

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

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

COMMENTS OF VERIZON

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I. Introduction and Summary

As the Commission and the D.C. Circuit have held, the Commission's rules for reporting earnings under price caps did not address whether sharing or lower formula adjustment revenues should be "added-back" to a carrier's reported revenues.² Until the Commission adopted an add-back requirement in 1995, therefore, add-back was neither required nor prohibited. Different carriers took different approaches; some applied add-back while others did not. Neither approach was guaranteed to maximize or minimize a carrier's revenues, however, and there is no basis for the Commission to decide at this late date that the carriers should have chosen one approach over another.

¹ The Verizon telephone companies ("Verizon") are the affiliated local telephone companies of Verizon Communications Inc. These companies are listed in Attachment A.

² In these comments, Verizon uses the term "add-back" to refer both to the procedure of *adding* the amount of sharing to the revenues in the period in which the exogenous cost reduction for sharing is applied as well as the procedure of *removing* the amount of the lower formula adjustment from the revenues in the period in which the exogenous cost increase for the lower formula adjustment is recovered.

II. Background

When the Commission adopted price caps for local exchange carriers in October 1990, it included both “sharing” and “lower formula adjustment” mechanisms in its rules. *See Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990) (“*LEC Price Cap Order*”). The sharing mechanism required a carrier earning above a certain rate of return to “share” a portion of those earnings through exogenous cost reductions in the following year.³ The “lower formula adjustment” permitted a carrier earning less than 10.25 percent in one year to include an exogenous cost increase in the following year in the amount that would have been necessary to achieve a 10.25 percent rate of return in the base year. Since both the sharing/lower formula adjustment and the prior rate-of-return enforcement rules cause earnings in one period to change rates in a subsequent period, the issue arose as to how to take those rate changes into account in calculating revenues and reporting the rate of return in the subsequent period.

Under rate of return, the Commission had an explicit rule that required the carriers to “add-back” the amount of any refund due to overearnings in the period in which the refund was implemented so that the revenues for that period would provide a clear picture of current earnings for that enforcement period. *See Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements*, 1 FCC Rcd 952, ¶ 43 (1986). Likewise, the form that carriers used under rate of return to report their earnings, known

³ Under the price rules at that time, a carrier selecting the 3.3 percent productivity, or “X-factor,” could retain all of its earnings up to 12.25 percent, but it was required to “share,” or return through a one-time exogenous cost reduction in the next annual filing, one half of its earnings between 12.25 percent and 16.25 percent, and all of its earnings in excess of 16.25 percent. *See LEC Price Cap Order*, ¶¶ 161-65. A carrier selecting the higher 4.3 percent X-factor could retain all of its earnings up to 13.25 percent, but was required to share half of all earnings up to 17.25 percent, and all of its earnings in excess of 17.25 percent.

as Form 492, required carriers to itemize the refund amount and to add that amount to the carrier's revenues in calculating the rate of return. *See id.*, ¶ 43 & Appendix C.

When the Commission adopted price caps for the local exchange carriers, however, it did not specify how carriers should take into account any revenue reductions or increases due to sharing or the lower formula adjustment in reporting their earnings. The Commission also did not immediately adopt a new form for the carriers to use in reporting their earnings, so the carriers initially used the same Form 492 that they had used under rate of return.⁴ On January 12, 1993, the Commission adopted a new form, known as Form 492A, for price cap carriers to use to report their earnings. *See Public Information Collection Requirement Submitted to the Office of Management and Budget for Review*, Public Notice 31305, 1993 LEXIS 190 (rel. Jan. 12, 1993). The Commission stated that this form would provide “a simplified and more relevant set of information” for price cap carriers. But neither the form nor the order adopting it provided any guidance as to whether the carriers should “add-back” sharing or lower formula adjustment amounts.

