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

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of )  
 ) CC Docket No. 93-36  
Tariff Filing Requirements for )  
Nondominant Common Carriers )

**OPPOSITION**

MCI Telecommunications Corporation (MCI) hereby opposes Bell Atlantic's Petition for Partial Reconsideration (Petition) in which Bell Atlantic asks the Commission to reconsider its Order<sup>1/</sup> insofar as it continues to exempt nondominant carriers from filing copies of their service-related contracts with other nondominant carriers (intercarrier contracts) with the Commission.

Bell Atlantic's Petition is stale and must be dismissed. In actuality, Bell Atlantic is seeking reconsideration of a 1986 Commission action in which nondominant carriers were exempted from filing their intercarrier contracts with the Commission.<sup>2/</sup> The Commission's Reporting Order was released on December 4, 1986, and Public Notice of it appeared in the Federal Register on December 23, 1986.<sup>3/</sup> Thus, petitions for reconsideration of the Reporting Order were due no later than January 22, 1987.

<sup>1/</sup> Order, CC Docket No. 93-36, FCC 95-399, rel. Sept. 27, 1995.

<sup>2/</sup> See Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 43.74 of the Commission's Rules to Eliminate Certain Reporting Requirements, Report and Order, 1 FCC Rcd 933, 934 & Appendix A (1986) (Reporting Order).

<sup>3/</sup> 51 Fed. Reg. 45,890 (1986).

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Consequently, Bell Atlantic's Petition is barred as untimely under Section 405(a) of the Communications Act and Section 1.429(d) of the Commission's Rules. The Commission is without authority to waive the statutory 30 day filing period for petitions for reconsideration specified in Section 405(a) of the Act and, accordingly, it has no choice in this matter.<sup>4/</sup>

In the Reporting Order, the Commission amended Section 43.51(a) of its rules to exempt nondominant carriers from filing intercarrier contracts. In 1993,<sup>5/</sup> the Commission amended Section 43.51(a) of its Rules only to delete the specific reference to the "forbearance rule," which was invalidated by judicial action.<sup>6/</sup> This was not a substantive change but, rather, simply removed the reference without any intent on the Commission's part to affect the rule itself. This amendment was then corrected by an Erratum (released Aug. 31, 1993). However, the Erratum published in the Federal Register on September 15, 1993<sup>7/</sup> did not contain the August 31, 1993 Erratum text and, therefore, "the text of Section 43.51(a), as corrected by the Erratum, does not appear in the Code of Federal Regulations."<sup>8/</sup>

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<sup>4/</sup> See Federation of American Health Systems, 9 FCC Rcd 3303, 3304 (Com. Car. Bur. 1994).

<sup>5/</sup> Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993) (Nondominant Filing Order).

<sup>6/</sup> MCI Telecommunications Corp. v. American Tel. & Tel. Co., 114 S.Ct. 2223 (1994) (MCI v. AT&T).

<sup>7/</sup> See 58 Fed. Reg. 48323 (Sept. 15, 1993).

<sup>8/</sup> Order at ¶¶ 18-19.

In issuing its Order, the Commission observed that, "in these circumstances" further notice and comment "is unnecessary" since "this portion of the Order is intended solely to correct an oversight in publication in the Code of Federal Regulations . . . because the amendment to Section 43.51(a) adopted in this portion of the Order is editorial in nature."<sup>9/</sup>

As noted, it is clear that Bell Atlantic's Petition is not directed against the purely ministerial action taken in the instant Order but, rather, is a challenge to the substance of the Commission's 1986 Reporting Order. Thus, Bell Atlantic states that "the only time the Commission attempted to justify this broad [Section 211] exemption was nearly nine years ago," citing the Reporting Order<sup>10/</sup>, and it then proceeds to criticize the legal conclusions of that order without addressing (since there was nothing to address) the ministerial treatment of Section 43.51 in the instant Order.<sup>11/</sup> Consequently, Bell Atlantic is simply using the Order as a vehicle for bootstrapping an argument that it failed to make nearly nine years ago. For this reason, Bell Atlantic's Petition is untimely.

Bell Atlantic's Petition also fails on the merits. Bell Atlantic argues that Section 211 of the Act requires every carrier to file copies of all contracts and that the Commission does not have the statutory authority to exempt all nondominant

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<sup>9/</sup> Id. at ¶ 20.

<sup>10/</sup> Bell Atlantic Petition at 3.

<sup>11/</sup> Id. at 5-6.

carriers from this mandate. Bell Atlantic incorrectly relies on the Court's decision in MCI v. AT&T striking down the Commission's forbearance rule which involved tariffing under Section 203 of the Act to support its position.

