ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 04-1352

VIRGIN ISLANDS TELEPHONE CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties:

1. Parties and *Amici* Before the Court

Virgin Islands Telephone Corp. ("Vitelco") is the petitioner in this case.

The Federal Communications Commission ("Commission") and the United States of America are respondents.

The National Exchange Carrier Association, the United States Telecom Association, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Independent Telephone & Telecommunications Alliance have intervened in support of petitioner.

BellSouth Corp., SBC Communications, Inc., and the Verizon telephone companies are participating as *amici curiae* on behalf of petitioner.

AT&T Corp. and AT&T of the Virgin Islands ("AT&T") have intervened in support of respondents.

2. Parties to the Proceeding Below

AT&T and Vitelco participated in the complaint proceeding before the Commission.

B. Ruling Under Review:

AT&T Corp. v. Virgin Islands Telephone Corp., Memorandum Opinion and Order, 19 FCC Rcd 15978 (rel. Aug. 11, 2004) ("*Order*") (JA 411).

C. <u>Related Cases</u>:

The order under review has not previously been before this Court or any other court, and Commission counsel are not aware of any related cases currently pending before this Court or any other court.

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GLOSSARY

Term	Definition
1996 Act	Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56
Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*.
AT&T	AT&T Corp. and AT&T of the Virgin Islands
Commission or FCC	Federal Communications Commission
IXC	interexchange carrier
July 1997 Tariff	Vitelco's tariff for the period July 1, 1997 through December 31, 1997
LEC	local exchange carrier
NECA	National Exchange Carrier Association
Order	the order on review: *AT&T Corp. v. Virgin Islands Telephone Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 15978 (2004) (JA 411)
Reconsideration Order	*1997 Annual Access Tariff Filings*, Order Designating Issues for Investigation and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 11417 (Com.Car.Bur. 1997)
Suspension Order	*1997 Annual Access Tariff Filings*, 13 FCC Rcd 5677 (Com.Car.Bur. 1997)
Streamlined Tariff Order	*Implementation of Section 402(b)(1) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170 (1997)
Streamlined Tariff Reconsideration Order	*Implementation of Section 402(b)(1) of the Telecommunications Act of 1995*, 17 FCC Rcd 17040 (2002)
Vitelco	Virgin Islands Telephone Corp.

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PETITION FOR REVIEW OF AN ORDER OF THE
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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

The Federal Communications Commission released the order on review on August 11, 2004. *See AT&T Corp. v. Virgin Islands Tel. Corp.,* Memorandum Opinion and Order, 19 FCC Rcd 15978 (2004) ("*Order*") (JA 411). Virgin Islands Telephone Corporation ("Vitelco") filed its petition for review on October 12, 2004. The Court's jurisdiction rests on 28 U.S.C. § 2342(l) and 47 U.S.C. § 402(a).

STATEMENT OF ISSUES

In the order on review, the Commission held that Vitelco's violation of an FCC-prescribed maximum allowable rate of return rendered the company liable to a complaining

customer, AT&T Corp. ("AT&T"), for damages caused by Vitelco's overearnings in 1997. As part of that holding, the Commission determined that Vitelco's overearnings during the last six months of 1997 were not immune from AT&T's damages claim by operation of 47 U.S.C. § 204(a)(3), which provides that, in the event the agency does not take certain action within a period of seven or 15 days after the filing of a tariff, the tariffed rates shall be "deemed lawful" and become effective. This case presents the following issues for the Court:

1. Whether the Commission reasonably determined that AT&T timely filed its complaint within the two-year limitations period prescribed by 47 U.S.C. § 415(b).

2. Whether the Commission reasonably determined that 47 U.S.C. § 204(a)(3) did not insulate Vitelco from damages liability for its overearnings during the last six months of 1997, where the agency had suspended the relevant tariff before it took effect, initiated an investigation into the tariff's lawfulness, and imposed an accounting order.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

I. BACKGROUND

A. Statutory and Regulatory Framework

Interstate Access Charges. In order to complete long distance calls on behalf of their customers, interexchange carriers ("IXCs") such as AT&T must pay local exchange carriers ("LECs") such as Vitelco for access to their local telephone networks. *See*, *e.g.*, *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1409 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1129 (1996). These interstate access charges, as they are called, generate billions of dollars of revenue industry-wide for LECs and represent a significant cost component for IXCs. *See Developing a*

Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking, FCC 05-33, 20 FCC Rcd 4685, para. 98 & n.309 (rel. Mar. 3, 2005). Accordingly, access charges can have a significant impact on the retail long distance rates an IXC charges to its end-user customers.

General Tariff Procedures. Under the Communications Act of 1934, as amended ("Act"), the Commission has the duty to ensure that a LEC's interstate access charges are just and reasonable, 47 U.S.C. § 201(b), and free of unjust and unreasonable discrimination, 47 U.S.C. § 202(a). Unless the Commission forbears from applying tariffing requirements (*see* 47 U.S.C. § 160), the LEC must file and maintain tariffs with the Commission specifying the rates, terms, and conditions governing its access service offerings. *See* 47 U.S.C. §§ 203-205. A LEC must file an access service tariff in advance of its effective date to provide the Commission and the public with notice of changes in the carrier's rates, terms, or conditions of service. 47 U.S.C. § 203(b); 47 C.F.R. § 61.58(a)(2) (2004). The mandatory period of time between the filing of a tariff and its effective date is known as the "notice period."

Either on its own motion or in response to a complaint, the Commission during the notice period may suspend the effectiveness of a new or revised tariff for up to five months and initiate a hearing – commonly called an "investigation" – to determine whether the tariff is lawful. 47 U.S.C. § 204(a). The Commission exercises these suspension and investigation powers when it finds during the notice period that a proposed tariff filing raises a significant question of

lawfulness.[1] In a tariff investigation, the LEC bears the burden of proving that its rates are just and reasonable. 47 U.S.C. § 204(a)(1); *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 785, 787 (D.C. Cir. 2000). When the Commission suspends the effectiveness of a tariff, it often does so for one day only, and the carrier's rates take effect the following day pending the results of the investigation.

When the suspension period ends, the tariff goes into effect whether or not the Commission has completed its investigation. 47 U.S.C. § 204(a). When this occurs, the tariff is binding on the carrier and its customers, and thus considered "legal," but the tariffed rates are not necessarily lawful (*i.e.*, just and reasonable) within the meaning of section 201(b). *See Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry. Co.*, 284 U.S. 370, 384-85 (1932). The Commission may order the LEC to keep an accounting of its collections under the tariff to facilitate refunds to customers if, at the conclusion of the investigation, the agency finds the LEC's rates to be unlawful. 47 U.S.C. § 204(a)(1). In addition to requiring refunds, the Commission may also prescribe rates prospectively. *Id*. The Act, as amended by Congress in

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[1] *See*, *e.g*., *Investigation of Alascom, Inc. Interstate Transport and Switching Services*, Order, DA 03-0491, 2003 WL 23009202 (WCB/Pricing Div. Dec. 23, 2003) ("We conclude … that significant questions of lawfulness exist" concerning Alascom's tariff); *Verizon Tel. Cos. Tariff FCC Nos. 1, 11, 14, and 16, Transmittal No. 243*, Order, 17 FCC Rcd 19128 (WCB/Pricing Div. 2002) (tariff transmittals "raise substantial questions of lawfulness warranting suspension and investigation"); *Western Union Int'l, Inc. v. FCC*, 652 F.2d 136, 141 (D.C. Cir. 1980) (noting FCC's suspension of tariff revisions that raised substantial questions of lawfulness regarding rate of return); *see Protested Tariff Transmittal Action Taken*, Public Notice, DA 05-1286, 2005 WL 1036768 (WCB/Pricing Div. May 4, 2005) (staff allowed tariff to take effect because complaining party had not presented issues regarding the transmittal "that raise significant questions of lawfulness"). The Commission uses the terms "significant" and "substantial" interchangeably in this context.

1996, directs the Commission to issue an order concluding a tariff investigation within five months after the date the tariff would have gone into effect. 47 U.S.C. § 204(a)(2)(A).[2]

Streamlined Access Tariff Filings. As part of a comprehensive revision of the Communications Act, Congress in 1996 amended section 204 by adding paragraph (a)(3) to authorize "streamlined" tariff filings by LECs.[3] *See* Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 402(b)(1)(A), 110 Stat. 56. Streamlined tariffs differ in two ways from tariffs filed under the traditional procedures set out in 47 U.S.C. § 203. The first difference involves timing: Streamlined tariffs are subject to abbreviated notice periods – seven days for proposed rate reductions and 15 days for proposed rate increases. As with other tariff filings, the Commission under section 204(a)(1) may suspend a streamlined access service tariff before it takes effect, initiate an investigation into its lawfulness, impose an accounting order, and require refunds upon a finding of unlawfulness.

