expeditiously would best be served by ensuring that the investigation and related discussions continue with a minimum of disruption during the pendency of the formal complaint. Because the tariff and complaint proceedings involve common issues, however, we believe that this interest must be balanced against the parties' interest in ensuring that decisions on the common issues are based upon a record that is available to all interested parties. . . . The Bureau finds that the public interest would be served by making applicable to the formal complaint proceeding the "permit but disclose" *ex parte* rules applicable to nonrestricted proceedings.[20]

8. On July 5, 1994, Beehive filed an Application for Review of the staff's decision in the *Public Notice* to modify the *ex parte* procedures for the complaint proceeding.[21] In its Application, Beehive asserted that Commission staff had no authority to modify the *ex parte* procedures and, even if they had such authority, the changes prescribed in the *Public Notice* exceeded such authority and violated proper procedures.[22] On August 16, 1995, the Commission issued an order that denied Beehive's formal complaint on the merits.[23] This order did not, however, address the *ex parte* issues raised in Beehive's Application for Review of the *Public Notice*. Beehive petitioned the U.S. Court of Appeals for the D.C. Circuit to review this order, and included in this petition its claims based on the alleged *ex parte* improprieties.[24] Because the *ex parte* issue had been initially raised before the Commission, but had not been addressed in the order under review, the Commission requested and was granted a remand.[25]

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20 *Id*.

21 Beehive Application, *supra*. On July 20, 1994, the BOCs jointly filed an Opposition to Beehive's Application for Review ("BOC Opposition"). Beehive filed a Reply to the BOC Opposition on August 4, 1994. ("Beehive Reply").

22 Application at 5-16.

23 *Beehive Order, supra*.

24 Beehive Brief at 28-31.

25 *Remand Order*.

B. The Commission's Ex Parte Rules

9. The primary purpose of the Commission's *ex parte* rules is to assure that the agency's decisions are based upon a publicly available record, rather than influenced by off-the-record communications between decision-makers and outside persons.[26] As stated in the rules, the *ex parte* requirements serve an important role in ensuring that the Commission's decision-making processes are fair, impartial, and otherwise comport with the concepts of due process.[27] We have also explained that "[a]n equally important objective is to establish procedures that allow the Commission sufficient flexibility to obtain information and evidence necessary for reasoned decision-making. Thus, the *ex parte* rules not only set forth guidelines that are intended to comport with elementary principles of 'fairness' and 'due process,' but they are also designed to facilitate a full exchange of information so that informed and reasoned agency decision making may result."[28]

10. In the *1987 Ex Parte Order*, the Commission significantly revamped the existing rules by clarifying the scope of *ex parte* presentations, establishing three broad categories of *ex parte* rules -- exempt, non-restricted and restricted -- and identifying the various Commission proceedings to which these rules apply.[29] Under these rules, an *ex parte* presentation generally encompasses any communication with Commission decision-making personnel directed at the merits or outcome of a proceeding that (i) if written, is not served on the parties to the proceeding, or (ii) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[30] The first category of proceedings established by the *1987 Ex Parte Order* are those for which there are no *ex parte* restrictions. In these "exempt" proceedings, parties and Commission decision-makers may communicate freely, without regard to the prohibitions and disclosure

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[26] *See 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, 3012 (1987) ("*1987 Ex Parte Order*").

[27] 47 C.F.R. § 1.1200.

[28] *Amendment of Subpart H, Part 1 of the Commissions Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, Gen. Docket No. 86-225, Notice of Proposed Rulemaking, 104 FCC 2d 1323 (1986) ("*1986 Ex Parte NPRM*").

[29] *1987 Ex Parte Order, supra*. Although we have recently issued an order amending the Commission's *ex parte* rules, these rules did not become effective until June 2, 1997. *See Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Report and Order, FCC 97-92 (Mar. 19, 1997) ("*1997 Ex Parte Report and Order*"). Accordingly, our consideration of this matter is governed by the 1987 rules and any amendments to those rules which may have existed at the time of Beehive's complaint.

[30] 47 C.F.R. § 1.1202(a)-(b).

requirements in the rules.[31] The second category are those proceedings classified as "non-restricted" or "permit but disclose." In non-restricted proceedings, parties and Commission decision-makers are permitted to engage in *ex parte* communications but certain disclosure requirements must be met.[32] In general, the rules require persons making written *ex parte* presentations in non-restricted proceedings to submit copies of such presentations for inclusion in the record, while those making oral *ex parte* presentations are required to submit written summaries of such communications for inclusion in the record.[33] The final category of proceedings established by the rules is "restricted," in which *ex parte* presentations are generally prohibited.[34]

11. As stated above, the tariff investigation was designated a non-restricted, or "permit but disclose" proceeding, pursuant to Section 1.1206(b) of the Commission's rules.[35] Pursuant to these rules, Commission staff were allowed to receive both oral and written presentations so long as they were included in the record. Also pursuant to the rules, Beehive's formal complaint, filed under Section 208 of the Act, was initially designated a restricted proceeding.[36] While the Commission may still receive communications on the merits of proceedings designated as restricted, written presentations must be served on all parties to the proceeding and oral presentations must be preceded by advance notice to all parties with the opportunity for all parties to be present.[37]

III. CONTENTIONS AND DISCUSSION

12. Beehive raises several arguments in support of its position that the decision to modify the *ex parte* procedures applicable to its complaint violated the Commission's own rules, and thereby tainted that proceeding. We will address these arguments *seriatim*.

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31 *Id*. at § 1.1204.

32 *Id.* at § 1.1206.

33 *Id.* at § 1.1206(a).

34 *Id.* at § 1.1208.

35 *Id.* at § 1.1206(b).

36 47 C.F.R. § 1.1208(c)(1)(ii)(B).

37 *Id.* at § 1.1202(b).

A. Did Commission Staff Have Authority to Modify the Ex Parte Rules?

1. Staff Authority to Modify the Rules.

13. In its Application, Beehive challenges the Bureau's authority to issue a public notice setting forth modified *ex parte* procedures.[38] Beehive argues that because the *ex parte* rules were properly promulgated, Commission staff were obligated to obey those rules and had no authority to engage in its own "balancing" of interests.[39] Beehive concludes that "[Commission] staff had no more authority than Beehive to adopt 'modified' *ex parte* procedures to govern its own conduct."[40]

14. Beehive's challenge is without merit. The Commission has general authority to suspend, waive, or amend its rules, on its own motion, for good cause.[41] As the D.C. Circuit has confirmed, good cause exists where "particular facts would make strict compliance inconsistent with the public interest."[42] Moreover, our *ex parte* rules specifically provide that "[w]here the public interest so requires in a particular proceeding, the Commission retains the discretion to issue public notices setting forth modified or more stringent *ex parte* procedures."[43] Accordingly, the Commission has retained authority to alter the standard *ex parte* procedures where such modification is in the public interest.[44]

15. Furthermore, the Common Carrier Bureau is authorized to act for the Commission under delegated authority, and to carry out the common carrier-related functions of the Commission under the Act.[45] Pursuant to this authority, the Bureau is authorized to take such action as is

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38 Application at 5-10.

39 *Id.*

40 *Id.* at 8.

41 47 C.F.R. § 1.3.

42 *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (upholding Commission's authority to waive rules providing parties right to file reply comments in rulemaking proceeding).

43 47 C.F.R. § 1.1200(a).

44 *See, e.g., East River Electric Cooperative*, DA 97-205 (Wireless Telecommunications Bureau, released Jan. 28, 1997); *Application of Comsat Corp.*, DA 96-1972 (International Bureau, released Nov. 23, 1996); *United Artists Cable of Baltimore*, DA 95-1366 (Cable Services Bureau, released June 19, 1995); *Telephone Electronics Corp.*, 11 FCC Rcd 4457 (Wireless Tel. Bur. and Office of General Counsel, 1995).

45 47 C.F.R. § 0.91(a), (f); 47 C.F.R. § 0.291.

appropriate for the performance of its functions, with certain enumerated exceptions not relevant here.[46] These functions include advising the Commission, or acting for the Commission under delegated authority, in both adjudicatory and rulemaking proceedings pertaining to the regulation and licensing of communications common carriers.[47] Therefore, where appropriate for the effective resolution of such proceedings, and to the extent not inconsistent with other applicable law, Bureau staff is necessarily delegated the authority to modify the *ex parte* rules.[48] Indeed, as we recognized in our recent order amending the *ex parte* rules, the staff's conduct in this matter was consistent with existing Commission practice.[49]

16. For the above reasons, we also disagree with Beehive's argument that the Commission's rules require any modifications to the *ex parte* procedures to be directed exclusively by the Office of the Managing Director (OMD) rather than by the bureau responsible for handling the applicable proceeding.[50] Although Commission rules identify the Managing Director as the principal operating official on *ex parte* matters involving restricted proceedings, the rules do not restrict to OMD the authority to modify the *ex parte* procedures.[51] Rather, as explained above, the Chief of the Common Carrier Bureau is delegated broad authority to perform all common carrier-related functions of the Commission, subject to specific exceptions and limitations not relevant here, and staff involved in specific proceedings are typically best situated to evaluate the need for *ex parte* modifications.[52] Finally, we note that the delegation of authority rules are a matter between the Commission and its

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46 *See* 47 U.S.C. § 0.291.

