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FCC MAIL SECTION

Federal Communications Commission

FCC 97-135

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DISPATCHED BY

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

In the Matter of	)	
	)	
800 Data Base Access Tariffs and the	)	CC Docket No. 93-129 ✓
	)	
800 Service Management System Tariff	)	
	)	
and	)	
	)	
Provision of 800 Services	)	CC Docket No. 86-10

**ORDER ON RECONSIDERATION**

**Adopted: April 14, 1997**

**Released: April 14, 1997**

By the Commission:

**I. INTRODUCTION AND BACKGROUND**

1. On October 28, 1996, we released a *Report and Order* in this proceeding that terminated an investigation into tariffs filed in March 1993 by incumbent local exchange carriers (LECs) for 800 data base services.<sup>1</sup> These tariffs were filed pursuant to CC Docket No. 86-10, in which we required all incumbent LECs to convert simultaneously on May 1, 1993 to a new data base system of 800 access. This new access service has allowed 800 customers to change their interexchange carriers (IXCs), but retain their 800 telephone numbers. This capability is known as 800 number portability. The incumbent LECs provide this new data base system by linking their signalling system 7 (SS7) networks with data bases containing consumer information associated with each 800 number, including the IXC selected by the 800 subscriber, to deliver calls to that 800 number. The incumbent LECs offer two types of 800 data base access services: (1) "basic" query service;<sup>2</sup> and (2) "vertical features" service,<sup>3</sup> both of which are tariffed. The Common Carrier Bureau suspended the tariffs for one day, imposed an accounting order, and

<sup>1</sup> *In re 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services* Report and Order, 11 FCC Rcd 15227 (1996) (*Report and Order*).

<sup>2</sup> "Basic" query service provides only the identity of the IXC to which the call should be routed at the service origination point.

<sup>3</sup> "Vertical features" services permit more sophisticated routing instructions, including the ability of an incumbent LEC to vary where it routes the traffic to an 800 number according to a number of factors, such as the time of day the call originated.

initiated an investigation,<sup>4</sup> which culminated in the *Report and Order*.

2. The *Report and Order* required incumbent LECs that filed tariffs for 800 data base services to recalculate their price cap indices (PCIs) in accordance with our findings in the *Report and Order*, and to resubmit their tariffs.<sup>5</sup> The *Report and Order* examined, *inter alia*, the terms and conditions of the incumbent LECs' tariffs in light of our orders concerning 800 data base services. The *Report and Order* also contained our determinations regarding the reasonableness of the price cap incumbent LECs' restructuring of their 800 data base service rates, the reasonableness of certain exogenous costs claimed by those incumbent LECs,<sup>6</sup> and of the allocation of those exogenous costs between interstate and intrastate jurisdictions. With regard to the central data base service tariff offered by the Bell Operating Companies (BOCs), we determined the reasonableness of many tariff provisions, as well as the reasonableness of the costs and cost allocations underlying the BOCs' rates for that service.

3. AT&T Corp. (AT&T), MCI Telecommunications Corporation (MCI), the Bell Atlantic telephone companies,<sup>7</sup> Southwestern Bell Telephone Company (SWBT), and Pacific Bell all filed Petitions for Reconsideration (Petitions) of the *Report and Order*. The NYNEX Telephone Companies (NYNEX), GTE Service Corporation (GTE), U S West Communications, Inc. (U S West), Pacific Bell, Nevada Bell, and SWBT filed Oppositions to the Petitions for Reconsideration (Oppositions) of AT&T and MCI.<sup>8</sup> Sprint Corporation (Sprint) filed a Response to the Petitions for Reconsideration (Sprint Response). AT&T filed Oppositions to the Petitions of Bell Atlantic<sup>9</sup> and Pacific Bell.<sup>10</sup> No party filed an opposition to SWBT's Petition. AT&T, MCI, Bell Atlantic, and Pacific Bell filed Replies to the Oppositions to their respective Petitions.

## II. PLEADINGS AND DISCUSSION

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<sup>4</sup> *In re The Bell Operating Companies' Tariff for the 800 Service Management System, Tariff F.C.C. No. 1 and the 800 Data Base Access Tariffs Order*, 8 FCC Rcd 3242 (1993) (*Suspension Order*).

<sup>5</sup> *Report and Order* at ¶¶ 316-317.

<sup>6</sup> The standard for treating costs as exogenous was set forth in the *Rate Structure Order*: "exogenous treatment [will] only extend to those costs incurred specifically for the implementation of basic 800 data base service." *In re Provision of Access for 800 Service*, CC Docket No. 86-10, Second Report and Order, 8 FCC Rcd 907, 911 (1993) (*Rate Structure Order*). See also *Report and Order* at ¶ 48.

<sup>7</sup> The Bell Atlantic telephone companies, hereafter referred to as Bell Atlantic, are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; and Bell Atlantic-West Virginia, Inc.

<sup>8</sup> Pacific Bell and Nevada Bell filed a joint opposition (Pacific/Nevada Bell Opposition).

<sup>9</sup> AT&T only partially opposes Bell Atlantic's Petition for Reconsideration.

<sup>10</sup> AT&T's Opposition to Pacific Bell's Petition for Reconsideration was filed concurrently with the Motion of AT&T to Accept Late-Filed Opposition.

A. Petitions for Reconsideration filed by AT&T and MCI

1. Pleadings

4. In the *Report and Order*, we disallowed certain costs claimed by the incumbent LECs to be exogenous based upon findings that those costs were not specifically incurred for the implementation of basic 800 data base service. Accordingly, we ordered the price cap incumbent LECs to lower their PCIs by an aggregate \$34.1 million, on a prospective basis, to reflect the disallowances of their overstated exogenous costs.<sup>11</sup> AT&T and MCI seek reconsideration of the *Report and Order* to the extent that we did not require the incumbent LECs to refund the revenues already generated under the PCIs. AT&T and MCI argue that, in ordering only a prospective PCI adjustment, we failed to consider the accounting order that AT&T and MCI allege contemplates refunds.<sup>12</sup>

5. SWBT, NYNEX, U S West, GTE, Pacific Bell, and Nevada Bell all argue that under section 204(a) of the Telecommunications Act of 1934, as amended (the Act), we may, but are not required, to order refunds. NYNEX argues that, in this instance, we exercised our discretion by requiring only a prospective reduction in rates, and not a retroactive refund.<sup>13</sup> The incumbent LECs also cite examples in which this Commission, after concluding that a tariff was unlawful, declined to order refunds.<sup>14</sup>

6. SWBT, NYNEX, U S West, GTE, Pacific Bell, and Nevada Bell also contend that they had "headroom" under the price caps so that any retroactive exogenous reduction would not require the full amount to be refunded. These parties argue that AT&T and MCI failed to recognize that the Actual Price Indices (APIs) may have been below the PCIs for price cap incumbent LECs. Therefore a reduction in the PCIs to reflect the disallowed exogenous costs would not necessarily result in an equal reduction in the API rates for that period.<sup>15</sup> These parties further contend that had they known of the disallowances earlier, they could have adjusted their

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<sup>11</sup> *Report and Order* at ¶¶ 307-315.

<sup>12</sup> AT&T Petition at 3; MCI Petition at 2-3.

<sup>13</sup> NYNEX Opposition at 2.

<sup>14</sup> See *In re Local Exchange Carrier Access Tariff Rate Levels, Bell Atlantic Telephone Companies Tariff F.C.C. No. 1; GVNW Inc./Management Bourbeuse Telephone Company Tariff F.C.C. No. 1*, Memorandum Opinion and Order, CC Docket No. 85-554 (Rel. August 16, 1993) (*LEC Access Tariff Order*); and *In re Special Access Tariffs of Local Exchange Carriers* Memorandum Opinion and Order, 5 FCC Rcd 1717 (1990) (*Special Access Tariff Order*).

<sup>15</sup> There could only be a dollar for dollar reduction if the APIs were the same as the PCIs. In that instance, a 5% reduction in a PCI would require an equal reduction in the relevant API.

prices in other baskets to offset or eliminate entirely the need for a refund.<sup>16</sup> They argue that it is now too late to order a refund, because the incumbent LECs will lose monies they legitimately could have collected. Pacific Bell and Nevada Bell further contend that it is legally too late for us to order refunds.<sup>17</sup> The *Report and Order* was issued nearly three and one-half years after the tariffs took effect. These parties contend that we did not meet our statutory obligation to conclude the proceedings within fifteen months of the effective date of the tariffs (the relevant statutory time period), and that we cannot now order refunds to be paid.

7. SWBT, U S West, Pacific Bell, and Nevada Bell further contend that they already refunded a portion of the amounts to AT&T and MCI through the "sharing" mechanism.<sup>18</sup> Under the price cap rules, the incumbent LECs were required to share 50 percent of their 1993-1996 earnings in excess of the rate of return ceiling prescribed by us.<sup>19</sup> They contend that any refund order must take this into account.

8. Bell Atlantic also makes a broad statement without elaboration that the IXCs would suffer no harm if refunds were not ordered, because the IXCs were able to pass along their costs for 800 data base service to their customers.<sup>20</sup> Regarding the calculation of any amounts due, GTE contends that AT&T's use of compound instead of simple interest is inappropriate, overstates the amounts owed, and is contrary to Commission precedent.<sup>21</sup>

9. Sprint also filed a response to the Petitions by AT&T and MCI, on behalf of its local operating companies. Sprint contends that, in the Suspension Order, we suspended only that portion of the rates for Sprint's local operating companies that exceeded .0067 dollars per query. According to Sprint, the rates filed by its local operating companies have not exceeded the ceiling since the amended tariffs were filed on April 29, 1993 (effective May 1, 1993), and thus were never suspended nor subject to an accounting order.<sup>22</sup> Therefore, according to Sprint, our investigation of these Sprint rates was under the authority of section 205 of the Act, not section 204. Sprint contends that we have no authority under section 205 to order refunds contemplated

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<sup>16</sup> SWBT Opposition at 2-4; NYNEX Opposition at 2-3; U S West Opposition at 3; GTE Opposition at 2-3; Pacific/Nevada Bell Opposition at 4.

<sup>17</sup> Pacific/Nevada Bell Opposition at 2-3.

<sup>18</sup> SWBT Opposition at 4-5; U S West Opposition at 6-7; Pacific/Nevada Bell Opposition at 4.

<sup>19</sup> *See In re Policy and Rules Concerning Rates for Dominant Carriers* Second Report and Order, 5 FCC Rcd 6786, 6788 (1990) (*Second Dominant Carrier Order*).

<sup>20</sup> Bell Atlantic Reply at 5. This statement was made in Bell Atlantic's Reply to AT&T's Opposition to Bell Atlantic's Petition.

<sup>21</sup> GTE Opposition at 4.

<sup>22</sup> Sprint Response at 2-3.

only by section 204.<sup>23</sup>

10. In its Reply, although it agrees that it is within our discretion to order refunds, AT&T argues that "by failing to consider and address the refund issue the Commission raised in its own accounting order in this proceeding, the Commission failed to exercise its discretion at all."<sup>24</sup> In addition, MCI contends that the discretion proceedings cited by the incumbent LECs where refunds were not ordered are not supportive of their position, because those matters involved situations in which there were only several months, not years, of accrued payments.<sup>25</sup>

11. In response to the incumbent LECs' argument that they could have made adjustments to counter any loss of revenues if they had been made aware earlier of the disallowances cited in the *Report and Order*, AT&T and MCI make several arguments. First, MCI contends that the length of time an unlawful tariff is in effect is irrelevant to a determination of whether refunds are required. MCI states that it had to pay the unlawful amounts for over three years -- the incumbent LECs needed only to keep accurate accounts.<sup>26</sup> Further, MCI argues that the refund liability cannot be offset by headroom in other baskets. MCI contends that the incumbent LECs' argument that above-cap pricing in one basket can be offset by below-cap pricing in other baskets is contrary to the principles underlying this Commission's price cap regime. According to MCI, we adopted 4 baskets, not a single aggregate price cap, in order to deter cost shifting between service categories and to prevent discrimination among different classes of customers.<sup>27</sup> MCI contends that the incumbent LECs' proposal would defeat this because it would, for example, permit the incumbent LECs to discriminate in favor of their interexchange customers at the expense of their access customers.<sup>28</sup> Both AT&T and MCI argue that the incumbent LECs' contention that their rates were priced below their price caps misses the point. AT&T and MCI contend that there was a determination that the incumbent LECs' PCIs (not their rates) were overstated since May 1993. Thus, AT&T contends that "the PCIs . . . should be adjusted regardless of the rates charged."<sup>29</sup> AT&T states that historically incumbent LECs have not been given any credit in their PCI calculation for a current year to compensate for pricing below cap during the prior year. AT&T cites as an example the annual price cap filings, in which "LECs are required to adjust their PCIs without consideration of whether they

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<sup>23</sup> Sprint Response at 3.

<sup>24</sup> AT&T Reply at 3.

<sup>25</sup> MCI Reply at 3.

<sup>26</sup> MCI Reply at 4-5.

<sup>27</sup> MCI Reply at 6. *See also Second Dominant Carrier Order*, 5 FCC Rcd at 6811.

<sup>28</sup> MCI Reply at 6. *See also MCI v. FCC*, 59 F.3d 1407, 1418-1419 (D.C. Cir. 1995).

<sup>29</sup> AT&T Reply at 4.

priced their services below cap."<sup>30</sup> In those cases argues AT&T, "the LECs are not permitted to apply a credit to their annual PCI adjustments even if they had foregone the opportunity to earn more revenues by pricing below cap."<sup>31</sup>

12. Regarding the "sharing" mechanism, AT&T argues that any PCI adjustment is independent of the incumbent LECs' sharing obligation, which arises as a result of overearnings. In addition, AT&T contends that the incumbent LECs have not demonstrated that any sharing obligation resulted from their 800 data base services, the only services available to offset the refunds in question.<sup>32</sup>

## 2. Discussion

13. Our review of the *Report and Order* reveals that AT&T and MCI correctly assert that we did not consider whether to order refunds in this proceeding. We do so now, and for the reasons set forth below, hereby order that refunds be paid based upon the disallowances of exogenous costs set forth in both this Order and the *Report and Order*. We delegate to the Common Carrier Bureau the authority to ensure the proper payment of these refunds.

14. As all of the parties acknowledge, ordering refunds in a section 204 investigation is generally within the Commission's discretion.<sup>33</sup> In enunciating the standards for ordering refunds, we have stated that:

[R]efunds are largely a matter of equity, and in arriving at a decision as to whether or not refunds should be awarded, we must balance the interests of both the carrier and the customer in determining the public interest. In addition, each case must be examined in light of its own particular circumstances.<sup>34</sup>

15. Pacific Bell and Nevada Bell contend here, however, that it is legally too late for us to order refunds. They contend that section 204(a)(2)(A) of the Act required us to issue an order concluding this proceeding within fifteen months of the effective date of the tariffs at issue. Pacific Bell and Nevada Bell contend that, because this did not occur, "it would not be appropriate . . . for the Commission to order refunds."<sup>35</sup> The courts, however, have held that

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<sup>30</sup> AT&T Reply at 4.

<sup>31</sup> AT&T Reply at 4.

<sup>32</sup> AT&T Reply at 7.

<sup>33</sup> Section 204(a) of the Telecommunications Act of 1934, as amended. *See also Nader v. FCC* 520 F.2d 182, 206 (D.C. Cir. 1975); *AT&T v. FCC* 487 F.2d 864, 880 (2nd Cir. 1973).

<sup>34</sup> *In re American Television Relay, Inc.*, 67 FCC.2d 703, 708-709 (1978).

<sup>35</sup> Pacific/Nevada Bell Opposition at 3.

administrative agencies retain their authority to act notwithstanding the passing of a statutory deadline, and Pacific Bell and Nevada Bell have pointed to nothing in the statute or any legislative history that indicates that Congress intended to take away our section 204 refund authority in that circumstance.<sup>36</sup> We also conclude that their reliance upon *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) is misplaced. Pacific Bell and Nevada Bell cite *Illinois Bell Tel Co.* for the proposition:

The question is not whether the Commission is obliged to conduct a Section 204 proceeding, the question is whether it is authorized to order refunds when it has not conducted such a proceeding. . . . [O]ur answer is 'no.'<sup>37</sup>

The current proceeding was instituted pursuant to, *inter alia*, section 204 of the Act.<sup>38</sup> That an order terminating this proceeding was not issued within fifteen months after the effective date of the tariffs (May 1, 1993) does not alter this fact. Moreover, the facts underlying the decision in *Illinois Bell Tel. Co.* are far removed from the facts in this proceeding. *Illinois Bell Tel. Co.* involved a proceeding in which we permitted rates to go into effect *without* a suspension.<sup>39</sup> The Court concluded that when we allowed those rates to go into effect without a suspension, we acted under section 205, *not* section 204 of the Act. The Court further concluded that we did not have the authority under section 205 of the Act to order refunds contemplated only under section 204 of the Act.<sup>40</sup> That is not the case here, as we did in fact suspend the rates for one day before they became effective, issued an accounting order, and have been exercising our authority under section 204 of the Act.<sup>41</sup> Therefore, *Illinois Bell Tel. Co.* offers no support for the proposition that we cannot legally order refunds in this proceeding.

16. Pacific Bell and Nevada Bell also argue that the proceeding has gone on too long equitably to require that any refunds be ordered.<sup>42</sup> We have previously addressed and dismissed such an argument:

[B]ecause the Commission's final decision . . . was not forthcoming for over two years, ATR states that its refund liability exposure was increased unreasonably.

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<sup>36</sup> See generally *Gottlieb v. Pena*, 41 F.3d 730, 734 (D.C. Cir. 1994): "[T]his court has repeatedly concluded that missing a statutory deadline does not divest an agency of authority over a case or issue."

<sup>37</sup> *Illinois Bell Tel. Co.*, 966 F.2d at 1483.

<sup>38</sup> *Suspension Order*, 8 FCC Rcd at 3245.

<sup>39</sup> *Illinois Bell Tel. Co.*, 966 F.2d at 1480.

<sup>40</sup> *Illinois Bell Tel. Co.* 966 F.2d at 1483.

<sup>41</sup> *Suspension Order*, 8 FCC Rcd at 3242.

<sup>42</sup> Pacific/Nevada Bell Opposition at 4.

Admittedly, this proceeding has been of extended duration, but ATR has been on notice from the very beginning that the possibility of refunds existed . . . and therefore, should have been preparing for this possibility from the outset.<sup>43</sup>

17. We also find unpersuasive arguments by various incumbent LECs that we should not require refunds because they could have raised rates in other baskets if we had concluded the investigation earlier. For example, U S West argues that "the revenue that U S West would have foregone in the Traffic Sensitive basket as a result of an earlier resolution could have been recouped via rate element increases in the Interexchange and Trunking baskets."<sup>44</sup> In *American Television Relay, Inc.*, we confronted an analogous situation.<sup>45</sup> The common carrier argued against being ordered to refund unlawful rate increases to one group of customers because the carrier would not have the opportunity to increase retroactively the rates paid by another group of customers who had paid rates lower than the maximum.<sup>46</sup> We relied then, and do so again now, on the Supreme Court decision in *FPC v. Tennessee Gas Co.*:

In addition, an analysis of the policy of the [Natural Gas] Act clearly indicates that a natural gas company initiating a rate increase in rates under § 4(d) [of the Natural Gas Act] assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being "just and reasonable." In addition, the company can never recoup the income lost when the suspension power of the Commission is exercised under § 4(e) [of the Natural Gas Act]. The company is also required to refund any sums thereafter collected should it not sustain the burden of proving the reasonableness of an increased rate, and it may suffer further loss when the Commission upon a finding of excessiveness makes adjustments in the rate detail of the company's filing. In this latter respect a rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of

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<sup>43</sup> *American Television Relay, Inc.*, 67 FCC.2d at 711. See also *Continental Oil Company v. FPC*, 378 F.2d 510 (5th Cir. 1967).

<sup>44</sup> U S West Opposition at 3. Further, although it is unclear from the record that any party is contending this, to the extent that the incumbent LECs are arguing that they should be entitled to actually recoup monies they could have earned by retroactively increasing rate elements in certain baskets, as opposed to using these amounts to offset their refund liability, this has been consistently rejected as retroactive ratemaking. We have stated that retroactive ratemaking "bars the Commission from allowing a carrier to raise rates to recoup past underrecovery." *In re Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 11 FCC Rcd 8961, 9072 (1995). See also *Nader v. FCC*, 520 F.2d at 202.

<sup>45</sup> In *American Television Relay*, the argument was that it would be inequitable to order any refunds, not just to reduce refund liabilities as is argued here. We find that the rationale behind *American Television Relay* is applicable to this argument as well.

<sup>46</sup> *American Television Relay, Inc.*, 67 FCC.2d at 710-711 (1978).

customers is found to be subjected to excessive rates, and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter. Such situations are entirely consistent with the policy of the Act and, we are told, occur with frequency. The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.<sup>47</sup>

Although these cases dealt with rate reductions, not a decrease in PCIs, we find the underlying rationale applicable to this matter, and not affected by the length of the investigation.

18. The incumbent LECs' citations to cases in which we did not order refunds even after a finding that the tariffs were unlawful bear little weight on this proceeding. As stated *supra*, our discretion to order refunds depends upon the factual circumstances of each case. The cases cited by the incumbent LECs, the *LEC Access Tariff Order* and the *Special Access Tariff Order*, are factually dissimilar to the current proceeding. These dissimilarities go beyond the much shorter period of overearnings in those proceedings than here. In fact, in the *Special Access Tariff Order*, we stated that we reached our conclusion not based upon the brevity of the six-month period in question, but upon the "unique circumstances that existed during the six months in question."<sup>48</sup> We agree that these cases stand for the proposition that we *can* exercise our discretion not to order refunds even when there is a finding of overearnings. For the reasons stated below we choose not to.

19. The other arguments raised by the incumbent LECs primarily involve how the refunds should be calculated. One argument common among the incumbent LECs is their headroom analysis stating that refunds should only reflect the degree to which the API exceeds the adjusted PCI. This is an argument that refunds, if they are allowed, should take these adjustments into consideration, not an argument that there should be no refunds.

20. In the *Report and Order*, we found that several of the incumbent LECs' tariff provisions were unlawful, which led to the requirement that the incumbent LECs adjust their PCIs based upon the disallowance of certain exogenous costs.<sup>49</sup> No party argues that the incumbent LECs did not receive these amounts, and it is clear that these monies represent

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<sup>47</sup> *FPC v. Tennessee Gas Co.*, 371 U.S. 145, 152-53 (1962). We also noted that section 4(d) of the Natural Gas Act, 15 U.S.C. § 717(c) is similar to section 203(b) of the Communications Act, and that section 4(e) of the Natural Gas Act, 15 U.S.C. § 717 is similar to section 204(a) the Communications Act. *American Television Relay, Inc.*, 67 FCC.2d at 711, n. 13.

<sup>48</sup> *Special Access Tariff Order*, 5 FCC Red at 1719.

<sup>49</sup> *Report and Order* at ¶¶ 306-317.

payments made pursuant to tariff provisions found to be unlawful.<sup>50</sup> The incumbent LECs argue generally that we have already exercised our discretion by not ordering refunds, but AT&T and MCI are correct that there was no discussion in the *Report and Order* regarding refunds. After reviewing all the facts and circumstances of this case, including a balance of the interest of the carriers and customers, we conclude that we should order refunds, consistent with the findings of both the *Report and Order* and this Order. We base this decision on our finding the tariffed rates unlawful, requiring a prospective reduction of the PCIs, as specified in the *Report and Order*. This downward adjustment reflected our findings of certain disallowed exogenous costs claimed by the incumbent LECs. Through the use of the accounting order, we put the incumbent LECs on notice that refunds might be necessary, and established a mechanism that could readily place customers in a position of having paid no more than lawful rates during the period of investigation. We find no reason why these adjustments for disallowed costs should only be prospective in nature.

21. In the Ordering Clauses of the *Report and Order*, we delegated authority to the Common Carrier Bureau to "take action necessary to ensure that the Local Exchange Carriers properly adjust their relevant Price Cap Indices to reflect the requirements of this order."<sup>51</sup> This language gave the Common Carrier Bureau the authority to ensure the proper prospective adjustment of the incumbent LECs' PCIs, but did not delegate to the Bureau the authority to ensure the payment of refunds for these same improper gains. We hereby delegate to the Bureau the authority it requires to ensure that the necessary refunds are paid to the proper parties. To further this result, we will require the incumbent LECs with disallowed exogenous costs<sup>52</sup> to file a schedule of proposed refunds consistent with both this Order and the prior *Report and Order*. Each schedule should be accompanied by a detailed description of how the proposed refunds were calculated, and a description of the carrier's plan to implement the refund. The incumbent LECs raise various arguments regarding the amount of any refund obligation. With the exception of those arguments addressed explicitly here, the Bureau shall resolve such questions in determining the amount of refunds. Further, LECs may advance other arguments pertaining to the amount of refunds consistent with the Commission's price cap rules and policies. All parties will be allowed to file comments on these schedules. We delegate to the Common Carrier Bureau the authority to consider and rule upon all schedules relating to the refund amounts in question.

22. Regarding the use of simple versus compound interest, we have adopted a general requirement that interest awarded for refund cases under section 204 of the Act be computed on

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<sup>50</sup> *Report and Order* ¶¶ 306-317.

<sup>51</sup> *Report and Order* ¶ 318.

<sup>52</sup> This includes Ameritech Operating Companies, Bell Atlantic, BellSouth Telecommunications, Inc, NYNEX, Pacific Bell, SWBT, U S West, GTE, Southern New England Telephone Company, and the Sprint Operating Telephone Companies (referred to in the *Report and Order* as the United Operating Telephone Companies). Appendix D of the *Report and Order*.

a daily compounded basis.<sup>53</sup> As stated in the *Section 208 Order*, we did not foreclose the possibility that in a particular proceeding unique circumstances may warrant the use of simple rather than compound interest.<sup>54</sup> There has been, however, no such showing of unique circumstances in this proceeding, and therefore the incumbent LECs must include in their refund calculations an interest component computed on a daily compounded basis.

23. Regarding Sprint's Response, it is correct that the Commission only suspended the data base query rates under section 204(a) to the extent they exceeded .0067 dollars per query.<sup>55</sup> Sprint's local operating companies' tariffs never exceeded that rate for data base queries. Therefore, the rates for data base query service filed by the Sprint local operating companies were never suspended, and therefore not subject to section 204 of the Act.<sup>56</sup> The Commission will therefore not order the Sprint local operating companies to issue refunds in this matter with respect to its data base query rates.

24. Bell Atlantic's comments on AT&T's and MCI's Petitions were not filed in the time period permitted by our Rules. These comments are, in fact, arguments in opposition to the Petitions filed by AT&T and MCI. As such, they needed to be filed within fifteen days of the date those petitions were filed -- specifically, by December 12, 1996.<sup>57</sup> These comments were in fact filed as part of Bell Atlantic's Reply, on December 23, 1996. Bell Atlantic did not file a motion to accept a late-filed opposition, and therefore we are not required to consider its comments in opposition.<sup>58</sup> Even considering Bell Atlantic's contention that the IXCs would not suffer any harm if there were no refunds because the IXCs could have passed their 800 data base service costs to their customers, however, Bell Atlantic presents no supporting evidence. Without any factual support, Bell Atlantic's contention must be rejected as unsubstantiated. Moreover, although an agency has discretion in its calculation of refunds, this argument does not bear directly on the statutory standard for refunds under section 204, 47 U.S.C. § 204, providing that a refund consists of that amount found to be not justified.

## B. Pacific Bell's Petition for Reconsideration

### 1. Pleadings

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<sup>53</sup> *In re Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period*, 8 FCC Rcd 5485 (1993) (*Section 208 Order*).

<sup>54</sup> *Section 208 Order*, 8 FCC Rcd at 5495.

<sup>55</sup> *Suspension Order* 8 FCC Rcd at 3244.

<sup>56</sup> *Illinois Bell Tel. Co.*, 966 F.2d at 1483.

<sup>57</sup> 47 C.F.R. § 1.429(f).

<sup>58</sup> For public interest concerns, however, we will consider Bell Atlantic's argument.

25. Pacific Bell contends that our decision in the *Report and Order* to disallow any cost recovery for the cost of upgrading Pacific Bell's tandems: (1) rests upon an erroneous legal premise; and (2) is factually incorrect.<sup>59</sup> These costs, according to Pacific Bell, were to upgrade its tandem switches to add increased capacity and service origination point capability at the tandem. These costs include both switch hardware and software.<sup>60</sup> Pacific Bell alleges that these upgrades were made solely to meet the 800 data base access time standards<sup>61</sup> and implementation date.<sup>62</sup> Pacific Bell contends that these costs meet the standard for granting exogenous treatment stated in the *Rate Structure Order*:

[I]t is appropriate to allow the LECs to treat as exogenous the reasonable costs they incurred specifically for the implementation and operation of the basic 800 data base service required by Commission orders.<sup>63</sup>

Pacific Bell alleges that the sole reason for disallowing the tandem cost recovery is our statement in the *Report and Order* that:

[T]hese tandem costs do not meet the *Rate Structure Order* standard for granting exogenous treatment only to those costs incurred specifically to implement basic 800 data base service because the Commission has expressly stated that the costs of meeting the access time standards are not eligible for exogenous treatment.<sup>64</sup>

Pacific Bell contends that there is no such statement in the *Rate Structure Order*, and that we never stated that the costs for meeting the access time standards will never be considered

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<sup>59</sup> Pacific Bell is seeking a one-time recovery of \$1,315,000 for its tandem-related costs. Pacific Bell Petition at 1.

<sup>60</sup> Specifically, Pacific Bell states that its tandems:

[R]equired processor upgrades, replacement of equipment and additional software to provide for 11,500 SS7 trunk augments and 26,500 tandem trunk conversions from MF [multi-frequency] to SS7 signaling.

Pacific Bell Petition, Ex. 1 at II-7.

<sup>61</sup> See *In re Provision of Access for 800 Service*, MM Docket No. 86-10, *Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking*, 6 FCC Rcd 5421, 5425 (1991) (800 *Reconsideration and Second Supplemental NPRM*).

<sup>62</sup> Pacific Bell Petition, Ex. 1 at II-7.

<sup>63</sup> *Rate Structure Order*, 8 FCC Rcd at 911.

<sup>64</sup> *Report and Order* at ¶ 125.

exogenous.<sup>65</sup> Instead, argues Pacific Bell, the standard for exogenous cost recovery focuses on costs specifically incurred for the implementation and operation of the basic 800 data base service.<sup>66</sup> In fact, states Pacific Bell, one of the reasons we gave for allowing incumbent LECs exogenous recovery was that we "established stricter access time standards for 800 data base service than proposed by the LECs, thus increasing the costs associated with the provision of the service."<sup>67</sup> Pacific Bell thus contends that its tandem costs fit squarely within the standard for exogenous cost treatment.

26. In addition, Pacific Bell also seeks to introduce new facts pursuant to 47 C.F.R. sections 1.429(b)(1), (2), and (3) to demonstrate that our prior conclusion is now factually incorrect. Pacific Bell alleges that it has discovered since the filing of its tariff that the tandem feature is now necessary for several 800 data base functions, such as for 800 traffic for any call routed via Operator Services, or for calls routed from equipment used by the disabled.<sup>68</sup> Pacific Bell contends that it also discovered that these upgrades were necessary in order to provide access to 800 data base service to independent and rural carriers with switches that were not SS7 compatible,<sup>69</sup> and that it has separated its 800 traffic from all other traffic with the use of 800 trunk groups devoted to 800 traffic.<sup>70</sup> The latter was done, according to Pacific Bell, so that the 800 traffic "did not consume all routes between the end office and the tandem to the exclusion of direct-dialed traffic."<sup>71</sup> If it had not done so, Pacific Bell alleges, general telephone traffic would have been threatened with interruptions caused by high-volume 800 call events.<sup>72</sup> Finally, Pacific Bell contends that it used in the past, and is still using today, the 800 tandem upgrades exclusively for 800 data base purposes.<sup>73</sup>

27. AT&T contends that, contrary to Pacific Bell's claim, the *Rate Structure Order*

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<sup>65</sup> Pacific Bell Petition at 2.

<sup>66</sup> Pacific Bell Petition at 3.

<sup>67</sup> *Rate Structure Order*, 8 FCC Red at 911.

<sup>68</sup> Pacific Bell Petition at 4.

<sup>69</sup> Pacific Bell Petition at 4.

<sup>70</sup> Pacific Bell Petition at 5.

<sup>71</sup> Pacific Bell Petition at 5.

<sup>72</sup> Pacific Bell Petition at 5. According to Pacific Bell, these "800 call events" can occur, for example, as a result of a contest for which the participant must dial an 800 number.

<sup>73</sup> Pacific Bell Petition at 4-6. Originally, these upgrades were intended solely as an interim measure, because the service origination point function would have to be redeployed to the end offices in order to meet the 1995 access time standards. *Report and Order* at ¶ 123. Pacific Bell's Petition indicates that these upgrades are now viewed by Pacific Bell as part of a long-term solution for 800 data base services.

does support the disallowance of certain costs associated with meeting the access time standards, such as "the costs of accelerating SS7 deployment to meet the implementation timetable."<sup>74</sup> AT&T, focusing on the capability of the tandem upgrades, also argues that, notwithstanding the Pacific Bell's claim that these upgrades are being used exclusively for 800 data base purposes, these upgrades are capable of being used for services "other than 800 service."<sup>75</sup> It is this capability, according to AT&T, that disqualifies these upgrades for exogenous treatment.

28. Pacific Bell, in its Reply, states that the cost of accelerating SS7 deployment to meet the implementation timetable is separate and distinct from those for meeting the access time standards.<sup>76</sup> Further, Pacific Bell contends that AT&T offers no evidence to contradict Pacific Bell's new evidence allegedly demonstrating that the tandem upgrades can only be used in connection with 800 services.<sup>77</sup>

## 2. Discussion

29. As an initial matter, we grant AT&T's Motion to Accept Late-Filed Opposition. The late filing has not unduly prejudiced any party, and will serve to supplement the record in this proceeding.

30. Pacific Bell's Petition points out a need to clarify our reasoning in the *Report and Order*. Pacific Bell is correct that the *Report and Order* incorrectly cited the *Rate Structure Order* for the proposition that we had expressly denied exogenous treatment for the costs of meeting the access time standards. Rather, the *Rate Structure Order* decided that the costs of accelerating SS7 deployment to meet the implementation timetable would not be granted exogenous treatment.<sup>78</sup>

31. We found in the *Report and Order* that the costs for Pacific Bell's tandem upgrades fell within the latter prohibition. In the Description and Justification section of its tariffs, Pacific Bell stated that its tandem costs "would never have been incurred were it not for the necessity to comply with the 1993 access time standards and implementation date."<sup>79</sup> Pacific Bell went on to state that its tandems "required . . . additional software to provide for SS7 trunk

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<sup>74</sup> AT&T Opposition to Pacific Bell's Petition at 3.

<sup>75</sup> AT&T Opposition to Pacific Bell's Petition at 3-4.

<sup>76</sup> Pacific Bell Reply at 1.

<sup>77</sup> Pacific Bell Reply at 2.

<sup>78</sup> *Rate Structure Order*, 8 FCC Rcd at 911.

<sup>79</sup> See Ex. 1, page II-7 attached to Pacific Bell Petition. (Emphasis added).

augments and 26,500 tandem trunk conversions from MF to SS7 signalling."<sup>80</sup> We found that these costs were in the nature of general network (SS7) costs, and therefore did not qualify for exogenous treatment.<sup>81</sup> Further, although the *Report and Order* was not specific on this point, we found that Pacific Bell's own documents demonstrate that these costs were incurred to meet the implementation timetable, which specifically precludes their receiving exogenous cost treatment.

32. Pacific Bell's new evidence does not contradict our prior conclusion, and is not sufficient to warrant us to reconsider the *Report and Order*. While its new evidence alleges that Pacific Bell was and still is using its tandem upgrades exclusively for 800 data base purposes, this does not change the nature of the costs when they were incurred. Pacific Bell had the burden to demonstrate that these costs were entitled to exogenous treatment, and none of the evidence it has presented shows that these costs meet the standard for such treatment.<sup>82</sup> In addition, the costs for the tandem upgrades, which were intended only as an interim measure and which are now claimed by Pacific Bell to be a long-term solution, have never been found to be reasonably incurred as a long-term solution, and in fact the tandem upgrades were never presented by Pacific Bell as a long-term solution until its Petition. After review of this new record, we find that Pacific Bell has failed to demonstrate the reasonableness of these costs as a long-term solution as well, as it presents no new evidence that even suggests that its costs were reasonable.<sup>83</sup> We therefore find that Pacific Bell has not satisfied the standard for reconsideration,<sup>84</sup> and we will not reconsider our ruling in the *Report and Order* with regards to Pacific Bell's tandem upgrade costs.

### C. Bell Atlantic's Petition for Reconsideration

#### 1. Pleadings

33. Bell Atlantic contends that in calculating its exogenous costs for its regional data base we inappropriately rejected Bell Atlantic's actual costs, and instead based its allowance on

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<sup>80</sup> See Ex. 1, page II-7 attached to Pacific Bell Petition.

<sup>81</sup> *Report and Order*, ¶ 125.

<sup>82</sup> As stated in the *Rate Structure Order*, "[w]e have already held that LEC investment in SS7 infrastructure elements should be treated as a general network upgrade." *Rate Structure Order*, 8 FCC Rcd at 911.

<sup>83</sup> *Rate Structure Order*, 8 FCC Rcd at 911.

<sup>84</sup> The standard for reconsideration of a Commission Order is that reconsideration is appropriate "where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters." *In re Applications of D.W.S., Inc.*, 11 FCC Rcd 2933 (1996). See also *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965) *cert. denied*, 383 U.S. 967 (1966).

the average of the costs submitted by four other regional BOCs.<sup>85</sup> Bell Atlantic states that this is inconsistent with our grant of exogenous treatment in 1993, when we concluded that it was appropriate to treat as exogenous the reasonable costs the incumbent LECs "incurred specifically for the implementation and operation of the basic 800 data base service."<sup>86</sup> According to Bell Atlantic, we rejected its first filing, which was based upon a proprietary cost model, because Bell Atlantic chose not to disclose the model on the record. Then, according to Bell Atlantic, we rejected its second filing based upon Bell Atlantic's actual cost data because: (1) Bell Atlantic had the highest total regional data base investment; and (2) Bell Atlantic had shown large increases in investment during the investigation. Bell Atlantic argues that our rejection of its actual cost data is incorrect because Bell Atlantic deployed a more advanced data base platform that is more adaptable to future services.<sup>87</sup> Bell Atlantic claims that it is being penalized for deploying more advanced technology, an outcome inconsistent with the Congressional admonition in section 706 of the Telecommunications Act of 1996 encouraging the deployment of advanced telecommunications.<sup>88</sup> Although it admits that its actual cost support showed higher costs than did its original filing, Bell Atlantic argues that the original filing was rejected, and cannot form the basis for rejecting a second filing based upon actual costs. Bell Atlantic asserts not only that we rejected the new submission solely because its actual costs were higher than the original study, but also that we should not have costs that were lower than either submission made by Bell Atlantic.<sup>89</sup> Bell Atlantic therefore requests that we reconsider our *Report and Order*, and allow Bell Atlantic exogenous cost treatment for its regional data base costs based upon Bell Atlantic's actual cost filing.

34. Bell Atlantic also seeks reconsideration of the denial of exogenous treatment for its: (1) costs for ports at and links between its local and regional signal transfer points; and (2) costs of the ports at its transfer points and its regional data bases (the ports connected to the regional signal transfer point and the ports connected to the regional data base). On the first issue, Bell Atlantic argues that we are incorrect in concluding that these links provide many services other than 800 service.<sup>90</sup> According to Bell Atlantic, 95 percent of the usage of these links is associated with 800 query service,<sup>91</sup> which Bell Atlantic contends the *Report and Order* fails to consider. Similarly, Bell Atlantic argues that we should reconsider our decision to deny recovery of the costs of the ports associated with the links between Bell Atlantic's local and

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<sup>85</sup> *Report and Order* at ¶ 102.

<sup>86</sup> Bell Atlantic Petition at 2, citing *Rate Structure Order*, 8 FCC Rcd at 911.

<sup>87</sup> Bell Atlantic Petition at 2-3.

<sup>88</sup> Bell Atlantic Petition at 3.

<sup>89</sup> Bell Atlantic Petition at 4-5.

<sup>90</sup> Bell Atlantic Petition at 5.

<sup>91</sup> Bell Atlantic Petition at 5.

regional transfer points because, if the links almost exclusively carry 800 query traffic, the associated ports have the same usage.<sup>92</sup> On the second issue, Bell Atlantic contends that we erred in our decision to deny recovery of the port costs at the regional transfer point and the regional data base. According to Bell Atlantic, we recognized that the costs of the associated links were specifically incurred to provide 800 data base query service. If the link between two ports carries such traffic argues Bell Atlantic, then the ports must carry the same traffic, and the costs for those ports should be treated as exogenous as well.<sup>93</sup>

35. AT&T's Opposition cites our finding that Bell Atlantic failed to meet its burden of showing that its regional data base costs were reasonable,<sup>94</sup> and argues that Bell Atlantic has still never explained why its costs increased so dramatically between its first and second submissions. Further, AT&T contends that Bell Atlantic is not being penalized for deploying higher technology because exogenous cost treatment is limited to costs that are wholly beyond a carrier's control.<sup>95</sup> To the extent that Bell Atlantic decided to deploy state-of-the-art technology, AT&T argues that those costs were discretionary. No party, including AT&T, filed an opposition to Bell Atlantic's Petition requesting exogenous treatment for its link and port costs.

36. In responding to AT&T's Opposition to the costs of Bell Atlantic's regional data base, Bell Atlantic contends that AT&T did not offer any substantive grounds for objecting to its Petition, and that AT&T's position places the Commission in the role of arbiter of what technology choices are correct -- a role, adds Bell Atlantic, that we have rejected in the past.<sup>96</sup> Bell Atlantic states that its decision has been validated because new facts demonstrate that several companies are now moving towards Bell Atlantic's technological approach.<sup>97</sup>

## 2. Discussion

37. We rejected Bell Atlantic's first submission attempting to justify its claim for exogenous treatment for its regional data base investment because Bell Atlantic chose not to disclose its proprietary cost model on the record.<sup>98</sup> That submission is therefore no longer

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<sup>92</sup> Bell Atlantic Petition at 6.

<sup>93</sup> Bell Atlantic Petition at 6.

<sup>94</sup> *Report and Order* ¶ 102.

<sup>95</sup> AT&T Opposition to Bell Atlantic's Petition at 4. *See also Second Dominant Carrier Order*, 5 FCC Rcd 6786 at 6807: "Exogenous costs are in general those costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers."

<sup>96</sup> Bell Atlantic Reply at 2-3.

<sup>97</sup> Bell Atlantic Reply at 3.

<sup>98</sup> *Report and Order* ¶ 94.

relevant for the purpose of demonstrating that those costs are an accurate reflection of Bell Atlantic's regional data base investment. Therefore, Bell Atlantic's arguments in its Petition that rely upon this first submission must be rejected.<sup>99</sup>

38. We allowed Bell Atlantic another opportunity to attempt to justify its costs, but again it failed to meet its burden that its regional data base costs were "reasonable and . . . incurred specifically for the provision of 800 data base service."<sup>100</sup> Just as the other major incumbent LECs, Bell Atlantic has one pair of dedicated regional data bases and one pair of shared regional data bases. Yet Bell Atlantic's costs far exceed those of the other incumbent LECs.<sup>101</sup> Bell Atlantic has failed to make a specific demonstration that these higher costs are in fact reasonable. Bell Atlantic is therefore incorrect in its assertion that we rejected its submission based on actual costs solely because it was higher than Bell Atlantic's first submission. Rather, we rejected Bell Atlantic's actual cost filing because it did not satisfy our standard for exogenous cost treatment, which was Bell Atlantic's burden to meet. Bell Atlantic has offered no probative evidence in its Petition that would cause us to reconsider our decision in the *Report and Order*.

39. Bell Atlantic's argument that it is being penalized for deploying more advanced technology also fails. Bell Atlantic has not demonstrated that all the costs of an advanced technology that provides the carrier with many other benefits satisfy the standard for inclusion in 800 database rates. Bell Atlantic's final argument, that its choice of technology has been validated as reasonable because other companies are beginning to implement the same approach, does not justify the inclusion of all these costs in 800 database rates, and adds support to Bell Atlantic's prior failed efforts to show that its costs were incurred specifically for implementing 800 data base services. Therefore, we will not reconsider and will not grant exogenous treatment to the costs presented in Bell Atlantic's final submission, based upon what Bell Atlantic considers to be its actual costs for its regional data bases.

40. In support of its request for exogenous treatment for the ports at which the links between its regional signal transfer points and regional data bases terminate, Bell Atlantic states that these ports carry the same traffic as the associated links, and therefore should be accorded the same exogenous treatment.<sup>102</sup> Based upon our review of the record in this proceeding and Bell Atlantic's Petition, we agree, and find that Bell Atlantic has satisfied our standard for reconsideration defined in footnote 84, *supra*. Therefore, we reconsider our decision in the *Report and Order*, and grant Bell Atlantic exogenous treatment for those ports at its regional signal transfer point at which the links that, in turn, are connected with a regional data base

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<sup>99</sup> However, Bell Atlantic's first submission remains relevant to demonstrate the problems and questions raised by its second submission.

<sup>100</sup> *Report and Order* at ¶ 102; *see also Rate Structure Order*, 8 FCC Red at 911.

<sup>101</sup> *Report and Order* at ¶ 101.

<sup>102</sup> Bell Atlantic Petition at 6.

terminate. As part of any filing submitted by Bell Atlantic in response to our decision, Bell Atlantic must file a detailed schedule of the costs associated with the ports that meet this criterion. We will allow comments upon that schedule, and will delegate to the Common Carrier Bureau the authority to determine exactly what costs will be granted exogenous treatment, based upon its review of the schedule filed by Bell Atlantic and any comments thereon.

41. Bell Atlantic is not entitled, however, to exogenous treatment for the costs of its link between its local and regional signal transfer points and of the ports at which those links terminate, despite Bell Atlantic's contention that 95 percent of the traffic carried over the links between these points is comprised of 800 data base queries.<sup>103</sup> The link and port costs associated with the local and regional signal transfer points are core SS7 costs that Bell Atlantic is "recovering from all network users."<sup>104</sup> Bell Atlantic adds nothing new in its Petition to warrant reconsideration. Therefore, we deny Bell Atlantic's Petition to reconsider these costs for exogenous treatment.

D. SWBT's Petition for Reconsideration

1. Pleadings

42. SWBT objects to the following language in the *Report and Order*:

Section 32.27(d) of the Commission's rules governs purchases of service between a regulated LEC and its affiliate. When either the affiliate or the regulated LEC is selling service to the other, it must price those services at prevailing company prices, if the services are also sold to unregulated customers, or at fully distributed costs if the regulated LEC or the affiliate is the only customer.<sup>105</sup>

SWBT requests that we clarify this language to affirm that the affiliate transaction rules do not regulate the price of transactions between an incumbent LEC and its affiliates, and that those rules only govern how such transactions are recorded on the incumbent LEC's regulated books.<sup>106</sup>

43. SWBT also objects to certain language contained in paragraph 263 of the *Report and Order*:

The [affiliate transaction] rules require a carrier to record the services it provides to or obtains from affiliates at tariffed rates when applicable, at prevailing

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<sup>103</sup> Bell Atlantic Petition at 5.

<sup>104</sup> *Report and Order* at ¶ 116.

<sup>105</sup> *Report and Order* at ¶ 258.

<sup>106</sup> SWBT Petition at 1-2.

company prices when the provider of the services also provides substantial amounts of them to non-affiliates, or, absent a tariffed rate or prevailing company price, at fully-distributed costs.<sup>107</sup>

SWBT requests that we clarify this language to affirm that the affiliate transactions rules define how an incumbent LEC records *revenues* derived from services provided to affiliates.<sup>108</sup>

44. SWBT also objects to other language contained in paragraph 263:

[A]ll services, including nonregulated services, that Southwestern provides to DSMI are subject to the Commission's affiliate transaction rules.<sup>109</sup>

SWBT contends that this language is directly contrary to a prior Commission ruling that held that when a carrier "provides a nonregulated service to its affiliate and records the transaction in a nonregulated revenue account, § 32.27 does not apply."<sup>110</sup> SWBT states that its computer bureau service is a nonregulated service, and that SWBT records its revenues from such service in Account 5280 of the Uniform System of Accounts for Telecommunications Companies (USOA).<sup>111</sup> SWBT further argues that the language in the *Report and Order* is also inconsistent with the *Joint Cost Order*,<sup>112</sup> which SWBT alleges "never contemplated that the provision of a nonregulated service to an affiliate would be subject to the Commission's affiliate transactions rules."<sup>113</sup> Further, if we decide to reconsider this conclusion, then SWBT further requests that we reconsider the requirement that SWBT amend the computer bureau service transaction with DSMI in SWBT's Cost Allocation Manual (CAM).<sup>114</sup>

45. Finally, SWBT requests that we conclude that all of the CAM filing requirements

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<sup>107</sup> *Report and Order* ¶ 263.

<sup>108</sup> SWBT Petition at 2-3.

<sup>109</sup> *Report and Order* ¶ 263.

<sup>110</sup> SWBT Petition at 4, citing *In re United Telephone Systems Companies' Permanent Cost Allocation Manuals for Separation of Regulated and Nonregulated Costs* 7 FCC Rcd 4370 (1992) (*United Order*).

<sup>111</sup> 47 C.F.R. § 32.5280.

<sup>112</sup> *In re Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates* 2 FCC Rcd 1298 (1987) (*Joint Cost Order*).

<sup>113</sup> SWBT Petition at 5.

<sup>114</sup> The *Report and Order* required SWBT to revise the Computer Bureau Service transaction with DSMI in its CAM by replacing the phrase "negotiated price" with "fully distributed cost." *Report and Order* ¶ 264.

of the *Report and Order* are unnecessary and contrary to section 402 of the Telecommunications Act of 1996, which states that we "shall permit any common carrier . . . to file cost allocation manuals . . . annually, to the extent such carrier is required to file such manuals."<sup>115</sup>

## 2. Discussion

46. Regarding SWBT's first request for clarification, we find that section 32.27(d) of the Commission's Rules does not directly dictate the prices of services an incumbent LEC sells its affiliate, but it does determine what amount must be recorded in the incumbent LEC's books. For example, services provided by an affiliate to the regulated entity must be recorded at market rates when those same services are also provided by the affiliate to unaffiliated entities.<sup>116</sup> This was the point made in the *Report and Order*, and no further clarification is necessary.<sup>117</sup>

47. Regarding the second request for clarification from SWBT, the affiliate transaction rules set out how the incumbent LEC is to determine and record amounts to represent revenues derived from services provided to affiliates. No further clarification is necessary.

48. SWBT contends that section 32.27 only applies to transactions between the incumbent LEC's regulated activities and its affiliates, and objects to the language in the *Report and Order* that concludes that all services, including nonregulated services, that SWBT provides to DSMI are subject to the Commission's affiliate transactions rules.<sup>118</sup> This same issue was addressed by us in a recent Order on Review.<sup>119</sup> There, we denied an application for review filed by SWBT, and affirmed a Memorandum Opinion and Order issued by the Common Carrier Bureau<sup>120</sup> that determined that affiliate transactions involving nonregulated services must comply with our affiliate transaction rules.<sup>121</sup> The reasons given were the same as cited in the *Report and*

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<sup>115</sup> SWBT Petition at 8-9, citing section 402 of the Telecommunications Act of 1996.

<sup>116</sup> 47 C.F.R. § 32.27(d).

<sup>117</sup> See also *In re Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions Between Carriers and Their Nonregulated Affiliates*, 8 FCC Red 8071 at 8073-74 (1993) (*Affiliate Transactions Notice*).

<sup>118</sup> SWBT Petition at 4.

<sup>119</sup> *In re Southwestern Bell Telephone Company, Application for Review of Memorandum Opinion and Order Concerning the Proper Treatment of Affiliate Transactions*, FCC 97-33, (February 6, 1997) (*Order on Review*).

<sup>120</sup> *In re Citizens Utilities Company Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, Memorandum Opinion and Order, 11 FCC Red 4676 (1996).

<sup>121</sup> *Order on Review* at ¶ 1. See also ¶ 13 which states, in part:

[W]e find no basis to conclude that the Bureau erred when it required Citizens to report in its CAM transactions for nonregulated services provided to nonregulated affiliates. The Bureau applied the Commission's rules consistently

*Order*, for example, that the costs recorded in any given USOA account may be used to apportion major cost categories between regulated and nonregulated activities.<sup>122</sup> We had already noted that when costs are recorded in USOA revenue accounts, which is where SWBT states that its transaction will be recorded, "such transactions can be links in transactional chains that result in [other] costs being recorded in USOA accounts."<sup>123</sup> Further, the *Order on Review* fully explained why the *United Order* is not inconsistent with our findings in the *Report and Order* or with the *Joint Cost Order*. In the *Order on Review*, we stated that:

The proper interpretation was articulated by the *Joint Cost Order* proceeding and the *United Order*. Specifically, the Bureau's Order on reconsideration of the *Joint Cost Order* stated that "[t]he operation of the affiliate transaction rules applies . . . to transactions between regulated and nonregulated entities[.]" [Footnote omitted.] The *United Order* then clarified this finding by drawing a distinction between transactions recorded in regulated versus nonregulated accounts. The *United Order* states, as we do here, that only those services recorded in a carrier's regulated books of account are governed by the requirements of Section 32.27.<sup>124</sup>

Therefore, SWBT has not shown any error in the *Report and Order*, and presents no new evidence for us to consider. Its Petition relating to this issue is therefore denied. For these same reasons, SWBT is still required to revise its CAM to replace "negotiated price" with "fully distributed cost" for its computer bureau transaction with DSMT. Further, we decline to reconsider our conclusion that SWBT comply with the other CAM filing requirements set forth in the *Report and Order*. We see nothing in section 402 of the Telecommunications Act of 1996 that is contrary to the requirements set forth in the *Report and Order*.

### III. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, that the Petition for Reconsideration filed by AT&T, and the Petition for Reconsideration filed by MCI, are

in accordance with the requirements of Sections 32.23 and 32.27. The application of the affiliate transactions rules depends on whether the transaction is recorded in the carrier's Part 32 books of account or in a separate nonregulated set of books rather than on the nature of the transaction. Thus, any transaction between a carrier subject to Part 32 and its nonregulated affiliate is governed by the affiliate transaction rules when the transaction is recorded in a regulated account.

<sup>122</sup> *In re Bell Atlantic Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 5 FCC Rcd 2551, 2552 (1990); see also *Affiliate Transactions Notice*, 8 FCC Rcd at 8108.

<sup>123</sup> *Affiliate Transactions Notice*, 8 FCC Rcd at 8108.

<sup>124</sup> *Order on Review*, ¶ 12.

GRANTED to the extent herein specified in this Order, and are otherwise DENIED.

50. IT IS FURTHER ORDERED that Ameritech Operating Companies, Bell Atlantic Telephone Company, BellSouth Telecommunications, Inc, New York and New England Telephone Company, Pacific Bell Telephone Company, Southwestern Bell Telephone Company, U S West Communications, Inc, GTE Service Corporation, Southern New England Telephone Company, and the Sprint Operating Telephone Companies file within 30 days of the release of this Order a schedule of proposed refunds and refund plan consistent with this Order, see paragraphs 21, 22 and 23, *supra*, and the Order entitled *In re 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, FCC 96-392, (October 28, 1996).

51. IT IS FURTHER ORDERED that all Comments to the refund schedules and refund plans filed pursuant to paragraph 50, *supra*, be filed 20 days after the date the refund schedules and refund plans are due, and Reply Comments be filed 10 days after the date Comments are due.

52. IT IS FURTHER ORDERED that the Commission delegates authority to the Common Carrier Bureau to take action necessary to ensure that the Local Exchange Carriers properly make refund payments reflecting the requirements of this Order and the *Report and Order*.

53. IT IS FURTHER ORDERED that the Motion of AT&T Corp. to Accept Late-Filed Opposition is GRANTED.

54. IT IS FURTHER ORDERED that Pacific Bell's Petition for Reconsideration is DENIED.

55. IT IS FURTHER ORDERED that the Bell Atlantic Petition for Reconsideration is GRANTED to the extent herein specified in this Order, and is otherwise DENIED.

56. IT IS FURTHER ORDERED that Bell Atlantic file within 30 days of the release of this Order a schedule of port costs entitled to exogenous treatment as detailed in paragraph 40, *supra*.

57. IT IS FURTHER ORDERED that all Comments to the Bell Atlantic schedule of port costs entitled to exogenous treatment filed pursuant to paragraph 56, *supra*, be filed 20 days after the date the schedule is due, and Reply Comments be filed 10 days after the date Comments are due.

58. IT IS FURTHER ORDERED that the Commission delegates authority to the Common Carrier Bureau to take action necessary to ensure that Bell Atlantic properly details its port costs that will be allowed exogenous treatment to reflect the requirements of this Order.

59. IT IS FURTHER ORDERED that the Petition for Clarification and Reconsideration filed by SWBT is DENIED.

FEDERAL COMMUNICATIONS  
COMMISSION



William F. Canton  
Acting Secretary