

**Before the
Federal Communications Commission
Washington, DC 20554**

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

OPPOSITION OF AT&T CORP. TO DIRECT CASE

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May 12, 2003

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OPPOSITION OF AT&T CORP. TO DIRECT CASE

Pursuant to the Commission's *Notice*,¹ AT&T Corp. ("AT&T") respectfully submits these comments opposing Verizon's Direct Case concerning its 1993 Annual Access Tariff Filings.

INTRODUCTION AND SUMMARY

Two independent Commission rules bar Verizon from obtaining exogenous cost treatment for purported costs related to its implementation of SFAS-106 prior to January 1, 1993. First, the Commission's rules provide that "no GAAP change can be given exogenous treatment

¹ Order, Notice, and *Erratum*, *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, 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*, CC Docket Nos. 93-193, 94-65, 93-193, 94-157, DA 03-488 (rel. Feb. 25, 2003) ("*Notice*").

until the Financial Accounting Standards Board has actually approved the change and it has become effective.”² Here, as Verizon frankly concedes, SFAS-106 did not become “effective” until after December 1992. The Commission’s rules, therefore, expressly prohibit Verizon from obtaining exogenous cost treatment for any purported costs related to Verizon’s implementation of SFAS-106 prior to that time.

Second, the Commission’s rules permit LECs to obtain exogenous treatment only for costs incurred that are “beyond th[eir] control.”³ Again, it is undisputed that implementation of SFAS-106 was not mandatory for LECs’ regulatory books until January 1, 1993, and implementation *prior* to that date was entirely *within* LECs’ control. Thus, Verizon is barred from obtaining exogenous cost adjustments associated with implementation of SFAS-106 prior to January 1, 1993, when adoption became mandatory.

Verizon’s attempt to obtain unlawful exogenous cost adjustments for its early adoption of SFAS-106 is made even more absurd by the fact that these accounting changes had no economic impact whatsoever on Verizon’s actual economic costs. As the Commission has explained, “LECs are not required [by SFAS-106] to change their OPEB commitments to employees, but merely to change the timing of the recognition of these costs on their books.”⁴ And “although [the LECs’] accounting books may have changed,” SFAS-106 “leav[es] cash flow unchanged.”⁵ There is accordingly no possible justification to disregard the Commission rules and to allow Verizon to retain what is, by any measure, a pure windfall.

² See Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786, ¶ 168 (1990) (“1990 Price Cap Order”).

³ *Id.* ¶ 166.

⁴ First Report and Order, *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd. 8961, ¶ 307 (1995) (“1995 Price Cap Performance Order”).

⁵ *Id.*

Finally, there is no merit to Verizon’s claim that the Commission is powerless to reach the right outcome here because the Commission erroneously included one of the dockets at issue on a list of terminated proceedings. The Commission has broad authority to correct inadvertent errors such as that one.⁶ And the Commission has routinely recognized and exercised such inherent error-correction authority as part of its statutorily-delegated authority to regulate its proceedings.⁷

BACKGROUND

In the *1990 Price Cap Order* and the *1991 Price Cap Reconsideration Order*,⁸ the Commission adopted a “price cap” regime – whereby the Commission regulates the maximum prices that LECs can charge for baskets of interstate access services rather than the maximum rates-of-return they can earn. As part of the price cap mechanism, the Commission recognized that the maximum prices (the “price cap index” or “PCI”) would have to be adjusted to allow price cap LECs to recover costs that were not originally reflected in the PCIs, but that the LECs incurred as a result of forces outside their control.⁹ The Commission’s price cap system provides for “exogenous cost” adjustments to address “costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers” and which “should result in an adjustment to the cap in order to ensure that the price cap formula does not lead to unreasonably

⁶ See, e.g., *American Trucking Ass’n v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958) (“[i]t is axiomatic” that agencies “have the power and duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake”).

⁷ See 47 U.S.C. §§ 154(i) (“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”).

⁸ Order on Reconsideration, *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd. 2637 (1991) (“*1991 Price Cap Reconsideration Order*”).

