

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

In the Matter of	)	
	)	
Local Exchange Carriers' Individual Case Basis DS3 Service Offerings	)	CC Docket No. 88-166
	)	
Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1	)	Transmittal No. 395
	)	
BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4	)	Transmittal No. 354
	)	
Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68	)	Transmittal Nos. 2039, 2062, and 2094
	)	
US West Communications Revisions to Tariff F.C.C. No. 1	)	Transmittal No. 127
	)	
Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service	)	
	)	
Southwestern Bell Telephone Company	)	File No. W-P-C-6670
	)	
US West Communications	)	File No. W-P-D-364
	)	
Bell Atlantic Telephone Companies	)	(No File Number)
	)	
BellSouth Telephone Companies	)	(No File Number)
	)	

**ORDER ON REMAND**

**Adopted: January 2, 2008**

**Released: January 3, 2008**

By the Commission:

**I. INTRODUCTION**

1. In this Order, the Commission responds to the remand from the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) in *Southwestern Bell v. FCC* regarding whether certain Bell Operating Company (BOC) dark fiber offerings constitute common carrier offerings subject to tariffing and licensing requirements.<sup>1</sup> As discussed below, we conclude that the record on remand is inadequate to conclude that the dark fiber arrangements at issue constitute common carriage, and we vacate the remanded orders.

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<sup>1</sup> *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994) (*Dark Fiber Remand*).

## II. REMANDED DARK FIBER ISSUES

### A. Background and Legal History

2. As part of their 1988 tariff filings, several BOCs submitted multiyear individual case basis (ICB) arrangements for DS3 circuits and dark fiber provided to certain carrier customers and large retail customers.<sup>2</sup> The Commission initiated a proceeding to investigate whether it was appropriate for the BOCs to use ICB pricing for these services. In its *ICB Order*, the Commission found that the BOCs had sufficient experience providing DS3s to file generally tariffed rates for their DS3 services.<sup>3</sup> While indicating its uncertainty as to whether dark fiber was subject to Title II, the Commission in any event, concluded that the BOCs' limited experience to that point in offering dark fiber on an individual case basis was insufficient to allow the BOCs to develop general dark fiber tariffs.

3. On reconsideration, the Commission considered new evidence that the BOCs did have sufficient experience providing dark fiber. Specifically, the Commission identified more than 100 fixed-term ICB arrangements for point-to-point dark fiber services in the BOCs' tariffs.<sup>4</sup> In the *ICB Reconsideration Order*, the Commission required the BOCs to amend their dark fiber ICBs and to offer dark fiber as a generally available service at averaged rates.<sup>5</sup> In a footnote to that decision, the Commission concluded that the BOCs' filing of dark fiber ICBs demonstrated that the BOCs offered

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<sup>2</sup> As a general legal matter, "ICB offerings refer to the carrier practice of providing a particular service in response to a specific request from a customer under individualized rates, terms, and conditions. . . . [U]nlike contract tariffs, although the tariffs containing the specific service offerings and ICB rates are filed with the Commission, ICB offerings are not immediately available to other prospective customers." *Southwestern Bell Telephone Company*, CC Docket No. 97-158, Transmittal No. 2633, Order Designating Issues for Investigation, 12 FCC Rcd 10231, 10242, para. 20 (CCB 1997) (citing *Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 94-1, 93-124, 93-197, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 888 (1995); *Common Carrier Bureau Restates Commission Policy on Individual Case Basis Tariff Offerings*, Public Notice, 11 FCC Rcd 4001 (CCB 1995)). The Commission explained that "there are two types of ICB offerings: (1) those that provide a new technology for which little demand initially exists, but that later evolve into generally-available offerings as demand grows; and (2) those that are unique service arrangements offered to meet the needs of specific customers and that never evolve into a generally-available offering." *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730, 18905, para. 428 (1997).

<sup>3</sup> *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings; GTE Telephone Operating Companies Revisions to Tariff F.C.C. No.1*, CC Docket No. 88-136, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*ICB Order*).

