EX PARTE OR LATE FILED

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

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In the Matter of	)	
	)	
Local Exchange Carriers' Rates	)	
Terms and Conditions for Expanded	)	CC Docket No. 93-162
Interconnection for Special Access	)	
	)	

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MOTION TO ACCEPT LATE-FILED OPPOSITION

Sprint Communications Company ("Sprint") hereby respectfully requests that the Commission accept its Opposition filed on August 30, 1994 in the above-captioned matter. Sprint submits that good cause exists to permit Sprint to file opposition one day out of time. Due to difficulties in internal coordination, the opposition was not finalized until late on August 29, the due date for filing. Sprint is hand-serving this opposition on Bell Atlantic today, and thus, no prejudice will be caused to Bell Atlantic. In addition, the record in this matter will be more complete if the Commission accepts Sprint's opposition.

WHEREFORE, Sprint respectfully requests that the Commission accepts its Opposition filed simultaneously herein in the above-captioned proceeding.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY L.P.

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Its Attorneys

August 30, 1994

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Local Exchange Carriers' Rates	)	
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OPPOSITION

Sprint Communications Company L.P. ("Sprint") hereby files the following Opposition to the Petition for Clarification filed by Bell Atlantic on June 30, 1994 in the above-captioned matter. Bell Atlantic claims (at 1) that the Bureau had

> "...erroneously state[d] that ICB arrangements are common carrier offerings and that, '[o]nce sufficient knowledge is gained about the costs of the service, the Commission requires that the ICB rates be converted to averaged rates applicable to all customers.'"

According to Bell Atlantic, the Bureau's statement is at odds with the decision of the D.C. Circuit in *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (1994) (the "*Dark Fiber Decision*"), where the Court found (or so the argument runs) that by treating ICB dark fiber tariffs as common carrier offerings, the Commission had "contradicted [its] long-standing policy not to consider ICB offerings as common carriage" (Petition at 2).

The D.C. Circuit made no such determination in the *Dark Fiber* case.[1] The Court noted (at 1482-83) that

> [i]n 1984 the FCC commenced a rulemaking seeking "to modify [the Commission's] traditional common-carrier treatment of special construction of lines and special service arrangements." *In re Special Construction of Lines and Special Service Arrangements Provided by Common Carriers*, 97 F.C.C.2d 978, 981 (1984) (Special Construction NPRM").

But, as the Court also noted, six years later this rulemaking was abandoned (at 1483). Surely, the abandonment by the Commission of a rulemaking designed to change the status quo requires the conclusion that the Commission decided not to make the change contemplated. The status quo therefore remained in effect and, at least as far as the Commission was concerned, ICBs were consistently regarded as common carriage. This was true before the Commission initiated its rulemaking in 1984, during the time the rulemaking was pending and after it was abandoned by the Commission in 1990.

The view that ICBs have traditionally been regarded as common carrier offerings is shown by the fact that ICBs--even if limited to a specific customer--were uniformly tariffed under existing Commission practice. Except for carrier-to-carrier contracts which are required to be filed under Section

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[1] Although Bell Atlantic's petition is otherwise meticulous in its citations to referenced material, there is no citation to support the assertion that the Court found the FCC had contradicted its own long-standing policy.

211(a), there would ordinarily be no basis[2] for requiring ICB customer contracts to be filed with the Commission unless these filings were considered to cover common carrier service. Thus, under Commission rules, carriers are not only excused from filing tariffs for non-common carrier services, they are, in fact, forbidden to do so. See the Commission's decision in the *Second Computer Inquiry*, 77 F.C.C. 2d 384 (1980).

The Court's citation to the Commission's language in the *LEC Price Cap Order* (5 FCC Rcd 6786, 6810 (1090) does not require a different conclusion. The Court simply relies upon this language as proclaiming the Commission's view "that not all ICB offerings are indiscriminate offers of common carriage service" (at 1482) (emphasis added). The problem here is the use of the word indiscriminate. Sprint believes that the Commission considered--perhaps correctly, perhaps not--that even ICB offerings which were "simply unique service arrangements to meet the needs of specific customers that will never evolve into generally available offerings" (*In re Policy and Rules Concern Rates for Dominant Carriers*, 5 F.C.C. Rcd at 610) were, nevertheless, common carriage.[3] In the

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[2] The Commission could, of course, require specific contracts to be filed under Section 211(b) even though these contracts do not involve common carriage.

[3] This is similar to the situation created by the D.C. Circuit's decision in *CompTel v. FCC*, 998 F.2d 1058 (1993), where AT&T was permitted to file individually tailored "integrated service packages" which were designed to

Commission's view, these offerings for specific kinds of special construction, for temporary construction, for unique facilities and the like should be made available to all customers. The only caveat was that because there was limited experience with each such offering, the cost averaging typical of common carriage regulation would not be appropriate and that a reasonable, perhaps necessary, alternative was to charge each customer the costs of the specific facilities provided--that is, to charge each customer an individual case based rate. Nevertheless, notwithstanding the use of such separate rates, and notwithstanding the difficulty of determining discrimination, it was generally believed that such services were an integral part of common carriage and that each customer should be entitled to obtain such service as long as such customer was willing to pay the price.

Under the circumstances, the most that Bell Atlantic can claim here is that the D.C. Circuit's decision in the *Dark Fiber* case overruled long-standing Commission practice by finding that ICBs were not, in fact, common carriage. Even this contention, however, substantially overstates the Court's holding. The Court's decision determined only that the filing of an ICB tariff does not, in and of itself, require a carrier to make the service it is providing pursuant to ICB tariffs

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accommodate the needs of a single customer. It has never been found that such service is not common carrier service.

available at generalized average rates to all users. The Court found that in order to require service at generalized average rates, the Commission must first conclude, based on the nature of the service itself, and not simply on the fact that a carrier filed an ICB rate, that the Act mandates the provision of a broader offering. The Court's decision does not determine that all ICBs are "private carriage."

Nor does the Court suggest any intent to free carriers from the obligation to file ICB rates for services tailored to specific customers. Rather, the Court stated specifically..."we do not decide today whether the Commission may draw on other authority, such as its ancillary jurisdiction, to regulate petitioners' [dark fiber] services."

WHEREFORE, for the reasons stated here, Bell Atlantic's Petition for Clarification should be denied.

Respectfully submitted,

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Its Attorneys

August 30, 1994

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **OPPOSITION** of Sprint Communications Company L.P. was sent by United States first-class mail, postage prepaid, on this the 30th day of August, 1994, to the parties on the attached list:

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