

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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No. 04-1352

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VIRGIN ISLANDS TELEPHONE CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

The Commission largely fails to answer Vitelco's various demonstrations of the legal infirmity of the *Order*.¹ For example, with respect to the ultimate question whether the steps taken by the agency suffice permanently to strip Vitelco's July 1997 Tariff of deemed lawful status under Section 204(a)(3), the FCC repeatedly mischaracterizes Vitelco's argument. Vitelco never argued that the agency must conclude the entire Section 204(a)(1) process within fifteen days, and indeed in its opening brief took care to make its position clear. Again, Vitelco's contention is that what happened in this case – in which it is now undisputed that no determination of lawfulness under Section 204(a)(1) *ever* occurred and in which, in any event, the initial steps that the Bureau did undertake were subsequently *set aside* – is insufficient. Similarly, the Commission does not answer Vitelco's well-supported showing that the purely preliminary, procedural steps of suspension and accounting cannot, as a matter of law or logic, operate to permanently deprive Vitelco's tariff of deemed lawful status, instead beseeching this Court in a footnote to remand based on the last-ditch and unfounded claim that the agency never had the opportunity to consider the questions presented here.

This abdication by the FCC signals its acquiescence in the bulk of Vitelco's arguments and "operates as a waiver." *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001); *see also City of N.Y. v. Minetta*, 262 F.3d 169, 179 (2d Cir. 2001). At the very least, the Commission's non-responsiveness shows that no credible rejoinders exist, given the *Order*'s myriad analytical flaws, logical inconsistencies, and erroneous legal conclusions. *See, e.g., Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049-53 (vacating decision where FCC was

¹ *AT&T Corp. & AT&T of the Virgin Islands, Inc. v. Virgin Islands Tel. Corp., d/b/a Innovative Telephone*, 19 F.C.C.R. 15,978 (2004) ("Order") (JA __ - __).

“largely unresponsive” to arguments on appeal), *reh’g granted in part on other grounds*, 293 F.3d 537 (D.C. Cir. 2002).

In those few instances in which the Commission joins the questions presented by Vitelco, its defense of the *Order* amounts to the following. The Bureau really *did* conduct a Section 204(a)(1) hearing – “an abbreviated and inchoate one,” FCC Br. 29, consisting of the filing of a one-page chart by Vitelco – which “the staff did not advance ... to the next stage” and “decided ... not to continue and complete,” *id.* at 30, but which was also never “conclude[d],” *id.* at 20, “terminat[ed],” *id.*, “set[] aside,” *id.* at 33, or “vacate[d],” *id.* at 33 n.25, thus “remain[ing] open,” *id.* at 34, to this day, yet was at some point in time “overtaken” by AT&T’s Section 208 complaint, *id.* at 20. The FCC maintains that this anomalous proceeding, resembling no tariff review process delineated in Title II and never resulting in *any* determination of lawfulness under *any* timeframe, properly served as the basis for the permanent denial of deemed lawful status. Further, the agency claims, the *Reconsideration*² had no effect *at all* on the supposed legal consequences of its special “abbreviated and inchoate” proceeding because, even though the *Reconsideration* was issued in express “reli[ance] on 47 C.F.R. § 1.108,” FCC Br. 31, it did not explicitly “state that the staff was ‘vacating’ or ‘setting aside’ the earlier *Suspension Order*,”³ FCC Br. 33.

At the conclusion of these mind-boggling contentions, the Commission suggests that it does not engage in the practices at issue anymore, implying that the Court can deny Vitelco’s petition for review without fear. But affirmance of the *Order* would only embolden the FCC by

² 1997 *Annual Access Tariff Filings*, 12 F.C.C.R. 11,417 (1997) (“*Reconsideration*”) (JA __ - __)

³ 1997 *Annual Access Tariff Filings*, 13 F.C.C.R. 5677 (1997) (“*Suspension*”) (JA __ - __).

granting it *carte blanche* to take this approach with future streamlined tariffs and would ignore the harm indisputably inflicted upon Vitelco in this case.

The Commission's Alice-in-Wonderland defense of its purported authority under Section 204(a)(3) would be comical if it were not the grounds for the destruction of Vitelco's substantive legal right to be free from retroactive damages claims under the July 1997 Tariff. As Vitelco previously explained and the FCC has failed to rebut, the agency has not complied with the most basic elements of the process set forth in Section 204(a)(1), instead claiming power to devise its own procedures for evaluating streamlined rates by "pick[ing] and choos[ing] at will," *Ill. Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992) (internal quotations omitted), among the tariff review steps provided in various sections of Title II. Moreover, whatever the effect of the *Suspension*, the *Reconsideration* clearly vacated that decision and thus restored the *status quo ante*. Finally, the FCC's finding that AT&T's claim for damages was not time-barred is premised on the outmoded idea that the two-year monitoring period is always the relevant time frame for rate-of-return purposes, which, after the enactment of Section 204(a)(3), is clearly wrong. For these reasons, the *Order* must be reversed.

ARGUMENT

I. SECTION 204 PRECLUDES THE COMMISSION'S CONTENTION THAT THE VACATED SUSPENSION ORDER PERMANENTLY STRIPPED VITELCO'S TARIFF OF DEEMED LAWFUL STATUS.

A. The FCC Cannot Escape the Reality that It Neither Conducted a Hearing Nor Reached a Conclusion on the Merits of Vitelco's Tariff, Pursuant to Section 204(a)(1).