⁹ See *1990 Price Cap Order* ¶¶ 120-165; *1991 Price Cap Reconsideration Order* ¶¶ 95-121.

high or unreasonably low rates.”¹⁰ Exogenous cost adjustments are allowed only in very rare circumstances because “[i]t is a basic feature of price caps that most changes in the current cost of providing service are treated endogenously, that is, are not directly reflected in current prices.”¹¹ Authorized exogenous cost adjustments are implemented through one-time modifications in the PCI formula.¹²

In its 1990 price cap order, the Commission recognized that exogenous costs could be incurred as a result of changes in generally accepted accounting principles (“GAAP”), because such actions might impact the LECs’ costs and be “outside the [LECs’] control.”¹³ Requests to adjust PCIs to reflect GAAP changes would be granted, or permitted to go into effect,¹⁴ however, only where the proposed change was “compatible with [the Commission’s] regulatory accounting needs.”¹⁵ In this regard, the Commission expressly determined in the *1990 Price Cap Order* that exogenous cost treatment of purported costs associated with a change in GAAP would *never* be appropriate prior to the time that such a change became “effective.”¹⁶

In December 1990 (three months after the Commission released the *1990 Price Cap Order*), the Financial Accounting Standards Board (“FASB”) adopted Statement of Financial

¹⁰ *1990 Price Cap Order* ¶ 166.

¹¹ First Report and Order, *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd. 8961, ¶ 301 (1995) (“*1995 Price Cap Performance Order*”).

¹² See 47 C.F.R. § 61.47.

¹³ *1990 Price Cap Order* ¶ 168.

¹⁴ A new FASB standard takes effect 90 days after a company informs the Commission that it intends to follow the standard, unless the Commission notifies the Company to the contrary. 47 C.F.R. § 32.16.

¹⁵ *1990 Price Cap Order* ¶ 168.

¹⁶ *Id.* (“we wish to clarify that no GAAP change can be given exogenous treatment until the Financial Accounting Standards Board has actually approved the change and it has become effective.”).

Accounting Standards (“SFAS”) Number 106 (“SFAS-106”), which constituted a change in GAAP. SFAS-106 established new financial accounting and reporting requirements for “other post-employment benefits” (“OPEBs”).¹⁷ Prior to adoption of SFAS-106, most companies had been accounting for OPEBs on a cash or “pay-as-you-go” basis, recognizing OPEBs as expenses when paid. SFAS-106 required companies to account for OPEB liabilities to employees on an accrual basis, *i.e.*, to recognize OPEB obligations as they accrue during the years employees earn the benefits. Although SFAS-106 was adopted in December 1990, it did not become effective (*i.e.*, mandatory) for the LECs’ financial books until the “fiscal years beginning after December 15, 1992.”¹⁸

Notwithstanding that the Commission requires the LECs to keep regulatory accounting books separate from the financial accounting books upon which their annual reports and securities filings are based, the Commission’s policy generally is to conform regulatory accounting requirements for LECs to GAAP, unless the GAAP principle conflicts with the Commission’s regulatory objectives.¹⁹ In December 1991, the Commission adopted SFAS-106, and required the LECs to implement the SFAS-106 rules (with minor exceptions) on their regulatory books “on or before January 1, 1993.”²⁰

¹⁷ OPEBs are post-employment benefits other than pensions, such as retiree health, life, and dental insurance. *See, e.g., Notice* ¶¶ 5-18.

¹⁸ *See* SFAS 106 (attachment B to Verizon’s Direct Case) at ¶ 108 (“this Statement shall be effective for fiscal years beginning after December 15, 1992”); *see also id.* at 1 (“Effective Date: For fiscal years beginning after December 15, 1992”).

¹⁹ *See* Report and Order, *Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles*, 102 F.C.C.2d 964 (1985); 47 C.F.R. § 32.16.

²⁰ *Southwestern Bell Corporations, GTE Service Corporation, Notification of Intent to Adopt Statement of Financial Accounting Standards No. 106, Employers’ Accounting for Postretirement Benefits Other Than Pensions*, 6 FCC Rcd. 7560, ¶¶ 3,5 (1991).

