

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

In the Matter of)	
)	
Price Cap Performance Review for Local Exchange Carriers)	CC Docket No. 94-1
)	
Access Charge Reform)	CC Docket No. 96-262

REPLY COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries, (“BellSouth”) hereby submit Reply Comments in response to the Public Notice (DA 04-2475) in the above referenced proceedings requesting interested parties to file comments and reply comments to refresh the record with regard to pending petitions for reconsideration.

In response to the Public Notice, AT&T submitted supplemental comments regarding its pending petition for partial reconsideration of the *1997 Price Cap Review Order*.¹ AT&T’s petition asked the Commission to reconsider three aspects of its *1997 Price Cap Review Order*: (1) the use of total factor productivity instead of an interstate only productivity factor; (2) the elimination of the low-end adjustment formula along with sharing; and (3) the application of the revised productivity factor retroactively to 1995 access rates.

Each of these issues, or a variant thereof, was raised on appeal by MCI of the *1997 Price Cap Review Order* and rejected by the Court in *USTA*. With respect to the use of total factor

¹ *Price Cap Performance Review for Local Exchange Carriers, Access Charge Reform*, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd 16,642 (1997) (“*1997 Price Cap Review Order*”), *aff’d in part, rev’d in part sub nom. USTA v. FCC*, 188 F. 3d 521 (D.C. Cir. 1999) (“*USTA*”).

productivity, MCI argued that the Commission should have based the productivity factor on interstate productivity only. The Court affirmed the Commission's use of total factor productivity stating:

In the first place, its not clear that "interstate productivity," as opposed to total company productivity, is measurable, or even economically well-defined. This is so because direct productivity measurement requires measurement of inputs, and there is no obviously meaningful way to segregate LEC interstate and intrastate inputs because, as is undisputed, "interstate and intrastate services are usually provided over common facilities." *1997 Order*, 12 FCC Rcd at 16,685, ¶ 107.²

AT&T, in its comments, suggests that the Court's decision regarding productivity does not affect its reconsideration request because the decision is not a determination on the merits. AT&T neglects the fact that its petition is nothing more than a restatement of the same arguments and data that the Commission reviewed in the *1997 Price Cap Review Order*. In the underlying proceeding, USTA and other parties showed that AT&T's methodology and data were flawed. The Commission rejected AT&T's approach. On appellate review, the Court noted that AT&T "offered claims of faster interstate productivity growth. It based these claims on an assumption of equal growth rates for interstate and intrastate inputs, but it offered no explanation why that assumption was economically justified, much less one so compelling that it would be error for the FCC to reject it."³

Nothing in AT&T's petition for reconsideration provides an economically supportable rationale for adopting an interstate only productivity factor. Indeed, in its opposition to AT&T's petition for reconsideration, USTA pointed to substantial record evidence that demonstrated that

² *USTA v. FCC*, 188 F 3d at 528.

³ *Id.*

there is no economically valid distinction between intrastate and interstate productivity or between interstate and intrastate input prices.⁴

AT&T's second issue is that the Commission should not have retained the low-end adjustment formula while discontinuing sharing. AT&T's position distills to an argument that there is a lack of symmetry in retaining the low-end adjustment as a part of the price cap rules because it gives the local exchange carrier some leeway to prevent returns from reaching unreasonably low levels without requiring them to share earnings when returns are high. This claim is essentially the same argument MCI presented to the Court upon review. The Court found that the Commission gave a good reason for "creating this asymmetry—the Constitution's takings clause, which forbids the imposition of confiscatory rates without just compensation (Citations Omitted). The Commission thus avoided raising a non-trivial constitutional question, one that has no analogy at the upper end of the range of allowable rates."⁵

Other than its dislike of the Commission's determination in the *1997 Price Cap Review Order*, AT&T offers nothing in its petition that undermines the lawfulness of the Commission's decision. The Commission had valid reasons for retaining the low-end adjustment formula and for eliminating sharing. Symmetry is not required and nothing in AT&T's petition provides a basis for the Commission to modify its decision.

AT&T's last issue, the retroactive application to 1995 of the revised productivity factor, likewise has a counterpart in the Court's review of the *1997 Price Cap Review Order*. MCI argued that the Commission should have reinitialized the productivity factor back to 1991 or, in

⁴ See *Opposition of the United States Telephone Association to the Petitions for Reconsideration Filed by AT&T and Ad Hoc*, CC Docket No. 94-1 and CC Docket No. 96-262, August 18, 1997, pp. 1-6.

⁵ *USTA v. FCC* at 528.

the alternative, at least to 1995. The Court found that the Commission had adequately explained the basis to limit reinitialization and found the Commission's policy objectives sufficiently articulated and persuasive that it rejected MCI's claim.⁶ The issue presented in AT&T's petition is fundamentally no different than the claim made by MCI and rejected by the Court. Indeed, AT&T effectively concedes the point in its comments.⁷ It argues that the Court's decision does not preclude the Commission from exercising its discretion and revisiting its determination regarding reinitialization. While AT&T might not approve of the Commission's determination, the Court found the Commission's reasoning convincing. Despite AT&T's entreaty, the Commission may not simply abandon its decision without fully explaining the reasons for the change in policy and nothing in AT&T's petition provides a sustainable basis for making such a change.

AT&T attempts to imbue its petition with a renewed importance, pointing to the expiration of the CALLS plan and the work being done by the Commission to reform intercarrier compensation. None of these factors make AT&T's petition for reconsideration valid. Moreover, there are numerous avenues open to the Commission as it develops the next generation of rules. While AT&T would have the Commission accept that, absent adoption of the ICF proposal, a more restrictive price cap regulatory regime must be instituted immediately upon the expiration of the CALLS plan, such a result is neither necessary nor in the public interest. The CALLS plan has had beneficial market effects, and, while a long-term, permanent plan must be formulated, the Commission does not have to discard or ignore the positive market aspects that the CALLS plan has evidenced. It is within the Commission's authority to continue

⁶ *Id.* at 530.

⁷ AT&T Comments at 12.

the plan on an interim basis as it continues its work toward developing a long-term solution. Following such a path constitutes sound public policy. Accordingly, the Commission should not be deceived by the false sense of urgency that AT&T attempts to create.

The issue before the Commission is AT&T's petition for reconsideration. Clearly, AT&T intends to pursue its petition. The record on the petition is complete. Based on that record and the Court's review of the *1997 Price Cap Review Order*, the Commission should deny AT&T's petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 1st day of October 2004 served the following parties to this action with a copy of the foregoing **REPLY COMMENTS** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

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Reply Comments
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