

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

_____)	
1993 Annual Access Tariff Filings)	
Phase I)	
)	
1994 Annual Access Tariff Filings)	
)	
AT&T Communications Tariff F.C.C.)	
Nos. 1 and 2, Transmittal Nos. 5460,)	CC Docket Nos. 93-193, 94-65, 94-157
5461, 5462, and 5464)	
Phase III)	
)	
BellAtlantic Telephone Companies Tariff)	
F.C.C. NO. 1, Transmittal No. 690)	
)	
NYNEX Telephone Companies Tariff)	
F.C.C. No. 1, Transmittal No. 328)	
_____)	

**OPPOSITION OF WORLDCOM, INC. AND AT&T CORP.
TO VERIZON'S PETITION FOR RECONSIDERATION**

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Pursuant to 47 C.F.R. § 1.106, WorldCom, Inc. (“WorldCom”) and AT&T Corp. (“AT&T”) respectfully submit this opposition to Verizon’s Petition for Reconsideration (“Petition”).

INTRODUCTION AND SUMMARY

The Petition is the latest ploy in a near decade long campaign by Verizon and other incumbent local exchange carriers (“LECs”) to evade review of massive and patently unlawful rate hikes. In the early 1990s, these LECs concocted a variety of schemes to use paper accounting changes that had no cash flow or other economic impact on them as a basis to raise price-capped interstate access charges by hundreds of millions of dollars. Because the LECs have no plausible substantive defense of these rate increases – the Commission has already rejected the arguments that the LECs advanced in support of charging ratepayers for such

phantom “costs” – they have consistently attempted to bog down these tariff investigations in a procedural quagmire. And now that the Commission is finally poised to address the merits of claims that, by statute, were required to be decided years ago, Verizon contends that a conceded error bars the Commission from ever addressing those claims or holding the LECs accountable for their unlawful tariffs.

Verizon seeks reconsideration of the Order, Notice and Erratum in *Matter of Stale or Moot Docketed Proceedings*, DA 03-488 (rel. February 25, 2003) (“*Erratum*”), which recognized that CC Docket No. 94-157 had been erroneously included in a list of over one hundred dockets “deemed terminated” on the ground that listed dockets contained no “outstanding issues” and that “no further action by the Commission [was] required.” *See Matter of Stale or Moot Docketed Proceedings*, 17 FCC Rcd. 1199 (2002) (“*Termination Order*”). As Verizon admits, all of the “outstanding issues” in Docket No. 94-157 were very much alive, no “final order” had been issued, and “further action” by the Commission was unquestionably required – indeed, statutorily required, *see* 47 U.S.C. § 204. Although the Commission obviously never intended to terminate this proceeding, Verizon contends that the Commission no longer has any authority to correct that error because the time for reconsideration and judicial review of the *Termination Order* has expired. In Verizon’s view, the Commission’s erroneous listing of Docket No. 94-157 in the *Termination Order* has conferred an extraordinary and irrevocable windfall on Verizon – tariff suspension and accounting orders have been magically (and silently) revoked, rates that the Commission previously identified as raising substantial questions of lawfulness have (silently) been deemed lawful, and ratepayers are now forever barred from obtaining a Commission ruling on the merits.

The Petition is entirely without merit. It is well settled, indeed “axiomatic,” that agencies, like courts, have inherent power to “correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake.” *See American Trucking Ass’n v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958). The Commission has routinely recognized and exercised such inherent error-correction authority as part of its statutorily-delegated authority to regulate its proceedings. *See* 47 U.S.C. §§ 4(i), 151. Indeed, the Commission has already reinstated two other proceedings that were erroneously terminated in the *Termination Order* at issue here, and the D.C. Circuit has upheld the Commission’s authority to do so beyond the time period provided for reconsideration. The *Erratum* is plainly an exercise in error correction: The *Termination Order* by its terms applied only to proceedings without “outstanding issues” – a description wholly inapplicable to Docket 94-157. Moreover, the order identified as resolving all outstanding issues in Docket 94-157 expressly stated that the tariff investigations were “ongoing” and, indeed, broadened the investigations by suspending an additional tariff. The *Erratum* is a routine and appropriate exercise of the Commission’s indisputable, inherent error-correction power.

None of Verizon’s contrary arguments can endure scrutiny. The *Erratum* is not a “reconsideration” of the merits of the *Termination Order*, and thus it is not required to be treated within the procedural framework for substantive reconsideration, as the Commission and the courts have recognized. The Commission’s inherent error-correction authority is not governed by the Federal Rules of Civil Procedure (which, by their terms, apply only to federal district courts) and thus is not limited by either the terms or the judicial construction of those Rules. In any event, if the Commission were so limited, the error corrected in the *Erratum* falls comfortably in the category of “clerical mistakes” that may be corrected at any time under Rule

60(a). Finally, Verizon lacks any legitimate reliance interest in the erroneous, apparent termination of the OPEB investigation; the *Termination Order* plainly did not apply to the investigation and *a fortiori* did not conclude the investigation or address the lawfulness of the suspended rates. There is no justification for adding the injury of agency error to that already caused by long agency delay.

But even if the Commission did lack authority to correct the clearly erroneous inclusion of Docket 94-157 on the *Termination Order* list of proceedings in which all issues had been finally resolved, the tariff investigations that Verizon seeks to avoid would live on. The investigations were initiated in separate dockets (93-193 and 94-65), and as the Commission's subsequent orders (and even Verizon's own submissions in these dockets) confirm, the separate dockets retained continuing vitality; the Commission treated the tariff investigation issues as having been consolidated in all the dockets. Moreover, a section 204 investigation can be terminated only by an affirmative order – *viz.*, an “order concluding the hearing,” and either affirmatively finding the rates lawful or unlawful or revoking the tariff suspension order, 47 U.S.C. § 204(b) – and the *Termination Order* did not purport to do either. As the plain terms of the *Termination Order* make clear, that order did not even constitute “further action” in any of the listed proceedings.

In short, the Commission never intended to, and in fact never did, terminate the tariff investigations at issue here. The Petition should be denied.

BACKGROUND

In 1992 tariff filings, Verizon's predecessors and several other incumbent LECs sought massive rate increases to reflect changed accounting for “other postretirement employee benefits” (“OPEBs”). Notwithstanding that the accounting change was a purely paper change

that had no cash flow or other economic impact, the LECs contended that they were entitled to “exogenous cost” increases to their price cap indices (“PCIs”). The Commission suspended the rates, imposed accounting orders, and ordered investigations. The Commission found the LECs’ proposed rate increases unlawful, *Treatment of Local Exchange Carrier Tariffs Implementing Statement of Fin. Accounting Standards*, Memorandum Opinion and Order, 8 FCC Rcd 1024 (1993), but the D.C. Circuit, unpersuaded by the Commission’s reasoning, remanded the matter to the Commission. *Southwestern Bell Telephone Company v. FCC*, 28 F.3d 165, 169-70 (D.C. Cir. 1994).

Verizon’s predecessors and others renewed their OPEB claims in 1994 tariff filings (and had also done so in 1993 tariff filings). These tariffs too were suspended; accounting orders were imposed; and the tariffs were set for investigation.¹ On June 30, 1995, the Commission issued an Order Designating Issues for Investigation in all of these outstanding OPEB-related tariff investigations.² The Commission explained that it was “designating one set of issues for all three investigations.”³ It noted that this “combined investigation” sought to determine whether the common assumptions underlying all of the tariffs at issue were “just and reasonable, in

¹ *1993 Annual Access Tariff Filings*, CC Docket No. 93-193, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, 8 FCC Rcd. 4960 (1993); *1994 Annual Access Tariff Filings*, CC Docket No. 94-65, Memorandum Opinion and Order Suspending Rates, 9 FCC Rcd. 3519 (1994); *Bell Atlantic Telephone Companies Tariff FCC No. 1, Transmittal 690*, *NYNEX Telephone Companies Tariff FCC No. 1, Transmittal No. 328*, *Pacific Bell Tariff FCC No. 128, Transmittal No. 1738*, *US West Communications, Transmittal No. 550*, CC Docket No. 94-157, Memorandum Opinion and Order, 10 FCC Rcd 1594 (1994).

² See *1993 Annual Access Tariff Filings*, *1994 Annual Access Tariff Filings*, *AT&T Communications Tariff FCC Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464*, *Bell Atlantic Telephone Companies Tariff FCC No. 1, Transmittal No. 690*, Order Designating Issues for Investigation, 10 FCC Rcd 11804 (1995) (“*1995 OPEB Investigation Order*”).

