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

In the Matter of)

Open Network Architecture Tariffs)
of Bell Operating Companies)

CC Docket No. 92-91

TO: The Commission

REPLY TO OPPOSITIONS

MCI Telecommunications Corporation (MCI) hereby replies to the oppositions to its Petition for Reconsideration of the Commission's ONA Investigation Final Order in the above-captioned proceeding.¹

The principal issue raised by MCI in its Petition for Reconsideration of the ONA Investigation Final Order (Order) relates to the Commission's characterization of the extent to which MCI and other intervenors were permitted to participate in this important tariff investigation. As noted in MCI's Petition, the Commission in paragraph 80 of the Order concluded that:

the redactions did not prevent interested parties from making a meaningful review of SCIS for purposes of evaluating the ONA tariffs. The intervenors were able to conduct sensitivity analyses, i.e., to examine how changes in SCIS inputs affect SCIS outputs, on most of the relevant SCIS inputs. These sensitivity analyses...enabled the intervenors to raise specific questions regarding the reasonableness of the cost and rate development.... We conclude that the restrictions placed by Bellcore and US West on the examination of Redaction II permitted intervenors an adequate opportunity for review.

There is no record support for any of these determinations. To the extent the BOCs merely echo the Commission's "findings" and "conclusions" on these key issues, they contribute nothing whatsoever of value toward the resolution of the important issues raised in MCI's petition. The BOC oppositions serve only to prolong the Commission's evident confusion and thereby prevent it from focusing on the important issues raised by intervenors in this proceeding.

Intervenors' Ability To Conduct Sensitivity Analyses. MCI believed that it had made it quite clear in its Opposition to Direct Cases (specified by the

¹ FCC 93-532 (released Dec. 15, 1993).

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Commission as the appropriate vehicle for raising such issues) that sensitivity analyses were "impossible"² with either of the redactions, thereby preventing meaningful participation in the tariff investigation. In its Petition, MCI noted that there were no credible statements in the record contradicting MCI's observations as to the deficiencies of the redacted models, and that there was, therefore, no credible support for the Commission's claim that "intervenors were able to conduct sensitivity analyses...."³

Of the four BOCs addressing this issue in Oppositions to MCI's Petition, only one accurately characterizes MCI's contention that "intervenors were unable to perform sensitivity analyses on data inputs and thus to enjoy meaningful participation in the tariff investigation." BellSouth Opposition at 2. The other three baldly assert — without citation to any evidence of record, thereby bearing silent witness to the merits of MCI's position on this issue — that intervenors were able to conduct sensitivity analyses.⁴

Intervenors' Specific Questions. Two of the BOCs echo the Commission's assertion, at para. 80 of the Order, that the intervenors' "sensitivity analyses, in addition to the information in the Andersen Report, enabled the intervenors to raise specific questions regarding the reasonableness of the cost and rate development." See SW Bell Opposition at 3 and Ameritech Opposition at 2.

For its part, Ameritech merely paraphrases the Commission's description

² MCI Opposition at 32.

³ MCI was not the only intervenor to assert that the redactions made it impossible for intervenors to conduct sensitivity analyses. See, e.g., Ad Hoc's Opposition to Direct Cases at 7:

As [Ad Hoc's expert] ETI points out, only Arthur Andersen was given access to the data necessary to perform these analyses; intervenors were not permitted to even see, much less analyze, such data.

See also, Sprint Comments (January 27, 1994) at 1; Oppositions to Direct Cases of AT&T (p. 6, n. 9); Metromedia at 10-11; Sprint at 4-7 and n. 8; WilTel at 19. With respect to this issue, there is total unanimity among the intervenors who reviewed Redaction II; neither Allnet nor GSA participated in that phase of the proceeding.