47 47 C.F.R. § 0.91(a).

48 *See, e.g., Comsat Corp., supra* (order issued by International Bureau modifying *ex parte* rules applicable to an application proceeding from "restricted" to "non-restricted"); *United Artists Cable of Baltimore, supra* (public notice issued by Cable Services Bureau modifying *ex parte* rules in an rate appeal proceeding from "restricted" to "non-restricted"); *Telephone Electronics Corp., supra* (modifying *ex parte* rules for waiver application).

49 *1997 Ex Parte Report and Order* at para. 13. The new rules amended Section 1.1200(a) by specifically delegating to the staff the "discretion to modify the applicable ex parte rules by order, letter, or public notice." 47 C.F.R. § 1.1200(a), *as amended.* As we emphasized in the order, however, that amendment merely codified current Commission practice in this regard. *1997 Ex Parte Report and Order* at para. 13.

50 Application at 15 & n.21.

51 *See* 47 C.F.R. §§ 1.1212, 1.1216.

52 *See* 47 C.F.R. §§ 0.91(a), 0.291. And, as previously noted, past Commission practice has been for the appropriate bureau staff to issue notices effecting such changes. *See, e.g., East River Electric Cooperative*, supra (Wireless Telecommunications Bureau); Comsat Corp., *supra* (International Bureau); *United Artists Cable of Baltimore, supra* (Cable Services Bureau); *Telephone Electronics Corp., supra* (Wireless Telecommunications Bureau and Office of General Counsel). Other examples abound.

staff and do not give private parties rights. In this regard, our decision to affirm the staff's decision effectively renders moot Beehive's delegated authority argument.

2. Recusal Arguments.

17. Beehive also asserts that Bureau staff involved in the investigation and complaint proceedings were obligated to recuse themselves from consideration of the *ex parte* modification.[53] Beehive argues that any staff who participated in *ex parte* communications between the date Beehive's complaint was filed and the date the Public Notice was issued were subject to sanctions for violating the *ex parte* rules, and therefore such staff had a personal interest in modifying those rules.[54] Beehive concludes that in order to avoid the appearance of bias, any determination to modify the *ex parte* procedures should not have been made by the staff involved in the tariff investigation or complaint proceeding.[55]

18. We disagree. As detailed below, as to any *ex parte* presentation that may have occurred prior to the issuance of the *Public Notice*,[56] Beehive has shown neither prejudice from such *ex parte* presentations nor evidence of bad faith on the part of Commission staff. Although Beehive's Application contains numerous innuendo and suggestions of malfeasance by the staff in issuing the *Public Notice,* Beehive fails to offer any support for such accusations. In sum, there is no basis for finding that the decision to issue the *Public Notice* was tainted by staff bias.

3. Timing of Modification.

19. Finally, we note that in its appellate brief (but not in its Application), Beehive seeks to draw a distinction between modifications made to the *ex parte* rules "before the case got underway, so that the procedural change would operate prospectively," and those modifications made "after the decision-making process was underway."[57] Beehive suggests that no modifications could be adopted after its complaint was filed.[58]

20. The distinction Beehive seeks to draw is inconsistent with the language of the rules,

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53 Application at 14-16.

54 *Id*.

55 *Id.* at 15.

56 *See* paras. 28-30, *infra*.

57 Brief of Petitioners at 30, n.35.

58 *Id.*

which grant the Commission the authority to modify the *ex parte* procedures wherever the public interest so requires.[59] Indeed, such a restriction would not be in the public interest because it would severely limit the Commission's flexibility to modify its rules to respond to particular situations as they arise. For example, in this proceeding, it was not until May 2, 1994, nearly two months after it filed its complaint, that Beehive notified the Commission of the potential *ex parte* conflict.[60] Shortly thereafter, on June 2, 1994, the *Public Notice* was issued in a timely fashion to address this potential conflict in a manner deemed best suited to serve the public interest.[61] Furthermore, and contrary to Beehive's assertion, the modification adopted in the *Public Notice* applied only prospectively.[62] We address below whether Beehive may have been unfairly prejudiced by any *ex parte* communications which may have occurred between the filing of its complaint and issuance of the Public Notice.[63]

B. Was the Modification Adopted Within the Scope Authorized?

21. Beehive next argues that even if Bureau staff were authorized to modify the *ex parte* rules in appropriate circumstances, the redesignation of the complaint proceeding from restricted to non-restricted was a fundamental change beyond the scope envisioned by the rules.[64] According to Beehive, the changes to the *ex parte* procedures adopted in the *Public Notice* were outside the scope of a "modification" as that term has been interpreted by the courts.[65] Beehive further asserts that the amended *ex parte* procedures unreasonably and improperly infringed upon its Constitutional due process rights.[66]

22. We find that the Bureau acted within the scope of the Commission's rules. The *ex parte* rules provide that the Commission may "issue public notices setting forth *modified* or more

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59 47 C.F.R. § 1.1200(a); *see also* 47 C.F.R. § 1.3.

60 Application at 2.

61 *Public Notice*, *supra.*

62 *Public Notice*, 9 FCC Rcd at 2751. As stated therein, parties who filed presentations in the investigation in the period between Beehive's filing of the complaint and the publication of the *Public Notice* were allowed, at their option, to include those presentations in the complaint record.

63 *See* paras. 28-30, *infra*.

64 Application at 8-10.

65 Application at 8-10 (*citing MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218 (1994) (hereinafter "*MCI v. AT&T*")).

66 *Id*. at 10-14.

stringent *ex parte* procedures."[67] Further, to the extent the *MCI v. AT&T* decision may be applicable to the current dispute,[68] we find the staff's amended procedures to be consistent with the Court's concept of "modify." In *MCI v. AT&T*, the Supreme Court reviewed a Commission order making tariff filing optional for all nondominant long distance carriers.[69] The Commission issued this order in reliance on the authority of Section 203 of the Act, which provided that the Commission could "modify" any requirement in that section.[70] After an extensive lexicological analysis, the Court explained that "modify" connotes "moderate change," and accordingly the Commission policy could be justified only if it made "a less than radical or fundamental change in the Act's tariff-filing requirements."[71] In striking down the Commission's order, the Court emphasized that the tariff-filing requirements were "the heart of the common-carrier section of the Communications Act," and were "utterly central" to the administration of the Act. Noting that the order eliminated a crucial provision of the statute for 40 percent of a major sector of the telecommunications industry, the Court found that such a change was a "fundamental revision of the statute," contrary to the regulatory requirements mandated by Congress.[72] Significantly, however, the Court concluded its discussion by recognizing as follows:

> We do not mean to suggest that the tariff-filing requirement is so inviolate that the Commission's existing modification authority does not reach it at all. Certainly the Commission can modify the form, contents, and location of required filings, and can defer filing or perhaps even waive it altogether in limited circumstances. But what we have here goes well beyond that. It is effectively the introduction of a whole new regime of regulation . . . which may be a better regime but is not the one that Congress established.[73]

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67 47 C.F.R. § 1.1200(a) (emphasis added).

68 The *MCI v. AT&T* case involved the construction of statutory language giving the agency the discretion to alter the tariff filing requirement set forth in Section 203, whereas the current proceeding involves the agency's interpretation of its own rules. *See* 512 U.S. at 231-32. At the time the staff issued the *Public Notice*, the Commission lacked the power to forebear from applying Section 203, but did have explicit authority to waive its ex parte rules for good cause. *See* 47 C.F.R. § 1.3.

69 *MCI v. AT&T*, 512 U.S. at 220-21.

70 *Id*.

71 *Id.* at 227-29.

72 *Id*. at 231-32.

73 *Id*. at 234.

23. The current circumstances appear to be within the scope of what the Court contemplated as a modification under the Commission's authority to amend -- and even *waive* -- rules where deemed desirable to address specific circumstances. Unlike the rules struck down in *MCI v. AT&T*, the *Public Notice* clearly did not establish a new regulatory "regime," but instead applied the amended procedures to a "particular instance," specifically the single complaint proceeding.[74] Moreover, and contrary to Beehive's assertion, the staff did not "waive" the *ex parte* rules for this proceeding or grant parties "*carte blanche*" to make contacts with Commission decision-makers.[75] Rather, quite distinct from designating the proceeding "exempt" (the equivalent of waiving the rules since no restrictions or disclosure requirements apply), the staff redesignated the complaint proceeding as non-restricted, thereby ensuring that all communications were disclosed in the record.[76] We find that the adopted change was reasonably tailored to resolve the specific public interest concerns enunciated in the *Public Notice*, while simultaneously protecting the interests of the parties. In any event, the Commission has authority to waive any of its rules on its own motion for good cause.[77]

24. We also find that the modified procedures did not improperly infringe upon Beehive's due process rights.[78] As noted above, the essential distinction between restricted and non-restricted proceedings is that, under the rules for non-restricted proceedings, all parties need not be served with written presentations or notified in advance of oral presentations. Nonetheless, the substance of each such presentation must be included in the record for the proceeding. Courts reviewing *ex parte* issues have been most concerned with undisclosed contacts, and whether communications contain factual matter or other information outside of the record, which all parties did not have the opportunity to

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[74] *See Id.* at 231-32 (drawing a distinction under Section 203(b)(2) of the Act between actions which have general application and those where the Commission acts "in particular instances").

