

**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
	)	
	)	

**OPPOSITION OF AT&T CORP.  
TO BELLSOUTH'S APPLICATION FOR REVIEW OF BUREAU ORDER**

Pursuant to 47 C.F.R. § 1.115(f), AT&T Corp. ("AT&T") submits this Opposition to BellSouth Telecommunications, Inc.'s ("BellSouth") August 12, 2005 Application for Review of Bureau Order ("Application"). The Commission should dismiss BellSouth's Application because it fails to comply with Sections 1.115 and 1.106 of the Commission's Rules as well as the limitations of the Hobbs Act. Moreover, even if the Commission could reach the merits of BellSouth's arguments, those arguments are clearly specious and should be rejected.

**ARGUMENT**

More than a year ago, in an order issued on July 30, 2004, the Commission determined that BellSouth is liable to AT&T and other carriers for failing to use the "add-back" methodology to compute access rates in its 1993 and 1994 tariffs.<sup>1</sup> The Commission delegated the task to computing the amount of refunds owed by BellSouth to the Pricing Policy Division of the Wireline Competition Bureau ("Bureau"). Accordingly, on July 15, 2005, the Bureau issued

---

<sup>1</sup> See *1993 Annual Access Tariff Filings; 1994 Annual Access Tariff Filings*, Order, 19 FCC Rcd. 14,949 (2004) ("*Commission Liability Order*").

an order identifying the amount of damages for which BellSouth is liable for its unlawful overcharges.<sup>2</sup>

Although BellSouth styles its Application as an “Application for Review of *Bureau Order*” (emphasis added), BellSouth frankly concedes that its Application does not actually seek review of the *Bureau Order*. Rather, according to BellSouth, it is actually seeking review of the Commission’s July 30, 2004 *Commission Liability Order*. See Application at 6 (“BellSouth challenges here *not the Bureau’s decision* to approve BellSouth’s specific plan of refunds . . . *but rather the underlying ruling* that refunds are warranted in the circumstances of this case”) (emphasis added). Specifically, BellSouth seeks review of purported Commission action in the *Commission Liability Order* related to whether it is equitable to order BellSouth to pay refunds for overcharges associated with its failure to apply add-back in its 1993 and 1994 tariffs. See Application at 1, 3-6. Taking BellSouth’s claims at face value – *i.e.*, that its Application seeks review of the Commission’s purported equitable decisions in the year-old *Commission Liability Order* – BellSouth’s the Application must be dismissed.

*First*, BellSouth’s application must be dismissed because it seeks review of issues that were never addressed by the Commission in the *Commission Liability Order*.<sup>3</sup> As the

---

<sup>2</sup> 1993 *Annual Access Tariff Filings*, CC Docket No. 93-193, 1994 *Annual Access Tariff Filings*, CC Docket No. 94-65, Order, DA 05-2029 (Chief, Pricing Policy Division, Wireline Competition Bureau, rel. July 15, 2005).

<sup>3</sup> See 47 C.F.R. § 1.106(a)(1) (limiting reconsideration to issues on which the Commission has taken “action”); *id.* § 1.115(c) (limiting review of bureau decisions to any “action” taken). See also *Regionet Wireless License, LLC Granted Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in the United States*, Memorandum Opinion and Order, 17 FCC Rcd. 21,263, ¶ 8 (2002) (denying application for review in part because it raised arguments never addressed by the relevant Division in its reconsideration order); *Application of Liberty Productions, LP For A Construction Permit For A New FM Station In Biltmore Forest, North Carolina*, Memorandum Opinion and Order, 7 FCC Rcd. 7581, ¶ 36 (1992) (rejecting petitioner’s argument that reconsideration is warranted “because the Commission did not address decisionally significant issues raised in its application for review”).

Commission has stated to the D.C. Circuit, the *Commission Liability Order* did not, in fact, address whether ordering refunds for BellSouth's failure to apply add-back in its 1993 and 1994 tariffs is equitable. *Verizon Telephone Companies et al. v. Federal Communications Commission*, Nos. 04-1331 and 04-1332, Brief for Respondents (FCC), at 21-22, 36-37, 42-43 (D.C. Cir. filed June 17, 2005). As explained by the Commission,

The Commission in its [*Liability Order*] did not order any refunds, and thus had no legal obligation to address in that [order] the equities of ordering – or not ordering – refunds. While the Commission had discretion to discuss the equities, it lawfully could have ignored equitable claims in deciding the lawfulness of the tariffs. The Commission is not required, ruling on the lawfulness of tariffs, to analyze the equities that might be involved in a possible future refund decision.