Verizon purports to have notified the Commission on December 31, 1991 that it would implement the SFAS-106 rules, and that those changes would be reflected in its regulatory books beginning in January 1, 1991, well before the January 1, 1993 mandatory deadline.²¹ Other LECs also began to implement SFAS-106 (although they did not seek exogenous cost treatment for pre-1993 adoption of SFAS-106). In their 1992 tariffs, Verizon and other LECs sought exogenous cost treatment of their purported SFAS-106 costs. In April 1992, the Commission suspended those tariffs for five months and set them for investigation because the “changes submitted by [the LECs] [w]ere of sufficient magnitude and their justification is sufficiently questionable.”²² One of the many issues set for investigation was whether “costs associated with implementation of SFAS-106 prior to January 1, 1993 (when the accounting change becomes mandatory) [should] be treated as exogenous.”²³

In January 1993, the Commission concluded its investigation of the LECs’ 1992 tariffs and found the tariffs to be unlawful. Specifically, the Commission rejected the tariffs on the broad ground that *all* OPEB-related cost changes were to be treated endogenously rather than exogenously. The Commission reasoned that, because the carriers could control what OPEB benefits it paid out, the cost changes were “within the carriers’ control” within the meaning of its exogenous cost rules.²⁴ And because the Commission determined that “the LECs have failed to

²¹ Direct Case at 4 (citing Letter to Kenneth D. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau (Dec. 31, 1991)).

²² Order of Investigation and Suspension, *Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, “Employers Accounting for Postretirement Benefits Other Than Pensions”*; *Bell Atlantic Tariff F.C.C. No. 1*; *US West Communications, Inc., Tariff F.C.C. Nos. 1 and 4*; *Pacific Bell Tariff F.C.C. No. 128*, 7 FCC Rcd. 2124, ¶ 8 (1992).

²³ *Id.* ¶ 10.

²⁴ Memorandum Opinion and Order, *Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, “Employers Accounting for Postretirement*

clear the threshold question raised in the investigation (that is, whether the LECs have borne their burden of demonstrating that implementation of SFAS-106 results in an exogenous cost change under the Commission's price cap rules), [the Commission did] not address . . . all of the subsequent questions raised in [the] Suspension and Investigation Order."²⁵ The Commission, therefore, never reached the question of whether Verizon's attempt to seek exogenous cost treatment of purported costs associated with its pre-1993 implementation of SFAS-106 was appropriate under the Commission's rules.

The LECs appealed the *1992 Rejection Order*. While that decision was pending, the LECs filed their 1993 tariffs, and again sought exogenous cost treatment for purported costs associated with implementing SFAS-106. In so doing, Verizon again sought exogenous cost treatment for its purported costs of implementing SFAS-106 prior to January 1, 1993.²⁶ The pre-1993 costs sought by Verizon amounted to approximately \$37 million.²⁷ The Commission suspended those rates for one day, issued an accounting order, and set those rates for investigation.²⁸

Benefits Other Than Pensions"; *Bell Atlantic Tariff F.C.C. No. 1*; *US West Communications, Inc., Tariff F.C.C. Nos. 1 and 4*; *Pacific Bell Tariff F.C.C. No. 128*, 8 FCC Rcd. 1024, ¶ 53 (1993) ("*1992 Tariff Rejection Order*"). The Commission also found that the LECs had failed to demonstrate that they had actually incurred any OPEB-related costs and that exogenous cost treatment of the purported costs would not result in double recovery. *Id.* ¶¶ 66-69.

²⁵ *1992 Tariff Rejection Order*, n.80.

²⁶ *See, e.g., Notice* ¶ 11.

²⁷ Exhibit 1 (attached).

²⁸ Memorandum Opinion and Order Suspending Rates and Designating Issues For Investigation, *1993 Annual Access Tariff Filings; National Exchange Carriers Association, Universal Service Fund and Lifeline Assistance Rates; GSF Order Compliance Filings; Bell Operating Companies' Tariff for the 800 Service Management System and 800 Data Base Access Tariffs*, 8 FCC Rcd. 4960 (1993).

In July 1994, the Court issued a decision rejecting the Commission's reasons for rejecting the 1992 tariffs.²⁹ The Court held that the Commission misapplied its "control" test by finding that the LECs retained control over the amount of benefits they pay to employees.³⁰ The Court also found that the Commission improperly rejected certain cost studies.³¹ However, because the Commission never reached the question of whether LECs could seek exogenous cost treatment for purported costs of implementing SFAS-106 prior to the mandatory Commission deadline (January 1, 1993), the Court did not address that issue.³²

In September 1994, Verizon filed another tariff seeking exogenous cost treatment of additional purported SFAS-106 related costs dating back to January 1, 1991.³³ The portion of those costs that relate to the pre-1993 mandatory implementation date was \$3 million.³⁴ Again, the Commission suspended those rates, set them for investigation and issued an accounting order.³⁵

Recognizing that it had not yet resolved its 1993 and 1994 tariff investigations, the Commission, on June 30, 1995, issued the *Combined OPEB Order*. The *Combined OPEB Order* set the issues raised in the 1993 and 1994 tariffs for investigation, including whether "exogenous claims [should] be permitted for SFAS-106 costs incurred prior to January 1, 1993, the Commission's date for mandatory compliance."³⁶

²⁹ *Southwestern Bell Telephone Company v. FCC*, 28 F.3d 165 (D.C. Cir. 1994).

³⁰ *Id.* at 172.

³¹ *Id.*

³² By the time the Court issued its order, the LECs already had withdrawn their 1992 tariffs.

³³ *See Notice* ¶ 11.

³⁴ *See Exhibit 1* (attached).

³⁵ *See Notice* ¶ 11.

³⁶ *In the Matter of 1993 Annual Access Tariff Filings, 1994 Annual Access Tariff Filings, AT&T*

In 1995, the Commission ended the controversy on a *prospective* basis by prohibiting LECs from seeking exogenous adjustments for OPEB-related cost changes beginning in 1994. In its *1995 Price Cap Performance Order*, the Commission explained that “OPEB cost changes are noneconomic cost changes.”³⁷ The “LECs are not required [by SFAS-106] to change their OPEB commitments to employees, but merely to change the timing of the recognition of these costs on their books.”³⁸ And “although [the LECs’] accounting books may have changed,” SFAS-106 “leav[es] cash flow unchanged.”³⁹ The Commission, therefore, determined that LECs should not be permitted to increase rates based on such paper accounting costs.⁴⁰ Thus, beginning in 1995 a carrier that otherwise satisfied the other necessary requirements to obtain an exogenous cost change – which Verizon does not – would not be permitted to recover OPEB costs. The Commission, however, still has not addressed whether the pre-1993 exogenous costs sought by Verizon in its 1993 and 1994 tariffs are lawful.

ARGUMENT

I. VERIZON’S ATTEMPT TO RECOVER ITS 1991 AND 1992 OPEB COSTS VIOLATES THE COMMISSION’S EXOGENOUS COST RULES.

The Commission’s rules in 1993 squarely prohibited Verizon from obtaining exogenous cost treatment of any purported costs associated with pre-1993 implementation of the SFAS-106 accounting change, for two independent reasons. First, the Commission’s *1990 Price Cap Order*

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, NYNEX Telephone Companies Tariff FCC No. 1, Transmittal No. 328, Order Designating Issues for Investigation, 10 FCC Rcd. 11804, ¶ 19 (“Issue B”) (1995) (“Combined OPEB Investigation Order”).

³⁷ *1995 Price Cap Performance Order* ¶ 309.

³⁸ *Id.* ¶ 307.

³⁹ *Id.*

⁴⁰ *Id.*

made clear that “no GAAP change can be given exogenous treatment until the Financial Accounting Standards Board has actually approved the change *and it has become effective.*”⁴¹ As Verizon concedes (at 3), the “effective” date of SFAS-106 was December 15, 1992.⁴² Thus, the Commission’s rules squarely prohibit Verizon from obtaining an exogenous cost adjustment for any SFAS–106 costs incurred prior to December 15, 1992.

Second, implementation of SFAS-106 on the LECs’ regulatory books was not mandatory – and thus not *exogenous* – until January 1, 1993. As the Commission has repeatedly explained, and as the courts have affirmed, LECs are permitted to obtain exogenous cost treatment only for costs incurred that are “beyond the[ir] control.”⁴³ Here, the Commission (quite sensibly) did not require the LECs to reflect SFAS-106 in their accounting books until January 1, 1993, after the effective date of SFAS-106. Whether any individual LEC (such as Verizon) wished to implement the SFAS-106 changes prior to January 1, 1993 was entirely within each LEC’s control. Accordingly, whatever cost changes Verizon may have recognized in 1991 and 1992

⁴¹ *1990 Price Cap Order* ¶ 168 (emphasis added). See also *1991 Price Cap Reconsideration Order* ¶ 59 (“no carrier c[an] treat GAAP changes as exogenous until [the Commission] approve[s] the changes, and that exogenous treatment will not be granted until FASB ha[s] actually approved a change in GAAP, and the change has become effective”); *1995 Price Cap Performance Order* ¶ 275 (exogenous cost treatment would only be accorded to GAAP changes “that have been adopted by the Financial Accounting Standards Board (“FASB”) and have become effective”); cf. *American Tel. and Tel. Co. Revisions to Tariff FCC Nos. 1, 2, and 13*, 5 FCC Rcd. 3680 (1990) (denying exogenous cost treatment based on AT&T’s switch from cash basis to accrual accounting for post-employment health and welfare benefits because AT&T implemented this change before FASB adopted a new rule requiring it).

⁴² See SFAS 106 (attachment B to Verizon’s Direct Case) at ¶ 108 (“this Statement shall be effective for fiscal years beginning after December 15, 1992”); see also *id.* at 1 (“Effective Date: For fiscal years beginning after December 15, 1992”); *1995 Price Cap Order* ¶ 276 (“In December 1990, the FASB adopted SFAS-106, which requires companies to account for other post-retirement benefits on an accrual basis beginning December 15, 1992.”).

⁴³ *1990 Price Cap Order* ¶ 166; *Southwestern Bell*, 28 F.3d at 170 (“an FASB change adopted by the Commission is not a change under control of the carrier, and, *once mandated by the Commission*, the change satisfies the control criterion”) (emphasis added).

were not exogenous cost changes within the meaning of the Commission's rule. This should be the end of the argument.

Verizon does not mention – let alone address – these dispositive rules. Instead, Verizon asserts that “the date that the carrier complies with the accounting change is irrelevant.”⁴⁴ However, the principal case upon which Verizon relies refutes that assertion. In the passage Verizon quotes, the D.C. Circuit makes clear that a change in GAAP meets the criteria for exogenous treatment only “once [the change is] *mandated by the Commission*.”⁴⁵ And, as noted, the SFAS-106 changes were not mandated by the Commission until January 1, 1993.

Furthermore, the Commission finding that pre-1993 SFAS-106 costs were within Verizon's control, and hence are not exogenous, would not, as Verizon claims, add a new prong to the exogenous treatment test in violation of *Southwestern Bell*.⁴⁶ In *Southwestern Bell*, the Court rejected the Commission's finding that the “control” test could be interpreted to mean that a LEC maintains control, even after an accounting change has become both “effective” and “mandatory,” if the LEC retains control of the underlying OPEB costs – *e.g.*, the LEC's ability to control the type of benefits it pays to its employees. The Court reasoned that such an “underlying control” criterion was not part of the Commission's previous “control” test, and if the Commission chose to augment the test, it could do so only prospectively.⁴⁷ Here, by contrast, the question is whether Verizon had control over the implementation of SFAS-106 prior to January 1, 1993 under the Commission's *original* “control” test. The answer is clearly yes. As noted, SFAS-106 did not become effective until December 15, 1992, and it did not become

⁴⁴ Direct Case at 8, n. 22.

⁴⁵ *Southwestern Bell*, 28 F.3d at 170.

⁴⁶ Direct Case at 8-9 (“for the same reasons, the Commission cannot add a new test here of whether the carrier could have delayed the implementation of SFAS 106 to a later time”).

mandatory for the LECs' regulatory books until January 1, 1993. Thus, under the classic control test Verizon maintained complete control over whether to adopt SFAS-106 prior to January 1, 1993. Indeed, the degree of that control is illustrated by the fact that most other LECs chose *not* to implement SFAS-106 prior to January 1, 1993. And the few LECs that did adopt SFAS-106 prior to January 1, 1993 did not seek exogenous cost treatment for that change.

Verizon makes much of the fact that it was "permitted" and "encouraged" to make the accounting change prior to January 1, 1993,⁴⁸ but that is irrelevant to the question whether such cost changes are *exogenous*. As explained above, a cost change is exogenous only if it is truly beyond the control of the carrier, and prior to January 1, 1993, cost changes related to SFAS-106 were not. Indeed, a rule where a LEC could obtain a exogenous cost treatment for voluntary early-adoption of accounting changes would create an entirely one-sided system in which LECs could implement early all rules that benefit them and delay until the last minute implementation of rules that would not benefit them. Ratepayers would consistently face the maximum possible rates for the maximum time after every rule change. And that is precisely why, as noted, the Commission's rules forbid LECs from obtaining exogenous cost treatment for *voluntary* adoption of accounting changes.⁴⁹

As demonstrated in Exhibit 1 (attached), Verizon's 1993 tariffs resulted in \$37 million in unlawful earnings related to purported 1991 and 1992 SFAS-106 implementation costs, and

⁴⁷ *Southwestern Bell*, 28 F.3d at 170, 173.

⁴⁸ Direct Case at 9.

⁴⁹ See, e.g., *1995 Price Cap Performance Order* ¶ 312 (noting that "LECs have significant incentives to request exogenous cost treatment for cost changes that might increase their PCIs, but not to request exogenous cost treatment for cost changes that might decrease their PCIs"). Verizon's further claim (at 10) that "[w]hen the law establishes a deadline, compliance prior to the deadline is no less mandatory than compliance at the last minute" simply makes no sense; whether LECs implemented SFAS-106 prior to January 1, 1993 was unquestionably "within the carriers' control." *1990 Price Cap Order* ¶ 166.

Verizon's 1994 tariffs resulted in \$3 million in unlawful earnings related to purported 1991 and 1992 SFAS-106 implementation costs. Accordingly, the Commission should resolve this investigation by ordering Verizon to refund that \$40 in unlawful earnings to ratepayers.

II. THE COMMISSION HAD AMPLE AUTHORITY TO CORRECT THE MINISTERIAL ERROR IN THE TERMINATION ORDER.

In urging (Direct Case at 13-14) the Commission to “terminate this investigation,” Verizon rehashes arguments that it made in its pending petition for reconsideration of the Commission's Errata decision that recognized that one of the dockets at issue in this proceeding had been erroneously included in a list of proceedings in which final Commission action had already been taken. As AT&T demonstrated in its opposition to that petition and in its comments in these proceedings,⁵⁰ Verizon's arguments are meritless.

As AT&T demonstrated, the LECs cannot dispute that the Commission has broad authority to correct inadvertent errors such as the one at issue here: “[i]t is axiomatic” that agencies “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'n v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958). 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).⁵¹ 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. § 154(i) (“The Commission may perform any and all acts, make

⁵⁰ *See* Reply Comments of AT&T Corp. at 6-12 (April 22, 2003).

⁵¹ *See also, e.g., Howard Sobor, Inc. v. ICC*, 628 F.2d 36, 37 (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).

such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions”); *see also* 47 U.S.C. § 151.

There can be no serious dispute that the *Erratum* at issue was in the nature of error correction. The Commission’s instructions were clear from the face of the *Termination Order*⁵² – the Commission had made a considered, substantive decision that the only proceedings to be terminated were those in which there were no “outstanding issues,” in which the matter had been “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,” and in which “no further action by the Commission is required.” *Termination Order* ¶ 1. Moreover, these instructions were not subject to interpretation or susceptible to judgment calls – *i.e.*, the identification of such proceedings was a ministerial task. Accordingly, the erroneous inclusion of these proceedings in the list accompanying the *Termination Order* was a ministerial error.

Verizon has no direct response to this analysis, asserting (at 13) only that the Bureau lacked authority to correct its ministerial error “after the period for seeking review has expired.” Verizon does not cite any authority for this assertion in its Direct Case, but has previously relied on *Albertson v. FCC*, 182 F.2d 397 (D.C. Cir. 1950), and *American Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984).⁵³ Verizon reads far too much into *Albertson*. In *Albertson*, a party filed a petition for rehearing of a licensing determination, and after that petition was denied, it filed another pleading styled a “petition to reconsider.” The petition did not assert that the Commission had made an inadvertent error, but that the decision was substantively incorrect. The court found that the Commission had broad inherent powers to reconsiders its own actions,

⁵² Order, *Matter of Stale or Moot Docketed Proceedings*, 17 FCC Rcd. 1199 (2002).

⁵³ *See* Verizon Reply in Support of Petition for Reconsideration at 2-3 (April 17, 2003) (arguing that the Commission only has authority to correct erroneous orders on its own motion within the

because “the power to reconsider is inherent in the power to decide.” Based on this inherent power, the court’s only holdings were (1) that the agency had authority to entertain the petition (even though such petitions were nowhere mentioned in either the Act or the rules) and (2) that the petition tolled the time for appeal. *See Albertson*, 182 F.2d at 399-400.

The court did *not* hold that agencies may reconsider their decisions *only* within the time frame for judicial review. Indeed, the court had no occasion to address the ultimate boundaries of the agency’s inherent statutory power to reconsider even substantive decisions; it certainly did not consider the scope of the Commission’s even broader error correction authority, which was not at issue in *Albertson*. And *American Methyl Corp. v. EPA*, 749 F.2d 826 (D.C. Cir. 1984), Verizon’s other principal authority, made clear that the court neither considered nor took a position on “what further inherent or implicit authority might exist,” because in that case Congress had provided an express error correction mechanism for the Environmental Protection Agency.

Moreover, Verizon’s position was rejected by the D.C. Circuit in another decision. 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 rules had expired, the Commission “concluded that the termination of [the dockets] was an inadvertent, technical error, and reinstated [the dockets].” *Id.* AT&T appealed, but the D.C. Circuit permitted the Commission to correct its error (precisely the type of error at issue here), both (1) after the statutory time period for reconsideration had passed *and* (2) after the Commission had lost jurisdiction over the order due to the filing of a petition for review in the court of appeals.

period for taking an appeal).

The court could only have permitted such amendment if it had accepted the argument that the Commission had ample authority to reinstate an inadvertently terminated docket at any time.⁵⁴

⁵⁴ *AT&T Corp. v. FCC*, No. 02-1084 (*per curiam*) (July 5, 2002) (unpublished). Verizon also argues (at 14) that AT&T would be required to pass through any refunds to AT&T's own customers from that period, and, for that reason, the Commission should not bother to reach the plainly correct result in this proceeding. Even if true, that would hardly justify allowing Verizon to keep the windfalls it reaped by using OPEB costs improperly to raise its price caps. In any event, AT&T's prices, unlike the LECs' prices, were at all relevant times well below its price caps, and Verizon's "passthrough" argument is, accordingly, wrong as a matter of fact as well (and other long distance carriers that paid the LECs' OPEB-inflated access charges were, of course, not subject to any price cap regulation at the time).

CONCLUSION

For the foregoing reasons, the Commission should reject Verizon's unlawful tariffs and order Verizon to make refunds to its ratepayers.

Respectfully submitted,

/s/ Judy Sello

David L. Lawson
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May 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2003, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to Direct Case to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: May 12, 2003
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

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⁵⁵ Filed electronically via ECFS

1991 & 1992 OPEB Costs Included in Bell Atlantic's PCIs

Exhibit 1

<u>Line No.</u>	<u>Year</u>	<u>Description of OPEB Cost</u>	<u>Amount Included in Exog Cost</u>
Ln 1	1991/92	TBO (Retirees as of 1/1/91)*	\$37,522
Ln 2	1991/92	TBO (Active employees as of 1/1/91 and accruals for ongoing benefits)**	\$3,041
Ln 3 = Ln1+Ln2		Total	\$40,563

* Bell Atlantic Transmittal No. 565, filed April 2, 1993, Workpaper 8-51-15.

** Petition of AT&T Corp., filed September 16, 1994, Appendix A.