In its opening brief, Vitelco demonstrated that: (1) the Commission failed to comply with Section 204(a)(1) by failing to conduct a hearing; and (2) even the suggestion in the *Order* that a hearing was commenced is belied by the record. *See* Vitelco Br. 20-24. Accordingly, it is clear that no determination of lawfulness pursuant to Section 204(a)(1) was ever made. *Id.* at 23-

24. The FCC offers little of substance in response, instead simply mischaracterizing Vitelco's argument as being that a hearing must be concluded within fifteen days. *See, e.g.*, FCC Br. 16, 19, 27. But Vitelco previously explained that it has "never argued that the Commission must conclude a hearing within that timeframe but, rather, consistently stated that a hearing must be concluded within five months, as required by Section 204(a)(2)(A)." Vitelco Br. 23 n.14. Thus, as in the *Order*, the agency continues to "misleadingly frame the question as *when* a hearing must be *concluded*" in order to "sidestep[] the real issue – *whether* a hearing under Section 204(a)(1) must ever be *held at all* to strip a tariff of 'deemed lawful' status." *Id.* (emphasis in original). The FCC's focus on timing only highlights its lack of substantive reply to Vitelco's argument that no proper hearing occurred, and thus no determination on the lawfulness of the tariff was reached, under Section 204(a)(1). *See id.* at 22-24 & n.13.

The best the agency can do – in apparent recognition that merely "set[ting] for" or "initiat[ing]" an "investigation," *Suspension*, 13 F.C.C.R. at 5679, 5702 (JA __, __), is too weak a reed to support the denial of deemed lawful status – is to claim that the Bureau conducted "an abbreviated and inchoate" Section 204(a)(1) hearing. FCC Br. 29. This "hearing" consisted entirely of Vitelco submitting a two-page document, composed of a cover letter and one table with eleven line-item figures showing cash working capital ("CWC"). *See id.* at 29-30.⁴ Based

⁴ The FCC attempts to attach significance to Vitelco's submission of this document "post-suspension." *Id.* at 30. But the submission's timing is immaterial because the Bureau's actions alone demonstrate that no Section 204(a)(1) hearing took place. *See infra* pp. 5-6. In any event, the letter merely confirmed representations made before the *Suspension*: that Vitelco "use[d] the 15-day [lag] period to calculate [its] CWC requirements," *Suspension*, 13 F.C.C.R. at 5701 (citing Vitelco Reply at 1) (JA __), and that "AT&T's computation [was] incorrect because it fail[ed] to include all of [Vitelco's] cash operating expenses, such as customer and corporate expenses and interest," *id.* at 5702 (citing Vitelco Reply at 2). *See* Letter from Gregory Vogt to William Caton (July 2, 1997) (noting that Vitelco's CWC calculation "assumes a 15 day lag" and includes expense figures for "[c]ustomer [o]perations," "[c]orporate [o]perations," and interest) (JA __).

on this letter, the agency now claims, the Bureau “decided ... not to *continue* ... the investigation.” FCC Br. 30 (emphasis added); *see also id.* at 34 (asserting that “the staff ‘decided not to investigate’ Vitelco’s rates *further*”) (emphasis added).

This appellate version of events contravenes: (1) the Bureau’s contemporaneous description of its decision to “decline to investigate” Vitelco’s tariff, *Reconsideration*, 12 F.C.C.R. at 11,449, 11,452 (JA __, __); (2) the *Order*’s statement that the Bureau merely “began a hearing concerning the lawfulness of the tariff,” 19 F.C.C.R. at 15,990 (JA __);⁵ and (3) language elsewhere in the Commission’s brief indicating the hearing was “beg[un],” FCC Br. 26; *see id.* at 27 (“initiation of a hearing”); *id.* at 28 (“initiation of a tariff investigation”); *id.* (“setting [tariffed rates] for investigation”). Moreover, it ignores the fact that the Bureau lacked power to end the “hearing” it supposedly conducted, *see* 47 U.S.C. § 155(c)(1), and thus creates a violation of the five-month time limit, *id.* § 204(a)(2)(A); *see* FCC Br. 20 (positing violation of statutory deadline). Finally, the suggestion is utterly illogical: Vitelco’s submission of a single chart could not possibly have constituted a “hearing” because it occurred before the agency designated issues for hearing (as it did with all other carriers whose suspensions were *not* set aside) or established procedural rules for any such proceeding. *See* Vitelco Br. 23 n.13.

It is equally clear that no hearing was ever commenced. *But see* FCC Br. 29 (“The hearing got under way upon issuance of the *Suspension Order*.”). In another case currently

⁵ In so stating, the *Order* implicitly rejected the claim, advanced below, that a hearing on lawfulness actually transpired. *See, e.g.*, Supplemental Brief of AT&T Corp., File No. EB-04-MD-002, at 5 (May 4, 2004) (“[T]he provision of new information to the Bureau by [Vitelco] in response to the Bureau’s request was in fact an ‘investigation,’ regardless of the fact that it was brief and quickly completed.”) (JA __). Thus, even the FCC, at least at the time it adopted the *Order*, recognized the absurdity of the notion that a hearing took place and opted not to rely on it. In any event, because the Commission did not rely on that argument below, it cannot do so on appeal. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Am. Mun. Power-Ohio, Inc. v. FERC*, 863 F.2d 70, 73 (D.C. Cir. 1988) (quoting *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974)).

before this Court, the FCC concedes that the designation of issues for hearing begins the hearing and triggers the duty to resolve lawfulness. *See* Br. of Respondents at 32-33, *Verizon Tel. Cos. v. FCC*, Nos. 04-1331 & 04-1332, at 32-33 (D.C. Cir. May 2, 2005). There, the FCC states that:

Once the Commission designated the add-back issue for investigation, it had a duty to resolve the lawfulness issue. This Court has determined that, in the absence of an adequate explanation for not reaching a particular issue, the Commission must decide the issues it has designated for investigation in a section 204 tariff proceeding.