[75] Application at 10, 13 n.18.

[76] *See* 47 C.F.R. § 1.1206. As Beehive itself describes the distinction between restricted and non-restricted *ex parte* rules, the rules in the restricted proceeding "merely mean that another party must be served with filings or invited to meetings." Application at 12 (*quoting Rainbow Broadcasting Co.*, 75 RR 2d 316, 322 (1994)).

[77] 47 C.F.R. § 1.3.

[78] It is also clear that the modified procedures do not violate the Administrative Procedure Act, 5 U.S.C. § 557(d), which imposes restrictions on *ex parte* communications only in formal adjudications and rulemakings required to be determined "on-the-record" after evidentiary hearing. 5 U.S.C. § 557(a). Formal complaint proceedings under Section 208 of the Act are not encompassed by this provision because they are not required by statute to be determined pursuant to a formal hearing. *See* 47 U.S.C. § 208.

rebut.[79] Under the modified *ex parte* procedures adopted by the staff in this complaint proceeding, all communications were subject to timely disclosure and scrutiny by Beehive or a reviewing court. While it may be true that Beehive would have to "traipse over to the Commission" to find out what is in the public record, as argued in its Application, we do not believe this rises to the level of an unconstitutional burden.[80]

C. Was the Staff's Decision to Modify the *Ex Parte* Rules Appropriate?

25. Having found that the *ex parte* modification was procedurally proper, we next consider whether that action was appropriate or whether it unreasonably prejudiced Beehive. Beehive argues that the modifications adopted were unnecessary, because the staff could have achieved their stated objectives without altering the *ex parte* rules.[81]

26. We disagree with Beehive's assertion that the nodification was improper. The *ex parte* rules may be modified upon a determination that the modification is in the public interest.[82] The staff explained its decision to modify the generally applicable *ex parte* procedures for the complaint proceeding as serving the public interest in ensuring that the staff could continue to engage in discussions for the purpose of obtaining information deemed essential to the tariff investigation and to resolve expeditiously the issues raised in the investigation.[83] We find this to be a reasonable determination of the public interest under the circumstances presented. It was certainly reasonable for the staff to conclude that the public interest would *not* be served if a tariff investigation implementing major Commission public policy initiatives was impeded by the restricted *ex parte* procedures that are intended to apply to narrow private adjudications common to complaint proceedings. The rules recognize that proceedings subject to the "permit but disclose" procedures often involve complex issues of general interest not readily conducted under the constraints applicable to restricted proceedings. It was reasonable for the staff to determine that the public interest in ensuring "the vigorous exchange of information necessary for reasoned and informed decision-

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79 *See, e.g., Power Authority of the State of New York v. FERC*, 743 F.2d 93, 110 (2d Cir. 1984); *PATCO v. FLRA*, 685 F.2d 547, 564-65 (D.C.Cir. 1982) (in making a fairness determination, it is relevant "whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond").

80 Application at 17. In any event, we note that the Commission's rules require it to publish on a weekly basis a list of all *ex parte* filings. 47 C.F.R. § 1.1206(a)(4).

81 Application at 10-14.

82 47 C.F.R. § 1.1200(a); *see also Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (upholding Commission's authority to waive rules providing parties right to file reply comments in rulemaking proceeding).

83 *Public Notice*, 9 FCC Rcd at 2751; *see* para. 7, *supra*.

making"[84] weighed in favor of modifying the *ex parte* rules in the complaint proceeding.

27. Nor do we find that Beehive was unduly prejudiced by the modification. As Beehive itself recognizes, the only distinction between restricted and "permit but disclose" procedures is that Beehive was not entitled to service of written presentations or to be invited to attend oral presentations.[85] Nonetheless, Beehive had virtually immediate access to all written *ex parte* presentations and summaries of all oral presentations.[86] These procedures were specifically tailored to ensure that all agency decisions are based upon an open record available to the public and reviewing courts.[87] Furthermore, once the rules were modified, Beehive had equal opportunity to make presentations to the staff, subject to the filing of required summaries. In sum, the final decisions in both proceedings were made upon a record that was fully available to all parties, including Beehive, and were therefore consistent with the principles underlying the *ex parte* rules.

D. Did *Ex Parte* Presentations Made Prior to Issuance of the Public Notice Taint the Complaint Proceeding?

28. Finally, Beehive requests a ruling as to whether the complaint proceeding was tainted by *ex parte* presentations made in the tariff investigation between the date on which its complaint was filed and the date on which the *Public Notice* was issued.[88] Having reviewed each such communication, we find no prejudice to Beehive.

29. The docket in the tariff investigation indicates that two oral *ex parte* communications occurred in this interim period.[89] One, from private counsel dated April 28, 1994, involved a telephone inquiry into the status of the investigation and whether it encompassed the SMS Tariff provision concerning the sale or brokering of 800 numbers.[90] Because this communication did not

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84 *See 1987 Ex Parte Order*, 2 FCC Rcd at 3012.

85 Application at 12.

86 *See* 47 C.F.R. § 1.1206(a)(2) (requiring summaries of oral *ex parte* presentations to be filed on the same day the presentation is made).

87 *1987 Ex Parte Order*, 2 FCC Rcd at 3012.

88 Application at 19.

89 *See 800 Data Base Tariffs and the 800 Service Management System Tariff*, CC Docket No. 93-129.

90 Letter from Henry D. Levine to William F. Caton, Acting Secretary, FCC (Apr. 28, 1996), CC Docket No. 93-129.

go to the merits of Beehive's complaint, it was not an *ex parte* presentation for purposes of this proceeding.[91] Even if it were, however, we do not find any prejudice to Beehive from this discussion. The only other oral presentation during this period was a meeting between Tariff Division staff and representatives from US West, which occurred on April 6, 1994.[92] The *ex parte* disclosure indicates that the principal topic of that meeting was the staff's decision to deny the BOCs a waiver from an order requiring them to place in the public record confidential information used to derive their 800 data base tariff prices.[93] Again, this communication does not concern the merits of Beehive's complaint, nor do we see any prejudice to Beehive from its occurrence. We also note that each of these communications were made exclusively to Tariff Division staff, and occurred prior to the date on which Beehive notified the Commission of its concerns regarding the overlap of the two proceedings.[94] Because Enforcement Division staff involved in the complaint proceeding did not attend these communications, there is no reason for the participants to have been aware of the potential *ex parte* issues.

30. Additionally, a number of written communications were included in the tariff investigation record in this interim period prior to the issuance of the Public Notice. Most of these communications were comments on the investigation filed pursuant to a staff scheduling order originally issued prior to the filing of Beehive's complaint.[95] Because these were formal, public comments requested by the staff in a non-restricted proceeding, we believe the failure to serve these filings on parties to the complaint proceeding at most constituted inadvertent violations of the *ex parte* requirements.[96] In any event, we do not find that the failure to serve these comments, or the other written *ex parte* presentations reflected in the docket, to have tainted the complaint proceeding

91 47 C.F.R. § 1.1202(a). Even if the communication had been to the merits of Beehive's complaint, it would still fall within the "status inquiry" exception to the rules. *Id.*

92 Letter from Laura D. Ford, US West, to William F. Caton, Acting Secretary, FCC (April 6, 1994), CC Docket No. 93-129.

93 *Id.*

94 *See* Application at 2.

95 9 FCC Rcd 974 (Feb. 14, 1994); 9 FCC Rcd. 1881 (Apr. 15, 1994).

96 In its Application, Beehive points to one of these filing made by the BOCs on May 5, 1994, and asserts that this filing was particularly egregious because it was made three days after Beehive notified the parties of its concern with the potential *ex parte* conflict. Application at 19. Beyond the reasons addressed above, we note that the docket indicates that service of this letter by Beehive was made by mail, and, at least with the copy sent to the Commission's Managing Director, was not postmarked until May 3, 1996. *See* Docket, File No. E-94-57. Given that the Commission received its mailed copy on May 6, 1996, and that there is a standard presumption of three days for service by mail, *see Fed.R.Cia.P. 6(e)*, there is no basis for assuming that the parties received this notification prior to submitting the May 5th filings.

or unduly prejudiced Beehive. As explained above, all such written materials were readily available to Beehive in a timely fashion. That Beehive had to make arrangements to obtain these materials, rather than having them served, does not undermine the fact that final decisions in both proceedings were made based upon a full and open record available to both Beehive and reviewing courts. Moreover, given that Beehive knew about all of these presentations prior to the Commission's decision on its complaint, it had full opportunity to respond in the context of the complaint proceeding. The Commission's order on the merits of Beehive's complaint would not have been affected by different *ex parte* procedures, and therefore vacating that order would serve no useful purpose.[97]

E. Miscellaneous Matters

31. Beehive has also raised other issues in this proceeding which relate to the tariff investigation. We briefly address certain of these issues below in order to ensure a complete record on review.[98]

32. In its Application, Beehive asserts that because the tariff investigation involved current and past rates and practices, it was an adjudicative proceeding under the rules and therefore should have been designated as "restricted" pursuant to Section 1.1208(c)(1)(ii)(A).[99] Beehive goes on to concede, however, that "reasonable uncertainties could exist as to whether the SMS Tariff investigation was a restricted proceeding."[100] We find Beehive's argument to be without merit. Beehive's assertion that the tariff investigation was an "adjudicative proceeding" is not dispositive. While the section cited by Beehive applies to "any adjudicative proceeding," that phrase is qualified by the beginning of Section 1.1208(c) which excludes any proceeding otherwise governed by Sections 1.1204 or 1.1206.[101] Further, under the provisions of Section 1.1206(b)(6), the non-restricted *ex parte* rules are to be applied to tariff proceedings which are set for investigation by the Commission

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97 *See PATCO v. FLRA*, 685 F.2d 547, 564 (D.C. Cir. 1982) (describing factors to be considered in determining whether improper *ex parte* contacts "irrevocably tainted" proceeding).