⁴ See Ameritech at 3, NYNEX at 3, SW Bell at 3.

of the "specific questions" raised by intervenors; its echo adds nothing of substance. SW Bell, at 3, asserts that MCI formulated its questions "after...its sensitivity analyses...." — an obvious absurdity, inasmuch as MCI's assertion that such analyses were "impossible" is uncontroverted by any record evidence whatsoever. Like the Commission, Ameritech and SW Bell have ignored the obvious: of all of the "specific questions regarding the reasonableness of the cost and rate development," none were based upon sensitivity analyses of SCIS and SCM, which were not conducted. Some of the "specific questions" were based upon on limited information in the redacted Andersen report. The remainder were, as MCI noted in its Petition, "well-documented suspicions" derived from intervenors' review of the limited materials available to them: the Designation Order⁵, the BOC Direct Cases, and the severely redacted models — in some cases augmented by the past experience of intervenors' experts with SCIS, SCM or similar models in state proceedings where far more information was available, with or without non-disclosure agreements.⁶ As MCI pointed out, there is no way of knowing whether sensitivity analyses would have turned up numerous other significant issues.

Andersen's Independent "Audit". Ameritech, at 3, asserts that "the Commission provided for an independent audit of the SCIS model by Arthur Andersen, which filed a report." Similarly, NYNEX, at 4, describes "an independent audit of the entire SCIS and SCM program by an outside accounting firm, under Commission supervision." Just as there were no "sensitivity analyses" conducted by intervenors, there was no "audit" — notwithstanding the

⁵ The "specific questions" enumerated by Ameritech at 2 as having been raised by intervenors inexplicably include three of the issues specifically designated by the Commission for investigation: "whether the information properly represented the mix of each BOCs' [sic] switches" [Designation Order, issue (2)], "whether the information should reflect the embedded or prospective cost of the switches" [Designation Order, issue (4)], "as well as the cost of money used in the formula." [Designation Order, issue (3)].

⁶ For example, MCI expert Don Wood was able to view more of SCIS than permitted under Redaction I or II without signing a confidentiality agreement in Florida Docket 900633-TL and in New York Case No. 28425. See also AT&T Opposition to Waiver Petitions, October 4, 1991 at 8, discussing numerous state proceedings where SCM and SCIS were made available to intervenors pursuant to protective orders.

Bureau's unambiguous directive that an independent audit be conducted. The "independent audit" was quickly scaled back to an "independent review" over the vigorous protests of MCI and other intervenors. Andersen's unwillingness to characterize its limited "review" as an "audit" speaks volumes with respect to the degree of rigor and thoroughness of its undertaking, and the eleventh-hour efforts of these BOCs to create an "audit" where none was ever undertaken speaks volumes with respect to the merits of their position.

The Independent Staff Review. Southwestern Bell, at 3 n. 11, cites the "Commission's ability to conduct its own analyses" as support for the proposition that "the Commission obviously found it unnecessary to have the "benefit" of all of the intervenors' analyses."⁷ Even if NYNEX's characterization of the Andersen review as covering "the entire SCIS and SCM program" were correct, the staff's "independent review" of the SCIS models submitted in camera could not have been equally comprehensive: the SCIS In Camera Order required each Bell Operating Company to submit SCIS or SCM for "one study area" only.⁸ The Commission's assertion, at para. 82 of the Order, that "the results of Andersen's analysis were consistent with our conclusions, based upon independent staff review" identifies four issue areas of review ostensibly undertaken by staff. MCI has reviewed the four sections of the Order cited by the Commission in the notes accompanying para. 82, and has been

⁷ The "obvious" Commission finding referenced by SW Bell shares two salient characteristics with many other "findings" in this proceeding: it is neither set forth in the Order nor supported by any record evidence.

⁸ There is no indication that the Commission staff (or, for that matter, Arthur Andersen) ever reviewed two "other" cost models used by BOCs to develop ONA BSEs. The first of these "other" models is the CCSCIS model used by Ameritech to develop direct costs for one BSE (SCIS In Camera Order at 2, n. 4). The second unreviewed model is the pre-1987 version of SCIS employed by US West. (Compare SCIS In Camera Order at 2, n. 4: "US West does not rely on SCIS for the development of BSE direct costs...." with Order at 22, n. 113:

US West also did not submit the pre-1987 SCIS version it used to develop the majority of its BSE rates in January 1992, as was required by the SCIS In Camera Order. In April 1992, US West explained which software was had been used to develop each of its 24 BSEs, and offered to submit the SCIS software it had used.

