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February 3, 2004

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges – WC Docket No. 02-361

Dear Ms. Dortch:

The purpose of this letter is to briefly comment on a key issue raised in a series of *ex parte* communications filed by SBC Communications Inc. (January 14, 2004 and December 19, 2003), BellSouth Corporation (January 9, 2004), and the law firm of Sidley Austin Brown & Wood LLP (representing AT&T Corp. ("AT&T"), filed on December 22, 2003). The *ex parte* communications each imply that the Commission has the authority to make a determination on AT&T's request for declaratory ruling on a prospective basis only, and to thereby absolve AT&T of its obligation to pay Qwest and other parties for access charges on what it calls "phone-to-phone IP telephony service."

Qwest respectfully submits the attached memorandum which demonstrates that, because "phone-to-phone IP telephony service" is a common carrier service which must purchase access services from incumbent local exchange carriers' ("ILECs") access tariffs, the current proceeding could lawfully exempt AT&T from making such payments only on a prospective basis. In any legal action seeking recovery of their lawfully tariffed charges from AT&T, ILECs are entitled to an actual determination of what the applicable law was at the time AT&T purchased services from them. Because the law required that AT&T purchase its services from ILEC interstate access tariffs, the Commission cannot retroactively modify that law to excuse AT&T's obligation to pay for such services.

Qwest also takes exception to the following statement in AT&T's December 22, 2003 *ex parte* letter:

The entire industry has operated for years on the understanding that phone-to-phone VOIP services have been exempt from access charges, and an about face by the Commission now would do extraordinary harm.<sup>1</sup>

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<sup>1</sup> Letter from Sidley Austin Brown & Wood LLP (representing AT&T Corp., filed on December 22, 2003), p. 2.

In fact, most of the industry has operated for years under explicit Commission rulings that such traffic is subject to access charges. Several times over the last twenty years, the Commission has held that, unless there is a net conversion, the fact that traffic is converted to IP protocol for the purposes of transport does not make such traffic either an enhanced or an information service. In other words, if the traffic is originated and terminated as TDM [Time-Division Multiplexing], the fact that the traffic is converted to IP protocol in the middle does not change the fact that the traffic constitutes a telecommunications service subject to access charges. In its December 19, 2003 *ex parte* communication and accompanying Memorandum,<sup>2</sup> SBC sets forth the cases in which the Commission has rejected on numerous occasions over the last twenty years the notion that an Internet protocol conversion which is reversed at the end of a carrier's transmission could be an enhanced or an information service.<sup>3</sup>

According to Commission precedent, traffic constitutes a telecommunications service unless there is a net conversion from TDM to IP protocol. Thus, true VOIP services – traffic that originates as TDM and terminates as IP protocol or that originates as IP protocol and terminates as TDM – may be considered an information service. However, there is no Commission or court precedent that supports AT&T's claim that what it calls "phone-to-phone IP telephony service" – traffic for which there is no net conversion – is an information service. This distinction was recognized by the United States District Court for the District of Minnesota in its decision declaring that VOIP is an information service.<sup>4</sup> In that decision, the Court cited to the Commission's precedent that "phone-to-phone IP telephony" is a telecommunications service. The Court then held that VOIP service offered by Vonage is different, because "a net change in form and content occurs when Vonage's customers place a call." The Court held that the VOIP service offered by Vonage is an information service and not a telecommunications service, "because 'from the end user's standpoint' the form of a transmission undergoes a 'net change.'"<sup>5</sup>

In light of the Commission's clear rulings that traffic constitutes a telecommunications service unless there is a net conversion, most of the industry has followed the Commission's rules and paid access charges on "phone-to-phone IP telephony services." Qwest is one of the companies that has followed Commission rules and paid access charges on such services. In its long distance network, Qwest converts some traffic from TDM to IP telephony and then converts such traffic back to TDM for termination. Qwest has paid access charges on such services.

AT&T, on the other hand, has admitted to disguising such traffic as local and terminating it through its competitive local exchange entities. It would be manifestly unfair to allow AT&T to get away with such behavior when its competitors such as Qwest have followed the rules and paid applicable access charges.

Qwest acknowledges that true VOIP services – traffic for which there is a net conversion – may be considered information services, and that access charges may not apply to such

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<sup>2</sup> Memorandum by SBC Communications Inc., Urging the Commission to Deny AT&T's Access Charge Avoidance Petition, January 14, 2004 (hereafter "SBC Memorandum").

