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

In the matter of	)	
	)	
1993 Annual Access Tariff Filings Phase 1	)	
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 93-193
	)	
AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464 Phase II	)	CC Docket No. 94-65
	)	CC Docket No. 93-193
	)	
Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690	)	
	)	CC Docket No. 94-157
NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328	)	

ORDER TERMINATING INVESTIGATION

Adopted: March 14, 2005 **Released: March 30, 2005**

By the Commission: Commissioner Abernathy not participating; former Chairman Powell did not participate in the final consideration of this item.

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I. INTRODUCTION

1. In this order, we resolve several pending tariff investigations related to the accounting treatment of certain postretirement benefits other than pensions, known as "OPEBs." In particular, we address local exchange carrier (LEC) claims (1) that accrued OPEB costs were eligible for exogenous treatment in price caps; and (2) that accrued OPEB liabilities need not be deducted from their interstate rate bases. As set forth more fully below, we find that Verizon has justified exogenous treatment for accrued OPEB costs for the years 1991 and 1992. We also find that it was reasonable for LECs subject to price cap regulation to include accrued OPEB costs in their interstate rate bases. Accordingly, we conclude that those LECs were permitted to make exogenous adjustments to their price cap indices to reflect the reduced sharing obligations flowing from inclusion of these costs in the rate base.

II. BACKGROUND

2. In December 1990, the Financial Accounting Standards Board (FASB) adopted SFAS-106 for companies that follow generally accepted accounting principles (GAAP). SFAS-106 established new financial accounting and reporting requirements for any employer offering postretirement benefits other than pensions (OPEBs) to its employees.[1] OPEBs typically consist of health and dental care benefits and life insurance.

3. SFAS-106 requires companies to account for OPEBs on an accrual basis, rather than on a "pay-as-you-go" or cash basis. Thus, SFAS-106 treats these benefits as a form of deferred compensation earned by employees during their working years, and it requires recognition of the costs of OPEBs during the years the employees earn the benefits before they retire, rather than during the years when the company actually pays benefits.

4. The accounting standard in SFAS-106 adopted in 1990 created two categories of OPEB expenses, "ongoing amounts" and the "transitional benefit obligation" (TBO). The "ongoing amount" represents the yearly expense that a firm recognizes as its current employees earn benefits that will be paid after they retire. SFAS-106 also requires companies to "book" (*i.e.,* to recognize on their financial records) the amount of their unfunded obligation for OPEBs to retirees and to active employees existing as of the date of their implementation of SFAS-106. This unfunded obligation, referred to as the TBO, reflects the amount that a company would have accrued on its books as of the effective date of the accounting change if it previously had been operating under the accrual method.[2] SFAS-106 permits companies whose benefits plans have active participants either to recognize the TBO as an immediate expense or to amortize it over the average remaining service years of plan participants. If the average remaining service period is less than 20 years, SFAS-106 permits the employer to use a 20-year period rather than an average period.

5. In December 1991, the Common Carrier Bureau, under delegated authority, issued an order approving the requests of two LECs to adopt SFAS-106-type accounting for OPEBs, on or before January

[1] *Statement of Financial Accounting Standards No. 106 Employers' Accounting for Postretirement Benefits Other Than Pensions*, SFAS-106 Financial Accounting Standards Board (Dec. 1990) (SFAS-106).

[2] SFAS-106 defines the TBO as "the unrecognized amount, as of the date this Statement is initially applied, of (a) the accumulated postretirement benefit obligation in excess of (b) the fair value of plan assets plus any recognized accrued postretirement benefit cost or less any recognized prepaid postretirement benefit cost."

1, 1993.[3] The Common Carrier Bureau declined, however, to allow any LECs or AT&T to adopt the SFAS-106 option of immediately recognizing the full TBO, because the amounts involved were so large that accounting for them as one-time expenses would have distorted the carriers' earnings during the affected period. Instead, the Common Carrier Bureau required the carriers to use the other SFAS-106 option of amortizing the TBO expense over either a 20-year period or the average remaining service period of active plan participants.[4]

6. On May 4, 1992, the Common Carrier Bureau released *RAO Letter 20* to provide carriers with accounting and ratemaking instructions for OPEBs in a manner consistent with SFAS-106.[5] *RAO Letter 20* identified the Part 32 accounts that carriers must use to record OPEB costs under SFAS-106.[6] It directed the LECs to deduct accrued OPEB liabilities recorded in USOA Account 4310 from their interstate rate bases and to include prepaid OPEB benefits recorded in USOA Account 1410 in their interstate rate bases.[7]

7. After the Common Carrier Bureau required AT&T and the LECs to conform their regulatory accounting practices to SFAS-106, several LECs subject to price cap regulation filed tariff transmittals in 1992 that included exogenous treatment for the change in OPEB costs.[8] The Common Carrier Bureau suspended the 1992 transmittals for five months and set them for investigation, and made all price cap regulated LECs subject to this investigation.[9] On January 22, 1993, in its *OPEB Order,* the Commission terminated the investigation and denied the LECs' requests for exogenous treatment of OPEBs.[10]

8. In the *OPEB Order*, the Commission addressed the two types of OPEB expenses. With respect to the OPEB amounts accruing after the SFAS-106 change -- the ongoing amounts -- the

[3] *See Southwestern Bell Corporation, GTE Service Corporation*, AAD 91-80, *Notification of Intent to Adopt Statement of Financial Accounting Standards No. 106, Employers' Accounting for Postretirement Benefits Other Than Pensions*, Order, 6 FCC Rcd 7560 (Com. Car. Bur. 1991) (*OPEB Approval Order*).

[4] *Id. See also Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32*, 7 FCC Rcd 2872 (Accounting and Audits Division, Com. Car. Bur. 1992) (*RAO Letter 20*), *vacated*, 11 FCC Rcd 2957 (1996) (*RAO 20 Rescission Order*), *recon. denied*, 12 FCC Rcd 2321 (1997) (*RAO 20 Rescission Reconsideration*).

[5] *See RAO Letter 20*, 7 FCC Rcd at 2872. *See also 1996 Annual Access Tariff Filings; National Exchange Carrier Association Universal Service Fund and Lifeline Assistance Rates; NYNEX Telephone Company Petition to Advance the Effective Date of the 5.3 X-Factor to January 1, 1995, Transmittal No. 710*, Memorandum Opinion and Order, 11 FCC Rcd 7564, 7567, para. 5 (Com. Car. Bur. 1996) (*1996 Tariff Order*).

[6] *See RAO Letter 20*, 7 FCC Rcd at 2872. Part 32 of the Commission rules contains the Uniform system of Accounts ("USOA"). *See* 47 C.F.R. Part 32.

[7] *RAO Letter 20,* 7 FCC Rcd at 2872.

[8] *See Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 497* (filed Feb. 28, 1992); *U S West Communications, Inc. Tariff F.C.C. Nos. 1 and 4, Transmittal No. 246* (filed Apr. 3, 1992); and *Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1579* (filed Apr. 16, 1992). The "Price Cap Index" or "PCI" serves as an upper limit on rates. This index is adjusted annually for productivity, inflation (GNP-PI), and other factors, including exogenous adjustments. Thus, these LEC tariff transmittals sought an exogenous adjustment to increase their PCIs, and therefore the rates they could charge, to reflect the OPEB costs.

[9] *Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards,* "*Employers Accounting for Postretirement Benefits Other Than Pensions*," CC Docket No. 92-101, Order of Investigation and Suspension, 7 FCC Rcd 2724 (Com. Car. Bur. 1992) (*1992 Suspension Order*).

[10] *Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards,* "*Employers Accounting for Postretirement Benefits Other Than Pensions*," CC Docket No. 92-101, Memorandum Opinion and Order, 8 FCC Rcd 1024 (1993) (*OPEB Order*). This order directed Bell Atlantic, U S West, and Pacific Bell to file tariff revisions removing the OPEB costs from the calculation of their PCI. *Id.* at 1037, para. 75.

Commission found that LECs have substantial control over the level of OPEB expenses. Accordingly, the Commission found that, with regard to the ongoing amounts, the LECs failed the first prong of the test for exogenous cost treatment that requires a cost to be outside of a carrier's control.[11] With regard to the TBO amounts, the Commission stated that it did not have to resolve the control issue because the LECs had failed to establish that the TBO had not affected the economy generally (and was therefore not already accounted for in the GNP-PI portion of the price cap formula) -- the second prong of the test for exogenous cost treatment.[12] Finally, the Commission indicated that it might further consider exogenous treatment of the TBO amounts based on a better and more complete record, and suggested the annual 1993 access tariff filings as a possible forum for such consideration.[13] Accordingly, in the 1993 annual access tariff filings, several LECs included adjustments to their price cap indices and rates based on exogenous treatment of certain TBO amounts. Effective July 1, 1993, AT&T also revised its price cap indices to reflect the LECs' proposed changes in access prices and to include adjustments for exogenous treatment of its own TBO amounts.[14] The Commission suspended the LECs' and AT&T's transmittals for one day and imposed an accounting order.[15] The Commission designated the LEC portion of the investigation as "Phase I" and the AT&T portion of the investigation as "Phase II."[16]

9. On July 12, 1994, the United States Court of Appeals for District of Columbia Circuit reversed and remanded the *OPEB Order*, concluding that the Commission had not adequately explained its denial of the LECs' request for exogenous treatment of the SFAS-106 incremental costs and remanding the case for consideration of the amount of OPEB-related costs that are eligible for exogenous treatment.[17] Because the carriers had withdrawn the tariffs that were the subject of the *OPEB Order*, and no tariffs remained pending in the remanded CC Docket No. 92-101, the Commission vacated the *OPEB Order* and terminated the CC Docket No. 92-101 proceeding.[18] In response to the court's remand of the *OPEB Order,* however, LECs filed tariff revisions that sought exogenous treatment of SFAS-106 amounts that they had not previously claimed.[19] The Common Carrier Bureau suspended these tariffs for

[11] *See OPEB Order*, 8 FCC Rcd at 1033, paras. 53-56. *See also* 47 C.F.R. § 61.45(d) (1993).

[12] *See OPEB Order*, 8 FCC Rcd at 1033-34, paras. 57-59. *See also* 47 C.F.R. § 61.45(d) (1993).

[13] *See OPEB Order*, 8 FCC Rcd at 1037, para. 75.

[14] *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464*, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, 8 FCC Rcd 6227 (Com. Car. Bur. 1993) (*AT&T OPEB Investigation Order*).

[15] *See 1993 Annual Access Tariff Filings*, CC Docket No. 93-193*, National Exchange Carrier Association, Transmittal No. 556, Universal Service Fund and Lifeline Assistance Rates*, CC Docket No. 93-123*, GSF Order Compliance Filings, Bell Operating Companies Tariffs for the 800 Service Management System and 800 Data Base Access Tariffs*, CC Docket No. 93-129, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, 8 FCC Rcd 4960 (Com. Car. Bur. 1993) (*1993 Annual Access Investigation Order*); *AT&T OPEB Investigation Order,* 8 FCC Rcd at 6227.

[16] *AT&T OPEB Investigation Order,* 8 FCC Rcd at 6227.

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

[18] *Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards,* "*Employers Accounting for Postretirement Benefits Other Than Pensions*," CC Docket No. 92-101, Memorandum Opinion and Order, 10 FCC Rcd 11821 (1995).

