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FCC-MAILROOM

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

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

ORDER

Adopted: July 15, 2005 **Released: July 15, 2005**

By the Chief, Pricing Policy Division:

1. By this order, we approve the refund plan submitted in this proceeding by BellSouth Telecommunications, Inc. (BellSouth) and, with the clarification specified below, the modified refund plan submitted by Verizon.

2. In the *Add-Back Tariff Investigation Order* released July 30, 2004, the Commission concluded its investigation of the 1993 and 1994 access tariffs of price cap LECs that implemented a sharing or lower formula adjustment in 1992 or 1993.[1] The Commission ordered price cap LECs that implemented a sharing or lower formula adjustment and failed to apply add-back in their 1993 and 1994 access tariff filings to: (1) recalculate their 1992 and 1993 earnings and rates of return making such an adjustment; (2) determine the appropriate sharing or lower formula adjustment to their PCIs for the subsequent tariff year; (3) compute the amount of any resulting access rate decrease; and (4) submit a plan for refunding the amounts owed to customers plus interest as a result of any such rate decrease.[2] Refund plans were submitted in response to the Commission's *Add-Back Tariff Investigation Order*.[3]

3. On March 17, 2005, the Bureau issued the *Add-Back Refund Order*, which resolved various issues raised by the refund plans and responsive pleadings and determined the appropriate treatment for each refund plan.[4] In that order, the Bureau disapproved the refund plans submitted by BellSouth Telecommunications, Inc. and Verizon (on behalf of the former Bell Atlantic and several

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[1] *1993 Annual Access Tariff Filings*, CC Docket No. 93-193, *1994 Annual Access Tariff Filings*, CC Docket No. 94-65, Order, 19 FCC Rcd 14949 (2004) (*Add-Back Tariff Investigation Order*).

[2] *See id.* at 14961, para. 29. A complete explanation of the add-back methodology is provided in that order and will not be repeated here.

[3] *See* BellSouth Refund Plan (filed Aug. 30, 2004); Letter from Melissa E. Newman, Vice President - Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Aug. 30, 2004); Refund Plan of SBC Communications Inc. (filed Aug. 30, 2004); Recalculation and Refund Plan of the Sprint Incumbent Local Exchange Companies (filed Aug. 30, 2004); Verizon Refund Plan (filed Aug. 30, 2004); *see also* Verizon Refund Plan Errata (filed Sept. 10, 2004).

[4] *1993 Annual Access Tariff Filings*, CC Docket No. 93-193, *1994 Annual Access Tariff Filings*, CC Docket No. 94-65, 20 FCC Rcd 6077 (WCB 2005) (*Add-Back Refund Order*).

former GTE LECs).[5] The Bureau directed BellSouth and Verizon to meet with Commission staff to discuss recalculation of these carriers' refund liability and to submit modified refund plans.[6]

4. BellSouth. In the *Add-Back Refund Order*, the Bureau questioned BellSouth's use of a 12.75 percent earnings threshold to calculate its sharing obligations for 1993 and 1994, which appeared to be inconsistent with Commission precedent.[7] In the *LEC Price Cap Order*, the Commission required carriers using a productivity offset of 3.3 percent in a given year to share 50 percent of their earnings between 12.25 percent and 16.25 percent for that year, and carriers using a productivity offset of 4.3 percent to share 50 percent of their earnings between 13.25 and 17.25 percent.[8] In response to the *Add-Back Refund Order*, BellSouth submitted an *ex parte* letter further explaining the calculations in its refund plan.[9] In light of this explanation, we find that the BellSouth refund plan satisfies the requirements of the *Add-Back Tariff Investigation Order*. BellSouth explains that it used a 12.75 percent threshold to calculate its sharing obligation for the 1993 investigation because 12.75 percent is the arithmetic average of the two earnings thresholds applicable to its 1992 calendar year earnings. The productivity offset is determined and applied by the tariff year. The sharing obligation, applied at the beginning of the tariff year, is based upon the prior calendar year's earnings. Thus, BellSouth's calendar year 1992 earnings determined the sharing obligation at issue in the 1993 tariff investigation and its calendar year 1993 earnings determined the sharing obligation at issue in the 1994 tariff investigation.[10] For the period January 1-June 30, 1992, BellSouth applied a productivity offset of 3.3 percent, and for the period July 1-December 31, 1992, its productivity offset was 4.3 percent. We conclude, therefore, that BellSouth appropriately used a 12.75 percent threshold to calculate its sharing obligation for the 1993 tariff year because 12.75 percent is the arithmetic average of 12.25 and 13.25 percent. Similarly, for the period January 1-June 30, 1993, BellSouth used a productivity offset of 4.3 percent, and for the period July 1-December 31, 1993, it used a productivity offset of 3.3 percent. Thus, use of a 12.75 percent sharing threshold also was appropriate for the 1994 tariff year.