³ *Id.* ¶ 14.

accordance with the Commission's rules and the public interest."⁴ The Commission stated that "[t]his combined investigation will be conducted as a notice and comment proceeding," and that "CC Docket No. 94-157 will be used as the designation for this investigation."⁵ The ordering clauses stated specifically that the investigation included "matters discussed herein and in the following proceedings," listing Dockets 93-193, 94-65, 94-157, as well as four other matters, but the Commission did not terminate any of those dockets.⁶

Pursuant to the Commission's order, in August and September 1995, Verizon's predecessors and others submitted their direct cases. MCI filed an opposition, and the LECs replied. AT&T had identified legal and other infirmities in the LECs' OPEB-related rate increases in response to the 1993 and 1994 tariffs and did not file additional comments in response to the *1995 OPEB Investigation Order*. All of the parties, including Verizon's predecessors, continued to file in all of the open dockets, and not just Docket 94-157.⁷

The Commission too made clear that Dockets 93-193 and 94-65 had continuing vitality. Most strikingly, in 1996, the Commission added other OPEB-related issues from the LECs' 1996 annual access tariff filings to the consolidated investigations, but the Commission noted that the 1996 filings presented issues "similar to the issue before us in our investigation of *CC Docket 93-193*" – not Docket 94-157.⁸ And, in resolving, on a prospective basis, a subset of OPEB-

⁴ *Id.* ¶ 15.

⁵ *Id.* ¶ 32.

⁶ *Id.* ¶ 38.

⁷ See, e.g., Bell Atlantic Reply (filed September 28, 1995) (listing Dockets 93-193, 94-65, and 94-157); NYNEX Rebuttal (filed September 28, 1995) (same).

⁸ See *1996 Annual Access Tariff Filings: National Exchange Carrier Association Universal Service Fund and Lifeline Assistance Rates; NYNEX Telephone Company Petition to Advance the Effective Date of the 5.3 X-Factor to January 1, 1995*, Transmittal No. 710, Memorandum Opinion and Order, 11 FCC Rcd. 7564, at ¶ 21 (1996) (emphasis added). Verizon does not

related issues in April of 1997, the FCC expressly noted that it was not “address[ing] two sets of issues designated for investigation by the 1993 Annual Access Order or made subject to CC Docket 93-193.”⁹ Each of the subsequent orders issued in the consolidated proceeding contain captions that individually list each of the open dockets.

On January 11, 2002, the Commission issued the *Termination Order*. That two paragraph order terminated more than 100 proceedings. It described those proceedings and its decision to terminate as follows:

We have reviewed the docket proceedings listed in the Appendix, and have determined that the dockets should be terminated. *None of the dockets have any outstanding issues. The matters at issue in these proceedings were resolved by the issuance of final orders that were not subject to judicial review, or if subject to judicial review, were affirmed and the court’s mandate was issued. Therefore, no further action by the Commission is required in the dockets listed in the attached Appendix, and they are hereby deemed terminated. Termination Order at 1 (emphasis supplied).*

This description of the proceedings terminated indisputably does not apply to the ongoing investigation of OPEB-related exogenous cost claims. The issues that were the subject of the OPEB investigation were “outstanding” and certainly had not been “resolved by the issuance of final orders that were not subject to judicial review” or “affirmed”; “further action by the Commission [w]as required.” Moreover, the *Termination Order* did not list Dockets 93-193 or 94-65.

For each terminated docket, the *Termination Order* listed the final Commission order that had purportedly resolved the proceeding. With respect to Docket 94-157, the “final order” listed

appear to be opposing the reinstatement of the OPEB-related investigation arising out of the *1996 Annual Access Tariff Filings*.

⁹ *1993 Annual Access Tariff Filings; GSF Order Compliance Filings; 1994 Annual Access Tariff Filings; In the Matter of 1995 Annual Access Tariff Filings; 1996 Annual Access Tariff Filings, CC Docket 93-193; CC Docket No. 94-65, Memorandum Opinion and Order, 12 FCC Rcd. 6277 at ¶ n. 6 (1997).*

was actually an order suspending a Pacific Bell tariff and setting it for investigation.¹⁰ The order noted that the tariff “raises the same issues that are under investigation in CC Docket No. 94-157, the Commission’s *ongoing* investigation of the exogenous treatment of OPEBs costs,” and the tariff “will be subject to the investigation initiated in CC Docket No. 94-157.”¹¹ In short, the cited order did not constitute a final order in any of the investigations, or indeed, a final order resolving any issues.

