

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

<b>In the Matter of</b>	)	
	)	
<b>AT&amp;T CORP. AND</b>	)	
<b>AT&amp;T OF THE VIRGIN ISLANDS, INC.,</b>	)	
	)	
<b>Complainants,</b>	)	<b>File No. EB-04-MD-002</b>
	)	
<b>v.</b>	)	
	)	
<b>VIRGIN ISLANDS TELEPHONE</b>	)	
<b>CORPORATION,</b>	)	
<b>D/B/A/ INNOVATIVE TELEPHONE,</b>	)	
	)	
<b>Defendant.</b>	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 4, 2004**

**Released: August 11, 2004**

**By the Commission: Commissioner Martin approving in part, dissenting in part, and issuing a statement.**

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we grant a formal complaint<sup>1</sup> filed by AT&T Corp. and AT&T of the Virgin Islands, Inc., (collectively, "AT&T") against Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone ("Vitelco"), pursuant to section 208 of the Communications Act of 1934, as amended ("the Act").<sup>2</sup> AT&T alleges that Vitelco violated section 201(b) of the Act<sup>3</sup> by earning access revenues above its maximum allowable rate of return ("overearning") during the period beginning January 1, 1997 and concluding December 31, 1998 (the "1997-1998 Monitoring Period" or "Monitoring Period"). AT&T further alleges that Vitelco is liable for refunds regarding Vitelco's overearnings in 1997, when, in AT&T's view, Vitelco's access rates were not "deemed lawful" under

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<sup>1</sup> AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, *Formal Complaint*, File No. EB-04-MD-002 (filed Jan. 27, 2004; supplemented to cure deficiencies Mar. 4, 2004) ("Complaint").

<sup>2</sup> 47 U.S.C. § 208.

<sup>3</sup> 47 U.S.C. § 201(b).

section 204(a)(3) of the Act.<sup>4</sup> For the reasons explained below, we agree with AT&T. Accordingly, we grant AT&T's Complaint and hold Vitelco liable to AT&T for AT&T's portion of Vitelco's overearnings from rates in effect from January 1, 1997 through December 31, 1997.

## II. BACKGROUND

### A. Factual and Legal Background

#### 1. The Parties

2. AT&T provides interexchange telecommunications services.<sup>5</sup> Vitelco is a "rate of return" local exchange carrier that provides interstate access services.<sup>6</sup> During 1997 and 1998, AT&T purchased interstate access services from Vitelco pursuant to Vitelco's Interstate Access Tariff.<sup>7</sup>

#### 2. Rate-of-Return Regulation

3. Under section 201(b) of the Act, a local exchange carrier may charge only "just and reasonable" rates for its provision of access services.<sup>8</sup> To enforce this requirement, the Commission has prescribed an authorized rate of return of 11.25 percent for rate-of-return carriers.<sup>9</sup> To comply with this prescription, a rate-of-return carrier sets its tariff rates at levels designed to produce no more than an 11.25 percent return on its investment for the tariff period, based on an analysis of historical and projected cost data and the respective demand for services.<sup>10</sup> The carrier may then file its rates on a "non-streamlined" basis on at least 16 days' notice pursuant to section 203 of the Act<sup>11</sup> and sections 69.3(a) and 61.58 of our rules.<sup>12</sup>

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<sup>4</sup> 47 U.S.C. § 204(a)(3). AT&T does not dispute the lawfulness of Vitelco's earnings in 1998. Joint Statement at 4, ¶¶ 22-23.

<sup>5</sup> AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, *Joint Statements of Complainant and Defendants*, File No. EB-04-MD-002 (filed Apr. 7, 2004) ("Joint Statement") at 3, ¶¶ 1-3.

<sup>6</sup> AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, *List of Further Stipulations to Supplement the Joint Statement of Complainants and Defendant*, File No. EB-04-MD-002 (filed Apr. 20, 2004) ("Further Stipulations") at 1, ¶ 2; Joint Statement at 3, ¶¶ 5, 6.

<sup>7</sup> Joint Statement at 3, ¶ 8.

<sup>8</sup> 47 U.S.C. § 201(b).

<sup>9</sup> See, e.g., *MCI Telecom. Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995) ("*MCI v. FCC*"); *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993) ("*Virgin Islands*"); *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd 7507, 7532 at ¶¶ 1, 216 (1990) ("*Rate-of-Return Prescription Order*") (subsequent history omitted).

<sup>10</sup> See, e.g., 47 C.F.R. §§ 61.38, 61.39.

<sup>11</sup> 47 U.S.C. § 203.

<sup>12</sup> 47 C.F.R. §§ 69.3(a), 61.58(a)(2)(ii). Annual tariffs for access services generally become effective July 1. 47 C.F.R. § 69.3(f).

4. The carrier's access earnings are measured over a two year period (the "monitoring period") to determine compliance with the maximum allowable rate of return.<sup>13</sup> After the first year, the carrier files an "interim monitoring report" that reflects earnings realized during the first year.<sup>14</sup> During the course of the two-year monitoring period, a rate-of-return carrier may make access rate adjustments to try to ensure that it does not exceed or fall short of its maximum allowable rate of return.<sup>15</sup> Moreover, during the course of the two-year monitoring period, the Commission may require the carrier to change its rates prospectively, pursuant either to a section 205 investigation or a section 208 complaint.<sup>16</sup>

5. When the two-year monitoring period ends, the carrier files a "final monitoring report" reflecting its total access earnings.<sup>17</sup> If this final monitoring report indicates that the carrier has exceeded its maximum allowable rate of return at the end of the two-year monitoring period, the Commission may then, in response to formal complaints for damages, require refunds of any such overearnings to affected access customers.<sup>18</sup>

### 3. "Streamlined" Access Tariffs

6. In the Telecommunications Act of 1996,<sup>19</sup> Congress provided all local exchange carriers, including rate-of-return carriers such as Vitelco, an alternative method for filing interstate access rates.<sup>20</sup> Under section 204(a)(3) of the Act, a rate-of-return carrier may file new or revised access rates on a "streamlined" basis.<sup>21</sup> Access rates that a carrier files pursuant to this provision "shall be *deemed lawful* and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which the rates are filed with the Commission unless the Commission takes action under paragraph (1) [47 U.S.C. § 204(a)(1)] before the end of the 7-day or 15-day period, as appropriate."<sup>22</sup> Even if the carrier files a "streamlined" access tariff under section 204(a)(3), the carrier must still report its earnings periodically, and may still revise its rates during the course of the monitoring period, just as if the tariff had been filed under section 203. Moreover, interim monitoring reports that

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<sup>13</sup> The maximum allowable rate of return is equal to the prescribed rate of return plus the amount specified in sections 65.700(a) or (b), of our rules, 47 C.F.R. §§ 65.700(a),(b), which is a margin that the carrier may earn from legal tariff rates before any refund obligation arises. *See, e.g.*, 47 C.F.R. §§ 65.600(b), 65.700-702; *MCI v. FCC*, 59 F.3d at 1415. The two-year monitoring period for determining compliance with the maximum allowable rate of return begins on January 1 of odd-numbered years and ends on December 31 of even-numbered years. 47 C.F.R. § 65.701.

<sup>14</sup> 47 C.F.R. § 65.600(d)(1).