5. Verizon. In the *Add-Back Refund Order*, the Bureau disapproved Verizon's calculation methodology, which impermissibly aggregated headroom[11] across price cap baskets, tariff filing periods, and tariff filing entities.[12] Verizon submitted a Modified Refund Plan in response to the *Add-Back Refund Order*.[13] In its modified plan, Verizon does not aggregate headroom but separately calculates its refund

[5] *Id.* at 6089, para. 26. That order also approved the refund filing of Qwest Corporation, which resulted in no refund liability, and approved, with certain modifications, the refund plans of SBC Communications and the Sprint Incumbent Local Exchange Companies. *Id.* at paras. 24-25.

[6] *Id.* at 6084-85, 6089, paras. 14, 26.

[7] *Id.* at 6084-85, para. 14 (citing *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6801-02, paras. 124, 126 (1990) (*LEC Price Cap Order*), *recon. granted in part and denied in part*, Order on Reconsideration, 6 FCC Rcd 2637 (1991)).

[8] *See LEC Price Cap Order*, 5 FCC Rcd at 6801-02, paras. 124, 126.

[9] *See* Letter from Mary L. Henze, Assistant Vice President, Federal Regulatory, BellSouth, to Marlene Dortch, Secretary, Federal Communications Commission (filed Mar. 29, 2005) (*BellSouth Ex Parte Letter*); *see also* BellSouth Refund Plan.

[10] *See BellSouth Ex Parte Letter* at 2. The tariff year runs from July 1 to June 30.

[11] Headroom is the amount by which a carrier's Price Cap Index (PCI) exceeds the carrier's Actual Price Index (API) for a particular basket. Under the price cap regime, the PCI sets an upper limit on the interstate access rates a LEC may charge, but the LEC may set its rates below the PCI. Thus, if a LEC's Actual Price Index (API) for a particular basket is lower than the applicable PCI, it has headroom in that basket, measured by the amount by which the PCI exceeds the API. *See Add-Back Refund Order*, 20 FCC Rcd at 6079-84, paras. 5-13.

[12] *Id.* at 6082-84, paras. 10-13.

[13] *See* Verizon Modified Refund Plan (filed April 18, 2005).

liability by tariff filing entity, tariff year, and price cap basket.[14] Verizon also states that "[r]efunds will be subject to any prior settlement agreements between the customer and Verizon."[15] To the extent that Verizon claims that any refund is reduced or extinguished by a settlement agreement, we direct it to provide written notice informing the customer of this fact and of the amount Verizon is withholding due to the settlement. Subject to this clarification, we find that Verizon's Modified Refund Plan satisfies the requirements of the *Add-Back Tariff Investigation Order*.

6. We note that this approval of these refund plans is subject to compliance with all of the requirements set forth in the *Add-Back Refund Order*.

7. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 204(a), and through the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F. R. §§ 0.91 and 0.291, the refund filing of BellSouth Telecommunications, Inc. is APPROVED.

8. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 204(a), and through the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F. R. §§ 0.91 and 0.291, the modified refund plan of Verizon is APPROVED with the clarification specified herein.

FEDERAL COMMUNCATIONS COMMISSION

Tamara L. Preiss
Chief, Pricing Policy Division

[14] *See id.* at Attachments C-F.

[15] Verizon Modified Refund Plan, Attachment B at 3.