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

In the Matter of	)	
	)	
SMS/800	)	Transmittal No. 18
Revisions to Tariff FCC No. 1	)	

RESPONSE TO SPRINT CORPORATION PETITION FOR SUSPENSION AND INVESTIGATION

I. INTRODUCTION

The Bell Operating Companies ("BOCs") herein respond to Sprint Corporation's ("Sprint") June 7, 2001, "Petition for Suspension and Investigation," ("Petition") with respect to a Transmittal No. 18, filed May 31, 2001. As demonstrated below, Sprint provides no sound legal or policy basis to support such suspension and investigation. Therefore, its request should be denied.

In Transmittal No. 18, the BOCs propose to reduce their rates for SMS/800 access services by an estimated $49.06 million (D&J, Table 1), or approximately 38% of the revenues they would have earned at current rate levels. Sprint concedes that "the proposed rate reductions are significant," yet argues that the reductions are "far less than they should be."[1] However, Sprint fails to provide sufficient evidence to support its assertion. Below, the BOCs refute Sprint's arguments in support of its position that Transmittal No. 18 should be subject to suspension and investigation.

II. THE PROPOSED REVENUE REQUIREMENT IS ADEQUATELY DOCUMENTED

Contrary to Sprint's assertion, the BOCs provided sufficient documentation with respect to Transmittal No. 18 to prove the reasonableness of our claimed revenue requirement.

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[1] Petition at 1.

A. The $18.5 Million Increase In The Revenue Requirement That Resulted From The Introduction Of New 866/855 Codes In 1998 Is Legitimately Included In The Revenue Requirement For The Instant Filing

Sprint is challenging the reasonableness of the $85.2 million revenue requirement forecast for the 2001/02 rate period and included in the instant Transmittal No. 18 by referencing information filed with Transmittal No. **13** on June 5, 1998. The gist of Sprint's argument is that the 1998 tariff filing included $18.5 million for introduction of the new 866/855 codes that Sprint apparently views as a one-time cost, which should be subtracted from the current $85.2 million revenue requirement to calculate a base revenue requirement that could be used to test the reasonableness of the forecast.

Sprint's analysis is based on two erroneous assumptions. The first is that the $18.5 million increase is due entirely to the planned introduction of 866/855, even though the D&J wording Sprint quotes from states that the increase is due "primarily" -- not only -- to the introduction of the 866/855 codes. Actually, 866/855 accounted for about $12 million, or two thirds of the total increase.

The second erroneous assumption is that the 866/855 costs were one-time, or non-recurring in nature. In fact, the introduction of 866/855 required upgrading of the data center central processors in St. Louis and Dallas to increase capacity in anticipation of higher activity levels generated by the new codes. The $6.4 million contractual commitment to upgrade the central processors is an ongoing (recurring) expense that will be incurred for as long as the current data center configuration remains in service.

If the $6.4 million is added to the $73.4 million past year revenue requirement for 1997/98 shown in Table 2 of the Description & Justification for Transmittal No. 13, the resulting $79.7 million would be a more accurate base for Sprint's analysis. Even if grown for only two

years by applying a 4% inflation factor, the resulting revenue requirement would be $86.2 million, which is $1 million more than the revenue requirement forecast for the 2001/2002 rate period.

B. Explanation Of Revenue Requirement Development

The revenue requirement forecast for Transmittal No. 18 was developed by analyzing historical data for each budget item and adjusting it to reflect expectations related to each item's magnitude for the years 2001 and 2002.

Help Desk Operation -- The forecast is based on the current vendor contract and the anticipated demand for services.

Management and Administration -- Forecasted based on the trend from the prior years.

Indirect Costs -- Calculated at 15% of projected costs

Data Center Operation -- The historical trend has this growing approximately 12% per year. This growth rate was reduced to 3% and applied to the 2000 actuals to project 2001. Expenditures for 2002 were left at the same level as 2001.

Software Support -- While there has been a steady increase over the last four years, the forecast was reduced from the going trend because of the anticipated decline in requested enhancements from the Responsible Organizations.

C. The 15% Indirect Cost Is Appropriate

As Sprint correctly notes, the instant revenue requirement forecast includes an indirect cost of $11.116 million, equal to 15% of direct costs (Transmittal No. 18, D&J, p. 2). While the BOCs believe sufficient information was included in the D&J to defend the 15% charge, we provide additional argument here to respond to Sprint's allegations.