Id. (footnotes omitted). In fact, the agency admits *here* that its longstanding practice is to issue designation orders before hearings are commenced. FCC Br. 12 n.12 (“[T]he staff typically issues a second order, commonly called a designation order, which provides additional detail and analysis and establishes procedures and a pleading cycle for [the hearing].”). It is undisputed that no issues relating to Vitelco’s tariff were ever designated for hearing. *Id.* at 30 (acknowledging that “the staff did not ... includ[e] Vitelco’s tariff as part of the subsequent designation order”). Accordingly, the correct reading of the record, and the one that avoids the conclusion that the agency violated Section 204(a)(2)(A), is that the Bureau planned to initiate a hearing by issuing a designation order *after* the *Suspension*, but never did so because the *Reconsideration* vacated that decision. Vitelco Br. 22-23.

But whether the Bureau conducted but never concluded a hearing, initiated a hearing, or only decided to commence a hearing, the agency’s position still must fail. Section 204(a)(1) hearings are not an academic exercise, the mere commencement of which can substantively and permanently determine legal rights, as the FCC contends. *See, e.g.*, FCC Br. 28, 30.⁶ Their sole purpose, in the words of the statute, is to enable the agency to produce a “decision” on the

⁶ AT&T wrongly contends that the Commission’s theory of its powers under Section 204(a)(3) does not affect Vitelco’s “substantive” rights. AT&T Br. 7 n.3. The “substantive” right at issue is not the ultimate lawfulness of Vitelco’s rates, but Vitelco’s right to immunity from damages under the July 1997 Tariff pursuant to Section 204(a)(3).

“lawfulness” of a filed rate. 47 U.S.C. § 204(a)(1); *see* Vitelco Br. 17-18, 20-22. The FCC has now effectively conceded that it never reached *any* conclusion, under *any* applicable timeframe, regarding the lawfulness of Vitelco’s tariff under Section 204(a)(1). *See* FCC Br. 20 (noting that Section 204 “investigation” was never concluded and that it was the “*Order* [that found] Vitelco’s rates to be unlawful”); *id.* at 35 (stating that “ruling on ... lawfulness” occurred “for the first time” in the *Order*). This admission is fatal. In the absence of any “decision” regarding “lawfulness,” there is no compliance with the steps enumerated in Section 204(a)(1) and thus no “action” sufficient to permanently remove a streamlined tariff from Section 204(a)(3).

That the Commission purports to have “adjudicated the lawfulness of Vitelco’s rates ... in the section 208 context,” FCC Br. at 35; *see also id.* at 20; AT&T Br. 7 n.3, does nothing to cure this fundamental flaw. As an initial matter, this was not a basis for the agency’s decision below and cannot be grounds for affirmance here. *See Burlington Truck Lines*, 371 U.S. at 168; *Am. Mun. Power-Ohio*, 863 F.2d at 73. In any event, to deny a streamlined tariff its conclusive presumption of lawfulness, Congress specified that the FCC “take[] action *under [Section 204(a)(1)]*,” 47 U.S.C. § 204(a)(3) (emphasis added), *not* Section 208. Under the unambiguous terms of Section 204(a)(3), a ruling on lawfulness arising under Section 208 is no substitute for a decision under Section 204(a)(1). In addition to the clarity of this statutory language, it bears emphasis that regulated carriers enjoy important protections in Section 204(a)(1) proceedings, such as the five-month deadline and the right of immediate judicial review, Vitelco Br. 6-7, 10, 36-37, that are severely undermined in Section 208 proceedings that occur years after a tariff takes effect.⁷ Indeed, the Commission’s claimed authority to find

⁷ Section 204(a)(1) proceedings also differ from Section 208 proceedings in that they take place while the tariff is still in effect, the refund remedy is permissive, and the prescribed rate of return is only one of several components the agency must take into account. In addition, prior to ordering a refund, the FCC must strike a reasonable accommodation among several other

Vitelco's streamlined rates "unlawful" more than *seven years* after their filing is precisely the sort of open-ended vulnerability to retroactive liability that Section 204(a)(3) was meant to prevent.

B. The FCC's Argument that the *Suspension* Could Permanently Deprive the July 1997 Streamlined Tariff of Deemed Lawful Status, Pursuant to Section 204(a)(1), Cannot be Sustained as a Matter of Law or Logic.

Vitelco also showed that the plain language and structure of Section 204(a)(3) compel the conclusion that the suspension and accounting powers are preliminary procedural devices incident to the power to conduct a hearing and reach a decision on a tariff's lawfulness. Vitelco Br. 24-25. The Commission's lone riposte is that it took *certain* of the steps required by Section 204(a)(3) and, in turn, Section 204(a)(1). FCC Br. 26-29. In taking this position, it is the FCC, not Vitelco, that seeks to "deconstruct," *id.* at 29, the statute by asking this Court to deem the steps delineated in Section 204(a)(1) to be merely optional.

