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EX PARTE
VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th St. S.W.
Room TW-A325
Washington, D.C. 20554

**Re: BellSouth Refund Plan Submitted in Connection With the 1993 Annual
Access Tariff Filings, CC Docket No. 93-193 and the 1994 Annual Access
Tariff Filings, CC Docket No. 94-65**

Dear Ms. Dortch:

On August 30, 2004, BellSouth Telecommunications Inc. ("BellSouth") submitted its Refund Plan in accordance with the directives set forth in the Commission's July 30, 2004 *Order* in the above referenced proceedings. On September 13, 2004, AT&T filed comments on BellSouth's plan urging that the Commission adopt the plan but with two modifications. AT&T suggests that the Commission require that the IRS interest rate for corporate overpayments be used in calculating refund amounts. Second, AT&T believes that the Commission should amend the plan to require that refunds be made within 90 days of plan approval instead of 180 days as proposed by BellSouth. As discussed below, neither modification is warranted.

In its comments, AT&T portrays the selection of an interest rate as settled Commission policy. Relying on *GCI v. ACS*,¹ AT&T contends that the Commission identified the circumstances under which a particular IRS interest rate applied: (1) the corporate underpayment rate applies when there is willful misconduct; (2) the corporate overpayment rate applies when the carrier has constructive knowledge that its conduct was inconsistent with Commission holdings; or (3) the rate for corporate overpayments that exceed \$10,000 applies when the

¹ *General Communications, Inc. v. Alaska Communications Systems Holdings, Inc.*, EB-00-MD-016, *Memorandum Opinion and Order*, 16 FCC Rcd 2834 (2001).

conduct is the result of a miscalculation. Despite AT&T's portrayal, the *GCI* case simply is not a formula for interest rate selection. To the contrary, in *GCI*, a Section 208 complaint proceeding, the parties disagreed as to which of the three rates should apply in the event the complainant prevailed in the complaint. In the *GCI* case, the Commission determined that the corporate overpayment rate should apply because ACS, the defendant, should have known that the Commission in other contexts had rejected accounting approaches similar to that used by ACS.

The Commission applied a fact-specific analysis to determine the appropriate interest rate. As the Commission has always recognized, the award of interest is discretionary. The Commission is under no duty to award interest. When, however, interest is awarded, the Commission properly understands that interest is not a penalty. Instead, it generally represents "the price that one pays for using another's person's money."² In order to make such a determination, the Commission has also recognized that the selection of an appropriate interest rate requires consideration of all the facts of the particular case as well as the equities of the matter. Thus, a wide array of interest rates have been accepted by the Commission.

In the instant case, the Commission did not specify the interest rate to be applied. The IRS rate for corporate overpayments in excess of \$10,000 is most consistent with the Commission's view that interest should not be punitive. BellSouth made the tariff filings in good faith. It believed that it calculated its sharing obligations consistent with the then existing price cap rules. The delay in reaching a decision in the two tariff investigations cannot be attributed to any conduct on the part of carriers whose tariffs were being investigated. The equities of the situation thus compel a balanced approach to deciding the appropriate interest rate. Certainly the rate associated with corporate overpayments exceeding \$10,000 defines the IRS category within which BellSouth's refund obligation falls. Further, the rate is comprised of the federal short-term rate plus 0.5 percent and is recomputed quarterly. From a refund perspective, the IRS rate for corporate overpayments exceeding \$10,000 represents reasonable compensation for any overpayment of access charges that may have occurred.

Even if, as AT&T suggests, *GCI* sets forth the rates and the circumstances that define the application of the IRS rate, the Commission must still apply the facts of the specific case to determine the appropriate IRS rate. Indeed, in *GCI*, the Commission selected the corporate overpayment rate because it believed that the defendant should have been aware that the Commission, in other contexts, had rejected the accounting approach the defendant had used. Upon judicial review, however, the Court reversed and remanded that determination.³ The Court

² See *Western Union Telegraph Company, Revisions to Tariff F.C.C. Nos. 240 and 258 filed with Transmittal No. 7346, et al.*, CC Docket Nos. 78-97 and 82-122, *Memorandum Opinion and Order*, 10 FCC Rcd 1741, 1748, ¶ 38 (1995).

³ *ACS v. FCC*, 290 F. 3d 403 (D.C. Cir. 2002).

found that the Commission had not adequately explained how the defendant could be deemed to have constructive knowledge of the Commission's views when the Commission did not express those views until after ACS had filed the disputed rates. It observed that it could not understand how the facts in the case differed from the instance of a miscalculation.⁴

When BellSouth made the tariff filings, it did so on the good faith belief that the price cap rules did not require or permit add-back in the calculation of low-end formula adjustments or sharing amounts. The fact that the tariff filing was set for investigation does not, as AT&T suggests, establish constructive notice that anything BellSouth had done was unlawful. The very purpose of the investigation was to make a determination regarding lawfulness. Until July 30 of this year, the Commission expressed no opinion as to whether 1993 or 1994 tariffs were lawful. Indeed, in 1995 when the Commission amended its price cap rules prospectively, it specifically noted that it was not addressing the issues being considered in the tariff investigations. It is absurd to suggest that BellSouth had notice, constructive or otherwise, that its 1993 or 1994 tariff filings were unlawful when the tariff filings were made. Thus, even under the *GCI* approach, the Commission, before rejecting the rate associated with corporate overpayments exceeding \$10,000, would have to explain why this case is different than a miscalculation of revenue. The fact of the matter is that there is no difference and AT&T has not offered any.

The second modification urged by AT&T is that the Commission should require that refunds be made in 90 days (from approval of the plan) instead of the 180 days proposed by BellSouth. The only basis for AT&T's request is that SBC and Sprint had plans proposing a 90-day cycle. The existence of a proposal that is different than BellSouth's does not compel a modification of BellSouth's plan. While BellSouth has billing data from which it will calculate the refunds, the data must be analyzed in order to compute a refund amount for each carrier. As BellSouth indicated in its plan, the billing data are by ACNA and the ACNAs must be associated with specific customers. In some cases, BellSouth will not have the information to identify the customer and will post the unidentified ACNA on its website for customers to self identify. BellSouth proposed 180 days to provide sufficient time to complete all the necessary work in a thorough manner. Moreover, customers who will receive refunds are not adversely affected by the 180-day period because interest will accrue until the date the refund is issued. Under the circumstances, the 180-day period is fair and balanced.

⁴ *Id.* at 414-15. Before the Commission acted on the remand, GCI and ACS settled the complaint.

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For the reasons discussed above, BellSouth believes the Commission should reject AT&T's suggested modifications to its refund plan.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Sbaratta", written in a cursive style.

Richard M. Sbaratta

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