[19] *See Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690, NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328, Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1738 and U S West Communications, Transmittal No. 550*, CC Docket No. 94-157, Memorandum Opinion and Order, 10 FCC Rcd 1594 (Com. Car. Bur. 1994) (*Bell Atlantic/NYNEX Investigation Order*).

one day, imposed an accounting order, and initiated a further series of tariff investigations.[20]

10. In April 1995, in its *Performance Review Order,* the Commission adopted new economic cost standards for exogenous treatment of accounting changes.[21] In applying the new standards to SFAS-106, the Commission again rejected exogenous treatment of OPEB-related costs.[22] The Commission noted, however, that the new standards would operate on a prospective basis only and would not affect the pending investigations of exogenous claims associated with implementation of SFAS-106 in CC Docket Nos. 93-193 and 94-157.[23]

11. On June 30, 1995, the Common Carrier Bureau consolidated three separate pending investigations of exogenous claims (in CC Docket Nos. 93-193 and 94-157) into a single proceeding, designating CC Docket No. 94-157 as the docket number for this investigation.[24] The first investigation examines several issues relating to the 1993 annual access tariffs,[25] including the LECs' claims for exogenous treatment of the TBO portion of SFAS-106.[26] The second investigation involves certain AT&T transmittals that proposed rates designed to recover LEC access charges that included the LECs' SFAS-106 costs, as well as AT&T's own SFAS-106 amounts.[27] The third investigation in the *Combined OPEB Investigations Order* involves proposed tariff revisions filed by Bell Atlantic and NYNEX that sought exogenous treatment of SFAS-106 amounts not previously claimed.[28] The Common Carrier Bureau included four additional proposed tariff revisions in CC Docket No. 94-157.[29] In each of the

[20] *Id.*

[21] *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9090-97, paras. 293-309 (1995) (*Performance Review Order*). The *Performance Review Order* amended the Commission's rules to preclude price cap index adjustments for accounting changes that involve no changes in economic cost "expected to affect prices." *See id*. at 9090, para. 293. Applying the new rule in the *Performance Review Order,* the Commission ordered the price cap indices reduced prospectively, in order to preclude recovery of future, amortized installments of OPEB costs. *See id.* at 9095-97, paras. 306-309.

[22] *Performance Review Order,* 10 FCC Rcd at 9096-97, paras. 306-309.

[23] *Performance Review Order,* 10 FCC Rcd at 9096-97, paras. 306-309. *See also Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1204-05 (D.C. Cir. 1996) (holding that the Commission's application of its new standard did not constitute impermissible retroactive rulemaking).

[24] *See 1993 Annual Access Tariff Filings,* CC Docket No. 93-193, Phase I, *1994 Annual Access Tariff Filings,* CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2 Transmittal Nos. 5460, 5461, 5462 and 5464,* CC Docket No. 93-193, Phase II, *Bell Atlantic 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 No. 94-157, Order Designating Issues for Investigation, 10 FCC Rcd at 11804, 11817, para. 32 (1995) (*Combined OPEB Investigations Order*).

[25] *See 1993 Annual Access Investigation Order,* 8 FCC Rcd 4960.

[26] The *1993 Annual Access Investigation Order* also includes an investigation of Rochester Telephone Corporation, Tariff F.C.C. No. 1, Transmittal No. 222, for SFAS-106 TBO amounts that were suspended by the Bureau for one day in the 1994 annual access tariff order. *See 1994 Annual Access Tariff Filings*, CC Docket No. 94-65, Memorandum Opinion and Order Suspending Rates, 9 FCC Rcd 3519 (Com. Car. Bur. 1994) (*1994 Annual Access Investigation Order I*); *1994 Annual Access Tariff Filings*, CC Docket No. 94-65, Memorandum Opinion and Order Suspending Rates, 9 FCC Rcd 3705 (Com. Car. Bur. 1994) (*1994 Annual Access Investigation Order II*).

[27] *See AT&T OPEB Investigation Order*, 8 FCC Rcd 6227.

[28] *See Bell Atlantic/NYNEX Investigation Order*, 10 FCC Rcd 1594.

[29] The Bureau included the following four tariff filings in the investigation: *Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 747*, CC Docket Nos. 94-139 and 94-157, Memorandum Opinion and Order Suspending Rates, 10 FCC Rcd 5027 (Tar. Div., Com. Car. Bur. 1995); *Pacific Bell, Tariff F.C.C. No. 128, Transmittal No. 1773 and U S West, Tariff F.C.C. No. 5, Transmittal No. 584*, CC Docket No. 94-157,

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orders initiating these OPEB tariff investigations, the Common Carrier Bureau suspended the tariffs for one day and imposed accounting orders in the event the carriers' proposed rates were later found to be unreasonable.[30]

12. On March 7, 1996, the Commission rescinded the portion of *RAO Letter 20* that addressed the rate base treatment of OPEB-related liabilities.[31] The Commission explained that sections 65.820 and 65.830 of its rules "define explicitly those items to be included in, or excluded from, the interstate rate base."[32] Because accrued OPEB expenses were not listed among the enumerated deductions, the Commission found that the staff in *RAO Letter 20* erroneously had construed its rules when it directed the LECs to exclude those expenses. At the same time, however, the Commission tentatively concluded as a matter of policy that accrued OPEB expenses ought to be excluded from the interstate rate base. Accordingly, the Commission instituted a proceeding to consider amending its rules to require the exclusion of accrued OPEB costs from the interstate rate base.[33]

13. In response to the *RAO 20 Rescission Order*, the LECs proposed to increase their PCIs for the 1996-1997 tariff period by adjusting their rate base treatment of OPEBs for certain prior years, resulting in reduced sharing obligations for those periods.[34] Thus, in filing their 1996 annual access tariffs, Ameritech, Bell Atlantic, BellSouth, Nevada Bell, Pacific Bell, Southwestern Bell, U S West, Lincoln Telephone, GTE, and Sprint LTCs amended their Price Cap Regulation Rate of Return Monitoring Reports (FCC Form 492A) to increase their interstate rate bases by the amount of the accrued OPEB costs they previously had deducted from the rate bases in response to *RAO Letter 20*.[35] The increases to the LECs' interstate rate bases lowered their reported rates of return, thereby decreasing their calculated price cap sharing obligations.[36] Reduced sharing obligations resulted in higher PCIs.[37] Ameritech amended its FCC Form 492A to reflect OPEB liability costs accrued in 1992-1994; Bell Atlantic, Pacific Bell, Southwestern Bell, and Lincoln Telephone amended their earnings reports to reflect OPEB costs in 1993,

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Memorandum Opinion and Order Suspending Rates, 10 FCC Rcd 6038 (Tar. Div., Com. Car. Bur. 1995); *The NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 374*, CC Docket No. 94-157, Memorandum Opinion and Order Suspending Rates, DA 95-966 (Tar. Div., Com. Car. Bur., rel. Apr. 27, 1995).

[30] *See Combined OPEB Investigations Order*, 10 FCC Rcd at 11812-15, paras. 16-23.

[31] *RAO 20 Rescission Order,* 11 FCC Rcd at 2961, paras. 25, 27.

[32] *Id.* at 2961, para. 25.

[33] *Id.*

[34] *See 1996 Tariff Order*, 11 FCC Rcd at 7568, para. 7. The sharing mechanism provided that carriers would share some portion of earnings above a certain level with their customers through future price reductions. These sharing obligations were established, *inter alia*, to ensure that errors in setting prices under the price cap formula would not lead to unreasonably high rates and to ensure that a portion of cost reductions were passed through to each carrier's customers. *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786,6797-88, paras. 7-8 (1990) (*1990 Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637, *further recon. dism'd*, 6 FCC Rcd 7482 (1991), *aff'd, National Rural Telecom. Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[35] *1996 Tariff Order*, 11 FCC Rcd at 7568, para. 7. As a result of mergers and acquisitions, Ameritech, Nevada Bell, Pacific Bell, and Southwestern Bell have become SBC Communications, Inc. Bell Atlantic and GTE (including GTE Telephone Operating Companies and GTE system Telephone Companies) are part of Verizon Telephone Companies. US West Communications is now part of Qwest Communications Corp. Lincoln Telephone properties are now owned by Alltel Telephone Companies.

[36] *Id*.

[37] *Id*.

1994, and 1995.[38] U S West amended its FCC Form 492A to include OPEB costs accrued in 1993, 1994, and 1995.[39]

14. In a June 24, 1996 order, the Common Carrier Bureau found that "the LECs' rate base treatment of OPEBs raises a substantial question of lawfulness under existing rules that warrants investigation."[40] The Common Carrier Bureau also agreed with AT&T that "the LECs . . . failed to document and explain the derivation of the rate base adjustments underlying the [proposed tariff] revisions."[41] The Bureau determined that it would investigate the extent to which the LECs were seeking to increase their rate bases to reflect accrued OPEB costs while simultaneously seeking exogenous treatment for the same costs.[42] It suspended the LEC tariffs, imposed an accounting order, and initiated an investigation.[43] In 1997, the Commission amended Part 65 of its rules to require LECs to deduct OPEB liabilities from the rate base.[44] These rules became effective on April 30, 1997.[45]

15. The OPEB tariff investigation lay dormant for several years. In December 2001, the Commission adopted an order summarily terminating more than one hundred stale or moot docketed proceedings that allegedly 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."[46] Although the Commission had not completed the OPEB investigation, it erroneously listed the OPEB docket, CC Docket No. 94-157, as one of the terminated proceedings.

16. Upon discovering the error, the Wireline Competition Bureau (Bureau) reinstated CC Docket No. 94-157 on February 25, 2003.[47] Recognizing that the existing OPEB record might be stale and not reflect the parties' current positions, the Bureau directed the parties to "state in full their arguments" on the OPEBs issues and to "identify clearly the portions of the previous filings [that] are no longer relevant."[48] The Bureau also directed Verizon to submit a direct case and studies to show that "OPEB-related costs incurred prior to January 1, 1993 are eligible for exogenous treatment."[49] The Bureau noted

[38] *Id*.

[39] *Id*.

[40] *Id*. at 7573, para. 19.

[41] *Id*., para. 20.

[42] *Id*. at 7574, para. 21. The Bureau stated that, "[s]ince the issue of rate base treatment of OPEB costs claimed for the 1992-1993 period is similar to the issue before us in our investigation of CC Docket 93-193, we add the tariff revisions filed by Ameritech, Bell Atlantic, U S West, Pacific Bell, Southwestern Bell, and Lincoln to that investigation." *Id.*

[43] *Id*. at 7566-67, 7573-74, paras. 4, 20-21.

[44] *RAO 20 Rescission Reconsideration,* 12 FCC Rcd at 2325-27, paras. 14-20.

[45] *See id.* at 2331, para. 34.

[46] *Termination Order,* 17 FCC Rcd 1199 (2002); 67 Fed. Reg. 3617 (Jan. 25, 2002).

[47] *See Stale or Moot Docketed Proceedings, 1993 Annual Access Tariff Filings Phase 1,* CC Docket No. 93-193, *1994 Annual Access Tariff Filings,* CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464, Phase II*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690*, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328*, Order, Notice and Erratum, 18 FCC Rcd 2550, 2558, para. 22 (Wireline Comp. Bur. 2003) (*Erratum Order*). The Common Carrier Bureau was re-named the Wireline Competition Bureau following a reorganization in 2002.

[48] *Erratum Order,* 18 FCC Rcd at 2558, para. 22.

[49] *Id.* at 2558, para. 23.

that AT&T in an October 2002 *ex parte* had requested agency action with respect to two specific issues involving OPEBS: (1) whether LECs may treat as exogenous SFAS-106 costs incurred before January 1, 1993 (the date by which the Commission's rules required implementation of SFAS-106), and (2) the proper rate base treatment of OPEBs under investigation in conjunction with the 1996 access tariffs. The Bureau stated that it would limit the pending investigation to those issues unless parties timely identified other issues in response to the request for comments.[50] Verizon filed its direct case on April 11, 2003.[51] On May 12, 2003, AT&T Corp. (AT&T) filed its opposition.[52] Verizon filed its rebuttal on May 27, 2003.[53] On April 8, 2003, Verizon, SBC Communications, Inc. (SBC), AT&T, and WorldCom filed comments concerning the rate base adjustment issue.[54] On April 22, 2003, Verizon, AT&T, and SBC filed reply comments.[55]

17. On March 27, 2003, Verizon filed a petition for reconsideration of the *Erratum Order*.[56]

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[50] *Id.* at 2559, para 25.