Contrary to the Commission's suggestion, *see id.* at 26-27 – and AT&T's explicit contention, *see, e.g.*, AT&T Br. 1, 6, 9 – Section 204(a)(3) does not state that deemed lawful status is permanently removed once the FCC "takes *any* action" or "*any one* action" provided for in Section 204(a)(1). Instead, Section 204(a)(3) says that the Commission must "take[] action under [Section 204(a)(1)]," which in turn sets forth all the steps the agency must take in order to declare a tariffed rate unlawful and thus permanently remove deemed lawful status. 47 U.S.C. § 204(a)(3). Those steps include not only suspension of the tariff and issuance of an accounting order (or even one or both coupled with the *commencement* of a hearing), but also the

factors, including: (1) whether earnings projections were reasonable when made; (2) the actual harm suffered by the ratepayer; (3) changes in the market environment; and (4) overriding equitable considerations. *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995) ("*MCI II*"); *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1240 (D.C. Cir. 1993). By contrast, damage proceedings under 208 involving overearnings take place *after* the relevant monitoring period has ended, the damage remedy is mandatory, and they treat earnings in excess of the prescribed rate of return as *per se* violative of the Communications Act. *See MCI II*, 59 F.3d at 1414.

culmination of the proceeding in some decision regarding the lawfulness of rates. *Id.* § 204(a)(1); Vitelco Br. 17-18. Consistent with this view, this Court has unequivocally instructed that the FCC cannot “pick and choose at will” from among the steps that Section 204(a)(1) requires. *Ill. Bell*, 966 F.2d at 1482; Vitelco Br. 26-27. Rather, the statute obligates the Commission to follow *all* of the mandated procedures in order lawfully to affect substantive rights. Had Congress intended deemed lawful status to be immediately removed once the FCC took *any one* of the steps enumerated in Section 204(a)(3) (particularly preliminary, procedural actions, *see* Vitelco Br. 27-30), it would have said so expressly. *See, e.g., Time Warner Entm’t Co. v. FCC*, 56 F.3d 151, 189 (D.C. Cir. 1995).⁸ Not only has the Commission failed to satisfy Section 204(a)(1), but it purports to substitute its ruling in the Section 208 complaint adjudication process for the decision on lawfulness required by Section 204(a)(1). *See supra* pp. 7-8. This is precisely the sort of “blend[ing]” of Title II tariff review processes that this Court has found unlawful. *Ill. Bell*, 966 F.2d at 1482 (holding that FCC cannot blend authority provided under Section 204 with procedures under Section 205).

The FCC’s only other mention of this issue is relegated to a footnote that fails to address the substance of Vitelco’s arguments. FCC Br. 30 n.19. The Commission essays no response to the venerable body of law – including binding Circuit precedent regarding the FCC’s lack of authority to select from among the various procedural steps set forth in Section 204(a)(3) and analogous statutory provisions, as well as over a century of decisional law concerning the preliminary injunction power of courts (from which the Commission’s suspension power

⁸ AT&T is incorrect that this Court’s decision in *ACS* “implicitly recognized” that deemed lawful status may be removed through suspension or the initiation of an investigation alone. AT&T Br. 7 & n.4. The portion of *ACS* that AT&T cites quotes from the *Streamlining Order*, *id.* at 7, which elsewhere states that suspension *and* a hearing are required for a streamlined tariff to be denied “deemed lawful” status, Vitelco Br. 21. Moreover, the tariff in *ACS* was neither suspended nor investigated, and no accounting order was issued, rendering any statement regarding whether one or more of these steps standing alone could remove deemed lawful status *dicta*.

originates)⁹ – which definitively precludes the use of purely procedural steps to affect substantive legal rights. *See Vitelco Br.* 26-31. Instead, the FCC pleads that this Court refrain from considering Vitelco’s arguments and remand this matter to give the Commission a second bite at the apple – presumably because the agency recognizes that it failed to follow the dictates of Section 204(a) the first time. *See FCC Br.* 30 n.19.

As an initial matter, the FCC’s failure to respond substantively to Vitelco’s precedent-based arguments is tantamount to acquiescence in Vitelco’s position and results in a waiver of any claim to the contrary. *See Cincinnati Ins. Co.*, 260 F.3d at 747. Apart from this legal impact, the FCC’s silence exposes its position as untenable: the Commission makes no argument that its interpretation of the statute can be sustained under the precedents that Vitelco cited because no colorable argument is available.

