

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS OF SPRINT CORPORATION**

Sprint Corporation, on behalf of its incumbent local exchange (“ILEC”), competitive LEC (“CLEC”)/long distance, and wireless divisions, respectfully submits its reply to comments filed in the above-captioned proceeding on May 5, 2003.

AT&T claims that the 1993 and 1994 Annual Access Tariff investigations are still pending and that “[i]n a separate rulemaking proceeding, the Commission definitely resolved the add-back issue.”<sup>1</sup> Sprint agrees, but then comes to an entirely different conclusion about what these facts mean.

As Qwest correctly points out, there “is no longer an open item permitting any action other than the administrative action of closing the investigation[s].”<sup>2</sup> The reason is simple. The 1993 *MO&O*<sup>3</sup> designated the issue of “add-backs” and noted that the issue would be decided in the *Add-Back NPRM* proceeding.<sup>4</sup> The Commission then definitely

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<sup>1</sup> Comments of AT&T Corp. (“AT&T’s Comments”), filed May 5, 2003 at p. 2.

<sup>2</sup> Comments of Qwest Corporation (“Qwest’s Comments”), filed May 5, 2003 at p. 1.

<sup>3</sup> *In the Matter of 1993 Annual Access Tariff Filings, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation*, 8 FCC Rcd 4960 (1993) (“1993 *MO&O*”).

<sup>4</sup> *In the Matter of Price Cap Regulation of Local Exchange Carriers, Rate of Return Sharing and Lower Formula Adjustment, Notice of Proposed Rulemaking*, 8 FCC Rcd

decided the issue in its *1995 Add-Back Order* by ruling that there was no authorization or requirement for add-backs for the 1993 and 1994 Annual Access Tariff filings:

We agree with commenters that the explicit add-back rule adopted here may, as a legal matter, be applied only on a prospective basis. [Citation omitted.] Accordingly, **this rule will first be applied when carriers file their 1995 access tariffs.** At that point, carriers must make an adjustment to offset any sharing or low-end adjustments made for 1994 rates to determine any 1995 required sharing or permitted low-end adjustments.<sup>5</sup>

With no applicable rule, there could be no add-back for sharing or low-end adjustments. That is exactly how the Sprint ILEC division handled the matter. As noted by AT&T in Exhibit 3 to their Comments, several Sprint ILECs had sharing obligations stemming from 1992 and 1993 access earnings. None of these Sprint ILECs performed an add-back adjustment for the sharing obligation in either the 1993 or 1994 Annual Access Tariff filing.

Conspicuously absent from AT&T's Exhibit 3, is the fact that one of Sprint's ILECs, Carolina Telephone and Telegraph, under earned for 1992 and had a low-end adjustment. Unlike NYNEX and SNET, Sprint took no add-back for this adjustment, because none was allowed under the applicable rule or, as pointed out by BellSouth, under the rate of return report, Form 492A:

The rate of return was that which was specified on the LEC's Form 492A. [Citation omitted.] 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

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4415 (1993) ("*Add-Back NPRM*") at ¶ 32. Furthermore, the 1994 Add-back NPRM (In the Matter of 1994 Annual Access Tariff Filings, Memorandum Opinion and Order Suspending Rates, 9 FCC Rcd 3705 (1994) ¶ 105-06) noted that the 1994 add-back issue would be decided along with the 1993 proceeding.

<sup>5</sup> *In the Matter of Price Cap Regulation of Local Exchange Carriers Rate-of-Return Sharing and Lower Formula Adjustment*, 10 FCC Rcd 5656 (1995) ("*1995 Add-Back Order*"), at ¶ 49. [Emphasis supplied.]

sharing or low-end adjustment made in the base year as a result of earnings for the year prior to the base year.<sup>6</sup>

AT&T argues that the Commission can now retroactively impose an add-back requirement for the 1993 and 1994 Annual Access Tariff filings without running afoul of the rule against retroactive ratemaking because that rule only applies to rulemaking proceedings, not section 204 [47 U.S.C. § 204] tariff investigations. AT&T's argument fails because it ignores the fact, as demonstrated above, that in designating add-back as an issue for the 1993 and 1994 tariff investigations, the Commission declared that the issue would be decided as part of the rulemaking which resulted in the *1995 Add-Back Order*. Furthermore, AT&T completely ignores the fact, as noted by SBC, that section 204 only gives the Commission twelve months to order refunds in a tariff case.<sup>7</sup> Clearly, the twelve month period in this proceeding has long since expired.