The second difference concerns the remedies available to a complaining customer under 47 U.S.C. § 208.[4] Under the traditional tariff procedures reflected in section 203, a tariff that

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[2] The five-month time limit is intended to expedite Commission action, but it does not operate as a statute of limitations and its violation does not constrain the Commission's authority to act. *Southwestern Bell Tel. Co. v. FCC*, 138 F.3d 746, 749 (8th Cir. 1998). *See also 1993 Annual Access Tariff Filings*, 19 FCC Rcd 14949, 14959-60, paras. 21-24 (2004).

[3] Section 204(a)(3) provides in full: "A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) [section 204(a)(1)] before the end of that 7-day or 15-day period, as appropriate." 47 U.S.C. § 204(a)(3).

[4] Section 208 of the Act allows a customer to file an administrative complaint against a carrier alleging a violation of the Act. The Commission has a "duty" to adjudicate the complaint, 47 U.S.C. § 208(a), and is authorized to award damages, 47 U.S.C. § 209.

takes effect without suspension or investigation is considered legal (*i.e.*, procedurally valid), but not necessarily lawful (*i.e.*, substantively just and reasonable). *See ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410-11 (D.C. Cir. 2002). In such circumstances, a customer may file a complaint against the LEC under section 208; upon a finding of unlawfulness, the Commission may award damages for past overcharges and may also prescribe lawful rates prospectively.[5]

In contrast, a tariff filed on a streamlined basis under section 204(a)(3) is "deemed lawful" if the Commission does not "take[] action" under section 204(a)(1) before the end of the seven- or 15-day notice period. 47 U.S.C. § 204(a)(3). Streamlined tariffs that are "deemed lawful" by operation of section 204(a)(3) are not subject to retroactive damages even if the Commission later determines them to be unlawful after adjudicating a section 208 complaint. *See ACS of Anchorage*, 290 F.3d at 411 (holding that "deemed lawful" tariffs are subject only to prospective remedies if later reexamination shows them to be unreasonable); *see also Implementation of Section 402(b)(1) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2183, para. 20 (1997) ("*Streamlined Tariff Order*"), *recon. denied*, 17 FCC Rcd 17040 (2002) ("*Streamlined Tariff Reconsideration Order*"). Thus, section 204(a)(3) eliminates the remedy of retroactive damages for a complaining customer under section 208 if the Commission does not exercise its suspension and investigation powers within the seven- or 15-day notice period. In such circumstances, upon a finding of unlawfulness, the Commission may only require the carrier to charge a lawful rate prospectively.

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[5] In the absence of a complaint, the Commission may also exercise its power under section 205 to investigate the lawfulness of a tariff that has taken effect without suspension or investigation and, after a hearing and a finding of unlawfulness, may prescribe rates prospectively and require that any subsequently filed tariffs conform to such prescription. 47 U.S.C. § 205.

There is scant legislative history regarding section 204(a)(3). Neither of the bills reported out of the relevant House and Senate committees in 1995 that formed the basis for the 1996 Act provided for streamlined tariffs. Rather, the language adding section 204(a)(3) was included with virtually no explanation or debate as part of a broad package of amendments to S.652 on the floor of the Senate.[6] Although that provision survived the House-Senate conference, the conference report casts no significant light on its meaning.[7]

Rate of Return Regulation. For certain LECs, the Commission exercises its authority to ensure just and reasonable rates under 47 U.S.C. § 201(b) by prescribing an authorized rate of return, rather than a specific rate. *See generally Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (upholding FCC's statutory authority to prescribe rate of return).[8] Rate-of-return LECs are required to set their tariff rates at levels that are targeted to produce no more than an FCC-prescribed return on investment (11.25 percent since 1990[9]). To provide for fluctuations in demand, operating costs, and other variables that the LEC may not fully be able to predict, the

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[6] *See* 141 Cong. Rec. S7926-01, S7927 (June 7, 1995); 141 Cong. Rec. S7881-02, S7898 (June 7, 1995) (remarks of Sen. Dole); 141 Cong. Rec. S8061-02, S8065 (June 9, 1995). Early in its brief (p. 10), Vitelco attempts to create the impression that comments by Senator Daschle from the Congressional Record shed light on the purposes of section 204(a)(3). The quoted comments merely described in general terms a broad package of amendments to the Senate bill, of which the streamlined tariff provision was one. Those comments were not directed specifically at the language that became section 204(a)(3). And when Senator Daschle did offer more precise and extensive comments, he directed them at four specific provisions, none of which involved streamlined tariffs. *See* 141 Cong. Rec. at S8066 (remarks of Sen. Daschle).

[7] *See* S. Conf. Rep. No. 230, 104th Cong., 2d Sess., at 186 (stating only that new section 204(a)(3) "streamlines the procedures for revision by local exchange carriers of charges, classifications, and practices under section 204").

[8] LECs may elect either rate of return regulation or "price cap" regulation. *See* 47 C.F.R. §§ 65.1(b), 61.41(a)(3) (2004). Vitelco has chosen to remain regulated as a rate of return carrier.

[9] *See Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd 7507, 7532, paras. 1, 216 (1990) (subsequent history omitted).

Commission adds a margin for error, or "buffer," to that target to establish the maximum allowable rate of return. 47 C.F.R. §§ 65.700(a), (b) (2004). A LEC will not be liable for damages unless its earnings exceed that prescribed maximum. *See*, *e.g.*, *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1233 (D.C. Cir. 1993) (Commission takes no remedial action for rates within "buffer" range).

To provide further protection to the LEC, the Commission measures compliance with the prescribed rate of return over two years (the "monitoring period"). 47 C.F.R. § 65.701 (2004). That permits short-term earnings spikes and downturns to even out over the course of the monitoring period. *See generally Virgin Islands*, 989 F.2d 1231. A rate-of-return LEC files earnings reports on FCC Form 492 annually and for each two-year monitoring period. *See* 47 C.F.R. § 65.600(b) (2004). The carrier has a six-month grace period to make final adjustments to the data contained in those reports. *Id.*; *see MCI*, 59 F.3d at 1417 (recognizing a LEC's ability under the rule to adjust data submitted in prior report).

The report filed at the conclusion of the monitoring period (and after the grace period, if necessary) is commonly referred to as the "final report." The final report reflects total access earnings over the entire two-year period. If it indicates that the LEC has exceeded its maximum allowable rate of return, the carrier has unlawfully "overearned" – *i.e.*, its rates have violated the "just and reasonable" rate requirement of section 201(b). *See*, *e.g.*, *MCI*, 59 F.2d at 1414 ("We have repeatedly held that a rate-of-return prescription has the force of law and that the Commission may therefore treat a violation of that prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates, *see* 47 U.S.C. § 201(b).").

A carrier may adjust its rates in the middle of the monitoring period. Thus, the results reflected in the so-called "interim report" – filed after the first year of the two-year monitoring period and showing earnings for the first twelve months – may prompt a LEC to revise its access rates in an effort to ensure that its earnings over the two-year period achieve the prescribed rate of return without exceeding the maximum. *See MCI*, 59 F.3d at 1417; *Virgin Islands*, 989 F.3d at 1237-38; *ACS of Anchorage*, 290 F.3d at 407. Similarly, during the course of the two-year monitoring period, the Commission may require a LEC to alter its rates prospectively, after either a section 205 hearing or adjudication of a section 208 complaint. *See ACS of Anchorage*, 290 F.3d at 407; *Streamlined Tariff Order*, 12 FCC Rcd at 2175-76, 2181-84, paras. 8, 19-21, 23, 24 (1997).

Allocation of Tariff Functions Between the Commission and Its Staff. In section 5(c) of the Act, Congress authorized the Commission to delegate "any of its functions" to its staff, subject to certain exceptions. 47 U.S.C. § 155(c). Consistent with that provision, the Commission has delegated general authority to the staff that encompasses the power to suspend a tariff and initiate an investigation into its lawfulness. *See* 47 C.F.R. §§ 0.91, 0.291 (2004) (delegation of authority to the Chief, Wireline Competition Bureau). But section 5(c) specifically forbids the Commission from delegating authority to the staff to take "action [under] section 204(a)(2)," 47 U.S.C. § 155(c), meaning that the staff may not "issue an order concluding [a tariff] investigation," 47 U.S.C. § 204(a)(2)(A). The staff therefore may commence but not conclude a tariff investigation. *See Streamlined Tariff Order*, 12 FCC Rcd at 2220, para. 103.