<sup>4</sup> As the court itself notes, the precise legal status of these ICB tariff filings is an unresolved matter of dispute in this proceeding. *Dark Fiber Remand*, 19 F.3d at 1478 n.1 ("We are unable to determine with any confidence exactly why these ICB contracts were filed with the FCC."). In their comments and pleadings, the carriers frequently referred to the tariff filings as "ICB contracts." See, e.g., *Southwestern Bell Telephone Company's Reply to Oppositions and Comments to Petition for Reconsideration*, CC Docket No. 88-136 at 4-5 (filed Oct. 1, 1990); *U S WEST Petition for Partial Further Reconsideration*, CC Docket No. 88-136 at 6-7 (filed Sept. 5, 1990); *Reply of Local Area Telecommunications, Inc. to Oppositions to Petition for Partial Reconsideration and Clarification*, CC Docket No. 88-136 at 4, 9 (filed Feb. 20, 1990); *Pacific Bell Oppositions to Petitions for Reconsideration and Clarification*, CC Docket No. 88-136 at 8 (filed Feb. 12, 1990). The D.C. Circuit, in *Dark Fiber Remand*, periodically uses this terminology as well. See *Dark Fiber Remand*, 19 F.3d at 1478 n.1, 1480-81.

The "ICB contract" terminology could be misleading as to the nature of the tariff filings and their relationship to underlying dark fiber contracts, and we thus decline to use the term "ICB contract" to refer to these filings. To avoid confusion we instead refer to these filing as "ICBs," "ICB arrangements," or the like.

<sup>5</sup> *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, CC Docket No. 88-136, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 4842, para. 33 (1990) (*ICB Reconsideration Order*).

these “wire communication” services on a common carrier basis, subject to Title II.<sup>6</sup> The Commission subsequently denied the BOCs’ petitions seeking waiver of the tariffing requirement.<sup>7</sup> The Commission later found more explicitly that dark fiber clearly fell within the Act’s definition of “wire communication,” which includes “all instrumentalities, facilities, apparatus, and services incidental to” the transmission of information “between two or more points by means of electronic communications.”<sup>8</sup> The Commission also denied the BOCs’ petitions for section 214 authority to discontinue their dark fiber services, which the BOCs claimed were based on their business decisions not to pursue the dark fiber market.<sup>9</sup> The BOCs challenged these decisions before the D.C. Circuit.

4. In the *Dark Fiber Remand*, the D.C. Circuit addressed the BOC appeals of the orders denying waiver of dark fiber tariffing requirements and denying section 214 discontinuance authority for dark fiber.<sup>10</sup> The court did not address the Commission’s determination that dark fiber met the definition of “wire communication.” The court did find, however, that the BOCs’ mere submission of dark fiber ICBs was not, in itself, adequate to find that they were offering dark fiber on a common carrier basis subject to Title II. The court concluded that the Commission had not properly applied the *NARUC* analysis of common carriage, stating that the “Commission provided insufficient support for concluding that the [BOCs] had offered dark fiber service on a common carrier basis.”<sup>11</sup> The court thus suspended the orders, and remanded them to the Commission for “reconsideration of the basis for its authority to regulate dark

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<sup>6</sup> *Id.* at para. 33 n.15.

<sup>7</sup> *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings, Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1, Transmittal No. 395; BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4, Transmittal No. 354; Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68, Transmittal Nos. 2039, 2062, and 2094; US West Communications Revisions to Tariff F.C.C. No. 1, Transmittal No. 127*, CC Docket No. 88-136, Memorandum Opinion and Order, 6 FCC Rcd 4891 (1991); *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings, Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1, Transmittal No. 395; BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4, Transmittal No. 354; Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68, Transmittal No. 2039; US West Communications Revisions to Tariff F.C.C. No. 1, Transmittal No. 127*, CC Docket No. 88-136, Memorandum Opinion and Order, 6 FCC Rcd 4776 (1991); *Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1, Transmittal No. 395; BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4, Transmittal No. 354; Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68, Transmittal No. 2039; US West Communications Revisions to Tariff F.C.C. No. 1, Transmittal No. 127*, CC Docket No. 88-136, Memorandum Opinion and Order, 6 FCC Rcd 1436 (CCB 1991); *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings, Petitions for Waiver of the Dark Fiber Filing Requirement, Petition for Emergency Relief*, CC Docket No. 88-136, Order, 5 FCC Rcd 6772 (CCB 1990) (*Dark Fiber Waiver Denial Order*).

<sup>8</sup> *Southwestern Bell Telephone Company, et al., Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, File Nos. W-P-C-6670, W-P-D-364, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2593, para. 17 (1993) (*Section 214 Order*) (citing 47 U.S.C. § 153(a)). In particular, in concluding that dark fiber services constitute “wire communication,” the Commission analogized them to “dim fiber” services – where the carrier lights the fiber at one end, and the customer lights the fiber from the other end – which the BOCs already offered pursuant to tariff and without challenge to the Commission’s Title II jurisdiction. *Id.* at 2593, para. 18.