On October 23, 2002, AT&T renewed its request for the Commission to act in the pending investigations. See Letter from Patrick H. Merrick, Director, AT&T Federal Government Affairs, to Marlene H. Dortch, Secretary, FCC, CC Dockets 93-193 and 94-157 (filed October 23, 2002). Neither Verizon nor any other party contended that the investigations had terminated.

On February 25, 2003, the Bureau issued the *Erratum*. The *Erratum* sought comment to refresh the record in the combined OPEB tariff investigations, and it also corrected the erroneous statement in the *Termination Order* that Docket 94-157 was among the dockets that had been “resolved by the issuance of final orders” and for which “no further action by the Commission [was] required.” The Bureau explained:

The text of the *Termination Order* states that “none of the [terminated] dockets have any outstanding issues.” Further, the *Termination Order* states that “the matters at issue in these [terminated] proceedings were resolved by the issuance of final orders that were not subject to judicial review.” The appendix of the *Termination Order* explicitly lists CC Docket 94-157 as one of the dockets terminated by that order. Because certain issues in CC Docket 94-157 remain unresolved, we conclude that the inclusion of CC Docket 94-157 in the appendix of the *Termination Order* was an inadvertent technical error, and the Commission

¹⁰ See *Termination Order*, Appendix at 3 (listing “12 FCC Rcd. 18724”); *Pacific Bell Revisions to Tariff F.C.C. No. 128*, Transmittal No. 1911, Order, 12 FCC Rcd. 18724 (1997) (“*Pacific Bell Tariff Order*”).

¹¹ *Pacific Bell Tariff Order* ¶ 3.

never intended to terminate the OPEB tariff investigation in this docket.”
Erratum ¶ 21.

The Bureau also recognized that it had previously taken identical action to reinstate other inadvertently terminated dockets. It observed that in the *Termination Order*, “at least two other dockets with pending issues were terminated.” *Id.* at ¶ 18 n.49 (citing *Termination Order*, 17 FCC Rcd. 4543 (2002)). In an order issued after the time for reconsideration had expired, the Bureau had also “concluded that the termination of [the dockets] was an inadvertent technical error and reinstated [the dockets].” *Id.* The D.C. Circuit subsequently agreed that those dockets should be reinstated. *See AT&T Corp. v. FCC*, No. 02-1084 (July 5, 2002) (per curiam) (unpublished)).

ARGUMENT

Verizon’s claim that the Bureau exceeded its authority by issuing an order that corrected the error in the *Termination Order*, is entirely without merit. The Commission has broad error correction powers that it exercised appropriately in this instance, and Verizon’s arguments to the contrary address limits on powers that the Bureau did not exercise (such as reconsidering a prior order), limits that do not apply to the agency’s actions (such as those contained in the Federal Rules of Civil Procedure), or limits that might apply to facts that do not exist (such as inappropriate interference with Verizon’s substantive rights or interests in repose).

Verizon does not seriously dispute that the Commission has broad powers to order its affairs and processes, including extensive powers to correct errors occurring in the course of its proceedings. Section 4(i) clearly establishes the requisite power when it provides: “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions.” 47

U.S.C. §§ 154(i), 151.¹² The Commission has recognized and routinely exercised this inherent error-correction authority.

In so doing, the Commission relies on the Supreme Court’s teaching that “[i]t is axiomatic” that agencies, like courts, “have the power and *duty* to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake.” *See American Trucking Ass’ns v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958) (*emphasis added*). As the Court stated, “the presence of authority in administrative officers and tribunals to correct [inadvertent] errors has long been recognized – probably so well recognized that little discussion has ensued in the reported cases.” *Id.* (citing *Bell v. Hearne*, 19 How. 252). *See also, e.g., Howard Sobor, Inc. v. ICC*, 628 F.2d 36 (D. C. Cir. 1980) (agency “has the authority to rectify ministerial mistakes made in good faith”); *Chicano Educ. & Manpower Services v. U.S. Dep’t of Labor*, 909 F.2d 1320, 1328 (9th Cir. 1990) (same); *U.S. v. CAB*, 510 F.2d 769, 772-76 (D.C. Cir. 1975) (“liberal relief is the guiding principle of Rule 60” and “regulatory and other boards substituting for trial courts in finding facts have similar broad discretion”); *City of Long Beach v. DOE*, 754 F.2d 379, 387-88 (Temp. Emer. Ct. App. 1985). Here, the Commission plainly acted under a broad grant of authority to conduct and regulate proceedings necessary to the provision of communications services, and thus has inherent authority to correct inadvertent errors.