98 The Commission requested and was granted remand in order to assure a complete record on review. *See Remand Order*. Other issues raised by Beehive in the course of this proceeding have been addresses in the *Beehive Order*, which is attached hereto and is which is readopted and reaffirmed by this *Order*.

99 Application at 5.

100 *Id.*

101 47 C.F.R. § 1.1206(c).

under Section 204 or 205 of the Act. Such was the case with the investigation at issue.[102] Although under Section 1.1206(b) proceedings pertaining primarily to past rates or practices *may* be restricted, Beehive has not shown that the tariff investigation dealt primarily with past rates or practices, or that the Bureau abused its discretion in treating this proceeding as permit-but-disclose.

33. Beehive also asserts that the Bureau did not have authority to institute the tariff investigation because such authority was not delegated by the Commission.[103] This argument is patently wrong. Section 0.291 of our rules delegates to the Common Carrier Bureau all of the Commission's functions in the common carrier area, including tariff investigations,[104] except where authority is specifically withheld. The authority to investigate tariffs has not been specifically withheld, and indeed is an authority routinely exercised.[105]

34. Finally, Beehive has argued that SMS service is not properly tariffed because the service does not encompass service between points "on its own system."[106] This argument is not persuasive. Initially, we note that we are authorized under Section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions."[107] The Court of Appeals has previously recognized our authority under Section 4(i) to direct a party to file a tariff, even if Section 203 is inapplicable:

> We can assume, without deciding, that [Lincoln Telephone & Telegraph Company] is a connecting carrier for purposes of Section 203(a), and is therefore exempt from any tariff filing requirement that the section might otherwise impose. Sections 203(a)'s terms do not, however, in any way suggest that the section provides the exclusive

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102 *See Investigation Order*, 8 FCC Rcd at 3245; *also 1986 Ex Parte NPRM*, 104 FCC 2d at 1345 (specifying that ratemaking or tariff proceedings under Sections 204 and 205 of the Act are to be treated as non-restricted after they have been set for investigation).

103 Application at 4, n.7.

104 *See* 47 C.F.R. § 0.91 (functions of the Common Carrier Bureau include determinations of the lawfulness of carrier tariffs).

105 Beehive cites, *without explanation*, to Section 0.291(h) of the Commission's rules as supporting its position that the Commission withheld this power from the authority delegated to the Bureau. This section, which authorizes the Bureau to issue non-hearing related subpoenas for evidence in investigations of matters within the the Bureau's jurisdiction, does not support Beehive's argument. *See* 47 U.S.C. § 0.291(h).

106 Beehive Brief at 38-42.

107 47 C.F.R. 154(i).

> authority under which the Commission can require a tariff to be filed. Thus, while Section 203(a) did not grant the Commission the requisite authority for its action, Section 154(i) did.[108]

Therefore, if we are authorized under Section 4(i), as the courts have held, to direct a party to file a tariff even if Section 203 is not applicable, we have the authority to require the BOCs to file the SMS Tariff as we directed.

35. Moreover, we are authorized under Section 203(b)(2) to modify, for good cause shown, "any requirement made by or under the authority of this section . . . in particular instances."[109] Good cause was demonstrated in the *CompTel Declaratory Ruling*[110] when, after we listed the numerous factors supporting same, we found that "SMS access is technically necessary to the provision of 800 access service, and is *incidental* to the provision of such access."[111] Because of this necessity and the incidental nature of SMS service, we are empowered under Section 203(b)(2) to order the tariff to be filed as directed.

IV. CONCLUSION

36. For the reasons stated above, we find nothing improper or prejudicial in the staff's decision to modify the *ex parte* procedures applicable to Beehive's complaint proceeding. We also find that Beehive has failed to substantiate its claims that any impermissible *ex parte* contacts tainted this proceeding. Finally, we conclude that Beehive's other arguments relating to this proceeding and the tariff investigation are unpersuasive. Having now completed our consideration of Beehive's claims, we hereby adopt and reaffirm the Beehive Order and deny Beehive's formal complaint.[112]

V. ORDERING CLAUSES

37. ACCORDINGLY, IT IS ORDERED pursuant to Sections 4(i), 4(j), 5(c)(5), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(c)(5), 208, and

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[108] *Lincoln Telephone and Telegraph Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981).

[109] 47 U.S.C. § 203(b)(2).

[110] *In re Provision of Access for 800 Service*, Order, 8 FCC Rcd 1423, (1993) (*CompTel Declaratory Ruling*).

[111] *CompTel Declaratory Ruling*, 8 FCC Rcd at 1426. *See, also, In re Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528 (1992).

[112] In granting the Commission's request for remand, the Court of Appeals vacated the Beehive Order pending completion of the administrative proceedings. *See* Remand Order, *supra*. The Beehive Order is attached hereto.

Sections 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), that the Application for Review filed by Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc., in the above-captioned proceeding, IS DENIED.

38. IT IS FURTHER ORDERED that the Commission's Memorandum Opinion and Order in this proceeding, released August 15, 1995, and attached hereto, is hereby adopted and reaffirmed, and Complainants' formal complaint in this matter IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment

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

In the Matter of	)	**FCC 95-358**
	)	
BEEHIVE TELEPHONE, INC., and	)	
BEEHIVE TELEPHONE NEVADA, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	File No. E-94-57
	)	
THE BELL OPERATING COMPANIES	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1995; Released: August 16, 1995

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a complaint filed by Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc. (collectively Beehive) against the Bell Operating Companies (BOCs).[1] In its complaint, Beehive challenges the lawfulness of the 800 Service Management System Functions Tariff (SMS Tariff)[2] that was filed by the BOCs to comply with the Commission's instructions in a declaratory ruling it issued,[3] and alleges

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1 The BOCs include the Ameritech Operating Companies; the Bell Atlantic Telephone Companies; BellSouth Telecommunications, Inc.; Southwestern Bell Telephone Company; the NYNEX Telephone Companies; Pacific Bell and Nevada Bell; and U S West Communications, Inc.

2 Bell Operating Companies' Tariff F.C.C. No. 1.

3 Provision of Access for 800 Service, Order, 8 FCC Rcd 1423 (1993) (CompTel Declaratory Ruling) (finding, among other things, that access to the 800 Service Management System by Responsible Organizations (RespOrgs) is a Title II common

violations of the Communications Act of 1934, as amended.[4] For the reasons discussed below, we deny Beehive's complaint.

II. BACKGROUND

2. The 800 Service Management System (SMS) is the computer-based system that allows 800 numbers to be portable among service providers. Because of the SMS, an 800 customer may change carriers without changing 800 numbers. To accomplish this, the SMS uses a database that contains service information associated with each 800 number, including the identity of the carrier selected by the 800 customer for each number.[5]

3. Physically, the SMS consists of a main database and twelve regional databases called service control points (SCPs). All subscriber information for 800 customers is maintained in the main database and downloaded to the SCPs. When a caller places an 800 call, the local exchange company's (LEC) switch queries an SCP for routing information. The SCP directs the switch to route the call to the carrier chosen by the 800 customer. That carrier then delivers the call to the 800 customer.[6]

4. Database Service Management, Inc. (DSMI), a wholly-owned subsidiary of Central Services Organization, Inc. (Bellcore), which is itself jointly owned by the BOCs, manages the SMS. Southwestern Bell Telephone Company (SWBT), using software developed by Bellcore,[7] actually administers the SMS and provides the necessary computer hardware and network and operational support under contract with DSMI. Also under contract with DSMI, Lockheed Information Management Services Company (Lockheed) manages the Number Administration and Service Center (NASC), which provides administrative and support services to SMS users.[8]

5. Entities known as Responsible Organizations (RespOrgs) are responsible for entering information into and maintaining the accuracy of the information contained in the main database. Any entity that meets certain financial, technical, and service-related eligibility criteria set forth in the SMS Tariff may be a RespOrg, including an interexchange carrier (IXC), a local

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carrier service and shall be provided pursuant to tariff).

4 47 U.S.C. § 151, et seq. (the "Act").

