

LEXSEE 7 FCC RCD 7942

In the Matter of BUSINESS WATS, INC., Complainant, v. AMERICAN
TELEPHONE AND TELEGRAPH COMPANY, Defendant

File No. E-93-011

FEDERAL COMMUNICATIONS COMMISSION

7 FCC Rcd 7942; 1992 FCC LEXIS 6661

RELEASE-NUMBER: DA 92-1613

December 7, 1992 Released; Adopted November 25, 1992

ACTION: [*1]

MEMORANDUM OPINION AND ORDER

JUDGES:

By the Deputy Chief, Enforcement Division, Common Carrier Bureau

OPINIONBY: WEISS

OPINION:

1. In this order, we address a Petition for Emergency Relief (Petition) filed by Business WATS, Inc (BWI), a reseller of the Distributed Network Services (DNS) of American Telephone and Telegraph Company (AT&T). BWI seeks the issuance of a Commission order preventing AT&T from (1) requiring BWI to pay disputed non-DNS charges, (2) disconnecting DNS service to BWI, (3) restricting provisioning of new DNS or similarly tariffed service to BWI or BWI's customers, or (4) imposing security or advance payment requirements on BWI for all tariffed services, pending hearing of BWI's complaint. For reasons discussed below, we deny BWI's Petition.

2. In determining whether to grant the extraordinary remedy of a stay of its action or other extraordinary relief in the nature of a temporary restraining order or preliminary injunction, the Commission generally considers whether the petitioner has made a strong showing that it is likely to prevail on the merits on appeal, that irreparable injury would result absent a stay, a stay will not substantially harm other interested parties, and that a [*2] stay will be in the public interest. n1 BWI has not shown that it would be irreparably injured by paying the disputed amounts billed to it by AT&T or by meeting AT&T's security or advance payment requirements, and that it cannot be made whole should it ultimately prevail on the merits of its complaint. n2 The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations. n3

n1 See *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 104 FCC 2d 451, 456 (1985), citing *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Big Valley Cablevision, Inc.*, 85 FCC 2d 973, 978 (1981).

n2 BWI's showing of supposed irreparable harm consists mostly, if not entirely, of conclusionary allegations that it will be put out of business and forced to abandon the resale market if AT&T cuts off its service. (Petition at 10-15). In light of BWI's failure to show irreparable injury, we need not determine whether BWI met the other criteria of the four-prong test for a stay or injunctive relief.

n3 *MCI Telecommunications Corp.*, 62 FCC 2d 703, 705-06 (1976) (Customer may not withhold payment of properly billed tariffed charges for voluntarily ordered services).

[*3]

3. The Commission generally is disinclined to intervene in matters involving a carrier's decision to terminate service of a particular customer that has failed to pay legally effective and overdue tariffed charges for tariffed service that the carrier has duly rendered. Nor is the Commission inclined to second guess a carrier's decision, with respect to a particular customer, to impose deposit, advance payment or other security arrangements provided for in its tariff. Such determinations properly are matters within the carrier's business judgment and, as such, ordinarily will be left undisturbed, absent a showing that the carrier acted unreasonably or unduly discriminated. n4

n4 *Business Choice Network v. AT&T*, FCC Rcd (Enf.Div.Com.Car.Bur.1992); slip op., DA 92-1582 (released Nov. 18, 1992) at 2.

4. Carriers have been cautioned that a decision to terminate a customer's service, or their refusal to accept or to provision a customer's additional orders for service, particularly when such customer, as here, is a competitor, has grave consequences and should not be taken lightly. Such action would be proper, and not anticompetitive, only if a carrier had "substantially [*4] performed" and "reasonably discharged all of its obligations" under its tariff, including, but not limited to, billing accurately and granting credits called for under all of the circumstances of a particular case. n5 Whether AT&T's conduct in this regard was, in fact, lawful is an issue to be determined, following further discovery, on the record in the above-captioned proceeding.

n5 Id. at 3, citing *Mocatta Metals*, 54 FCC 2d 104, 117-18 (ALJ R. Lozner 1975).

5. In view of the foregoing, we conclude that BWI has not met its burden for the extraordinary relief that it seeks.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the Petition for Emergency Relief, filed by Business WATS, Inc. on November 5, 1992, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss

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Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau