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

In the Matter of	)	
	)	
1993 Annual Access Tariff Filings	)	CC Docket No. 93-193
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65

COMMENTS OF BELLSOUTH

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COMMENTS

BellSouth Corporation and BellSouth Telecommunications ("BellSouth") hereby submit the following Comments in response to the *Public Notice* issued by the Commission in the above referenced proceedings on April 7, 2003.[1]

I. INTRODUCTION AND SUMMARY

In the *Public Notice*, the Commission requests comment on the appropriate treatment of sharing and low-end adjustments made by price cap local exchange carriers ("LECs") in 1992 and 1993 for purposes of calculating their rates of return in filing their interstate access tariffs for the years 1993 and 1994. As noted by the Commission, these questions were first considered among the issues designated for investigation pursuant to Section 204 in connection with the 1993 and 1994 annual access tariff filings made by the LECs. While the Commission, by order, made determinations regarding many of the issues designated in the tariff investigations, the issue of add-back for sharing and low-end adjustment calculations was not among them. Add-

[1] *Further Comment Requested on the Appropriate Treatment of Sharing and Low-End Adjustments Made by Price Cap Local Exchange Carriers in Filing 1993 and 1994 Interstate Access Tariffs*, CC Docket Nos. 93-193 & 94-65, *Public Notice*, DA 03-1101 (rel. Apr. 7, 2003).

back has lain dormant for nearly ten years, and the Commission through the *Public Notice* attempts to resuscitate its Section 204 investigation.

Because the Commission modified its price cap rules in 1995 to resolve the add-back issue on a prospective basis, and since sharing and low-end adjustments are no longer part of price cap regulation, the only possible reason for revisiting this matter would be to consider refunds under Section 204. As discussed more fully below, the Commission is without statutory authority to reinstate this stale tariff investigation under Section 204. At the time the 1993 and 1994 annual access filings were made, Section 204 mandated that investigations initiated pursuant to that Section be completed within 12 months. Accordingly, the Commission cannot rely on Section 204 to conduct this proceeding. Because Section 204 is the only statutory provision that authorizes refunds and there is no prospective relief that the Commission can prescribe, this proceeding should be terminated.

Even assuming that the Commission had authority under Section 204 to proceed, it must find that BellSouth properly calculated its sharing obligations in the 1993 and 1994 annual filings. The price cap rules that were in effect at the time did not provide for add-back. Indeed, the Commission subsequently, through rulemaking, amended the price cap rules to require add-back. If the Commission were to attempt to impose an add-back requirement in connection with the 1993 and 1994 annual access filings, such action would be tantamount to an impermissible retroactive application of a rule. Accordingly, even on the merits, the Section 204 proceeding should be terminated.

II. THE COMMISSION IS BARRED FROM RESUMING THE 1993 AND 1994 TARIFF INVESTIGATION PURSUANT TO SECTION 204

The Commission is without authority to resume the decade-old investigation regarding the 1993 and 1994 interstate access tariffs of price cap LECs. The Commission's efforts to refresh the record in an investigation that has long since expired conflict not only with the plain language of Section 204 of the Act and its legislative history but also with the principles of equity and fairness. Accordingly, the Commission may not re-open this investigation.

The Commission initiated the instant tariff investigation concerning the treatment of sharing and low-end adjustments by price cap LECs in 1993 pursuant to its authority under Section 204(a) of the Communications Act.[2] As the controlling law, Section 204 sets forth with specificity the procedures for investigating the lawfulness of a tariff prior to its effective date and the available remedies. Specifically, Section 204 empowers the Commission, either on its own or upon request, to suspend a proposed tariff for a maximum of five months, impose an accounting order, and conduct an investigation to determine the lawfulness of the tariffed rates.[3] Section 204 also grants the Commission discretionary authority to order refunds. However, a statutory prerequisite to the ordering of refunds is the completion of a hearing and the issuance of a final, reviewable order by the Commission within the timeframe mandated by Section 204.

At the time when the Commission first initiated the instant proceeding, Section 204 required the agency to complete a tariff investigation and issue a final, reviewable order within 12 months after the tariff became effective.[4] Although the Commission satisfied the initial

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[2] *See In the Matter of 1993 Annual Access Tariff Filings; National Exchange Carrier Association, Universal Service Fund and Lifeline Assistance Rates; GSF Order Compliance Filings; Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs*, CC Docket Nos. 93-193, 93-123, and 93-129; Transmittal No. 556, *Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation*, 8 FCC Rcd 4960, 4961, ¶ 3 (1993).

[3] 47 U.S.C. § 204(a).