Since the issue was not addressed, the local exchange carriers followed different procedures in filing their Form 492A reports on March 31, 1993 for calendar year 1992. The former NYNEX companies and SNET continued to follow the add-back principle by removing from their 1992 rate of return calculations the lower formula adjustment revenues they received in

⁴ *See, e.g., Form 492 Reports of New York Telephone and New England Telephone* (filed Apr. 20, 1992). In its order on reconsideration of the *LEC Price Cap Order*, the Commission rescinded the rule requiring the price cap carriers to include any carry-over refunds from the rate of return enforcement regime to the next annual price cap filing. *See Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration*, 6 FCC Rcd 2637, ¶¶ 119-20 (1991).

1992 as a result of earning less than the 10.25 percent lower limit in 1991.⁵ The other local exchange carriers reported actual revenues received for 1992 without add-back.

The 1992 rate of return reports were the basis for the sharing or lower formula adjustments that the local exchange carriers included in their 1993 annual access tariff filings. The Common Carrier Bureau suspended and investigated the tariffs of all of the price cap carriers on this issue, noting that the Commission had just initiated a rulemaking proceeding to “clarify the LEC price cap rules to require that price cap LECs compute their rates of return for the price cap sharing and low-end adjustment mechanisms in basically the same manner as rate of return carriers do in determining overearnings.” *1993 Annual Access Tariff Filings*, 8 FCC Rcd 4960, ¶ 32 (1993), *citing* *Price Cap Regulation for Local Exchange Carriers Rate of Return Sharing and Lower Formula Adjustment, Notice of Proposed Rulemaking*, 8 FCC Rcd 4415 (1993) (“*Add-back NPRM*”). Specifically, the Commission’s proposal included an “add back” requirement to take into account the effect of both rate increases and reductions due to sharing or lower formula adjustments. *See id.* The Commission expressly “recognize[d] that this issue was neither expressly discussed in the LEC price cap orders nor clearly addressed in our Rules,” *Add-back NPRM*, ¶ 4, and it tentatively concluded that an add-back adjustment was consistent with price caps and “should continue to be part of the rate of return calculations of LECs subject to price caps,” *id.*, ¶ 15.

⁵ The NYNEX companies did it by reporting the lower formula adjustment in rates during 1992 on line 6 and by adjusting the “earned” revenues on line 1 of Form 492A to exclude the amount of the 1992 lower formula adjustment. *See* Form 492 Reports of New York Telephone and New England Telephone (filed Mar. 31, 1993). NYNEX also increased its revenues on line 1 to reverse the effect of an accrual it had made in 1992 for an anticipated sharing obligation in 1993. *See id.*

In the 1994 annual access tariff filings, the local exchange carriers again pursued different interpretations of the price cap rules. Consistent with their 1993 filings, NYNEX and SNET incorporated add-back, while other price cap carriers did not. The Bureau again suspended and investigated the tariff filings of all price cap carriers to determine whether add-back should be applied to price caps prior to the prospective rule change. *See 1994 Annual Access Tariff Filings*, 9 FCC Rcd 3705, ¶ 12 (1994).

On April 14, 1995, the Commission completed the add-back rulemaking proceeding and explicitly adopted the add-back rule for price caps. *See Price Cap Regulation for Local Exchange Carriers Rate of Return Sharing and Lower Formula Adjustment, Report and Order*, 10 FCC Rcd 5656 (1995) (“*Add-back Order*”). The Commission recognized that the issue had not been discussed in its price cap orders nor addressed in its rules. *See id.*, ¶ 15. The Commission also recognized that, as a legal matter, it could impose this rule change only prospectively, and it noted that the issue of applying add-back to the 1993 and 1994 tariffs remained under examination in the pending tariff investigations. *See id.*, ¶ 49 & fn. 3.

The price cap carriers that opposed including add-back in price caps appealed this decision, which was upheld by the D.C. Circuit. *See Bell Atlantic Telephone Companies v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996). The Court noted that “the state of the law has never been clear, and the issue has been disputed since it first arose in 1993. In 1993, some carriers filed their tariffs using the add-back rule, while others did not. . . . Petitioners made their X-factor decisions in the face of considerable uncertainty about whether the 1990 *LEC Price Cap Order* included add-back.” *Id.*, 1207. In its brief to the Court, the Commission stated that “[n]either the LEC Price Cap Order nor the rules adopted in that order provided detailed guidelines for computing

