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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Tariff Filing Requirements for)
Nondominant Common Carriers)

CC Docket No. 93-36

REPLY

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The parties opposing Bell Atlantic's¹ reconsideration petition² raise two arguments, neither of which has merit. First, they claim that Bell Atlantic's petition is time barred, because it asks the Commission to reconsider a decision made in 1986. In fact, the Commission promulgated the current language of the rule in question in the order for which Bell Atlantic seeks reconsideration. Moreover, the Commission's failure to revisit its earlier decision in light of intervening events, including court rulings invalidating other Commission forbearance orders, was itself error and warrants reconsideration. Second, the parties dispute Bell Atlantic's interpretation of Section 211 of the Communications Act. In so doing, however, they primarily regurgitate the Commission's own earlier arguments, which Bell Atlantic fully addressed in its Petition.

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

² Petition for Partial Reconsideration ("Petition") (filed Nov. 9, 1995).

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The Commission should grant Bell Atlantic's Petition and find that Section 211 of the Communications Act deprives it of the authority to exempt classes of carriers from filing any intercarrier contracts.

Several parties erroneously contend that Bell Atlantic's petition is stale, because Bell Atlantic should have sought reconsideration in 1986, when the Commission adopted the initial policy that formed the basis of the current rule.³ The Commission's recent Order, however, revised the contract filing rule by deleting the reference to forbearance.⁴ The fact that the Commission, or the parties, consider the revision to be a "correction,"⁵ or "ministerial"⁶ does not change the fact that the Commission adopted the rule language in this Order. The very failure of the Commission to consider the substance of the rule and, instead, to adopt the "correction" without analyzing its merits prompts Bell Atlantic's Petition and makes it timely. As Bell Atlantic pointed out, "much has happened in the intervening nine years that would make [its earlier] finding invalid today."⁷ These changes include the appellate rulings invalidating forbearance orders

³ MCI Telecommunications Corp., Opposition ("MCI") at 1-3; Telecommunications Resellers Association, Opposition to Petition of Bell Atlantic for Partial Reconsideration ("TRA") at 3-4; Opposition of Sprint ("Sprint") at 7-8.

⁴ *Order*, FCC 95-399, ¶ 18 and App. (rel. Sept. 27, 1995).

⁵ *Id.*

⁶ MCI at 3.

⁷ Petition at 5. The 1986 decision that initially exempted "non-dominant" carriers from filing intercarrier contract is *Amendment of Sections 43.51, 43.52, 43.53, 43.54, and 43.74 of the Commission's Rules to Eliminate Certain Reporting Requirements*, 1 FCC Rcd 933 (1986).

under Section 203 of the Act⁸ and the substantial changes to the telecommunications industry that have occurred.⁹ The Order itself was prompted by the reversals of the Commission's earlier forbearance decisions, and it was incumbent upon the Commission to address its related contract filing rule in light of these decisions. Its failure to do so has been found in analogous circumstances to exhibit a lack of reasoned decision-making that is itself grounds for reversal.¹⁰

Most of the parties attempt to refute Bell Atlantic's substantive arguments by simply repeating the Commission's justification in its 1986 order for selectively exempting from filing all inter-carrier contracts between "non-dominant" carriers. Bell Atlantic has shown that this justification contains a flawed reading of the statute.¹¹ Even if the Commission's analysis were correct at the time, however, which it was not, the Commission was obliged to revisit it in light of the forbearance reversals.

TRA also claims that the courts have upheld earlier Commission decisions exempting intercarrier contracts from the filing requirement of Section 211.¹² The only case TRA cites,¹³ however, not only is not in point but supports the contrary view. In

⁸ *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 114 S. Ct. 2223 (1994); *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

⁹ See Petition at 5-6.

¹⁰ *Natural Resources Defense Council, Inc. v. EPA* 859 F.2d 156, 203 (D.C. Cir. 1988).

¹¹ Petition at 3-4.

¹² TRA at 7.

¹³ *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988) ("*MCF*").

MCI, MCI challenged the Commission's failure to require AT&T to file copies of its Shared Network Facilities Agreements with the Bell operating companies. The court refused to reach this issue, because MCI had not raised it before the Commission. In *dictum*, however, the court accepted the Commission's view that "section 211(a)'s filing requirement does not encompass court-approved asset-sharing agreements necessitated by an antitrust settlement, which are not 'agreements ... with other carriers' as the phrase is naturally understood."¹⁴ That language suggests that agreements with other carriers must be filed, even if antitrust settlements need not be. Here, there is no question that the Commission's rule purports to exempt from filing "agreements with other carriers."¹⁵

TRA also attempts to distinguish the provisions of Section 211, relating to intercarrier contracts, and Section 203, which requires tariff filings.¹⁶ TRA contends that the tariff filing provisions "are central to the purposes of Act. ... Not so for the contract filing requirements of Section 211(a)."¹⁷ However, as Bell Atlantic showed in its Petition, Section 211 serves the same purpose as Section 203, to give notice of the rates charged for common carrier services.¹⁸ The Congressional policy that requires all carriers to file their tariffs, therefore, applies equally to intercarrier contracts .

¹⁴ *Id.* at 1301.

¹⁵ *See* 47 C.F.R. § 43.51(a).

¹⁶ TRA at 6-7.

¹⁷ *Id.* at 6.

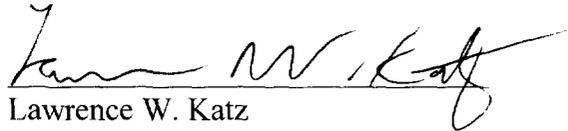
¹⁸ *See* Petition at 2-3.

Accordingly, the Commission should reconsider its Order and require all “non-dominant” carriers to file copies of intercarrier contracts, as required by Section 211 of the Communications Act.

Respectfully Submitted,

**The Bell Atlantic Telephone
Companies**

By their Attorney

A handwritten signature in cursive script, appearing to read "Lawrence W. Katz", written over a horizontal line.

Lawrence W. Katz

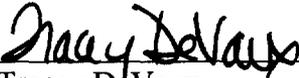
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January 29, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply" was sent this 29th day of January, 1996 by first class mail, postage prepaid, to the parties on the attached list.


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