Section 211(a) of the Act states that "[e]very carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party."<sup>12/</sup> Section 211(b) of the Act states that "[t]he Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine."<sup>13/</sup> In the Reporting Order, the Commission found that the second clause in Section 211(b) authorizes the Commission to exempt the filing of any contract it determines to be minor, "even if the filing requirement stems from Subsection (a) of Section 211."<sup>14/</sup> The Commission reasoned that limiting the application of the exemption in subsection (b) to the first clause of that subsection would render it superfluous "since the Commission could effectuate an exemption simply by not imposing a filing

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<sup>12/</sup> 47 U.S.C. 211(a).

<sup>13/</sup> 47 U.S.C. 211(b).

<sup>14/</sup> Reporting Order at 934 (citation omitted).

requirement in the first place...".<sup>15/</sup> The Commission correctly found that such an interpretation would violate the rules of statutory construction, which require that "statutes be reasonably construed and that no part be rendered inoperative...".<sup>16/</sup>

The Court's decision in MCI v. AT&T concerned the Commission's authority under Section 203 of the Act and does not negate the Commission's interpretation here because Section 203 is not parallel to Section 211. Specifically, in MCI v. AT&T, the Court found that the Commission erred in finding that the word "modify" in Section 203 gave it the authority to "exempt" carriers from filing tariffs. In Section 211, however, Congress specifically gave the Commission the authority to "exempt" the filing of certain contracts.

Finally, Bell Atlantic argues that, even if the Commission has the authority to exempt the filing of subsection (a) contracts, it can only "exempt specific contracts that it considers 'minor' from the filing requirement, not all contracts entered into by broad categories of carriers."<sup>17/</sup> Bell Atlantic further argues that circumstances have changed since the Commission found that contracts between nondominant carriers are "minor" that make that finding invalid today. Thus, it argues that today Competitive Access Providers provide interstate access

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<sup>15/</sup> Id.

<sup>16/</sup> Id. (citation omitted).

<sup>17/</sup> Bell Atlantic Petition at 4.

services that are worth "tens of millions of dollars" and that AT&T, which "still carries more than half of the long distance traffic in the United States and provides a great many of the facilities which its competitors... resell in providing their interexchange services," also has contracts for service worth "tens or even hundreds of millions of dollars."<sup>18/</sup> According to Bell Atlantic, "given the size and importance of these types of arrangements to the interstate telecommunications marketplace, it is inconceivable that they could reasonably be considered 'minor' and exempt from filing under Section 211(b)."<sup>19/</sup> Bell Atlantic is incorrect.

As an initial matter, Section 211(b) does not limit the Commission to exempting "specific" minor contracts. Therefore, the Commission is not foreclosed from finding that certain classes of intercarrier contracts are minor. Moreover, such a category is entirely reasonable. As found by the Commission, nondominant carriers lack the ability to engage in anti-competitive practices in the marketplace and, therefore, prior review of such contracts by the Commission is not necessary to protect the public interest and to enforce the Communications Act.<sup>20/</sup> Thus, even though such contracts may involve large

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<sup>18/</sup> Bell Atlantic Petition at 5.

<sup>19/</sup> Bell Atlantic Petition at 5-6.

<sup>20/</sup> It should be noted that contracts subject to the current rule must be maintained by nondominant carriers and provided to the Commission upon request. Presumably, such requests will be made by the Commission, or an interested party, if there were reason

(continued...)

dollar amounts, since there is no need for them to be filed for the Commission to perform its duties, it has appropriately concluded that such contracts are minor and, therefore, exempt from the filing requirement.

Based on the foregoing, MCI respectfully requests that the Commission dismiss or otherwise deny Bell Atlantic's Petition.

Respectfully submitted,

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Dated: December 19, 1995

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<sup>20</sup>(...continued)  
to believe that it were necessary to obtain such contracts for review.

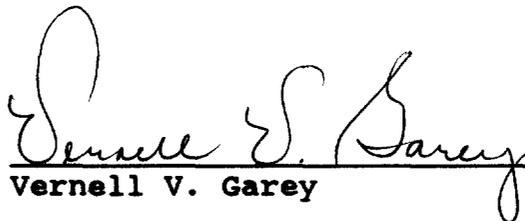
**CERTIFICATE OF SERVICE**

I, Vernell V. Garey, hereby certify that the foregoing "OPPOSITION" in CC Docket No. 93-36 was served on **JAN 08 1998** by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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