

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

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

**REPLY COMMENTS**

BellSouth Corporation and BellSouth Telecommunications, Inc. (“BellSouth”) hereby submit their Reply Comments in the above referenced proceedings.

**I. INTRODUCTION**

1. AT&T alone argues that the Commission must conclude that some type of refund is required in this prolonged tariff investigation. The core elements of AT&T’s position are: (1) that the Commission’s 1995 Add-Back rulemaking, which modified the LEC price cap rules to include add-back as a feature of the LEC price caps regime, confirmed that an add-back requirement was implicit in the original price cap rules from their inception; (2) application of the add-back rule to the 1993/1994 annual access filings does not constitute retroactive rulemaking; and (3) the Commission has authority under Section 204 to order refunds.

2. As discussed further below, a pivotal consideration is the statutory framework and the Commission’s authority thereunder. While the Commission has a variety of mechanisms under the Communications Act by which it can take action, the statute circumscribes the Commission’s powers. To the extent remedial action is required in this proceeding, the Commission’s actions are constrained by the statute. In the instant case, the only remedy that would be supported by

the statute is prospective in nature.<sup>1</sup> Section 204 mandates that the Commission act within a proscribed time period, and, having failed to act within the limits established by Congress, the Commission has no authority to require refunds.

3. Even if there were no issue regarding the Commission's authority under Section 204, the Commission could not conclude, as AT&T suggests, that add-back is required for the 1993 and 1994 annual filings. The fact, which is undisputed by AT&T, is that add-back was not an explicit requirement of the price cap rules. Such a requirement did not manifest itself until 1995, after the Commission conducted a rulemaking proceeding. The Commission cannot lawfully apply the 1995 rule retroactively.

## **II. THE COMMISSION MAY NOT ORDER REFUNDS**

4. While Section 204 of the Communications Act empowers the Commission to award refunds, such authority is not unconstrained. In order to act under Section 204, the Commission must follow the prescriptions laid out by Congress. Specifically, before the Commission can order refunds, it must suspend and investigate the tariff in question and impose an accounting order. In addition, the Commission must complete its investigation with a final, reviewable order within a time specified by the statute.

5. 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

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<sup>1</sup> No prospective change, however, to the price cap rules is required. As BellSouth pointed out in its Comments, 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.

12 months after the tariff became effective.<sup>2</sup> Although the Commission satisfied the initial 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 under Section 204 has expired, and the Commission is barred not only from resuming this proceeding, but also from ordering a refund.

6. 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.

7. As BellSouth pointed out in its comments, Congress' intent with regard to the time limit to complete Section 204 proceedings is unambiguous.<sup>3</sup> Not only is the plain language of the statute one of command, but also the legislative history underscores the mandatory nature of the deadline. There is simply no room for an alternate interpretation.

8. AT&T fails to address the requirements of Section 204. Rather, AT&T merely assumes Section 204 to be applicable. The question here, however, is not whether the statute

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<sup>2</sup> 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 12-month deadline and again in 1996 to shorten this deadline to five months. *See* BellSouth Comments at 5-7 for additional discussion of the legislative history of Section 204.

<sup>3</sup> BellSouth Comments at 4-8.

provides the Commission with authority to order refunds. Instead, the appropriate question is whether the Commission has followed the statute in exercising its authority. In this case, the answer is clearly no. Accordingly, the Commission cannot rely on Section 204 to order refunds.

**III. EVEN IF THE COMMISSION COULD ACT UNDER SECTION 204, IT COULD NOT REQUIRE ADD-BACK**

9. AT&T contends that the central issue of the investigation, add-back, was decided by the Commission in its 1995 Add-Back rulemaking. AT&T further argues that the Court of Appeals for the D.C. Circuit affirmed the Commission's add-back determination.

10. To the extent the 1995 Add-Back rulemaking is central to the 1993/1994 investigations, as AT&T argues, then the Commission need go no further than to terminate these two proceedings. As Qwest argues, the 1995 Add-Back rulemaking was conclusive as to the 1993 and 1994 tariff investigations:

[T]he add-back rule adopted in the *Add-Back Order* is likewise binding in the tariff proceedings involving ILEC 1993 and 1994 annual access tariff filings. Both the 1993 and the 1994 investigations of ILEC annual access tariff filings were predicated on the announced expectation that the Add-Back rulemaking proceeding would, when decided, resolve the add-back issue in those proceedings as well. The add-back rule did just that – by determining that the rule was not retroactive in nature, the *Add-Back Order* established definitively that add-back would not be applied to the 1993 or 1994 annual access tariff investigations. Thus, the tariff investigations have been effectively completed as well.<sup>4</sup>

11. Even if it were not the case that the 1995 Add-Back rulemaking effectively concluded the tariff 1993 and 1994 tariff investigations, it is clear that the rulemaking changed the price cap rules and that such change was and could, as a matter of law, only have been prospective in nature. Contrary to AT&T's argument, the Court of Appeals in affirming the 1995 Add-Back

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<sup>4</sup> Qwest Comments at 7.

Rulemaking never affirmed that add-back was implicit in the price cap rules that existed when the 1993 and 1994 annual access tariff filings were made. The Court acknowledged the Commission's argument but did not adopt it. Instead, the Court concluded that the new rule was not retroactive 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.<sup>5</sup>

12. As BellSouth has pointed out, 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.<sup>6</sup> 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.<sup>7</sup>

13. AT&T attempts to side-step the retroactive rulemaking prohibition by characterizing the 1993 and 1994 tariff investigations as ratemaking proceedings. According to AT&T, Section 204 empowers the Commission to order refunds that have a retroactive effect by determining the

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<sup>5</sup> *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1206-7 (D.C. Cir. 1996).

<sup>6</sup> *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

<sup>7</sup> BellSouth Comments at 11.

lawfulness of rates already filed and in effect.<sup>8</sup> AT&T's argument misses the point. At issue are not carrier-developed methodologies. Instead, the question is whether BellSouth followed the Commission's price cap rules in calculating its sharing obligations. As BellSouth made clear in its direct cases in the tariff investigations and again in its comments, the price cap rules in effect when the 1993 and 1994 annual filings were made did not include add-back. BellSouth was required to follow and did follow the price cap rules as they existed. To require add-back for the 1993 and 1994 annual filings would effectively constitute a retroactive change in the then applicable price cap rules and as a matter of law such retroactive rulemaking is prohibited.<sup>9</sup>

14. Accordingly, the Commission should terminate this proceeding.

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<sup>8</sup> Of course, AT&T's argument is further diminished by the fact that the Commission has not acted in conformance with Section 204's requirements and, thus, cannot rely on Section 204 for authority to engage in retroactive adjustments.

<sup>9</sup> In Exhibit 1 to AT&T's Comments, AT&T attempts to quantify the additional sharing obligations of the RBOCs, assuming add-back were required. AT&T's analysis and computations are flawed because they fail to consider the impact that add-back would have had on all related sharing exogenous adjustments in the 1993/1994 annual filings, such as sharing true-ups and the reversal of sharing adjustments. When all sharing-related adjustments are considered in the 1993/1994 annual filings and in subsequent years' annual filings, the impacts are essentially negligible.

Respectfully submitted,

**BELLSOUTH CORPORATION  
BELLSOUTH TELECOMMUNICATIONS, INC.**

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Date: May 19, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19<sup>th</sup> day of May 2003 served the following parties to this action with a copy of the foregoing **REPLY COMMENTS** by electronic filing, electronic mail and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

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