the rate of return in a particular calendar year. The absence of guidelines led to a controversy in the third year of price cap regulation.” *Bell Atlantic v. FCC*, Case No. 95-1217, Brief for Respondents, 25 (filed Oct. 13, 1995) (“*Brief for Respondents*”). In their intervenors’ brief, AT&T and MCI supported the add-back rule and abandoned their previous opposition to NYNEX’s application of add-back, noting with approval that NYNEX had applied the add-back principle to the lower formula adjustment revenues. *See* Letter from Joseph DiBella, NYNEX, to Geraldine Matisse, Chief, Tariff Division, Common Carrier Bureau, CC Docket No. 93-193 (filed Jan. 17, 1996), incorporating *Bell Atlantic v. FCC*, Case No. 95-1217, Joint Intervenors’ Brief of AT&T and MCI at 2, 4 n.3, 5 n.5, 6, 7, 8 (filed Oct. 27, 1995)) (“*Joint Intervenors’ Brief*”).⁶

The Court also rejected the petitioners’ claims that the add-back rule constituted retroactive ratemaking, but only because of the limited scope of the Commission’s rule. *See Bell Atlantic*, 79 F.3d at 1207. The Court found that the 1995 rule was acceptable because it only affected the 1995 tariffs, even if it calculated a carrier’s rate of return for the 1994 base year using add-back. The Court made it clear that the new rules did not apply to earlier tariffs or require refunds of money collected under those tariffs. *See id.* at 1206.

The investigations of the 1993 and 1994 annual access tariffs languished for almost 10 years until the Commission issued its public notice here seeking to refresh the record.

⁶ MCI tried to work the issue in the tariff investigation to its maximum advantage by arguing that add-back is required for sharing, but not for lower formula adjustments. *See, e.g., 1994 Annual Access Tariff Filings*, 9 FCC Rcd 3705, ¶ 9 (1994). However, in its brief to the Court, it made no such distinction, and it cited with approval NYNEX’s use of add-back in the tariff investigations. *See* Joint Intervenors’ Brief, n.5.

III. The Commission's Rules In 1993 and 1994 Neither Required Nor Prohibited Application Of Add-back In The Price Cap Tariffs.

As both the Commission and the D.C. Circuit have recognized, the Commission's price cap rules prior to the 1995 rule change did not state that add-back was either prohibited or required in calculating a carrier's rate of return. In these circumstances, the Commission cannot find that either applying add-back or not applying add-back was unreasonable.

The Commission's actions upon adopting price caps necessarily left the issue of add-back up to the decision of the carrier, because the Commission neither required nor prohibited add-back. Neither the *LEC Price Cap Order* nor the price cap rules addressed the issue at all, even though it had been a specific part of the prior rate-of-return earnings enforcement mechanism. *See Add-back NPRM*, ¶ 4. The Commission itself described the price cap regime as being fundamentally different in nature than the prior rate-of-return system of regulation, with price caps containing "sharing" and "lower formula adjustment" mechanisms to deal with possible errors in calculating the productivity factor, while the rate-of-return enforcement mechanism was designed to provide automatic refunds of all earnings in excess of the maximum level, regardless of changes in a carrier's productivity. *See, e.g., LEC Price Cap Order*, ¶ 120.

The carriers made several contacts with the Commission's staff to clarify the add-back issue, but no order came out of the Commission to provide direction prior to the 1995 annual access tariff filings.⁷ Because the Commission had not addressed the issue, the carriers had to

⁷ *See, e.g.*, Letter from David J. Hatton, NYNEX Government Affairs, to Kenneth P. Moran, Chief, Accounting and Audits Division (filed Dec. 2, 1992) (discussing the accounting treatment of lower formula adjustment revenues under generally accepted accounting principles and the question of normalizing revenues in the 1992 rate of return reports).

decide individually how they would treat this issue in selecting the X-factor and in filing their rate of return reports.