[51] *Stale or Moot Docketed Proceedings, 1993 Annual Access Tariff Filings Phase 1,* CC Docket No. 93-193, *1994 Annual Access Tariff Filings,* CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464, Phase II*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690*, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328*, Direct Case of Verizon, filed Apr. 11, 2003 (Verizon Direct Case). Although parties made earlier filings, parties were directed to "state in full their arguments on these issues" because the record may have become stale and because the old record may not accurately reflect current positions of parties that have merged. *See Erratum Order*, 18 FCC Rcd at 2558, para. 22.

[52] *Stale or Moot Docketed Proceedings, 1993 Annual Access Tariff Filings Phase 1,* CC Docket No. 93-193, *1994 Annual Access Tariff Filings,* CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464, Phase II*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690*, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328*, Opposition of AT&T Corp. to Direct Case, filed May 12, 2003 (AT&T Opposition).

[53] *Stale or Moot Docketed Proceedings, 1993 Annual Access Tariff Filings Phase 1,* CC Docket No. 93-193, *1994 Annual Access Tariff Filings,* CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464, Phase II*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690*, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328,* Rebuttal of Verizon to AT&T Opposition to Direct Case, filed May 27, 2003 (Verizon Rebuttal).

[54] *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 II*, 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*, CC Docket No. 94-157, Comments of Verizon, filed Apr. 8, 2003 (Verizon Comments), Comments of SBC Communications, Inc., filed Apr. 8, 2003 (SBC Comments), Comments of AT&T Corp., filed Apr. 8, 2003 (AT&T Comments), WorldCom Comments, filed Apr. 8, 2003 (WorldCom Comments).

[55] *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 II*, 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*, CC Docket No. 94-157, Reply Comments of Verizon, filed Apr. 22, 2003 (Verizon Reply Comments), Reply Comments of AT&T Corp., filed Apr. 22, 2003 (AT&T Reply Comments), Reply Comments of SBC Communications, Inc., filed Apr. 22, 2003 (SBC Reply Comments).

[56] *Stale or Moot Docketed Proceedings, 1993 Annual Access Tariff Filings Phase 1,* CC Docket No. 93-193, *1994 Annual Access Tariff Filings,* CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464, Phase II*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff*

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Treating Verizon's petition as an application for review, in 2004 the Commission affirmed the Bureau's decision in the *Erratum Order* and denied Verizon's petition.[57]

III. DISCUSSION

A. Exogenous Treatment for Pre-January 1, 1993 SFAS-106 Costs

1. Positions of the Parties

18. Verizon asserts that its OPEB costs incurred prior to January 1, 1993 are eligible for exogenous treatment under price cap regulation.[58] Citing the court's decision in *Southwestern Bell*, Verizon asserts that both USOA and GAAP changes, if approved by the Commission, meet the definition of being beyond the carrier's control.[59] According to Verizon, the only difference between a USOA change and a GAAP change is that the latter is mandatory only after the carrier files a notice of its intent to adopt the change and if the Commission does not disapprove the adoption within 90 days of the notice.[60] Verizon asserts that the date that the carrier complies with the accounting changes is irrelevant, as the "control" standard for exogenous treatment under price caps is met if the Commission approves the accounting change.[61] In further support of this argument, Verizon cites the Common Carrier Bureau's order approving adoption of SFAS-106 and its direction to adopt the accounting change "on or before January 1, 1993."[62]

19. AT&T maintains that the Commission's rules in effect in 1993 prohibited Verizon from receiving exogenous treatment of any purported costs associated with pre-1993 implementation of SFAS-106 for two reasons. First, AT&T asserts, the Commission's *1990 Price Cap Order* provides 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."[63] Second, AT&T avers that the implementation of SFAS-106 was not mandatory – and thus not exogenous – until January 1, 1993. According to AT&T, any conversion to SFAS-106 accounting for OPEBs prior to this date was voluntary – a decision within the control of the company.[64]

2. Discussion

20. In determining whether to allow exogenous treatment of Verizon's OPEBs costs, we apply

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F.C.C. No. 1, Transmittal No. 690, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328*, Petition for Reconsideration of Verizon, filed March 27, 2003 (Verizon Petition).

[57] *Stale or Moot Docketed Proceedings, 1993 Annual Access Tariff Filings Phase 1,* CC Docket No. 93-193, *1994 Annual Access Tariff Filings,* CC Docket No. 94-65, *AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464, Phase II*, CC Docket No. 93-193, *Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690*, CC Docket No. 94-157, *NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328*, Order, 19 FCC Rcd 2527 (2004).

[58] Verizon Direct Case at 8.

[59] *Id*. (citing *Southwestern Bell*, 28 F.3d at 170); *see also* Verizon Rebuttal at 7.

[60] Verizon Direct Case at 8 (citing 47 C.F.R. § 32.16).

[61] Verizon Direct Case at 8-9.

[62] *Id*. at 9 (citing *OPEB Approval Order*, 6 FCC Rcd at 7560, para. 3); *see also* Verizon Rebuttal at 8.

[63] AT&T Opposition at 10-11 (citing *1990 Price Cap Order* at 6807, para. 168 (1990)).

[64] AT&T Opposition at 11.

the price cap rules that were in effect at the time the tariffs under investigation were filed.[65] Those rules generally provided exogenous treatment for "costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers."[66] Costs arising from changes made in the Uniform System of Accounts were considered exogenous as a matter of law because such costs "are imposed by this Commission and are outside of the control of carriers."[67] While the Commission recognized that "there is no difference in principle" between a cost change caused by a USOA revision and one caused by a change in GAAP,[68] insofar as both types of changes were beyond the carrier's control, the rules did not "authorize carriers to adjust their price caps automatically to reflect [GAAP] changes."[69] A GAAP change did not qualify for exogenous treatment unless it first had been "actually approved" by the Financial Accounting Standards Board.[70] In other words, the rules precluded exogenous treatment of costs arising from the anticipation that the FASB would approve a GAAP change.[71] Once the FASB prescribed a GAAP change, section 32.16(a) of the Commission's rules required the carriers' "records and accounts [to] be adjusted to apply [the] new accounting standard[]**.**"[72] That change would "automatically take effect" 90 days after the carrier notified the agency that it proposed to implement the change, "unless the Commission notifie[d] the carrier to the contrary."[73] The Commission's practice was to permit FASB-approved GAAP changes to go into effect unless the agency determined that the GAAP change was incompatible with the agency's regulatory needs. [74]

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[65] In 1995, the Commission amended its price cap rules to limit exogenous cost adjustments to accounting practices that affect economic costs, thereby making "most if not all cost changes resulting from the adoption of SFAS-106" ineligible for exogenous treatment. *Performance Review Order*, 10 FCC Rcd at 9095 para. 307. The Commission specified that the 1995 amendment would be applied "on a prospective basis" and that the tariffs under investigation in this case would be evaluated under the exogenous price cap rules in effect when the tariffs were filed. *Id*. at 9096-97, paras. 305, 307.

[66] *1990 Price Caps Order*, 5 FCC Rcd at 6807 para. 166. *See Southwestern Bell v. FCC*, 28 F.3d at 169) (The "FCC's statement of its criteria for exogenous cost treatment [in its *1990 Price Cap Order*] constituted a rule.").

[67] *1990 Price Cap Order*, 5 FCC Rcd at 6807, para. 168. *See Southwestern Bell v. FCC*, 28 F.3d at 168.

[68] *Southwestern Bell v. FCC*, 28 F.3d at 169 (quoting *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, 3017-18, para. 295 (1989)).

[69] *1990 Price Cap Order*, 5 FCC Rcd at 6807, para. 168.

[70] *Id*. "The FASB is the authoritative standard setting body for accounting practices that are used in the American business community." *Responsible Accounting Officer Letter 20, Uniform Accounting For Postretirement Benefits Other Than Pensions in Part 32*, 12 FCC Rcd 2321, 2322 n.9 (1997).

[71] In May 1990, AT&T filed a tariff that treated as exogenous the costs incurred by its switch from a cash basis to an accrual basis accounting for OPEB costs. Although AT&T's tariff predated SFAS-106, AT&T attempted to justify the exogenous treatment by claiming that FASB "intends to make such accrual accounting mandatory." *American Telephone and Telegraph Co.,* 5 FCC Rcd 3680, para. 2 (Com.Car.Bur. 1990). The staff rejected AT&T's tariff, explaining that neither the *1990 Price Cap Order* nor the Commission's rules "enable AT&T to claim as exogenous a proposed change in GAAP or USOA." 5 FCC Rcd at 3680, para. 4. *See also 1990 Price Cap Order*, 5 FCC Rcd at 6807, para. 168 ("The price cap mechanism is intended to reflect changes in costs that have occurred, not anticipated cost changes.").

[72] 47 C.F.R. § 32.16(a) (1991). Unless otherwise noted, all rule citations in this order refer to the rules in effect at the time the relevant tariffs were filed.

[73] *Id.*

[74] *See Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting For Postretirement Benefits Other Than Pensions*, CC Docket No. 92-101, Memorandum Opinion and Order, 10 FCC Rcd 11821, para. 2 (1995); *1990 Price Cap Order*, 5 FCC Rcd at 6807, para. 168*; Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted*

(continued....)

21. Under the Commission's rules, the price cap indices determine the percentage by which a LEC could increase or must decrease its aggregate rates each year. The basic PCI formula had three components: (1) an inflation element measured by the Gross National Product-Price Index ("GNP-PI");[75] (2) a productivity offset of 3.3 percent which represented the amount by which the LECs historically have exceeded productivity in the economy as a whole, plus a 0.5 percent "consumer productivity dividend;"[76] and (3) exogenous cost adjustments. A GAAP change was not accorded exogenous treatment unless the LEC showed that the change "will not be double counted in the Price Cap Index, once in the GNP-PI and once as an exogenous cost."[77]

22. We find that Verizon has justified exogenous treatment for accrued OPEB costs for the years 1991 and 1992. As shown below, the costs Verizon treats as exogenous were associated with implementing a FASB-prescribed change in the GAAP that the Commission had approved and had directed to be put into effect "on or before January 1, 1993."[78] In addition, the record demonstrates that the exogenous treatment of SFAS-106 costs would not lead to appreciable "double counting" of these costs by their inclusion in the GNP-PI.

23. SFAS-106's Approval By the FASB and the FCC. Verizon's tariff revisions took effect January 1, 1991, *i.e.*, subsequent to when the FASB had "actually approved"[79] the accounting change at issue here. In December 1990, the FASB in SFAS-106 directed that companies should change the prevailing practice of accounting for postretirement benefits on a pay-as-you-go or cash basis "by requiring accrual, during the years that the employee renders the necessary service, of the expected cost of providing those benefits."[80] The FASB determined that the accrual method provides "more relevant and useful information than does cash basis accounting" of OPEB costs because the former "goes beyond cash transactions and attempts to recognize the financial effects of non-cash transactions and events as they occur."[81] According to the FASB, the recognition and measurement of the accrued obligation to provide OPEB benefits gives users of financial statements "the opportunity to assess the financial consequences of employers' compensation decisions."[82] While the FASB made the change effective "for fiscal years beginning after December 15, 1992," it emphasized that "[e]arlier application is encouraged."[83] The FASB in SFAS-106 thus approved the change to accrual accounting for OPEBs in December 1990 and required firms to implement that accounting change no later than the fiscal year commencing December 15, 1992.

24. Moreover, in its *OPEB Approval Order* released December 26, 1991, the Commission's staff,

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Accounting Principles (Parts 31, 33, 42, and 43 of the FCC's Rules), CC Docket No. 84-469, *Report and Order,* 102 FCC 2d 964, 985-87, paras. 71-75 (1985).