*Id.* at 42-43. BellSouth's Application thus should be dismissed because it seeks review of issues that the Commission never reached in the *Commission Liability Order*, let alone addressed.

*Second*, even if the Commission had addressed the issues on which BellSouth's Application seeks review, BellSouth's Application still must be dismissed because BellSouth's Application is actually an untimely Petition for Reconsideration of the *Commission Liability Order*. As noted, BellSouth admits that it is not actually seeking review of the Bureau's order, but is in fact seeking review of the *Commission Liability Order*. The proper procedure for seeking review of the *Commission Liability Order* would have been to submit a Petition for Reconsideration of that order to the Commission within thirty days from the date of the public notice of that order. *See* 47 C.F.R. § 1.106(f). BellSouth failed to do so. As a result, BellSouth's Application for review of the *Bureau Order* cannot be treated as a timely petition for reconsideration of the *Liability Order* and must be dismissed.<sup>4</sup>

---

<sup>4</sup> *See, e.g., Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 7151, ¶ 53

*Third*, even if BellSouth's Application could be treated as a timely petition for reconsideration, it still would have to be dismissed because a party may not simultaneously seek review of a Commission decision at both the Commission and at the D.C. Circuit, as BellSouth proposes to do here. It is well settled that parties aggrieved by a Commission order may seek review by the D.C. Circuit *or* by the Commission, but it cannot simultaneously do both:

Petitioners have the option of proceeding directly to the court of appeals, or giving the agency another chance to consider the matter and apply to the court of appeals afterward. We can see no justification for allowing a petitioner to apply to both the court and the agency at the same time. On the contrary, such a regime could lead only to a waste of resources on the part of the agency, or the court, or both, without any countervailing benefit.<sup>5</sup>

Thus, because BellSouth has already appealed to the D.C. Circuit,<sup>6</sup> it cannot also seek review of the same issues at the Commission and its Application must be dismissed.

In all events, even if the Commission were not foreclosed by its Rules and federal law from reaching the merits of BellSouth's Application, the Commission still should dismiss the Application. In support of its Application BellSouth raises no new arguments and provides no new evidence. Instead, BellSouth rehashes arguments that were made to the Commission during

---

(1993) (holding that if the applicant wanted to raise an issue never considered in the proceeding, it should have filed a petition for reconsideration of the Commission's order instead of an application for review of the Common Carrier Bureau's implementation of that order); *Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69*, Memorandum Opinion and Order, 5 FCC Rcd. 2573, ¶ 5 (1990) (denying Bell Atlantic's application for review because "the proper method of contesting a final Commission action is to file a timely petition for reconsideration" and therefore, Bell Atlantic should have filed a petition for reconsideration within 30 days of the Commission's order).

<sup>5</sup> *United Transp. Union v. ICC*, 871 F.2d 1114, 1118 (D.C. Cir. 1989) (quoting *West Penn Power Co. v. EPA*, 860 F.2d 581, 586 (3d Cir. 1988)).

<sup>6</sup> See Application at 2 ("BellSouth filed a petition for review challenging the 2004 Order in the United States Court of Appeals for the District of Columbia Circuit and has now filed briefs together with Verizon in support of that petition.").

the *1993 and 1994 Annual Access Tariff Filings* (“*Add-Back*”) proceedings and that the Commission already has considered and rejected.

First, BellSouth rehashes the erroneous claim that “the record indicates that AT&T . . . was able to pass on to its end-user customers any additional access-charge costs that it incurred because of the LECs’ failure to an add-back methodology.” Application at 3. The “record” to which the BellSouth refers are the comments filed by Verizon, which AT&T demonstrated to be wholly unsupported.<sup>7</sup> In fact, AT&T’s tariffs did not correct for the LECs’ unlawful application of add-back. Rather, as the very tariff investigation order related to the add-back proceeding makes clear, the only LEC-related exogenous costs incorporated by AT&T were those associated with the LECs’ unlawful accounting treatment of certain retiree benefits, which are completely unrelated to the damages incurred by AT&T from the LECs failure to properly apply add-back. *AT&T Communications Tariff FCC Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5464*, 8 FCC Rcd. 6227, ¶ 3 (1993).

Second, BellSouth contends that the Commission’s delay in concluding its investigation somehow militates against an award of refunds. *See* Application at 4-5. But the delay has only injured AT&T and the LECs’ other access customers, all of whom have gone years without return of their unlawfully inflated access charges. By contrast, the delay has benefited BellSouth and the LECs by giving them extended use of money they should never have received in the first place. It would be perverse to respond to this state of affairs by refusing to provide any remedy for the LECs’ unlawful charges.