<sup>9</sup> *Section 214 Order*, 8 FCC Rcd at 2589.

<sup>10</sup> We further note that certain Commission orders underlying those decisions were not subject to the D.C. Circuit’s remand, but nonetheless subjected the BOCs’ dark fiber offerings to common carrier regulation on the basis of the same reasoning ultimately rejected by the court in the *Dark Fiber Remand*. See *Dark Fiber Waiver Denial Order*, 5 FCC Rcd 6772; *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings*, CC Docket No. 88-136, Order, 5 FCC Rcd 5919 (CCB 1990); *Local Exchange Carriers’ Individual Case Basis DS3 Service Offerings*, CC Docket No. 88-136, Order, 5 FCC Rcd 5420 (CCB 1990); *ICB Reconsideration Order*, 5 FCC Rcd 4842.

<sup>11</sup> *Dark Fiber Remand*, 19 F.3d at 1484 (citing *NARUC v. FCC*, 525 F.2d 630, 641, 644 n.76 (D.C. Cir. 1976) (*NARUC I*); *NARUC v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (*NARUC II*) (collectively *NARUC*)).

fiber services.”<sup>12</sup> The Commission has not yet resolved this question of dark fiber service classification, although it raised this issue as it relates to universal service in a Further Notice of Proposed Rulemaking on schools and libraries universal service funding.<sup>13</sup>

## B. Resolution of the Remanded Dark Fiber Issues

5. We find that the record on remand is inadequate to support the imposition of common carrier obligations on the BOC dark fiber offerings at issue in this proceeding. The *NARUC* test for common carriage considers “whether there are reasons implicit in the nature of [the offering] to expect an indifferent holding out to the eligible user public” and whether “there will be any legal compulsion . . . to serve indifferently.”<sup>14</sup> Here, however, the record contains virtually no evidence regarding whether the BOCs current dark fiber offerings allow us to apply this test.

6. In particular, the record on remand provides virtually no direct evidence regarding how dark fiber is being offered by the BOCs today. Consequently, we cannot find, based on that record, that the BOCs are, in fact, indifferently holding out to the public any or all of the dark fiber offerings that were the subject of the remanded orders. The record evidence regarding those BOC dark fiber offerings is limited to arrangements provisioned in the late 1980s through 1990.<sup>15</sup> The record reveals that most or all of these dark fiber arrangements would already have ended under their original terms.<sup>16</sup> More broadly, the point-to-point, fixed-term dark fiber offerings that were the subject to the proceedings underlying the *Dark Fiber Remand* shed little light on the variety of ways in which BOCs may actually offer dark fiber today. The telecommunications market has changed dramatically since the time the BOCs offered such dark fiber ICB arrangements, as the dark fiber offerings at issue in the remanded proceedings generally involved service terms of ten or fewer years. However, as noted in other proceedings, providers today may offer dark fiber on different terms, such as on an indefeasible-right-of-use (IRU) basis, which may warrant different regulatory treatment.<sup>17</sup> Further, other service providers or end users may acquire dark

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<sup>12</sup> *Id.*

<sup>13</sup> The *Schools and Libraries FNPRM* recognized that, pending resolution of whether dark fiber service is a telecommunications service, schools and libraries may not receive support for dark fiber as a telecommunications service, but seeks comment generally on whether dark fiber service should be eligible for support. *Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-6, 18 FCC Rcd 26912, 26943-44, paras. 76-77 (2003) (*Schools and Libraries FNPRM*).

<sup>14</sup> *NARUC I*, 525 F.2d at 642.

<sup>15</sup> See, e.g., Southwestern Bell Telephone Company’s Reply to Oppositions to its Direct Case, CC Docket No. 88-136, Transmittal No. 2039, Exh. 2 (filed Apr. 15, 1991) (ICB tariff filings for numerous point-to-point dark fiber arrangements, with service expiration dates ranging from 1990-2000); Williams Telecommunications Group Petition for Emergency Relief, CC Docket No. 88-136, Transmittal No. 415, Attach. (filed Aug. 1, 1991) (point-to-point dark fiber arrangements in Louisiana effective from 1985 through 2002); Southwestern Bell Telephone Company’s Reply to Oppositions and Comments to Petition for Reconsideration, CC Docket No. 88-136 at 5 (filed Oct. 1, 1990) (noting that all its provisioned dark fiber services would have expired by 2000 pursuant to their original terms); U S WEST Petition for Partial Further Reconsideration, CC Docket No. 88-136 at 4 n.15 and Attach. A (filed Sept. 5, 1990) (listing U S WEST’s point-to-point dark fiber arrangements provisioned in the late 1980s).