The Commission also did not address the issue when it adopted the revised Form 492A form in the first quarter of 1993 for price cap carriers to use in reporting their rates of return for 1992, the first year in which they had incorporated sharing or lower formula adjustments. The form contained a line to report the sharing or lower formula adjustment amount for the base period, but, unlike the previous Form 492, it did not tell the carriers what to do with this information in calculating the rate of return. Likewise, the form still required the carriers to report “earned” rather than “booked” revenues, which requires carriers to make out-of-period adjustments, but it did not indicate whether the out-of-period adjustments should include removing the impact of sharing or lower formula adjustments that are attributable to earnings in the prior period.

The Commission’s *Add-back NPRM*, released on July 6, 1993, added to the confusion. In that notice, the Commission stated that it had anticipated that the price cap sharing and lower formula adjustment “backstop” mechanisms would operate much like rate of return enforcement and that rates of return would continue to be calculated in essentially the same manner. *See Add-back NPRM*, ¶ 8. But it also proposed to modify the rules to include an add-back requirement. *See id.* Moreover, if the Commission thought its price cap rules already included an add-back requirement, the Commission could have issued a declaratory ruling clarifying the issue. *See* 47 C.F.R. § 1.3 (“The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty”). It did not issue a declaratory ruling, finding that a rule

change was necessary. This would suggest that the price cap regime did not require add-back unless and until the rule was changed and that, like all rule changes, it would apply only prospectively if it were adopted. But, of course, none of this meant that add-back was prohibited under the then-existing rules either.

Given the lack of any rule on the subject, the Commission cannot find that either applying add-back or not applying add-back was unreasonable in the 1993 and 1994 annual access tariffs. With the lack of guidance from the Commission, the price cap carriers followed different approaches based on reasonable interpretations of the purpose of the price cap backstop mechanism.

For instance, Bell Atlantic believed that add-back was inconsistent with the purpose of sharing, which was intended to be a one-time, prospective adjustment to the price cap indices, because add-back could trigger sharing obligations in successive future years solely due to the additional revenues that add-back included in calculating a carrier's earnings in prior years. *See Add-back Order*, ¶ 33. Bell Atlantic also argued that add-back would turn price caps into a rate-of-return enforcement regime with a guaranteed minimum return and that this would reduce the carriers' incentives to become more efficient and to meet the price cap productivity goals. *See id.*, ¶ 36. GTE, which also opposed add-back even though some of its companies were in a sharing mode while others had applied lower formula adjustments, agreed with Bell Atlantic. *See id.*, ¶¶ 31, 33. In contrast, NYNEX continued to follow the previous add-back practice under rate-of-return, believing normalization of its 1992 revenues by removing the lower formula adjustment revenues was consistent with the Form 492A report, which required the carriers to report "earned" revenues, *i.e.*, revenues adjusted for out of period amounts such as sharing and

lower formula adjustments that were based on the prior year rate of return. *See 1993 Annual Access Tariff Filings*, Reply of the NYNEX Telephone Companies, Transmittal Nos. 176, 186, Appendix A, 7 (filed May 10, 1993). NYNEX also believed that add-back was consistent with the Commission's findings that carrier returns would not be allowed to fall below the lower formula adjustment level or rise above the maximum level for the X-factor selected by the carrier. *See id.*, 2-5.

The arguments both for and against add-back show that there is a reasoned basis for either position. Indeed, the Commission was able to choose between one and the other only after conducting a notice and comment rulemaking proceeding, eventually deciding in the *Add-back Order* that add-back was the preferred option. When the carriers filed their 1993 annual access tariffs, they had no official pronouncement from the Commission other than the new Form 492A, which sent mixed signals about how to calculate the rate of return for price caps. The *Add-back NPRM* issued between the 1993 and 1994 filings contained tentative conclusions that add-back was consistent with the price cap rules, but the fact that it was a rulemaking proceeding indicated that it would not have retroactive effect. Since the rule did not issue until April 1995, the carriers had every reason to continue with their differing, yet reasonable, interpretations of the price cap rules in the 1994 annual access tariff filings.

It would be arbitrary and capricious for the Commission to decide retroactively that the carriers acted unreasonably in either applying add-back or not applying add-back. As is shown herein, either approach was a reasonable interpretation of the Commission's price cap rules prior to the time that the Commission formally amended its rules to require add-back in the rulemaking

proceeding. Therefore, the Commission cannot find that the carriers failed to meet their burden of showing that their rates were not “unjust or unreasonable” under section 201(b) of the Act.

IV. The Commission Cannot Impose An Add-Back Requirement Retroactively To The 1993 and 1994 Tariff Periods.

The Commission cannot impose a mandatory add-back requirement retroactively to the 1993 and 1994 tariff periods to disallow the rates filed by carriers that did not apply add-back. As the Supreme Court has made clear, “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen v. Georgetown Hospital*, 488 US 204, 208 (1988). There is nothing in the Act that authorizes the Commission to apply rule changes retroactively.

The retroactivity issue with regard to add-back was addressed by the D.C. Circuit in *Bell Atlantic*, where the Court rejected arguments that the Commission could not apply its 1995 add-back rule to the 1995 annual access tariffs. *See Bell Atlantic*, 79 F.3d at 1206-1208. The petitioners argued that the add-back rule was retroactive because the Commission applied it to the carriers’ earnings for 1994, which were the basis for the sharing adjustments in the 1995 annual access tariffs. The Court agreed with the Commission’s arguments that the rule was not retroactive, even though it drew upon antecedent facts concerning the calculation of earnings in the prior year, because it only affected the carriers’ liability for the future tariff period *after* the rule became effective.⁸ The Court was careful to point out that the new add-back rule “do[es] not

⁸ *See id.* The Commission maintained that the *Add-back Order* did not alter “the past legal consequences of past actions” and “did not unreasonably upset telephone company reliance interests.” *See* Brief for Respondents, 61.

render current tariffs unlawful, and [it does] not require carriers to refund money that they have already earned.” *Id.* at 1206. The Court also noted that the prospective add-back rule did not remove the “benefit of the bargain” for carriers that had chosen the 3.3 percent X-factor in previous years. *See id.* at 1207. The Court would have reached a completely different conclusion if the Commission’s application of the add-back rule would have “increase[d] a party’s liability for past conduct,” such as Verizon’s liability for refunds for money collected under the 1993 and 1994 tariffs at issue here. *See id.* Consequently, the Commission cannot find that Verizon was required to apply the add-back rule to its 1993 and 1994 tariffs or order refunds on that basis.

V. While Add-Back Was Not Required Prior To 1995, It Also Was Not Prohibited.

While the Commission cannot *require* a carrier to apply add-back to its tariffs prior to the 1995 rule change, neither can it find that a carrier acted unreasonably in *voluntarily* applying add-back in the 1993 and 1994 tariffs, as NYNEX did. After the Commission adopted price caps, NYNEX continued to report its earnings by including add-back as it had under rate-of-return, in the reasonable belief that this was consistent with the price cap scheme as well. The Commission had never said anything to suggest that add-back was prohibited under the price cap rules. In the *Add-back Order*, the Commission took the position, echoed by the Court and endorsed by AT&T and MCI, that “an ‘add-back requirement is not only fully consistent with, but also an essential element of, the system of price cap regulation.’” *Bell Atlantic*, 79 F.3d at 1202. The Commission cannot find NYNEX’s continued application of add-back to be unreasonable or inconsistent with the Commission’s price cap rules without contradicting its own reasons for adopting add-back.

VI. The Carriers' Differing Approaches To Add-back Prior To The Rule Change Did Not Give Them Undue Discretion In Developing Their Rates.

''The fact that the carriers followed different approaches to add-back in the 1993 and 1994 tariffs did not give them undue discretion in developing their rates. First, as the Commission pointed out in the *Add-back Order*, add-back provides more revenues for a carrier earning less than the lower formula level than the carrier would receive without add-back, but it provides less revenues for a carrier in the sharing zone than the carrier would receive without add-back. *See Add-back Order*, ¶¶ 21, 26. However, the Commission's examples assume that a carrier's earnings always stay at the same level. In fact, a carrier's earnings vary from year to year and can swing between the lower formula adjustment level and the sharing level and back again. For instance, NYNEX started out in the lower formula adjustment zone for 1991, so initially it received more revenues with add-back than it would have received without add-back. However, by 1992, only the first year under price caps, its earnings were in the sharing zone, and from that point forward its adoption of add-back caused it to add revenues in the sharing years and to incur higher future sharing adjustments than it would have reported if it had not followed add-back. GTE had some tariff entities that were in the sharing zone while others were in the lower formula adjustment zone. *See Price Cap Regulation of Local Exchange Carriers*, GTE's Reply Comments, CC Docket No. 93-179, 10 (filed Sept. 1, 1993). GTE's decision not to apply add-back did not provide it an overall advantage given the variety of financial results among its operating companies and the likely changes from year to year. Since carriers could not accurately predict how their earnings would change in the future, a carrier's decision on the add-back issue prior to the Commission's adoption of the add-back rule could not be considered inherently unreasonable in terms of the objectives of price cap regulation so long as the carrier applied the

rule consistently, which the Verizon carriers did (each kept to its initial approach to add-back until the *Add-back Order* settled the issue).

Second, a carrier's decision on the add-back issue affected its selection of the X-factor, which to some extent offsets the effect of add-back on its sharing obligations. For example, if a carrier had high earnings and decided not to apply add-back, its sharing obligation was less than if it had followed add-back, and it was less inclined to select a higher X-factor. If it decided that add-back was required, it had a higher sharing obligation, and it would have been inclined to reduce that sharing obligation by selecting the higher X-factor. In fact, after the add-back rule was adopted, many carriers, such as Bell Atlantic, that had previously not applied add-back decided to select the higher X-factor to offset the increased sharing obligation. *See* Bell Atlantic 1995 Compliance Filing Transmittal No. 806, filed July 27, 1995; Bell Atlantic 1996 Compliance Filing, Transmittal No. 890, filed July 12, 1996. Consequently, the ratepayer was not prejudiced by the fact that carriers differed in their approach to add-back, and neither approach could be considered unreasonable at the time.

VII. The Commission's Excessive Delay In Concluding These Investigation Bars The Ordering Of Refunds Or Any Further Action.

The Commission is procedurally barred under section 204 of the Act from resuming the 1993 and 1994 tariff investigations of the treatment of add-back and from ordering refunds.

Section 204(a)(2)(B) requires that, with respect to any tariff investigation begun by the Commission prior to enactment of the Telecommunications Act of 1996, the Commission shall issue an order concluding the hearing in not more than 12 months. *See* 47 U.S.C. § 204(a)(2)(B). Here, the Bureau issued orders suspending for one day, and instituting investigations, of the 1993

and 1994 annual access tariffs and then proceeded to ignore the 12 month deadline for almost nine years. The Commission cannot now, over six years after that deadline and almost 10 years after the investigations were begun, resume these investigations and require the carriers to justify anew the lawfulness of their tariffs.

The Commission's delay in these cases is particularly egregious in light of the fact that Congress twice took action to compel the Commission to resolve tariff investigations on a timely basis. Until 1988, there was no statutory time limit for tariff investigations. In 1988, the Commission added a provision to section 204(a) imposing a 12-month time limit on tariff investigations. *See* P.L. 100-594, § 8(b), 102 Stat. 3023. Not satisfied with the Commission's performance in meeting this deadline, Congress shortened the deadline for new tariff investigations to five months in the 1996 Act and specifically instructed the Commission to complete all pending investigations within 12 months. Nonetheless, the Commission completely ignored the statutory deadlines and did nothing in the 1993 and 1994 tariff investigations until its April 7, 2003 Public Notice, when it asked the parties to refresh the record and to restate their positions because the Commission's inaction had rendered the record "stale."

Section 204(a)(2)(B) is unambiguous. All pending tariff investigations at the time of the 1996 Act were to be concluded within 12 months. Consequently, the Commission lacks the statutory authority to go forward with this case and order refunds. Such a reading of the Act is not inconsistent with the general rule that time limits in regulatory statutes are considered directory, rather than jurisdictional. *See, e.g., Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994). As the court pointed out in *Illinois Bell Telephone Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992), the ability to order refunds is an exception to the "cardinal principle of ratemaking" that a

regulatory agency may not set rates retroactively, except as specifically authorized by Congress. *See id.* at 1482-83, *citing Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). Precisely because they are an exception to such a fundamental principle, statutory provisions such as section 204 “which convey the power to order refunds likewise set forth the conditions of that conveyance.” *Id.* at 1481. As a result, Commission must strictly adhere to each step of the procedures set out in section 204 before it can order a refund. By its express terms, section 204 authorizes the Commission to grant refunds *only* if it acts within 12 months, and the Commission cannot unilaterally expand the authority granted by Congress. In addition, unlike other statutes, where the courts have found that failure to meet a deadline does not affect the agency’s authority because the statutes in those cases did not specify the consequences of such failure, the Communications Act *does* specify the consequences of the Commission’s failure to adhere to the statutory time limit. As the Court explained in *Illinois Bell*, the consequence of the Commission’s failure to comply with the prerequisites to order a refund is that the Commission can only take prospective ratemaking action under Section 205 of the Act.⁹

The Commission’s failure to abide by that explicit statutory mandate has prejudiced Verizon’s ability to defend its tariffs and to avoid making unjustified refunds. Many key personnel and expert witnesses who helped prepare those filings have left the company or have moved to other responsibilities, and their ability to help Verizon reconstruct and defend the basis for their actions or dispute specific claims for refunds has been impaired. The difficulty that parties face in trying to resolve factual issues after so long a time is one reason why Congress took additional

⁹ *See id.* at 1481. In *Southwestern Bell Telephone Co. v. FCC*, 138 F.3d 746 (8th Cir. 1998), the 8th Circuit did not find that following all of the procedural steps in section 204 was a prerequisite to the Commission’s ordering refunds. However, this is contradicted by *Illinois Bell*, where the D.C. Circuit found that such adherence was mandatory.

action in the 1996 Telecommunications Act to shorten the deadline for completing tariff investigations. Having failed to meet the statutory deadline, the Commission has lost the authority to issue orders resolving these long moribund investigations.

In addition, the Commission's unaccountable delay in resolving these investigations has prejudiced the price cap carriers' interests. Having failed to provide the necessary guidance on add-back for almost five years under price caps and having failed to resolve these investigations for almost 10 years, the Commission cannot now decide that the carriers acted unreasonably and subject them to retroactive refunds. The fact that the Commission suspended and investigated the tariffs gave the carriers no ability to determine the "correct" approach prior to the Commission's adoption of the add-back rule change. Without this guidance, the carriers were left to select their X-factor and their corresponding sharing obligations based on the impact of the approach to add-back that they reasonably selected. Since it is too late for the Commission to undo those decisions, it would be unreasonable for the Commission to order refunds.

In addition, AT&T, the largest potential recipient of refunds in these investigations, would have to refund most of those amounts in turn to its own customers for these periods, since AT&T incorporated the local exchange carriers' exogenous cost increases sharing and other exogenous cost changes in its own 1993 tariff filings, which are still under investigation and subject to suspension and an accounting order. *See AT&T Communications, Tariff FCC Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462 and 5464, 8 FCC Rcd 6227 (1993)*. It is unlikely, despite the accounting order, that AT&T could identify the millions of customers from as much as ten years ago that would be entitled to these refunds, many of whom have since migrated to other carriers, including Verizon. Furthermore, the second largest recipient of potential refunds, WorldCom, is

currently in bankruptcy, where it seeks to avoid a substantial portion of its debts from the pre-bankruptcy period. The rest of the interexchange carriers, who recovered Verizon's access charges through their own long distance rates in 1993 and 1994, also would be unjustly enriched if they were to obtain refunds at this late date.

Conclusion

The Commission cannot find that there was a rule either requiring or prohibiting that application of add-back to the 1993 and 1994 annual access tariffs, and it cannot find that either approach was unreasonable. The lack of a rule left it up to the carriers to apply add-back or not in selecting their X factors and their associated sharing obligations. The Commission should terminate these investigations without ordering refunds or taking any other remedial actions.

Respectfully submitted,

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THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.