The indirect cost about which Sprint complains has been part of the SMS/800 Tariff since Transmittal No. 12, which was filed in May 1997. Sprint has had ample time and multiple opportunities to review and address the appropriateness of the indirect cost. The BOCs support the reasonableness of the indirect cost based on three factors:

First, in the course of their administration of the SMS/800 Tariff, and the associated services, the BOCs incur costs associated primarily with the staff assigned to support SMS/800. Assigned staff include not only the members of the SMS/800 Management Team ("SMT"), but also other BOC employees that are experts in legal and regulatory matters, contract and procurement issues, industry interface contacts, etc. The incremental costs associated with the support provided by these BOC employees are rightfully recovered through the SMS/800 Tariff rate elements.

Second, it should be noted that while the experts identified above are actually engaged in the supporting activities for SMS/800, they are not simultaneously available to support other revenue generating opportunities within their companies. These opportunity costs can represent a significant loss of both revenue and profit to the BOCs, and are costs that the BOCs should recover through the rate elements.

Lastly, it is unreasonable to expect any corporation, or in this case, group of corporations, to devote time and resources to the provision and support of a product or service offering without allowing that corporation to earn a margin as compensation for their efforts. The provision of SMS/800 Services should not be any different. The BOCs are responsible for the provision of SMS/800 Services, as the result of federal regulatory mandates. To now penalize the BOCs, by requiring them to perform the Commission-mandated service without an opportunity to cover their expenses and recover a fair and reasonable margin for their efforts in administering those same services would be unacceptable.

For these reasons, the Commission should reject Sprint's complaints regarding the indirect cost contained within the instant tariff Transmittal.

III. SPRINT'S CLAIMS OF PAST OVERCHARGES ARE WITHOUT MERIT

A. Sprint's Substantive Arguments Are Without Merit

Sprint attempts to use the instant filing as a vehicle to collaterally attack existing CRA rates. It contends that Transmittal No. 18 is defective, because it does not correct for alleged "overcharges" and does not commit to reduce rates in the future.[2] There is nothing in Sprint's arguments that raise questions of lawfulness of the instant Transmittal that would warrant suspension or investigation. And, to the extent Sprint's objections are to rates for prior time periods, its remedy is not the suspension and investigation of the instant rates or refunds for past "overcharges." Rather, its remedy lies -- if anywhere -- through the Section 208[3] complaint process.

As an initial matter, neither Sprint nor any other customer has been "overcharged" for the services provided under the SMS/800 tariff. To sustain a claim of overcharges, Sprint would have to demonstrate that it was being charged rates in excess of the tariff rates. Sprint has never even alleged that it was charged in excess of the tariffed rate, nor could it make such a demonstration. Section 203[4] commands that a carrier charge its tariff rates, and the BOCs have complied with that obligation. At all times Sprint has been charged the rates that are set forth in that tariff.

Instead, Sprint argues that the existing rate should have been lower in the past, and that the Commission should require the BOCs to refund amounts that Sprint alleges represent excessive charges. The Commission is without authority to order refunds of existing charges.

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[2] Petition at 3-6.

[3] 47 U.S.C. § 208.

[4] 47 U.S.C. § 203.

Indeed, the Commission's power to order refunds is carefully circumscribed under Section 204 of the Act.

Section 204 requires, as a condition predicate to refunds, that the Commission (a) suspend the questionable charge and (b) subject such charge to an accounting order. The two statutory prerequisites for a refund were never imposed on the existing rates, i.e., the current rates were neither suspended nor subjected to an accounting order. Because the Commission failed to follow the statutory procedures for ordering a refund under Section 204, it lacks the authority to order a refund.[5] Any attempt to adjust the existing rate retrospectively would constitute retroactive ratemaking -- a practice which, as a matter of law, is prohibited.[6]

Moreover, the current rate was filed in June of 1998 in accordance with the notice provisions set forth in 47 U.S.C. Section 204(a)(3). The Commission took no action on the filing and, accordingly, the rate was, by operation of the statute, deemed lawful (not merely "legal") upon effectiveness. As the Commission has determined, under the current statutory structure, a rate that is deemed lawful is "conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect" and "section 208 complaint proceeding[s] would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness."[7] Accordingly, even if Sprint had availed itself of the Section 208 complaint remedy, it would not have been entitled to monetary damages prior to a declaration of unlawfulness. And, given that the past rates objected to by Sprint are being

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[5] See Illinois Bell Telephone Company, et. al. v. FCC, 966 F. 2d 1478, 1483 (D.C. Cir. 1992).