Third, BellSouth contends that it would be inequitable to award refunds because the orders suspending their tariffs did not provide sufficient notice due to their suspension of the

---

<sup>7</sup> AT&T 2003 Reply Comments at 13 n.26 (CC Docket No. 93-193, filed May 19, 2003).

tariffs of both carriers that applied add-back and those that did not. Application at 5-6. But the D.C. Circuit has already concluded that the suspension orders did in fact provide adequate notice to *all* carriers that their add-back calculations were subject to challenge, such that none of them had any “reasonable reliance interests” in those calculations. *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996). Although BellSouth asserts that the Commission’s suspension orders failed to provide “guidance” on what the right rule would ultimately be, Application at 3, its contention has no grounding in the statute, which requires only a statement of the Commission’s “reasons” for suspending the tariff. 47 U.S.C. § 204. The Commission gave its “reasons” for suspending the tariffs: to investigate how price-cap LECs should “reflect amounts from prior year sharing or low-end adjustments in computing their rates of return for the current year’s sharing and low-end adjustments to price cap indices.” *1993 Annual Access Tariff Filings*, CC Docket No. 93-193, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, 8 FCC Rcd. 4960, ¶ 105 (Common Carrier Bureau 1993). That is all that was required under the statute.<sup>8</sup>

---

<sup>8</sup> Although the D.C. Circuit has surmised that one of Congress’s reasons for requiring the agency to explain its reasons for suspending a tariff might have been to provide an opportunity for carriers “to bring [themselves] within compliance and obviate the whole process,” *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992), it has never said that a neutral identification of issues under investigation fails to comply with the statute. Such a rule would have no basis in the text of the statute and would require the agency to make snap judgments in favor of one side any time LECs take different positions on an unsettled issue in their tariff filings. That would be contrary to one of the key purposes of the tariff investigation process: to permit agencies to “pursue ‘a more measured course’” than “summar[y]” proceedings would allow. *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 655 (1978).

**CONCLUSION**

For the foregoing reasons, the Commission should dismiss BellSouth's Application for Review of Bureau Order.

Respectfully submitted,

By /s/ Judy Sello

David L. Lawson  
Christopher T. Shenk  
Nirali D. Patel  
Sidley Austin Brown & Wood L.L.P.  
1501 K St. N.W.  
Washington, D.C. 20005  
(202) 736-8000

Leonard J. Cali  
Lawrence J. Lafaro  
Judy Sello  
AT&T Corp.  
Room 3A229  
One AT&T Way  
Bedminster, NJ 07921  
(908) 532-1846

*Attorneys for AT&T Corp.*

August 29, 2005

## **CERTIFICATE OF SERVICE**

I hereby certify that, on this 29<sup>th</sup> day of August 2005, I caused a copy of the foregoing Opposition of AT&T Corp. to BellSouth's Application for Review of Bureau Order to be served upon each of the parties on the attached service list by first-class mail, postage prepaid.

---

Christopher T. Shenk

## **SERVICE LIST**

### **FEDERAL COMMUNICATIONS COMMISSION (BY ELECTRONIC FILING)**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

Tamara L. Preiss  
Chief, Policy Pricing Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

### **UNITED STATES OF AMERICA**

Catherine G. O'Sullivan  
Robert J. Wiggers  
Robert B. Nicholson  
U.S. Department of Justice  
Antitrust Division – Appellate Section  
950 Pennsylvania Avenue, N.W.  
Room 3224  
Washington, D.C. 20530-0001

### **BELLSOUTH TELECOMMUNICATIONS, INC.**

Mark L. Evans  
Sean A. Lev  
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, DC 20036

### **QWEST CORPORATION**

Robert B. McKenna  
Qwest Corporation  
607 14<sup>th</sup> Street, N.W., Suite 950  
Washington, D.C. 20005

**SBC COMMUNICATIONS INC.**

James D. Ellis  
Paul K. Mancini  
SBC Communications Inc.  
175 East Houston  
San Antonio, Texas 78205

Gary L. Phillips  
Davida M. Grant  
SBC Communications Inc.  
1401 I Street, N.W., Suite 400  
Washington, D.C. 20005

**VERIZON TELEPHONE COMPANIES**

Michael E. Glover  
Edward Shakin  
Verizon  
1515 North Courthouse Road, Suite 500  
Arlington, Virginia 22201