¹² Verizon incorrectly claims that *Motion Picture Ass’n v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002), limits the scope of section 4(i) in some relevant sense. There, the court endorsed the view that section 4(i) cannot “be read in isolation” as an independent grant of authority over a matter that is otherwise beyond the Commission’s authority, but instead “is more akin to a ‘necessary and proper’ clause” supporting authorized agency activities. Here, the *Order* directly buttresses the Commission’s unquestioned authority to review tariffs, *see* sections 204-05, rather than seeks to address an unauthorized activity such as the regulation of video programming content at issue in *MPAA v. FCC*. Moreover, as noted above, other sections of the Communications Act, too, unquestionably delegate to the Commission authority to govern and conduct the proceedings before it.

Verizon also does not seriously dispute that the Errata was in the nature of error correction. Nor could it. The *Termination Order* – which purported to terminate more than 100 proceedings – explicitly described the types of proceedings that the Commission intended to terminate and the justification for the terminations in terms that self-evidently have no application to the ongoing OPEB-related investigation:

We have reviewed the docket proceedings listed in the Appendix, and have determined that the dockets should be terminated. *None of the dockets have any outstanding issues. The matters at issue in these proceedings were resolved by the issuance of final orders that were not subject to judicial review, or if subject to judicial review, were affirmed and the court's mandate was issued. Therefore, no further action by the Commission is required in the dockets listed in the attached Appendix, and they are hereby deemed terminated. Termination Order ¶ 1.*

The OPEB-related investigations do not remotely match the *Termination Order's* description of the types of proceedings being terminated. The tariff investigation issues remained wholly undecided and not “resolved” – the precise opposite of the order’s explanation of all proceedings properly included within the termination. The OPEB-related investigations were also “outstanding,” and neither “subject to judicial review” nor governed by judicial decision – and thus not encompassed within the terms of the *Termination Order*. The *Erratum* quite adequately set forth the facts establishing the Commission’s earlier error and expressly acted to correct it. *See Erratum ¶¶ 19-21.*¹³

Verizon has no direct response to this argument, and thus presents four indirect arguments that mistake the nature of the order or the facts surrounding it. None of these claims can withstand review.

¹³ Even if there were any doubt on this point, the Commission has an exceptionally broad power to interpret the meaning and effect of its own prior orders, and courts accord tremendous deference to those determinations. *See, e.g., Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991); *American Train Dispatchers Ass’n v. ICC*, 54 F.3d 842, 848 (D.C. Cir. 1995).

1. Verizon mischaracterizes the *Erratum* as a “reconsideration” of the *Termination Order* and claims that the Bureau did not issue the *Erratum* within the time period that the Commission’s rules establish for *sua sponte* reconsideration of its orders. This sleight of terms poses no barrier to the Commission’s action. As noted, it is the Commission, not Verizon, that has broad authority and discretion to characterize its own prior order. In addition, an ample factual basis exists to support characterizing the order as an exercise in error-correction rather than as a reconsideration order. The *Erratum* is styled “Order, Notice and Erratum” and plainly indicates that the Bureau was acting to correct the inadvertent error of including in the *Termination Order*’s list of 119 “resolved” matters one matter that, in fact, was unresolved. *See Erratum* ¶¶ 3, 19-21. The Bureau was not in any sense readdressing any substantive determination addressed in the *Termination Order* but was, for the reasons amply identified at Paragraphs 19-21 of its *Erratum*, simply identifying and correcting the earlier quite clear error in designating Docket 94-157 as one in which all issues had been finally resolved.

If there were any doubt regarding this point, the D.C. Circuit has already resolved it against Verizon’s position. As described in the *Erratum*, “at least two other dockets with pending issues were terminated” in the *Termination Order* at issue here. *See id.* at ¶ 18 n.49 (*citing Termination Order*). In those dockets, as is true here, after the time for the reconsideration under the Commission’s rule had expired, the Commission “concluded that the termination of [the dockets] was an inadvertent, technical error and reinstated [the dockets].” *Id.* AT&T appealed that decision to the United States Court of Appeals for the D.C. Circuit, arguing that a pending petition for review precluded the Commission from issuing an order reinstating the dockets and that the Commission lacked power to reinstate the dockets based on a technical or inadvertent error after the time for reconsideration had expired. The D.C. Circuit agreed with

AT&T that, in light of the pending petition for review, the Commission should have requested the court's permission before acting. But, critically here, the D.C. Circuit granted that consent on its own motion and left in place the Commission's reinstatement of the dockets erroneously designated in the *Termination Order* – an order it could not have entered if it had accepted the argument that the Commission lacked any authority to reinstate a docket terminated inadvertently after the time for reconsideration had passed. Indeed, Judge Sentelle *dissented* on this very ground; the note to the order states that he would have ruled in AT&T's favor “as the FCC exceeded its jurisdiction by issuing the March 12, 2002 Erratum.” *See AT&T Corp. v. FCC*, No. 02-1084 (per curiam) (July 5, 2002) (unpublished).

2. Verizon next asserts that the Commission's ability to act to correct errors is constrained by Federal Rule of Civil Procedure 60(b). In particular, Verizon argues that because the error correction at issue here is not a “clerical error,” the Commission is bound by the one year limit that Rule 60(b) applies to correction of “mistake[s].” Verizon Pet. at 8-9. This argument contains multiple flaws. First, Rule 60 expressly does not apply to the Commission. Although courts have analogized the federal district court's express error-correction authority under the federal rules to agencies' inherent error-correction powers, the Federal Rules of Civil Procedure by their very terms apply to courts, not agencies. *See Fed. R. Civ. P. 1* (“These rules govern the procedure *in the United States district courts*”). Indeed, given that these rules were drafted by the Supreme Court and only apply to the district courts, expressly applying the rules to independent agencies or unduly limiting agency action according to the specific limits applicable only to courts would present unusual and significant constitutional issues.

Further, the courts that have employed general “analogies” derived from Rule 60 in the agency context have, in fact, upheld agency efforts to correct errors even more than one year

following the initial error. *See, e.g., Howard Sober, Inc.*, 628 F.2d at 38-39 (certificate of public convenience modified more than five years after agency error); *City of Long Beach*, 754 F.2d at 387-88 (granting refund based on error committed in order issued more than three years earlier). Thus, while courts have recognized that, like courts, agencies have the ability to correct errors, they have, for obvious reasons, never held that agencies are rigidly bound by the one year deadline that is imposed only on federal district courts for correction of certain classes of mistakes under Rule 60(b).

Finally, even if the Federal Rules of Civil Procedure did limit Commission action, Verizon concedes, as it must, that Rule 60(a) allows even a “district court to correct a ‘clerical mistake’ ‘at any time.’” Verizon Pet. at 8. The error at issue here – inclusion of Docket 94-157 in the appended list of “resolved” matters – fits comfortably within this definition and therefore the Commission would have full authority to correct this “clerical” error at any time even under the Rule 60(a) standard. Indeed, the an error of this type – erroneously listing a proceeding that clearly does not fit the description of listed proceedings – is a quintessential “clerical” error.

Verizon’s contrary argument that the error correction at issue here is akin to those governed by Rule 60(b), rather than 60(a), is plainly wrong. According to Verizon, the authority to correct clerical errors pursuant to Rule 60(a) does not apply when that correction affects a party’s “substantive” rights. The substantive/procedural distinction drawn by Verizon has no applicability to Rule 60; error correction under Rule 60(a) often affects the substantive rights of parties. As a leading treatise explains:

Subdivision (a) deals solely with the correction of errors that properly may be described as clerical or as arising from oversight or omission. Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b). . . . Thus, a motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say some thing other than what originally was pronounced. Wright, Miller & Cooper, at § 2854.

For these reasons, while Rule 60(a) may not be used to affect substantive rights in the sense that it may not *alter* the substance of an actual judgment erroneously recorded, error correction under Rule 60(a) often affects substantive rights. *See id.* at 240-248 (e.g., adding interest that is a matter of right, adding costs, correcting jury verdict as to amount of money jury intended to award, correcting erroneous apportionment of damages, adding provision judge neglected to include).¹⁴ Here, it is evident that the inclusion of CC Docket 94-157 was a clerical error within the meaning of Rule 60(a), because the *Termination Order* by its terms did not address and was not intended to address dockets with ongoing or open matters – as Docket 94-157 at all times clearly was. Thus, even applying the Rule 60(a) analogy, the Commission was fully authorized to reinstate the docket.

3. Verizon nonetheless claims that “[c]onsiderations of finality and repose are of special significance here,” because the long period that has elapsed since the investigation began exacerbates its difficulties in responding to the investigation and gives rise to prejudice. Petition at 11. At the outset, it must be recognized that any “passage of time” problems here are a product of the Commission’s failure to resolve the tariff investigations, as it was required by statute to do years before the *Termination Order* even issued, 47 U.S.C. § 204(a)(2), and not by the comparatively short period between the *Termination Order* and the error-correcting *Order*. It would therefore be profoundly ironic for the Commission to cite delay or finality as a reason not to correct its conceded error in including Docket 94-157 in the *Termination Order* list.

¹⁴ This point is illustrated by *In re American Precision Vibrator Co.*, 863 F.2d 428, 430 (5th Cir. 1989), cited by Verizon, which states that clerical mistakes do not include errors “that involve judgment or discretion, especially when altering the error affects the substance of the judgment.” Here, the error was not a matter of judgment or discretion; rather, a staff member that had been directed to engage in the mechanical exercise of listing dockets that had been resolved by final

In all events, there are several additional reasons that Verizon is wrong. First, Verizon cannot plausibly assert that it (or its predecessors) relied on the *Termination Order*. The language of the *Termination Order* plainly did not apply to the OPEB tariff investigations; the *Termination Order* did not recite all applicable dockets; it did not conclude the investigations or address the lawfulness of the suspended rates; and, the order erroneously cited in the *Termination Order* lists as finally resolving the many outstanding issues in 94-157 was itself a suspension order regarding an *additional* tariff to be investigated (and that, accordingly, did not finally resolve anything, much less the issues under investigation in the suspended tariffs). Second, Verizon's defense of its characterization of 1991 and 1992 OPEB costs as exogenous costs beyond its control, notwithstanding that it was under no legal obligation to recognize OPEB costs until 1993, is legal, not factual, as Verizon made clear in its 1995 direct case.¹⁵ Third, any burden that the passage of time places on Verizon will fall equally on AT&T and others who oppose the treatment of OPEB-related costs by Verizon's predecessors.

Thus, although AT&T agrees with Verizon that these investigations have been excessively delayed and that the Commission's handling of the matters does not comply with the statutory timetable for completing tariff investigations, Verizon will suffer no material prejudice if the investigations now move forward. Agency delay in this case should not be compounded by agency error, as Verizon suggests. The Communications Act requires that there should be a determination whether the tariffs at issue are lawful.

4. Verizon's final claim – that sections 204 and 205 somehow bar reinstatement of the investigation – is equally meritless. *See* Petition at 5-8. Tellingly, Verizon does not point to

commission order simply goofed. And in issuing the *Termination Order* the Commission simply signed off on a list it assumed had been compiled correctly.

any language in either Section 204 or 205 that would prohibit the Commission from exercising its general error-correction authority. Rather, Verizon’s argument is that the mere existence of Section 205 implies that the Commission could not reinstate a tariff investigation once mistakenly terminated.

That is nonsense. Verizon’s only support for that proposition, *American Methyl Corp. v. EPA*, 749 F.2d 826, 834-35 (D.C. Cir. 1984), is not remotely on point. *American Methyl* involved provisions of the Clean Air Act governing regulation of fuels and fuel additives. The court held that, where Congress had expressly provided a *specific avenue* for removing a fuel or fuel additive from commerce, the court would not read a different provision as implying the power to accomplish the same thing by other means (there, revocation of a waiver). This case presents the opposite situation. The Commission has full authority to correct errors “*nunc pro tunc*.”¹⁶ Indeed, the D.C. Circuit has repeatedly held that where an agency makes an “error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made,”¹⁷ – *i.e.*, to make its actions “retroactive.”¹⁸ Thus, section 204 and section 205 are simply irrelevant here. By correcting the error, the Commission has made clear that the docket was *not* terminated, that the Termination Order never applied to Docket 94-157, and that investigation and suspensions it began in 1993 are still ongoing. Accordingly, there is no need for the Commission to initiate a new proceeding under sections 204 and 205, because there is

¹⁵ Verizon asserts that it may be required to provide new studies or information, Pet. at 2, but it is unclear why this would be so, and Verizon provides no explanation.

¹⁶ This is analogous to the authority of district courts to issue *nunc pro tunc* orders to correct errors retroactively. See, e.g., *TransAmerica Ins. Co. v. South*, 975 F.2d 321, 325 (7th Cir. 1992).

¹⁷ *Public Utils. Comm’n of the State of California v. FERC*, 988 F.2d 154, 168 (D.C.Cir. 1993) see also, e.g., *Panhandle Eastern Pipe Line Co. v. FERC*, 907 F.2d 185, 189 (D.C.Cir. 1990); *Office of Consumers’ Counsel, State of Ohio v. FERC*, 826 F.2d 1136, 1139 (D.C.Cir. 1987) (per curiam).

currently an active proceeding in which all of the suspension and related requirements of section 204 have already been met.

In any event, the tariff investigations at issue plainly live on in dockets that the Commission did not list in the *Termination Order*. The Commission initiated the OPEB investigations in separate dockets – Dockets 93-193, 94-65, and 94-157. Although it stated that it was consolidating the investigations in Docket 94-157, it continued to list all of the individual docket numbers in subsequent orders connected with the consolidated investigations. Indeed, when an OPEB-related issue arose in connection with the *1996 Annual Access Filing*, the Commission consolidated the investigation with Docket 93-193, not 94-157.

Thus, notwithstanding the initial, nominal consolidation of all issues in Docket 94-157, the Commission in practice has treated all of the issues as having been consolidated in all of the dockets. In the *Termination Order*, the Commission terminated only Docket 94-157; it did not terminate any of the other dockets (93-193, 94-65, or the investigation connected with the 1996 tariff filings). In these circumstances, the fact that the Commission did not terminate the remaining consolidated dockets means that all of the issues in this “combined investigation” remain live.

Even if that were not the case, the *Termination Order* is not an “order concluding the hearing” within the meaning of Section 204(b). 47 U.S.C. § 204(b). There are only three ways to terminate a tariff investigation under section 204: (1) an affirmative finding by the Commission that the tariff at issue is lawful; (2) an affirmative finding by the Commission that the tariff is unlawful; or (3) an affirmative finding by the Commission that it has reconsidered the grounds upon which the suspension order was entered and that the suspension order is revoked.

¹⁸ *Exxon Co., USA v. FERC*, 182 F.3d 30, at 49 (D.C. Cir. 1999).

Each of these decisions requires a substantive decision on the part of the Commission, and the Commission always expressly cites Section 204 as the authority upon which it is concluding a hearing under that section.

The *Termination Order* does not meet any of these requirements, nor does it purport to do so. The Commission expressly stated that the *Termination Order* was not a substantive order of any type. As the plain terms of the *Termination Order* make clear, the Commission's intent was to terminate dockets in which there were not "any outstanding issues," and which had *already* been resolved by the "issuance of final orders not subject to judicial review, or if subject to judicial review, were affirmed and the court's mandate was issued," and for which "no further action by the Commission [was] required." Contrary to its plain terms, Verizon interprets the *Termination Order* as a substantive decision revoking the suspension order – *i.e.*, Verizon interprets the *Termination Order* as the "further action" the Commission expressly disavowed. Because the *Termination Order* makes clear on its face that the order is does not constitute "further action" in any of the listed dockets, the order cannot be interpreted as a revocation of the suspension order. This is further confirmed by the fact that the Commission cited only sections 4(i) and 4(j) as authority for its actions in the *Termination Order*. The fact that the Commission did not cite section 204 underscores that the *Termination Order* was not intended to be, and did not even purport to be, a substantive "order concluding a hearing" within the meaning of section 204(b).¹⁹

¹⁹ Even if the *Termination Order* could, contrary to its express terms, be construed as an order concluding the pending tariff hearings, it is far from clear what the effect of that order would be. Once the Commission suspends a tariff under Section 204 and institutes an investigation, the presumption is that the rates are *unlawful*. As Section 204 expressly provides, "the burden of proof to show that the . . . charge . . . is just and reasonable shall be upon the carrier." 47 U.S.C. § 204(a). Once the Commission has suspended a tariff – which requires a formal finding by the Commission with "a statement of its reasons" – and once the statutory burden of proof is placed

But all of this simply confirms that the *Termination Order* does not constitute an “order concluding the hearing” in the Verizon tariff investigation within the meaning of Section 204. The Verizon tariff investigation, including the suspension order and accounting, remain live, and Verizon’s latest attempt to avoid substantive review of its unlawful OPEB-related rate increases must be rejected.

on Verizon to prove that its rates are in fact lawful, mere discontinuance of the proceeding is not sufficient to overturn the Commission’s findings that there are substantial questions as to the lawfulness of Verizon’s rates.

CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's Petition for Reconsideration of the *Erratum*.

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April 7, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2003, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: March 7, 2003
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/s/ Peter M. Andros

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