[4] This statutory deadline for issuance of an order concluding a tariff investigation under Section 204 has changed over the years. Prior to 1988, there was no deadline for Commission action to resolve a tariff investigation pursuant to Section 204. In an attempt to foster more expedient tariff decisions by the Commission, Congress amended Section 204 in 1988 to add a

statutory requirements of Section 204 by issuing an order suspending the tariffs for one day, designating issues for investigation, and imposing an accounting order, it failed to complete the additional obligation of concluding the investigation and issuing a final order within the requisite 12-month timeframe. Accordingly, the time for resolving the instant investigation has expired, and the Commission is barred not only from resuming this proceeding, but also from ordering a refund.

In addition, the Commission may not rely on Section 205 as the basis for its authority to resume the instant tariff investigation and fashion a remedy. While it is true that the Commission may, at any time, commence an investigation into the lawfulness of a tariff pursuant to Section 205, this provision of the Act allows for prospective remedies only.[5] The instant tariff investigation, however, does not lend itself to a prospective remedy. The Commission has implemented various changes to its price cap rules over the years such that sharing and low-end adjustments are no longer components of the Commission's price cap rules. Accordingly, the add-back issues are moot.

Any action other than terminating this proceeding to refresh the record would exceed the scope of the Commission's authority under Section 204(a) and conflict with Congressional intent. Established rules of statutory construction mandate that the Commission follow the express language of Section 204(a). The statute does not establish an open-ended obligation to issue a final order in a Section 204 tariff investigation. To the contrary, in 1993, the Act provided as follows: "[T]he Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 12 months after the date the charge, classification,

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12-month deadline and again in 1996 to shorten this deadline to five months. *See infra* pp. 5-7 for additional discussion of the legislative history of Section 204.

5 47 U.S.C. § 205; *Illinois Bell Tel. Co. v. FCC,* 966 F.2d 1478 (D.C. Cir. 1992).

regulation, or practice subject to the hearing becomes effective." [6] Compliance with this statutory deadline is not optional or discretionary. Nor is the Commission afforded any deference to offer an alternate interpretation where the plain language of the statute is clear. [7]

Even if there were a question regarding this statutory deadline, which there is not, the legislative history of Section 204 underscores the mandatory nature of this deadline. Prior to 1988, there was no limit on the time by which the Commission had to conclude an investigation and issue a final, reviewable order. The lack of a statutory deadline led to protracted tariff investigations – a result Congress found harmful to the public and to carriers. Consequently, in 1988, Congress amended Section 204(a) to establish a 12-month deadline for issuing an order concluding a tariff investigation. Congress explicitly found that "the FCC often fails to reach a decision completing a tariff investigation in a reasonable amount of time."[8] As an example, Congress pointed out that of the 21 pending tariff investigations at the time, 12 of those were over 1 year old.[9] In addition, two had been pending for <u>seven</u> years. As Congress stated, "[t]his administrative delay in a nontrial proceeding would be troublesome in any context. It is especially troublesome in this case because the new rates are in effect pending the completion of the investigation."[10]

Clearly, Congress was dissatisfied by the Commission's failure to act in a timely manner. Its inclusion of a statutory deadline was a deliberate attempt to avoid the types of situations like

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6 47 U.S.C. § 204(a)(2)(A) (1993), *amended by* 47 U.S.C. § 204(a)(2)(A) (1996).

7 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

8 S. Rep. No. 100-142, Statement by Legislative Leader, *reprinted in* 1988 U.S.C.C.A.N. 4103, 4111.

9 *Id.*

10 *Id.*

the instant case – where the Commission takes years – even decades – to conclude an investigation. As Congress announced, "[t]he sole purpose for proposing this legislation is to hold the FCC as accountable for its tariff decisions as for its rulemaking decisions."[11]

Although Congress established a 12-month timeframe in 1988, it expected more prompt action by the Commission in most instances. Indeed, Congress's expectation was that 12 months would serve as an outer limit for resolution:

> In setting a 12 month limit, it is not intended that the FCC take the full 12 months to complete every investigation. The Commission should conclude every investigation as soon as it is possible to do so. The reason for giving the Commission as much as 12 months is that some tariff investigations require the collection and analysis of detailed factual information. The resolution of legal or policy issues should take no more than a few months.[12]

Recognizing that some tariffs may pose complicated issues that necessitate additional time for resolution, Congress granted the Commission additional scheduling flexibility. In its 1988 amendment, Congress gave the Commission an additional three months after the effective date of a tariff (or 15 months total) to conclude the investigation and issue an order for unusual and complex cases.[13]

In 1996, Congress amended Section 204 to adopt an even more stringent deadline. Congress shortened the timeframe for concluding an investigation from 12 to 5 months and eliminated the additional three-month extension for complex cases.[14] Thus, the intent of Congress could not be any more clear. The Commission must conclude a tariff investigation

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11 *Id.* at 4114.

12 *Id.* at 4113.

13 *Id.* at 4112.