<sup>3</sup> *Id.* at 3, especially note 10.

<sup>4</sup> *Vonage Holdings Corp. v. Minnesota PUC, et al.*, No. 03-5287, Memorandum Opinion and Order (October 16, 2003).

<sup>5</sup> *Id.* at 13.

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services when the traffic is delivered in a manner consistent with the rules applicable to access and information service providers. The law is clear, however, that the traffic subject to AT&T's petition is subject to access charges. For that reason, Qwest has been paying access charges on such traffic for years. The Commission cannot and should not exempt one company, AT&T, from following the rules. The only fair, legal and just way for the Commission to resolve AT&T's petition is to declare that, unless and until the Commission holds otherwise on a prospective basis, "phone-to-phone IP telephony service" is and has been subject to access charges. The Commission need not explicitly state that AT&T must retroactively pay such charges – once the Commission reiterates the law that access charges apply to such traffic, then AT&T's obligation to pay such charges on traffic it handled in the past is a matter of law to be addressed in collection actions against AT&T. The Commission cannot in this proceeding exempt AT&T from its legal obligation to pay such charges.

Respectfully submitted,

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## MEMORANDUM

**RE:** Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges – WC Docket No. 02-361

**DATE:** February 3, 2004

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The purpose of this memorandum is to briefly comment on a key issue raised in a series of *ex parte* communications filed by SBC Communications Inc. (January 14, 2004 and December 19, 2003), BellSouth Corporation (January 9, 2004), and the law firm of Sidley Austin Brown & Wood LLP (representing AT&T Corp. (“AT&T”), filed on December 22, 2003<sup>1</sup>). The *ex parte* communications each imply that the Commission has the authority to make a determination on AT&T's request for declaratory ruling on a prospective basis only, and to thereby absolve AT&T of its obligation to pay Qwest and other parties for access charges on what it calls “phone-to-phone IP telephony service.” This memorandum demonstrates that, because “phone-to-phone IP telephony service” is a common carrier service which must purchase access services from incumbent local exchange carriers’ (“ILECs”) access tariffs, the current proceeding could lawfully exempt AT&T from making such payments only on a prospective basis. The Commission is without jurisdiction to retroactively absolve AT&T from complying with then-applicable Commission rules. This is true even if AT&T were to be found to have avoided purchasing access services in good faith, and even if the Commission were to find that there was ambiguity in its rules.

ILECs in any legal action seeking recovery of their lawfully tariffed charges from AT&T are entitled to an actual determination of what the applicable law was at the time AT&T purchased services from them. Because the law required that AT&T purchase its services from ILEC interstate access tariffs, the Commission cannot retroactively modify that law in order to enable AT&T to claim that its obligation to pay for such services has been excused by Commission directive.

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<sup>1</sup> Hereafter “AT&T Memorandum.”

I. UNDER CURRENT LAW, WHAT AT&T CALLS “PHONE-TO-PHONE IP TELEPHONY SERVICE” IS A COMMON CARRIER SERVICE THAT MUST PAY THE SAME CARRIER’S CARRIER CHARGES AS OTHER USES OF LOCAL EXCHANGE SWITCHING FACILITIES.

In its January 14, 2004 *ex parte* communication and accompanying Memorandum,<sup>2</sup> SBC points out with clarity that AT&T’s claim that a TDM-to-TDM [Time-Division Multiplexing] call using IP protocol as an internal transmission vehicle was an “information service” and is dramatically inconsistent with the Commission’s rules and the tariffs of the ILECs implementing those rules.<sup>3</sup> As SBC observes, the Commission has rejected on numerous occasions over the last twenty years the notion that an Internet protocol conversion which is reversed at the end of a carrier’s transmission could be an enhanced or an information service.<sup>4</sup> The plain terms of the law require that AT&T pay access charges on such traffic under the interstate access tariffs, including carrier’s carrier charges established pursuant to 47 C.F.R. § 69.5(b). SBC also demolishes the argument that the Commission did, could have, or wanted to change this uniform principle in the 1998 Report to Congress on Universal Service.<sup>5</sup>

II. THE COMMISSION CANNOT LAWFULLY CUT OFF THE RIGHTS OF ILECs TO COLLECT CARRIER’S CARRIER CHARGES THAT AT&T OWES THE ILECS.

