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October 20, 2004

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S. E.
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:

This *ex parte* responds to the letter submitted by AT&T on October 5, 2004 which again claims that Commission precedent requires that the Commission apply the IRS interest rate for corporate overpayments. The precedent to which AT&T refers is an order in a formal complaint proceeding, *GCI v. ACS*.¹ As BellSouth explained in its September 24 letter, the *GCI* case is not a formula for interest rate selection. To the contrary, in *GCI*, a Section 208 complaint, the parties disagreed as to which of the three rates presented to the Commission should apply. Based on the facts of that case, the Commission determined that the corporate overpayment rate should apply.²

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

² AT&T argues that the Commission has not distinguished between complaint proceedings under Section 208 and tariff investigations under Section 204 for the purposes of assessing interest rates, citing *Section 208 Complaints Alleging Violations of the Commission’s Rate of Return Prescription for the 1987-1988 Monitoring Period*, 8 FCC Rcd 5485 (1993). AT&T claims that this case stands for the proposition that the Commission adopted the same interest methodology regardless of the nature of the proceeding. All the Commission did in that proceeding was to determine that it would no longer use a simple interest calculation but rather in reparations and refund proceedings it would, when interest was awarded, require that interest

Moreover, even AT&T acknowledges that the Commission has used a variety of different interest rates in the past, not just those listed in the *GCI* case. The fact of the matter is that precedent demonstrates that the Commission engages in a fact-specific analysis for each case to determine the appropriate interest rate. Such a determination requires consideration of all the facts of the particular case as well as the equities of the matter. Indeed, if interest rate selection were as simple as AT&T contends, the Commission, in its order directing the submission of a refund plan, would have specified the interest rate to be applied. It did not do so.

In its September 24 letter, BellSouth explained the factors that supported the selection of the rate associated with corporate overpayments exceeding \$10,000. Significant is the fact that BellSouth believed that add-back was inconsistent with the price cap rules in effect at the time the 1993 and 1994 annual access tariff filings were in effect. In this proceeding, BellSouth has steadfastly maintained that add-back was not a matter of discretion and that the price cap rules controlled the 1993 and 1994 filings.

Furthermore, assuming *arguendo* that *GCI* established the criteria for the selection of an interest rate, the proper interest rate would be the rate associated with corporate overpayments exceeding \$10,000. In the *GCI* case, the Commission applied the corporate overpayment rate based on its conclusion that the defendant had constructive knowledge of the Commission's view that accounting practices used by the defendant were inappropriate. Upon review, the Court of Appeals reversed and remanded the Commission's application of the corporate overpayment interest rate. The Court 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 the defendant had filed the disputed rates. The Court went on to express its view that it did not understand how such facts differed from the instance of a miscalculation (for which the lower rate associated with corporate overpayments in excess of \$10,000 would apply).

AT&T claims that the Commission must find that BellSouth had constructive knowledge that add-back was required. The only support that AT&T can muster for its position are statements made by the Commission in a rulemaking that changed the price cap rules prospectively and the Court of Appeals' affirmation of the rule change.³ Even taken at face value, these pronouncements came after the tariff filings at issue were made. As the Court made

be awarded on a compounded daily basis. The selection of the interest rate, however, has remained a case-by-case determination.

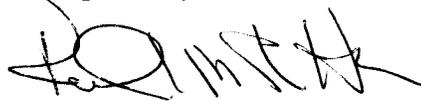
³ AT&T submits a quote from the Court's opinion in *Bell Atlantic v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996) which it claims confirms that the Court found that add-back was implicit in the sharing rules from the beginning of price caps. The statement that AT&T attributes to the Court was nothing more than the Court recounting the history of the order adopting the add-back

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clear in its review of the *GCI* case, events that occur subsequent to the matter in question do not give rise to constructive knowledge. Furthermore, BellSouth, in its September 24 letter, provided the reasons that, under a *GCI* approach, BellSouth's tariff filings should be treated no differently than a miscalculation of revenue.

BellSouth has shown that whether the Commission engages in a case specific analysis as it has done in the past or applies the criteria set forth in the *GCI* case, the appropriate IRS interest rate is that which is associated with corporate overpayments in excess of \$10,000. Nothing in AT&T's October 5 *ex parte* alters this conclusion.

Respectfully submitted,



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rule change. AT&T conveniently omitted from the particular quote the introductory phrase "The Commission claimed."