<sup>15</sup> *See, e.g.*, *MCI v. FCC*, 59 F.3d at 1415; *Virgin Islands*, 989 F.2d at 1238-39; 47 C.F.R. § 69.3(b); *In the Matter of Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements*, Report and Order, 1 FCC Rcd 952, 954 at ¶ 10 (1986) ("*Rate-of-Return Methodologies Order*") (subsequent history omitted).

<sup>16</sup> 47 U.S.C. §§ 205, 208. *See In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2170, 2175-78, 2181-84, 2197 at ¶¶ 8, 11, 12, 19-21, 23, 24, 51 (1997) ("*Streamlined Tariff Order*").

<sup>17</sup> 47 C.F.R. § 65.600(b).

<sup>18</sup> *See, e.g.*, *MCI v. FCC. Id.*, 59 F.3d at 1414.

<sup>19</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

<sup>20</sup> 47 U.S.C. § 204.

<sup>21</sup> 47 U.S.C. § 204(a)(3). *See Streamlined Tariff Order*.

<sup>22</sup> 47 U.S.C. § 204(a)(3) (emphasis added).

reveal overearnings can still prompt the Commission to cause the carrier to change its rates prospectively, pursuant to a section 205 investigation or a section 208 complaint. If the carrier has overearned at the end of the two-year monitoring period, however, the Commission cannot require the carrier to refund such overearnings to its access customers for periods during which the rates have been “deemed lawful” by operation of law.<sup>23</sup>

#### 4. Vitelco’s Access Tariffs Applicable to the 1997-1998 Monitoring Period

7. Vitelco’s maximum allowable rate of return was 11.65% for the 1997-1998 Monitoring Period.<sup>24</sup> Four Vitelco access tariffs applied during different portions of the 1997-1998 Monitoring Period. The first was effective on July 1, 1996;<sup>25</sup> the second was effective on July 1, 1997;<sup>26</sup> the third was effective on January 1, 1998;<sup>27</sup> and the fourth was effective on July 1, 1998.<sup>28</sup> Vitelco filed the July 1996 tariff on a non-streamlined basis pursuant to section 203 of the Act.<sup>29</sup> Vitelco filed the subsequent three tariffs on a streamlined basis pursuant to section 204(a)(3) of the Act.<sup>30</sup> During the 1997-1998 Monitoring Period, Vitelco also filed interim monitoring reports on September 25, 1997<sup>31</sup> and on March

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<sup>23</sup> See, e.g., *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 403, 410-411 (D.C. Cir. 2002) (“*ACS v. FCC*”); *Streamlined Tariff Order*, 12 FCC Rcd at 2181-83, ¶¶ 18-20.

<sup>24</sup> See, e.g., 47 C.F.R. § 65.700; *Rate-of-Return Prescription Order*, 5 FCC Rcd at 7509, ¶ 13 (1990). See also Joint Statement at 4, ¶ 14; *AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, Answer of Innovative Telephone*, EB-04-MD-002 (Mar. 24, 2001) (“Answer”) at C-8 (Calculations of [Vitelco’s] Interstate Access Earnings in Excess of 11.65% for the Period July – December 1997).

<sup>25</sup> Complaint, Att. F, Item 2, Transmittal No. 28, Letter from Jonathan E. Canis, Counsel for Vitelco, to William F. Caton, Acting Secretary, Federal Communications Commission, Annual Access Filing Tariff (filed Apr. 2, 1996; effective July 1, 1996) (“July 1996 Tariff”).

<sup>26</sup> Complaint, Att. F, Item 3, Transmittal No. 34, Letter from Gregory J. Vogt, Counsel for Vitelco, to Secretary, Federal Communications Commission, Annual Access Filing Tariff (filed June 16, 1997; effective July 1, 1997); Complaint, Att. F, Item 4, Transmittal No. 35, Letter from Gregory J. Vogt, Counsel for Vitelco, to Secretary, Federal Communications Commission, Supplement Tariff (filed June 30, 1997; effective June 30, suspended for one day) (“July 1997 Tariff”). For convenience, the reference in the text encompasses both tariff transmittals.

<sup>27</sup> Complaint, Att. F, Item 5, Transmittal No. 36, Letter from Gregory J. Vogt, Counsel for Vitelco, to Magalie Roman Salas, Secretary, Federal Communications Commission, Access Filing Tariff (filed Dec. 17, 1997; effective January 1, 1998) (“January 1998 Tariff”).

<sup>28</sup> Complaint, Att. F, Item 6, Transmittal No. 37, Letter from Gregory J. Vogt, Counsel for Vitelco, to Magalie Roman Salas, Secretary, Federal Communications Commission, Annual Access Filing Tariff (filed June 16, 1998; effective July 1, 1998) (“July 1998 Tariff”).

<sup>29</sup> July 1996 Tariff; Joint Statement at 3, ¶ 10.

<sup>30</sup> July 1997 Tariff; January 1998 Tariff; July 1998 Tariff; Joint Statement at 4, ¶¶ 18, 22.

<sup>31</sup> Answer, D-2; *AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, Supplemental Complaint*, File No. EB-04-MD-002 (filed Mar. 3, 2004) (“*Supplemental Complaint*”) Supp. Exh. C, Item 2, Letter from Griselda Dobbins, Chief Financial Officer, to William F. Caton, Acting Secretary, Federal Communications Commission, FCC Form 492 for the period January 1, 1997 to June 30, 1997 (filed Sept. 25, 1997) (“September 1997 492”).

30, 1998,<sup>32</sup> and a final monitoring report and a corrected final monitoring report on September 30, 1999<sup>33</sup> and October 5, 1999,<sup>34</sup> respectively.

8. On June 27, 1997, the Common Carrier Bureau (“CCB”)<sup>35</sup> issued an order suspending and setting for investigation Vitelco’s second tariff (*i.e.*, the July 1997 tariff).<sup>36</sup> On July 28, 1997, on its own motion, CCB issued an order (i) reconsidering its decision to suspend and investigate Vitelco’s July 1997 tariff and (ii) declining to investigate that tariff.<sup>37</sup>

### 5. Vitelco’s Earnings During the 1997-1998 Monitoring Period

9. The parties stipulate that Vitelco’s access earnings exceeded its maximum allowable rate of return during the first six months of 1997.<sup>38</sup> In addition, the record clearly indicates that Vitelco’s access earnings exceeded its maximum allowable rate of return during the remainder of the 1997-1998 Monitoring Period, as well.<sup>39</sup>

### B. Procedural Background

10. On September 10, 2001, pursuant to sections 1.716-1.717 of our rules,<sup>40</sup> AT&T filed an informal complaint against Vitelco alleging that Vitelco had earned more than its maximum allowable rate of return, and thus had overcharged AT&T for access services, during the 1997-1998 Monitoring Period.<sup>41</sup> Also on September 10, 2001, AT&T and Vitelco moved jointly that the Enforcement Bureau (“Bureau”) instruct Vitelco not to respond to AT&T’s informal complaint until 90 days after a certain

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<sup>32</sup> Answer, D-2; *Supplemental Complaint*, Supp. Exh. D, Letter from Griselda Dobbins, Chief Financial Officer, to William F. Caton, Acting Secretary, Federal Communications Commission, FCC Form 492 for the period January 1, 1997 to December 31, 1997 (dated Mar. 30, 1998) (“March 1998 492”).