14 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 402, § 11, 110 Stat. 56, 129.

commenced under Section 204(a) and issue a final, reviewable order within the statutory timeframe. In the absence of compliance with this deadline, the time for resolution and potential remedies under Section 204 has expired.

It is also important to note that any parties claiming to have been aggrieved by the 1993/1994 tariffs also have lost their opportunity to complain. As an initial matter, the Commission was under no legal obligation to suspend the tariffs in the first place. The Commission has the discretionary authority under Section 204 to refuse, to reject, or to suspend and investigate a tariff filing.[15] Thus, Section 204 does not guarantee a remedy for an aggrieved party.

Any carrier desiring to challenge the tariffs at issue could have sought relief through the Section 208 complaint process.[16] The tariff investigation was not an exclusive remedy. To the extent any parties were dissatisfied with the Commission's timeliness, they could have sought redress by filing a Section 208 complaint.[17] (Of course, a Section 208 enforcement complaint is no longer available as a remedy because the time for filing has long since expired.)[18] A party's decision to remain silent and not pursue legal remedies available to it was a voluntary decision that eliminates a party's right to complain ten years later.

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15 *American Broadcasting Cos. v. FCC*, 682 F.2d 25, 29 (2d Cir. 1982).

16 47 U.S.C. § 208.

17 In extreme cases of Commission delay, parties may seek a writ of mandamus from a court compelling the Commission to act. However, in the instant case, mandamus was not available as a remedy. As courts have concluded, "[t]he writ of mandamus is an extraordinary remedy, however, and will usually be denied when the petitioner could have invoked an adequate, ordinary remedy." *In re GTE Service Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985). As indicated above, the Section 208 complaint process was the available remedy.

18 Section 415 of the Act requires an action for damages to be filed within two years of the time a cause of action accrues. 47 U.S.C. § 415(b).

In addition to the statutory basis for ending this effort to update the record, the principles of equity and fairness also dictate terminating this new effort. As the courts have found, there is a "general presumption that governmental delay is unfair."[19] Indeed, resuming a decade-old investigation would be extremely prejudicial to price cap LECs such as BellSouth. Access to relevant documents and key personnel will most certainly be limited, thereby significantly impairing BellSouth's ability to satisfy its burden of proof. It strains credulity to think that the Commission deems it lawful or appropriate to resume a tariff investigation ten years after it began. As the D.C. Circuit stated, "[m]any of the same considerations that impel judicial protection of the right to a 'speedy trial' in criminal cases or implementation of civil decrees with all deliberate speed are not inapposite in agency deliberations."[20] Thus, in the interests of justice and fairness, the Commission should not pursue the resurrection of the instant tariff investigation.

III. APPLICATION OF SHARING ADD-BACK WOULD CONSTITUTE AN IMPERMISSIBLE RETROACTIVE APPLICATION OF A RULE CHANGE

Even assuming that the Commission has the statutory authority to reanimate this ten year old investigation, which it does not, the fact remains that the Commission could not in 1993/1994 require add-back with respect to sharing amounts. When the 1993/1994 annual access tariff filings were made, price cap LECs were required to follow the Commission's price cap rules that existed at that time. Under such rules, there was no provision for taking into account in the annual filings any sharing or low-end adjustment amounts from prior years. Rather, the sharing and low-end adjustments reflected in 1993 and 1994 annual filings had to be based upon the

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[19] *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 341, n.92 (D.C. Cir. 1980).

[20] *Id.* at 341.

interstate rates of return for 1992 and 1993 respectively, unadjusted by any sharing or low-end adjustments for 1991 and 1992 earnings.

The then existing rules established the means by which a price cap LEC was required to determine sharing and low-end adjustments for the purpose of establishing its indices for the annual filings. Section 61.45(d) required that the LEC's reported rate of return during the base year (1992 and 1993 for the 1993 and 1994 filings) be utilized.[21] If the LEC reported earnings above a threshold rate of return, e.g., 12.25%, then it was obligated to share. Similarly, a low-end adjustment was permitted for LECs whose rate of return during the base year was below 10.25%.[22]

There was only one rate of return under the rules from which to determine whether earnings during the base year were above 12.25% or below 10.25%. The rate of return was that which was specified on the LEC's Form 492A.[23] Nowhere in the Commission's rules, in a Commission order or on the rate of return report was there any requirement or provision for any adjustment whatsoever of the rate of return to account for any sharing or low-end adjustment made in the base year as a result of earnings for the year prior to the base year. As the Commission stated in its *Second Report and Order*, "our sharing and adjustment mechanisms are based on total interstate rate of return and that is the only earnings data used in the price caps plan."[24]

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21 *See In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Second Report and Order*, 5 FCC Rcd 6786 (1990).

