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

In the Matter of	)	
	)	
1993 Annual Access Tariff Filings	)	CC Docket No. 93-193
	)	Phase I, Part 2
GSF Order Compliance Filings	)	
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	
1995 Annual Access Tariff Filings	)	
	)	
1996 Annual Access Tariff Filings	)	

Order on Review

Adopted: March 10, 2005 **Released: March 14, 2005**

By the Commission:

I. INTRODUCTION

1. In this order, we deny applications for review filed on July 25, 1997, by the Bell Atlantic Telephone Companies (now Verizon)[1] and by Pacific Bell (now SBC).[2] The applications sought review of the Common Carrier Bureau's June 25, 1997 Memorandum Opinion and Order (*MO&O*).[3] In the *MO&O*, the Bureau clarified methodologies to be used by incumbent local exchange carriers (LECs) to allocate refund and sharing amounts among the price cap baskets. Specifically, the Bureau determined that Bell Atlantic and Pacific Bell could not, in connection with refunds ordered for the common line basket, increase price cap indices for other baskets to account for previous misallocation of sharing obligations among baskets.

II. BACKGROUND

2. In the *1992 Annual Access Order*, the Bureau set forth, *inter alia*, the methodology to be used by incumbent local exchange carriers (LECs) subject to price cap regulation to allocate their sharing obligations among baskets.[4] The Bureau stated that LECs should allocate sharing obligations among

[1] *See* Bell Atlantic Application for Review, filed July 25, 1997. The Bell Atlantic telephone companies included: Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and, Bell Atlantic-West Virginia, Inc. (*Bell Atlantic Application for Review*).

[2] *See* Application for Review, filed July 25, 1997 by Pacific Bell (*Pacific Bell Application for Review*).

[3] *1993 Annual Access Tariff Filings*, CC Docket No. 93-193, Phase I, Part 2, *GSF Order Compliance Filings*, *1994 Annual Access Tariff Filings*, CC Docket No. 94-65, *1995 Annual Access Tariff Filings*, *1996 Annual Access Tariff Filings*, Memorandum Opinion and Order, 12 FCC Rcd 8349 (Com. Car. Bur. 1997) (*MO&O*). The Common Carrier Bureau is now known as the Wireline Competition Bureau.

[4] *1992 Annual Access Tariff Filings, National Exchange Carrier Association, Universal Service Fund and Lifeline Assistance Rates*, CC Docket No. 92-141, Memorandum Opinion and Order, 7 FCC Rcd 4721, 4732-33 (Com.Car.Bur. 1992) (*1992 Annual Access Order*).

baskets on a cost causative basis.[5] It also found that, because rates are set based on costs, LECs could use basket revenues as a proxy for basket costs in determining the allocation of sharing among baskets.[6] The Bureau required that LECs allocate their adjustments to all price cap baskets based on the proportion of "total revenue in each basket" to total interstate revenue.[7]

3. The *1993 Annual Access Order* set for investigation, *inter alia*, the issue of whether the Bell Atlantic Telephone Companies (Bell Atlantic) could exclude end-user common line (EUCL) charge revenues from the common line basket for purposes of allocating sharing obligations.[8] Bell Atlantic and Pacific Bell argued that EUCL revenues should be removed from the common line basket before a carrier calculates the basket revenue allocators (each basket's revenue as a percent of the total revenue) used to allocate sharing among baskets.[9] They maintained that a sharing obligation for end-user charges is irrelevant because those charges are designed to earn a net return of 11.25 percent, whereas sharing is based on earnings in excess of 12.25 percent.[10]

4. In the *1993-96 Annual Access Order*, the Commission rejected Bell Atlantic's and Pacific Bell's contention that end-user common line (EUCL) revenues may be excluded for purposes of allocating sharing amounts among price cap baskets.[11] Section 61.45(d)(4) of the Commission's Rules provides that exogenous cost changes should be allocated among price cap baskets on a cost-causative basis.[12] The Commission found that, when LECs use basket revenues as a proxy for costs, excluding EUCL revenues from the common line basket would distort the use of these revenues as a proxy for costs because total revenues would not be used. The Commission held that Bell Atlantic, for its 1993 through 1996 annual access tariff filings, and Pacific Bell, for its 1994 through 1996 annual access tariff filings, incorrectly allocated their sharing obligations among the various service baskets by excluding EUCL revenues from their calculations.[13] Bell Atlantic and Pacific Bell were ordered to correct the allocation of their sharing adjustments among baskets, and to revise their price cap indices (PCIs), the upper limits on the service band indices in the service categories and subcategories, and the maximum carrier common line rates, and

[5] *Id.*

[6] *Id.* at 4732 n.4.

[7] *Id.* at 4732-33.

[8] *1993 Annual Access Tariff Filings, National Exchange Carrier Association Universal Service Fund and Lifeline Assistance Rates, GSF Order Compliance Filings, Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs*, CC Docket Nos. 93-193 and 86-10, *Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation*, 8 FCC Rcd 4960 (Com.Car.Bur. 1993) (*1993 Annual Access Order*). "Sharing" was a mechanism by which the Commission required price cap LECs to refund, or "share," a portion of their earnings above a certain level by lowering their price cap indices in the following year. *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Second Report and Order*, 5 FCC Rcd 6786 (1990).

[9] *Id*. at 6297.

[10] *Id.*

[11] *Id.* at 6296-97. In its Petition for Clarification of the Commission's *1993-96 Annual Access Order*, Bell Atlantic stated that its 1993 annual tariff filing allocated sharing among baskets based upon the revenues in those baskets consistent with the cost causation principles enunciated in the *1992 Annual Access Order*. Bell Atlantic's Petition for Clarification filed May 19, 1997, at 3 (*Bell Atlantic Petition*). In performing this calculation, however, Bell Atlantic and Pacific Bell excluded EUCL revenues from the amount of revenue assigned to the common line basket. Bell Atlantic argued that, because EUCL revenues are based solely on a forecasted revenue requirement as opposed to PCIs or productivity adjustments, EUCL revenues should be excluded from any sharing calculation. *Bell Atlantic Petition* at 3.

[12] 47 C.F.R. § 61.45(d)(4).

[13] *1993-96 Annual Access Tariff Order*, 12 FCC Rcd at 6297-99.

to implement refunds for those baskets where the corrected PCI was lower than what had been charged to customers during the relevant period.[14] On May 8, 1997, Bell Atlantic and Pacific Bell filed their revised 1997 Tariff Review Plans (TRPs), incorporating, in part, the instructions set forth in the *1993-96 Annual Access Order*, but also incorporating rate increases to other baskets to offset the refund to the common line basket. The Commission delegated to the Common Carrier Bureau authority to resolve further issues concerning the implementation of refunds.[15]

5. On June 25, 1997, the Common Carrier Bureau released its *MO&O*, in which it determined that Bell Atlantic and Pacific Bell may not, in connection with the refunds ordered for the common line basket in the *1993-96 Annual Access Tariff Order*, increase PCIs for other baskets to account for the previous misallocation of sharing obligations among baskets.[16] The Bureau concluded that the "equities or balancing of interests" in this particular case did not justify the proposed offsetting increases. The Bureau ordered Bell Atlantic and Pacific Bell to file revised tariffs in accordance with the Bureau's findings.[17]

6. On July 25, 1997, Bell Atlantic and Pacific Bell filed applications for review of the *Refund Plan Revision Order*. On September 8, 1997, oppositions to the applications for review were filed by AT&T Corp. (AT&T) and by MCI Telecommunications Corporation (MCI). Bell Atlantic and Pacific Bell each filed reply comments on September 23, 1997.

III. DISCUSSION

7. AT&T argues that the applications for review were untimely because Verizon and Pacific Bell raised arguments for the first time before the Bureau that they should have raised before the Commission in the *1993-96 Annual Access Tariff Order*.[18] While we agree that parties are required to make arguments at the first opportunity and should not be permitted to raise arguments piecemeal, it is not clear that Verizon and Pacific Bell engaged in such practices here. In any event, we need not reach a conclusion on that issue, because we find that the applications for review should be denied on the merits.

