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October 24, 2008

The Honorable John D. Dingell
Chairman, Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Dingell:

I am responding to your letter of September 30, 2008, sent to James Cicconi, asking questions pertaining to a variety of telecommunications policy matters. AT&T appreciates your interest in and leadership role in assessing these important issues, and looks forward to the opportunity to work with you and the entire Committee to determine appropriate policies. Below are AT&T's responses to your specific inquiries (with your questions reprinted in italics).

Forbearance

Q. Are you aware of any provisions of Title II of the Communications Act that include a statutory deadline for Commission Action?

Yes, there are numerous provisions in Title II of the Communications Act that include statutory deadlines for the Federal Communications Commission ("FCC" or "Commission") to take action. They include:

- § 204(2)(A) (5 months for issuing orders ruling on tariff investigations)
- § 208(b)(1) (5 months for issuing orders on complaints)
- § 252(e)(5) (90 days for FCC action when state commission does not act)
- § 257(c) (triennial report to Congress)
- § 260(b) (120 and 60 days for action on complaints)
- § 271(d)(3) (90 days for action on 271 applications)
- § 275(c) (120 and 60 days for action on complaints)

In addition, numerous sections of Title II set deadlines for Commission action to adopt rules implementing certain sections of the Telecommunications Act of 1996. Some of these include:

- § 225(d) (hearing-impaired and speech-impaired access) (1 year after Americans with Disabilities Act to adopt rules)
- § 227(c) (restrictions on use of telephone equipment) (9 months after Telephone Consumer Protection Act to adopt rules)
- § 228(b), (c) (pay per-call services) (270 days after Telephone Disclosure and Dispute Resolution Act to adopt rules)

- § 251(d) (interconnection) (6 months after 1996 Act to adopt rules)
- § 254(a)(2) (universal service) (15 months after 1996 Act to adopt rules)
- § 257(a) (market entry barriers) (15 months after 1996 Act to adopt rules)
- § 259(a) (infrastructure sharing) (1 year after 1996 Act to adopt rules)
- § 273(d)(5) (manufacturing by Bell companies) (90 days after 1996 Act to prescribe dispute resolution process)
- § 276(b)(1) (payphone service) (9 months after 1996 Act to adopt rules)

Finally, although not in Title II of the Communications Act, there are certain other provisions of Title I of the Act that contain statutory deadlines that affect carriers subject to Title II. These include the following:

- §157 (12 months to act on petitions or Commission-initiated proceedings regarding new technologies).
- §157 note (§706 of the 1996 Act) (inquiry on broadband deployment to be initiated within 30 months of the Act's passage and "regularly thereafter;" all such inquiries must be completed within 180 days of their initiation) (See Appendix for discussion of proceedings where deadline implicated).
- §160 (12 months for action on forbearance petitions, subject to 90 day extension) (See Appendix for discussion of proceedings where deadline implicated).
- §161 (requiring the FCC to conduct a biennial review of in every even-numbered year to eliminate unnecessary rules) (See Appendix for discussion of proceedings where deadline implicated).

Q. Have you ever been a party to any proceeding at the Commission where such a statutory deadline was implicated?

Yes. Since the Communications Act was enacted in 1934, AT&T and its corporate predecessors have been parties to numerous Commission proceedings where statutory deadlines have been implicated. These proceedings have included complaints, tariff investigations, applications to offer long distance service pursuant to section 271, biennial review proceedings pursuant to section 161, inquiries on advanced telecommunications capability pursuant to section 706, and forbearance petitions pursuant to section 10.

Q. In those cases, did the Commission act in accordance with the statutory deadline?

There are many cases where the Commission has met applicable statutory deadlines, but there have been a number of cases where it has not. Besides not meeting statutory deadlines, the Commission has failed to render decisions in the Biennial Review of Telecommunications Regulations, a mandatory process that Congress enacted. The failure of the FCC to meet the statutory deadlines, however, has occurred at various stages and is not unique to the current Commission. In fact, the current Commission has ruled upon matters that were commenced in

prior Commissions and pending for several years. Set forth in Appendix A are examples of matters involving AT&T where the Commission did not meet the applicable statutory deadline.

Q. If not, did you seek any remedy in an effort to force the Commission to comply with the statutory deadline? What was the outcome?

Parties have no timely or effective recourse to enforce missed statutory deadlines. The Supreme Court and the Courts of Appeal have held on numerous occasions that, when Congress places an agency under a legal obligation to render a decision within a specified period of time but does not set forth the consequences of exceeding that deadline, the time period will be considered by the courts as "directory" and not "mandatory."[1] In *Southwestern Bell Tel. Co. v. FCC*, 138 F.3d 746 (8th Cir. 1998), even though it took the FCC 12 years to conclude a section 204 tariff investigation into the special access tariffs of AT&T and other carriers, the 8th Circuit concluded that the FCC's authority to rule on the tariffs, however belatedly exercised, could not be challenged because section 204 "contains no provision touching on the appropriate remedy, *if any*, for the FCC's failure to adhere to the time that it imposes" (emphasis added). This judicial perspective leaves as the principal mechanism to force agency action a petition for a writ of mandamus. For a variety of reasons, this costly and time consuming procedure rarely leads to prompt relief – or any effective relief at all. Even when an agency has clearly missed a congressional deadline for action, obtaining timely relief through a mandamus petition is still an uphill battle. Indeed, the D.C. Circuit has held that the question in such cases is "whether the agency has demonstrated a reasonable need for delay in light of the duties with which it has been charged," and "the specificity of the statutory timetable is merely *one of six factors* [the court] consider[s] when determining whether a protestant is entitled to relief from the agency's delay." *Western Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1174 (D.C. Cir. 2000) (emphasis added) (citing *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)). [2] And, even if the court concludes that agency delay is unreasonable, the typical remedy is merely to direct the agency to act without undue delay and to retain jurisdiction to ensure that it does so. *See In re United Mine Workers of America Int's Union*, 190 F.3d 545, 550-51, 556 (D.C. Cir. 1999).

The *OPEB* case[3] is illustrative of this process. The case was pending at the FCC for over 10 years with a maximum statutory deadline of 15 months, and AT&T filed a petition for mandamus with the D.C. Circuit in January 2004. The FCC initially sought a 30-day extension

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[1] *See Brock v. Pierce County*, 476 U.S. 253 (1986); *U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003); *Gottlieb v. Pena*, 41 F.3d 730 (D.C. Cir. 1994).

[2] *See also, In re Barr Laboratories, Inc.*, 930 F.2d 72 (D.C. Cir. 1991), where the court refused to enforce a congressional mandate that the FDA act on applications to approve generic drugs within 180 days. Although the FDA had repeatedly exceeded the statutory deadline, the court denied the applicant's petition for mandamus on the theory that, irrespective of the congressional intent reflected in the statute, "[t]he agency is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects of each, and allocate its resources in the optimal way." *Id.* at 76. *See also id.* (referring to cases "where this court has actually issued an order compelling an agency to press forward with a specific project" as "exceptionally rare").

[3] *1993 Annual Access Tariff Filings Phase I, 1994 Annual Access Tariff Filings*, 20 FCC Rcd 7672 (2005) (*OPEB Order*).

of time to respond to AT&T's petition, which the court granted. Thirty days later, the FCC told the court that it would finish the order in 45 days. By January 2005, however, the FCC still had not issued an order and AT&T again asked the court to grant its mandamus petition. Two months later, in March 2005, while AT&T's mandamus petition was still pending, the FCC finally issued its *OPEB Order*. In May 2005, the D.C. Circuit dismissed AT&T's mandamus petition as moot. Thus, despite waiting a decade for FCC action on the tariff investigation and having filed a mandamus petition, AT&T still had to wait another 14 months for the FCC to take action.

Q. The "deemed granted" language in Section 10 of the Communications Act perverts the forbearance process and does not serve the best interest of consumers. If the deemed granted language were removed from Section 10, could companies still seek regulatory relief under Section 10? If the deemed granted language were removed, would the Commission still be operating under a statutory deadline to act on forbearance petitions?

AT&T respectfully disagrees that the deemed granted provision of section 10 "perverts the forbearance process and does not serve the best interests of consumers." Congress had sound public policy and administrative law bases for making the "deemed granted" requirement a part of the statutorily-established forbearance process. Of the 95 forbearance petitions decided by the FCC since enactment of the 1996 Telecommunications Act, 91 were decided on the basis of a majority vote of Commissioners. The remaining four were approved under the "deemed granted" provision of section 10, but three of those involved non-controversial matters. In only one case out of 95 (the Verizon matter) was a petition deemed granted on the basis of the Commission's failure to achieve a majority vote for any outcome and without a written decision being released by the Commission. At the same time, the forbearance mechanism has been a valuable tool for the Commission to wipe away anachronistic, unnecessary or counter-productive regulations and foster the "pro-competitive, *de-regulatory* national policy framework" designed to accelerate the deployment of advanced services to all Americans that Congress envisioned when it wrote the 1996 Act. Moreover, the very existence of the "deemed granted" provision has been a reliable and invaluable incentive for the FCC to act in a timely manner on important matters of public policy. If the "deemed granted" provision were removed from Section 10(c), there would, as discussed above, be no self-executing consequences when the Commission fails to act within the statutory deadline. Thus, without the "deemed granted" provision, companies could still seek regulatory forbearance under Section 10 of the 1996 Act, but there would be no effective mechanism to encourage, let alone compel, timely action by the FCC. The very concerns that led Congress to codify the deemed granted concept would ripen once again. there would be a return to the days when petitions would habitually languish for years and the Commission felt free to avoid ever having to address the issues those petitions presented.

Q. From November 2008 well into 2009, it is highly likely that the Commission will operate with only four Commissioners. Does AT&T have any forbearance petitions pending at the Commission that could come due during that time?

Other than the remand of its IP Platform Services Forbearance Petition (which AT&T filed with the Commission more than 56 months ago),[4] AT&T currently has no forbearance petitions pending at the Commission.

Q. When the Commission was operating with only four Commissioners in 2006, a Verizon forbearance petition was deemed granted without a written order because a majority of Commissioners could not agree to grant or deny the petition. On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed that the petition was deemed granted by operation of law and that no written order spelling out the scope of the relief granted was required. If the Commission is again operating with only four Commissioners, do you think it is appropriate for the Commission to allow a petition to be deemed granted without an accompanying written order? Please explain. Do you think it is appropriate for the Commission to allow a petition to be deemed granted without a vote? Please explain.

AT&T believes that the public interest would best be served if the Congress and the Commission required that the Commission issue a written decision in every forbearance petition proceeding within the statutory deadline, including in the event a forbearance petition is "deemed granted." A proper written decision would provide the petitioner and other interested parties with a clear description of the exact relief granted and an explanation of the Commission's rationale for the relief received by the petitioner, and would thus further the public's understanding of the FCC's policies and rationale.

While AT&T is not aware of any forbearance petition having been deemed granted without the FCC first bringing the petition to a vote, and while we believe it is highly unlikely that the FCC would allow such an event to occur in the future, we believe as a matter of good public policy that the FCC should adopt a rule requiring that forbearance petitions be voted upon by all eligible commissioners prior to the statutory deadline. However, in light of the information provided herein, AT&T still believes that the statutorily-required "deemed granted" mechanism is an important and useful incentive for encouraging the Commission to vote to approve or deny a

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[4] In February 2004, AT&T (then SBC) filed a petition seeking forbearance from Title II common carrier regulation of certain IP-enabled services. Fifteen months later, on May 5, 2005, the FCC denied the petition on procedural grounds. *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 05-95, Memorandum Opinion and Order, FCC 05-95 (released May 5, 2005). Specifically, the FCC explained that because it had not yet determined whether Title II common carrier regulations apply to such services, it could not address a petition seeking forbearance from rules that "may not even apply." The FCC also asserted that AT&T had not sufficiently identified the provisions of Title II from which it was seeking relief. On appeal, the FCC withdrew its first argument and the Court rejected its second argument and remanded the case to the FCC in June 2006. *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006). To date, more than 56 months after it filed its forbearance petition, the FCC has taken no further action on AT&T's petition.

forbearance petition within the statutorily-mandated deadline. Absent some other specified, meaningful consequence for the Commission to ensure that all forbearance petitions are acted upon in a timely fashion, this will remain one of the few, if not only, effective mechanisms carriers have to obtain concrete action on important issues.

Q. What steps can the Commission take to ensure that no other forbearance petitions are permitted to be deemed granted with no accompanying written order that clearly sets forth the scope of the relief granted?

Section 10(c) already requires the FCC to issue written decisions in response to forbearance petitions. Should Congress see the need to further refine the deemed granted procedures, it could require that, in the event a forbearance petition is deemed granted as the result of a 2-2 vote, the written statement(s) of the two Commissioners voting in favor of the petition shall constitute the opinion of the Commission for the purpose of satisfying section 10(c).

Q. In Congress, if a vote on a bill results in a tie, the bill is rejected. Should the Commission adopt the same rule for forbearance petitions? If not, please explain how allowing a forbearance petition to be deemed granted in the event of a tie promotes the public interest.

The essential purpose of the forbearance provision in the 1996 Act is to eliminate the competitive and marketplace disparities and defects that result from unnecessary, outdated and/or harmful regulation that no longer serves the public interest. That purpose is as important today as it was when Congress initially adopted the forbearance process requirements. Indeed, so central is this concept to ensuring a properly functioning communications marketplace that Congress mandated that the FCC eliminate unnecessary regulation on its own accord – not just in response to a petition. (47 U.S.C. §160(a)). That is, the forbearance provisions reflect a clear congressional directive that the Commission be proactive in seeking opportunities to clear away regulatory underbrush that might impede full and effective competition and undermine consumer welfare. The opportunity for a carrier to file a petition subject to the deemed granted mechanism is an important procedural check to ensure that the Commission effectuates Congress's mandate. In this context, the "deemed granted" element is perfectly consistent with the rule that the FCC "shall" forbear from applying unnecessary regulations that meet the specifically enumerated standards; it essentially requires a majority of Commissioners to explain why maintaining the regulation is necessary notwithstanding Congress's preference for deregulation. If a majority cannot agree upon and explain why the regulation in question continues to be necessary and in the public interest, the regulation should be eliminated.

Retention Marketing

Q. Does AT&T engage in retention marketing to consumers who have elected to change voice service providers during the porting interval?

AT&T does not engage in retention marketing to consumers who have elected to change voice service providers based on a number porting request or other porting information received from a competitor. If a customer contacts AT&T directly during the porting interval to disconnect service, AT&T may engage in retention marketing, but only as expressly permitted under the Commission's CPNI orders and state commission requirements.

Q. Do you believe that the Committee should consider revising Section 222 or other provisions of the Communications Act concerning consumer privacy and retention marketing practices? If so, how?

Any reform effort should focus on harmonizing the rules governing consumer privacy and retention marketing practices applicable to all carriers, cable operators and other providers offering competing voice, video and data services. Since Congress opened telecommunications markets to competition in the 1996 Act, competition among inter- and intra-modal communications service providers has grown exponentially, as telecommunications carriers, cable operators, VOIP providers, wireless providers and others have entered each others' market-segments, offering competing bundled packages of voice, video and broadband services over different platforms. Unfortunately, regulation has not kept pace with these marketplace developments and the Communications Act retains an anachronistic, siloed approach to regulation. The Commission's retention marketing prohibition, denying telecommunication carriers the ability to engage in the same marketing practices employed by their principal competitors (cable operators).

Fiber Deployment

Q. What is AT&T's current policy with regard to copper lines when AT&T installs fiber at or near a consumer's home? If AT&T is not currently installing fiber at or near homes but intends to do so in the future, please explain fully what AT&T's policy with regard to copper lines will be in such circumstances?

As an initial matter, AT&T deploys fiber-to-the-home broadband facilities in relatively limited circumstances, generally in Greenfield environments that previously have not been served by copper loop facilities. In most cases, AT&T deploys loop fiber in a fiber-to-the-node architecture, with fiber running to a Digital Subscriber Line Access Multiplexer ("DSLAM") network device, usually located at a central office, which receives signals from multiple customer broadband connections. In these circumstances, the copper facilities already in place from the node to the customer premises are unaffected.
Nonetheless, in the event AT&T retires copper facilities, it does so in full compliance with relevant federal and state rules governing copper retirement. Specifically, AT&T takes

reasonable steps to assure that existing operational retail and wholesale service configurations are not disrupted. These steps include:

- Transitioning retail customers to service on the replacement loop architecture that is substantially similar or superior to the service they currently receive;
- Transitioning wholesale customers to configurations delivering 64 kbps voice grade service, consistent with the Commission's rules; and
- To the extent feasible and economically practicable, grandfathering and/or continuing to provide copper-based loops to existing UNE loop customers.

Pole Attachments

Q. Should the Commission set a uniform rate for pole attachments? If so, what rate formula should the Commission use to arrive at that rate? Should the Commission take steps to shorten so-called "make ready" periods, or the time it takes a pole owner to prepare a pole so that a competitor can attach fiber or other equipment? Please explain your answer.

AT&T supports the FCC's tentative conclusion reached in WC Docket No. 07-245 that all pole attachers (*i.e.*, cable operators and all wireline/wireless telecommunications service providers) should pay a uniform broadband pole attachment rate to pole owners. Pole attachment rates should be fair and equitable among all providers to insure that no competitor has an unjustified cost advantage. Currently, cable companies pay a reduced rate from the market rates ILECs pay, CLECs pay a statutory rate, and ILECs pay a market rate. A uniform pole attachment rate would eliminate the regulatory disparities that currently distort competition for broadband services. To this end, and in response to the Commission's tentative conclusions in the Pole Attachment proceedings referenced above, AT&T and Verizon recently proposed a new formula in an *ex parte* letter to the FCC, dated October 21, 2008 (attached). The formula is designed to achieve a uniform rate that is just and reasonable for broadband-capable attachments to be paid by all attachers (*i.e.*, cable companies, CLECs and ILECs). Treatment of non-broadband-related attachments, on the other hand, would be unaffected by the AT&T/Verizon proposal, and the *status quo* for those attachments would remain. The proposal, if adopted, would promote the Commission's and Congress' broadband deployment goals under Section 706 of the Act by eliminating the distortions created under the present system for broadband attachments and, thereby, promote a robust, national broadband build-out.

AT&T does not, however, believe that the Commission should adopt prescriptive rules -- *e.g.* "make-ready" timelines -- to ensure non-discriminatory access to poles for attachers. Although pole attachment access is necessary and appropriate in order to preserve a competitive marketplace, there is no evidence of a systemic problem that calls for a national rule to address it. Regulations to shorten access time intervals for attachments should not be imposed upon utility owners of poles and conduit without there being a clear showing – established by detailed evidence – that pole owners are failing to grant such timely access. In AT&T's experience,

negotiated agreements between pole/conduit owners and prospective users of those facilities generally have been successful, at least where the pole owner is subject to Commission oversight.

Telephone Number Porting

Q. Can AT&T complete an intra-modal port in approximately 48 hours? If not, please explain why AT&T cannot meet a 48-hour intra-modal porting interval when AT&T Wireless can complete a wireless-to-wireless port in about four hours.

AT&T believes it can make changes to its systems such that it could complete a simple wireline-to-wireline port in approximately 48 hours. Simple ports, as defined by the North American Numbering Council ("NANC") and adopted by the FCC are those ports that: (1) do not involve unbundled network elements; (2) involve an account only for a single line; (3) do not include complex switch translations (*e.g.*, Centrex, ISDN, AIN services, remote call forwarding, or multiple services on the loop); and (4) do not include a reseller." *See, e.g., Inter-modal Number Portability FNPRM,* 18 FCC Rcd at 23715, para. 45 n.112 citing North American Numbering Council Local Number Portability Administration Working Group Third Report on Wireless Wireline Integration, Sept. 30, 2000, CC Docket No. 95-116 (filed Nov. 29, 2000). While the Commission's tentative conclusion to reduce the interval for simple porting may seem relatively easy, a wireline-to-wireline porting request is not accomplished by a mere computer programming change. Wireline porting implicates physical plant complexities and legacy operational systems that differentiate it from the wireless process, which was deployed six years later than the wireline process. These are technical challenges that are best resolved by the NANC and its working groups. These challenges include those relating to the order flow process, confirmation and activation intervals, and electronic order submission. The NANC and its working groups have been an ongoing source of industry technical solutions since it was formed by the FCC in the late '90s and is uniquely situated to provide an expert evaluation of the Commission's tentative conclusion.

Q. Do you think that consumers would be well served if the Commission established a two-day porting interval for the three incumbent phone companies?

AT&T generally supports the Commission's tentative conclusion to adopt a reduced porting interval, subject to NANC's expedited review of that conclusion. We have stated publicly that speedier porting would "produce benefits for consumers and further strengthen competition among service providers." In theory, an interval for simple ports of 48 hours is achievable if the technical issues, referenced above, can be resolved by the industry, and, in any event, would be effective and appropriate only if it were to apply in a reciprocal fashion to all industry participants and service providers, not just the three incumbent phone companies. If the Commission nonetheless chooses to exempt select carriers from a reduced porting interval requirement or chooses to waive such requirement in specific cases, the Commission should make it clear that the other carriers who port-out a number to a non-compliant carrier will only be held to the same porting interval applicable to that non-compliant carrier. In the absence of

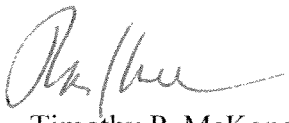
such an express ruling from the Commission, compliant carriers could find themselves at a significant competitive disadvantage compared to their non-compliant counterparts.

Q. At the Subcommittee hearing on July 22, 2008, Jonathan Banks of USTelecom testified that several of USTelecom's members routinely receive port requests from competitors that are longer than the standard four-day porting interval. Is that true for AT&T? What percent of the intra-modal port requests received by AT&T fall within the four-business day standard?

Yes, most port requests from competitors exceed the standard four-business day interval. Across AT&T's ILEC operations, approximately 11% of port requests are confirmed at the minimum four-day interval. However, demand for shorter intervals varies across AT&T states by a range of 3% to more than 20% for the current minimum four-day interval, over the last year.

Again, thank you for this opportunity to provide AT&T's position on these important issues. Please contact me if you require additional information.

Sincerely,



Timothy P. McKone
Executive Vice President – Federal Relations

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Cliff Stearns, Ranking Member
Subcommittee on Telecommunications and the Internet

APPENDIX A

Examples of FCC Missed Statutorily Mandated Deadlines

- *Center for Communications Management Information, Econobill Corp., and On Line Marketing Inc. v. AT&T*, Memorandum Opinion and Order, FCC 08-167 (released July 23, 2008) (Section 208 Complaint - 5 Month Deadline Expired October 2004). In May 2004, certain parties filed a section 208 complaint against AT&T regarding the adequacy of AT&T's compliance with the FCC's rules for posting information about interstate long distance services. The FCC adopted an order dismissing the complaint and concluding its investigation in AT&T's favor in July 2008, almost 4 years after the 5-month statutory deadline had expired.

- *Total Telecommunications Services, Inc. v. AT&T*, 16 FCC Rcd. 5726 (2001) (Section 208 Complaint – 12 to 15 Month Deadline, Pre-1996 Act, Expired No Later Than January 1997).[5] In October 1996, certain local exchange carriers filed a section 208 complaint against AT&T regarding a dispute over access charges. The FCC adopted an order denying the complaint in March 2001, more than 3 years after the statutory deadline expired.

- *1993 Annual Access Tariff Filings*, Order, 19 FCC Rcd 14949 (2004) (*Add-Back Order*) (Section 204 Tariff Investigation – 12 to 15 Month Deadline, Pre-1996 Act, Expired No Later Than September 1994 and September 1995). In 1993 and again in 1994, the FCC began an investigation of tariffs filed by AT&T and other carriers implementing new price cap formulas. In 2004, nearly 10 years after first investigating AT&T's 2004 tariff and nearly 11 years after starting its investigation of AT&T's 2003 tariff, the FCC issued an order finding that carriers had implemented the formulas properly in some tariffs but not others. In doing so, the FCC observed that because section 204 "does not specify a consequence for non-compliance with statutory timing provisions," the FCC's decade-long delay in concluding the tariff investigation was not a basis to challenge the *Order*. *Add-Back Order* ¶ 22.

- *1993 Annual Access Tariff Filings Phase I, 1994 Annual Access Tariff Filings*, 20 FCC Rcd 7672 (2005) (*OPEB Order*) (Section 204 Tariff Investigation – 12 to 15 Month Deadline, pre-1996 Act, Expired No Later Than September 1994 and March 1996). In 1993 and also in 1994, the FCC began investigations of tariffs filed by AT&T and other carriers applying certain accounting treatment to offers of post-retirement employment benefits (OPEBs). In 2005, more than a decade after the FCC first started investigating these tariffs, the FCC adopted an order concluding that the tariffs of AT&T and the other carriers were lawful. As in the *Add-Back Order*, the

[5] Prior to the 1996 Act, Sections 204 and 208 of the Communications Act each contained 12 month deadlines that could be extended by the Commission to a total of 15 months if the matter raised questions of "extraordinary complexity."

FCC found that its failure to comply with the statutory deadline set by Congress provided no basis for a challenge to its ruling. *OPEB Order* ¶¶ 39-41.

- *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Access Transport*, Order Terminating Investigation, FCC 08-24 (2008) (*Termination Order*) (Section 204 Tariff Investigation - 12 to 15 Month Deadline, pre-1996 Act, Expired No Later Than December 1996). In September 1995, the FCC designated for investigation certain issues regarding the expanded interconnection tariffs of AT&T and other carriers. In January 2008, 11 years after the section 204 deadline expired, the FCC issued an order terminating the investigation because "[d]ue the length of time that has passed since the record was compiled in these investigations, we find that the costs of concluding the investigations are likely to outweigh any potential benefits." *Termination Order* ¶ 16.

- *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Communications Act of 1996*, GN Docket No. 07-45, Fifth Report (released June 12, 2008) (Section 706 Inquiry on Advanced Services – 180 Day Deadline Expired September 2007). On March 12, 2007, the FCC initiated its fifth inquiry into the state of broadband deployment in the U.S. In response, AT&T and numerous other parties filed comments. On March 19, 2008, 6 months past the statutory 180-day deadline, the FCC adopted its Fifth Report, concluding that deployment is reasonable and timely. The FCC released the text of that Report in June 12, 2008, 9 months beyond the Congress's 180-day deadline.

- *The Commission Seeks Comment in the 2004 Biennial Review of Telecommunications Regulations*, Public Notice, FCC 04-105 (2004) (Section 161 Biennial Review - Shall Be Completed in Every Even Numbered Year, Deadline Expired December 2004). On May 11, 2004, the FCC issued a public notice soliciting comment on whether any of its rules should be modified or repealed pursuant to section 161. On January 5, 2005 (5 days after the statutory deadline in section 161), the staff of the FCC issued a series of reports containing recommendations that the FCC modify or repeal certain rules. The Commission took no further action to "*determine* whether any such regulation is no longer necessary in the public interest," despite Congress's directive in section 161 that it do so in "every even numbered year." Instead, FCC staff opined that their "recommendations" satisfied the Commission's statutory obligation to make such a "determin[ation]." *Commission Staff Releases Reports on 2004 Biennial Review of Telecommunications Regulations*, Public Notice, DA 05-24 (2005) at 2.

- *The Commission Seeks Comment in the 2006 Biennial Review of Telecommunications Regulations*, Public Notice, FCC 06-115 (2006) (Section 161 Biennial Review - Shall Be Completed in Every Even Numbered Year, Deadline Expired December 2006). On August 10, 2006, the FCC issued a public notice soliciting comment on whether

any of its rules should be modified or repealed consistent with section 161. On February 14, 2007 (6 weeks after the statutory deadline in section 161), the staff of the FCC issued a series of reports containing recommendations that the FCC modify or repeal certain rules. Like the prior review in 2004 (Public Notice, FCC 04-105 (2004) (Section 161 Biennial Review), the FCC staff opined that their "recommendations" satisfied the Commission's statutory obligation to make such a "determin[ation]" and the Commission took no further action. *Commission Staff Releases Reports on 2006 Biennial Review of Telecommunications Regulations*, Public Notice, DA 07-669 (2007) at 4.