<sup>33</sup> Answer, D-2; *Supplemental Complaint*, Supp. Exh. C, Item 3, Letter from Elisa G. Hodge, Acting Chief Financial Officer, to Magalie R. Salas, Secretary, Federal Communications Commission, FCC Form 492 for the period January 1, 1997 to December 31, 1998 (filed Sept. 30, 1999) (“September 1999 492”).

<sup>34</sup> Answer, D-2; Exh. G-3, Rate of Return Report, FCC Form 492 for the period January 1, 1997 to December 31, 1998 (dated Oct. 5, 1999) (“October 1999 492”). AT&T questions whether the reports dated March 30, 1998 and October 5, 1999 were actually filed, *see, e.g.*, AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, *AT&T Corp.’s Reply to [Vitelco’s] Answer*, File No. EB-04-MD-002 (filed Mar. 29, 2004) (“Reply”) at 29, ¶¶ S-3, S-4, but we need not and do not resolve that question in order to make the liability determination herein.

<sup>35</sup> The Common Carrier Bureau is now the Wireline Competition Bureau.

<sup>36</sup> 1997 Annual Access Tariff Filings, *Memorandum Opinion and Order*, 13 FCC Rcd 5677, 5677, 5700, 5679, 5702, 5708-09 at ¶¶ 1, 65, 67, 91, 92 (Com. Car. Bur. June 27, 1997) (“*Suspension Order*”).

<sup>37</sup> 1997 Annual Access Tariff Filings, *Order Designating Issues for Investigation Memorandum Opinion and Order and Order on Reconsideration*, 12 FCC Rcd 11417, 11417-18, 11445, 11449, 11452 at ¶¶ 2, 63, 75, 87 (Com. Car. Bur. July 28, 1997) (“*Reconsideration Order*”).

<sup>38</sup> Joint Statement at 4, ¶¶ 13-14; Further Stipulations at 1, ¶ 3.

<sup>39</sup> *See, e.g.*, September 1999 492; October 1999 492.

<sup>40</sup> 47 C.F.R. §§ 1.716-717.

<sup>41</sup> AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, *Informal Complaint*, EB-01-MDIC-0552 (filed Sept. 10, 2001) (“*Informal Complaint*”).

court decision became final.<sup>42</sup> The Bureau granted the Joint Request.<sup>43</sup> Thereafter, the relevant court decision became final, our informal complaint process ran its course, and AT&T timely filed its formal complaint. Thus, pursuant to our informal complaint rules and orders, the instant formal complaint relates back to AT&T's September 10, 2001 informal complaint for purposes of tolling the applicable two-year statute of limitations set forth in 47 U.S.C. § 415(b).<sup>44</sup>

11. The formal complaint alleges that Vitelco violated section 201(b) of the Act by reaping access earnings over its 11.65% maximum allowable rate of return during the 1997-1998 Monitoring Period.<sup>45</sup> Pursuant to section 1.722(d) of our rules,<sup>46</sup> AT&T "bifurcated" this proceeding and requests a determination regarding only liability at this time.<sup>47</sup> AT&T seeks a finding of liability for damages only with respect to Vitelco's 1997 earnings, however. AT&T concedes that section 204(a)(3) precludes any finding of liability for damages regarding Vitelco's 1998 earnings.<sup>48</sup>

12. In response, Vitelco asserts that AT&T's claims for damages are barred by the two-year statute of limitations in section 415(b) of the Act.<sup>49</sup> Vitelco also asserts that section 204(a)(3) bars AT&T's claim for damages regarding Vitelco's earnings during the period July 1, 1997 through December 31, 1997, because the *Suspension Order* did not deprive Vitelco's access rates of their "deemed lawful" status during that period.<sup>50</sup>

### III. DISCUSSION

13. For the reasons discussed below, we find that AT&T timely filed its September 10, 2001 informal complaint, and thus the statute of limitations in section 415(b) of the Act does not bar AT&T's claims for damages. We also find that the *Suspension Order* stripped Vitelco's July 1997 access rates of their deemed lawful status, and that the *Reconsideration Order* did not subsequently render those rates "lawful." Moreover, we find that Vitelco overearned in 1997 and did not underearn in 1998. Accordingly, we grant AT&T's Complaint and hold Vitelco liable to AT&T for AT&T's share of Vitelco's overearnings during 1997.

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<sup>42</sup> AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, *Joint Motion Regarding Procedure for Response to Informal Complaint*, EB-01-MDIC-0552 (filed Sept. 10, 2001) ("Joint Motion"). The court decision at issue was *ACS v. FCC, supra*, which involved many of the same questions raised in AT&T's informal complaint against Vitelco.

<sup>43</sup> *Order*, EB-01-MDIC-0552 (Enf. Bur.– MDRD, Nov. 21, 2001).

<sup>44</sup> 47 U.S.C. § 415(b); 47 C.F.R. §§ 1.716-718.

<sup>45</sup> *See, e.g.*, Complaint at 2, 5, 6, ¶¶ 2, 13, 15.

<sup>46</sup> 47 C.F.R. § 1.722(d).

<sup>47</sup> *See, e.g.*, Joint Statement at 2. Given that we find in favor of AT&T on liability, AT&T may now file a supplemental complaint for damages in accordance with 47 C.F.R. § 1.722. If Vitelco plans to seek court review of this Order, however, the parties may wish to seek a waiver and extension of our 60-day deadline for filing a supplemental complaint for damages.

<sup>48</sup> Complaint at 10, ¶ 30; Joint Statement at 4, ¶ 23.

<sup>49</sup> Answer at pp. 3-4, A-7-9, A-34, A-17-20, A-22-23, A-24-25, A-27-28, A-30-31, A-33-35, ¶¶ 14, 19, 31, 33, 47-48, 55, 59, 64-66.

<sup>50</sup> Answer at pp. 2-3, A-2, A-5, A-7-8, A-13, A-36-37, A-9-12, A-14-17, A-25, A-31-33, A-36-41 ¶¶ 2, 12, 14, 18-20, 22, 25, 29-30, 49, 60-63, 71-78.

### C. AT&T's Claims Are Timely.

14. In Vitelco's view, AT&T's claim for damages arising from the overearnings that Vitelco reaped during the period January 1, 1997 through June 30, 1997 is barred by the two-year statute of limitations set forth in section 415(b) of the Act.<sup>51</sup> According to Vitelco, AT&T's claim for these damages accrued on September 30, 1997, when Vitelco filed its interim monitoring report reflecting its excessive earnings for the first six months of 1997.<sup>52</sup> Vitelco argues, therefore, that AT&T's September 10, 2001 complaint – filed almost four years after Vitelco publicly acknowledged its overearnings on September 30, 1997 – is simply too late.<sup>53</sup>

15. For similar reasons, Vitelco further asserts that AT&T's claim for damages arising from the earnings that Vitelco reaped during the period July 1, 1997 through December 31, 1997 is also barred by the Act's two-year limitations period.<sup>54</sup> According to Vitelco, AT&T's claim for these damages accrued on March 30, 1998, when Vitelco filed its interim monitoring report reflecting its earnings for the last six months of 1997.<sup>55</sup> Vitelco argues, therefore, that AT&T's September 10, 2001 complaint – filed over three years after Vitelco publicly acknowledged its earnings on March 30, 1998 – is time-barred.<sup>56</sup>

16. We disagree with Vitelco's assertions regarding the tardiness of AT&T's damages claims, for the reasons explained below. In accordance with our rules and case law, we conclude that AT&T's claims for damages arising from Vitelco's earnings in 1997 did not accrue until September 30, 1999, the date that Vitelco filed its final monitoring report for the entire 1997-1998 Monitoring Period.<sup>57</sup> Thus, AT&T's September 10, 2001 complaint fell within the Act's two-year limitations period.