Additionally, Sprint believes that SBC persuasively demonstrates why application of add-backs to the 1993 and 1994 Annual Access Tariff filings would constitute retroactive rulemaking.<sup>8</sup> The Commission's recognition that its original price cap order and rules contained no provision for add-backs and its subsequent determination in the *1995 Add-Back Order* that an express rule was required to provide for add-backs beginning in 1995 demonstrates that adoption of an add-back requirement for price-cap

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<sup>6</sup> Comments of BellSouth ("BellSouth's Comments"), filed May 5, 2003 at p. 9.

<sup>7</sup> Comments of SBC Communications, Inc. ("SBC's Comments"), filed May 5, 2003 at p. 4. *See also*, BellSouth's Comments at pp. 3-8 and *Illinois Bell Telephone Co. v. FCC*, 966 F.2d 1479 (D.C. Cir. 1992) in which the D. C. Circuit held the FCC to strict compliance with the terms of section 204, *but see* *Southwestern Bell Telephone Co. v. FCC*, 138 F.3d 746 (8<sup>th</sup> Cir. 1998) in which the 8<sup>th</sup> Circuit did not find that following all of the steps in section 204 is a prerequisite to ordering refunds.

<sup>8</sup> SBC Comments at pp. 8-10.

LECs is a substantial rule change. Adoption of such a requirement for the 1993 and 1994 access filings would also constitute a retroactive rulemaking because, as SBC notes:

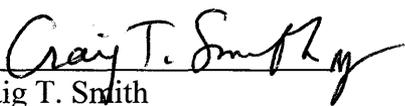
In determining whether a rule operates retroactively, the courts have considered whether application of the rule “impairs rights a party possessed when he acted, increases a party’s liability for past conduct, or imposes new duties with respect to transactions already completed.” While satisfaction of each of these factors is not required, each are met here.<sup>9</sup>

Finally, SBC notes that the final question is whether Congress expressly authorized the Commission to retroactively adopt substantive rule changes. In this case, there is no such statutory provision.

For the foregoing reasons the Commission should conclude that there is no rule authorizing or requiring add back in computing price-cap ILEC sharing or low-end adjustments and that such a rule cannot be adopted now. Price-cap ILECs that under earned and then added back the low-end adjustment should be required to make refunds.

Respectfully submitted,

SPRINT CORPORATION

By   
Craig T. Smith  
6450 Sprint Parkway  
Overland Park, KS 66251  
(913) 315-9172

H. Richard Juhnke  
401 9<sup>th</sup> Street, NW, #400  
Washington, DC 20004  
(202) 585-1910

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<sup>9</sup> SBC Comments at p. 9, quoting Landgraf v. USI Film Products et al., 511 U.S. 244, 280 (1994).

## CERTIFICATE OF SERVICE

I, Joyce Y. Walker, hereby certify that I have on this 19<sup>th</sup> day of May 2003, served via Internet, U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing letter," In the Matter of 1993 Annual Access Tariff Filings, CC Docket No. 93-193 and 1994 Annual Access Tariff Filings, CC Docket No. 94-65", filed this date with the Secretary, Federal Communications Commission, to the persons listed below.



Joyce Y. Walker

**Tamara Preiss**  
Pricing Policy Division  
445 12th Street SW.,  
Washington, DC 20554

**Qualex International**  
Portals II  
445 12th Street SW.,  
Washington, DC 20554

**Richard M. Sbaratta**  
BellSouth  
675 West Peachtree Street NE, Suite  
4300  
Atlanta, GA 30375-0001

**David Grant**  
SBC Corporation  
1401 I Street NW., Suite 400  
Washington, DC 20005

**Sidley, Austin Brown & Wood LLP**  
Attorney's for AT&T Corp  
1501 K Street NW.,  
Washington, DC 20005

**Joseph DiBella**  
Verizon Telephone Companies  
1515 North Courthouse Road, Suite  
500  
Arlington, VA 22201-2909

**Robert McKenna**  
Qwest Corporation  
1020 19th Street NW., Suite 700  
Washington, DC 20036