There is no evidence that the Bureau accepted US West's "offer"; if it did, it denied intervenors any opportunity to review US West's pre-1987 SCIS, even in redacted form.

unable to find any evidence whatsoever that an independent staff review, described as "examin[ing] proprietary materials from additional or different perspectives" was conducted.⁹ Although the Commission broadly asserted that "[t]he staff review process did not duplicate the Andersen effort," none of the conclusions of that independent review process are set forth in the Order. The Order does not identify any issues that were not "referred to Andersen" by the staff. Order at para. 22. In at least one instance, the Commission dramatically overstated Andersen's "findings," thereby leaving in doubt the accuracy of its assertion that Andersen's report and its "own review" — nowhere described — support the conclusion reached by the Commission.¹⁰

Applicability of the "FOIA Standard". Two of the BOCs rely heavily on the Commission's determination that SCIS should not be made available for public disclosure under the Freedom of Information Act (FOIA) in support of the Commission's decision to limit intervenor participation.¹¹ As the Commission recently recognized in the 800 Data Base Access Tariff Proceeding, the

⁹ Although each of the cited sections of the Order makes a passing reference to "our own review" (para. 17), "our internal review" (para. 21), "our analysis" (para. 31), or "staff review" (para. 38), all supporting data not based on public record evidence (BOC direct cases, intervenor oppositions and BOC replies) was apparently derived from the Andersen report. See, e.g., Order at notes 31, 34, 35, 45, 48, and 76.

¹⁰ In Section III.B.1., "Representative Model Offices," at para. 17, the Commission asserts that "Andersen verified that SCIS could not accommodate all the switching offices in BellSouth's region, and that the user-defined study produces results which are virtually identical to the result BellSouth would have obtained if it could include all its switching offices in the model office." [emphasis added]. These assertions dramatically overstate the conclusions set forth in the redacted Andersen report made available to intervenors. Andersen did not claim that it "verified" the capability of the SCIS software by contacting its developer, Bellcore, but merely that it "reviewed the explanation provided by BellSouth." Additionally, Andersen did not express a conclusion that the results of a user-defined study would produce results which are "virtually identical to the result [it] would have obtained" had SCIS been able to accommodate all switching offices. On the contrary, having already accepted BellSouth's explanation of the capacity limits of SCIS as a given, Andersen merely stated that it "believes that the user defined approach used by BellSouth produces results that are consistent with the results that would have been obtained by using the model office study approach followed by the other BOCs."

¹¹ Ameritech, at 2-3: "the SCIS model was properly found to be a trade secret and exempt from disclosure under the Freedom of Information Act." See also NYNEX, at 2.

"interest in maintaining the private, confidential status of commercial and financial information, including trade secrets" which underlies FOIA, must be balanced in cases such as this against another "fundamental" policy, namely that "access to relevant information is preferred because it enables interested persons to participate fully in a Section 204 investigation."¹² In the Order in this proceeding, the Commission acknowledged in passing (at para. 78) the need to balance these competing interests, but the balancing process is nowhere in evidence.¹³

The Disclosure "Compromise". BellSouth, at 4, asserts that the "parameters of intervenors' access to SCIS material were the product of a compromise painstakingly developed between competing interests." BellSouth ignores the fact that one of the two "fundamental" interests (see 800 Data Base Order, above) — represented by the ratepayer intervenors — was absent from the room when the "compromise" was negotiated. In a similar vein, US West (at 3, n. 8) asserts that "both the Commission and the filing carriers bent over backward to permit MCI to participate fully in the tariff proceeding." Any "bending over" which may have occurred must have taken place in closed door sessions to which only the Commission staff, Bellcore, the BOCs and the switch vendors were admitted. MCI witnessed none of it.¹⁴

The Limits of "Discretion". Some of the BOCs question the legal significance of the unprecedented procedures used in this proceeding, characterizing intervenor participation in tariff investigations as purely "discretionary" and claiming that the BOCs' submissions of undisclosed cost models

¹² Order, DA 94-99, CC Docket No. 93-129, released January 31, 1994, at 6.

¹³ The ultimate conclusion in para. 80 appears to have been strongly influenced, on the one hand, by the Commission's erroneous "conclusions" with respect to the degree of intervenor participation and, on the other, by the Commission's earlier decision on the FOIA issue (n. 173).

