

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

CC Docket No. 85-166  
Phase I

In the Matter of

Investigation of Special Access  
Tariffs of Local Exchange Carriers

### MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1989; Released: January 18, 1989

By the Chief, Common Carrier Bureau:

#### I. INTRODUCTION

1. By this Order, we direct American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies (BOCs) to file copies of all Shared Network Facilities Agreements (SNFAs) negotiated between AT&T and the BOCs pursuant to the Plan of Reorganization approved by the Court in *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). In addition, this Order outlines our proposed framework for analyzing the terms of the SNFAs in compliance with the mandate of the Court in *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988) (*Remand Order*). Finally, we propose a schedule for filing supplemental direct cases and other submissions in the captioned proceeding. As we explain more fully below, we will consider carefully arguments that submission of some portion of the SNFAs will be sufficient to the task before us.

#### II. BACKGROUND

2. By an Order released May 24, 1985, this Bureau designated for investigation in this proceeding two issues concerning SNFAs: first, whether the facilities provided under SNFAs constitute special access service; and second, whether the BOCs' special access tariffs unlawfully discriminate against interexchange carriers that cannot obtain facilities pursuant to SNFAs.<sup>1</sup> In a subsequent Order, the Commission concluded "that SNFAs are reasonable under the Communications Act because they further the public interest."<sup>2</sup> The Commission reasoned that the existence of SNFAs and special access did not appear to constitute the unlawful provision of like services because it found that the record indicated that differences between the charges, terms, and conditions governing SNFAs and those governing special access are justifiable and reasonable.<sup>3</sup>

3. In the *Remand Order* the Court remanded the *SNFA Order* for further consideration of the issue of whether the special access tariffs unlawfully discriminate against carriers that cannot obtain SNFAs. In its decision, the Court

outlined a three-stage inquiry which it concluded is essential to ascertain whether unreasonable discrimination exists. The Court stated that

[f]irst, the FCC must determine, generally, whether some or all facilities available to AT&T under the SNFAs are "like" facilities that are used to provide special access services. Where the facilities are alike, the FCC must devise some reasonable mechanism to assess amounts paid under the two pricing schemes to determine whether some tariffs are discriminatory by comparison with their SNFA counterparts. Finally, if discrimination exists, the FCC must decide whether it is just and reasonable.

842 F.2d at 1307. The Court noted that, in order to perform this analysis, the Commission must obtain copies of the SNFAs or a reasonable sampling of them and lists of charges paid by AT&T pursuant to the agreements. Finally, the Court left to the Commission the task of designing an appropriate procedure to ensure that interexchange carriers other than AT&T are not being forced to pay unjustly or unreasonably discriminatory rates. *Id.*

#### III. DISCUSSION

4. As we noted at the outset, the purpose of this Order is to establish both a framework for the next stage of this investigation and a schedule for the filing of further submissions in this proceeding.

##### A. Proposed Analysis

5. We conclude that, in order to respond to the Court's mandate, we must direct AT&T and the BOCs to file copies of all SNFAs -- regardless of whether the SNFA pertains to the lease of facilities from a BOC to AT&T or to a lease of facilities from AT&T to a BOC. Although the Court stated that we could require the parties to file a reasonable sampling of the SNFAs in response to its remand, it is not altogether clear that we could design a methodology that would produce a reasonably representative sample of the SNFAs. This is so because it is not obvious what characteristics, if any, would make a SNFA "representative" of all SNFAs. We will allow AT&T and the BOCs five months from the release of this Order to submit copies of all SNFAs.<sup>4</sup>

6. We are open to argument that the filing of all SNFAs is not the only practical way to proceed. Accordingly, we will entertain alternatives to this approach, including detailed explanations of any statistical sampling methodology that parties may believe is appropriate and would yield a representative sampling of SNFAs. In addition, it is our understanding that substantial portions of each of the approximately 17,000 SNFAs are identical. Any proposed alternatives should therefore address the reasonableness of permitting AT&T and the BOCs to file only those portions of each SNFA that set out unique terms of the particular agreement.<sup>5</sup>

7. We wish to emphasize that we do not anticipate granting confidential treatment to these submissions. We believe that a full and fair resolution of the issues remanded by the Court requires that the SNFAs be made publicly available and that the Commission have the benefit of the parties' analysis of the material to be filed

in resolving the issues before it. Obviously, if we were to withhold disclosure of these materials, it would be impossible for parties to give the Commission an informed analysis of their contents. Moreover, to the extent that a substantial portion of the SNFAs have now expired, the competitive sensitivity of these documents is, in our view, greatly lessened.<sup>6</sup>

8. Contemporaneously with the filing of the SNFAs (or, alternatively, of such portions of SNFAs as we may by subsequent Order require AT&T and the BOCs to file), we direct AT&T and the BOCs to file supplements to their direct cases in this investigation.<sup>7</sup> These submissions should, obviously, present the parties' justification of the special access tariffs under investigation in light of the SNFAs. In particular, we call the parties' attention to the Court's directive to the Commission to determine whether the facilities available to AT&T under the SNFAs are "like" facilities that are used to provide special access service; to assess whether the rates paid under the special access tariffs are discriminatory by comparison with the SNFAs; and, finally, to determine whether any discrimination that may exist is just and reasonable. We would also expect these submissions to address whether the leases of SNFA facilities from AT&T to the BOCs affect the justness and reasonableness of the special access rates charged by the BOCs.<sup>8</sup> We also believe that discussion of the contrast between the shared nature of SNFA facilities, as compared to the dedicated nature of special access facilities, might prove to be relevant to the Commission's resolution of the pending investigation.

#### B. Filing Requirements

9. Interested parties may file proposed alternatives to the procedures established by this Order (as discussed in para. 6, *supra*) not later than February 14, 1989. Comments concerning these proposals should be filed not later than March 1, 1989. We emphasize that, although we are willing to consider alternative approaches, AT&T and the BOCs should be prepared to comply with the requirements of this Order unless different requirements are established by subsequent Order.

10. Due to the volume of material that AT&T and the BOCs will be required to file, we direct AT&T and the BOCs to file the SNFAs not later than June 13, 1989. In view of the fact that we are allowing the parties a substantial amount of time to file the SNFAs, however, we conclude that AT&T and the BOCs also should file their supplemental direct cases at the same time they file the SNFAs. The material on which the direct cases must be based is already available to AT&T and the BOCs. We therefore conclude that this schedule should not present any substantial problems for AT&T and the BOCs. In contrast, we believe that parties filing oppositions to the supplemental direct cases should be given a generous period of time in which to review the material that AT&T and the BOCs will file and to prepare their analyses of this material. Therefore, oppositions shall be filed not later than September 13, 1989. Finally, rebuttals will be due not later than October 13, 1989. It is our intention to act expeditiously, after the completion of this pleading cycle, to resolve the issues remanded to the Commission by the Court.

#### IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that American Telephone and Telegraph Company and the Bell Operating Companies SHALL FILE all Shared Network Facilities Agreements as required by the terms of this Order not later than **June 13, 1989**.

12. IT IS FURTHER ORDERED that American Telephone and Telegraph Company and the Bell Operating Companies SHALL FILE supplements to their direct cases in the above-captioned proceeding not later than **June 13, 1989**.

13. IT IS FURTHER ORDERED that parties filing comments in response to this Order SHALL FILE one copy of their comments with the Commission's contractor for public records duplication, International Transcription Services, Inc., Room 246, 1919 M St., N.W. Washington, D.C. 20554. Commenters shall also serve all parties of record in the above-captioned proceeding.

#### FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock  
Chief, Common Carrier Bureau

#### FOOTNOTES

<sup>1</sup> Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985 (*Designation Order*) at para. 18.

<sup>2</sup> Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52, released Jan. 24, 1986 (*SNFA Order*) at para. 54.

<sup>3</sup> *Id.* at paras. 54-55.

<sup>4</sup> Obviously, both AT&T and the relevant BOC should have copies of all SNFAs that affect them. It is not necessary for each party to file a copy. We leave it to the parties to devise some mutually satisfactory arrangement for distributing the cost of filing the SNFAs.

<sup>5</sup> Such unique portions would presumably include, *inter alia*, language identifying the particular facilities in question and the charges for leasing the facilities. Proposals should identify any other provisions that must be filed to permit the Commission to resolve the issues before it. AT&T and each BOC should also provide an estimate of the cubic feet of materials it would expect to file under our procedure or under any proposed alternative procedure.

<sup>6</sup> At an earlier stage of this proceeding we concluded that some of the SNFAs submitted to the Commission were entitled to confidential treatment pursuant to Sections 0.457 and 0.459 of the Commission's Rules, 47 C.F.R. §§ 0.457, 0.459. See letter from Chief, Common Carrier Bureau, FCC, to J. Scorze, MCI Telecommunications Corp., Jan. 2, 1985. As we stated at that time, the above-cited rules allow persons submitting information to request confidential treatment of such information. In order to prevail in a request for confidential treatment, the submitter must demonstrate by a preponderance of the evidence that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. § 552. Even if submitted information is competitively sensitive, its disclosure is a matter of administrative discretion and the Commission may determine that an overriding public interest, when balanced against the

risk of injury to the submitter, warrants release of confidential information. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 290-94 (1979); 47 C.F.R. § 0.461(f)(4). In the wake of the remand of the *SNFA Order*, we believe that it is now unlikely that AT&T and the BOCs will be able to demonstrate that non-disclosure is justified.

<sup>7</sup> In the *Designation Order* we directed AT&T to file a direct case addressing the SNFA issues designated for investigation. This procedure was, of course, somewhat unusual in view of the fact that no tariffed offering of AT&T was subject to the investigation. Nevertheless, because AT&T is inextricably involved in the issues presented by the remand, we direct AT&T to file a supplement to its direct case.

<sup>8</sup> Such discussion should include a comparison of the charges paid by the BOCs to AT&T under the SNFAs with rates for any comparable tariffed offerings of AT&T. Although an empirical analysis may be difficult to perform, we believe that it is possible that, to the extent AT&T is assessed favorable charges for SNFA facilities that it leases from the BOCs, the BOCs receive similarly favorable terms from AT&T.