[75] *See* 47 C.F.R. § 61.45*; 1990 Price Caps Order*, 5 FCC Rcd at 6792-93, paras. 47-54.

[76] *1990 Price Cap Order*, 5 FCC Rcd at 6792, paras. 47-49, 6798-99, paras. 96-102.

[77] *Southwestern Bell Telephone Co. v. FCC*, 28 F.3d at 168 (quoting *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 665, 674, para. 75 (1991)).

[78] *OPEB Approval Order*, 6 FCC Rcd at 7560, para. 3.

[79] *1990 Price Cap Order*, 5 FCC Rcd at 6807, para. 168.

[80] Verizon Direct Case at Att. B (citing SFAS-106, at 1).

[81] *Id*. (citing SFAS-106, at 2).

[82] *Id.*

[83] *Id.* (citing SFAS-106, at 35, para. 108).

acting under delegated authority, reviewed SFAS-106 and affirmatively concluded that its implementation "did not conflict with [the Commission's] regulatory objectives."[84] The staff required all subject carriers, including Verizon, to adopt SFAS-106 accounting "on or before January 1, 1993."[85] Five days later, Verizon adopted SFAS-106 effective January 1, 1991.[86] Verizon thus implemented SFAS-106 after its approval by the agency, in full compliance with the time frame prescribed in the *OPEB Approval Order*.

25. Relying on the fact that the price cap rules barred exogenous treatment for costs of implementing a GAAP change before the change has become effective,[87] AT&T argues Verizon cannot obtain exogenous treatment for any accrued OPEB costs that were incurred before December 15, 1992.[88] We disagree. As noted above, although the FASB made SFAS-106 "effective for the fiscal years beginning after December 15, 1992,"[89] it affirmatively encouraged firms to put SFAS-106 in effect before that mandatory deadline. More significantly, Verizon implemented SFAS-106 after the Commission's staff under delegated authority directed carriers to put SFAS-106 in effect "on or before January 1, 1993 as a mandatory practice for purposes of the USOA."[90] Thus, at the time Verizon implemented SFAS-106, the carrier had been authorized to make that GAAP change effective for purposes of regulatory accounting "before January 1, 1993" – a period of time that clearly encompasses 1991 and 1992.

26. AT&T also argues that Verizon's 1991 and 1992 OPEB costs did not qualify for exogenous treatment under the price cap rules because Verizon's implementation of SFAS-106 was not beyond its control until January 1, 1993. According to AT&T, the "Commission did not require the LECs to reflect SFAS-106 in their accounting books until January 1, 1993," and thus Verizon's decision to implement SFAS-106 for the years 1991 and 1992 was purely "voluntary."[91] We find AT&T's contention unpersuasive.

27. The issue of whether costs associated with the implementation of SFAS-106 are beyond the carrier's control within the meaning of the then applicable exogenous cost rules is a matter of second impression. In its *OPEB Order*, the Commission denied exogenous treatment of the costs associated with the implementation of SFAS-106 in access tariffs filed by several price cap LECs in early 1992.[92] Even

[84] *OPEB Approval Order*, 6 FCC Rcd at 7560, para. 3. The staff noted that SFAS-106 provided companies with two alternatives in recognizing the transition obligation: a flash-cut approach, *i.e.,* recognizing the embedded liability as an expense immediately, or a deferral and amortization approach, *i.e.,* amortizing the transition obligation over a period of at least 20 years. Expressing concern that the incremental effects on interstate expenses of using a flash cut would distort the carriers' operating results, the staff directed the carriers to amortize the transition obligation in implementing SFAS-106. *Id.* at 7560, para. 4. It is undisputed that Verizon, in implementing SFAS-106, complied with the staff's directive by adopting the deferral and amortization approach to the transition obligation.

[85] *Id.* at 7560, paras. 3, 5.

[86] Verizon at the end of 1991 put SFAS-106 in effect as of January 1, 1991 "because its books of account were still open for calendar year 1991 when the Bureau issued its order and because both the [*OPEB Approval Order*] and FASB had encouraged early implementation." Verizon Direct Case at 4.

[87] *See 1990 Price Cap Order*, 5 FCC Rcd at 6807, para. 168 ("no GAAP change can be given exogenous treatment until the Financial Accounting Standards Board has actually approved the change and it has become effective").

[88] AT&T Opposition at 1-2, 10-11.

[89] SFAS-106 at 35, para. 108.

[90] *1992 Suspension Order*, 7 FCC Rcd 2724, para. 3 (quoting *OPEB Approval Order*, 6 FCC Rcd at 7560, paras. 3, 5). *See Southwestern Bell Telephone Co. v. FCC*, 28 F.3d at 169.

[91] AT&T Opposition at 11, 13.

[92] *See OPEB Order.*

though the Commission recognized that "the change to accrual accounting by FASB was not within the carriers' control," it found that the carriers failed to satisfy the control test because the "LECs can exercise substantial control over the level and timing of OPEB expenses."[93] The court of appeals, in reversing that determination, held that the Commission had misconstrued its control test. The court pointed out that a "FASB change [in the GAAP] 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."[94] It explained that the price cap rules treated GAAP changes that had been adopted by the FASB and approved by the Commission "on a par"[95] with USOA changes, noting that "[f]or both types of accounting changes, the Commission's mandate brings about the change and demonstrates that the carriers lacked control."[96] Consistent with the court's decision in *Southwestern Bell*, we find that Verizon's decision to implement SFAS-106 in this case was beyond the carrier's control under the then applicable exogenous price cap rules because that GAAP change had been adopted by the FASB and mandated by the Commission.

28. We reject AT&T's claim that Verizon's implementation of SFAS-106 did not satisfy the control test because the *OPEB Approval Order* gave Verizon the option of waiting until January 1, 1993 to implement SFAS-106. *Southwestern Bell* establishes that the proper inquiry is not the carrier's "'control over the level and timing of OPEB expense'"[97] but rather whether the accounting change itself was "mandated by the Commission."[98] The *OPEB Approval Order* adopted SFAS-106 "'as a mandatory practice for purposes of the USOA'"[99] and directed carriers to implement that accounting change "on or before January 1, 1993."[100] AT&T's claim that the agency did not mandate SFAS-106 until January 1, 1993 disregards the crucial phrase "or before" in the *OPEB Approval Order*. Where, as here, a governmental entity requires action "on or before" a particular date, the act of complying "before" the last permissible day is no less mandatory than the act of complying "on" the expiration of the deadline. Just as the filing of a tax return is not a "voluntary" act because the taxpayer chooses to file on April 1 instead of April 15, Verizon's implementation of SFAS-106 was not a "voluntary" act because it elected to put the mandated accounting change into effect before January 1, 1993.

29. Moreover, AT&T's interpretation of the control test is inconsistent with the facts underlying *Southwestern Bell*. The LECs in that case successfully challenged the Commission's rejection of exogenous treatment of accrued OPEB costs in tariffs that had been filed by the LECs in February and March 1992.[101] Notwithstanding the fact that LECs had implemented SFAS-106 before January 1, 1993, the court held that the Commission had erred in finding the accrued OPEB costs were within the LECs'

[93] *Id.* at 1033, para. 53. *See Southwestern Bell Telephone Co. v. FCC*, 28 F.3d at 169.

[94] *Southwestern Bell Telephone Co. v. FCC*, 28 F.3d at 170.

[95] 28 F.3d at 170.

[96] 28 F.3d at 168. *See id.* at 170 ("the 'control' test [is] satisfied simply by the fact of exogenous imposition of the accounting rule").

[97] 28 F.3d at 169 (quoting *OPEB Order*, 8 FCC Rcd at 1033, para. 53).

[98] 28 F.3d at 168.

[99] 28 F.3d at 169 (quoting *Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions,"* 7 FCC Rcd at 2725, para.10).

[100] *OPEB Approval Order*, 6 FCC Rcd at 7560, para. 3.

[101] *See 1992 Suspension Order*, 7 FCC Rcd at n.1. As Verizon pointed out, in that case its predecessor, Bell Atlantic, "sought exogenous treatment of its OPEB costs for 1991 and 1992, to be recovered in the July 1, 1992 through June 30, tariff period [the dates the access tariffs were scheduled to go into effect]." Verizon Rebuttal at 5.

control.

30. Double Counting. There is substantial record evidence demonstrating that the exogenous treatment of SFAS-106 costs will not lead to appreciable "double counting" of these costs by their inclusion in the GNP-PI.[102] This evidence, which was not contested in any filing made in response to the *Erratum Order,* includes, *inter alia*: two comprehensive econometric studies -- the Godwins Study[103] and a study performed by the National Economic Research Associates ("NERA");[104] a macroeconomic model;[105] and expert analyses.[106] The court of appeals, while noting that the Godwins and NERA studies employed different assumptions and used different methodological approaches, held in effect that these two studies alone established a *prima facie* case that the exogenous treatment of SFAS-106 costs would not lead to appreciable "double counting" and that the Commission erred in rejecting them.[107] The court pointed out that "[t]he substantial identity of results [of these two studies] in the face of widely varying assumptions" tended to show that the outcome was "insensitive to this variation, [which in turn] rendered the conclusions more robust."[108] We find the NERA and Godwins studies to be credible and conclude that these studies, along with the other record material referenced above, show that the exogenous treatment of OPEB costs will not result in appreciable "double counting."

31. Economic Cost Requirement. AT&T states that it is "absurd" for Verizon to seek exogenous treatment of its implementation of SFAS-106 because that accounting change merely altered the timing of the recognition of the specified costs on the LECs' books of account without changing Verizon's actual economic costs.[109] We agree that "SFAS-106 does not require the LECs to change their OPEB commitments to employees, but merely to change the timing of the recognition of these costs on their books."[110] We also recognize that because LECs "have the option of leaving cash flow unchanged," "SFAS-106 has had little or no effect on the opportunity cost and economic cost to LECs."[111] Indeed, in 1995, the Commission in its *Performance Review Order* changed its exogenous rules to require a showing of real economic costs in order to qualify for exogenous treatment, and expressly recognized that this new rule would make most if not all costs resulting from the implementation of SFAS-106 ineligible for exogenous treatment.[112] The Commission, however, made clear that this new rule would operate on a prospective basis and that the tariffs in this investigation would be "judged under the rule in effect when the tariffs were filed."[113] Under those rules, the fact that SFAS-106 was a change solely to the accounting rule presented "no obstacle to exogenous cost treatment."[114] We thus reject AT&T's suggestion that we

[102] *See* Verizon Direct Case, Exh. D "United States Telephone Association Direct Case," filed Aug. 14, 1995.

[103] Godwins, "Post-Retirement Health Care Study Comparison of Telco Demographic and Economic Structures and Actuarial Basis National Averages" (1992), *attached to* Verizon Direct Case, Atts. C, E, F.

[104] *See* Verizon Direct Case, Att. I.

[105] *Id*., Att. D.

[106] *Id*., Atts. A, B.

[107] *Southwestern Bell Telephone Co. v. FCC*, 28 F.3d at 171-72.

[108] *Id*. at 172.

[109] AT&T Opposition at 3.

[110] *Performance Review Order*, 10 FCC Rcd at 9095, para. 307.

[111] *Id*.

[112] *Id*.

[113] *Id*. at 9096-97, para. 309.

[114] *Southwestern Bell Telephone Co. v. FCC*, 28 F.3d at 168 n.1.

deny exogenous treatment for the OPEB costs at issue in this investigation on the grounds that they did not affect economic costs.

B. Rate Base Adjustments

32. We now address the price cap carriers' 1996 claims related to their rate base treatment of accrued OPEB costs. At that time, the carriers adjusted their rate base treatment of OPEBs for prior years by increasing their interstate rate bases by the amount of accrued OPEB costs that they previously had deducted in response to *RAO Letter 20*. These increases lowered the carriers' reported rates of return, thereby potentially decreasing their calculated price cap sharing obligations. Reduced sharing obligations resulted in higher PCIs and, potentially, higher rates.