In any event, the FCC’s footnoted request for a remand must be denied on its merits. First, the Commission’s assertion that it “did not reach” the question whether suspension of a tariff and issuance of an accounting order, absent a hearing, are sufficient to foreclose deemed lawful status, *FCC Br.* 30 n.19, is absurd. Vitelco squarely presented that question below, specifically arguing that a hearing is required before the FCC may remove deemed lawful

⁹ AT&T’s attack on this caselaw, *AT&T Br.* 9, is similarly unpersuasive. AT&T never denies that Section 204(a)(3)’s suspension power is the historical equivalent of the judicial power to award preliminary injunctive relief or explains how, in light of precedent establishing that a preliminary injunction cannot affect substantive legal rights, *see Vitelco Br.* 28-29, the suspension power can be interpreted any differently. AT&T’s analogy to a “hypothetical statute in which Congress specified that a party would gain a certain right only if it did not become subject to a preliminary injunction,” *AT&T Br.* 9 n.6, is inapt: unlike AT&T’s imaginary statute, Section 204(a)(3) nowhere “*specifie[s]*” that the “exercise” of “*the power to suspend*” is “sufficient to deny a tariff ‘deemed lawful’ status,” *id.* at 9 (emphasis added). It says only that the Commission must “take[] action under” Section 204(a)(1), without reference to suspension.

status,¹⁰ and AT&T directly responded.¹¹ Despite its claim to the contrary, the Commission expressly addressed Vitelco's argument and answered the question – albeit wrongly – that it now astoundingly claims never to have reached. *Order*, 19 F.C.C.R. at 15,990 (“[S]ection 204(a)(3) does not require an investigation to be concluded prior to removing deemed lawful status.”) (JA__). Moreover, the FCC did not conclude that it *had* held a hearing in attempting to justify its decision. Rather, it declined to adopt AT&T's preposterous suggestion that a hearing took place, notwithstanding current efforts to resurrect that theory. *See supra* p. 5 & n.5.

Second, and regardless of whether the Commission actually considered whether Section 204(a)(3) requires a hearing, there is no reasonable construction of the statute under which the FCC *could* conclude on remand that suspension and accounting standing alone are sufficient to remove “deemed lawful” status. *See Vitelco Br.* 24-31; *see also id.* at 20-24; *supra* pp. 8-9. Furthermore, as explained above, “inchoate” hearing, initiated hearing, or no hearing at all, it is undisputed that no decision on lawfulness under Section 204(a)(1) was ever made. *See supra* pp. 6-7. In these circumstances, a remand is inappropriate and unnecessary. *See Fox*, 280 F.3d at 1053 (vacating decision where reasons given by Commission to support its decision “were at best flimsy, and its half-hearted attempt to defend its decision in this court [provided] but another indication that the [decision was] a hopeless cause”); *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1268 (D.C. Cir. 1994) (declining to remand and vacating because EPA did not suggest in its decision “that there [wa]s any alternative basis in the record” to support its conclusions). In addition, this Court would likely be asked to resolve the same questions presented here on appeal

¹⁰ *See Answer of Innovative Tel.*, FCC File No. EB-04-MD-002, ¶ 19 (Mar. 24, 2004) (“[T]he plain meaning of Section 204(a)(1) is that a hearing or investigation must be conducted and concluded in order for Section 204(a)(3)'s ‘takes action’ [language] to be triggered. ... Mere suspension, without investigation, is therefore insufficient to trigger the ‘take action’ exception under Section 204(a)(3).”) (JA__ - __); *id.* ¶¶ 61, 63, 72, 73, 78 (JA__, __, __, __).

¹¹ *See supra* n.5.

from any remand proceeding, causing needless expenditure of judicial resources. Accordingly, the Court should decide these issues now and reject the FCC's construction of the statute.

C. **The Commission's Effort to Avoid the Legal Import of the *Reconsideration* Decision Is Unpersuasive.**

Vitelco also demonstrated that, whatever the legal effect of the *Suspension* on deemed lawful status, the subsequent *Reconsideration* decision, which by its terms and indisputable operation "set aside" the *Suspension*, eliminated any permanent substantive effect the *Suspension* might have had. Vitelco Br. 31-35. The FCC never engages on this issue, but simply proclaims, based on a *post hoc* version of events divorced from reality, that its contrary position is correct.

In response to Vitelco's discussion of the text of the *Reconsideration* (stating that "we reconsider on our own motion our decision to suspend and investigate tariff provisions" for Vitelco), *id.* at 31 (quoting *Reconsideration*, 12 F.C.C.R. at 11,449 (JA__)), the *Reconsideration*'s exclusive citation to the FCC rule allowing the Commission only to "set aside" its prior actions, *id.* (quoting 47 C.F.R. § 1.108), and Vitelco's discussion of plentiful precedent making clear that the term "set aside" is a legal term of art meaning "to vacate," *id.* at 32-33, the FCC simply asserts that Vitelco is "wrong" and insists that the staff never vacated its prior decision and that Vitelco's precedent is "beside the point," FCC Br. 32, 33 n.25. This, however, provides no legal response at all.

The Commission's reference to its practice of sometimes coupling an order "setting aside" a prior action with other steps, such as changing compliance dates or modifying substantive requirements, *id.* at 32, similarly fails to explain how an order "setting aside" a particular action can possibly be interpreted to leave that action intact. When the FCC "sets aside" one order in a subsequent one, the new order necessarily supercedes the previous order.

Indeed, the very decisions that the Commission cites prove that, following issuance of an order pursuant to Section 1.108, the part of the prior order being reconsidered is *no longer effective*.¹²

The FCC next argues, as in the *Order*, that the Bureau did not expressly *say* that it was “setting aside” or vacating its decision. FCC Br. 33. As Vitelco showed, that is legally irrelevant, for the rule upon which the Bureau explicitly relied *authorizes no other action*, thus rendering any such statement superfluous. Vitelco Br. 34. Section 1.108 allows an order only to be “set aside.” 47 C.F.R. § 1.108. The Commission’s occasional habit of reiterating the blindingly obvious in other reconsideration orders cannot change the legal effect of an action explicitly taken pursuant to that rule. *See* Vitelco Br. 34 (citing cases); *see also* AT&T Br. 13 (“Agencies cannot avoid statutory prohibitions through labels.”).¹³

¹² *See Children’s Television Obligations of Digital Television Broadcasters*, 20 F.C.C.R. 2055, 2055-56 (2005) (reconsidering under Section 1.108 and changing effective date from February 1, 2005 to January 1, 2006); *Amendment of Parts 13 & 80 of the Comm’n’s Rules*, 19 F.C.C.R. 9105, 9106-07 (2004) (reconsidering under Section 1.108 and changing effective date from sixty days after Federal Register publication to date of publication); *Amendment of Parts 1, 21, 73, 74, & 101 of the Comm’n’s Rules*, 19 F.C.C.R. 22,284, 22,285, 22,286 (2004) (reconsidering under Section 1.108 parts of prior decision and “supplementing and modifying the rules” adopted therein to “reinstate [an] adjustment factor contained in ... former rules” deleted by initial decision and to “delete” a revision made by initial decision); *Improving Public Safety Communications in the 800 MHz Band*, 19 F.C.C.R. 25,120, 25,122-23 (2004) (reconsidering under Section 1.108 and making “changes to” and “revis[ing]” parts of prior decision). Surely the FCC does not mean to suggest, for example, that following reconsideration the children’s television rules took effect on both February 1, 2005 and January 1, 2006.

¹³ Attempting to avoid its own prior recognition that a reconsideration decision “vacates” a prior order regardless of whether it expressly so states, the FCC mischaracterizes its rulings. *See* FCC Br. 33 n.25. *Connex Freight* expressly “rescind[ed]” an authorization, but did so based on the effect of a prior order “set[ting] aside” another authorization that the Commission found “resulted in the return of the application to pending status” and rendered the second application ungrantable. 15 F.C.C.R. 13,345, 13,345, 13,347 (2000). That conclusion was not based upon the presence of language expressly so stating in the reconsideration order but, rather, the inherent effect of such an order. *See id.* Similarly, *Com/Nav Marine, Inc.* does not state that the “staff reinstated the application to ‘restore the *status quo ante*,’” FCC Br. 33 n.25, but that the Bureau “set aside” a prior order and that “[t]he effect of th[is] action[] was to restore the *status quo ante*,” 2 F.C.C.R. 2144, 2144 (1987) (emphasis added). In addition, the statement in *Speidel Broadcasting Corp.* that “if petitioner is eventually successful in its request for reconsideration” of the grant of an authorization, the authorization “would, of course, be nullified,” demonstrates that a reconsideration order, by its nature, “nullif[ies]” the reconsidered action. 1 Rad. Reg. (P&F) 2d 355, 355 (1963). Finally, the FCC’s attempt to run away from the statements in *Stale*

Likewise, the FCC is incorrect that Vitelco's argument that the *Reconsideration* restored "deemed lawful" status to the July 1997 Tariff runs afoul of Section 5(c)(1) of the Communications Act, 47 U.S.C. § 155(c)(1), which prohibits the Bureau from concluding a hearing on the lawfulness of Vitelco's tariff, *see* FCC Br. 32-33; *see also* AT&T Br. 13.¹⁴ There is a clear difference between an order reconsidering a decision to suspend and investigate a tariff – which is what the Bureau issued here – and an order concluding a tariff hearing, *see* Vitelco Br. 34-35, which the Commission readily admits has never been issued in this case, *see* FCC Br. 34-35. Thus, it is Vitelco's construction of events, not the FCC's, that promotes harmony with Section 5(c)(1). *See supra* pp. 5-6.

The Commission also conclusorily states that it "makes no sense to talk about 'restoring' or 'reclaiming'" deemed lawful status, FCC Br. at 31, but it is the FCC's argument that is nonsensical. The Commission claims that once a tariff is suspended – even where, as here, the Bureau expressly finds that the suspension itself was unwarranted – a carrier is left hanging in a state of "endlessly suspended animation," *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002), in which a tariff is no longer deemed lawful pursuant to Section 204(a)(3) but has never been found *unlawful* under Section 204(a)(1). On this distorted view, a reconsideration decision is a meaningless act, and the status of a suspended tariff that has been

or Moot Docketed Proceedings, by characterizing them as "general comments ... about 'set[ting] aside' an action under [S]ection 1.108," FCC Br. 33 n.25, must be rejected. The Commission explained that when it "sets aside" an action under Section 1.108 it "deliberately changes course by vacating a decision that it later determines to have been ill-advised," 19 F.C.C.R. 2527, 2531 (2004), without reference to any explicit indication of intent to vacate a prior decision.

¹⁴ AT&T's claim that the *Reconsideration* "is a nullity," AT&T Br. 13, is not only wrong for the reasons just stated, but procedurally barred. AT&T did not advance this argument below, either in connection with the *Reconsideration* or the *Order*. *See Am. Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004). Nor can AT&T's argument that a decision in Vitelco's favor would deprive AT&T of rights under Section 204, AT&T Br. 14, form a basis for affirmance, because the FCC has not advanced this reasoning. *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) ("An intervening party may join issue only on a matter that has been brought before the court by another party.").

reconsidered might *never* be resolved, unless a third party happens to file a complaint under Section 208 and the FCC acts in a separate proceeding concluded years after the tariff's effective date.

The Commission, joined by AT&T, then manufactures an aberrant version of reality in which an investigation of Vitelco's tariff remained open after the *Reconsideration*. FCC Br. 34; AT&T Br. 13-14. But the agency never hinted at this in its *Order*, and this Court cannot now affirm based on reasoning neither advanced nor relied upon below. *E.g., Burlington Truck Lines*, 371 U.S. at 168. In addition, the FCC's position ignores both the plain language of the *Reconsideration* and the well-established legal import of reconsideration in general, and would mean that the Commission routinely ignores the statutory five-month deadline. Finally, the contention beggars belief, given the FCC's own behavior – if the agency truly believed that the investigation remained open, one would think the staff might have taken additional action in the proceeding, say, designating issues, establishing procedural rules, or indeed doing *something*, as it did with respect to those carriers whose suspensions were *not* reconsidered. *See supra* pp. 5-6; Vitelco Br. 23 n.13. But it did not.

The Commission's argument that Vitelco should have requested a determination of lawfulness or appealed from the *Reconsideration*, *see* FCC Br. 35, and AT&T's suggestion that Vitelco should have petitioned for mandamus, *see* AT&T Br. 14, fare no better. Vitelco had no reason to know that the FCC would later construe the *Reconsideration* (contrary to its express terms) to have left open a tariff hearing that Vitelco could have asked the FCC to conclude. Instead, Vitelco took the Bureau at its word – that it set aside its decision to suspend and investigate the tariff – and reasonably presumed that the matter was concluded. Moreover, the Commission surely would have disputed Vitelco's standing to challenge a decision *not* to hold a

hearing on its tariff. *See Sea-Land Serv., Inc. v. DOT*, 137 F.3d 640, 647 (D.C. Cir. 1998)

(“[P]revailing parties lack standing to appeal.”).¹⁵

II. THE FCC’S PURPORTED ABANDONMENT OF THE PROCEDURES EMPLOYED IN CONNECTION WITH VITELCO’S JULY 1997 TARIFF DOES NOTHING TO DEMONSTRATE HOW ITS ACTIONS IN THIS CASE CAN BE SQUARED WITH THE PURPOSES OF CONGRESS’ 1996 AMENDMENTS TO SECTION 204.

As Vitelco explained, the Commission’s interpretation of Section 204 arrogates to the FCC the power to gut the “deemed lawful” status of *every* streamlined tariff by simply suspending and then reconsidering the suspension of each such tariff, taking carriers back to the regulatory purgatory that predated even the 1988 amendments to Section 204. *See Vitelco Br.* 35-39; *see also id.* at 5-10.¹⁶ The Commission *never denies* that this is the logical result of its position. Instead, it professes that the Commission “no longer employs the procedure it followed in this case,” FCC Br. 37; *see AT&T Br.* 15, essentially admitting that the process violates Section 204(a)(3). There is simply no other explanation for the FCC’s abandonment of the procedure now.

¹⁵ Nor is the agency correct that Vitelco could have filed revised rates using a two-year monitoring period. *See FCC Br.* 35 n.28. In June of 1998, Vitelco filed on a streamlined basis rates targeted to earn 11.25%; the FCC allowed those rates to take effect, rendering them (indisputably) deemed lawful. Those rates therefore cannot be viewed as involving “overearnings” that should have been adjusted.

¹⁶ The FCC’s attempt to undercut the legislative history underlying the streamlined tariff provisions is unpersuasive. *See FCC Br.* 7 n.6. The provisions were part of a “package of provisions” “crafted ... [and] designed to strike a better balance between consumer protections and market deregulation,” 141 Cong. Rec. S8066 (1995) (statement of Senator Daschle), that “recognize[d] that companies need relief from burdensome Federal regulations,” *id.* The FCC itself concedes that Senator Daschle “described in general terms a broad package of amendments to the Senate bill, of which the streamlined tariff provision was one.” FCC Br. at 7 n.6. Senator Daschle’s failure to “offer more precise and extensive comments,” *id.*, does not diminish the applicability of his general description. Moreover, Senator Dole confirmed the point. *See* 141 Cong. Rec. S7898 (1995) (describing streamlined tariff amendments as providing “[r]egulatory relief,” “[s]peed[ing] up FCC action for phone companies,” and mandating that in order “[to] block [tariff] changes [that increase rates], [the] FCC must justify its actions”); *Implementation of Section 402(b)(1)(A) of the Telecomms. Act of 1996*, 12 F.C.C.R. 2170, 2172 n.2 (1997).

In any event, the Commission *did* employ this procedure with respect to Vitelco's July 1997 Tariff, and Vitelco, pursuant to the *Order*, is currently subject to a substantial claim for damages. The FCC's purported change in practice does nothing to eliminate Vitelco's injury. *See, e.g., Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (“[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case.”) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).¹⁷ Absent an explicit confession of error by the Commission, which it has thus far stopped only slightly short of, Vitelco is entitled to reversal of the *Order* and a ruling that the procedures employed in this case were insufficient to deprive its tariff of deemed lawful status. Unless this Court renders such a decision, there will be no constraint on the FCC's ability to revert to these practices in the future, because it is not bound by its brief here.

The Commission's only defense of the *Order* as consistent with the purposes of the statute is that “[it] achieves a reasonable balance between competing carrier and customer interests,” as conceived by the FCC. FCC Br. 36. It is not for the Commission, however, either to define or to “balance” interests when operating under Section 204(a)(3); Congress struck the balance it thought proper in enacting the 1996 amendments to Section 204, and the agency must now adhere to the requirements of those amendments, rather than attempt to end-run them. Vitelco Br. 19; Int.-Amici Br. 5-9.

¹⁷ The statement that “[t]he staff last employed this procedure in July 2004,” FCC Br. 37 n.30, is misleading. When the FCC filed its brief, the *July 1, 2004 Annual Access Charge Tariff Filings* proceeding was the last period in which carriers filed annual access charge tariffs; the 2005 filing period did not begin until June 16, 2005, so there had been no opportunity to use the procedure since the referenced proceeding. Further, the *Ameritech* decision, *id.* at 37, is inapposite. The carrier there withdrew the original tariff and presumably replaced it with one that took effect without *any* agency action.

III. THE FCC'S CONTINUED INSISTENCE THAT THE 1996 AMENDMENTS TO SECTION 204 DID NOTHING TO ALTER THE OPERATION OF THE STATUTE OF LIMITATIONS IS INCORRECT.

The Commission's response to Vitelco's statute of limitations argument rests on a single, erroneous premise: that earnings in an interim report can always be adjusted based on subsequent earnings. FCC Br. 23; AT&T Br. 18. This argument, which only parrots the *Order*, ignores that: (1) Vitelco's September 30, 1997 interim monitoring report provided AT&T with all information necessary to establish its claim, Vitelco Br. 40; and (2) Section 204(a)(3) "effected a considerable change in the regulatory regime," *ACS*, 290 F.3d at 411, enabling carriers to "cut short," *id.* at 413, 415, the old two-year monitoring period, rendering its continued use for rate of return calculation dubious, Vitelco Br. 40-41 & n.22.

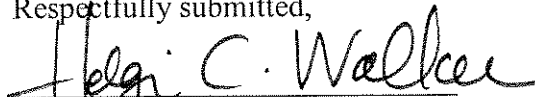
The FCC's attempt to dismiss the relevant language in *ACS* as a "passing reference," FCC Br. 24, is unavailing. The proposition that filings under Section 204(a)(3) "truncat[e]" the two-year period was essential to the Court's decision to remand for a determination of how to calculate rates of return, *i.e.*, whether they can still be set using a two-year timeframe, when a carrier files a streamlined tariff. *See ACS*, 290 F.3d at 413 (remanding, in light of determination that "§ 204(a)(3) immunizes ACS's rates for 1998," for the Commission to "address rate of return violations for [the two-year] period cut short" by ACS's filing of that streamlined rate). The fact that *ACS* involved the availability of damages, as opposed to the particular issue of claim accrual, FCC Br. 24-25, is a distinction without an analytical difference. If damages are unavailable due to a tariff's immunity under Section 204(a)(3), then there is no claim for damages that could possibly accrue. Ultimately, the methodology for calculating rates of return interrelates with both the availability of damages and claim accrual. *See, e.g.*, AT&T Br. 19 (noting that claim accrual "follow[s] automatically" from rate of return policy).

Accordingly, AT&T's overearnings claim is time barred, and the FCC's decision to the contrary is inconsistent with Section 204(a)(3) and must be reversed.¹⁸

CONCLUSION

For the foregoing reasons and those set forth in Vitelco's opening brief, this Court should grant the petition for review and reverse the Commission's *Order*.

Respectfully submitted,



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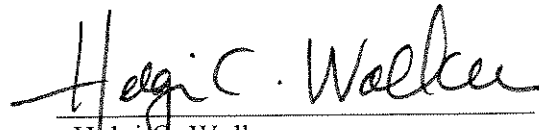
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July 1, 2005

¹⁸ If this Court rejects Vitelco's statute of limitations argument, it should clarify that Section 204(a)(3) precludes the Commission from considering earnings from deemed lawful periods in calculating overearnings during non-deemed lawful periods, thus penalizing carriers retroactively for rates immune from damages. *See ACS*, 290 F.3d at 411 ("[Where] the streamlined tariff provisions apply ... , the Commission may not ... impose refund liability for covered rates – even ones it concludes were unreasonable."). AT&T has attempted to use Vitelco's 1998 earnings (which are concededly deemed lawful, AT&T Br. 8 n.5) to inflate its 1997 damage calculations, and this issue will recur on any remand regarding damages. Specifically, AT&T calculated its damages for the two six-month periods in 1997 by taking Vitelco's earnings for the *entire* two-year monitoring period of 1997-98 and dividing that figure by four to arrive at six-month earnings figures. *See, e.g.*, AT&T Supplement to Formal Complaint, FCC File No. EB-04-MD-002 (Mar. 4, 2004), Supplemental Affidavit of Safir H. Rammah on Behalf of AT&T Corp. at 3, ¶ 5 (JA ___).

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(a), counsel for Vitelco certifies that this brief complies with the applicable type-volume limitations. The attached brief for Petitioner is printed using a proportionally spaced, 12-point Times New Roman typeface and contains 6939 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.



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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of July, 2005, I caused two true and correct copies of the foregoing Brief for Petitioner to be sent via first-class postage prepaid mail to the parties listed below.

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