<sup>16</sup> See, e.g., *id.*; *Dark Fiber Remand*, 19 F.3d at 1481 (dark fiber arrangements “were individually tailored arrangements negotiated to last for periods of five to ten years”).

<sup>17</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17178, para. 333 & n.981 (2003) (*Triennial Review Order*) (holding that a competitive carrier that has obtained dark fiber (continued...))

fiber in different physical configurations than previously was the case, owing to the increasing growth and complexity of the network.<sup>18</sup> The record on remand simply provides no evidence concerning the nature of any dark fiber offerings by the BOCs in the current market.

7. The record on remand also fails to account for the significant definitional changes that the 1996 Act introduced.<sup>19</sup> The record was developed in the late 1980s and early 1990s, well before the passage of the 1996 Act. In applying Title II prior to the 1996 Act, the Commission first determined whether an offering met the definition of “wire communication,” and if so, whether it was offered on a “common carrier” basis. The 1996 Act, however, while retaining the definition of “wire communication,” also added new definitions of “telecommunications,” “telecommunications service,” and “telecommunications carrier.”<sup>20</sup> The impact of these legal and definitional changes is not reflected in the record on remand, which argues against the imposition of common carrier regulation on the basis of that record.

8. Based on the record before us regarding the dark fiber offerings subject to the remanded orders, we therefore find that it is not possible to conclude either that the BOCs are under a legal compulsion to serve the public indifferently, or that the BOCs voluntarily are offering those dark fiber services indifferently to the public. Consequently, we are unable to conclude at this time, based on this record, that the BOCs are offering dark fiber on a common carrier basis, or that the Commission should require dark fiber arrangements to be offered on a common carrier basis. In fact, the record provides no evidence of how the BOCs offer dark fiber as a service today, and thus no basis upon which the Commission reasonably could conclude that, on a going-forward basis, the public interest requires the BOCs to offer dark fiber on a common carrier basis. Nor does this record demonstrate harm to the public interest arising from the court’s suspension of the remanded orders governing the relevant dark fiber arrangements. Given the lack of evidence here demonstrating that the dark fiber offerings are, or should be, common carrier services, we vacate the prior orders insofar as they subject the BOCs’ dark fiber offerings to common carrier regulation.

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on a long-term IRU basis should be treated as self-provisioning under network unbundling rules, in contrast to a competing carrier purchasing special access services), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), *rev’d on other grounds*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied sub nom. Nat’l Ass’n Regulatory Util. Comm’rs v. United States Telecomm Ass’n*, 125 S. Ct. 313, 316, 345 (2004); *Qwest Communications International*, File No. EB-02-IH-0674, Acct. No. 200332080012, FRN No. 0003605953, Order, 18 FCC Rcd 10299, 10305, at Consent Decree, para. 6 (2003) (describing dark fiber IRUs that Qwest was required to divest as a result of the *Qwest/U S WEST Merger Order*) (citing *Qwest Communications International Inc.*, and *US West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272, Memorandum Opinion and Order, 15 FCC Rcd 5376 (2000) (*Qwest/U S WEST Merger Order*)).

<sup>18</sup> See, e.g., *Triennial Review Order*, 18 FCC Rcd at 17212, para. 378 n.1160 (dark fiber rings); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18074, para. 86 (1998) (*WorldCom-MCI Merger Order*) (noting that companies sometimes acquire dark fiber IRUs from undersea dark fiber cable owners).

<sup>19</sup> The Telecommunications Act of 1996 (the 1996 Act) amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

<sup>20</sup> See 47 U.S.C. §§ 153(43) (telecommunications), 153(44) (telecommunications carrier), 153(46) (telecommunications service), 153(52) (wire communication).

**III. ORDERING CLAUSE**

9. Accordingly, IT IS ORDERED that pursuant to sections 1, 3, 4, 201-205, 251, 256, 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 256, 303(r), and section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, this *Order on Remand* in CC Docket No. 88-166, Transmittal No. 395, Transmittal No. 354, Transmittal Nos. 2039, 2062, and 2094, Transmittal No. 127, File No. W-P-C-6670, and File No. W-P-D-364, IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary