Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
1997 Annual Access Tariff Filings	)	**CC Docket No. 97-149**
	)	**CCB/CPD 98-1**
	)	

MCI OPPOSITION TO PETITIONS FOR RECONSIDERATION

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January 21, 1998

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SUMMARY

The Commission should deny the petitions for reconsideration. Contrary to SBC's contention, no Commission precedent precludes the Commission from requiring an R value adjustment in this proceeding. The equal access and inside wiring amortizations and the OPEB-reversal case involved tariffs that were allowed to go into effect without suspension and investigation. It is well established that a Commission decision allowing a tariff to go into effect decides nothing concerning the merits of the case.

The issue of whether an R value adjustment is necessary to eliminate the effects of a temporary cost change is therefore before the Commission for the first time in this proceeding. The Commission has correctly interpreted its rules and orders in requiring such an adjustment.

Bell Atlantic's arguments are similarly without merit. The use of a 0.90 confidence interval and a one-tailed test is appropriate in this case, and the Commission was correct to find a downward bias in NYNEX's forecasting techniques. Furthermore, the Commission cannot lawfully permit Bell Atlantic to increase its rates in order to recoup SLC "undercharges" from end users. 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.

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I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its Opposition to the Petitions for Reconsideration filed by the SBC Companies (SBC) and Bell Atlantic on December 31, 1997, in the above-captioned docket.

In its petition, SBC requests that the Commission reconsider and reverse that portion of the Memorandum Opinion and Order (Order) concluding its investigation of the LECs' 1997 annual access tariffs that requires the use of an "R" adjustment for the removal of equal access amortization costs.[1] Bell Atlantic requests that the Commission reconsider the portion of the Order that finds the Carrier Common Line (CCL) rates proposed by NYNEX in the 1997 annual access filing to be unreasonably high and

[1]SBC Petition at 1.

requires a refund of these overcharges.[2] The Commission should reject the arguments raised by SBC and Bell Atlantic and affirm the Order.

II. An "R" Adjustment is Required in Order to Remove the Effects of Equal Access Costs from Price Cap LEC Rates

In the Access Reform Order, the Commission required the LECs to reduce their traffic sensitive basket Price Cap Index (PCI) by an amount sufficient to remove the effects of equal access costs from their rates. In the Order, the Commission rejects the LECs' proposed method for computing this exogenous cost change and, in place of the LECs' proposed method, directs the LECs to multiply the equal access costs included in 1991 rates by a factor that captures the change in R between 1991 and 1997.[3] The R factor is defined in Section 61.45(c) of the Commission's rules as the product of base period demand and the rates in effect at the last PCI update.[4] The Commission concludes that this "R" adjustment is necessary to remove completely the effects of the initial inclusion of the equal access amortization in the PCI.[5]

SBC, in its petition, contends that the "R" adjustment required by the Order is contrary to Commission precedent.[6] In support of this contention, SBC cites the OPEB-

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[2]Bell Atlantic Petition at 1.

[3]Order at ¶112.

[4]47 C.F.R. §61.45(c).

[5]Order at ¶118.

[6]SBC Petition at 3-4.

related exogenous cost changes made by the LECs in the 1995 annual access filing and the exogenous cost changes made by the LECs at the completion of the inside wiring and reserve deficiency amortizations. Because it believes that an R value adjustment is not required by the price cap rules, and that the adoption of such a requirement is contrary to Commission precedent, SBC argues that the Commission can only adopt such a requirement in a notice and comment rulemaking.

A. Precedent Does Not Preclude an Adjustment for Changes in R

None of the examples cited by SBC support its claim that precedent prevents the Commission from requiring an R adjustment in this proceeding. In the inside wiring and reserve deficiency amortization cases, the Commission simply instructed the LECs to make an exogenous cost change at the conclusion of these amortizations, without discussing the methodology that the LECs should employ to compute the amount of the exogenous cost change.[7] The fact that the Commission allowed the tariffs filed by the LECs at the conclusion of these amortizations to go into effect without suspension and investigation, even though the exogenous cost changes did not reflect an adjustment for the change in R, is irrelevant. It is well established that a Commission decision allowing a tariff to go into effect "decides nothing concerning the merits of the case; it merely reserves the issues pending a hearing."[8]

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[7]In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6808 (1991) (LEC Price Cap Order).

[8]Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 240 (D.C. Cir. 1980).

The OPEB case differs from the inside wiring and reserve deficiency amortization cases only in that petitions were filed against the LEC tariffs proposing the exogenous cost change. Petitioners argued that the exogenous cost change reversing earlier OPEB-related PCI increases should reflect an adjustment for the intervening change in R.[9] As in the case of the inside wiring and reserve deficiency amortizations, however, the Bureau allowed the tariffs to go into effect without suspension and investigation.

Thus, the issue of whether an R value adjustment is necessary to fully eliminate the effects of an amortization or other temporary cost change from LEC rates is before the Commission for the first time in this proceeding. The Commission's decision to require an "R" adjustment does not conflict with any Commission precedent.

B. The Commission Has Correctly Interpreted its Rules and Orders

SBC argues that the Commission is without power to impose an "R" adjustment, since it did not specifically address whether one should apply in the Access Reform Order.[10] As the Commission observes in the Order, however, it can lawfully make interpretations of the price cap rules and requirements in the context of declaratory rulings in tariff proceedings.[11] The Administrative Procedure Act does not require that

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[9]In the Matter of 1995 Annual Access Tariff Filings of Price Cap Carriers, Memorandum Opinion and Order Suspending Rates, 11 FCC Rcd 5461, 5470-5472 (1995) (1995 Annual Access Suspension Order).

[10]SBC Petition at 4.

[11]Order at ¶51.

every implementation detail be spelled out in advance, only that the Commission's interpretation of its rules and orders not be plainly erroneous.[12] The Commission has simply made explict what was implicit from the beginning.[13]

In this case, there is no question that an R value adjustment is required in order to carry out the Access Reform Order's instruction that the effects of equal access costs be removed from LEC rates. SBC makes no attempt at all to support its contention that an R value adjustment cannot be justified under any circumstance,[14] even if the Commission were to undertake a notice and comment rulemaking as SBC insists that it should.

As the Commission discusses in the Order, in order for the LECs to fully eliminate the effects of the equal access amortization from current rates, the "current price cap will be set at the same level it would have been set had the amortization been completed before the initiation of price cap regulation."[15] Because PCI adjustments are computed as Z/R, with R at its 1997 level, the PCI can be set at the required level only if Z equals the original equal access cost adjusted for the change in R between 1991 and 1997.

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[12]United States v. Larionoff, 431 U.S. 864, 872 (1977) ("In construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.")

[13]See Pennzoil Co. v. DOE, 680 F.2d 156, 176 (TECA 1982), cert. dismissed, 459 U.S. 1190 (1983).

[14]See SBC Petition at 4.

[15]Order at ¶110.

III. The Commission Has the Authority to Require Refunds of CCL Overcharges

In the Order, the Commission finds that the Base Factor Portion (BFP) revenue requirement forecasts filed by six price cap LECs, including NYNEX, are unjust, unreasonable, and, therefore, unlawful.[16] The Commission concludes further that the resulting per-minute CCL charges are unjustifiably high, in violation of section 201(b) of the Communications Act, and orders the LECs to refund overcharges to their IXC customers for the period between July 1, 1997, and December 31, 1997.

Because NYNEX underforecasted its BFP, its multiline business SLC rate during the first six months of the tariff year was less than the SLC rate corresponding to the BFP forecast prescribed by the Order. Bell Atlantic requests reconsideration of the Order on the grounds that the Commission's decision "erroneously required [Bell Atlantic/NYNEX] to refund common line charges paid by long distance carriers under its 1997 access tariff without providing an opportunity to recover its admittedly legitimate common line costs from other customers that the Commission concluded should have paid them."[17]

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[16]Order at ¶21.

[17]Bell Atlantic Petition at 1.

A. Retroactive Rate Increases are Unlawful

The Commission cannot lawfully permit Bell Atlantic to increase its rates in order to recoup SLC "undercharges" from end users. 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. As the Supreme Court explained in Tennessee Gas, even when a rate is found to be less than the maximum that would have been permitted and is raised prospectively, "the company cannot recoup its losses by making retroactive the higher rate."[18] The Court held 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 actions including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."[19]

The Commission has, on several occasions, rejected LEC attempts to offset refunds with retroactive increases in other rates. In the 800 Data Base Reconsideration Order, for example, the Commission relied on Tennessee Gas in concluding that "to the extent 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 . . . this has been consistently rejected as retroactive ratemaking."[20] More

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

[19]Id.

[20]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,

recently, the Bureau rejected Bell Atlantic's attempt to offset refunds of common line basket overcharges with retroactive rate increases in other baskets, noting that there is a "longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases."[21]

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.[22] Because neither the Suspension Order nor the Designation Order provided similar adequate notice of retroactive rate increases, Bell Atlantic's request that the Commission authorize it to recoup past SLC undercharges would violate the filed rate doctrine.

B. The Refund Does Not Violate the Price Cap Rules

Bell Atlantic argues that by requiring a refund of CCL overcharges without providing a means for NYNEX to recoup its SLC "undercharges," the Commission has violated its own price cap rules. It contends that "[r]ather than being permitted to recover amounts up to the cap imposed on their revenues from the common line basket,

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1997, at ¶17 n.44 (800 Data Base Reconsideration Order).

[21]In the Matter of 1993 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 93-193, released June 25, 1997, at ¶15.

[22]See In the Matter of Tariffs Implementing Access Charge Reform, Memorandum Oopinion and Order, CC Docket No. 97-250, released December 30, 1997, at ¶7 (citing Lincoln Telephone, 72 FCC 2d 724, 728-29).

the affected LECs are limited to the difference between the cap and the refund ordered by the Commission."[23]

Nothing in the price cap rules or orders defines the PCI as a guaranteed level of recovery for the LEC; the primary purpose of the PCI is simply to define a "no-suspension" zone for the tariff review process.[24] Furthermore, the Commission specifically contemplated the continued exercise of its Section 204(a) refund authority under price cap regulation. In the AT&T Price Cap Order, whose legal framework was incorporated in the LEC Price Cap Order, the Commission promised that "parties will continue to have the opportunity in both the tariff review and complaint process to challenge rates they consider unjust or unreasonable."[25] This "opportunity" would be meaningless if a particular rate was subsequently determined to be unlawful, but customers were denied refunds of overcharges because the LEC's rates would be reduced below the cap.

C. Bell Atlantic's Due Process Rights Have Not Been Violated

Bell Atlantic characterizes the refund required by the Order as a "penalty," and argues that its due process rights have been violated because, it contends, the

[23]Bell Atlantic Petition at 4.

[24]LEC Price Cap Order, 5 FCC Rcd at 6788.

[25]In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3088 (1989) (AT&T Price Cap Order).

Commission has adopted new requirements after the fact.[26] It argues that the Commission has "adopted" a "new method of allocating common line costs among the two classes of customers" and that Bell Atlantic has been penalized "for failing to guess with absolute precision what the Commission would require."[27]

The Commission has not retroactively adopted a "new method" for LECs to use in forecasting their per-line BFP. All that the Commission does in the Order is use standard statistical analysis to evaluate whether LECs' forecasting techniques show a downward bias. For those LECs whose forecasting techniques show such a bias, the Commission uses its Section 205(a) authority to prescribe a BFP forecast derived using an "autoregressive" method. Nowhere in the Order, however, does the Commission establish a new rule or requirement that LECs must forecast their rates using the autoregressive method. The Commission emphasizes that the LECs remain free to use any forecasting technique they wish, as long as it produces reasonable results.[28]

IV. The Finding of a Biased NYNEX Projection was Correct

In its petition, Bell Atlantic attacks the Commission's use of the "sign test," arguing that the Commission has failed to evaluate the statistical significance of the

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[26]Bell Atlantic Petition at 4-5.

[27]Id.

[28]Order at ¶76 ("We continue to believe that there are many different methods that could produce reasonable forecasts for individual LECs, and that it would be counterproductive for us to prescribe the use of any particular methodology. In fact, the LECs whose forecasts we accept in this proceeding have used a wide variety of forecasting techniques, as was permitted in the 1997 TRP.")

results produced by this test. This ignores the fact that the sign test was only one of several tests employed by the Commission, and that it was employed only as a "preliminary indicator that the forecasts of the price cap LECs, as a group, likely show a downward bias."[29] The Commission emphasizes that it is not using the sign test, by itself, to evaluate whether LEC BFP forecasting techniques show a downward bias.[30]

The primary tool used by the Commission to evaluate whether the LECs' forecasting techniques show a downward bias is the "difference of the means" test. Bell Atlantic challenges the Commission's use, in conjunction with this test, of a 90 percent confidence interval and a one tailed test.

The use of a 0.90 confidence level is appropriate in this situation. While it may be true that statisticians often use a 0.95 or 0.99 confidence level, as Bell Atlantic contends, it is by no means true that a test employing a 0.90 confidence level is "flawed."[31] The 0.90 confidence interval is not used as rarely as Bell Atlantic claims,[32]

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[29]Order at ¶43.

[30]Id.

[31]See Bell Atlantic Petition at 10.

[32]Richard A. Johnson and Gouri K. Bhattacharyya, Statistics: Principles and Methods, at 317 (John Wiley & Sons, 1996) ("This probability, called the level of confidence, is typically taken as .90, .95, or .99"); Jay Devore and Roxy Peck, Statistics: The Exploration and Analysis of Data, at 272 (Duxbury Press, 1997) ("Usual choices for confidence levels are 90%, 95%, and 99%, although other levels are also possible.")

and has been used by the Common Carrier Bureau in evaluating LEC forecasts filed in a previous annual filing.[33]

With a small sample size, as in this case, there is already a requirement for a relatively high critical value before the "null hypothesis"-- that NYNEX's forecasting technique does not exhibit a downward bias -- can be rejected. If a 0.95 or 0.99 confidence interval were used, this would increase the likelihood of a so-called Type II error -- that the Commission would decide that NYNEX's forecasting technique does not exhibit any bias even when it is in fact biased towards underforecasting the BFP. Because the burden of proof is on the LEC in a tariff investigation to demonstrate that its forecast is just and reasonable, it is appropriate to select a confidence interval that reduces the likelihood of a Type II error. As the Commission concludes, a 0.90 confidence interval "permits the LECs a reasonable margin for error, but protects ratepayers and IXCs from the danger that a higher confidence interval would fail to detect actual bias in the LEC's forecasting techniques."[34]

The use of a one-tailed test is also appropriate. The choice of a one-tailed or a two-tailed test should be based on the hypothesis that is being tested. In this case, the Commission suspended the LECs' proposed rates because of the significant disparity between the LECs' BFP forecasts and the BFP projections supplied by AT&T, which

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[33]In the Matter of 1998 Annual Access Filings, Memorandum Opinion and Order, 3 FCC Rcd 1281, 1305 (1987).

[34]Order at ¶47.

suggested that the LECs had underforecasted their BFP.[35] Accordingly, in the Order, the Commission states that the purpose of the statistical tests is "[t]o determine whether the LECs have consistently underestimated their per-line BFP revenue requirement."[36] Thus, the "alternative hypothesis" in this case is that the mean of the LECs' forecasts is less than the mean actual BFP. In situations such as this, where the direction of the mean difference is predicted, it is appropriate to use a one-tailed test.[37]

The concern with the one-tailed test is that the investigator may begin with a two-tailed test, but then switch to a one-tailed test after conducting the experiment and seeing that only use of a one-tailed test will facilitate rejection of the null hypothesis.[38] In this proceeding, however, the statement of the alternative hypothesis, and consequently the use of a one-tailed test, was inherent in the issue designated for investigation.

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[35]Suspension Order at ¶22.

[36]Order at ¶37.

[37]Richard C. Sprinthall, Basic Statistical Analysis, 5th ed., at 196 (Allyn and Bacon, 1997).

[38]Id.

IV. Conclusion

For the reasons stated herein, MCI recommends that the Commission deny the petitions for reconsideration filed by SBC and Bell Atlantic.

Respectfully submitted,
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January 21, 1998

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on January 21, 1998.

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CERTIFICATE OF SERVICE

I, John E. Ferguson III, do hereby certify that copies of the foregoing Opposition of MCI to the Petitions for Reconsideration on the Matter of 1997 Annual Access Tariff Filings were sent, on this 21st day of January, 1998, via first-class mail, postage pre-paid, to the following:

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