¹⁴ As noted in the Commission's companion SCIS Review Order at note 25, US West unilaterally modified the "one attorney, two-expert" provision of the Bureau-prescribed Model Non-Disclosure Agreement "to accommodate the original attorney's vacation plans." US West's "flexibility" and "willingness to bend over backward" did not extend to modification of the same provision at the request of MCI. See MCI Opposition (April 1, 1992) at 10, n. 15.

and other cost support data was "primarily to aid the Commission in exercising its.... discretionary decision" as to whether to suspend a tariff and initiate an investigation, rather than "to confer important procedural benefits upon individuals."¹⁵

The problem, of course, is that here the Commission already made that discretionary decision in initiating this investigation under Section 204(a) of the Communications Act, which provides for a "hearing" "upon reasonable notice." It is elementary that an agency's failure "to disclose the information upon which it relies" violates "quasi-adjudicatory" informal "notice" and "hearing" requirements. See U.S. Lines, Inc. v. FMC., 584 F.2d 519, 535, 539 (D.C. Cir. 1978). Like the informal "notice and hearing" requirement at issue in U.S. Lines, the public right to a "hearing" "upon reasonable notice" under Section 204 is effectively nullified when the agency decision is based... on... secret points... to which the public and the participating parties have no access." Id. at 539. "[T]he requirement of a hearing to determine the public interest means, at a very minimum, that an opportunity must be afforded for meaningful public participation."

Here the parties were unable to probe the secret cost models on which the rates ultimately approved by the Commission were based. As in U.S. Lines, "there was no such opportunity...for a real dialogue or exchange of views." Id. at 540. Such secret decisionmaking does "violence not only to" Section 204 "but to the basic fairness concept of due process as well." Id. at 541.¹⁶

Moreover, it is equally elementary that the Commission's secret decision-making and the concomitant failure to disclose essential material to affected parties are arbitrary and capricious.¹⁷ Not only is an agency's

¹⁵ Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1235 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981), quoting American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 538 (1970).

¹⁶ See also, Sea-Land Service, Inc. v. FMC, 653 F.2d 544, 551-52 (D.C. Cir. 1981).

¹⁷ See U.S. Lines, supra, 584 F.2d at 533-35, 541-43.

reliance on undisclosed data for its decision arbitrary and capricious, id. at 533, but "the critical role of adversarial comment in ensuring proper functioning of agency decisionmaking" also requires timely disclosure of essential data to affected parties to avoid arbitrariness, id. at 542, independent of the agency's reliance on undisclosed data in its decision. Id. at 534. See also, Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (citing need for "adversarial discussion among the parties").

Even the Commission, in the ONA Investigation Final Order, concedes that "data sufficient to support the agency's actions [must be]... available... for comment."¹⁸ In this proceeding, however, because of the redactions in the cost models, intervenors were unable to perform the sensitivity analyses that were absolutely necessary to probe those models and thus the rates generated thereby. As in American Lithotripsy Society v. Sullivan, 785 F. Supp. 1034 (D.D.C. 1992), the "public" was not provided "a chance to comment on the methodology the agency used to derive a rate from the data....[T]he agency...cannot function properly without having the benefit of such comments before it makes any final decisions."¹⁹

¹⁸ Id. at ¶8 n.16, citing B.F. Goodrich Co. v. Department of Transportation, 541 F.2d 1178, 1184 (6th Cir. 1976), cert. denied, 430 U.S. 930 (1977); In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1354 n.9 (D.C. Cir. 1980).

¹⁹ Id. at 1036. See also, Portland Cement Ass'n v. Ruckelshaus, 486 F. 2d 375, 392 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (citing "refusal of the agency to respond to what seem to be legitimate problems with the [agency's] methodology" as "a critical defect in the decision-making process").