B. Factual and Procedural Background

Vitelco's overearnings. Vitelco's access service earnings exceeded its FCC-prescribed maximum allowable rate of return over the 1997-1998 monitoring period. Its final monitoring

report, submitted on September 30, 1999, revealed a cumulative interstate switched access rate of return for the two-year period of 14.78 percent. (JA 264, 265). Vitelco submitted a corrected final monitoring report in October 1999 showing a cumulative two-year interstate switched access rate of return of 14.79 percent – well above the 11.65 percent maximum allowable rate of return for LECs (including the buffer). (JA 398).[10]

Vitelco's Tariff Filings. Four Vitelco access service tariffs applied during the 1997-1998 monitoring period and collectively produced excessive earnings over two years:

- The *July 1996 Tariff* was in effect for the first six months of 1997. Vitelco filed this tariff on a non-streamlined basis under section 203. It took effect without suspension or investigation and was thus legal, but not lawful.

- The *July 1997 Tariff*, filed on June 16, 1997, was in effect for the last six months of 1997. Vitelco filed this tariff on a streamlined basis under section 204(a)(3). As discussed in more detail below, the Commission's staff suspended that tariff before it took effect, initiated an investigation into its lawfulness, and issued an accounting order. The *July 1997 Tariff* is central to this case.

- The *January 1998 Tariff* was in effect for the first six months of 1998. Vitelco filed this tariff on a streamlined basis under section 204(a)(3). It took effect without suspension or investigation and was thus "deemed lawful" by operation of law.

- The *July 1998 Tariff* was in effect for the last six months of 1998. Vitelco filed this tariff on a streamlined basis under section 204(a)(3). It took effect without suspension or investigation and was thus "deemed lawful" by operation of law.

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[10] Vitelco's interim monitoring reports had suggested an early trend toward overearnings. *See* September 25, 1997 Interim Report (cumulative interstate switched access rate of return of 12.98 percent for the first six months of 1997) (JA 260, 261); March 30, 1998 Interim Report (cumulative interstate switched access rate of return of 12.94 percent for calendar year 1997) (JA 267, 268).

<u>The Staff's *Suspension Order*</u>. As noted above, to avoid suspension and investigation during the notice period, a LEC must provide sufficient information in its initial tariff filing to demonstrate that its proposed tariff does not raise a significant question of lawfulness. In the 1997 access tariff proceeding, AT&T asked the Commission to reject or suspend and investigate tariffs submitted by certain rate-of-return LECs, including Vitelco's *July 1997 Tariff*. AT&T argued that those LECs had inflated their proposed rates by overstating a component used in setting those rates, known as cash working capital. *1997 Annual Access Tariff Filings*, 13 FCC Rcd 5677, 5700, para. 65 (Com.Car.Bur. 1997) ("*Suspension Order*"). Vitelco replied to AT&T's challenge. *Id*. at 5701, para. 66.

On the basis of the record, the Commission's staff determined that 11 LECs – including Vitelco – had "failed to provide sufficient explanation" in their tariff filings for their cash working capital calculations. *Id.* at 5702, para. 67. That failure "raise[d] significant questions of lawfulness" and prompted the staff to "suspend these LECs' tariff filings for one day and initiate an investigation into the lawfulness of their proposed [cash working capital] requirements." *Id*.[11] To facilitate possible refunds, the staff also ordered Vitelco and other carriers to "KEEP ACCURATE ACCOUNT of all amounts received that are associated with the rates that are subject to this investigation." *Id*. at 5708-09, para. 92. Consistent with longstanding practice, the staff indicated that it would separately issue an order designating issues for investigation for

[11] *See also Suspension Order*, 13 FCC Rcd at 5679, para. 3 ("we suspend for one day and set for investigation the LECs' 1997 Annual Access Tariffs discussed below"); *id*. at 5708, para. 91 ("IT IS FURTHER ORDERED that … the tariff revisions filed by … Virgin Islands Telephone Company … that include rate elements associated with cash working capital ARE SUSPENDED for one day and an investigation is instituted.").

all of the various suspended tariffs. *Id*. at 5679, para. 3.[12] Tariffs submitted by other carriers that did not raise significant questions of lawfulness were permitted to become effective without suspension and investigation. *Id*. To the extent those tariffs were filed under section 204(a)(3), they were thus "deemed lawful."

The Staff's *Reconsideration Order*. The staff issued a second order 30 days later. *See 1997 Annual Access Tariff Filings*, Order Designating Issues for Investigation and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 11417 (Com.Car.Bur. 1997) ("*Reconsideration Order*"). That order provided more detail and analysis regarding a number of issues set for investigation in the *Suspension Order* and, as to tariffs involving those issues, advanced the pending investigation to the next phase. The staff also determined, on its own motion, to reconsider its decisions to suspend and investigate several tariff filings.

In particular, in the 30 days following release of the *Suspension Order*, a number of carriers, including Vitelco, had supplied additional information to the staff in response to the staff's finding that they had "failed to provide sufficient explanation" regarding their cash working capital calculations.[13] The staff determined that this supplemental information, provided after the tariff was suspended, was "sufficient to replicate their [cash working capital] calculations and verify that their net lag periods are close" to the standard recognized by the

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[12] The staff in the omnibus 1997 access tariff review proceeding suspended and set for investigation tariffs filed by a number of carriers involving a variety of issues. *See Suspension Order*, 13 FCC Rcd at 5707-09, paras. 80-97 (listing carriers and issues). Because it often is not possible within the seven- or 15-day notice period to issue a written opinion that thoroughly discusses and refines each of the various issues set for investigation, the staff typically issues a second order, commonly called a designation order, which provides additional detail and analysis and establishes procedures and a pleading cycle for interested parties.

[13] *See* Letter from Gregory Vogt, counsel for Vitelco, to Secretary, FCC, dated July 2, 1997 (JA 041).

Commission. *Reconsideration Order*, 12 FCC Rcd at 11449, para. 75. On the basis of that supplemental, post-suspension information, the staff undertook to "reconsider on our own motion our decision to suspend and investigate tariff provisions that include rate elements associated with cash working capital." *Id*. The staff concluded: "We decline to investigate these LECs' tariff provisions that relate to cash working capital." *Id*. As authority for its action, the staff relied on 47 C.F.R. § 1.108 (2004), which permits *sua sponte* reconsideration of Commission decisions within 30 days. *Id*.

AT&T's Complaint. AT&T bought access service under each of Vitelco's four tariffs during the relevant period. In 2001, AT&T lodged an informal complaint against Vitelco under 47 C.F.R. §§ 1.716-.717 (2004)[14] seeking damages caused by Vitelco's overearnings in 1997 and 1998. AT&T thereafter timely converted its complaint against Vitelco to formal status;[15] under the Commission's rules, AT&T's formal complaint was deemed to relate back to the September 10, 2001, filing date of its informal complaint for purposes of tolling the applicable two-year statute of limitations set forth in 47 U.S.C. § 415(b). *See* 47 C.F.R. § 1.718 (2004).

AT&T's formal complaint sought damages for overearnings in 1997. AT&T noted that Vitelco's *July 1996 Tariff* – in effect during the first six months of 1997 – had not been filed under section 204(a)(3) and therefore was not eligible for "deemed lawful" status. AT&T also maintained that the *Suspension Order* had prevented "deemed lawful" status from attaching to

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[14] The Commission's rules provide for "informal" complaints as a way to resolve disputes against carriers short of formal litigation. A complainant that remains unsatisfied by the defendant carrier's response to its informal complaint may convert that complaint to "formal" status, 47 C.F.R. § 1.718 (2004), thereby invoking more extensive pleading and discovery procedures. *See generally* 47 C.F.R. §§ 1.720-.736 (2004).

[15] *AT&T Corp. v. Virgin Islands Tel. Corp.,* Formal Complaint, File No. EB-04-MD-002 (filed Jan. 27, 2004; supplemented Mar. 4, 2004) ("*Complaint*") (JA 083).

Vitelco's *July 1997 Tariff* rates that were in effect during the last six months of 1997. As both tariffs were merely legal – not adjudged lawful or "deemed lawful" – AT&T contended that Vitelco was liable for damages for overearnings produced by those tariffs in 1997 in violation of section 201(b). AT&T's formal complaint did not seek damages for overearnings in 1998, because Vitelco's superseding *January 1998* and *July 1998* tariffs had taken effect under section 204(a)(3) without prior suspension and investigation and were thus "deemed lawful."

Vitelco's Answer. Vitelco answered by arguing that AT&T's claim accrued when Vitelco filed interim monitoring reports in September 1997 and March 1998, not when Vitelco filed its final report. Since AT&T lodged its September 10, 2001, informal complaint more than two years after those interim reports were submitted to the Commission, Vitelco maintained that AT&T's complaint was time-barred by 47 U.S.C. § 415(b) as to both the *July 1996* and *July 1997* tariffs.