1. Positions of the Parties

a. Verizon and SBC

33. The LECs frame the issue as whether the Commission's rules required carriers subject to price cap regulation to deduct OPEB liabilities from the interstate regulated rate base for purposes of calculating earnings for years prior to 1997, when the Commission changed the rules to require such deductions.[115] The LECs rely on the Commission's *RAO 20 Rescission Order* as support for their contention that deduction of OPEB costs from their rate bases was not appropriate prior to 1997. In that order, the Commission stated,

> Sections 65.820 and 65.830 of our rules define explicitly those items to be included in, or excluded from, the interstate rate base. The Bureau cannot properly address any additional exclusion in an RAO letter, which under Section 32.17 of our rules must be limited to explanation, interpretation, and resolution of accounting matters.[116]

Verizon argues that the Commission found in the *RAO 20 Rescission Order* that the previous deductions that the carriers had made pursuant to *RAO Letter 20* were contrary to the Commission's rules. Consequently, according to Verizon, "the price cap carriers had an obligation to conform their books for the period covered by *RAO Letter 20* to the Commission's view of its own rate base rules."[117] Verizon contends that those rules permit carriers to deduct only specific listed items from the interstate regulated rate base, and, for the period at issue, OPEB liabilities were not among them.[118] Thus, the LECs argue, the effect of the *RAO 20 Rescission Order* was to require carriers to restate their rate-of-return reports and their sharing obligations for the prior years to reverse the OPEB liabilities deduction previously required

[115] Verizon Comments at 1; SBC Comments at 7.

[116] *RAO 20 Rescission Order*, 11 FCC Rcd at 2961, para. 25.

[117] Verizon Reply Comments at 9; *see also* SBC Comments at 7, 9 (in light of the *RAO 20 Rescission Order*, LECs "were required to include the omitted OPEB costs in their rate base"); Verizon Comments at 3 (citing *RAO 20 Rescission Order* as support for its view that no rule prohibited the addition of OPEB liabilities to rate base).

[118] Verizon Comments at 6; Verizon Reply Comments at 3-4; *see also* SBC Reply Comments at 3. At the time, section 65.830 stated that "[t]he following items shall be deducted from the interstate rate base: (1) deferred taxes (Accounts 4100 and 4340); (2) customer deposits (Account 4040); (3) unfunded accrued pension costs (Account 4310); and (4) other deferred credits (Account 4360) to the extent they arise from the provision of regulated telecommunications services. This shall include deferred gains related to sale-leaseback arrangements." *See* 65 Fed. Reg. 9047 (Mar. 3, 1989).

by *RAO Letter 20*.[119]

34. The LECs also cite the *RAO 20 Rescission Order* to rebut the argument that the Commission has broad discretion to interpret its rules and that a rule change is not required in order to direct carriers to deduct OPEB liabilities from their rate bases:

> We also are not persuaded by MCI's argument that the Commission can amend Part 65 through an interpretation without providing affected parties with any notice of or chance to comment on the amendment. Giving rate base recognition to OPEB in Part 65 would constitute a rule change for which proper notice and comment must be given.[120]

Verizon further argues that the D.C. Circuit has already rejected an attempt by the Commission to alter the treatment of OPEB costs without a rule change, stating that the court in *Southwestern Bell Telephone Company* held that the Commission was bound by its rule concerning the exogenous treatment of GAAP changes, such as SFAS-106, until such time as it amended the rules though a notice and comment rulemaking proceeding.[121]

b. AT&T and WorldCom

35. AT&T states that the LECs must establish that: (1) they have an unassailable right as a matter of law for each of the four years preceding the 1996 tariff filings to add to their rate bases unfunded OPEB liabilities that they previously deducted; (2) those rate base additions entitle them as a matter of law to make exogenous cost increases to their PCIs to reflect reduced sharing obligations for those prior years; and (3) they have met their burden of proof to demonstrate with record support that they performed the rate base, sharing, and PCI calculations correctly, adding no more than was previously deducted and reflecting all of the relevant offsetting effects.[122] AT&T argues that LECs have failed to establish these points.

36. First, AT&T argues that Commission rules prohibit rate base changes after 15 months from the end of the calendar year to which rate base calculations apply, a time period that expired well before the tariffs at issue were filed.[123] Second, AT&T asserts that the LECs failed to provide adequate cost support for their PCI increases and failed to include offsetting costs in their rate base recalculations.[124] AT&T and WorldCom further claim that the LECs' proposed exogenous adjustment is not permitted by section 61.45(d) of the Commission's rules without a rulemaking, rule waiver, or declaratory ruling.[125] AT&T argues that Commission rules prohibit exogenous cost increases designed to implement

[119] Verizon Comments at 6; SBC Reply Comments at 2.

[120] Verizon Comments at 5; Verizon Reply Comments at 7-8 (quoting *RAO 20 Rescission Order,* 11 FCC Rcd at 2961, para. 28).

[121] Verizon Comments at 9-10 (citing *Southwestern Bell Telephone Co. v. FCC*, 28 F.3d at 169).

[122] AT&T Comments at 2-3.

[123] AT&T Comments at 30-31 (citing 47 C.F.R.§ 65.600(d)). The 15-month rule has been in effect at all times relevant to this tariff investigation.

[124] AT&T Comments at 31-37; AT&T Reply Comments at 12-15.

[125] AT&T Comments at 26-27; WorldCom Comments at 3-4. Section 61.45(d) states that exogenous cost adjustments in the price cap formula are limited to those the Commission permits or requires by rule, rule waiver, or declaratory ruling. 47 C.F.R. § 61.45(d).

accounting changes that do not reflect "economic cost changes."[126]

37. AT&T also asserts that the D.C. Circuit's decision in *Southwestern Bell Telephone Company* does not preclude the Commission from engaging in rulemaking in these tariff proceedings to establish the appropriate rate base treatment of OPEB costs.[127] It contends that a tariff investigation is itself a rulemaking in which the Commission may implement or change rules to better serve the public interest or to prevent the violation of Commission policy.[128] AT&T denies that rejecting the LECs' request to restate their prior years' rate bases for purposes of calculating their sharing requirements would be retroactive ratemaking. Instead, precluding the LECs from adjusting their PCIs to reflect their recalculated sharing obligations for the years 1992-94 is consistent with their actual tariffs and accounting practices during those years and does not require "retroactive" assumptions or adjustments.[129] Indeed, AT&T argues, it is the LECs that seek a special adjustment to their price caps.[130]

38. AT&T contends that, based on the LECs' submissions, the LECs have unlawfully reduced their sharing obligations by approximately $173 million.[131] SBC asserts that AT&T's method of calculating the reduced sharing obligation of the SBC LECs overstates the alleged obligation by approximately $12 million.[132]

2. Discussion

a. Section 204 Deadline Issue

39. As a threshold matter, we reject SBC's claim that the Commission lacks authority to pursue this tariff investigation because the agency did not complete action within the five-month deadline established by section 204(a)(2)(A).[133] We acknowledge that significant time has passed since the Commission initiated this investigation. Nevertheless, the Commission's failure to conclude this tariff investigation within the statutory time frame does not affect our authority to conduct it to its conclusion.

40. Section 204(a)(1) expressly authorizes the Commission to hold a hearing on the lawfulness of the rates, terms and conditions of interstate tariffs filed with the agency.[134] While section 204(a)(2)(A) directs the Commission to conclude that hearing within five months, that provision does not "specify a consequence for noncompliance with statutory timing provisions,"[135] let alone prescribe the

[126] AT&T Comments at 28-30 (citing *Performance Review Order*, 10 FCC Rcd at 9089, para. 293); *see also* WorldCom Comments at 2-3; *but see* Verizon Reply Comments at 8-9 (arguing that its 1996 tariff filing included no OPEB costs – only an adjustment for sharing in its 1996 tariffs).

[127] AT&T Reply Comments at 4.

[128] AT&T Comments at 20-23 (citing *1997 Annual Access Tariff Filings,* CC Docket 97-149, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10597, 10610, para. 30 (1998)); AT&T Reply Comments at 3-4.

[129] AT&T Comments at 23; *see also* SBC Reply Comments at 4 n.8 (acknowledging that, under the post-1995 rules, OPEB-related accounting changes do not qualify for exogenous treatment).

[130] AT&T Comments at 23.

[131] AT&T Comments at 37-38.

[132] SBC Reply Comments at 6 and Ex. 1. No other party has quantified any potential refund liability.

[133] SBC Comments at 5-6.

[134] 47 U.S.C. § 204(a)(1).

[135] *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 159 (2003).

"drastic remed[y]" of ousting the agency of jurisdiction.[136] The Supreme Court has made clear that the failure of a governmental entity to act within a statutory deadline does not itself divest that entity of jurisdiction to take subsequent action.[137] Consistent with that principle, the court of appeals has held that "the time constraint imposed by section 204 does not operate as a statute of limitations and that its violation therefore does not end the FCC's authority to act."[138]

41. SBC's construction of section 204(a)(2)(A) would undermine the statutory purpose. Congress enacted the time limits in section 204(a)(2)(A) in order "to spur the [Commission] to action, not to limit the scope of [its] authority."[139] A primary purpose of section 204 is "to protect consumers and competitors from unlawful rates in effect while the investigation is pending."[140] Divesting the Commission of its authority to make customers and competitors whole by ordering refunds at the conclusion of a tariff investigation would unfairly deprive innocent ratepayers of a statutory remedy because of the delay by the agency.[141] We do not believe that Congress intended that anomalous result when it enacted section 204(a)(2)(A).[142]

b. Interpretation of the Pre-1997 Rate Base Rules

42. The LECs defend their adjustments as corrective measures necessary to ensure that their rate bases are consistent with the applicable regulations, and thus we address first whether the Part 65 rules in effect when the tariffs were filed required inclusion of accrued OPEB liabilities in the interstate rate base.[143] Based upon the language of the relevant rule provisions, the regulatory history, and

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[136] *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

[137] *E.g.*, *Barnhart v. Peabody Coal Co*., 537 U.S. at 159; *United States v. Montalva-Murillo*, 495 U.S. 711, 717-18 (1990); *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). *See also Regions Hospital v. Shalala*, 522 U.S. 488, 457 (1988) ("The Secretary's failure to meet the deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it.").

[138] *Southwestern Bell Telephone Co. v. FCC*, 138 F.3d 746, 748 (8th Cir. 1998).

[139] *See Brock v. Pierce County*, 476 U.S. at 265.

[140] *See* Statement by Sen. Daniel K. Inouye, 134 Cong,. Rec. H10453 (Oct. 19, 1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News at 4111, 4112 ("Inouye Statement").

[141] *Brock v. Pierce County*, 476 U.S. at 263-64. *See also United States v. Montalva-Murillo*, 495 U.S. 718 ("[C]onstruction of the Act must conform to the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'").

[142] We note that the legislative history shows that Congress contemplated that parties aggrieved by a section 204(a)(2)(A) violation would have the opportunity to seek a writ of mandamus in federal court compelling the agency to complete the section 204 investigation. *See* Inouye Statement at 4114. Indeed, AT&T filed just such a petition in connection with this tariff investigation. *In re AT&T Corp.,* No. 04-1032 (D.C. Cir., filed Jan. 26, 2004). A mandamus remedy – a court directive to compel agency action -- is flatly at odds with the SBC's contention that the Commission's violation of the section 204(a)(2)(A) deadline divests the Commission of its authority to act under section 204(a)(1).

[143] Although the Commission in the *OPEB Adoption Order* amended its rules explicitly to require the removal of accrued OPEB costs and the other items recorded in Account 4310 from the interstate rate base, these rule revisions did not go into effect until April 30, 1997. *See OPEB Adoption Order*, 12 FCC Rcd at 2321, para. 34 (rules to become effective thirty days after their publication in the Federal Register); 62 Fed. Reg.15117 (March 31, 1997) (Federal Regulation publication of rules). Mindful of the rule against retroactive ratemaking, we have not considered the 1997 amendments – or the policy underlying those rule revisions – in determining the lawfulness of the LECs' inclusion of accrued OPEB costs in the rate base in the tariffs under investigation. Unless otherwise

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administrative precedent, we conclude that those rules required the LECs to include accrued OPEB costs in the interstate rate base.

43. Under well-established law, the language is the "starting point" in construing the meaning of a statutory or regulatory provision.[144] Section 65.800 of the Commission's rules provides that the rate base "shall consist of" certain assets "minus any deducted items computed in accordance with [section] 65.830."[145] Section 65.830, in turn, enumerates specific deductions from the rate base. While the current version of section 65.830 explicitly provides for the deduction from the rate base of liabilities recorded in Account 4300 (previously numbered as Account 4310), including accrued OPEB liabilities, the language prescribing that deduction was not adopted until 1997. Nothing in the language of the pre-1997 version of section 65.830 suggests that accrued OPEB liabilities are among the expenses that are to be deducted from the rate base.[146] To the contrary, the fact that former section 65.830 expressly contained an explicit deduction for accrued pension costs, which are analogous to accrued OPEB liabilities, indicates strongly the Commission's intent that accrued OPEB liabilities should not be deducted from the rate base.

44. The regulatory history corroborates that the pre-1997 version of section 65.830 did not require the deduction of accrued OPEB liabilities. In its 1987 rulemaking leading to the codification of the rate base rules, the Commission initially proposed section 65.830 to require that "[t]he interstate portion of zero-cost funds shall be deducted from the interstate rate base."[147] That broadly stated rule, if adopted, would have required the deduction not only of accrued pension liabilities but any other zero-cost long term liabilities, including accrued OPEB expenses that were or subsequently might be included in Account 4310. The Commission, however, did not adopt that proposed rule. Instead, the Commission promulgated a rule containing an enumeration of narrowly defined deductions that included the "interstate portion of unfunded accrued pension costs (Account 4310)"[148] without reference to any other type of zero-cost long-term liabilities. The Commission's codification of a narrowly worded deduction for pension expenses, coupled with its failure to adopt the proposed rule requiring the deduction of all zero-cost long term liabilities, further supports our conclusion that the former rule did not permit the deduction from the rate base of zero-cost liabilities other than pension expenses.

45. Moreover, our interpretation of the pre-1997 version of section 65.830 adheres to the Commission's construction of that rule in both the *RAO Rescission Order* and the *RAO Rescission*

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noted, the references to rule provisions in this section are to the rules in effect when the tariffs under investigation were filed.

[144] *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 557 (1990).

[145] 47 C.F.R. § 65.800 (1995).

[146] *Compare* 47 C.F.R. § 65.830 (2003) *with* 47 C.F.R. § 65.830 (1996).

[147] *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Incomes of Dominant Carriers*, CC Docket No. 86-497, Notice of Proposed Rulemaking, 2 FCC Rcd 332, 337 (App. A) (1987) (proposed section 65.830). "Zero-cost funds" refers to sources of money other than the carrier's investors. Examples include customer deposits or advances and deferred income taxes, as well as accrued liabilities for pensions and OPEBs.

[148] *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and New Income of Dominant Carriers*, CC Docket No. 86-497, Report and Order, 3 FCC Rcd 269, 285 (App. B) (1997) ("*Part 65 Rulemaking Order*"), *recon. granted in part and denied in part, 4 FCC Rcd 1697 (1999) ("Part 65 Rulemaking Reconsideration*"), *aff'd in part, rev'd in part & dism'd in part, Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990), *aff'd, Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1264 (D.C. Cir. 1993).

Reconsideration decisions. In 1992, the Commission's staff in its *RAO Letter 20* directed the LECs, *inter alia,* to deduct accrued OPEB liabilities recorded in Account 4310 from the rate base.[149] The sole basis for the staff's directive was that OPEB liabilities "are similar to pension expenses" and thus should be accorded the same rate base treatment.[150] On review, the Commission in the *RAO Rescission Order* rescinded RAO Letter 20 and vacated the staff's ratemaking instructions.[151] The Commission pointed out that sections 65.820 and 65.830 "define explicitly those items to be included in, or excluded from, the interstate rate base."[152] The Commission found that the staff, by directing the LECs to exclude accrued OPEBs from the rate base, had inserted an "additional exclusion[]" into section 65.830 "for which the Part 65 rules do not specifically provide."[153] Because the staff, under the guise of a rule interpretation, in effect had amended section 65.830, the Commission ruled that *RAO Letter 20* "exceeded the Bureau's delegated authority."[154] The Commission expressly interpreted section 65.830 to provide that, while "unfunded accrued pension costs recorded in Account 4310 are removed from the rate base, . . . other items recorded in Account 4310, *such as accrued OPEB liabilities*, are not removed from the rate base."[155]

46. The Commission in its *RAO Rescission Order* was not unsympathetic to the policy rationale underlying *RAO Letter 20.* In fact, the Commission in that order expressed its "tentative agree[ment]"[156] that accrued OPEB liabilities should be given the same rate base treatment as pension expenses and instituted a notice and comment rulemaking to make the necessary changes to section 65.830.[157] In the rulemaking section of that order, the Commission proposed language amending section 65.830 to "accord to all of the zero-cost funds recorded in Account 4310, including accrued OPEB liabilities, the same rate base treatment currently accorded to accrued pension liabilities."[158] The Commission would have not instituted that rulemaking or vacated the ratemaking instructions contained in the *RAO Letter 20* if it had believed that the pre-1997 version of section 65.830 reasonably could have been interpreted to permit the deduction of accrued OPEB costs from the rate base. Instead, the Commission simply would have itself declared that such deductions did not violate its rules – an action that would have mooted the issue of improper delegation and avoided the need to initiate a rulemaking. AT&T thus is mistaken in contending that the Commission in the *RAO Rescission Order* held that "the wrong Commission entity issued the plainly lawful ruling that OPEBs, like other zero cost funds, must be deducted from the rate base."[159] While the Commission determined that its staff had acted beyond the scope of its delegated authority, it also decided as a matter of substantive law that the staff had erred in interpreting section 65.830 to require the deduction of accrued OPEB expenses from the rate base. The Commission in interpreting the pre-1997 version of section 65.830 affirmatively determined that

[149] *RAO Letter 20,* 7 FCC Rcd 2872.

[150] *Id.* at 2872-73.

[151] *RAO Rescission Order*, 11 FCC Rcd 2957, para. 1.

[152] 11 FCC Rcd at 2961, para. 25.

[153] *Id*.

[154] *Id.*

[155] *Id.* at 2962, para. 32 (emphasis added).

[156] *Id.* at 2962, para. 29.

[157] *Id.* at 2962-63, paras. 32-33.

[158] *RAO Rescission Reconsideration,* 12 FCC Rcd at 2325-26, para. 14.

[159] Letter to Marlene H. Dortch, Secretary, FCC, from David Lawson, Counsel, AT&T (March 15, 2004) at 5.

accrued OPEB liabilities are not to be "removed from the rate base."[160]

47. The Commission reaffirmed this construction of the pre-1997 rules in the *RAO Rescission Reconsideration*. In that order it again rejected the argument that it should interpret section 65.830 to require the deduction of accrued OPEB costs from the rate base because those costs are similar to pension expenses. The Commission reiterated that the inclusion of accrued OPEB expenses as a rate base deduction, as provided by *RAO Letter 20,* "would [require] a rule change" and pointed out that the agency lacked authority to "amend Part 65 through an interpretation without providing affected parties with any notice of or chance to comment on the amendment."[161]

48. Thus, in each of the two decisions in which it addressed the issue, the Commission authoritatively construed the pre-1997 version of section 65.830 to require the inclusion of accrued OPEB costs into the rate base. We adhere to that administrative precedent in concluding in this investigation that the pre-1997 rule did not permit the LECs to deduct accrued OPEB costs from the rate base.[162] Where, as here, an administrative agency "has given its regulation a definitive interpretation,"[163] an agency "'can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.'"[164]

49. AT&T claims that this tariff investigation is itself a rulemaking that empowers the Commission to "implement or change" its rules.[165] AT&T urges the Commission to exercise that alleged rulemaking authority to establish in this tariff investigation that accrued OPEB liabilities should have been excluded from the rate base calculations during the time period in question. We reject that argument. Although a "tariff investigation is a rulemaking of particular applicability under the Administrative Procedure Act,"[166] the Commission lacks power in a tariff investigation to change its

[160] *RAO Rescission Order*, 11 FCC Rcd at 2962, para. 32.

[161] *RAO Rescission Reconsideration,* 12 FCC Rcd at 2329-30, para. 28. For the reasons set forth above, we disagree with the staff's statement in initiating this investigation that the *RAO Rescission Order* left "open the question of the correct rate base treatment of OPEBs under current rules," *1996 Tariff Order*, 11 FCC Rcd at 7572, para. 19. The staff's statement fails to take into account the fact that the Commission in the *RAO Rescission Order* "vacate[d] the ratemaking instructions" in the *RAO Letter 20.* 11 FCC Rcd at 2959, para. 1. In addition, the staff's statement was made prior to the Commission's clarification in the *RAO Rescission Reconsideration* that the pre-1997 version of section 65.830 did not permit the inclusion of accrued OPEB costs into the rate base.

[162] In support of its claim that the section 65.830 should be read to include OPEBs in the rate base, AT&T relies upon *Ameritech Operating Companies*, 10 FCC Rcd 5606, 5611 App. A, para. 6 (1995). In that order, the Commission rejected a LEC's practice of including an equity component in its calculation of cash working capital for inclusion in the rate base under section 65.820(d). In interpreting section 65.820(d), the Commission in that order adhered to a previous decision that "explicitly [had] exclude[d] equity from cash working capital." 10 FCC Rcd at 5611 App. A, para. 6. We find that this decision is not useful in evaluating whether the pre-1997 version of section 65.830 permitted the inclusion of accrued OPEBs in the rate base. The decision cited by AT&T involves neither accrued OPEB liabilities nor an agency interpretation of section 65.830. In any event, the Commission explicitly held that the pre-1997 rules required the inclusion of accrued OPEB expenses in the rate base in the subsequently decided *RAO Rescission Order* and *RAO Rescission Reconsideration.*

[163] *Alaska Professional Hunters Association v. FAA*, 77 F.3d 1030, 1035 (D.C. Cir. 1999).

[164] *Id.* at 1033-34 (quoting *Paralyzed Veterans of America v. D.C. Arena,* 117 F.3d 579, 586 (D.C.Cir.1997)). *See Southwestern Bell v. FCC*, 28 F.3d at 169 ("The Commission "was bound to follow [its exogenous cost rules] until it altered them through another rulemaking.").

[165] AT&T Comments (April 8, 2003) at 20 ("AT&T Comments").

[166] *1993 Annual Access Tariff Filings,* CC Docket No. 94-65, Order, 19 FCC Rcd 14949, 14956, para. 17 (2004). *See Tariffs Implementing Access Charge Reform,* CC Docket No. 97-250, Memorandum Opinion and Order, 13 FCC Rcd 14683, 14747, para. 81 (1998).

governing regulations retroactively.[167] In performing ratemaking duties under section 204 the Commission cannot simply ignore its published regulations and pretend they had never been promulgated. The Commission's rules establish agency policy until such time as they are rescinded or amended in a notice and comment rulemaking.[168] In the absence of a waiver, an administrative agency must adhere to its regulations as long as those rules are in effect.[169] The Commission did not amend section 65.830 to require the deduction of accrued OPEB expenses from the rate base until 1997, and then it specified that the rule amendment would have prospective effect only.[170] The subsequent rule change has no effect on our decision in this investigation, which must be based upon the rules in effect when the tariffs were filed. And, as noted above, those rules did not permit the LECs to deduct accrued OPEB liabilities from the rate base.

50. In any event, AT&T is mistaken in arguing that the Commission in the course of this tariff investigation gave parties the notice and opportunity to comment required for a rule amendment by the Administrative Procedure Act ("APA").[171] In instituting this tariff proceeding, the Commission stated that it would investigate the lawfulness of the LECs' rate base treatment of OPEBs "under existing rules."[172] That order supplied notice of the Commission's intent to apply its existing rate base rules to the tariffs under investigation, and did not supply notice of any intent to consider amendments to those rules. The Commission in this tariff investigation neither proposed changes to section 65.830 nor provided parties with any opportunity to comment on amendments to that section.

c. Reasonableness of the LECs' Decision to Correct and to Make Retroactive Adjustments to the Rate Base

51. We next address whether the LECs, in the tariff revisions under investigation, acted reasonably in recalculating their rate bases for the years 1992 through 1995 by adding back accrued OPEB liabilities after the Commission issued its *RAO Rescission Order*. We believe the corrections were reasonable. The LECs deducted accrued OPEB liabilities during the years 1992 through 1995 solely to comply with the staff's *RAO Letter 20*. That formal published staff opinion was binding upon the LECs during the time that it remained in effect.[173] When the Commission rescinded that staff order

[167] *See generally Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

[168] *E.g., Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) (quoting *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C.Cir.1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations.")). *See Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003); *Southwestern Bell Telephone Co. v. FCC*, 28 F.3d at 169. The Commission can also waive its rules upon the proper showing of good cause.

[169] *See Southwestern Bell Telephone Co. v. FCC,* 28 F.2d at 169 (The FCC was bound to follow its rate base rules governing OPEB costs in a tariff investigation "until such time as it altered them through another rulemaking.").

[170] *RAO Rescission Reconsideration,* 12 FCC Rcd at 2331, para 34. In the 1997 rulemaking that amended section 65.830, AT&T correctly told the Commission that "any change to the Part 65 rules will affect the rate base on a prospective basis and will not affect the pending OPEB investigations because those investigations deal with past OPEB costs." 12 FCC Rcd at 2328, para. 22. In this tariff proceeding, however, AT&T relies on the Commission's policy decisions in the 1997 rulemaking to support its argument that the tariffs are unlawful. *See, e.g.,* AT&T Comments at 19. As noted above, we decline to give retroactive effect to the 1997 rulemaking.

[171] AT&T Comments at 20. *See* 5 U.S.C. § 553.

[172] *1996 Tariff Order*, 11 FCC Rcd at 7568, para. 7.

[173] *See* 47 U.S.C. § 416(c) ("It shall be the duty of every person . . . to observe and comply with [Commission] orders so long as the same shall remain in effect."); 47 U.S.C. § 155(c)(1) (staff orders issued under delegated authority "shall have the same force and effect" as Commission orders). Although the Commission in the *RAO Rescission Order* ultimately held that the staff had exceeded its delegated authority, it had not stayed that staff

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and authoritatively interpreted the pre-1997 version of section 65.830 to require the inclusion of accrued OPEB costs in the rate base, the LECs acted reasonably in adjusting their computations in conformance with that rule interpretation. The LECs had an obligation to ensure that their rate bases conformed to the governing rules and the adjustments the LECs made ensured that the composition of their rate bases during the years 1992 through 1995 was consistent with agency regulations as definitively interpreted by the Commission.

52. AT&T argues that, even if the pre-1997 version of section 65.830 required the LECs to include accrued OPEBs in the rate base, other rules in effect at the time the tariffs were filed barred the LECs from making retroactive adjustments to the rate base for purposes of calculating their sharing obligations under the price cap rules. AT&T claims that the LECs' adjustments violate section 65.600(d)(2), which it contends proscribes rate base changes made more than 15 months after the end of the calendar year.[174] AT&T also argues that the LECs' exogenous cost changes are barred by section 61.45(d), which limits exogenous cost changes to "those cost changes that the Commission shall permit or require by rule, rule waiver, or declaratory ruling."[175] According to AT&T, not only did the Commission not issue a rule, waiver, or declaratory ruling expressly sanctioning those changes, but the retroactive adjustment is inconsistent with the agency policy limiting "exogenous cost treatment of cost changes resulting from changes in the USOA requirements to economic cost changes."[176] The LECs deny that their adjustments violate sections 65.600(d)(2) or 61.45(d).[177] To the extent the Commission finds that a waiver is necessary, U S West (now Qwest) asks the Commission to waive its rules to permit it and the other LECs to make the appropriate adjustments.[178]

53. For purposes of this tariff investigation we will assume, but not decide, that the LECs' retroactive adjustments are inconsistent with sections 65.600(d)(2) and 61.45(d). We find it to be in the public interest to grant waivers of these rules to the extent necessary to permit the LECs to restore for the years 1992 through 1995 the accrued OPEB liabilities that the LECs deducted from their rate bases in compliance with the now vacated *RAO Letter 20.* Section 1.3 gives the Commission plenary authority to waive "at any time" any rule provision on its own motion or at the request of a petitioning party "for good cause."[179] Good cause exists "if particular facts would make strict compliance inconsistent with the public interest."[180]

54. We conclude that, in the specific circumstances of this case, it would be inequitable to enforce the deadline in section 65.600(d)(2) requiring a carrier to make corrections or modifications to

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decision pending full Commission review and the LECs were bound by that decision until it was rescinded by the Commission.

[174] AT&T Comments at 25 (citing 47 C.F.R. § 65.600(d)(2)).

[175] AT&T Comments at 26-27 (citing 47 C.F.R. § 61.45(d)).

[176] AT&T Comments at 28 (citing Price *Cap Performance Review for Local Exchange Carriers,* CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9089-90, para. 292 (1995)).

[177] *See, e.g.,* Verizon Reply Comments at 8-9.

[178] Letter to Marlene H. Dortch, Secretary, FCC, from John W. Kure, Executive Director – Federal Regulatory, Qwest (March 29, 2004) at 4.

[179] 47 C.F.R. § 1.3. *See also* 47 C.F.R. § 61.45(d)(d) (specifically authorizing the Commission to issue waivers of rules governing exogenous cost changes). *See generally WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[180] *Keller Communications, Inc. v. FCC,* 130 F.3d 1073, 1076 (D.C. Cir. 1997) (quoting *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)). *Accord Omnipoint Corp. v. FCC*, 78 F.3d 620 631 (D.C. Cir. 1996).

its rate base within 15 months of the calendar year to which the entries applied. As noted above, the LECs had a statutory obligation to adhere to the *RAO Letter 20* during the time period in which that order was in effect. These carriers hardly could have been expected to file rate base adjustments reversing the effects of the *RAO Letter 20 before* the Commission vacated that staff decision in March 1996. AT&T's construction of section 65.600(d)(2), however, would set a deadline for the filing of such rate base adjustments that falls, for at least some of the years in question, before the *RAO Rescission Order* had been issued. It is unquestioned that the LECs filed their rate base adjustments in a prompt manner shortly after the Commission issued the *RAO Rescission Order*. In these particular circumstances, we find it serves the public interest to waive section 65.600(d)(2) to the extent that the rule imposes a 15-month deadline for the filing of the rate base adjustments at issue in this investigation.

55. Given the unusual circumstances of this case, we also find that the public interest is served by a waiver, if one is necessary, of the rule provision limiting exogenous cost adjustments to economic cost changes.[181] By granting a waiver, we enable the LECs to rectify the effects of the vacated *RAO Letter 20* and to ensure that their rate bases are consistent with the agency's regulations. As shown above, the version of section 65.830 in effect when the tariffs were filed required the inclusion of accrued OPEB liabilities in the LECs' rate base. Had the staff not erroneously directed the LECs to deduct such liabilities in the now vacated *RAO Letter 20*, the LECs would have included accrued OPEB liabilities in their rate bases in the years 1992 through 1995 without any need for any "exogenous" cost adjustments. The only reason that the LECs made "exogenous" costs adjustments in 1996 was to rectify the effects of complying with *RAO Letter 20.*

56. It is well-established that an agency has authority to "'undo . . . what was wrongfully done by virtue of [a legally erroneous] order.'"[182] Indeed, "[w]hen the Commission commits legal error, the proper [action] is one that puts the parties in the position they would have been in had the error not been made."[183] Permitting the LECs to adjust their rate bases to include accrued OPEB liabilities in the years 1992 through 1995 puts both the LECs and their interexchange customers exactly in the position they would have been in if the staff had not issued the now vacated *RAO Letter 20*. It enables the LECs to calculate their sharing obligations and PCIs free from the rate base errors arising from their compelled adherence to the now vacated *RAO Letter 20.* In other words, the waivers we grant today advance the public interest by permitting the LECs to correct the errors arising solely from their compliance with the staff's legally deficient order.

d. Accounting and Cost Issues

57. Having decided that the LECs were authorized to make exogenous increases in 1996 in

[181] *See Price Cap Performance Review for Local Exchange Carriers,* 10 FCC Rcd at 9089-90, para. 292. The LECs dispute AT&T's claim that their rate base adjustments are inconsistent with any of the rules in effect when the tariffs were filed. Because we find that a waiver is in the public interest assuming the validity of AT&T's construction of the applicable regulations, we have no need to resolve in this order whether AT&T or the LECs have construed properly the relevant price cap rules. In particular, we take no position on whether section 61.45(d) authorized the exogenous cost adjustments at issue in this case.

[182] *Southeastern Michigan Gas Co. v. FERC,* 133 F.3d 34, 42 (D.C. Cir. 1998) (quoting *United States Gas Improvement Co. v. Callery Properties, Inc.,* 382 U.S. 223, 229 (1965)). *See Public Utilities Commission of the State Of California v. FERC,* 988 F.2d 154, 163 (D.C. Cir. 1993).

[183] *Exxon Co. v. FERC,* 182 F.3d 30, 49 (D.C. Cir. 1992) (quoting *Public Utilities Commission of the State Of California v. FERC,* 988 F.2d at 168). *See Communications Vending Corp. Of Arizona v. Citizens Communications Co.,* 17 FCC Rcd 24201, 24215 (2002), *aff'd, Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004).

order to adjust their price cap indices to reflect the effect of the rescission of *RAO Letter 20*, we now turn to AT&T's arguments concerning costs and accounting.

i. Deduction of Prepaid OPEB Amounts in Account 1410

58. AT&T argues that the LECs did not establish that the prepaid OPEB Account 1410 amounts, which had been added to the rate base under *RAO Letter 20*, were deducted when that letter was rescinded.[184] SBC states that, under SFAS-106 accounting, an employer accounts for the OPEB liability on a net basis. Accordingly, any asset set aside for the payment of future OPEB liabilities must be offset against the OPEB liability account when presenting the company's balance sheet.[185]

59. We agree with SBC. *RAO Letter 20* provides that Account 4310, Other Long-Term Liabilities, shall be used to record amounts accrued for postretirement benefits. It further states that companies shall credit this account for the net periodic cost of postretirement benefits recorded in the expense account matrix for the current year, and shall debit this account for any fund payments made during the current year.[186] If, on the other hand, fund payments caused the postretirement benefits portion of Account 4310 to have a debit balance, then, according to *RAO Letter 20*, the debit balance of postretirement benefits would be reported in Account 1410, Other Non-current Assets.[187] The accounting is thus a netting process. SBC correctly states that, if a company filed an adjustment to its rate base to include the amounts recorded in Account 4310, then that same company would not have any OPEB prepaid assets in Account 1410.[188]

ii. Ameritech's Adjustments to Remove Account 4310 Amounts

60. AT&T next alleges that Ameritech overstated its adjustments to remove Account 4310 amounts and added more than the amounts Ameritech originally deducted in response to *RAO Letter 20*.[189] In response to AT&T's allegations, SBC states that the OPEB liability is a balance sheet account, meaning that it reflects a cumulative balance for all prior years, plus the current year.[190] SBC also provided additional data showing the annual cumulative balances; however, it lacked data from the years 1991 and 1992. SBC therefore assumed that the activity in accounts 4310 for those years was the same as in 1993.[191]

61. AT&T argues that these assumptions for the years 1991 and 1992 are "counter-intuitive" because, as payments are made, amounts should be transferred out of the account. AT&T asserts that a constant rate of growth in the account implies that there is no mechanism for "relieving" the account. Furthermore, AT&T alleges that amortization of the TBO would reduce both current year's and prior

[184] AT&T Comments at 32, 33-34.

[185] *See* Letter to Marlene H. Dortch, Secretary, FCC, from Debra Clemens, Associate Director Federal Regulatory, SBC (October 15, 2004) at 1 (citing SFAS 106, para. 74(C)(6)) (SBC Ex Parte Oct. 15, 2004).

[186] *RAO Letter 20*, 7 FCC Rcd at 2872.

[187] *Id.*

[188] SBC Ex Parte Oct. 15, 2004 at 1.

[189] AT&T Comments at 34-35; AT&T Reply Comments at 14.

[190] SBC Comments at 10-12.

[191] *Id.* at 11.

years' balances in Account 4310.[192]

62. SBC responds to each of these arguments. Concerning the rate of growth of OPEB liability account balances, it argues that the Account 4310 balance is increased each year by the amount of SFAS-106 expense recognized and is reduced by the amount of actual retiree benefits paid and any contributions to the benefit plan trust. SBC states that SFAS-106 levels have exceeded benefit payments and trust contributions each year, resulting in the growth of Account 4310.[193] With respect to AT&T's argument that there appears to be no means of "relieving" the liability account balance, SBC states that the relief of Account 4310 occurs from the benefit payments or contributions to the trust fund. SBC also clarifies that the "incremental" OPEB costs used in its prior analysis represent the net amount of the annual expense estimates less the benefit payments and contributions.[194] It also asserts that amortization of the TBO does not reduce the current and prior years' balances; rather, it increases the current year balance in Account 4310 and has no effect on the prior years' balance.[195]

63. Account 4310 is a balance sheet account. This means the account, and in particular the OPEBs sub-account, contains the cumulative activity in the account rather than just a single year's activity. SBC correctly points out that the liability account is increased by recognized OPEB liability and is decreased by amounts paid to retirees or paid into trust. Accordingly, there are means of "relieving" the liability account. Furthermore, SBC has provided reasonable explanations for the growth in the liability account. Therefore, we accept SBC's arguments and find that its descriptions of the Account 4310 activity are reasonable.

iii. Timing of OPEB Rate Base Impacts

64. AT&T argues that SBC arbitrarily assumes that the additional OPEB rate base impact occurs at the beginning of each year. AT&T contends that, if the impact occurred at the end of the year, the average rate base effects would not be as great.[196] SBC responds that its analysis assumes that the effects occur on a *pro rata* basis throughout the year because the OPEB expense accrual is recorded monthly and actual benefit payments are made monthly.[197] SBC states that the amount reflected is the annual activity in the account, *i.e.,* the net of the annual OPEB expense recognized less the estimated benefit payments and trust contributions. SBC argues that AT&T's assumption that the activity would occur only at the end of the year is incorrect and violates accounting principles that require transactions to be recorded in the period in which they occur.[198]

65. SBC correctly describes the proper accounting and timing requirements for recording amounts in the liability account. We find that SBC has reasonably explained its calculations of the Account 4310 amounts offered in support of its tariff filing.

[192] AT&T Reply Comments at 17 (Attachment 1).

[193] SBC Ex Parte Oct. 15, 2004 at 2.

[194] *Id.; see also* AT&T Reply Comments at 17 (arguing that the 1992 average would be calculated from the sum of the 1991 and 1992 accumulated OPEB amounts).

[195] SBC Ex Parte Oct. 15, 2004 at 2.

[196] AT&T Reply Comments at 17.

[197] SBC Ex Parte Oct 15, 2004 at 2-3.

[198] *Id*.

iv. Curtailment Costs

66. AT&T challenges SBC's inclusion in its exogenous cost increase of a $24 million "1993 interstate curtailment cost."[199] According to SBC, a force reduction plan resulted in additional SFAS-106 curtailment costs.[200] AT&T argues that one-time costs associated with company downsizing should result in payment of some of the one-time expenses in the year they were incurred, thus reducing the "curtailment" effect.[201]

67. SBC states that SFAS-106 requires companies to recognize curtailment costs when certain events occur. It argues that SFAS-106 defines a plan curtailment as

> an event that significantly reduces the expected years of future service of active plan participants or eliminates the accrual of defined benefits for some or all of the future service of a significant number of active plan participants. Curtailments include: (a) Termination of employees' services earlier than expected, which may or may not involve closing a facility or discontinuing a segment of business. (b) Termination or suspension of a plan so that employees do not earn additional benefits for future service.[202]

SBC states that Ameritech experienced significant force reduction plans which triggered plan curtailments.[203] It argues that SFAS-106 requires that the unrecognized prior service costs, including any remaining unrecognized TBO, associated with the future years of service that are no longer expected to be rendered, must be recognized as a loss and included in those expenses for the year.[204] In effect, SBC continues, a curtailment accelerates the recognition of prior service costs and any remaining TBO that had not yet been amortized. According to SBC, the recognition of these curtailment costs has the same impact on the OPEB liability recorded in Account 4310 as does the normal SFAS-106 cost accruals; it increases the balance in that account. Any payments that may have been related to the curtailment, SBC argues, would have been included with all other benefit payments and thus already reflected in the Account 4310 activity for the year.[205]

68. SBC is correct that SFAS-106 recognizes curtailment costs associated with force reduction plans. We also find reasonable SBC's conclusion that its force reduction plan was "significant" within the meaning of "curtailment" as defined in SFAS-106. Thus SBC properly included the associated expenses in Account 4310.

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[199] AT&T Reply Comments at 18.

[200] SBC Comments at 11, n. 24.

[201] AT&T Reply Comments at 18.

[202] SBC Ex Parte Oct. 15, 2004 at 3 (quoting *SFAS 106* at para. 96).

[203] SBC Ex Parte Oct. 15, 2004 at 3.

[204] *Id.* (citing *SFAS 106* at para. 97)(*SFAS-106* states: "The unrecognized prior service cost associated with the portion of the future years of service that had been expected to be rendered, but as a result of a curtailment are no longer expected to be rendered, is a loss. For purposes of measuring the effect of a curtailment, unrecognized prior service cost includes the cost of plan amendments and any remaining unrecognized transition obligation. For example, a curtailment may result from the termination of a significant number of employees who were plan participants at the date of a prior plan amendment.").

[205] *Id.*

v. Base Factor Portion (BFP) Calculations

69. AT&T asserts that the LECs included in their calculations only those rate base effects that increased their PCIs and excluded offsetting rate base effects that would have reduced their PCIs.[206] According to AT&T, the increased rate base effect of the OPEB adjustments affects more than the LECs' rate of return and sharing obligations. AT&T argues that these adjustments also affect the development of the LECs' prospective base factor portion (BFP) revenue requirements used to develop End-User Common Line (EUCL) charges.[207] The increased rate base established in the historical period, AT&T continues, allows the LECs to project a correspondingly higher prospective rate base that underlies the development of the BFP revenue requirement. Thus, AT&T contends, if the LECs are permitted to recalculate their interstate rate bases, they should also recalculate their historical subscriber line charges and carrier common line (CCL) rates. [208]

70. The record suggests that individual companies took different approaches to the BFP calculation. SBC, for example, has submitted evidence that Ameritech and Southwestern Bell Telephone Company did recalculate their historical BFPs.[209] SBC states, however, that the BFP for Pacific Bell was not revised because it was predicated on the assumption that the *RAO 20 Rescission Order* would not stand,[210] and, in fact, the deduction required by *RAO Letter 20* was adopted as a rule in 1997.[211] Verizon contends that Bell Atlantic's BFP forecasts for the 1996-97 tariff period were based on 1995 base period costs, which reflected the full effect of the *RAO 20 Rescission Order,*[212] and it furthers argues that it was not obligated to make changes for tariff periods prior to 1996.[213] With respect to some companies, we lack record evidence to determine exactly how they calculated their BFPs in the relevant period.

71. We find that the variable treatment of the BFP calculation in the tariffs subject to this investigation and the lack of record evidence counsels against further investigation of this issue. Throughout the long and tortured history of this proceeding, the appropriate rate base treatment of accrued OPEB costs has been hotly contested and the subject of changing and uncertain regulatory requirements. The LECs subject to this investigation have, since 1992, submitted thousands of pages of evidence and argument to the Commission. Thirteen years later, we finally decide in this order that the LECs were entitled – indeed required – to include these costs in their interstate rate bases and, therefore, were justified in making exogenous adjustments to their price cap indices to reflect the reduced sharing obligations flowing from that rate base treatment. We also have concluded that the LECs calculated these adjustments in a manner consistent with the appropriate rate base treatment.[214]

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[206] AT&T Comments at 35-36; AT&T Reply Comments at 13.

[207] AT&T Comments at 36.

[208] *Id.*

[209] SBC Ex Parte Oct. 15, 2004 at 4.

[210] *Id.* The 1996-97 tariff filing reflected a forecasted BFP. *See id.*

[211] SBC notes that, if the Commission accepted AT&T's argument that Pacific Bell's BFP should have followed the rate base treatment, there is no provision in the rules to recover a higher multi-line EUCL rate to offset a lower CCL rate. *Id.* SBC asserts that a waiver of the Commission's rules would be required to increase the multi-line EUCL rate and to permit the combined EUCL rates to exceed common line, marketing, and certain residual interconnection charge interstate access elements (CMT) recovery. *Id.*

[212] Verizon Reply Comments at 16.

[213] *Id.*

[214] *See supra* paras. 58-68.

In light of these findings, we believe that the cost of requesting additional evidentiary submissions outweighs any benefit associated with the outcome of a further inquiry into the LECs' calculation of historical BFP. The shared interest of the parties, the Commission, and the public in finality and closure compels us instead to terminate the investigation at this time.

C. Other OPEBs Issues

72. In the *Erratum Order*, with respect to other OPEB issues under investigation in CC Docket No. 94-157, CC Docket No. 94-65, and CC Docket No. 93-193, the Bureau requested that parties with interest in such issues inform the Bureau of any issue that remains open. The Order stated that, if no timely comments in response to this request were received, the OPEB investigation in CC Docket No. 94-65 and CC Docket No. 93-193 would be terminated without further action. As stated in that Order, termination of issues no longer in dispute serves the public interest because it reduces the uncertainty to which carriers are subject in their normal operations, and it permits both carriers and the Commission to devote their resources more efficiently to other matters of significance. Because we have resolved the OPEB issues addressed in this Order, and because no parties raised any issues additional to those specified in the *Erratum Order,* we terminate all outstanding OPEB investigations other than those addressed by this Order.

IV. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201-205, 403, and 404 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 403, 404, that Verizon's exogenous treatment of accrued OPEB costs for the years 1991 and 1992 WAS LAWFUL.

74. IT IS FURTHER ORDERED that SBC Communications, Inc., the Verizon Telephone Companies, BellSouth Telecommunications, Inc., Qwest Communications Corp., Alltel Telephone System, and Sprint Local Telephone Companies WERE PERMITTED to make exogenous adjustments to their price cap indices in 1996 as set forth herein.

75. IT IS FURTHER ORDERED that the investigations of the inclusion of OPEB costs in the interstate rate bases of incumbent LECs instituted in CC Docket Nos. 93-193 and 94-157, together with the related accounting orders, ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary