Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of:	)	
Bell Atlantic Petition for Clarification	)	**CCB/CPD 97-25**
In CC Docket No. 93-193, Phase I, Part 2 and	)	
CC Docket No. 94-65	)	

MCI COMMENTS

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SUMMARY

MCI Telecommunications Corporation (MCI) hereby submits its comments on the Petition for Clarification filed by Bell Atlantic on May 19, 1997. The Commission should not clarify the Order in the manner that Bell Atlantic proposes, as Bell Atlantic's proposed "correction" for past misallocations of sharing is contrary to the intent of the Order. Furthermore, Bell Atlantic's proposed methodology would violate the Commission's price cap rules and the Communications Act. The price cap rules do not permit Bell Atlantic to carry forward unused headroom, as it proposes to do in the traffic sensitive, trunking, and interexchange baskets. The proposed methodology would also constitute prohibited retroactive ratemaking, in violation of the "filed rate doctrine," and would violate the prohibition on offsets.

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MCI COMMENTS

I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its comments on the Petition for Clarification filed by Bell Atlantic on May 19, 1997 in the above-captioned docket. In the Order,[1] the Commission concludes that Bell Atlantic violated the price cap rules and orders in two respects. First, the Commission finds that Bell Atlantic incorrectly allocated sharing amounts among the price cap baskets in its 1993, 1994, 1995, and 1996 annual access filings.[2] Second, the Commission concludes that Bell Atlantic incorrectly calculated the "g" factor used in its 1993, 1994, 1995, and 1996 annual access filings.[3]

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[1]In the Matter of 1993 Annual Access Tariff Filings; GSF Order Compliance Filings; 1994 Annual Access Tariff Filings; 1995 Annual Access Tariff Filings; 1996 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 93-193, Phase I, Part 2 and CC Docket No. 94-65, released April 17, 1997 (Order).

[2]Order at ¶39.

[3]Order at ¶30.

Bell Atlantic does not seek reconsideration of the Commission's conclusion that Bell Atlantic improperly allocated sharing among the baskets. Instead, it requests that the Commission "clarify" the sections of the Order prescribing the methodology that Bell Atlantic is to use in calculating refunds.[4] Application of the Order's methodology would require Bell Atlantic to make a downward adjustment to its 1997-98 common line basket PCI, in the amount of common line basket overcharges during the period the tariffs were under investigation. Bell Atlantic argues that there should be a "corresponding" upward adjustment in the PCIs for the other baskets, and requests that the Commission clarify that this was the intent of the Order. The Commission should reject Bell Atlantic's petition for clarification because the methodology that Bell Atlantic to "correct" its misallocation of sharing would violate the price cap rules and the Communications Act.

II. Remedial Actions Prescribed by the Order

In Section V of the Order, the Commission outlines the remedial actions that the LECs that have violated the price cap rules and orders are to take. First, the Commission requires the LECs to correct their PCIs and other pricing limits on a going-forward basis so that the PCIs are what would have been in place had they been calculated consistent with the Commission's rules and decisions.[5] This involves correcting the PCIs in effect

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[4]Bell Atlantic Petition for Clarification, CC Docket No. 93-193, Phase I, Part 2 and CC Docket No. 94-65, filed May 19, 1997, at 1-2 (Petition).

[5]Order at ¶¶97-103.

on July 1 and January 1 of each year "as required by the decisions in this order."[6] To account for the fact that each PCI depends on previous PCIs, the Order requires the LECs to first correct the July 1, 1993, PCIs, and then correct each subsequent half-yearly PCI in turn. The last corrected PCI that is computed, for June 30, 1997, is to be used as the basis for computing the going-forward PCIs that will become effective on July 1, 1997.

Application of this part of the Commission's methodology requires adjustments to the past PCIs for all four baskets. If, for example, Bell Atlantic's past PCIs reflected an underallocation of sharing to the common line basket and an overallocation of sharing to the other baskets, reallocation of sharing results in a corrected common line PCI below the original common line PCI, and corrected PCIs in the other baskets above the original PCIs. Normally, application of the Commission's methodology would also result in an adjustment to all four going-forward PCIs. However, because sharing is reversed at the end of each year, Bell Atlantic's current misallocation of sharing would not be reflected in its rates on July 1, 1997, the effective date of the revisions ordered by the Commission.

The Order then requires the LECs to use the sequence of corrected PCIs to calculate the amount of their refund liability.[7] In the Order, the Commission concludes that the LECs overcharged their customers if any API that was in effect exceeded the

[6]Order at ¶99.

[7]Order at ¶¶104-105.

PCI that would have been in effect had it been computed pursuant to the Commission's rules and orders, or any service category SBI or subcategory SBI exceeded its corrected upper limit, or any CCL rate exceeded the corrected maximum CCL rate. If the rates that were in effect exceeded the applicable corrected cap, the LEC is required to refund the above-cap service category or basket revenue with interest. The refund is to be implemented through an exogenous cost decrease effective July 1, 1997, and reversed on July 1, 1998.

Application of the refund methodology prescribed by the Order shows that Bell Atlantic overcharged its customers for common line basket services during the period covered by the investigation. Bell Atlantic's failure to allocate sharing amounts using total common line basket revenue resulted in an underallocation of sharing to the common line basket and an overallocation of sharing to the traffic sensitive, trunking, and interexchange baskets. Consequently, Bell Atlantic's original common line PCIs were higher than would have been the case had the cap been computed pursuant to the Commission's rules and orders. Because Bell Atlantic priced above the corrected PCIs from 1994 to the present, the Order requires it to refund the above-cap amount to its customers through an exogenous cost decrease for 1997-98.

On the other hand, application of the Commission's methodology shows that no adjustment to the 1997-98 traffic sensitive, trunking, and interexchange PCIs is required. Because Bell Atlantic overallocated sharing to these baskets, its PCIs in these baskets were lower than would have been the case had they been computed pursuant to the Commission's rules and orders. Thus, rates below the original caps were also below the corrected caps. No adjustments to Bell Atlantic's 1997-98 traffic sensitive, trunking, and interexchange PCIs are required in order to implement the remedial actions prescribed by the Order.

III. Bell Atlantic's Methodology

Bell Atlantic seeks to employ a very different methodology to correct its past misallocation of sharing. It argues that correction of its misallocation of sharing requires not only the downward adjustment in the 1997-98 common line PCI that results from application of the Order's methodology, but also a "corresponding" upward adjustment to the indices for the other baskets.[8]

In preparing its recent TRP revision, Bell Atlantic has employed a methodology that incorporates such offsetting PCI changes.[9] It proposes to make a downward "sharing adjustment" in the 1997-98 common line PCI and upward "sharing adjustments" in the 1997-98 PCIs for the other three baskets. To compute each "sharing adjustment," Bell Atlantic first calculates the difference between the sharing that it should have allocated to each basket and the sharing that it actually allocated to each basket.[10] The under- or overallocation of sharing, with interest, is then carried forward as an exogenous cost adjustment to Bell Atlantic's 1997-98 PCIs.

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[8]Petition at 1-2.

[9]Letter from Maureen Keenan, Bell Atlantic, to William F. Caton, FCC, May 8, 1997 (Bell Atlantic TRP Revision).

[10]Bell Atlantic TRP Revision, Workpapers S-1 - S-4.

Using this methodology, Bell Atlantic computes an exogenous cost decrease of $40.9 million in the common line basket, reflecting the fact that it overallocated sharing to this basket.[11] On the other hand, it computes exogenous cost increases in the other baskets -- $15.3 million in the traffic sensitive basket, $28.6 million in the trunking basket, and $3.1 million in the interexchange basket. In other words, in place of the refund required by the Commission's methodology, Bell Atlantic is proposing to "correct" its rule violation through a $6.1 million increase in 1997-98 PCIs. Such a result is contrary to the price cap rules and orders and the Communications Act.

IV. The Intent of the Order is Clear

Bell Atlantic interprets the Order's instruction that the LECs "correct how they allocate their sharing adjustments among the baskets" as providing the authority for its choice of methodology.[12] In Bell Atlantic's view, the requirement that the LECs reallocate sharing "among" the baskets must mean that any adjustment resulting from the correction of its rule violation would not be limited to a single basket. Because application of the Order's refund instructions results in a PCI adjustment in only the common line basket, and is therefore at odds with Bell Atlantic's interpretation of the Order, Bell Atlantic argues that clarification of the Order is required. In particular, Bell

[11]Bell Atlantic TRP Revision, Workpaper S.

[12]Petition at 6.

Atlantic requests that the Commission "remove any doubt about what was intended" and "clarify" that Bell Atlantic's methodology is authorized by the Order.[13]

Contrary to Bell Atlantic's contention, the Commission's methodology does reallocate sharing "among" the baskets. The Order directs the LECs to reallocate sharing among the baskets in computing past PCIs, which are the basis for the going-forward PCIs. Thus, the Commission's methodology is designed to arrive at going-forward PCIs that reflect the correct allocation of sharing among the baskets.

Bell Atlantic, however, seeks to make a very different kind of adjustment to all four baskets. It is not proposing to reallocate sharing "among" the baskets, as it contends, but to carry forward any under- or overallocation of sharing from past years and reflect this under- or overallocation in 1997-98 rates. While Bell Atlantic argues that this step is necessary to "correct" its past misallocation of sharing, nowhere does it explain why it believes that "correction" of its rule violation should involve carrying forward under- or overallocation of sharing from past years. It does not explain, for example, how a one-year increase in future PCIs can "correct" for past PCIs that were "too low."

In reality, the only way in which an order concluding a tariff investigation can "correct" for past rule violations is to prescribe lawful rates for the future and to prescribe refunds. The instruction that LECs are to correct how they allocate sharing among baskets simply tells Bell Atlantic to derive the lawful going-forward PCIs by

[13] Id.

correcting its past PCIs with reallocated sharing amounts.[14] Specifically, in recalculating the July 1, 1993, and subsequent corrected PCIs, Bell Atlantic must allocate sharing among the baskets based on total common line revenues. Not incidentally, these corrected PCIs may then be used to determine if Bell Atlantic overcharged its customers. By providing a mechanism for the LECs to calculate lawful going-forward PCIs, the Commission's methodology fully implements the Order's instruction that Bell Atlantic and Pacific "correct how they allocate their sharing adjustments among the baskets."

That the intent of the Order is clear, and that Bell Atlantic is seeking only to avoid its refund obligation, is demonstrated by the fact that Bell Atlantic has not sought clarification of the refund methodology as it applies to Bell Atlantic's misstatement of the "g" factor. In the same way that the Order directs the LECs to "correct how they allocate sharing among the baskets," the section of the Order dealing with the misstatement of "g" directs the LECs to "correct their 'g' calculations." In preparing its revised TRP, Bell Atlantic has had no difficulty understanding that the instruction that it "correct" its g calculation simply tells it to recalculate both past and going-forward PCIs using the correct g factor.[15] It should have no difficulty understanding that the parallel

[14]The instructions in Section V.B outlining the procedure for correcting the PCIs specify that the corrected PCIs are to be computed "as required by the decisions in this Order." The phrase "as required by the decisions in this Order" clearly refers to the instruction earlier in the Order that the LECs "reallocate sharing among the baskets."

[15]Bell Atlantic TRP Revision, Workpapers B-1 - E-5.

instruction that it "correct" its allocation of sharing simply tells it to recalculate past and going-forward PCIs using correct sharing allocations.

Thus, the intent of the Order is clear, and the Commission should reject Bell Atlantic's request that it "clarify" that it clarify the Order in the manner that Bell Atlantic proposes. Furthermore, the Commission should reject Bell Atlantic's secondary request that it clarify that there is no need to compute corrected July 1, 1993, and other past PCIs because they are not required to derive going-forward PCIs.[16] While it is true that past misstated PCIs resulting from the misallocation of sharing have no impact on the permanent going-forward PCIs to be effective on July 1, and thus also true that one of the reasons for computing past PCIs does not apply in this case, Bell Atlantic must still correct past PCIs in order to determine the amount of any overcharges during the 1993, 1994, 1995, and 1996 tariff years.

V. Bell Atlantic's Methodology Violates the Price Cap Rules and the Communications Act

Not only is there no authority for Bell Atlantic's methodology in the Order, but adoption of such a methodology would violate the price cap rules and orders and violate the Communications Act.

[16]Petition at 7.

A. Price Cap Rules Provide No Authority for Bell Atlantic's Methodology

The Commission's price cap rules prevent LECs from carrying forward unused "headroom" from one year to the next.[17] In developing the price cap rules, the Commission considered, but declined to adopt, price cap plans that would have allowed carriers to carry forward unused headroom.[18] Furthermore, the Commission has consistently rejected other proposals that would have had the effect of carrying forward unused headroom. Most recently, in the Add-Back Order, the Commission concluded that LECs could not gain any credit for below-cap pricing, stating that "we find that awarding LECs a credit for setting rates below the cap during the base year period would be inconsistent with the LEC price cap plan as originally adopted."[19]

The Commission should reject Bell Atlantic's proposed methodology because it involves carrying forward unused headroom and would therefore violate the price cap rules. Under Bell Atlantic's methodology, any under- or overallocation of sharing amounts is reflected as a "sharing adjustment" to 1997-98 PCIs. Reflecting any overallocation of sharing in next year's PCIs, however, involves carrying forward unused headroom. When Bell Atlantic decided to overallocate sharing to the traffic

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[17] In the formula in Sections 61.45(b) and 61.45(c) of the Commission's Rules, PCI(t) depends only on GDP-PI, X, Delta Y, Delta Z, R, g, and PCI(t-1), not API(t-1).

[18] See, e.g., In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3432 (Price Cap FNPRM); See also In the Matter of Price Cap Regulation of Local Exchange Carriers Rate-of-Return Sharing and Lower Formula Adjustment, Report and Order, 10 FCC Rcd 5656, 5665 at ¶54 (Add-Back Order).

[19] Add Back Order, 10 FCC Rcd at 5665.

sensitive, trunking, and interexchange baskets, it made a decision to price below the true cap and forego recovering certain revenues. In other words, Bell Atlantic decided to create headroom in these baskets. Because the Commission's price cap rules do not permit it to carry this headroom forward, Bell Atlantic may not "correct" for its past overallocation of sharing by increasing its 1997-98 PCIs.

B. The "Correction" Bell Atlantic Proposes Violates the Communications Act

As noted above, Bell Atlantic seeks to make positive adjustments to its 1997-98 traffic sensitive, trunking, and interexchange PCIs that "correspond" to a negative adjustment in the 1997-98 common line PCI. The Commission must reject Bell Atlantic's methodology because it violates the filed rate doctrine by retroactively raising the rates for services in the traffic sensitive, trunking, and interexchange baskets, and because it unlawfully uses offsets to reduce a refund liability.

1. Bell Atlantic's Methodology Violates the "Filed Rate Doctrine"

Under the "filed rate doctrine," a common carrier may only charge the rates covered by its tariff on file and in effect at a particular time, and such rates cannot be increased retroactively. Carriers thus are precluded from filing increased rates to recoup prior losses. As the Court explained in Tennessee Gas, even where a rate is found to be too low and is raised prospectively, "the company cannot recoup its losses by making retroactive the higher rate."[20] Similarly, in Belco, the Court concluded that retroactive rate increases may not be used to offset refunds ordered at the conclusion of an investigation.[21]

It cannot be disputed that, here, Bell Atlantic's methodology would violate the filed rate doctrine. By choosing to calculate its PCIs in a manner that violated a Bureau Order, Bell Atlantic made the decision to forego recovering revenues in the traffic sensitive, trunking, and interexchange baskets. Now, Bell Atlantic is proposing to increase its PCIs for the 1997-98 tariff year in the amount of these foregone revenues. Using Bell Atlantic's methodology, the 1997-98 traffic sensitive, trunking, and interexchange PCIs would be higher than if Bell Atlantic had never misallocated sharing. Because Bell Atlantic's methodology would allow it to recoup revenues lost because of its decision to price below cap, it violates the filed rate doctrine and the prohibition on retroactive ratemaking. Bell Atlantic's proposal should be rejected.

2. Customers Were Not Put On Notice that Retroactive Increases Could Occur

In its TRP Revision Reply Comments, Bell Atlantic argues that "[t]he rule against retroactive ratemaking -- which derives from the 'filed rate doctrine' -- does not prohibit the adjustments at issue here because the orders suspending Bell Atlantic's

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[20] Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145, 152 (1962) (Tennessee Gas).

[21] Belco Petroleum v. FERC, 589 F.2d 680, 687 (D.C. Cir. 1978) (Belco).

annual access tariff filings gave notice to Bell Atlantic's access customers that, after investigation, the allocation of sharing amounts to each price cap basket might have to be adjusted."[22] In particular, Bell Atlantic argues that "MCI and other carriers were put on notice through the Common Carrier Bureau's discussion of the issues and its conclusion that 'there is sufficient uncertainty to warrant investigation of Bell Atlantic's PCI adjustments.'"[23]

Bell Atlantic's characterization of the adjustments contemplated by the Suspension Order[24] as including a retroactive rate increase is without foundation. Once again, Bell Atlantic confuses the adjustments to all four baskets necessary to ensure that the going-forward PCIs are correct and its own, unjustified, proposal to carry forward past over- or underallocation of sharing amounts. The Suspension Order certainly contemplated adjusting the sharing amounts allocated to the baskets upon conclusion of the investigation, on a going-forward basis. This type of adjustment is implied by any order suspending rates and instituting an investigation; the purpose of the investigation is to determine whether the rate that has been filed is lawful or needs to be adjusted. In this case, the discussion of the issues in the Suspension Order indicates that the rates filed by Bell Atlantic may have to be adjusted by reallocating sharing among the

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[22]In the Matter of Bell Atlantic 1997 TRP Revisions, Bell Atlantic Reply Comments, May 27, 1997, at 2 (TRP Revision Reply Comments).

[23]Id.

[24]In the Matter of 1993 Annual Access Tariff Filings, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, 8 FCC Rcd 4960 (Suspension Order).

baskets. As with any other tariff investigation, however, this adjustment would only affect the going-forward rates. There is no suggestion anywhere in the Suspension Order that the "adjustments" that Bell Atlantic seeks to make -- carrying forward past headroom -- were contemplated, or that the traffic sensitive, trunking, and interexchange rates were interim and could be increased retroactively upon conclusion of the investigation.

Further, the language in the original petitions filed against Bell Atlantic's tariffs does not support its position.[25] Petitioners naturally requested, as in all petitions requesting suspension and investigation of a tariff, that the Commission require Bell Atlantic to correct its rates. In this case, they requested that the Commission require Bell Atlantic to reallocate sharing among the baskets. This would have ensured that Bell Atlantic's going-forward rates were lawful. However, petitioners clearly did not ask the Commission to require Bell Atlantic to carry forward any overallocation or underallocation of sharing if Bell Atlantic did not correct its rule violation before the tariff went into effect. As with any tariff investigation, petitioners expected any issues related to rates in effect prior to the conclusion of the investigation to be remedied through the refund mechanism.

Thus, the language in the Suspension Order is no different from any ordinary suspension order and does not indicate the possibility of retroactive rate increases. In

[25]Petition at 4-5; TRP Revision Reply Comments at 2;

Columbia Gas,[26] which Bell Atlantic cites for the principle that adequate notice "changes what would be purely retroactive ratemaking into a functionally prospective process"[27] the Court rejected FERC's attempts to impose a retroactive rate increase because adequate notice was not provided.[28] Consistent with this line of precedent, when the Commission has provided for retroactive rate increases, it has done so explicitly by indicating that rates are interim and subject to trueup, and by invoking its authority under Section 4(i) of the Act. In the Interim Expanded Interconnection Prescription Order, for example, the Commission stated that "our interim prescription is subject to adjustment in either direction at the conclusion of our further investigation. We hereby establish a two-way adjustment mechanism . . ."[29] Because the Suspension Order does not provide similar adequate notice of retroactive rate increases, Bell Atlantic's proposed methodology would violate the filed rate doctrine.

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[26]Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791 (D.C. Cir. 1990) (Columbia Gas).

[27]Bell Atlantic Reply at 2.

[28]Columbia Gas, 895 F.2d at 796.

[29]In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, First Report and Order, 8 FCC Rcd 8344, 8360 (Interim Expanded Interconnection Prescription Order). See also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, August 8, 1996, at ¶1067 ("In particular, we have authority under section 4(i), to set interim rates subject to a later "true-up" when final rates are established.")

3. Offsets of Refunds Are Unlawful

For each tariff year under investigation, Bell Atlantic is seeking to make both an exogenous cost reduction in the common line basket and an offsetting exogenous cost increase in the other baskets. Thus, Bell Atlantic's methodology has the effect of offsetting overcharges in the common line basket by the amount of "undercharges" in the other baskets. Indeed, Bell Atlantic is seeking to do more than offset its refund liability; for some tariff years, the total of the exogenous cost increases in the traffic sensitive, trunking, and interexchange baskets more than cancels out the required common line basket refund.

Offsets such as Bell Atlantic is proposing would violate Commission precedent. In the context of complaint proceedings, the ICC had prohibited offsets for undercharges long before the Communications Act was passed. In Laning-Harris,[30] the ICC held that it had no authority to award a "set-off." The ICC concluded that to award a "set-off" amounted to the same thing as adjudicating a claim against the customer, for which it had no authority.[31] The Commission has also recognized, in Thornell Barnes, that its jurisdiction over complaint actions is similarly restricted.[32] In MCI v. FCC, the Court

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[30]Laning-Harris Coal & Grain Co. v. St. Louis & San Fran. Ry. Co., 15 ICC 37, 38 (1909) (Laning-Harris).

[31]Id.

[32]Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 FCC 2d 1247 (1965) (Thornell Barnes).

confirme ermitting a carrier to offset undercharges against overcharges would violate F ICC precedent.[33]

O e also prohibited in tariff investigations. In the recent 800 Data Base Tariff Re ation Order, the Commission concludes that a carrier may not offset overcharg undercharges because of the prohibition against retroactive ratemakin Commission relies, as it did in American Television Relay,[35] on the Supreme C ecision in Tennessee Gas, concluding that "to the extent that incumbent LECs are a that they should be entitled to actually recoup monies they could have earned by r ively increasing rate elements in certain baskets... this has been consistentl ed as retroactive ratemaking."[36]

To p offsets would also defeat the "statutory and regulatory norms" against discriminati In developing its price cap regime, the Commission established separate bask f services, each with their own cap, in order to prevent cross-subsidy. In particular ommission stated that "by separating common line in its own basket, we can ensur these universal service programs are unaffected by the

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[33]MCI Telecommunications Corp. v. FCC, 59 F.3d 1407, 1419 (D.C. Cir. 1995) (MCI v. FCC).

[34]In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order on Reconsideration, CC Docket No. 93-129, released April 14, 1997, at ¶17 (800 Data Base Tariff Reconsideration Order).

[35]In the Matter of American Television Relay Inc., 67 FCC 2d. 703 (American Television Relay).

[36]800 Data Base Tariff Reconsideration Order at ¶17 n.44.

[37]MCI v. FCC, 59 F.3d at 1419.

implementation of price cap regulation."[38] Offsets, however, would permit Bell Atlantic to charge its customers excessive rates for common line basket services in order to make up for shortfalls in other services.

VI. The Order's Methodology Is Consistent With Price Cap Rules

Bell Atlantic argues that the Commission's methodology, without the "clarification" that it seeks, would result in an "increase in sharing" for prior tariff years.[39] Bell Atlantic argues that an increase in sharing is unlawful because it would violate the price cap rules governing sharing and thus "contradict the Commission's own theory of regulation."[40] However, the Commission's methodology does not increase sharing and is fully consistent with the goals of price cap regulation.

A. The Commission's Methodology Does Not Increase the Amount of Sharing

Bell Atlantic's argument that the Commission's methodology results in an increase in sharing is without foundation. To make this argument, Bell Atlantic must characterize the refund required by the Commission's methodology as an "adjustment to sharing." There is, however, a clear distinction between refunds and sharing. Refunds are ordered by the Commission when a portion of a rate has been found to be unlawful

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[38] In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, at ¶212.

[39] Petition at 8.

[40] Id.

pursuant to Section 204(a), and reflect actual overcharges paid by customers for one or several rate elements. Sharing, on the other hand, derives from the Commission's Section 205(a) authority, and is based on overall earnings. Refunds can be required even in the absence of sharing.

Bell Atlantic has apparently confused sharing and refunds because the rule violation that is the source of the overcharges involves sharing. However, refunds of overcharges resulting from the misallocation of sharing do not change the total amount of sharing any more than a refund of overcharges resulting from misallocation of other exogenous cost changes or, indeed, overcharges resulting from other rule violations. Consistent with this, in the Commission's methodology for computing refunds, the sharing amounts used in computing the July 1, 1993 and subsequent corrected PCIs are exactly the same as Bell Atlantic originally used. All that changes when calculating the corrected PCIs is the distribution of the sharing amounts.

Bell Atlantic may also have confused sharing and refunds because the mechanism the Commission has chosen to implement the refund is similar to the sharing mechanism. The Commission has directed the LECs to implement their refund through a one-time adjustment to PCIs for the 1997-98 tariff year. In a similar fashion, sharing obligations are implemented through a one-time PCI adjustment. Had the Commission chosen to implement the refund with a direct refund to customers, it would be even clearer that the refund is not a "sharing adjustment."

Once it is understood that the refund amount is not a "sharing adjustment," Bell Atlantic's arguments that the Commission's methodology violates the price cap rules can be easily refuted. First, the Commission's methodology does not require it to share more than fifty percent of its earnings as Bell Atlantic claims;[41] a refund of overcharges in no way changes the amount of sharing for prior years. Second, Bell Atlantic is not being asked to share a second time; the refund required by the Order does not constitute sharing. Third, Bell Atlantic is not being asked to share more in the common line basket; the 1997-98 PCI adjustment is a refund, not sharing. Finally, there is no inconsistency between the Order and the recent Price Cap Reform Order; the Order requires a refund, not an "additional reduction [in access rates] based on prior years' sharing obligations."[42]

B. Refunds of Common Line Basket Overcharges Are Consistent With the Goals of Price Cap Regulation

Contrary to Bell Atlantic's claim, the Commission's methodology is consistent with the price cap rules. Under price cap regulation, the PCIs, SBI upper limits, and CCL rate cap operate to define the "zone of reasonableness."[43] It is therefore consistent with price cap rules that, if the Commission finds in a tariff investigation that the rates in effect were within this zone, no remedial action is required. If, on the other hand, the rates are found to have been outside this zone, it is consistent with price cap rules to require a refund of the above-cap amount. In this case, Bell Atlantic's traffic sensitive,

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[41]Petition at 8-9.

[42]See Petition at 9.

[43]Price Cap FNPRM, 3 FCC Rcd at 3299.

trunking, and interexchange rates were within the "zone of reasonableness" and no remedial action is required, whereas a refund is required for common line rates that were found to be above cap.

Despite the fact that the Commission's methodology is a straightforward application of the principles of price cap regulation to a refund calculation, Bell Atlantic argues that application of the Commission's methodology would result in a "windfall" for its customers.[44] This is simply not the case. Because Bell Atlantic chose to misallocate sharing among the baskets, its customers paid more for common line services than the maximum permitted by the Commission's price cap rules. Bell Atlantic should be required to refund these amounts.

Bell Atlantic also argues that the requirement that it refund overcharges constitutes a "penalty."[45] It was, however, Bell Atlantic that decided to misallocate sharing in violation of a Bureau Order. In Tennessee Gas, the Supreme Court stated that "[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . 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."[46] Similarly, the award of a refund, and the foreclosure of Bell

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[44]Petition at 8.

[45]Id.

[46]Tennessee Gas, 371 U.S. at 153.

Atlantic's attempts to recoup foregone revenues, is fully consistent with the Communications Act.

Bell Atlantic's core argument is that no refund of common line basket overcharges should be required because its customers have already benefited through lower rates in the other baskets. It argues, for example, that "[t]hese customers purchase services from each of the price cap baskets. As a result, they have already benefited when Bell Atlantic shared the first time."[47] In essence, Bell Atlantic is asking the Commission to pretend that the system of baskets does not exist. However, different customers purchase in different proportions from the baskets. Further, access customers do not purchase at all from the interexchange basket; the effect of Bell Atlantic's misallocation of sharing was to reduce interexchange rates at the expense of access customers that were paying unlawful common line rates. It is fully consistent with the price cap regime's system of baskets to require a refund of common line basket overcharges without permitting offsets for below-cap rates in the other baskets.[48]

VII. Step 3 of the Refund Methodology Should Be Eliminated, Not Modified

Bell Atlantic contends that the Commission should "correct an apparent typographical error" in the instructions for Step 3 of the refund methodology.[49]

[47]Petition at 8.

[48]See MCI v. FCC (Excessive earnings in one access service category may not be offset by "underpayments" for other categories of service).

[49]Petition at 7.