Conclusion

Accordingly, the ONA Investigation Final Order should be reconsidered and the investigation reopened and conducted in a manner that permits meaningful participation by intervenors, thereby permitting a review of all of the issues necessary to assure reasonable ONA rates.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By:

Larry A Blosser

Larry A. Blosser

Frank W. Krogh

Donald J. Elardo

1801 Pennsylvania Avenue, N.W.

Washington, D.C. 20006

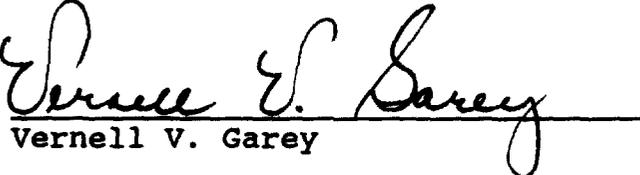
(202) 887-2727

Its Attorneys

Dated: February 8, 1994

CERTIFICATE OF SERVICE

I, Vernell V. Garey, hereby certify that copies of the foregoing "REPLY TO OPPOSITION" in CC Docket 92-91 were mailed first-class, postage prepaid, to the following on this 8th day of February 1994.


Vernell V. Garey

Kathleen Levitz*
Chief, Common Carrier
Bureau
Federal Communications
Commission
1919 M Street N.W.
Washington, D.C. 20554

Gregory Vogt, Esq.*
Chief, Tariff Division
Common Carrier Bureau
Federal Communications
Commission
1919 M Street N.W.
Washington, D.C. 20554

Stan Wiggins, Esq.*
Senior Attorney
Tariff Division
Common Carrier Bureau
Federal Communications
Commission
1919 M Street N.W.
Washington, D.C. 20554

James F. Britt
Executive Director
Bell Communications Research
LCC 2E-243
290 West Mt. Pleasant Avenue
Livingston, NJ 07039

U S WEST Communications, Inc.
1020 19th Street, N.W.
Suite 700
Washington, DC 20036

James S. Blaszak
Charles C. Hunter
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 - East Tower
Washington, DC 20005

J. Scott Nicholls
Roy L. Morris
Allnet Communications Services,
Inc.
1990 M Street, N.W.
Suite 500
Washington, DC 20036

Richard E. Wiley
Michael Yourshaw
William B. Baker
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006
Counsel for American
Newspaper Publishers Association

Francine J. Berry
David P. Condit
Peter H. Jacoby
Edward A. Ryan
American Telephone & Telegraph Co.
295 North Maple Avenue
Room 3244J1
Basking Ridge, NJ 07920

Daryl L. Avery
Peter Wolfe
Public Service Commission
of the District of Columbia
450 Fifth Street, N.W.
Washington, DC 20001

Michael J. Ettner
General Services Administration
Personal Property Division
18th & F Streets, N.W.
Room 4002
Washington, D.C. 20405

Leon M. Kestenbaum
US Sprint Communications
Company Limited Partnership
1850 M Street, N.W.
Suite 1110
Washington, DC 20036

Peter A. Rohrbach
Karis A. Hastings
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004

Randall B. Lowe
John E. Hoover
Michael R. Carper
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005
Counsel for Metromedia
Communications Corporation

Paul DeJongh
Northern Telecom, Inc.
P.O. Box 13010
Research Triangle
Park, NC 27709-3010

L. Michelle Boeckman
730 International Parkway
Richardson, TX 75081
Counsel for Ericsson Network
Systems

Albert Halprin
Stephen L. Goodman
Halprin, & Goodman
1301 K Street N.W.
Suite 1020 East
Washington, D.C. 20005

Jo Ann Goodard Riley
Director
Pacific Telesis
Federal Regulatory Relations
1275 Pennsylvania Avenue, N. W.
Suite 400
Washington, D.C. 20004

International Transcription
Service*
1919 M Street, N.W., Rm 246
Washington, D.C. 20554

Floyd S. Keene
Attorney for Ameritech
2000 West Ameritech Center Dr.
Rm. 4H64
Hoffman Estates, IL 60196-1025

Bell Atlantic
1710 H Street, N.W.
Washington, D.C. 20006

William B. Barfield
Attorney for BellSouth
1155 Peachtree St., N.E., Rm. 1800
Atlanta, GA 30367

Mary McDermott
Attorney for NYNEX
120 Bloomingdale Road
White Plains, NY 10605

William C. Sullivan
Attorney for Southwestern Bell
1010 Pine St., Rm. 2305
St. Louis, MO 63101