Vitelco also claimed that section 204(a)(3) precluded AT&T's claim for damages for overearnings during the last six months of 1997 when the *July 1997 Tariff* was in effect. Although Vitelco conceded that its earnings for the first half of 1997 were not "deemed lawful" and thus were subject to damages if AT&T's complaint were timely, Vitelco contended that the *Suspension Order* did not deprive its *July 1997* tariffed rates of "deemed lawful" status during the last half of 1997. And even if it had, Vitelco claimed, the *Reconsideration Order* restored such status because that second staff decision, in Vitelco's view, vacated the prior *Suspension Order* and restored the legal *status quo ante*.

II. THE ORDER ON REVIEW

On the basis of the administrative record before it, the Commission granted AT&T's complaint and held Vitelco liable to AT&T for damages for 1997 earnings in excess of Vitelco's

maximum allowable rate of return. *Order* at paras. 1, 40-43 (JA 411, 424-25). Because AT&T had requested "bifurcation" of the proceeding under 47 C.F.R. § 1.722(d) (2004), the Commission in the *Order* ruled only on the issue of liability and deferred calculation of any damages suffered by AT&T. *Order* at para. 11 & n.47 (JA 416).[16]

As a threshold matter, the Commission unanimously ruled that AT&T timely filed its complaint within the two-year limitations period of 47 U.S.C. § 415(b). *Order* at paras. 14-28 (JA 417-21). The Commission rejected Vitelco's contention that AT&T's cause of action accrued when Vitelco filed its two *interim* monitoring reports and instead held that AT&T's cause of action did not accrue until Vitelco filed its *final* report for the two-year monitoring period on September 30, 1999. Accordingly, the Commission ruled that AT&T's September 10, 2001, informal complaint was timely filed within the Act's two-year limitations period. *Id.* at paras. 16, 28 (JA 417, 421).

The Commission next considered whether the overearnings indisputably produced by Vitelco's *July 1997 Tariff* were insulated from AT&T's damages claim by operation of section 204(a)(3). *Order* at paras. 29-39 (JA 421-24). The Commission answered that question in the negative.[17] The Commission pointed out that during the 15-day notice period before the *July 1997 Tariff* took effect the staff had suspended that tariff, initiated an investigation into its lawfulness, and imposed an accounting order. Those actions within the notice period, the

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[16] At Vitelco's unopposed request, the staff subsequently waived and extended the 60-day deadline for AT&T to file a supplemental damages complaint, pending this Court's review of the Commission's liability determination in the *Order*. *See AT&T Corp. v. Virgin Islands Tel. Corp.,* 19 FCC Rcd 18841 (EB/M.D.R.Div. 2004) (JA 428).

[17] Commissioner Martin dissented from that portion of the *Order*. *See* Separate Statement of Commissioner Kevin J. Martin, Approving in Part, Dissenting in Part (JA 426-27).

Commission found, meant that the rates in the *July 1997 Tariff* "were never deemed lawful" in accordance with the terms of 47 U.S.C. § 204(a). *Order* at para. 32 (JA 422).

The Commission rejected Vitelco's contention that only a fully concluded tariff investigation, completed within the monitoring period, can prevent "deemed lawful" status from attaching to a tariff filed under section 204(a)(3). Vitelco's assertion, the Commission ruled, conflicted with the agency's prior determination in the *Streamlined Tariff Order* that "deemed lawful" status is foreclosed upon issuance of an order suspending the rates and setting them for investigation. *Id*. at para. 34 (JA 423) (quoting *Streamlined Tariff Order*, 12 FCC Rcd at 2182, para 19). The Commission also observed that Vitelco's interpretation would lead to illogical results. The statute requires the agency to "take action" under section 204(a)(1) within the relevant seven- or 15-day notice period. But, the Commission noted, it generally is not possible as a practical matter to conclude a full tariff investigation within those brief intervals. Vitelco's view that only a fully concluded tariff investigation would suffice to prevent "deemed lawful" status, the Commission explained, would therefore make it "virtually impossible" to prevent such status from attaching to any tariff – even though section 204(a)(3) provides that the Commission can prevent a tariff from being "deemed lawful" by taking action under section 204(a)(1). *Order* at para. 35 (JA 423).

The Commission rejected Vitelco's alternative contention that the staff's *Reconsideration Order* restored "deemed lawful" status to the *July 1997 Tariff*. *Order* at paras. 36-38 (JA 423-424). The Commission explained that once rates are suspended and set for investigation, they can become the lawful rates immune from damages liability only when and if the agency issues an order affirmatively finding the rates to be lawful. The Commission pointed out that it had issued no such order. The staff's *Reconsideration Order* indicated that the staff would not

pursue the tariff investigation, but did not adjudge the lawfulness of Vitelco's rates. Nor could it have constituted such an adjudication, the Commission noted, because 47 U.S.C. § 155(c) bars the staff from acting under delegated authority to conclude the tariff investigation and rule on the lawfulness of the *July 1997 Tariff*. Because Vitelco's *July 1997* tariffed rates were neither "deemed lawful" by operation of law nor adjudged lawful by affirmative order, the Commission held that they were "legal" (but not lawful) rates and thus were subject to complaint for overearnings. *Id*. at para. 38 (JA 424).

The Commission also rejected Vitelco's claim that the *Reconsideration Order* rendered the suspension and investigation a nullity. *Id*. at para. 39 (citing Vitelco's Delegation Brief at 5) (JA 424). The agency found no indication that the staff intended the *Reconsideration Order* to nullify retroactively its earlier suspension decision and commencement of an investigation. *Id*.

Finally, the Commission ruled on the undisputed record evidence indicating that Vitelco had exceeded its maximum allowable rate of return during 1997 (and had continued to do so in 1998). On the basis of its conclusion that Vitelco's 1997 rates were not immune from damages claims, the Commission determined that Vitelco violated section 201(b) and was therefore liable for damages inflicted on AT&T by Vitelco's 1997 overearnings. *Order* at paras. 40-42 (JA 424-425).

SUMMARY OF ARGUMENT

1. The Commission reasonably determined that AT&T timely filed its September 10, 2001, complaint against Vitelco within the statutory two-year limitations period. Consistent with longstanding judicial and administrative precedent, the Commission correctly held that AT&T's cause of action accrued when Vitelco filed its final earnings report for the 1997-1998 monitoring period on September 30, 1999, the earliest time AT&T could have ascertained with certainty that

Vitelco had, in fact, violated its maximum allowable rate of return for the two-year period. *See MCI*, 59 F.3d at 1416-17. Contrary to Vitelco's assertion, Vitelco's earlier, interim monitoring reports could not have put AT&T on clear notice of its claim, as Vitelco could thereafter have filed revised rates that erased or mitigated its overearnings in 1997 and eliminated or reduced any damages liability to AT&T. Vitelco's resort to this Court's decision in *ACS of Anchorage*, 290 F.3d 403, is unavailing, as that case did not involve the issue of claim accrual and did not purport to disturb the well-established rule approved in *MCI*. The Court should thus affirm the Commission's holding that AT&T timely filed its complaint; concomitantly (and consistent with Vitelco's stipulation below), the Court should uphold the Commission's determination that Vitelco is liable to AT&T for damages caused by overcharges during the first six months of 1997, when the relevant tariff indisputably was not eligible for "deemed lawful" status.

2.a. The Commission also reasonably determined that the *July 1997 Tariff* was not "deemed lawful," and that Vitelco therefore was not immunized from liability to AT&T for damages for overcharges during the last six months of 1997 when that tariff was in effect. Vitelco's attempt to seek sanctuary in section 204(a)(3) fails, because that provision confers "deemed lawful" status on tariffed rates *only* if (1) a LEC files its tariff on a streamlined basis, *and* (2) the Commission fails to take action under section 204(a)(1) within the relevant seven- or 15-day notice period. Here, the Commission's staff took the following actions under section 204(a)(1), all within the requisite 15-day notice period: it suspended the effectiveness of the *July 1997 Tariff*, commenced an investigation into its lawfulness, and imposed an accounting order. Consistent with the statutory language, and with the *Streamlined Tariff Order*, 12 FCC Rcd 2170, the Commission correctly found that those actions viewed as a whole prevented "deemed lawful" status from attaching to Vitelco's proposed rate increases.