5 CompTel Declaratory Ruling, 8 FCC Rcd at 1423.

6 Beehive Brief at 5; BOC Brief at 3.

7 BOC Brief at 3.

8 Beehive Brief at 7-10.

exchange carrier (LEC), the customer, or others.[9] RespOrgs are permitted access to the SMS under the terms and at the rates contained in the SMS Tariff. This tariffed service permits RespOrgs to reserve 800 numbers, create and modify customer records in the main database, and obtain various reports. For this tariffed service, RespOrgs pay a non-recurring charge to establish service and a flat monthly fee per 800 number associated with the RespOrg. RespOrgs may also pay a per-request tariffed fee for certain services.[10]

6. SCP owners contract with DSMI to receive updated information from the main database.[11] The BOCs deem this service to be unlike that provided to RespOrgs and do not offer it under tariff.[12] However, the services offered respectively to SCP owners and RespOrgs have two rate elements in common -- service establishment and main database access. SCP owners and RespOrgs are charged the same rates for these common rate elements.[13]

7. Beehive, which is a RespOrg, but not an SCP owner, has in the past taken the service offered by the BOCs under tariff. Beehive filed this complaint to challenge the lawfulness of the tariffed rates it has been charged for SMS service. At the time Beehive filed its complaint, it had paid a total of $42,768.90 and was threatened with service termination unless it paid additional charges of $7,909.50 that it had incurred, but refused to pay.[14] Beehive paid these additional charges,[15] but its service was subsequently disconnected for non-payment of other tariffed charges.[16]

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9 CompTel Declaratory Ruling, 8 FCC Rcd at 1426; Bell Operating Companies' Revisions to Tariff F.C.C. No. 1, 9 FCC Rcd 3037 n.1 (Com. Car. Bur. 1994); see Beehive Brief at n.3; see also BOC Brief at 3-4.

10 Beehive Brief at 11-13.

11 BOC Reply Brief at 9. Currently, SCPs are owned by the seven RBOCs, Southern New England Telephone Company, United Telephone Company, Bell of Canada, the GTE System Telephone Companies, and the GTE Operating Companies. These LECs have installed the necessary computer equipment to operate regional databases and contracted with DSMI to receive downloaded information from the SMS.

12 Id.

13 See Beehive Brief at 11.

14 Beehive Complaint at 18-19.

15 Amendment and Supplement to Complaint at 1-2.

16 Amendment and Supplement to Complaint at 1.

III. DISCUSSION

A. SUBSTANTIVE ISSUES

1. Contentions

8. Beehive objects to the rates it has been charged for SMS service,[17] and raises a number of arguments attacking the lawfulness of both the rates themselves and the tariff that sets them forth. Beehive's primary argument is that the SMS access service provided to RespOrgs is not a common carrier service, and, therefore, is not subject to the tariff or other provisions of Title II of the Act. According to Beehive, the test to be used here to determine whether SMS access service is a common carrier service is whether the SMS is used by RespOrgs to "transmit intelligence of their own design and choosing." Because the RespOrgs do not use the SMS for that purpose, argues Beehive, access to SMS cannot be a common carrier service.[18] Beehive claims that at most the SMS provides an administrative function that enables the accurate routing of 800 calls and is thus "incidental" to the provision of a communications service.[19] Beehive argues that this is insufficient to make SMS access a common carrier service subject to Title II.[20]

9. In the alternative, Beehive alleges a variety of Title II violations if the Commission finds the SMS access provided to RespOrgs to be a common carrier service. Beehive first claims that the tariffed rates it paid for SMS access are unjust and unreasonable under Section 201(b) of the Act[21] because they represent DSMI's revenue requirements rather than cost-based rates.[22] Beehive next claims that the BOCs unreasonably discriminate in violation of Section 202(a)[23] by

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17 See, e.g., Complaint at 7, 16; letter to DSMI from Art Brothers, CEO of Beehive (June 29, 1993).

18 Id. at 24-25 (citing National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (NARUC II)).

19 We will use the term "incidental service" to refer to a service that is incidental to transmission within the meaning of Section 3(a).

20 Beehive Brief at 26-27.

21 47 U.S.C. § 201(b). This section provides in pertinent part that "[a]ll charges, practices, classifications, and regulations for and in connection with such communications service shall be just and reasonable."

22 Beehive Brief at 31-32.

23 47 U.S.C. § 202(a). This section provides in pertinent part that it is unlawful for "any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like

offering SMS access to RespOrgs only under tariff, while offering the same service to SCP owners under negotiated contracts.[24] Beehive also claims that the BOCs should not be permitted to file the SMS tariff under Section 203(a)[25] because they are not the "carrier" with respect to the SMS.[26] Finally, Beehive argues that the BOCs did not get the proper authorization from the Commission pursuant to Section 214[27] before constructing the SMS in violation of Section 214(a).[28]

10. Beehive seeks both damages and injunctive relief for these alleged unlawful acts by the BOCs. Beehive seeks damages in the amount of the sum of the SMS charges it has paid plus interest at the IRS rate for tax refunds. Beehive also requests the return to its control of all 800 telephone numbers that it had reserved in the main database prior to the time its service was terminated.[29]

11. As a threshold matter, the BOCs, while agreeing with Beehive that, contrary to the Commission's finding, SMS service to RespOrgs is not a communications common carrier service and should not be tariffed under Section 203, argue that Beehive's allegations amount to an impermissible collateral attack on the CompTel Declaratory Ruling.[30] In the CompTel proceeding, the Commission required the tariffing of SMS service despite the BOCs' argument that the SMS administrator performs "administrative functions," not common carrier functions. According to the BOCs, Beehive should have challenged that ruling by filing a petition for reconsideration or an appeal. Because it failed to do so, the BOCs contend that Beehive cannot now properly challenge the Commission's determination that SMS is a common carrier service

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communications services."

24 Beehive Brief at 32.

25 47 U.S.C. § 203(a). This section provides in pertinent part that "[e]very carrier ... shall ... file with the Commission ... schedules showing all charges for ... communication between points on its own system ...."

26 Beehive Brief at 28-31.

27 47 U.S.C. § 214.

28 47 U.S.C. § 214(a). This section provides in pertinent part that "[n]o carrier shall undertake the construction of a new line ... unless and until there shall first have been obtained from the Commission a certificate ...."

29 Beehive Reply Brief at 10.

30 BOC Brief at 7; BOC Reply Brief at 2.

in this formal complaint proceeding.[31] The BOCs also argue that the reasonableness of the tariffed access rates are the subject of a Section 204 tariff investigation proceeding, and review of those rates in this Section 208 proceeding is inappropriate.[32] Finally, the BOCs deny that they unreasonably discriminate between RespOrgs and SCP owners because the services provided to each are not like because they are functionally different.[33] The BOCs did not specifically respond to Beehive's Section 214 claim and presented no substantive arguments to support the Commission's finding in the CompTel Declaratory Ruling that SMS access is a common carrier service.

12. Beehive responds to the BOCs' procedural challenges by arguing that a jurisdictional issue in a Commission ruling may be raised at any time.[34] Beehive further responds that the Commission has a duty to rule on questions properly raised in a formal complaint proceeding, and that it has properly raised issues about the lawfulness of the CompTel Declaratory Ruling.[35] Moreover, Beehive claims, the holding in the CompTel Declaratory Ruling that SMS service should be treated as a common carrier service was merely an initial determination that is subject to further consideration by the Commission. According to Beehive, the Commission has authority to detariff SMS and depart from the holding of the CompTel Declaratory Ruling if further examination or subsequent events show that SMS service is not a common carrier service.[36]

2. Discussion

a. BOCs' Collateral Estoppel Claim

13. We do not agree that Beehive is collaterally estopped from raising its jurisdictional claims in this proceeding. The doctrine of collateral estoppel precludes relitigation of facts issues only if 1) there is an identity of parties; 2) there is an identity of issues; 3) the parties had adequate opportunity to litigate the issues in the prior proceeding; 4) the issues were actually litigated and determined in the prior proceeding; and 5) the findings in the prior proceeding were

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31 BOC Brief at 6; BOC Reply Brief at 4.

32 BOC Reply Brief at 7-9.

33 Id. at 9.

34 Beehive Brief at 23 (citations omitted).

35 Id. (citing American Telephone and Telegraph Company v. FCC, 978 F.2d 727 (D.C. Cir. 1992) (AT&T v. FCC); other citations omitted).

36 Beehive Brief at 23-24.

necessary to the proceeding.[37] The first two elements are missing here. First, Beehive was not a party to the CompTel proceeding; thus, there is no identity of parties. Second, there is no identity of issues. This is true despite the fact that, as the BOCs claim, the Commission squarely addressed the question of whether SMS access is a communications common carrier service in the CompTel Declaratory Ruling. The issue as presented there and here is different in light of the changed circumstances alleged by Beehive.[38] Beehive alleges that the record in this proceeding contains information about the creation of DSMI and its operation of the SMS that Beehive claims was not available at the time of the CompTel Declaratory Ruling. Specifically, Beehive points to DSMI's handling of the day-to-day operation of the SMS as evidence that the BOCs no longer have general control over SMS access and alleges that DSMI, unlike the BOCs, is not a communications common carrier but for its operation of the SMS. From these changed circumstances, Beehive concludes, respectively, that the Commission's finding in the CompTel Declaratory Ruling that the BOCs should file the SMS Tariff is no longer valid and the Commission's additional finding that SMS access is a common carrier service is questionable. Given these allegations, we find that the issue presented in this proceeding lacks identity with the issue decided in the CompTel Declaratory Ruling. Because there is neither identity of parties nor issues between that proceeding and this one, we find that collateral estoppel does not bar Beehive from raising its claims in this proceeding.