17. The Commission recognizes that rate-setting is not an exact science, and that the overarching goal of rate-of-return regulation is to ensure that rates fall within a zone of reasonableness.<sup>58</sup> Consequently, “[t]o alleviate some of the imprecision inherent in the prescribed rate-of-return methodology, . . . the Commission employs what it deems a ‘long evaluation period’ allowing short term

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<sup>51</sup> Answer at pp. 3-4, A-7-8, A-17-19, A-20, A-22-25, A-27-28, A-30-31, A-33-35, ¶¶ 14, 31, 33, 47, 48, 55, 59, 64-66; 47 U.S.C. § 415(b).

<sup>52</sup> Answer at A-8-9, A-22-23, A-34, ¶¶ 19, 47, 65-66; September 1997 492.

<sup>53</sup> Answer at A-8-9, A-22-23, A-34-35, ¶¶ 19, 47, 65-66, 68.

<sup>54</sup> Answer at pp. 3-4, A-8, A-19, A-23-25, A-34-35, A-47, ¶¶ 14, 31, 47-48, 66-68.

<sup>55</sup> Answer at pp. 3-4, A-19, A-25, A-34-35, A-47, ¶¶ 31, 48, 66-68; March 1998 492. For purposes of this Order only, we will assume, without deciding, that Vitelco did, in fact, file an interim monitoring report on March 30, 1998.

<sup>56</sup> Answer at pp. 3-4, A-20, A-22, A-25, A-33-35, ¶¶ 34, 47-48, 65, 67-68.

<sup>57</sup> See, e.g., *ACS v. FCC*, 290 F.3d at 407 n.1; *MCI v. FCC*, 59 F.3d at 1416-17; *Virgin Islands*, 989 F.2d at 1238-39; *Allnet Communications Serv., Inc. v. US West, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 3017, 3019 at ¶ 13 (1993) (subsequent history omitted) (“*Allnet*”); *US Sprint Communications Ltd. Partnership v. Pacific Northwest Bell Tel. Co.*, Memorandum Opinion and Order, 8 FCC Rcd 1288, 1291-92 at ¶ 16 (1993) (subsequent history omitted).

<sup>58</sup> See, e.g., 47 U.S.C. § 201(b); *Virgin Islands*, 989 F.2d at 1239 (“[T]he Commission's prescribed rate of return is not Mosaic law, but a single point within a broad range of reasonable rates.”); *Nader v. FCC*, 520 F.2d 182, 193 (D.C. Cir. 1975) (“In terms of ratemaking, the agency's expertise allows us to accept its judgment after it defines the zone of reasonableness.”).

earnings ‘peaks’ and ‘valleys’ to offset each other.”<sup>59</sup> In particular, rule 65.701 provides, in pertinent part, that “interstate earnings shall be measured over a two year period to determine compliance with the maximum allowable rate of return.”<sup>60</sup> This two-year period allows a carrier time to minimize or eliminate overearnings that might otherwise result from cost and demand projections that prove to be inaccurate. Specifically, if the rates that a carrier files at the beginning of a monitoring period begin unexpectedly to yield excessive earnings, the carrier has time to observe that situation and to file new, lower rates to correct for the overearnings before the monitoring period ends.<sup>61</sup> The two-year monitoring period also protects carriers from having their rates adjudged based on unforeseen and unforeseeable earnings variations over short intervals.<sup>62</sup>

18. Based on how the rate-of-return regime works, as just described, the D.C. Circuit and the Commission have repeatedly held that overearnings claims for damages accrue when the carrier files its final monitoring report, and not before.<sup>63</sup> In fact, in *MCI v. FCC*, the D.C. Circuit squarely rejected the same argument that Vitelco makes here – that submission of a preliminary monitoring report triggers the running of the statute of limitations.<sup>64</sup>

19. This only makes sense, given the nature of rate-of-return regulation, because it serves to protect the carrier from complaints filed prematurely, before the carrier has had an opportunity to remedy a trend of overearnings. Here, for example, had Vitelco underearned during the last 12 months of the Monitoring Period, it would have reduced or perhaps even eliminated AT&T’s claim for damages. Such underearnings could have resulted from changed demand patterns, a voluntary tariff amendment, or a tariff amendment caused by Commission proceedings under section 205 or section 208. Moreover, during the last 12 months of the Monitoring Period, Vitelco might have decided, for some reason, to file non-streamlined rates. Thus, prior to Vitelco’s filing of its final monitoring report, AT&T could not have known whether or to what extent it had a viable claim for damages, even though, after the first six months of 1997, Vitelco filed its tariffed rates pursuant to section 204(a)(3). Accordingly, AT&T’s claim for damages did not accrue until Vitelco filed its final monitoring report in September 1999.

20. Vitelco acknowledges the foregoing rules and case law concluding that a damages claim alleging overearnings in violation of section 201(b) does not accrue until the final monitoring report

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<sup>59</sup> *Virgin Islands*, 989 F.2d at 1233.

<sup>60</sup> 47 C.F.R. § 65.701.

<sup>61</sup> *See, e.g., MCI v. FCC*, 59 F.3d at 1415 (“During any monitoring period in which its rates appeared destined to yield earnings above (or for that matter below) its authorized rate of return, the LEC could have revised its tariffs to avoid that result.”); *Virgin Islands*, 989 F.2d at 1233 (observing that carriers “may correct for erroneous projections in the first year through rate adjustments in the second year.”).

<sup>62</sup> *Virgin Islands*, 989 F.2d at 1238.

<sup>63</sup> *See, e.g., MCI v. FCC*, 59 F.3d at 1416-17; *Virgin Islands*, 989 F.2d at 1238-39 (observing that “the target ‘authorized return’ is a number that has meaning only in relation to the full two-year monitoring period.”); *AT&T v. Telephone Utils. Exch. Carrier Ass’n.*, Memorandum Opinion and Order, 10 FCC Rcd 8405, 8415 at ¶ 22 (“[T]he date of the filing of the final monitoring report is dispositive with regard to the date a complainant discovers the right or wrong or the facts on which such knowledge is chargeable as a matter of law.”); *Allnet*, 8 FCC Rcd at 3019, ¶ 13; *US Sprint Communications Ltd. Partnership v. Pacific Northwest Bell Tel. Co.*, Memorandum Opinion and Order, 8 FCC Rcd 1288, 1291-92 at ¶ 16 (1993) (subsequent history omitted); *MCI Telecom. Corp. v. Pacific Bell Tel. Co. et al.*, Memorandum Opinion and Order, 5 FCC Rcd 3463, 3464 at ¶ 6 (1990) (subsequent history omitted).

<sup>64</sup> *MCI v. FCC*, 59 F.3d at 1416-17 (holding that “a cause of action for damages [ . . . ] does not accrue until after [the carrier] files its final monitoring report.”).

is filed.<sup>65</sup> Vitelco argues, however, that those rules and case law did not fully survive the enactment of section 204(a)(3).<sup>66</sup> Specifically, Vitelco observes that the foregoing rules and case law were premised on the availability of refunds for the entire two-year monitoring period.<sup>67</sup> Thus, in Vitelco's view, where, as here, the operation of section 204(a)(3) limits the availability of refunds to only a portion of the two-year monitoring period, the pre-204(a)(3) rules and case law regarding claim accrual simply do not apply, and the two-year monitoring period is no longer relevant for statute-of-limitations purposes.<sup>68</sup> According to Vitelco, this is precisely what the D.C. Circuit meant when it stated, in the context of circumstances identical to those here, that the two-year monitoring period had been "cut short" by the filing of rates deemed lawful under section 204(a)(3).<sup>69</sup>

21. Vitelco is certainly correct that section 204(a)(3) "radically" altered tariff rate regulation, as the Commission has recognized.<sup>70</sup> Vitelco errs, however, in describing the scope of that alteration.

22. With respect to rate-of-return regulation, what section 204(a)(3) changed is the remedy available for "deemed lawful" rates that result in earnings above the maximum allowable rate of return: the Commission can no longer require the carrier to pay refunds for past overearnings generated by "deemed lawful" rates. What section 204(a)(3) did *not* change, however, is the Commission's requirement that carriers comply with the rate-of-return prescription over a two-year period. Specifically, even with respect to deemed lawful rates, the Commission can still cause the carrier to lower its rates prospectively via an investigation under section 205 of the Act or a complaint proceeding under section 208 of the Act to ensure compliance with the rate-of-return prescription during the course of the full two-year period.<sup>71</sup>

23. In order to perform those surviving functions properly, the Commission must continue to assess carriers' rates in the context of a predetermined, specific time-frame (here, two years). Otherwise, the rate-of return prescription would lose all meaning.<sup>72</sup> Indeed, Vitelco itself recognized the continuing vitality of the Commission's rules and case law regarding the two-year monitoring period, as

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<sup>65</sup> Answer at A-18-19, A-24-25, A-29, ¶ 31-32, 48, 56.

<sup>66</sup> Answer at A-5, A-18-19, A-24-25, A-27, A-29, ¶ 11, 31-32, 48, 53, 55-56.

<sup>67</sup> Answer at A-18-19, A-24, ¶ 31-32, 48.

<sup>68</sup> Answer at A-18-19, A-24-25, A-29, ¶ 31-32, 48, 56.

<sup>69</sup> Answer at 3, A-5, A-7, A-24-25, A-29, ¶¶ 12 n.9, 13, 48-49, 56 (all referencing *ACS v. FCC*, 290 F.3d at 415). See Joint Statement at 4, ¶ 17.

<sup>70</sup> Answer at A-18, ¶ 31 (citing *Streamlined Tariff Order*, 12 FCC Rcd at 2175-76, ¶ 8).

<sup>71</sup> See *Streamlined Tariff Order*, 12 FCC Rcd at 2183, ¶21 ("The 'deemed lawful' language in section 204(a)(3) changes the current regulatory scheme only by immunizing from challenge those rates that are not suspended or investigated before a finding of unlawfulness. It does nothing to change the Commission's ability to prescribe rates as to the future under section 205 or to find under section 208 that a rate will be unlawful if charged in the future."); *id.* at 2181-83, ¶¶ 19-20. Unlike a complaint for damages, such a complaint for prospective relief would not be premature, even if filed before the end of the monitoring period, because the alleged violation of the Act in that circumstance – charging rates that are likely to result in period-end earnings above the maximum allowable rate of return – accrues when that likelihood becomes evident. Otherwise, meaningful prospective relief (as opposed to damages) would never be available via a complaint proceeding.

<sup>72</sup> See, e.g., *Virgin Islands*, 989 F.2d at 1238-39 (stating that "the target 'authorized return' is a number that has meaning only in relation to the full two-year monitoring period.").

Vitelco maintained its practice of filing monitoring reports and amended tariffs.<sup>73</sup> Finally, the D.C. Circuit's passing reference to a monitoring period being "cut short" by section 204(a)(3) was, in our view, referring simply to the fact that damages could not arise directly from the "deemed lawful" rates in effect during part of the period at issue.<sup>74</sup> Thus, we conclude that section 204(a)(3) did not vitiate the two-year monitoring period. And, given that the two-year monitoring period survives the enactment of section 204(a)(3), so, too, does the rule regarding accrual of damages claims for statute-of-limitations purposes.

24. To further support its view on when AT&T's damages claim accrued, Vitelco makes another argument for why a two-year monitoring period does not apply here, and, thus, why the statute of limitations bars recovery for Vitelco's 1997 overearnings. Specifically, Vitelco argues that a two-year period is valid only if rates other than those deemed lawful are in effect for the entire period.<sup>75</sup> In Vitelco's view, if deemed lawful rates are in effect during any portion of the two-year period, the Commission can no longer consider whether the carrier overearned during the full two-year monitoring period, because to do so would require the Commission to consider earnings realized during a period of time when deemed lawful rates were in effect. According to Vitelco, that would result in a carrier being held liable for damages despite the deemed lawful status of its rates. In other words, in Vitelco's view, the mere existence of deemed lawful rates during any portion of the two-year monitoring period would immunize all rates in effect during the monitoring period, even rates not filed pursuant to section 204(a)(3).

25. We disagree. Nothing in section 204(a)(3), our rules, or precedent supports Vitelco's sweeping suggestion that the deemed lawful status of rates means not only that the earnings produced from those rates cannot themselves be the subject of refunds, but also that such earnings cannot even be considered in determining whether the earnings from *other* rates may be the subject of refunds. Our conclusion does not deprive Vitelco of the benefit of deemed lawful protection for its 1998 rates filed pursuant to section 204(a)(3), or impose a penalty on Vitelco based in part on those deemed lawful rates. To the extent that Vitelco's rates are "deemed lawful" under section 204(a)(3), we cannot and do not require Vitelco to refund "overcharges" to AT&T, because, as a legal matter, there are none.<sup>76</sup> Even though we find liability arising from Vitelco's overearnings during the time when Vitelco's rates were *not* deemed lawful, Vitelco still receives the full benefit of section 204(a)(3) during the time when Vitelco's rates *were* deemed lawful, because Vitelco gets to keep all the revenues it received during that time.

26. In fact, were we to accept Vitelco's suggestion, we would likely run afoul of *Virgin Islands*.<sup>77</sup> In that case, the court vacated the Commission's award of overearnings refunds, because the Commission had based the award on an examination of earnings during only a six-month subset of a two-

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<sup>73</sup> January 1998 Tariff; July 1998 Tariff; March 1998 492; September 1999 492; October 1999 492.

<sup>74</sup> See *ACS v. FCC*, 290 F.2d at 415.

<sup>75</sup> Answer at A-20, ¶ 32 ("Under new section 204(a)(3), retroactive damages are evaluated during the entire two-year period only if "non-deemed lawful" rates are in effect for that whole period. To decide otherwise would allow damages from rates that are deemed lawful."); A-29, ¶ 55 ("The use of a two-year monitoring period to ensure that rates are reasonable, when a portion of the rates being monitored are already conclusively presumed to be reasonable, would result in the recovery of damages for "deemed lawful rates."); A-31, ¶ 60 ("Without a two-year monitoring period, there is no refund obligation.").

<sup>76</sup> *Streamlined Tariff Order*, 12 FCC Rcd at 1275-76, ¶ 8. See *id.* at 2181-82, ¶ 19.

<sup>77</sup> *Virgin Islands*, 989 F.2d at 1238-39. For the reasons explained in paragraphs 21-23, *supra*, we reject Vitelco's argument that, after the enactment of section 204(a)(3), *Virgin Islands* is no longer instructive regarding the existence and operation of the two-year monitoring period.

year monitoring period.<sup>78</sup> In doing so, the court “held that the Commission could not evaluate a carrier’s rate-of-return using a period different from the two-year period the Commission itself had prescribed.”<sup>79</sup> Consequently, had Vitelco underearned during the last 12-18 months of the monitoring period, we would have had to take that fact into account in deciding whether and to what extent to award damages to AT&T. Put differently, *Virgin Islands* (and the nature of our rate-of-return regime) require us to consider Vitelco’s earnings throughout the entire 1997-1998 Monitoring Period in order to assess whether to grant AT&T’s claim, even though deemed lawful rates were in effect during part of that Monitoring Period.

27. Finally, Vitelco relies on a recent court decision, *Communications Vending*,<sup>80</sup> to support its position on claim accrual. In that case, the court held that uncertainty about the legal validity of a claim does not toll the running of the statute of limitations in section 415 of the Act; once a prospective claimant knows the *facts* supporting its claim, it must file its claim within the limitations period, even though the *law* supporting its claim is ambiguous.<sup>81</sup> Here, however, the uncertainty that existed when Vitelco filed its interim monitoring reports was factual, not legal: it was unknown whether Vitelco, as a factual matter, would actually overearn as of the end of the two-year monitoring period; thus, it was unknown whether AT&T would have any factual basis for an overearnings claim. Such factual uncertainty is fundamentally different from legal uncertainty, and renders *Communications Vending* inapposite.

28. In sum, AT&T’s claims for damages accrued when Vitelco filed its final monitoring report for the 1997-1998 Monitoring Period, not when Vitelco filed its interim monitoring reports. Consequently, AT&T’s claims for damages arising from Vitelco’s access earnings in 1997 are timely, and Vitelco’s defense based on the statute of limitations set forth in section 415(b) of the Act fails.

#### **B. Vitelco’s Access Rates for July 1997-December 31, 1997 Were Not “Deemed Lawful.”**

29. Before addressing the merits of the parties’ arguments regarding the last six months of 1997, the facts surrounding Vitelco’s July 1997 tariff bear repeating and elaboration. Vitelco initially filed the July 1997 tariff on June 16, 1997.<sup>82</sup> On June 27, 1997, in response to petitions filed by AT&T and MCI questioning the “cash working capital” (“CWC”) requirements of Vitelco and 10 other rate-of-return carriers, CCB suspended and set for investigation the tariffs of those 11 carriers.<sup>83</sup> CCB also ordered Vitelco and the other 10 carriers to “KEEP ACCURATE ACCOUNT” of all amounts received

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<sup>78</sup> *Virgin Islands*, 989 F.2d at 1238-39.

<sup>79</sup> *ACS v. FCC*, 290 F.2d at 413, citing *Virgin Islands*, 989 F.2d at 1238. It merits mention that the D.C. Circuit’s recent reliance on *Virgin Islands* in the ACS case further undermines Vitelco’s assertion that section 204(a)(3) has superceded pre-1997 case law regarding rate-of-return regulation.

<sup>80</sup> *Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004) (“*Communications Vending*”).

<sup>81</sup> *Communications Vending*, 365 F.3d at 1074.

<sup>82</sup> July 1997 Tariff, Further Stipulations at 1, ¶ 5.

<sup>83</sup> *Suspension Order*, 13 FCC Rcd at 5700, ¶ 65. *See id.* at 5679, ¶ 1 (“we suspend for one day and set for investigation” the carriers’ tariffs); *id.* at 5702, ¶ 67 (“We will therefore suspend these LECs’ tariff filings for one day and initiate an investigation into the lawfulness of their proposed CWC requirements.”); *id.* at 5708, ¶ 91 (“the tariff filings filed by ... [Vitelco and the 10 other carriers] ... ARE SUSPENDED for one day and an investigation is instituted.”).

that are associated with the rates that are subject to this investigation.”<sup>84</sup> CCB noted, however, that it would “separately issue an order designating issues for investigation.”<sup>85</sup>

30. One month later, on July 28, 1997, CCB “designate[d] for investigation issues regarding cash working capital for four [of the] rate of return carriers” referenced in the *Suspension Order*.<sup>86</sup> Vitelco was not among those four carriers. Instead, with respect to Vitelco and the six other carriers, CCB held that, “[p]ursuant to Sections 1.108 and 0.291 of the Commission’s rules, we reconsider on our own motion our decision to suspend and investigate tariff provisions that include rate elements associated with cash working capital....”<sup>87</sup> CCB did so because “[e]ach of these LECs made ex parte filings in which they provided information sufficient to” show compliance with Commission rules regarding cash working capital.<sup>88</sup> As a result, CCB “decline[d] to investigate these LECs’ tariff provisions that relate to cash working capital.”<sup>89</sup>

31. Vitelco filed the July 1997 tariff pursuant to section 204(a)(3) of the Act, and asserts that its rates for July through December 1997 were deemed lawful by operation of that section. AT&T asserts that the rates were not deemed lawful. As explained below, we agree with AT&T. Section 204(a)(3) states that rates filed pursuant to its terms shall be deemed lawful “unless the Commission *takes action under paragraph (1)* [i.e., section 204(a)(1)] before the end” of the applicable 7 or 15-day notice period.<sup>90</sup> Section 204(a)(1) encompasses the following actions: suspension of a new or revised tariffed charge; “enter[ing] upon a hearing concerning [its] lawfulness”; ordering a carrier “to keep accurate account of all amounts received by reason of such charge” pending such completion of the hearing; and making such order as the Commission deems proper regarding the lawfulness of the tariffed charge.<sup>91</sup>

32. Based upon the language of the statute, as interpreted by the Commission in the *Streamlined Tariff Order*, we find that the rates in the July 1997 tariff were never deemed lawful. According to the statute, a rate is deemed lawful “*unless* the Commission takes action under paragraph [204(a)(1)] before the end of [the] 7-day or 15-day period.” In this case, the Commission, through CCB acting on delegated authority, took a number of actions under section 204(a)(1). In the *Suspension Order*,

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<sup>84</sup> *Suspension Order*, 13 FCC Rcd at 5708-09, ¶ 92. See *Reconsideration Order*, 12 FCC Rcd at 11418, ¶ 1 (“On June 27, 1997, we released the [*Suspension Order*], which, *inter alia*, suspended for one day the annual access tariffs filed by several incumbent local exchange carriers, imposed an accounting order, and initiated an investigation into the lawfulness of a number of issues raised by these tariff filings.”).

<sup>85</sup> *Suspension Order*, 13 FCC Rcd at 5679, ¶ 3.

<sup>86</sup> *Reconsideration Order*, 12 FCC Rcd at 11418, ¶ 2. See *id.* at 11444-46, ¶¶ 62-66.

<sup>87</sup> *Reconsideration Order*, 12 FCC Rcd at 11449, ¶ 75 (footnote referencing 47 C.F.R. §§ 1.108 and 0.291 omitted). See *id.* at 11418, ¶ 2.

<sup>88</sup> *Reconsideration Order*, 12 FCC Rcd at 11449, ¶ 75. See *id.* at 11445, ¶ 63 (“We decline to investigate most of these Class B carriers because they have now provided information that verifies that their net lags are close to 15 days.”).

<sup>89</sup> *Reconsideration Order*, 12 FCC Rcd at 11449, ¶ 75. See *id.* at 11452, ¶ 87 (“IT IS FURTHER ORDERED that pursuant to Sections 0.291 and 1.108 of the Commission’s rules, 47 C.F.R. §§ 0.291, 1.108, we reconsider on our own motion our decision in the 1997 Annual Access Tariff *Suspension Order* to suspend and investigate tariff provisions that include rate elements associated with cash working capital for . . . Virgin Island Telephone Company, . . . and, for the reasons stated herein, we decline to investigate these LECs’ tariff provisions that relate to cash working capital.”); *id.* at 11445, ¶ 63.

<sup>90</sup> 47 U.S.C. § 204(a)(3) (emphasis added).

<sup>91</sup> 47 U.S.C. § 204(a)(1).

CCB suspended Vitelco's tariff, began a hearing concerning the lawfulness of the tariff, and issued an accounting order.

33. Vitelco argues, however, that the Commission does not "take action" within the meaning of section 204(a)(3) unless and until a tariffed charge has been suspended *and* investigated *and* ruled upon.<sup>92</sup> That is, according to Vitelco, an investigation "must be conducted and concluded" in order for section 204(a)(3)'s "takes action" language to be implicated. Vitelco asserts, therefore, that the access rates in the July tariff were deemed lawful by operation of section 204(a)(3), notwithstanding the *Suspension Order*.<sup>93</sup>

34. We disagree. The language of section 204(a)(3) does not require an investigation to be concluded prior to removing deemed lawful status from tariffed rates. Moreover, the Commission has already rejected this view in the *Streamlined Tariff Order*, which holds that the deemed lawful status of rates is removed upon the issuance of an order suspending the rates and setting them for investigation; an order concluding the investigation is not required.<sup>94</sup>

[T]he "deemed lawful" language does not govern streamlined tariff filings that become effective after *suspension* in those instances where the Commission *suspends and initiates* an investigation of a LEC tariff within the 7 or 15 day notice periods specified in section 204(a)(3). In those cases, the LEC streamlined tariffs would *not* be "deemed lawful" under section 204(a)(3) because they were *suspended and set for investigation*.<sup>95</sup>

35. Vitelco's interpretation of the statute is, moreover, illogical. As noted, the statute requires the Commission to "take[] action . . . before the end of that 7-day or 15-day period. . . ." If the action required to remove deemed lawful status were an order concluding the investigation, as Vitelco contends, the Commission could never accomplish this as a practical matter within the 7 or 15-day period specified in the statute.<sup>96</sup> Thus, Vitelco's interpretation of the statute would render it virtually impossible to remove deemed lawful status, an illogical result given the statute's explicit contemplation that deemed lawful status can and will be removed in appropriate circumstances.

36. Vitelco further argues that, even if the *Suspension Order* had stripped deemed lawful status from the access rates contained in Vitelco's July 1997 tariff, the *Reconsideration Order* restored the rates' deemed lawful status.<sup>97</sup> Thus, in Vitelco's view, the access rates contained in its July 1997 tariff reclaimed their deemed lawful status, which bars AT&T's claim for damages regarding Vitelco's earnings during the last six months of 1997.<sup>98</sup>

37. We reject this contention as well. We find that the *Suspension Order* stripped the access rates in the July 1997 tariff of their deemed lawful status, and the *Reconsideration Order* did not

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<sup>92</sup> Answer at A-4, A-9-12, A-15-16, A-36-37, A-40-41, ¶¶ 10, 19, 29, 71, 78; AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, *Supplemental Brief of Innovative Telephone*, File No. EB-04-MD-002 (Apr. 26, 2004) at 1-5 (Vitelco's Delegation Brief).

<sup>93</sup> Answer at 2, A-9-16, A-32-33, A-37-40, ¶¶ 19, 21-26, 29, 61, 63, 71-77.

<sup>94</sup> *Streamlined Tariff Order*, 12 FCC Rcd at 2182, 2220, ¶ 19, 103.

<sup>95</sup> *Streamlined Tariff Order*, 12 FCC Rcd at 2182, ¶ 19 (emphasis added).

<sup>96</sup> Indeed, the statute gives the Commission five months to conclude such an investigation. 47 U.S.C. § 204(a)(2).

<sup>97</sup> Answer at 2-3, A-15-16, A-32-33, A-40 ¶¶ 29, 61-62, 78; Vitelco's Delegation Brief at 1-6.

<sup>98</sup> Answer at A-7, A-9-16, A-32-33, A-36-41, ¶¶ 14, 19, 22-26, 29, 61-63, 71-78.

restore such status. As explained in the *Streamlined Tariff Order*, after rates are suspended and investigated, they can become the lawful rates only if the Commission issues an order affirmatively finding the rates to be lawful.<sup>99</sup>

[The rates] would be “legal” until the Commission concluded an investigation as to their lawfulness. The lawfulness of such tariffs would be determined by the orders issued by the Commission at the conclusion of those proceedings.<sup>100</sup>

38. Here, there was no order finding the rates lawful. The *Reconsideration Order* did not adjudge the lawfulness of Vitelco’s rates, but merely decided not to investigate them. Moreover, because it was issued by CCB rather than the full Commission, the *Reconsideration Order* cannot have adjudged the lawfulness of Vitelco’s rates, as CCB did not have the authority to issue such an order. Under section 5(c) of the Act, the Commission may not delegate to a Bureau the authority to take action under section 204(a)(2), *i.e.*, to issue an order concluding a tariff investigation. Both AT&T and Vitelco recognize that CCB did not have authority to rule on the lawfulness of Vitelco’s tariff.<sup>101</sup> Thus, in light of the suspension and investigation, Vitelco’s rates were not deemed lawful by operation of law. Nor were those rates ever adjudged to be lawful. Accordingly, the July to December 1997 access rates were legal, but not lawful, and those rates may therefore form the basis of liability to AT&T for damages.<sup>102</sup>

39. Finally, Vitelco asserts that the *Reconsideration Order* “rendered the suspension and investigation a nullity. As such, [Vitelco’s] rates were neither suspended nor investigated under Section 204(a)(1).”<sup>103</sup> We find nothing in the *Reconsideration Order*, however, that suggests it was intended to have such retroactive effect.

**C. Vitelco Violated Section 201(b) by Overearning During the 1997-1998 Monitoring Period, and is Liable for Damages Arising from its Overearnings in 1997.**

40. It is well established that the Commission’s rate-of-return prescription has the force of a statute, so exceeding that prescription subjects a carrier to liability:

We have repeatedly held that a rate-of-return prescription has the force of law and that the Commission may therefore treat a violation of the prescription as a per se violation of the requirement of the Communications Act that a common carrier maintain “just and reasonable” rates. . . .<sup>104</sup>

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<sup>99</sup> *Streamlined Tariff Order*, 12 FCC Rcd at 2182, 2220, ¶ 19, 103.

<sup>100</sup> *Streamlined Tariff Order*, 12 FCC Rcd at 2182, ¶ 19 (emphases added).

<sup>101</sup> Vitelco’s Delegation Brief at 1-5; *AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, d/b/a/ Innovative Telephone, Supplemental Brief of AT&T Corp.*, File No. EB-04-MD-002 (May 4, 2004) at 2-3 (“AT&T’s Delegation Brief”).

<sup>102</sup> *Streamlined Tariff Order*, 12 FCC Rcd at 2181-82, ¶¶ 18-19.

<sup>103</sup> Vitelco’s Delegation Brief at 5.

<sup>104</sup> *MCI v. FCC*, 59 F.3d at 1414 (citing and quoting 47 U.S.C. § 201(b)). *See, e.g., American Tel. & Tel. Co. v. FCC*, 836 F.2d 1386, 1392 (D.C. Cir. 1988); *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1106-07 (D.C. Cir. 1987) (“*New England Tel.*”); *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975).

41. If a carrier exceeds its maximum allowable rate of return, the Commission can order refunds and award damages to aggrieved customers in the context of a formal complaint case.<sup>105</sup> Damages may be based on the difference between the amount the customer paid to the carrier and the amount the customer would have paid to the carrier if the carrier had charged and applied its rates in a manner that produced earnings within the maximum-allowable rate-of-return ceiling.<sup>106</sup>

42. As stated above, the record indicates that Vitelco exceeded its maximum allowable rate of return during 1997 and continued to do so in 1998, resulting in access earnings above the maximum allowable rate of return for the 1997-1998 Monitoring Period.<sup>107</sup> As the record further indicates, Vitelco's access rates in effect during 1998 were deemed lawful.<sup>108</sup> As we have held herein, however, Vitelco's access rates in effect during 1997 were not deemed lawful. As even Vitelco acknowledges,<sup>109</sup> the Commission can still award damages for overearnings accrued during any portion of the monitoring period when the rates in effect were not deemed lawful. Accordingly, we conclude that Vitelco has violated section 201(b) of the Act and that Vitelco is liable to AT&T for AT&T's share of Vitelco's overearnings accrued during 1997.

#### IV. ORDERING CLAUSE

43. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 204, 206, 207, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 204, 206, 207, and 208, that AT&T's formal complaint is GRANTED.

#### FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>105</sup> See, e.g., *New England Tel.*, 826 F.2d at 1107-08 (stating that section 4(i) of the Act provides the Commission with the authority to enforce the rate-of-return prescription by ordering refunds); see also *In the Matter of Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes*, Report and Order, 10 FCC Rcd 6788, 6848-49 at ¶ 137 (1995) (subsequent history omitted) (noting that the complaint process embodied in section 208 of the Act provides a useful tool in enforcing the rate-of-return prescription, and that the Commission is authorized to award damages for violations of the rate-of-return prescription).

<sup>106</sup> *MCI v. FCC*, 59 F.3d at 1415.

<sup>107</sup> September 1997 492 (cumulative interstate access rate of return 12.98%); March 1998 492 (cumulative interstate access rate of return 12.94%); September 1999 492 (cumulative interstate access rate of return 14.78%); October 1999 492 (cumulative interstate access rate of return 14.79%).

<sup>108</sup> See, e.g., Joint Statement at 4, ¶¶ 22, 23; Complaint at 10, ¶ 30.

<sup>109</sup> Further Stipulations at ¶ 3; Answer at A-5-6, A-8-9, A-24-25, A-27-28, A-30-31, ¶¶ 12, 14, 19, 48, 55, 58, 60.

SEPARATE STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN  
Approving in Part, Dissenting in Part

Re: *AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corporation, D/B/A/ Innovative Telephone ( File No. EB-04-MD-002)*

I am troubled by today's decision that finds the Virgin Islands Telephone Corporation ("Vitelco") liable for refunds for overearnings on 1997 interstate access rates on the basis that such rates were not "deemed lawful" under section 204(a)(3) of the Communications Act.

Under section 204(a)(3), a local exchange carrier's access tariff, filed on a streamlined basis, is "deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action... before the end of that 7 day or 15-day period, as appropriate."<sup>110</sup> The "deemed lawful" language in section 204(a)(3) immunizes from challenge those rates that are not suspended or investigated before a finding of unlawfulness.<sup>111</sup> Filing carriers are not subject to liability for damages when tariffs take effect, without suspension, under section 204(a)(3) and even if they are subsequently determined to be unlawful in a section 205 investigation or a section 208 complaint proceeding.

On June 27, 1997, the Common Carrier Bureau ("Bureau") issued an order suspending and setting for investigation Vitelco's July 1997 to December 1997 tariff filing.<sup>112</sup> On July 28, 1997, on its own motion, the Bureau issued an order reconsidering its decision to suspend and investigate Vitelco's tariff and declining to investigate that tariff.<sup>113</sup>

Today's action finds that the Bureau's *Suspension Order* "stripped Vitelco's July 1997 tariff of their deemed lawful status,"<sup>114</sup> even though in the subsequent *Reconsideration Order* the Bureau reversed its decision to investigate the tariff. The Commission finds that while the Bureau had the authority to strip the "deemed lawful" status from Vitelco's 1997 access rates, the *Reconsideration Order* cannot restore the lawfulness of Vitelco's rates because the Bureau does not have the authority to issue such order.<sup>115</sup>

Today's decision essentially endorses the Bureau's ability, on delegated authority, to deny the presumed "deemed lawful" status associated with a carrier's streamlined tariff filing and effectively foreclose Commission review of that decision. On its own, the Bureau suspended and set for

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<sup>110</sup> 47 USC 204(a)(3).

<sup>111</sup> See, *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170 at paras.19-21 (1997) ("*Streamlined Tariff Order*").

<sup>112</sup> *1997 Annual Access Tariff Filings*, Memorandum Opinion and Order, *Suspension Order*, 13 FCC Rcd 5677 (Com. Car. Bur. June 27, 1997) ("*Suspension Order*").

<sup>113</sup> *1997 Annual Access Tariff Filings*, Order Designating issues for Investigation Memorandum Opinion and Order and Order on Reconsideration, 12 FCC Rcd 11417 (Com. Car. Bur. July 28, 1997) ("*Reconsideration Order*")

<sup>114</sup> *Order* at paras. 13, 37.

<sup>115</sup> Under section 5(c) of the Act, the Commission may not delegate to a Bureau the authority to take action under section 204(a)(2), i.e., to issue an order concluding a tariff investigation.

investigation Vitelco's tariff filing. That action revoked the "deemed lawful" status of the tariff. One month later, however, the Bureau reversed its decision to investigate the tariff and the lawfulness of Vitelco's tariff was thus never subsequently addressed. A procedural mechanism that enables the Bureau to strip carrier tariffs of their presumed lawfulness through a one-day suspension and subsequent failure to follow through on an investigation is inherently unfair and inconsistent with the intent of Section 204(a)(3). Accordingly, I approve in part and dissent in part from the order.