The Commission reasonably rejected Vitelco's assertion that the agency must *conclude* a hearing into the tariff's lawfulness in order to prevent statutory "deemed lawful" status from attaching to a proposed rate increase. Section 204(a)(3) directs the Commission to act within 15 days to preclude "deemed lawful" status for a proposed rate increase, and the Commission construed the undefined phrase "take[] action" in light of the temporal requirements Congress established in section 204 as a whole. Section 204 affords the Commission up to five months to conduct and conclude a tariff investigation. As Congress evidently recognized, it generally is not possible as a practical matter to complete tariff investigations within 15 days. If Vitelco were correct that a tariff investigation must be completed within 15 days for the "deemed lawful" provision to be overcome, Vitelco's asserted interpretation narrows the "take action" option of section 204(a)(3) in a fashion that is not suggested – much less compelled – by the statute.

Moreover, the Commission correctly rejected Vitelco's claim that the agency did not in fact commence an investigation into the lawfulness of the *July 1997 Tariff*. The *Suspension Order*, which clearly articulated the staff's decision to "initiate an investigation," refutes Vitelco's assertion, and subsequent events make clear that an abbreviated investigation did occur. Vitelco submitted supplemental information after release of the *Suspension Order*, in an effort to convince the staff not move forward to the next stage of the investigation. The staff then considered and relied on that post-suspension information in subsequently deciding not to continue and complete the tariff investigation. An investigation was thus commenced, and the act of commencing that investigation, combined with the staff's suspension of the proposed rate increases and imposition of accounting requirements, formed the basis for the Commission's reasonable interpretation that the staff's actions foreclosed "deemed lawful" status in these circumstances.

b. Equally unavailing is Vitelco's contention that the staff's *Reconsideration Order* vacated the *Suspension Order* and somehow "restored" the legal *status quo ante*. Vitelco's argument ignores section 5(c) of the Act, which denies the staff authority to conclude a tariff investigation once begun. In light of that clear prohibition, the Commission reasonably determined that the staff's *Reconsideration Order* did not conclude the tariff investigation or rule on the lawfulness of Vitelco's proposed rate increases because, as the Commission forthrightly acknowledged, the staff would have lacked authority to issue such an order. Furthermore, the staff did not specify that it was vacating or setting aside its prior decision, nor did it use the phrase "*nunc pro tunc*" (or similar language) to indicate that it intended to restore the legal *status quo ante* as the Commission typically does when it intends to act retroactively.

It is true that the full Commission missed the five-month deadline for concluding the section 204 investigation of Vitelco's *July 1997 Tariff* and did not issue an order expressly terminating that investigation. Instead, the tariff investigation was overtaken by the separate complaint proceeding that AT&T initiated and the Commission-level *Order* finding Vitelco's rates to be unlawful. But the Commission's failure to conclude the tariff investigation under section 204 in a timely manner does not invalidate the agency's separate and distinct determination in the *Order*, issued under section 208, that Vitelco's 1997 rates were unlawful.

c. The factual circumstances presented in this case are unlikely to recur. The FCC staff no longer employs the *sua sponte* reconsideration procedure in this context, and the full Commission now issues all orders concluding tariff investigations. Accordingly, there is no factual basis for Vitelco's speculation that unsupervised staff action might systematically negate "deemed lawful" status under section 204(a)(3).

ARGUMENT

I. STANDARD OF REVIEW

Vitelco raises both statutory construction and arbitrary and capricious challenges. The Commission's interpretations of the Communications Act are reviewed under the framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, when Congress has "spoken directly" to the precise question at issue, the Court's inquiry "is at an end." *Cellco Partnership v. FCC*, 357 F.3d 88, 94 (D.C. Cir. 2004). But when Congress' intent is unclear "because the statute is silent or the language Congress has used is ambiguous," the Court must defer to the agency's interpretation so long as it is reasonable. *Id. Accord Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 539 (2002) ("The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility.").

Vitelco's remaining challenges are reviewed under the standard of the Administrative Procedure Act: The Court may reverse the agency's determinations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard is highly deferential toward the agency; the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co*., 463 U.S. 29, 43 (1983). The Court "presumes the validity of agency action" and "must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco Partnership*, 357 F.3d at 93-94 (*citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

The Court gives the Commission "even greater interpretive latitude" when the agency construes its own rules. *Kay v. FCC*, 393 F.3d 1339, 1343 (D.C. Cir. 2005) (*citing Thomas*

Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). In such circumstances, the Commission's interpretation is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1069 (D.C. Cir. 2004); *Universal City Studios LLLP v. Peters*, 402 F.3d 1238, 1242 (D.C. Cir. 2005). Likewise, the Commission's interpretation of the intended effect of its own orders is controlling unless clearly erroneous. *MCI WorldCom Network Services, Inc. v. FCC*, 274 F.3d 542, 547 (D.C. Cir. 2001) (citation omitted).

II. THE COMMISSION REASONABLY DETERMINED THAT AT&T TIMELY FILED ITS COMPLAINT

The Act, 47 U.S.C. § 415(b), provides that a complaint for damages must be filed within two years from the time the cause of action accrues. The Commission found that AT&T's cause of action accrued on September 30, 1999, when Vitelco submitted its final earnings report for the 1997-1998 monitoring period, and thus AT&T's September 10, 2001, informal complaint was filed within the two-year limitations period. *See Order* at paras. 14-28 (JA 417-21). That finding is reasonable, fully explained, and consistent with well-established judicial and administrative precedent.

In an effort to avoid liability for damages for *all* of 1997 – even for overearnings during the first six months of that year when the relevant tariff indisputably was not "deemed lawful" under section 204(a)(3) – Vitelco asserts that AT&T's cause of action accrued when Vitelco filed two earlier, *interim* reports in September 1997 and March 1998. This Court's holding in *MCI*, 59 F.3d at 1416-17, stands squarely in opposition to Vitelco's position. There, the Court endorsed the Commission's longstanding position that a cause of action for damages for a

violation of a rate of return prescription "does not accrue until after the LEC files its final report." *Id*., at 1417.[18]

Moreover, Vitelco's fundamental premise – that its preliminary, interim reports "contained all of the information relevant to AT&T's claim and thus put AT&T on notice of injury," Br. at 39 – is wrong. AT&T could not have known whether it had a valid claim for damages for 1997 until Vitelco filed its final earnings report for the entire 1997-1998 monitoring period on September 30, 1999. As the Commission explained, if Vitelco had underearned during the last 12 months of the monitoring period, it would have reduced or perhaps even eliminated AT&T's claim for damages during the first twelve months. *Order* at para. 19 (JA 418).

Even after posting preliminary results during the first twelve months of the monitoring period that indicated excessive earnings, Vitelco under the Commission's rules had the opportunity to file revised rates for the second half of the monitoring period in an effort to abide by the Commission's rate of return prescription for the entire two-year period. This Court has recognized a carrier's ability to adjust its rates in mid-stream in response to interim earnings reports in order to comply with a rate of return prescription. *See MCI*, 59 F.3d at 1417 ("During any monitoring period in which its rates appeared destined to yield earnings above (or for that matter below) its authorized rate of return, the LEC could have revised its tariffs to avoid that

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[18] *See also Virgin Islands*, 989 F.2d at 1238-39 (observing that "the target 'authorized return' is a number that has meaning only in relation to the full two-year monitoring period"); *AT&T Corp. v. Telephone Utils. Exch. Carrier Ass'n*, 10 FCC Rcd 8405, 8415, para. 22 (1995) ("[T]he date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law."); *Allnet Communications, Inc. v. U S West, Inc.*, 8 FCC Rcd 3017, 3019, para. 13 (1993); *US Sprint Communications Ltd. Partnership v. Pacific Northwest Bell Tel. Co.*, 8 FCC Rcd 1288, 1291-92, para 16 (1993) (subsequent history omitted); *MCI Telecomms. Corp. v. Pacific Bell Tel. Co.*, 5 FCC Rcd 3463, 3464, para. 6 (1990) (subsequent history omitted).

result.”). The Court has emphasized this opportunity specifically with regard to Vitelco. *Virgin Islands*, 989 F.3d at 1237-38 (noting with favor Vitelco’s attempt to use its rate revision opportunities to keep its earnings within the permissible range). Indeed, the Court has reiterated this principle since the enactment of section 204(a)(3). *ACS of Anchorage*, 290 F.3d at 407 (noting that interim monitoring reports “may lead carriers to file revised rates”). Vitelco thus could have initiated tariff revisions for the second half of the reporting period that might have obviated AT&T’s claim for damages during 1997. In addition, as this Court has recognized, the Commission during the two-year monitoring period may exercise its authority under section 205 to prescribe new rates. *See ACS of Anchorage*, 290 F.3d at 407 (noting that interim reports may “cause the Commission to start proceedings under 47 U.S.C. § 205 to prescribe new rates”). Such action might also have eliminated any claim for damages.

Hence, Vitelco is wrong in asserting that AT&T was on notice of its damages claim when the interim reports were filed: The final results had not come in, and were unknowable, until Vitelco filed its report showing earnings for the entire two-year monitoring period. Given that uncertainty, the Commission properly followed this Court’s precedent and reasonably ruled that AT&T’s cause of action did not accrue until Vitelco filed its final monitoring report. *See MCI*, 59 F.3d at 1417; *see also Communications Vending Corp.*, 365 F.3d at 1074 (if an injury “is not readily discoverable,” cause of action accrues “when the plaintiff should have discovered it”).

Contrary to Vitelco’s argument (Br. at 41), nothing in *ACS of Anchorage* requires a different result. That case involved whether section 204(a)(3) barred damages for earnings produced during a portion of a two-year monitoring period when a “deemed lawful” tariff was in effect. As the Commission explained, the Court’s passing reference to a monitoring period being “cut short,” 290 F.3d at 413, appears simply to allude to the fact that damages were unavailable

as a remedy for the time that "deemed lawful" rates were in effect during the period at issue. *See Order* at para. 23 (JA 420). *ACS of Anchorage* did not involve the issue of claim accrual and did not purport to disturb the well-established rule approved in *MCI*. The Court should thus affirm the Commission's determination that AT&T timely filed its complaint.

Vitelco stipulated below that if AT&T's claim for the first half of 1997 is not time-barred, Vitelco owes AT&T a refund for the period January 1, 1997, through June 30, 1997, because its applicable tariff (the *July 1996 Tariff*) was filed under section 203 and was not eligible for "deemed lawful" status. Further Stipulations at 1, para. 3 (JA 400, 401). As demonstrated above, section 415(b) does not bar AT&T's claim. Thus, Vitelco is liable to AT&T for damages incurred during the first six months of 1997, and the Court should affirm the Commission's determination of liability for that period.

III. THE COMMISSION REASONABLY FOUND VITELCO LIABLE FOR DAMAGES DURING THE LAST SIX MONTHS OF 1997, BECAUSE THE *JULY 1997 TARIFF* WAS NOT "DEEMED LAWFUL"

The remaining issue for the Court is whether the Commission reasonably determined that Vitelco's rates were not "deemed lawful" during the last six months of 1997, when the *July 1997 Tariff* was in effect. It did.

A. The *Suspension Order* Prevented "Deemed Lawful" Status From Attaching to the *July 1997 Tariff*

Section 204(a)(3) confers "deemed lawful" status on a carrier's increased rates when two conditions are met. First, a LEC must file a tariff proposing rate increases on "streamlined" notice. Second, the Commission must fail to act under section 204(a)(1) "before the end of that [streamlined] notice period." 47 U.S.C. § 204(a)(3). Stated differently, the second condition

means that "deemed lawful" status does not attach to a proposed rate increase if the Commission "takes action" within the streamlined notice period.

Vitelco's *July 1997 Tariff* was filed on a streamlined basis, but the Commission did "take[] action" on that tariff filing under section 204(a)(1) during the notice period. The Commission therefore reasonably found, according to the terms of the statute, that Vitelco's proposed rate increases were never "deemed lawful" and were thus subject to complaint for alleged unlawful earnings. *See Order* at paras. 29-39 (JA 421-24).

The key question is what Congress meant when it provided that "deemed lawful" status would attach to proposed rate increases unless the Commission "*takes action under paragraph (1)* [*i.e.*, section 204(a)(1)] before the end" of the applicable (seven- or 15-day) notice period. 47 U.S.C. § 204(a)(3) (emphasis supplied). As the Commission pointed out, *Order* at para. 31 (JA 422), action under section 204(a)(1) includes: suspension of a new or revised tariffed charge; "enter[ing] upon a hearing concerning [its] lawfulness"; and ordering a carrier "to keep accurate account of all amounts received by reason of such charge" pending completion of the hearing. 47 U.S.C. § 204(a)(1).

On the basis of the statutory language, the Commission correctly found that Vitelco's *July 1997* rates "were never deemed lawful." *Order* at para. 32 (JA 422). The Commission, through its staff acting under delegated authority, took the following actions under section 204(a)(3) on June 27, 1997: it suspended the effectiveness of Vitelco's tariff; began a hearing concerning the lawfulness of the tariff; and issued an accounting order. *See Suspension Order*, 13 FCC Rcd at 5679, 5702, 5708-09, paras. 3, 67, 91-92. The Commission took all three of those actions "before the end of [the] … 15-day notice period" (which was to expire on July 1,

1997) as provided by section 204(a)(3). Those actions viewed as a whole, the Commission found, prevented "deemed lawful" status from attaching to Vitelco's *July 1997* tariffed rates.

Vitelco argues that suspension of the tariff, initiation of a hearing, and issuance of an accounting order are insufficient to deny "deemed lawful" status. According to Vitelco, the Commission also must *conduct* and *conclude* the hearing by ruling on the lawfulness of rates in order to "take action" within the meaning of section 204(a)(1).

As the Commission pointed out, *Order* at para. 34 (JA 423), the language of section 204(a)(3) does not clearly require a tariff investigation to be concluded before "deemed lawful" status is rendered inapplicable. The statute requires the Commission to take action "before the end of [the] … 15-day notice period" in order to deny "deemed lawful" status to a proposed tariff that increases rates. 47 U.S.C. § 204(a)(3). Section 204(a)(2) authorizes the Commission to take up to five months to conduct and conclude a tariff investigation. Section 204(a)(1) even accommodates a situation in which the Commission takes longer than five months to finish the job: If the Commission has not completed its investigation within the maximum five-month suspension period, the tariff takes effect, subject to an accounting order and the ultimate result of the Commission's investigation. 47 U.S.C. § 204(a)(1). Reading sections 204(a)(1), (a)(2), and (a)(3) in concert, it is apparent that section 204 does not require the Commission to conduct and conclude a tariff investigation within the notice period of 15 days, rather than the five-month investigation deadline, in order to "take action" sufficient to prevent "deemed lawful" status from attaching to proposed rate increases. The Commission reasonably construed the key language "take[] action" in light of the temporal requirement Congress attached to that phrase.

Under Vitelco's interpretation, the agency would rarely if ever be able to prevent "deemed lawful" status from attaching because it generally is not possible (nor required by

section 204(a)(2)) for the agency to conduct and conclude a tariff investigation in 15 days (much less the 7-day period that applies to proposed rate reductions). Vitelco's interpretation, as a practical matter, would read the "take[] action" option out of section 204(a)(3). That result would be "illogical," given that the statute plainly provides a route by which the Commission may deny "deemed lawful" status to a tariff. *Order* at para. 35 (JA 423).

Contrary to Vitelco's assertions (Br. at 21-22), the interpretation set forth in the *Order* is fully consistent with the Commission's statements in the *Streamlined Tariff Order*. There, the Commission stated:

> [T]he "deemed lawful" language does not govern streamlined tariff filings that become effective after *suspension* in those instances where the Commission *suspends and initiates an investigation* of a LEC tariff within the 7 or 15 day notice periods specified in section 204(a)(3). In those cases, the LEC streamlined tariffs would not be "deemed lawful" under section 204(a)(3) because they were *suspended and set for investigation*.

Streamlined Tariff Order, 19 FCC Rcd at 2182, para. 19 (emphasis added). Thus, the *Suspension Order* confirms that suspending tariffed rates and setting them for investigation is the triggering action that prevents "deemed lawful" status from attaching to those rates; an order concluding the investigation is not required. *Id.*; *Order* at para. 34 (JA 423).

Vitelco (Br. at 21) invokes some scattered quotations from FCC orders in an attempt to show that the Commission has held that it must complete a tariff investigation in order to deny "deemed lawful" status to proposed rates increases. Those quotations – in which the Commission used the phrase "suspend and investigate" – cast no doubt on the Commission's clearly expressed interpretation that suspension and initiation of a tariff investigation constitute action under section 204(a)(1) that forecloses "deemed lawful" status under section 204(a)(3).

Vitelco also invokes (Br. at 22) the Commission's unexceptional explanation that a streamlined tariff filing that takes effect after suspension is legal (but not lawful) until lawful status is determined by a Commission order at the conclusion of a hearing. *See Streamlined Tariff Order*, 19 FCC Rcd at 2182, para. 19. That explanation simply describes the state of the law when "deemed lawful" status has been denied and the tariff subsequently takes effect. Contrary to Vitelco's assertion, it is not a Commission holding that the agency must complete a tariff investigation in order to prevent a proposed rate increase from achieving "deemed lawful" status.

Vitelco further seeks to deconstruct the staff's "action" into separate components and then attack them *seriatim* as either illusory or insufficient standing alone to foreclose "deemed lawful" status. That strategy is unavailing. Viewed as a whole, the Commission took "action" in the *Suspension Order* that was sufficient to prevent "deemed lawful" status from attaching to Vitelco's July *1997 Tariff*.

Vitelco focuses initially on the hearing aspect of section 204(a)(3) and claims (Br. at 22-23) that the staff did not even commence a hearing involving its tariff. That is patently incorrect. The *Suspension Order* explicitly and unambiguously launched an investigation into the lawfulness of Vitelco's proposed rates. *See Suspension Order*, 19 FCC Rcd at 5702, para. 67 ("We … initiate an investigation" into the lawfulness of Vitelco's tariff); *id*. at 5708, para. 91 ("an investigation is instituted" into Vitelco's tariff). The hearing got under way upon issuance of the *Suspension Order*.

Subsequent events confirm the Commission's determination that its staff "began a hearing" (*Order* at para. 32 (JA 423)) and that an investigation – albeit an abbreviated and inchoate one – did occur. Vitelco filed supplemental information after the *Suspension Order* in

an attempt to justify its proposed rates. *See Reconsideration Order*, 12 FCC Rcd at 11449, para. 75 ("Each of these LECs made *ex parte* filings in which they provided information sufficient to replicate their calculations and verify that their net lag periods are close to 15 days."). The staff then considered Vitelco's supplemental submission and decided, on the basis of that post-suspension information, not to continue and complete the investigation. *See id*.

That the staff did not advance the hearing to the next stage by including Vitelco's tariff as part of the subsequent designation order does not alter the fact that a hearing was, in fact, begun. But, as explained above, a finding of lawfulness or unlawfulness is not necessarily part of the "action" Congress required the Commission to take within the notice period. Rather, the act of *commencing* a hearing into the lawfulness of Vitelco's *July 1997 Tariff* within the 15-day notice period, coupled with staff's suspension of that tariff and imposition of an accounting order, formed the basis for the Commission's conclusion that the staff's action in this case foreclosed "deemed lawful" status within the meaning of section 204(a)(3).[19]

[19] Vitelco argues at length (Br. at 24-31) that, in the absence of a hearing, suspension and issuance of an accounting order are insufficient to foreclose "deemed lawful" status. The Court should not reach that issue in this case, because the Commission did not reach it. In the event the Court disagrees with the Commission's conclusion that the *Suspension Order* commenced a hearing, the proper course would be a remand to the agency. That would afford the Commission an opportunity to consider in the first instance whether suspension and issuance of an accounting order are sufficient, in the absence of a hearing, to preclude "deemed lawful" status within the meaning of section 204(a)(3). *See INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (reviewing court should not conduct *de novo* examination of an issue the responsible agency did not address but rather should remand to agency for additional investigation or explanation); *see also SBC Communications, Inc. v. FCC*, 407 F.3d 1223, 1232 (D.C. Cir. 2005) (court remanded because it found agency had not interpreted exact scope of relevant legal duty).

B. The *Reconsideration Order* Did Not Retroactively Confer "Deemed Lawful" Status on Vitelco's *July 1997* Rates

Vitelco next argues that even if the *Suspension Order* and the ensuing proceedings prevented "deemed lawful" status from attaching to its *July 1997* tariffed rates, the staff's *Reconsideration Order* retroactively "restored" that status. As explained above, the statute specifies one – and only one – instance in which tariffed rates shall be "deemed lawful" by operation of law under section 204(a)(3): When the Commission fails to take action under section 204(a)(1) within the seven- or 15-day notice period. If the Commission *does* take such action in a timely manner, the tariff is never "deemed lawful." In that situation it makes no sense to talk about "restoring" or "reclaiming" such status. After rates are suspended and set for investigation, they can become the lawful rates only if the Commission issues an order affirmatively finding them to be lawful, *see Streamlined Tariff Order*, 12 FCC Rcd at 2182, para. 19, which did not happen in this case. The statute provides no contingency that can cause "deemed lawful" status to apply after rates have been suspended and set for investigation.[20]

Vitelco tries to avoid this rule by asserting that the *Reconsideration Order* "vacated" the *Suspension Order* and therefore put Vitelco back in the position it occupied prior to suspension of its rates.[21] In the *Reconsideration Order*, the staff relied on 47 C.F.R. § 1.108, entitled "Reconsideration on the Commission's Own Motion," which authorizes the Commission on its own motion to "set aside" a prior decision within 30 days. Vitelco asserts that "set aside" is

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[20] The Commission is not contending, as Intervenors and *amici* (hereinafter Intervenors) claim (Int. Br. at 3-4), that the *Reconsideration Order* denied "deemed lawful" status to Vitelco's *July 1997 Tariff*. Rather, it was the *Suspension Order* that the staff issued within the 15-day notice period that prevented such status from attaching to Vitelco's rates.

[21] Similarly, intervenors claim (Int. Br. at 3) that Vitelco's tariff "was deemed lawful as of its effective date" by virtue of the *Reconsideration Order*.

equivalent to "vacate." By invoking section 1.108, Vitelco claims, the staff demonstrated its intent to vacate the *Suspension Order* and restore the legal *status quo ante*. Br. at 31-35.

As an initial matter, Vitelco is wrong in asserting (Br. at 31) that section 1.108 allows the Commission only to vacate or set aside prior action. On the contrary, the Commission may take action under section 1.108 for a variety of purposes, independent of vacatur. For example, the Commission has acted under that rule to change compliance dates.[22] The Commission also has invoked section 1.108 to modify the substantive requirements of previously adopted rules.[23]

In this context, moreover, Vitelco's argument that reconsideration erases what has been done before ignores section 5(c) of the Act.[24] As the Commission explained, under section 5(c), "the Commission may not delegate to a Bureau the authority to take action under section 204(a)(2), *i.e.*, to issue an order concluding a tariff investigation." *Order* at para. 38 (JA 424). The Commission thus reasonably found, in light of section 5(c), that the staff's *Reconsideration Order* did not conclude the tariff investigation and "did not adjudge the lawfulness of Vitelco's rates" because, as the Commission forthrightly acknowledged, the staff "did not have authority

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[22] *See, e.g., Children's Television Obligations of Digital Television Broadcasters*, Order on Reconsideration, FCC 05-22, 20 FCC Rcd 2055 (rel. Jan. 31, 2005) (deferring the effective date of new rules to allow broadcasters and cable operators additional time to come into compliance); *Amendment of Parts 13 and 80 of the Commission's Rules Concerning Maritime Communications*, 19 FCC Rcd 9105 (2004) (accelerating the effective date of rules).

[23] *See, e.g., Improving Public Safety Communications in the 800 MHZ Band*, 19 FCC Rcd 25120 (2004) (making "clarifications of, and changes to" the provisions of a recent Report and Order and related rules); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150 – 2162 and 2500 – 2690 MHZ Bands*, 19 FCC Rcd 22284 (2004) ("supplementing and modifying" rules).

[24] Section 5(c) provides that "the Commission may, by published rule or order, delegate any of its functions (… except any action referred to in section[] 204(a)(2))" to its staff. 47 U.S.C. § 155(c). Section 204(a)(2), in turn, refers to the action of "issu[ing] an order concluding [a tariff] hearing." 47 U.S.C. § 204(a)(1).

to issue such an order." *Order* at para. 38 (JA 424). Section 5(c) is fatal to Vitelco's claim that the *Reconsideration Order* must be interpreted as a vacatur of the prior *Suspension Order* that retroactively restored the legal *status quo ante*.[25]

The reasonableness of the Commission's conclusion (*Order* at para. 39 (JA 424)) that the *Reconsideration Order* was not intended to have retroactive effect is confirmed by Commission practice: When the agency intends its decisions to have retroactive effect, it says so. For example, the *Reconsideration Order* did not state that the staff was "vacating" or "setting aside" the earlier *Suspension Order*, as the Commission typically does when it intends such action

[25] Cases cited by Vitelco (Br. at 32-33) discussing the effect of a court vacatur are beside the point, because the staff did not vacate its prior decision. *See*, *e.g*., *United States v. Munsingwear*, 340 U.S. 36 (1950); *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795 (D.C. Cir. 1983). The same is true of three Commission decisions cited by Vitelco (Br. at 33), which essentially undermine Vitelco's argument by showing that when the Commission intends its decisions to have retroactive effect, it says so explicitly. *See Connex Freight*, 15 FCC Rcd 13345, 13345 (WTB/P.S.P.W.Div. 2000) (granting petition for reconsideration and "rescind[ing]" prior authorization); *Com/Nav Marine, Inc.*, 2 FCC Rcd 2144, 2145 (Priv.Rad.Bur. 1987) (staff reinstated application "to restore the *status quo ante*"); *Speidel Broadcasting Corp. of Ohio*, 1 Rad.Reg. (P&F) 2d 355, 356 (1963) (in denying petition for stay due to lack of irreparable harm, Commission noted that authorization to competitor to construct radio station would "be nullified" if petitioner succeeded in its request for reconsideration). For similar reasons, Vitelco's reliance on the Commission's decision in *Stale or Moot Docketed Proceedings*, 19 FCC Rcd 2527, 2531 (2004), is misplaced. In that decision, the Commission held that the 30-day time limit for *sua sponte* reconsideration under section 1.108 did not apply to bar the staff from issuing an *erratum* order to reinstate a proceeding that had been closed inadvertently due to a clerical error. The general comments in that order about "set[ting] aside" an action under section 1.108 are consistent with the Commission's practice of explicitly stating that it is vacating a prior decision when it intends to do so.

under section 1.108.[26] Nor did the *Reconsideration Order* contain other language indicating that "it was intended to have such retroactive effect." *Id.* (JA 424). For example, the *Reconsideration Order* did not use the phrase "*nunc pro tunc*," as the Commission usually does, to signify that it is acting to restore the legal *status quo ante*.[27]

The Commission interpreted its staff's decisions as follows. In the *Suspension Order*, the staff "began a hearing" concerning the lawfulness of Vitelco's tariff. *Order* at para. 32 (JA 423). In the *Reconsideration Order*, the staff "decided not to investigate" Vitelco's rates further on the basis of post-suspension information, but did not complete and conclude the hearing or adjudge the lawfulness of Vitelco's rates because the staff lacked authority to issue such an order by virtue of section 5(c). *Id.* The upshot is that the tariff investigation remained open after the staff issued the *Reconsideration Order*. Nor did the full Commission issue an order concluding the

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[26] *See, e.g., Request For Review Of The Decision Of The Universal Service Administrator By Portsmouth School Department, Portsmouth, New Hampshire*, Order on Reconsideration, 17 FCC Rcd 24372, 24373, para. 4 (WCB/T.A.P.Div. 2002) (pursuant to section 1.108, "we hereby reconsider and vacate, on our own motion"); *Univision Partnership of New Jersey v. Comcast Cablevision of Danbury, Inc.,* Order on Reconsideration, 17 FCC Rcd 18327 (MB/Pol.Div. 2002) (rescinding and vacating part of order under section 1.108); *Leap Wireless International, Inc. and Nedelco, Inc. for Assignment of PCS Licenses for Stations WPOK584, WPOK593,* 15 FCC Rcd 25594 (WTB/C.W.Div. 2000) (rescinding grant of authorization to transfer licenses and vacating part of order under section 1.108).

[27] *See*, *e.g*., *Applications of: Michael Reed et al*., 18 FCC Rcd 14934 (2003) (reinstating licenses *nunc pro tunc*); *Sandwich Isles Communications, Inc*., Order, DA 05-1355, 2005 WL 1147760 (Wireline Comp. Bur. May 16, 2005) (granting rule waiver *nunc pro tunc*); *Mobile Satellite Ventures Subsidiary, Inc*., 19 FCC Rcd 18133 (IB/Sat.Div. 2004) (reinstating license amendment *nunc pro tunc*); *Savannah College of Art and Design*, 18 FCC Rcd 26345 (2003), *aff'd*, *Savannah College of Art and Design v. FCC*, 115 Fed.Appx. 444, 2004 WL 2980652 (D.C. Cir. Dec. 22, 2004) (FCC rule did not require Commission to give *nunc pro tunc* effect to a declaration of forteiture of construction permits); *see also Sierra Club v. Whitman,* 285 F.3d 63, 67 (D.C. Cir. 2002) ("*Nunc pro tunc*" is a fancy phrase for backdating … [and] is an ancient tool of equity designed to give retroactive effect to the order of a court.").

investigation. As a consequence, Vitelco's rates remained subject to investigation after the *Reconsideration Order* and were "legal," but never were adjudged lawful or "deemed lawful."

Having persuaded the staff not to proceed with the investigation, Vitelco evidently elected not to pursue the matter further. Vitelco did not ask the full Commission to issue an order ruling on the lawfulness of its rates; instead, Vitelco continued to charge its "legal" (but not "lawful") rates. In doing so, it assumed the risk that a customer might file a complaint challenging those rates.[28] When AT&T did just that, the Commission discharged its duty to adjudicate the complaint and ruled that Vitelco's rates were unlawful and thus Vitelco was liable to AT&T for damages.

The *Order*, which adjudicated the lawfulness of Vitelco's rates at the full Commission level in the section 208 context, did not specifically conclude the tariff investigation that the staff had begun under section 204. But whether that section 204 investigation was effectively concluded by the *Order*, or rendered moot by the *Order*, is not presented or material here. The important point is that the Commission has now – for the first time – ruled on the lawfulness of Vitelco's 1997 rates. There never was any decision concluding the tariff investigation that would conflict with the Commission's determination of unlawfulness in the *Order*.

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[28] Moreover, as this Court repeatedly has recognized, when Vitelco's interim earnings reports for 1997 indicated a trend toward overearnings, Vitelco could have filed revised rates for 1998 that were designed to ensure that its earnings over the two-year monitoring period did not exceed its maximum allowable rate of return. *See MCI*, 59 F.3d at 1417; *Virgin Islands*, 989 F.3d at 1237-38; *ACS of Anchorage*, 290 F.3d at 407. Instead, Vitelco filed rates for 1998 that exacerbated the problem.

C. Vitelco's Accusations of Misconduct Are Unfounded

Vitelco accuses the Commission (Br. at 35-36) of engaging in a scheme to "gut" section 204(a)(3) and condemn carriers to "regulatory purgatory." Similarly, intervenors (Int. Br. at 1) characterize the *Order* and "a practice of [the] Wireline Competition Bureau" as "subverting" the statute. The tariff provisions of the Communications Act represent a balance between carrier and customer interests. *See*, *e.g., MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 338-40 (D.C. Cir. 1980) (tariff provisions represent careful accommodation of competing interests); *Am. Tel. and Tel. Co. v. FCC*, 487 F.2d 864, 873-74 (2nd Cir. 1973) (same). Thus, although carriers such as Vitelco may reasonably desire predictability and certainty, so too may customers such as AT&T. A customer, for example, is entitled to rely on language of the statute indicating that when the Commission "takes action" under section 204(a)(1) before a streamlined tariff takes effect, thereby foreclosing "deemed lawful" status, the customer may thereafter seek damages under section 208. Likewise, although the Commission surely is accountable for its actions under the Act, so too Vitelco must be accountable for failing to submit sufficient information to show that its proposed streamlined tariff did not raise a significant question of lawfulness. And under the Act, Vitelco must be accountable to customers when it fails to charge just and reasonable rates, such as when it violates an FCC-prescribed maximum allowable rate of return. Contrary to Vitelco's position, the Commission's *Order* does not undermine clearly expressed congressional values running solely to LECs; rather, the *Order* achieves a reasonable balance between competing carrier and customer interests.[29]

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[29] As discussed above at p. 7, there is no legislative history of the 1996 Act that supports Vitelco's assertion that section 204(a)(3) was added to the Act solely in order to provide LECs certainty.

Vitelco raises the specter that the staff might in the future suspend and investigate all tariffs filed under section 204(a)(3) and then reconsider its decisions as to all such tariffs, thereby preventing "deemed lawful" status from attaching to *any* tariff. That postulation is misplaced. The FCC staff no longer employs the procedure it followed in this case.[30] All decisions terminating tariff investigations are now issued by the full Commission – even when an investigation is rendered moot by the fact that a carrier has withdrawn a suspended tariff. *See, e.g., Ameritech Operating Cos. Tariff FCC No. 2, et al.,* Order, FCC 05-118 (rel. May 27, 2005) at para. 2 & n.6 (terminating investigation on mootness grounds and noting that carrier filed new tariff revisions that took effect under section 204(a)(3) without suspension or investigation). Thus, there is no longer any factual basis for Vitelco's suggestion that the availability of "deemed lawful" status under section 204(a)(3) might become subject to the staff's "whim."

[30] The staff last employed this procedure in July 2004. *See July 1, 2004 Annual Access Charge Tariff Filings*, 19 FCC Rcd 14616 (WCB/Pricing Div. 2004).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

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June 2, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VIRGIN ISLANDS TELEPHONE CORPORATION, PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	))))))))))	NO. 04-1352

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 11817 words.

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July 21, 2005

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