22 *Id.* at 6801-02, ¶¶ 120-29.

23 47 C.F.R. §§ 65.600(d) and 1.795.

24 5 FCC Rcd at 6833, ¶ 380.

Moreover, it is significant that when the price cap rules were adopted, the Commission recognized the need to modify Form 492 for price cap carriers and directed the Common Carrier Bureau to modify the form accordingly.[25] In making such modifications, the Bureau did not provide for adjustments of base year earnings to account for sharing or low-end adjustments for the prior year. Indeed, the Bureau could not have made such adjustments because they were only authorized to make the changes that were necessary and appropriate and in accordance with the LEC price cap plan.[26]

To determine the need for any sharing adjustments in its annual filings, BellSouth calculated its rate of return for the base years in accordance with the Commission's rules and Form 492A. BellSouth calculated its sharing amount based upon that rate of return, as specified by the form, and included Form 492A in its filings.[27] The rate of return shown on the Form 492A established the basis for the sharing calculations because it was the only rate of return that existed under the rules.

Confirmation that the initial price cap rules did not require add-back is provided by the fact that the Commission, after a full notice and comment rulemaking, ultimately amended its price cap rules to make add-back a part of the sharing and low-end adjustment mechanisms,

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[25] *Id.* at 6834, ¶ 384.

[26] The fact that Form 492 was not further modified cannot be deemed to be an oversight, as the issue was called to the attention of the Bureau on more than one occasion. However, as explained in the NPRM in CC Docket No. 93-179, the issue of add-back was neither discussed in the price cap orders, nor addressed in the price cap rules.

[27] *See* BellSouth Transmittal No. 105 (1993 Annual Filing), Supporting Information, Volume 2, Exhibit A-10; BellSouth Transmittal No. 197 (1994 Annual Filing), Supporting Information, Volume 2-2, Exhibit A-9. No petitioner challenged the methodology utilized by BellSouth and, indeed, any such challenge would have been baseless, given that BellSouth followed the existing rules.

prospectively.[28] If add-back had been a feature of the price cap rules, such a rulemaking and rule change would not have been necessary. In affirming the new add-back rule, the Court of Appeals found that the rule was not impermissibly retroactive but rather prospective in effect:

> But the *Add-Back Order* is not retroactive. The sharing rules, including the add-back rule, are purely prospective. They determine how much a carrier can charge for services that it will provide in the future. They do not render current tariffs unlawful, and they do not require carriers to refund money they have already earned. . . . While a rule may be retroactive if it increases a party's liability for past conduct, [511 U.S. at 277,] 114 S.Ct. at 1503, the Commission has not increased any carrier's liability for past transactions.[29]

Application of add-back to the 1993/1994 tariff filings would be tantamount to the retroactive application of a new rule. Retroactivity occurs when the action impairs the rights that a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed.[30] Unlike the circumstances under which the Court upheld the new rule, applying add-back in the context of the 1993/1994 filings would impose new requirements with regard to the calculation of the rate of return that has already been completed and would increase a LEC's liability for past transactions.

The disdain for retroactive application of rules is grounded upon elementary considerations of fairness. As Justice Scalia has put it, "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."[31] The Commission's price cap rules at the time the 1993 and 1994 annual filings were made did not include any provision for add-back. The rules were

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28 *In the Matter of Price Cap Regulation of Local Exchange Carriers Rate-of-Return Sharing and Lower Formula Adjustments*, CC Docket No. 93-179, *Report and Order*, 10 FCC Rcd 5656 (1995).

29 *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1206-7 (D.C. Cir. 1996).

30 *See Landgraf v. USI Film Products,* 511 U.S. 244 (1994).

31 *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990).

clear and unambiguous. Price cap LECs had the right to rely, and, in fact, did rely, on the rules that were in effect at the time the annual filings were made. Although the Commission may have subsequently concluded that add-back should be a feature of its price cap and rate of return rules, it only had the power to effectuate such a rule change on a prospective basis.

IV. CONCLUSION

The Commission's actions must conform with the authority that is granted by Congress in the Communications Act. With respect to Section 204 investigations, Congress specifically circumscribed the time within which the Commission had to complete its investigation. The time limitation is not precatory but rather represents a limitation on Commission authority. Failing to adhere to the statute's provision, the Commission is without authority to complete its investigation some ten years after the statutory limit.

Even if Congress had not so limited the Commission, the Commission could not apply add-back to the 1993 and 1994 annual tariff filings. The price cap rules in effect at the time the filings were made did not provide for add-back. To impose add-back in those filings would be tantamount to an unlawful retroactive application of a rule that was not adopted until 1995.

For the reasons stated above, the Commission should immediately terminate these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of May 2003 served the following parties to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH** by electronic filing, electronic mail and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

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+ VIA ELECTRONIC FILING
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