8. In their applications for review of the *MO&O*, Bell Atlantic and Pacific Bell contend that the Bureau erred in not permitting them to make exogenous cost increases in baskets other than the common line basket to offset the exogenous cost decrease in the common line basket resulting from the *1993-96 Annual Access Tariff Order*. Bell Atlantic and Pacific Bell argue that these offsetting exogenous cost increases are necessary to maintain the total sharing obligation at fifty percent of earnings for the time period at issue.[19] They assert that, if they are not allowed to make the offsetting exogenous cost increases, their sharing obligation will be greater than fifty percent of earnings for the years at issue, which they allege would violate the Commission's price cap rules.[20] Bell Atlantic and Pacific Bell also contend that the Bureau misapplied the holding in *FPC v. Tennessee Gas Transmission Co.*;[21] however,

[14] *1993-96 Annual Access Tariff Order*, 12 FCC Rcd at 6297-98.

[15] *1993-96 Annual Access Tariff Order*, 12 FCC Rcd at 6303, 6318-19.

[16] *MO&O*, 12 FCC Rcd at 8355-57.

[17] *Id.*

[18] *AT&T Opposition* at 1-3.

[19] *Bell Atlantic Application for Review* at 8-10; *Pacific Bell Application for Review* at 6-7.

[20] *Bell Atlantic Application for Review* at 8-10; *Pacific Bell Application for Review* at 1, 4, 6-7.

[21] *Bell Atlantic Application for Review* at 11-12; *Pacific Bell Application for Review* at 5-6. *See FPC v. Tennessee Gas Transmission Co.*, 317 U.S. 145 (1962).

that case involved a rate increase rather than the price cap index adjustments at issue here.[22]

9. As the Bureau said in its *MO&O* of which the LECs seek review, the Bureau's *1992 Annual Access Order* stated that carriers must allocate sharing on the basis of "total basket revenues."[23] The Bureau further stated that Bell Atlantic and Pacific Bell "chose to disregard this directive when they excluded EUCL revenues" in their calculations of sharing.[24] We agree with the Bureau that, because this issue was set for investigation in every year that Bell Atlantic and Pacific Bell made this allocation, they were on notice that their allocation method was potentially unlawful and that they assumed the risk of potential refunds. Furthermore, Bell Atlantic and Pacific Bell had no reasonable basis for assuming that they would be entitled to make up undercharges to customers through prospective rate increases caused by their misallocation of sharing.[25] We also find that the Bureau properly balanced the interests of customers and carriers and that the equities and balancing of interests in this case do not support the proposed offsets.[26] We reaffirm the analysis set forth more fully in the Bureau's decision.

10. Finally, contrary to Bell Atlantic's and Pacific Bell's argument, we agree with the Bureau's application of *FPC v. Tennessee Gas Transmission Co.*, in which the Supreme Court held that "[t]he company's losses in the first instance do not justify its illegal gain in the latter . . . . The Company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."[27] In the instant case, Bell Atlantic and Pacific Bell sought an exogenous adjustment to enable them to charge higher rates for some services in order to recover revenues lost as a result of their misapplication of rules in prior years. Because an exogenous increase is analogous to a rate increase, we find the holding in *FPC v. Tennessee Gas Transmission Co.* on point. We therefore deny the applications for review.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that, pursuant to sections 4, 201-205 of the Communications Act of 1934, as amended 47 U.S.C. §§ 154, 201-205, and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the applications for review filed July 25, 1997, by the Bell Atlantic Telephone Companies (now Verizon) and Pacific Bell (now SBC) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary

[22] *See, e.g.,Pacific Bell Application for Review* at 6.

[23] *Bureau Order*, 12 FCC Rcd at 8355, para. 16 (*citing 1992 Annual Access Order*).

[24] *Id.* at 8355-56, para. 16.

[25] *Id.*

[26] *Id.* at 8356, para. 17-18.

[27] *Id.* at 8355, para. 15 (citing *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962)).