[6] See id. at 1482 (construing "the statutory language in § § 204 and 205 as a congressional embrace of [the] cardinal principle [that retroactive ratemaking is prohibited].").

[7] In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, 12 FCC Rcd 2170, 2182 ¶ 20 (1997).

reduced by Transmittal No. 18, Sprint's opportunity to secure an "unlawfulness" declaration with respect to past rates is quickly being foreclosed.

There is simply no legal basis for the Commission to suspend the instant Transmittal because of Sprint's dissatisfaction with the current rate -- particularly when the current rate is, by force of law, just and reasonable. Likewise, no basis exists to hold the instant transmittal hostage in order to extort some promise of future rate filings. The Commission's ability to suspend the instant filing must be predicated upon a finding that something inherent in the rates, terms or conditions in the instant filing raise a question of lawfulness. It cannot use the tariff filing and a threat of suspension as a mechanism for creating new rules and obligations that would otherwise have to be promulgated through a rulemaking proceeding.

B. The Waiver Order Provides Sprint No Legal Support

In its Petition, Sprint argues that it is supported in its claim that there should be refunding for past period "overcharges" because of previous adjustments voluntarily made by the BOCs in prior years.[8] These prior adjustments, Sprint claims "were sanctioned by the Commission to hold the BOCs to their public commitment to provide SMS/800 service on a not-for-profit basis."[9] Sprint's limited citation and procedural history fail to tell the whole story around the "not for profit" matter and Commission action.

The Waiver Order cited by Sprint did, in fact, contain the language quoted. However, the sentence consists of both an observation by the Common Carrier Bureau ("Bureau") (i.e., that the DSMI was administering the tariff on a non-profit basis) and a mandate that future profits be

[8] Petition at 5-6.

[9] Id., citing to BOC Waiver Order ¶ 14, ("…because DSMI is administering the central database tariff on a non-profit basis, the BOCs must ensure that DSMI refunds any profit made on these services by adjusting the tariffed rates for the following year").

"refunded" through a downward tariff adjustment. The Bureau's mandate had no foundation in prior Commission requirements.[10] And, it is not clear if the Bureau crafted the mandate because it -- erroneously -- thought that the BOCs did not intend to make a profit.

The genesis for the observation could be found in any number of factors or their combination. The Bureau may have assumed that, since the BOCs had voluntarily been providing the 800 database service from its inception without a profit, that they intended to do so in the future. And, that assumption may have been buttressed by a declarative sentence made by a commenting party reflecting **past** BOC practice (i.e., "The revenues collected by DSMI are intended to exactly recover the cost of services rendered by DSMI and the other vendors" [NYNEX and Southwestern Reply at 2]), and converted that declaration into a commitment not to make a profit in the future, reflecting this transposition of understanding and language into the Waiver Order.

In March of 1997, the BOCs filed an Application for Review ("AFR"), challenging the Bureau's condition that the DSMI refund any future profits.[11] That AFR sat before the Commission for over a year, until December 22, 1998, when the Bureau issued the BOC Waiver Order, declaring the waiver request moot and rescinding it, while at the same time dismissing the AFR. When the Bureau rescinded the BOC Waiver Petition and declared it moot, it also rescinded the condition that Sprint tries to rely on now -- that the BOCs lower their rates to reflect past "overearnings." Moreover, the BOCs' Petition never contained a "no profit"

[10] The original Commission Order requiring the BOCs to create the SMS 800 Entity did not address the profitability aspects of that Entity. In the Matter of Provision of Access for 800 Service, Order, 8 FCC Rcd. 1423 (1993).

[11] That AFR stated, in part, that "While the BOCs plan voluntarily to refund profits made thus far in administering the SMS . . . , the requirement that they refund all future profits in order to avail themselves of the waiver is arbitrary and capricious."

commitment; and -- indeed the BOCs challenged the imposition of such a restriction. However, since the waiver petition no longer was salient, neither was the Waiver Order imposing the no-profit condition; thus the pending AFR was dismissed. Sprint can cite to no salient Order imposing a "no profit" condition on the BOCs' operation of the 800 database service.

IV CONCLUSION

The revenue requirement in Transmittal No. 18 is adequately documented and justified, and Sprint cannot attack the lawfulness of the instant Transmittal on the basis of alleged past "overearnings." Accordingly, Sprint's Petition for Suspension and Investigation must be rejected.

Respectfully submitted,

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