Because of Commission precedent on this issue, to the extent that AT&T has been originating and terminating interexchange traffic over Qwest’s local exchange facilities via either local services purchased by AT&T or via competitive local exchange carriers (“CLEC”) pretending that the AT&T service was local, AT&T has incurred a legal indebtedness to Qwest which is enforceable and collectable in a court of law. As is pointed out below, the forgiveness of past debts owed by a customer of a carrier for services rendered is not a proper function of this Commission. The Commission does not have the power to forgive past debts owed by a customer to a carrier, or to retroactively change the law under which those debts were incurred.

Nevertheless, in its Memorandum, AT&T took the position that the Commission’s discretionary authority to fashion prospective rules and remedies on a retroactive basis applied to the debts which AT&T owes to the ILECs for its unpaid carrier’s carrier charges.<sup>6</sup> SBC countered with its Memorandum, in which it pointed out that the Commission has, in many cases, fashioned prospective remedies which were applied to retroactive facts.<sup>7</sup> SBC points out that, in cases where the Commission is fashioning a remedy in a proceeding where it is applying “existing law

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<sup>2</sup> Memorandum by SBC Communications Inc., Urging the Commission to Deny AT&T’s Access Charge Avoidance Petition, January 14, 2004 (hereafter “SBC Memorandum”).

<sup>3</sup> *Id.* at 1-4.

<sup>4</sup> *Id.* at 3, especially note 10.

<sup>5</sup> *Id.* at 4-9.

<sup>6</sup> AT&T Memorandum at 3-4.

<sup>7</sup> SBC Memorandum at 9-19.

to new facts or other clarifications of existing law[.]” retroactive application of the decision is “natural, normal, and necessary.”<sup>8</sup>

But the cases cited by SBC do not deal with the situation that is faced by AT&T and the ILECs to whom AT&T is indebted. They instead deal with retroactive application of new rules, adopted either in rulemaking proceedings or adjudications. For example, *Williams Natural Gas Company* examined whether a “rule announced in an agency adjudication may be given retroactive effect[.]”<sup>9</sup> *Exxon Company* dealt with a valuation method for petroleum products and a contested settlement agreement which had denied retroactivity to the detriment of only certain parties.<sup>10</sup> *Verizon* involved a complaint for damages arising from changing prospective rules occasioned by an intervening court reversal, and affirmed an award of retroactive damages.<sup>11</sup> But these cases (and the cases cited by AT&T) do not come to grips with the fundamental issue here -- the ILECs to whom AT&T owes money for its use of local exchange switching facilities to originate and terminate interexchange carrier (“IXC”) traffic have a private right of action against AT&T which the Commission cannot abrogate.

If AT&T violated the law by not paying such charges, the Commission may not retroactively eliminate AT&T’s liability to make such payments. In other words, if the ILECs bring proper complaints to recover this money in a court of law, the Commission is without power to modify that law retroactively in AT&T’s favor to insulate AT&T from its legal obligations. The money which AT&T owes to ILECs for carrier’s carrier charges is normally considered to be a private debt owed to a carrier by its customer, and an action to collect on that debt is thereby outside the jurisdiction of the Commission.<sup>12</sup>

Although the Commission’s interpretations of its rules could be binding on a court in any collection action initiated against AT&T under primary jurisdiction, generally the issue of whether AT&T owes ILECs for delinquent access charge payments is foremost a matter for courts, not the Commission, to decide. Any such collection action would be based on services provided under the law as it existed when the ILEC provided service, and the Commission’s rulemaking authority does not extend to such actions. The Commission cannot retroactively change the law on which such a private right of action is based. It seems quite clear that the Commission does not have the authority to interfere with an action in law by an ILEC against AT&T for remuneration for past services provided.

As far as we can determine, the Commission has never attempted to interfere in such a judicial proceeding. However, in several cases where the Commission did have jurisdiction over a complaint for private damages, but attempted to rule on the issues only prospectively, the

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<sup>8</sup> *Id.* at 10 (emphasis added by SBC), citing to *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (citing *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986)).

<sup>9</sup> *Williams Natural Gas*, 3 F.3d at 1553 (emphasis added).

<sup>10</sup> *Exxon Company v. FERC*, 182 F.3d 30 (D.C. Cir. 1999).

<sup>11</sup> *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1111-12 (D.C. Cir. 2001) (affirming retroactive liability but leaving the issue of damages for further consideration by the FCC).

<sup>12</sup> See *MCI Telecommunications Corporation v. FCC*, 59 F.3d 1407, 1417-18 (D.C. Cir. 1995), *cert. dismissed*, 517 U.S. 1129 (1996).

appellate courts clearly articulated that the Commission must make a finding as to whether the defendant's past actions violated the law as it existed relevant to the complaint. AT&T was a party to all of these actions, and in two of them argued successfully against the very position it has taken in this proceeding. The legal principles applied in these cases would apply to an action by Qwest or any other ILEC to collect carrier's carrier charges that AT&T wrongfully declined to pay.

Section 206 of the Act requires the Commission to award damages whenever a complainant has proven both a violation of the Act or the Commission's regulations and that the complainant has been damaged thereby.<sup>13</sup> This is not a discretionary function, and is not subject to considerations of equity, retroactivity, or the other public policy considerations that can apply when the Commission acts in its legislative capacity or otherwise acts to promulgate new rules to govern future conduct.<sup>14</sup> In fact, even if the law or regulation was ambiguous, a complaining party is entitled to a determination of what the law was and to damages if it was violated. The adjudicatory function of determining damages in the matter of a private complaint for damages is governed by the strict requirement that the law as it existed at the time of the complained-of violation must be applied and damages awarded upon proper proof. The Commission itself recently recognized this precise proposition:

An action in restitution is fundamentally different from the statutory claim for damages which Complainants have brought. As the D.C. Circuit has stated, Section 206 of the Act is "phrased in mandatory terms: A carrier that has violated the Act 'shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation.'" Section 209, likewise, provides that, if the Commission determines that a complainant is entitled to an award of damages, the Commission "shall" order the carrier to pay the complainant the sum to which it is entitled. Thus, Section 206 - in explicit terms - makes the Defendants liable to the Complainants in damages for any injuries they inflicted on the IPPs by unlawfully assessing EUCL charges. And Section 209 requires the Commission, upon making the necessary findings, to order the Defendants to pay such damages.<sup>15</sup>

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<sup>13</sup> 47 U.S.C. § 206:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, . . . such common carrier shall be liable to the person or persons injured thereby for the full amount of damages in consequence of any such violation of the provisions of this chapter. (Emphasis supplied.)

<sup>14</sup> See, e.g., *In the Matter of MCI Telecommunications Corporation v. AT&T, et al.*, CC Docket No. 81-217, *Memorandum Opinion and Order*, 85 F.C.C. 2d 994, 999 ¶ 17 (1981).

<sup>15</sup> *Communications Vending Corporation of Arizona, Inc. v. Citizens Communications Company*, *Memorandum Opinion and Order*, 17 FCC Rcd 24201, 24217-18 ¶ 41 (2002) (footnotes omitted), *appeal pending sub nom. Communications Vending Corp. of Arizona, Inc., et al. v. FCC*, No. 02-1364 (pet. for rev. filed Nov. 26, 2002).

This essential proposition has been elaborated on recently in three separate lines of cases.

A. *American Telephone and Telegraph Company v. FCC*<sup>16</sup>

AT&T had brought a complaint against MCI at the Commission pursuant to Sections 206-208 of the Communications Act. AT&T claimed that MCI had been offering interstate common carrier services on a contractual, rather than a tariffed basis, in violation of the Communications Act.<sup>17</sup> AT&T requested issuance of a cease and desist order and damages. The Commission dismissed the complaint on the basis, in part, that it was issuing a notice of proposed rulemaking in which it would examine whether an earlier Commission policy permitting such de-tariffed operations had been overruled by a subsequent appellate court decision. AT&T appealed, claiming that it had an absolute right for a determination of the lawfulness of MCI's past conduct and for assessment of damages if they could be proven.

The Court vacated the earlier Commission *Order* on which the Commission had relied in dismissing AT&T's complaint, reversed the dismissal itself, and remanded the case to the Commission for further assessment of AT&T's requests for relief. The Court emphasized several very important principles in so doing.

- When the Commission acts as an adjudicator of private rights, a complainant has a statutory right to a finding on whether a defendant's past actions violated the law as it existed at the time relevant to the complaint. The Court stated:

Agencies do have a fundamental choice whether to interpret and apply federal statutes through adjudication or through rulemaking. But they cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively. See *Bowen v. Georgetown Univ. Hosp.*, 488 US 204, 208 (1988). The choice an agency has between different methods of 'making law' is simply irrelevant when the agency is called upon as an adjudicator to apply existing law to a complaint. Here, as in *Meredith*, the Commission "confuses its quasi-judicial role with its quasi-legislative one." *Meredith [Corp. v. FCC]*, 809 F.2d 863, 873 (D.C. Cir. 1987), *cert denied*, 493 U.S. 1019 (1990)].<sup>18</sup>

- In analyzing a damages claim, the Commission has the authority to apply the standard retroactivity analysis which is set forth in the SBC Memorandum only in those cases

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<sup>16</sup> *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI v. AT&T*, 509 U.S. 913 (1993).

<sup>17</sup> Section 203(c) of the Act provides:

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder.

The Supreme Court ultimately held that this language precluded the FCC from de-tariffing interstate common carrier services subject to its jurisdiction. See 47 U.S.C. § 160 (1996). The 1996 amendments to the Act granted the Commission permission to forbear from requiring tariffs.

<sup>18</sup> *AT&T v. FCC*, 978 F.2d at 732.

where there has been a *bona fide* change in the law. While the Court ultimately did not decide the damages issue (leaving that for further analysis by the Commission), that was so because the Commission had not sufficiently explained what it had been doing or attempting to do to permit legal analysis. The Court observed as follows:

We do not think it appropriate to resolve this dispute and apply the five factor test at this stage because we do not fully understand what the Commission sees as ‘the law’ to be applied retroactively. By implication, the Commission must be referring to a prospective change in its regulation, but we think it is analytically incoherent to consider whether that change should be applied retroactively until it is fashioned. If the Commission means, instead, only its acceptance of our *MCI* interpretation, it would have to explain why that is a change in the law.

The Commission will also have to reconsider AT&T’s damages claim. If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.<sup>19</sup>

In the absence of an actual change in the law, there would be no lawful basis on which the Commission could avoid its statutory obligation to award damages to an injured party.

- In cases of adjudication of private rights, the fact that a defendant had proceeded in good faith is irrelevant to the award of damages to the party injured by the defendant’s conduct.<sup>20</sup>

B. *MCI Telecommunications Corporation v. FCC*<sup>21</sup>

MCI had complained to the Commission under Section 206 that AT&T had unlawfully bundled inbound and outbound 800 services in violation of the Communications Act, thereby damaging MCI. In the same year the Commission initiated a rulemaking proceeding to determine whether this precise practice should be prohibited prospectively. Ultimately the Commission found that the practice was anti-competitive and outlawed it for future AT&T customers, but grandfathered AT&T’s existing customers. The Commission dismissed MCI’s damages complaint on the basis that the rulemaking order was prospective only.

The Commission had held:

The effect of our finding in the *IXC Orders* regarding the unlawfulness of bundling 800 or inbound services using old 800 numbers is prospective and prior customers are grandfathered. Consistent with the *IXC Orders*, we conclude that

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<sup>19</sup> *Id.* at 737.

<sup>20</sup> *See id.* at 734-35, 736.

<sup>21</sup> *MCI v. FCC*, 10 F.3d 842 (D.C. Cir. 1993).

no liability for damages attaches to AT&T for conduct occurring prior to the release date of the *IXC Recon Order*.<sup>22</sup>

The appellate court criticized the Commission shirking its statutory duty to adjudicate complaints and award damages to a party who had proven a past violation of the Communications Act:

The Commission's reliance on the *IXC Orders* to dispose of MCI's complaint is a *non sequitur*. Nothing in the *Orders* in any way purports to determine the legality of conduct occurring before their effective date.<sup>23</sup>

The Court held that the Commission's *IXC Orders* shielded AT&T from liability for damages for grandfathered customers beginning on the date of the *Orders*, but that "it was an error of logic to claim, as the Commission did, that the ruling controls the question of AT&T's liability for provision of services before the effective date of the *IXC Orders*."<sup>24</sup> The Court reminded the Commission that it could not avoid its responsibilities in an adjudication by referring to the generally prospective nature of a rulemaking proceeding. The Court ultimately held that "the Commission acted arbitrarily and capriciously in dispensing with MCI's complaint for damages on the basis of the *IXC Orders*."<sup>25</sup>

### C. Overearnings Cases<sup>26</sup>

AT&T and various other IXCs brought complaints against a number of ILECs for damages under Sections 206-208 of the Act on the basis that the ILECs' earned rates of return for the two-year rate of return monitoring periods upon which earned rates of return were reviewed and measured.<sup>27</sup>

The ILEC earned rate of return was reported in three separate categories, and the Commission's initial rules had required that "overearning" in any category would result in an automatic refund to the ILECs' customers (almost entirely IXCs). The Court of Appeals vacated the refund rules on the basis that they were inconsistent with the theory of rate of return earnings which required refunds based on overearnings to consider the total earnings of all reported categories -- thus requiring that "overearning" and "underearning" categories be analyzed and allowed to offset each other.<sup>28</sup> Thereafter AT&T and the other IXCs initiated complaint proceedings, claiming that they had been damaged by the earnings of ILECs in any category in which the ILEC had

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<sup>22</sup> *MCI Telecommunications Corp. v. American Tel. and Tel. Co.*, 7 FCC Rcd 3047, 3050-51 (1992), quoted by the Court in *MCI v. FCC*, 10 F.3d at 845.

<sup>23</sup> *MCI v. FCC*, 10 F.3d at 846.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 847.

<sup>26</sup> *MCI v. FCC*, 59 F.3d 1407.

<sup>27</sup> The lexicon of overearnings cases is vast. The law and facts, except as otherwise cited here, are summarized in the Court's decision.

<sup>28</sup> *American Tel. and Tel. Co. v. FCC*, 836 F.2d 1386-92 (D.C. Cir. 1988).

“overearned,” essentially requesting by way of damages the exact same relief that the Court had held could not be awarded by way of refunds.

In response, the Commission granted the complaints, holding that damages for past violations of the Act were governed by entirely different standards than applied to the refund rules that the Court had vacated. Thus, the Commission awarded AT&T and the other complainants damages for ILECs’ overearnings. However, the Commission did not grant the complainants full relief, but instead tailored the damages remedy to the “total overearnings” model that the Court had mandated for overearning refunds -- allowing an ILEC to set off “underearnings” in one rate of return reporting category against damages liability caused by “overearnings” in another category. All parties appealed, and the Court affirmed the Commission with regard to its findings that the ILECs owed damages to the IXCs, but reversed the Commission’s decision to allow limited offsets from these damages for category “underearnings.”<sup>29</sup>

The *MCI* decision establishes that equitable principles such as good faith reliance and manifest injustice are inapplicable to damages actions:

- The ILECs had claimed that they had acted in complete good faith in filing tariffs that were accurately targeted to earn the appropriate return, and that it was inequitable for the FCC to award damages based on the innocent conduct of the ILECs. This and other equitable claims advanced by the ILECs were summarily rejected by the Commission on the basis that they were outside the scope of a damages inquiry occasioned by a violation of the Communications Act.

The defendants’ arguments are devoted primarily to attempting to persuade the Commission that MCI’s damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to MCI based on excessive earnings. The defendants argue, in effect that the damages MCI seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants’ violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act, this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.<sup>30</sup>

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<sup>29</sup> *MCI v. FCC*, 59 F.3d 1407.

<sup>30</sup> *MCI Telecommunications Corporation v. Pacific Bell Telephone Company*, 8 FCC Rcd 1517, 1525-26 ¶ 30 (1993) (footnotes omitted).

- The Commission similarly rejected the ILECs' contention that damages should not be awarded because it would result in a "windfall" to the IXCs:

The consideration of whether such an award would result in a windfall to MCI has no place in the context of a Section 208 proceeding that, contrary to defendants' repeated assertions, is not governed by equitable principles. MCI has been damaged by defendants excessive earnings and, under legal principles, is entitled to an award of damages.<sup>31</sup>

### III. CONCLUSION

These cases support a very simple conclusion that applies to the rights of ILECs to bring appropriate actions against AT&T to collect their lawful carrier's carrier charges. This Commission does not have the authority to exempt AT&T from making these payments for past services, or to insulate AT&T from court actions to collect these debts. The law as it existed at the time AT&T used ILEC local exchange switching facilities to originate and terminate the traffic discussed in this proceeding was clear -- the traffic was and is telecommunications traffic and AT&T is lawfully obligated to compensate ILECs for this traffic in accordance with this law and their tariffs. Even if the law was not totally clear, a complaining party is still entitled to an adjudication of what the law was during the relevant time period. Normal considerations of "retroactivity" as applied in cases where the Commission is formulating prospective rules and regulations have no applicability, and ILECs bringing legal collection actions against AT&T will at that time be entitled as a matter of law to a determination of the law that was operational and in place at the time AT&T made use of the ILEC local exchange facilities. The legal rights of the ILECs are now firm and vested, and the Commission has no authority to modify these rights or to otherwise excuse AT&T from its legal obligations arising from its past conduct.

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<sup>31</sup> *Id.* at 1526 ¶ 33 (emphasis supplied).