14. Further, where there is an allegation that subsequent events have rendered a ruling unlawful, the Commission is obliged to consider that allegation.[39] We note that the CompTel Declaratory Ruling was based on the BOCs plans for SMS access service, which was not yet offered at that time. Beehive alleges that the way in which SMS access is actually provided does not fully comport with the plans the Commission considered in the CompTel Declaratory Ruling.

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37 Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir. 1985); see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (Court held that a party may not be collaterally estopped if it did not have a full and fair opportunity to litigate an issue in the earlier proceeding and explained in dicta that a litigant who did not appear in the prior proceeding may not be collaterally estopped from litigating the issue).

38 See Aronson v. U.S. Dep't. of Housing and Urban Development, 869 F.2d 646 (1st Cir. 1989) (Aronson) (Due to its adoption of new eligibility notification procedures following judicial reversal, Department of Housing and Urban Development was not collaterally estopped from relitigating in later suit issue of whether entrepreneur was entitled, under the Freedom of Information Act, to lists of mortgagors due refunds under federal mortgage insurance program.); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4417 at 162-163.

39 AT&T v. FCC, 978 F.2d at 733.

We must consider these allegations.[40] The Commission emphasized in the CompTel Declaratory Ruling that its findings were based on the record available at that time. Implicit in that order was a recognition that subsequent events may require that those findings be revisited.[41] We, therefore, take this opportunity to discuss those findings further and to address Beehive's claims that the creation of DSMI has rendered them invalid. Beehive also has raised issues not present in the Section 204 proceeding and alleged violations of the Communications Act. Beehive is entitled to have these claims adjudicated here.[42]

b. Common Carriage

15. Beehive argues that SMS access service is not a common carrier service. The determination of the jurisdictional status of SMS access hinges upon two questions: (1) is SMS access an interstate or foreign communications service under Section 3(a) of the Communications Act, which defines communications services to include not only the transmission of signals by wire or radio, but also all services incidental to such transmission; and (2) if so, is it a common carrier service, under Section 3(h) of the Act. The first question was answered in the affirmative in the CompTel Declaratory Ruling. There, the Commission found SMS service to be incidental to 800 service, which is a common carrier transmission service, because 800 service does not function properly without the SMS.[43] That finding is not in dispute here. Even Beehive agrees that it is reasonable to view SMS service as incidental to 800 service.[44] The answer to the second question is also affirmative. The precedents are clear that the key feature of common carriage is that the service provider undertakes to provide service indifferently to all potential customers.[45]

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40 See National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 644 (D.C. Cir. 1976) (NARUC I).

41 CompTel Declaratory Ruling, 8 FCC Rcd at 1426. Further, in Aronson, the court found that changed circumstances precluded application of collateral estoppel, relying in part on the suggestion in its initial decision that adequate departmental procedures could have altered the result. 869 F.2d at 648.

42 See AT&T v. FCC, 978 F.2d at 732.

43 CompTel Declaratory Ruling, 8 FCC Rcd at 1426. Although the Commission has found SMS service to be necessary to 800 service, even services that are not technically necessary to a transmission service may be considered incidental thereto because the language of Section 3(a) is quite broad. Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 7 FCC Rcd 3528, 3531 (1992) (Validation Order).

44 Beehive Brief at 26.

45 See, e.g., Frontier, 24 FCC at 254; NARUC II, 533 F.2d at 608.

SMS access is offered indifferently to all entities that meet the criteria for being a RespOrg,[46] and many entities take service as RespOrgs under the BOCs' tariff. Indeed the Commission's regulatory scheme requires it to be so offered.[47] In the CompTel Declaratory Ruling, the Commission found that, because SMS access is necessary to the provision of 800 services, it is important to ensure that SMS access is provided at reasonable rates and on nondiscriminatory terms.[48] The Commission concluded there that requiring that SMS access be tariffed was necessary to reach the goals of reasonable rates and nondiscriminatory terms.[49]

16. The crux of Beehive's jurisdictional claim is that the test applied by the court in NARUC II also applies to the BOCs' provision of SMS access to RespOrgs and precludes a finding that the service is a common carrier service. NARUC II established that a transmission service is a common carrier service if in addition to the service provider undertaking to carry for all customers indifferently, the service enables the customer to "transmit intelligence of his own design and choosing."[50] Beehive argues that because SMS access service does not enable customers to transmit anything, it does not satisfy the NARUC II test. Beehive further contends that even if transmissions are deemed a component of SMS access service, that which is transmitted is not of the customer's own design and choosing. As discussed in more detail below, Beehive's reliance on NARUC II is misplaced. Nothing in that case suggests that a service, such as SMS access, which is incidental to a service that provides transmission of intelligence of the customer's own design and choosing fails to meet the test of common carriage applied there. Application of that test so as to exclude a service that is incidental to transmission from the definition of common carriage would produce a result at odds with the plain meaning of Sections 3(a) and 3(h), which respectively define "wire communication"[51] and "common carrier".[52]

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46 See supra note 9.

47 CompTel Declaratory Ruling, 8 FCC Rcd at 1426. This alone is sufficient evidence of offering indifferently to all potential customers. NARUC II, 533 F.2d at 609. See Validation Order, 7 FCC Rcd at 3532; infra note 60.

48 CompTel Declaratory Ruling, 8 FCC Rcd at 1426-7.

49 Id.

50 NARUC II, 533 F.2d at 608-09. The requirement to "transmit intelligence of [the customer's] own design and choosing" is unique to telecommunications and distinguishes common carriage in the telecommunications context from common carriage generally. Id. at 609.

51 "Wire communication" means:

> the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all

Moreover, as outlined below in paragraph 19, the Commission previously has rejected the theory advanced by Beehive that only the transmission portion of a communications service may be considered common carriage by holding that a service that is incidental to a common carrier transmission service is also common carriage.[53]

17. The "transmits intelligence of their design and choosing" test was first enunciated by the Commission in 1958 in determining whether a community antenna television (CATV) operator was a communications common carrier.[54] To develop this test, the Commission examined the interplay between Sections 3(a) and 3(h) of the Act.[55] The Commission noted that Section 3(h) does not specifically define "common carrier" and relied on the legislative history to determine that Congress intended the term to have its ordinary meaning of holding out to provide service indifferently to all potential customers.[56] Integrating the Act's definition of "wire communication," the Commission determined that a communications common carrier service is a service offered on a common carrier basis whereby customers could "transmit intelligence of their own design and choosing" over wire transmission facilities.[57]

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instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

47 U.S.C. § 153(a).

52 "Common carrier" means "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy...." 47 U.S.C. § 153(h).

53 Validation Order, 7 FCC Rcd at 3532.

54 See Frontier Broadcasting Co. v. J. E. Collier, 24 FCC 251 (1958) (Frontier). CATV provided access to broadcast television signals to persons living in areas of poor reception. This was accomplished by placing an antenna in an area where reception of broadcast signals was good (often a hilltop) and transmitting selected signals over wires to the subscribers' premises. Because the quality of the reception varied among different broadcast stations and the technical limitations of CATV technology, the CATV operator selected a limited number of broadcast stations to carry from among the broadcast stations signals that it could receive at the antenna site. Id. at 252.

55 See 47 U.S.C §§ 153(a) and (h).

56 Frontier, 24 FCC at 254. This view has been endorsed by the courts. See NARUC I, 525 F.2d at 642; NARUC II, 533 F.2d at 608.

57 Frontier, 24 FCC at 254. "Intelligence" is a shortened reference to the "writing, signs, signals, pictures, and sounds of all kinds" language of Section 3(a).

18. The Commission's decision in that proceeding turned on the question of whether the transmission of broadcast television signals over the CATV system's wires was the kind of transmission that would be considered "wire communications" under Section 3(a). In answering this question, the Commission focused on the ability of the customers to choose the intelligence to be transmitted, not merely on the fact of transmission itself. Ultimately, the Commission found the CATV operator not to be a communications common carrier because the customers (subscribers) were merely passive recipients of whatever signals the CATV operator chose to send over the system.[58] In contrast, the NARUC II court found a cable television operator that leased access channels for two-way, point-to-point, non-video communications to be a communications common carrier because its system permitted subscribers to engage in two-way communication. Importantly, these subscribers, unlike the CATV customers in Frontier, exercised discretion to use the cable system to transmit messages and thus to "transmit intelligence of their own design and choosing."[59] These cases deal exclusively with the question of when transmission services are common carrier services. Here the issue is whether a service that is incidental to transmission is a common carrier service. In neither Frontier nor NARUC II was there any analysis of this issue.

19. The Commission has, however, addressed the question of when services that are incidental to transmission fall within the Commission's Title II jurisdiction.[60] Importantly, the Commission has specifically rejected the theory advanced by Beehive that only transmission services are subject to the Commission's Title II jurisdiction by finding a service that is incidental to a common carrier transmission service to be common carriage.[61] In the Validation Order, the Commission found that services, such as validation and screening of calling cards, that are incidental to the transmission of telephone messages fall within the meaning of wire communications as defined in Section 3(a) and stated, "[w]e reject the contention ... that [incidental services] are not communications services because they do not employ wire or radio facilities to transmit intelligence designed by the [customer]."[62] The Commission went on to find

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58 Id. at 204-05. See supra note 54.

59 NARUC II, 533 F.2d at 609-10.

60 In addition to the case discussed in the text, the Commission addressed this issue in the context of billing and collection services. See Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (1986). There, the Commission found billing and collection services provided by non-carrier third parties not to be communications common carrier services because (1) the services, being neither transmission nor incidental to transmission, were not wire communications within the meaning of Section 3(a) and (2) the service providers, often credit card companies, were not common carriers within the meaning of Section 3(h). Id. at 1168-69.

61 See Validation Order, 7 FCC Rcd at 3532.

62 Id. at 3531.

these incidental services to be common carrier services because the Commission's regulatory scheme required them to be offered on a common carrier basis.[63]

20. In this proceeding, as in the above-mentioned precedents, we are guided by Sections 3(a) and 3(h) in determining whether the particular service at issue is a common carrier service. Section 3(h) plainly states that any wire communications service, as defined in Section 3(a), offered on a common carrier basis for hire is a common carrier service. Under these circumstances, we find that the SMS service offered to RespOrgs is a communications common carrier service and reject Beehive's claims as contrary to the plain meaning of Sections 3(a) and 3(h).

21. We note that this finding is consistent with the Commission's analysis of the distinction between enhanced and common carrier services.[64] In the NATA/Centrex Order, the Commission held that "adjunct" services that could be considered enhanced services and are not themselves basic transmission services will be treated and regulated as basic transmission services if their purpose is to "facilitate the use of the basic network without changing the nature of basic telephone service."[65] In both the NATA/Centrex Order and the Validation Order, a key to delineating the boundaries of common carriage has been the functional relationship between the service in question and the associated transmission service. Those services that are incidental or adjunct to the common carrier transmission service are to be regulated in the same way as the common carrier service.

22. Having found SMS access to be a communications common carrier service, we turn to Beehive's allegations of violations of Sections 201, 202, 203, and 214 of the Act. We address each of the alleged Title II violations below.

c. Title II Claims

Section 201

23. Beehive claims that the tariffed rates it has been charged for SMS access are unjust and unreasonable because they represent DSMI's revenue requirements rather than cost-based rates, and also that the BOCs bear the burden of proof in this Section 208 proceeding to show that their tariffed rates are cost-based. We reject Beehive's burden-of-proof claim. Although

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63 Id. at 3532. The Commission required validation and screening services to be offered on a common carrier basis because the service providers exercised monopoly control over the services. Id.

64 See North American Telecommunications Association, 101 FCC 2d 349 (1985) (NATA/Centrex Order), aff'd on recon., 3 FCC Rcd 4385 (1988).

65 Id. at 361.

carriers who file new or revised rates bear the burden of proof in Section 204 proceedings,[66] it is well settled that complainants in Section 208 formal complaint proceedings bear the burden of proof.[67] Beehive, as the complainant in this proceeding, has the burden of proving that the disputed rates are unjust and unreasonable.

24. Beehive has not met its burden under Section 208. Beehive presents scant evidence to support its claim that the tariffed rates for SMS access are not cost-based and are therefore unjust and unreasonable under Section 201(b). Beehive offers criticisms of the BOCs' ratemaking methodology, but does not demonstrate what the costs of service are and what the tariffed rates should be. Beehive also offers evidence that DSMI handles the daily operations of the SMS, which it alleges demonstrates that the tariffed rates are not cost-based because they reflect DSMI's revenue requirements rather than costs incurred by the BOCs. Although Beehive offers this evidence is support of its Section 201 claim, it seems more probative of Beehive's Section 203 claim that the BOCs are the wrong party to file the tariff. It does not tend to prove that the tariffed rates are not based on the costs of providing the tariffed service. We therefore find that Beehive has failed to meet its burden of proof to show that the rates contained in the SMS Tariff are not cost-based and are therefore unjust and unreasonable in violation of Section 201(b).

Section 202

25. Section 202(a) of the Act prohibits unjust or unreasonable discrimination in connection with like communications services. The crux of Beehive's discrimination claim is that the practice of providing tariffed SMS access to RespOrgs to create records, and non-tariffed SMS access to SCP owners to receive records is inherently preferential to SCP owners. Beehive alleges that as a result of the BOCs' practice, it has been required to pay tariffed rates while it litigated the issue of whether the tariff is lawful. On the other hand, Beehive alleges, SCP owners have presumably had the opportunity to negotiate the rates they are willing to pay for access to the SMS.

26. The defendants counter that Beehive's allegations fail to state a claim under Section 202(a) because the SMS service offered to RespOrgs is not "like" the service offered to SCP owners within the meaning of Section 202(a). According to defendants, the services provided to RespOrgs and SCP owners are fundamentally distinct because RespOrgs make "real

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66 47 U.S.C. § 204(a)(1). We note that in the Section 204 investigation of the SMS Tariff, we are reviewing the information submitted by the BOCs to support the SMS Tariff rates. The BOCs have the burden of proof in that proceeding. See Order Designating Issues for Investigation, 8 FCC Rcd 5132, 5137 (Com. Car. Bur. 1993).

67 See, e.g., Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795 (D.C. Cir 1982) (Ad Hoc v. FCC).

time" entries into the main database and are charged for making such entries, while SCP owners simply receive updated information from the main database.

27. Applicable judicial precedents establish a three-prong test for determining whether a defendant has unreasonably discriminated in violation of Section 202(a). The first prong requires the Commission to determine whether the services at issue are like one another. If so, the Commission must, under the second prong, determine whether there is disparate pricing or treatment between the like services. Third, if disparate pricing or treatment is found to exist, the Commission must decide whether the disparity is justified and, therefore, not unreasonable.[68] In the context of a Section 208 complaint proceeding, the complainant has the evidentiary burden of establishing that the services are like and that discriminatory pricing or treatment exists.[69] Once a prima facie showing of like services and discrimination has been made, the defendant has the burden of establishing that the discrimination is justified and, therefore, not unreasonable.[70]

28. The first question, whether the services are like, depends largely upon what has come to be known as the "functional equivalency" test.[71] This test looks to whether there are any material functional differences between the services. An important aspect of the test, as it has evolved, involves reliance upon customer perception to help determine whether the services being compared provide the same or equivalent functions. The test asks whether the services at issue are "different in any material functional respect"[72] and requires the Commission to examine both the nature of the services and the customer perception of the functional equivalency of the services.[73] The test presumes that not all differences between services make them a priori unlike. Rather, the differences must be functionally material or, put another way, of practical significance to customers.

29. In the instant case, Beehive does not contend that the SMS access services provided to RespOrgs and SCP owners are like. It argues instead that the Commission need not consider their likeness because Section 202(a) prohibits unreasonable discrimination "'in

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68 MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990); Competitive Telecommunications Association. v. FCC, 998 F.2d 1058 (D.C. Cir. 1993) (CompTel v. FCC).

69 Ad Hoc v. FCC, 680 F.2d at 795.

70 Id.

71 See Ad Hoc v. FCC, 680 F.2d at 790; American Broadcasting Corp. v. FCC, 663 F.2d 133 (D.C. Cir. 1980).

72 Ad Hoc v. FCC, 680 F.2d at 795.

73 Id. at 796.

connection with'" like communications services.[74] Beehive contends that because the BOCs discriminate between RespOrgs and SCP owners in offering access to the main database, which in each instance functions in connection with the same 800 access service, the BOCs' actions are unlawful within the meaning of Section 202(a).

30. We find that Beehive has failed to state a prima facie case of unlawful discrimination within the meaning of Section 202(a). Beehive's contention that we need not consider whether the SMS access services provided to RespOrgs and SCP owners are like misses the point of the analysis required under Section 202(a). Commission and court precedent firmly establish that under the first prong of the discrimination analysis the Commission must view the services at issue in light of their material relevance or practical significance to the class of customers or potential customers for such services. We conclude, therefore, that Beehive has failed to provide any persuasive argument or evidence to counter the BOCs' claim that the services are not like.

31. The rate elements of the service the BOCs offer to SCP owners are: (1) central data base access, (2) service establishment, (3) translations and validations, and (4) data base administration and support. The rate elements of the service the BOCs offer to RespOrgs are: (1) central data base access, (2) service establishment, (3) customer records administration, and (4) mechanized generic interface. It is true, as Beehive points out, that the services offered under contract to SCP owners and under tariff to the RespOrgs do include two common rate elements, central data base access and service establishment.[75] These common elements, however, when considered in the context of the services as a whole and the respective functions of affected customers do not, however, make the services functionally equivalent within the meaning of Section 202(a). The separate services offered to RespOrgs and SCP owners are specifically tailored to enable them to perform their separate and distinct functions. It is undisputed that the primary function of SCP owners is to disseminate broadly to carriers routing information that is periodically downloaded to the SCPs from the central database. The function of RespOrgs, on the other hand, is to enter data into the central database and to ensure that the information is accurate and current. We note, for example, that the mechanized generic interface element, which was created specifically for RespOrgs to enable them to enter efficiently large amounts of data into the main database, appears to be neither useful to nor desired by SCP owners.[76] At the same time, there is no indication in the record before us that RespOrgs would be indifferent to the loss of the mechanized generic interface element as a key component of the BOC's SMS service. In the absence of any persuasive showing by Beehive to the contrary, we conclude that the two

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74 Beehive Brief at 33.

75 See, e.g., Beehive Brief at 11.

76 See Bell Operating Companies Tariff F.C.C. No. 1, Transmittal No. 3 (Apr. 23, 1993), Description and Justification at 10.

services are functionally and materially different and, therefore, are not like services within the meaning of Section 202(a). [77]

Section 203

32. Beehive claims that DSMI is the SMS "carrier" and, as such, it, not the BOCs, should file the SMS Tariff. This claim is also unavailing. The Commission has stated, and the courts have affirmed, that Section 203 authorizes an agent to file tariffs on behalf of the operating companies that actually provide telecommunications services.[78] Thus, even if Beehive were correct that DSMI, rather than the BOCs, is the SMS carrier, the BOCs still could properly file the tariff. We do not agree, however, that DSMI is the carrier. We reaffirm the Commission's conclusion in the CompTel Declaratory Ruling that the BOCs are the real parties in interest with respect to the SMS. The creation of DSMI, a wholly-owned subsidiary of Bellcore, does not change the fact that the BOCs control all fundamental aspects of SMS access through Bellcore.[79] Further, the Commission was aware of and considered in the CompTel Declaratory Ruling the BOCs' intention to divorce responsibility for daily operation of the SMS from themselves and Bellcore, and to transfer responsibility for NASC duties to a third-party.[80] The record indicates that the BOCs have accomplished this by creating DSMI as a separate subsidiary of Bellcore to handle the day-to-day operation of the SMS and having DSMI contract out NASC duties to Lockheed. The fact that the BOCs have done as they intended does no harm to the CompTel Declaratory Ruling.

Section 214

33. Beehive claims that the BOCs did not have the necessary prior Section 214(a) authorization to construct the SMS. This claim is unfounded. In response to a request by Bell Atlantic that the Commission determine the obligations of local exchange carriers to provide 800 access to interexchange carriers, the Commission initiated the Docket 86-10 rulemaking that ultimately resulted in the creation of the SMS.[81] At the start of that rulemaking, the Commission

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77 See CompTel v. FCC for a similar analysis.

78 See Communique Telecommunications Inc., DA 95-1149, released May 25, 1995, ¶¶ 19-20 (Communique) (citing Allnet Communications Services, Inc. v. National Exchange Carrier Association, Inc., 965 F.2d 1118, 1120 (D.C. Cir. 1992)).

79 See CompTel Declaratory Ruling, 8 FCC Rcd at 1427.

80 Id.

81 See Provision of Access for 800 Service, CC Docket No. 86-10, Notice of Proposed Rule Making, 102 FCC 2d. 1387 (1986); Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 721 (1988); Report and Order, 4 FCC Rcd 2824 (1989) (First Report and Order); Memorandum Opinion and Order on Reconsideration and Second Supplemental

found that the BOCs did not need prior Section 214(a) authorization to develop and offer SMS access service because it was a new service offering, as opposed to an expansion of capacity (i.e., construction of a new or extended line) for an existing service.[82] The courts have held that because the policy underlying Section 214(a) is the avoidance of overcapacity and the consequent higher charges to customers, it does not apply to new service offerings.[83]

B. RELIEF REQUESTED

1. Contentions

34. Beehive originally sought a variety of remedies, including relief for the alleged Title II violations, and requested the opportunity to file a supplemental complaint for damages.[84] However, it stated in its reply brief that it could be made whole by being awarded damages equal the total of its payments for SMS access service plus interest at the IRS rate for tax refunds and by having returned to it all 800-629-XXXX numbers it had reserved in the database, but lost when its SMS service was disconnected for nonpayment.[85]

Notice of Proposed Rule Making, 6 FCC Rcd 5421 (1991) (Second Supplemental Notice); Order, 7 FCC Rcd 8616 (1992); Second Report and Order, 8 FCC Rcd 907 (1993); Memorandum Opinion and Order on Further Reconsideration, 8 FCC Rcd 1038 (1993); Order, 8 FCC Rcd 1423 (1993); Order, 8 FCC Rcd 1844 (1993).

82 First Report and Order, 4 FCC Rcd at 2839 n.9.

83 MCI Telecommunications Corp. v. FCC, 561 F.2d 365, 375-76 (D.C. Cir. 1977) cert. denied, 434 U.S. 1040 (1978).

84 See Beehive Complaint at 52-53. The relief requested included: an investigation of the SMS Tariff; a hearing to examine the lawfulness of the SMS Tariff under Section 204(a)(1); joinder of Southwestern Bell Telephone Company, Bellcore, and DSMI as defendants; an order enjoining enforcement of the SMS Tariff; dismissal of the SMS Tariff for lack of jurisdiction; an order requiring the BOCs to refund, with interest, all monies paid by Beehive for SMS service; a finding that the BOCs had violated Sections 201(b), 202(a), 203(c), and 214(a); a cease and desist order requiring the BOCs to tariff the service provided to SCP owners; divestiture of the SMS; compensatory damages; an opportunity to file a supplemental complaint for damages; an order requiring the parties to negotiate an amount of damages; and other appropriate relief. Id.

85 Beehive Reply Brief at 10.

35. The BOCs argue that the damages sought by Beehive amount to a refund and the Commission is precluded from ordering refunds in a Section 208 complaint proceeding.[86] Further, the BOCs argue, refunds that benefit all RespOrgs will be properly ordered, if at all, in the Section 204 proceeding if the Commission finds the tariffed rates unreasonable.[87] The BOCs also argue that it would be inappropriate to order the return of the reassigned 800-629-XXXX numbers because they have since been assigned to other RespOrgs, and through them, to end users who are not parties to this proceeding.[88]

2. Discussion

36. We have found no violation of the Act for which damages would lie. Accordingly, we find that Beehive has failed to establish a prima facie case for damages. Nor has Beehive provided a basis for a grant of the injunctive relief it seeks. Beehive's SMS access service was discontinued after it failed to pay in a timely manner for that access.[89]

C. OTHER MATTERS

1. Cross-Complaint

37. The BOCs cross-complained for amounts billed to Beehive, which Beehive has not paid. The BOCs' cross-claim does not allege a violation of the Act over which we have jurisdiction.[90] The cross-complaint is dismissed.

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86 BOC Reply Brief at 7-8 (citing Illinois Bell Telephone Company v. FCC, 966 F.2d 1478 (D.C. Cir. 1992)).

87 BOC Reply Brief at 8-9.

88 Letter to William F. Caton, Acting Secretary, FCC, from Paul Walters, Counsel for Southwestern Bell (Apr. 20, 1995).

89 See Complaint at 19; Amendment and Supplement to Complaint at 1-2; Motion to Dismiss Cross-Complaint at 1; and Answer to Amended and Supplemental Complaint at 1.

90 This Commission is not "a collection agent for carriers with respect to unpaid tariffed charges." Long Distance/USA, Inc. v. The Bell Telephone Co. of Pennsylvania, 7 FCC Rcd 408, 410 (Com. Car. Bur. 1992).

2. Request to Reopen Record

38. Beehive requests that we reopen the record in this proceeding to permit the parties to develop a record on the matter of the proposed sale of Bellcore by the BOCs.[91] We decline to reopen the record on this matter, which is not material to any issue in this proceeding.

3. Administrative Procedure Act

39. Beehive argued in its complaint that the CompTel Declaratory Ruling was invalid and should be disregarded for purposes of deciding whether SMS access is a communications common carrier service because of alleged violations of the Administrative Procedure Act (APA).[92] Because Beehive did not raise this issue in its briefs, it is not clear that it intended to pursue this argument further. In any event, we are not persuaded that an APA violation occurred. Moreover, even if we were to do as Beehive requests and disregard the CompTel Declaratory Ruling in deciding whether SMS access is a communications common carrier service, our conclusion would not change. The analysis contained herein independently demonstrates that SMS access is a communications common carrier service.

IV. CONCLUSION AND ORDERING CLAUSES

40. We conclude that Beehive's argument that SMS access is not a communications common carrier service does not amount to an impermissible collateral attack on the CompTel Declaratory Ruling. Despite Beehive's arguments, however, we continue to believe that the SMS access provided to RespOrgs is a communications common carrier service subject to Title II and should be tariffed. We also conclude that Beehive has failed to prove the Title II violations it has alleged.

41. Accordingly, IT IS ORDERED pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208 that the above-captioned complaint filed by Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc. IS DENIED.

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91 Letter to William F. Caton, Acting Secretary, FCC, from Russell D. Lukas, Counsel for Beehive (May 4, 1995).

92 Beehive Complaint at 19. Beehive alleged that inadequate notice was given that the Commission was considering asserting Title II jurisdiction over the SMS and that the Commission could not properly issue a declaratory ruling on a matter that was the subject of a rulemaking proceeding.

42. IT IS FURTHER ORDERED that the cross-complaint filed by the Bell Operating Companies IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary