

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

In the Matter of)	
)	WCB/Pricing File No. 11-07
Northern Valley Communications, LLC Revisions)	
to FCC Tariff No. 3)	Transmittal No. 5
)	

ORDER

Adopted: June 28, 2011

Released: June 28, 2011

By the Chief, Pricing Policy Division:

I. INTRODUCTION

1. On June 14, 2011, Northern Valley Communications, LLC (Northern Valley) filed revisions to its FCC Tariff No. 3.¹ The revisions were filed to revise certain tariff definitions in response to the Commission’s *Qwest v. Northern Valley* order.² The proposed tariff is scheduled to become effective on June 29, 2011. Because the tariff revisions do not comply with the requirements of the *Qwest v. Northern Valley* decision for the reasons described below, we reject Transmittal No. 5 as patently unlawful, in violation of the Commission’s order, section 61.2 of the Commission’s rules, and section 201(b) of the Act.³

II. BACKGROUND

2. Northern Valley’s tariff revisions modify two definitions in its FCC Tariff No. 3, “End User” and “Customer of an Interstate or Foreign Telecommunications Service,” in response to the Commission’s *Qwest v. Northern Valley* order.⁴ In the *Qwest v. Northern Valley* order, the Commission concluded that, to the extent Northern Valley’s then effective tariff purported to charge for providing access to individuals or entities to whom Northern Valley offered its services for free, it impermissibly charged for services that were not being offered to “end users” and thus were not the “functional equivalent” of ILEC services.⁵ Accordingly, the Commission found that Northern Valley’s tariff violated Commission rules and orders and required Northern Valley to revise its tariff “to provide that interstate switched access charges will apply only to the origination or termination of calls to or from an individual

¹ Letter from Katherine E. Barker Marshall, Counsel for Northern Valley Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 5 (filed June 14, 2011).

² *Qwest Communications Co., LLC v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, EB-11-MD-001, FCC 11-87 (rel. June 7, 2011) (*Qwest v. Northern Valley*).

³ 47 C.F.R. § 61.2 (“all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations”); 47 U.S.C. § 201(b) (prohibiting “unjust and unreasonable practices”).

⁴ Northern Valley FCC Tariff No. 3, 1st Revised Page Nos. 7, 8.

⁵ *Qwest v. Northern Valley* at para. 9.

or entity to whom Northern Valley offers telecommunications services for a fee,”⁶ because only those customers can qualify as “its own end users.”⁷ In its filed tariff revisions, Northern Valley modifies two definitions. Northern Valley modifies its definition of “Customer of an Interstate or Foreign Telecommunications Service” by deleting the phrase “without regard to whether and how much payment is tendered to either the Company or the Buyer for interstate or foreign Telecommunications service” and replaces it with “for a fee.”⁸ Northern Valley revises its definition of “End User” by deleting the final sentence in the definition, which read: “[a]n End User need not purchase any service provided by the Company.”⁹

3. On June 21, 2011, Sprint Communications Company, L.P. (Sprint) and Qwest Communications Company, LLC (Qwest) (collectively “Petitioners”) filed petitions to reject, or in the alternative, to suspend and investigate the Northern Valley tariff filing.¹⁰ The Petitioners contend that Northern Valley’s tariff revisions are unlawful because they fail to properly implement the Commission’s *Qwest v. Northern Valley* order and are not clear and explicit as required by the Commission’s rules.¹¹ On June 27, 2011, Northern Valley filed a reply responding to these petitions.¹²

III. DISCUSSION

4. The Commission may reject a tariff filed by a carrier if the filing is “so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket.”¹³ The United States Court of Appeals for the District of Columbia Circuit has explained that the Commission has “the power and in some cases the duty” to reject a tariff that is demonstrably unlawful on its face, or that conflicts with a statute, agency regulation or order.¹⁴ Under this standard, we reject Transmittal No. 5 because the tariff revisions conflict with the Commission’s *Qwest v. Northern Valley* order, section 61.2 of the Commission’s rules, and section 201(b) of the Act.

5. In *Qwest v. Northern Valley*, the Commission found that Northern Valley could only

⁶ *Qwest v. Northern Valley* at para. 17.

⁷ *Id.* at paras. 8 – 9.

⁸ Northern Valley FCC Tariff No. 3, 1st Revised Page No. 7. The relevant portion of Northern Valley’s definition of “Customer of an Interstate or Foreign Telecommunications Service” states “. . . includes any person or entity who sends or receives an interstate or foreign Telecommunications service transmitted to or from a Buyer across the Company’s Network, *without regard to whether and how much payment is tendered to either the Company or the Buyer for interstate or foreign Telecommunications service*” where the italicized portion has been removed by this transmittal and replaced with “for a fee.”

⁹ *Id.* at 1st Revised Page No. 8.

¹⁰ See Petition of Sprint Communications Company, L.P. to Reject or in the Alternative Suspend and Investigate, Northern Valley FCC Tariff No. 3, Transmittal No. 5 (filed June 21, 2011) (Sprint Petition); Petition of Qwest Communications Company, LLC to Reject or, in the Alternative, Suspend and Investigate, Northern Valley FCC Tariff No. 3, Transmittal No. 5 (filed June 21, 2011) (Qwest Petition).

¹¹ See, e.g., Qwest Petition at 6-8; Sprint Petition at 2.

¹² Northern Valley Communications, LLC Response to Sprint Communications Company, L.P.’s and Qwest Communications Company LLC’s Petitions to Reject, or, in the Alternative, to Suspend and Investigate (filed June 27, 2011) (Northern Valley Reply).

¹³ *Municipal Light Bds. v. FCC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971); *cert denied*, 405 U.S. 989 (1972); see also *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994); *American Broadcasting Cos. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980).

¹⁴ *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

assess the tariffed the benchmark switched access rate if it “provides an IXC with access to [Northern Valley’s] own end users.”¹⁵ The Commission explained that Northern Valley’s “own end users” are customers to whom Northern Valley offers “its services for a fee.”¹⁶ Petitioners assert that Northern Valley’s tariff revisions, although removing explicit statements that Northern Valley “customers” need pay nothing to Northern Valley, nonetheless fail to establish that in fact Northern Valley will be charging its end users a fee for any service.¹⁷ In its reply, Northern Valley explains, correctly, that it understands the *Qwest v. Northern Valley Order* as requiring “that its End Users must **pay Northern Valley a fee** for telecommunications services.” Although this is what the Commission found in *Qwest v. Northern Valley*, Northern Valley’s tariff revisions do not make this clear.¹⁸ As such, Northern Valley has not remedied the deficiencies found in its tariff by the Commission in *Qwest v. Northern Valley* and thus is in violation of that order and its tariff revisions are unlawful.

6. Section 61.2 of the Commission’s rules requires that tariffs “contain clear and explicit explanatory statements regarding the rates and regulations.”¹⁹ Qwest explains how the language in Northern Valley’s tariff is unclear and ambiguous, permitting an interpretation that would allow Northern Valley to assess switched access charges where, for example, a fee is “paid by Qwest’s customer to Qwest,” rather than where Northern Valley is paid by its own end users.²⁰ Sprint contends that Northern Valley’s tariff is unclear because it could “be interpreted to mean that the IXC’s payment of access charges qualifies as the ‘fee’ for transmission across Northern Valley’s network.”²¹ We find that Northern Valley’s tariff revisions are ambiguous and may be interpreted as Petitioners suggest. As a result, these revisions are not “clear and explicit” and violate section 61.2 of the Commission’s rules and section 201(b) of the Act.²²

7. We reject these tariff revisions and find them unlawful in violation of the Commission’s order in *Qwest v. Northern Valley*, section 61.2 of the Commission’s rules, and section 201(b) of the Act. Because we reject the tariff on these grounds, we need not and do not decide any other issues raised by the Petitioners in opposition to this tariff filing. Our findings here are limited to those portions of Northern Valley’s tariff revised in this Transmittal No. 5. We need not and do not make any findings with regard to any other provisions in Northern Valley’s tariff. Finally, we do not in this order address any potential liability Northern Valley may have for its failure to comply with the Commission’s *Qwest v. Northern Valley* order.²³ When Northern Valley refiles its tariff to comply with the Commission’s order,

¹⁵ *Qwest v. Northern Valley* at para. 8 (citing *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9115 (2004) (*CLEC Access Charge Reform Reconsideration Order*)).

¹⁶ *Qwest v. Northern Valley* at para. 9.

¹⁷ Sprint Petition at 2 - 3; Qwest Petition at 6.

¹⁸ Northern Valley Reply at 6 (emphasis in original). Although Northern Valley has removed the explicit language found unlawful in *Qwest v. Northern Valley* from its definition of “End User,” its inclusion of unclear and ambiguous language in its definition of “Customer of an Interstate or Foreign Telecommunications Service,” which is incorporated in its definition of End User, violates the Commission’s *Qwest v. Northern Valley* order and the Commission’s rules. See *infra* para. 6.

¹⁹ 47 C.F.R. § 61.2.

²⁰ Qwest Petition at 7 (emphasis in original).

²¹ Sprint Petition at 5.

²² See *Halperin, Temple, Goodman & Sugrue v. MCI Telecomm. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22574 – 76 (19xx) (finding that “the Tariff is not clear and explicit as required by section 61.2 of the Commission’s rules, which renders the Tariff unreasonable in violation of section 201(b) of the Act . . .”).

²³ See, e.g., 47 U.S.C. § 503(b)(1) (“Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection to have . . . willfully or repeatedly failed to comply with any of the provisions

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we encourage it to work with its intended carrier-customers to resolve their concerns before filing a new tariff.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), and 201(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), and 201(b), and section 61.2 of the Commission's rules, 47 C.F.R. § 61.2, and authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the revisions to Northern Valley Communications, LLC FCC Tariff No. 3 contained in Transmittal No. 5 ARE HEREBY REJECTED;

9. IT IS FURTHER ORDERED that, pursuant to section 61.69 of the Commission's rules, 47 C.F.R. § 61.69, Northern Valley SHALL FILE tariff revisions on one day's notice within five (5) business days from the release date of this order removing the rejected material;

10. IT IS FURTHER ORDERED that Northern Valley SHALL FILE tariff revisions within ten (10) days of the release date of this order to bring its tariff into compliance with the *Qwest v. Northern Valley* order.

FEDERAL COMMUNICATIONS COMMISSION

Albert M. Lewis
Chief, Pricing Policy Division
Wireline Competition Bureau

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of this Act or any rule, regulation, or order issued by the Commission under this Act . . . shall be liable to the United States for a forfeiture penalty.”).