

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

In the Matter of	)	
	)	
Qwest Communications Company, LLC,	)	File No.: EB-08-MD-012
	)	
Complainant,	)	
	)	
v.	)	
	)	
Budget Prepay, Inc. d/b/a Budget Phone,	)	
and	)	
Budget Phone, Inc.,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 30, 2013**

**Released: April 30, 2013**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we dismiss in part and otherwise deny a formal complaint<sup>1</sup> filed by Qwest Communications Company, LLC (Qwest)<sup>2</sup> against Budget Prepay, Inc. d/b/a Budget Phone, and Budget Phone, Inc. (collectively, Budget) under Section 208 of the Communications Act of 1934, as amended (Act).<sup>3</sup> In its Complaint, Qwest alleges that Budget violated Sections 201(b) and 203(c) of the Act by imposing excessive interstate access service charges on Qwest for toll-free traffic.<sup>4</sup> As explained below, we find that Qwest’s claims are barred by the applicable statute of limitations for the initial period at issue in the Complaint (May 2004 through March 2005), when Budget did not have a federal access services tariff on file. With respect to the remaining period at issue (April 2005 through August 2007), when Budget did have a federal tariff, Qwest does not show that Budget’s access charges violated its tariff and, therefore, does not establish that Budget violated Sections 201(b) or 203(c) of the Act.

<sup>1</sup> Formal Complaint, File No. EB-08-MD-012 (filed Dec. 30, 2008) (“Complaint”).

<sup>2</sup> After the Complaint was filed, Qwest merged with CenturyTel Inc., d/b/a CenturyLink. *See Applications Filed by Qwest Communications*, Memorandum Opinion and Order, 26 FCC Rcd 4194 (2011).

<sup>3</sup> 47 U.S.C. § 208.

<sup>4</sup> 47 U.S.C. §§ 201(b), 203(c). *See, e.g.*, Complaint at 1–2, 12–16, paras. 13–22, 18–20, paras. 27–38.

## II. BACKGROUND

### A. The Parties

2. Qwest is an interexchange carrier (IXC), providing interexchange and toll services throughout the United States. Qwest is also the Responsible Organization (RespOrg) for certain toll-free 8XX numbers, and offers those numbers to other telecommunications carriers for a fee.<sup>5</sup> Budget is a non-facilities based competitive local exchange carrier (LEC), leasing facilities from incumbent LECs to provide local exchange service to end users and exchange access service to IXCs such as Qwest.

3. Budget offers its end user customers a pre-paid toll call service accessed by dialing a toll-free 8XX number.<sup>6</sup> In order to provide this pre-paid service during the period at issue, Budget subscribed to a series of 8XX numbers from Qwest.<sup>7</sup> When a Budget pre-paid calling services customer dialed one of these 8XX numbers, the underlying incumbent LEC transported the call to Qwest. Qwest then transported the call for ultimate delivery to Budget's pre-paid calling platform, which validated the originating number to ensure it was a Budget customer, and then prompted the end user to dial the called party's number.<sup>8</sup> In the Complaint, Qwest alleges that Budget imposed excessive originating access charges on Qwest for this platform-bound 8XX traffic (Platform 8XX Traffic).<sup>9</sup>

### B. Budget's Access Charges

4. In order to calculate access charges, LECs such as Budget must determine the percent of IXC access traffic that is interstate and the percent that is intrastate.<sup>10</sup> This determination is necessary because interstate traffic is governed by federal rather than state tariffs, and interstate access rates are usually different from (and often lower than) intrastate rates. Thus, the LEC must determine how much of an IXC's access traffic is subject to each rate. Where the jurisdiction of a particular kind of traffic is not readily ascertainable, LECs calculate access charges by applying a Percent of Interstate Use (PIU) factor, which is an *estimate* of the percent of interstate traffic.<sup>11</sup> LEC interstate access tariffs typically

<sup>5</sup> Second Revised Joint Statement, File No. EB-08-MD-012 (filed Sept. 20, 2010) ("Joint Statement") at 2, paras. 3–4, 24, para. 12. A RespOrg is the organization (usually a carrier) authorized to reserve one or more toll-free numbers (8XX numbers) in the Service Management System toll-free numbers database and to manage the billing, routing and other records for those numbers. *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Second Notice of Proposed Rulemaking, 18 FCC Rcd 5099 (2003) at 5134, para. 92; 47 C.F.R. § 52.101(b) (defining "RespOrg" as "[t]he entity chosen by a toll free subscriber to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber").

<sup>6</sup> Joint Statement at 3–4, paras. 8–13. Budget states that the toll-free service at issue in the Complaint does not involve use of a pre-paid calling card. *See id.* at 3, para. 9.

<sup>7</sup> Joint Statement at 4, para. 13, 24–26, para. 12. *See* Complaint Ex. B (Qwest-Budget Wholesale Services Agreement).

<sup>8</sup> Joint Statement at 4, paras. 13–15, 17–18, paras. 4–11. Qwest delivered the call to a third party carrier, which then transported the call to Budget's platform. *Id.*

<sup>9</sup> *See* Complaint at 18, paras. 28–29 (Count I), 10, para. 32 (Count II), 20, para. 38 (Count III).

<sup>10</sup> *See* Joint Statement at 5, paras. 16–19; Complaint at 5–6, para. 7; Second Amended Answer of Budget Prepay, Inc., File No. EB-08-MD-012 (filed Mar. 24, 2009) ("Answer") at 14–15, para. 7.

<sup>11</sup> *See* Joint Statement at 5–6, para. 20; Complaint at 6, para. 8; Answer at 15, para. 8.

provide for IXCs to prepare and file periodic PIU reports with the LEC, and also typically provide that, if traffic is jurisdictionally indeterminate and the IXC does not file a PIU report, a “default” PIU of 50% will be used to calculate the IXC’s access charges.<sup>12</sup> Budget, however, had no federal tariff until 2005.

5. From the beginning of the Complaint period (May 2004) until April 2006, Qwest submitted no PIU reports to Budget for the Platform 8XX Traffic, and Budget calculated Qwest’s access charges as if the Platform 8XX traffic were 50 percent interstate. In April 2006, Qwest submitted its first PIU report to Budget for the Platform 8XX traffic, and for the rest of the Complaint period, Budget applied the PIU reported by Qwest to calculate Qwest’s access charges.<sup>13</sup>

6. In May 2006, Qwest sent Budget a “Notice of Dispute,” contending that the Platform 8XX Traffic was 90% interstate and that Budget had therefore over-billed Qwest. Qwest asserted that Budget should have determined the actual jurisdiction of Qwest’s Platform 8XX traffic to calculate Qwest’s access charges. Qwest stated, “[Budget] is capable of determining the state in which the calls to [its] 8XX phone numbers terminate.”<sup>14</sup> In its response to the Notice of Dispute, Budget denied that it could determine the jurisdiction of the Platform traffic and asserted that, because Qwest had not provided PIU reports, Budget was entitled under its state access service tariffs to apply a “default” 50% PIU to the traffic.<sup>15</sup> Qwest filed an informal complaint with the Commission in May 2008, again asserting that Budget should have determined the actual jurisdiction of the Platform 8XX Traffic.<sup>16</sup>

### C. Budget’s Tariff

7. Budget did not have a federal access services tariff from at least the beginning of this dispute until March 28, 2005.<sup>17</sup> Budget’s 2005 tariff (Tariff) was in effect from March 28, 2005 though the remainder of the period at issue. The Tariff sets forth the manner in which the jurisdiction of access traffic will be determined in a section headed “Obligations of the Customer [*i.e.*, Qwest]/Jurisdictional Report Requirements.”<sup>18</sup> Subsection 3 of that section states in relevant part as follows:

When a Customer [*i.e.*, Qwest] orders...8XX Toll Free..., the Telephone Company [*i.e.*, Budget], where the jurisdiction can be determined from the call detail, will determine the interstate percentage as follows. For originating access minutes, the interstate percentage will be developed on a monthly basis by end office when the...8XX Toll Free...access minutes are measured...when the call detail is adequate to determine the appropriate jurisdiction. When originating call details are insufficient to determine the jurisdiction for the call, the Customer shall supply the projected [PIU] or authorize the Telephone Company to use the Telephone

<sup>12</sup> See Joint Statement at 5–6, paras. 20–21; Complaint at 6–7, paras. 8–9; Answer at 15–16, paras. 8–9.

<sup>13</sup> Joint Statement at 7, para. 26.

<sup>14</sup> Complaint, Canfield Dec’n, Ex. C (Notice of Dispute).

<sup>15</sup> Joint Statement at 14, paras. 47–48; Complaint, Canfield Dec’n, Ex. C (Kim Wilber e-mail).

<sup>16</sup> Letter to Lisa Griffin, Enforcement Bureau, FCC, from Qwest (filed May 20, 2008) (“Informal Complaint”) at 2 (“The traffic at issue here was not of indeterminate jurisdiction.”), 4 and 5 (same).

<sup>17</sup> Joint Statement at 23, para. 27. Competitive LECs are not required to file interstate access services tariffs. See *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8596–8601, paras. 1–9 (1997).

<sup>18</sup> Complaint Ex. A (Budget Tariff FCC No. 1) at 27–35, § 2.3.3.A.

Company developed [PIU]. In the event the Customer [*i.e.*, Qwest] does not supply the projected PIU and the Telephone Company [*i.e.*, Budget] does not have the sufficient call detail to develop a PIU, then a PIU of 50 percent shall be used by the Telephone Company....<sup>19</sup>

### III. DISCUSSION

#### A. Qwest's Claims for the Period when Budget had no Federal Tariff are Time-Barred.

8. In its Complaint, Qwest alleges that Budget imposed excessive access charges on the Platform 8XX Traffic from May 2004 to August 2007, and requests damages.<sup>20</sup> We find that Qwest's claims for the period May 1, 2004 through March 27, 2005, when Budget did not have a federal access services tariff on file, are time-barred. These claims are governed by Section 415(b) of the Act, which provides that "complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues..."<sup>21</sup> Section 415(g) defines "overcharges" as charges in excess of those applicable pursuant to federal tariff.<sup>22</sup> Thus, Qwest's claims are not based on "overcharges" as defined by Section 415(g), and its claims are subject to the two-year limitation set forth in Section 415(b).

9. Qwest did not bring its claims within Section 415(b)'s two-year limitations period. It is well established that a claim challenging the lawfulness of a carrier's charges accrues when the customer receives the carrier's invoice containing the allegedly unlawful charges.<sup>23</sup> Qwest received its first Budget invoice during the period during which Budget had no tariff in June 2004, and received the last such invoice in June 2005.<sup>24</sup> Therefore, Qwest's claims accrued from June 2004 through June 2005. Yet Qwest did not file its Informal Complaint until May 2008, more than two years after its claim had accrued even with respect to the June 2005 invoice.<sup>25</sup>

10. Qwest does not agree that its claims accrued on receipt of Budget's invoices. Qwest invokes the discovery rule, under which a cause of action accrues on the date of injury or, if the injury is

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<sup>19</sup> Complaint Ex. A (Budget Tariff FCC No. 1) at 31, § 2.3.3.A.3; Joint Statement at 8–9, para. 34.

<sup>20</sup> Complaint at 21, para. 41. *See* Complaint at 20, para. 34 (Count III) (Budget violated section 201(b)'s requirement that charges and practices in connection with interstate telecommunications services be "just and reasonable" because, without a federal tariff, "Budget had no lawful basis for assessing on Qwest any interstate access charges...").

<sup>21</sup> 47 U.S.C. § 415(b).

<sup>22</sup> *See* 47 U.S.C. § 415(g) ("The term 'overcharges' as used in this section shall be deemed to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission.").

<sup>23</sup> *See, e.g., Operator Communications, Inc. v. Comtel of the South, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 19783, 19787, para. 11 (2005).

<sup>24</sup> Joint Statement at 12, para. 42.

<sup>25</sup> Section 415(d), which extends the section 415(b) limitations period by an additional ninety days when, on or before expiry of the limitations period, a carrier collects lawful service charges, does not help Qwest because Qwest waited more than two years and ninety days from the time its cause of action accrued to file its Informal Complaint. *See* 47 U.S.C. § 415(d).

not readily discoverable, on the date the complainant should have discovered the injury.<sup>26</sup> Qwest states that it “did not know that Budget did not have a tariff...[two years before Qwest filed its Informal Complaint] despite having made a diligent inquiry into the facts and circumstances...”<sup>27</sup> Qwest’s argument is unavailing. The question of whether Budget had a tariff on file with the Commission was a matter of public record and therefore readily discoverable by Qwest. In any event, even if we assume that Qwest reasonably did not inquire into the existence of a Budget tariff when it received Budget’s invoices, Qwest would still be time-barred. Qwest admits that it contacted Budget in December 2005 to challenge Budget’s bills.<sup>28</sup> Qwest cannot argue that its cause of action began to accrue after this date. Under the discovery rule, “[a]ccrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim....Once the prospective plaintiff is on notice that it might have a claim, it is required to make a diligent inquiry into the facts and circumstances that would support the claim.”<sup>29</sup>

11. Qwest contends that Budget fraudulently concealed the fact that it had no federal tariff.<sup>30</sup> This argument is also unsuccessful. Qwest alleges that, after failing to locate a Budget tariff in the Commission’s files or on Budget’s website, it asked Budget for a copy of its tariff, and that Budget responded that it followed the dominant carrier rates for interstate services.<sup>31</sup> Qwest admits that it “understood that response [by Budget] to be an implication that Budget did not have an interstate tariff filed with the Commission.”<sup>32</sup> Thus, Qwest was not deceived, and the Section 415(b) limitations period is not tolled.<sup>33</sup>

12. In short, Qwest has not established either that it acted with due diligence in pursuing its claims or that Budget deceived it. Accordingly, Qwest’s claims relating to the period when Budget did not have a federal tariff -- from May 1, 2004 through March 27, 2005 -- are time-barred pursuant to

<sup>26</sup> See Reply at 17 (citing *Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064, 1073 (D.C. Cir. 2004) and *Sprint Communications Co. v. FCC*, 76 F.3d 1221, 1226–31 (D.C. Cir. 1996)).

<sup>27</sup> Qwest Communications Corp.’s Reply to Second Amended Answer of [Budget], File No. EB-08-MD-012 (filed Apr. 13, 2009) (“Reply”) at 17.

<sup>28</sup> Complaint, Canfeld Dec’n, at 2, para. 4.

<sup>29</sup> *Sprint Communications*, 76 F.3d at 1228 (citations omitted).

<sup>30</sup> Reply at 19-20. See *Operator Communications*, 20 FCC Rcd at 19788, para. 14 (fraudulent concealment of the facts giving rise to a claim can toll the operation of section 415(b)); *Sprint Communications*, 76 F.3d at 1226 (same).

<sup>31</sup> Complaint, Canfeld Dec’n, at 10, para. 24; Reply, Second Canfeld Dec’n at 2, para. 4.

<sup>32</sup> Complaint, Canfeld Dec’n, at 10, para. 24.

<sup>33</sup> As the existence of a tariff is a matter of public record, it is unlikely that Qwest’s argument could succeed in any event. See, e.g., *Aetna Life Ins. Co. v. AT&T*, Memorandum Opinion and Order, 3 FCC Rcd 2126 (1988) at 2131, para. 16 (party alleging fraudulent concealment must establish “that the wrongful conduct resulted in the knowing concealment of the operative facts forming the basis of the cause of action and that these facts were not discovered despite the exercise of due diligence”); *Communications Vending*, 365 F.3d at 1075 (the federal courts and the Commission “have set a high hurdle for equitable tolling, allowing a statute to be tolled ‘only in extraordinary and carefully circumscribed instances’”) (citations omitted). We do not understand how Qwest could have been deceived by Budget’s providing Qwest two pages from the 2005 Tariff in December 2006. See Reply at 18. These Tariff pages, each of which states that it was issued on March 28, 2005, did not constitute a representation that Budget had filed a federal tariff before that date. See Reply, Hilton Dec’n, Ex. B (Tariff pages 34, 48).

Section 415(b) and are dismissed.<sup>34</sup>

**B. Qwest's Claims for the Period when Budget had a Federal Tariff are Denied Because Qwest Does Not Show that Budget Violated its Tariff.**

13. We also deny Qwest's claims for the remaining period at issue (March 28, 2005 to August 31, 2007). At the beginning of this period, Budget applied the Tariff's 50% default PIU to calculate Qwest's originating access charges for the Platform 8XX Traffic.<sup>35</sup> In April 2006, Qwest submitted its first PIU report to Budget and, for the rest of the Complaint period, Budget applied the PIU reported by Qwest to calculate Qwest's access charges. In its Complaint, Qwest asserts that Budget violated the Tariff because Budget should have determined the *actual* interstate percentage of Qwest's Platform 8XX Traffic rather than applying PIUs to bill for this traffic. Qwest notes that Budget's pre-paid calling platform records reflected both the calling party number and the called party number.<sup>36</sup> Qwest asserts, therefore, that "Budget possessed adequate or sufficient call detail to determine the actual jurisdiction of the [Platform] 8XX Traffic and was obligated to jurisdictionalize and bill that traffic accordingly...."<sup>37</sup> Further, Qwest alleges that, pursuant to the contract for Qwest's providing 8XX numbers to Budget, Budget submitted a PIU report to Qwest stating that the Platform 8XX Traffic was 100% interstate. Qwest argues that this report "confirms that Budget knew the jurisdiction of 8XX traffic."<sup>38</sup>

14. Qwest, however, ignores the language of the Tariff. In keeping with the industry-standard Carrier Access Billing System (CABS), under which originating access charges are billed on an end office basis,<sup>39</sup> the Tariff provides that Budget is to determine the actual interstate percentage of

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<sup>34</sup> Budget argues that Qwest's claims for the remaining period at issue (March 28, 2005 to August 31, 2007) also are time-barred because the Tariff contains a ninety-day notice of claim provision with which Qwest allegedly did not comply, and because Qwest's Notice of Dispute and Informal Complaint allegedly did not apprise Budget of the nature of the dispute. Budget argues further that Qwest's claims for the remaining period are barred by the doctrines of laches, estoppel, or waiver. *See* Answer at 7–12, paras. 14–22; *id.*, Legal Analysis, at 18–28. We do not address these defenses here because, as discussed below, we deny Qwest's claims for the remaining period on the merits.

<sup>35</sup> The parties agree that the Tariff's default rate of 50% is "typical" of LEC access tariffs. Joint Statement at 6, para. 21. *See* Complaint at 7, para. 9 (explaining that LEC tariff default PIUs are "typically established" at 50%).

<sup>36</sup> *See* Joint Statement at 28, para. 2; Complaint, Canfield Dec'n, at 13, para. 20 and Cok Dec'n at 2, paras. 3–5; Reply at 36–40.

<sup>37</sup> Qwest Communications Company, LLC's Opening Final Brief, File No. EB-08-MD-012 (filed Oct. 29, 2010) ("Qwest Opening Final Br.") at 1. *See, e.g.*, Complaint at 15 ("Because the [Platform 8XX Traffic] was jurisdictionally identifiable, it was never subject to PIU billing under the terms of Budget's tariff...."); Complaint, Legal Analysis, at 11 ("Budget had sufficient 'call detail' within the meaning of the 2005 Budget Tariff to have jurisdictionalized the [Platform 8XX Traffic] without resort to PIU surrogates."); Qwest Opening Final Br. at 2 ("[T]he only question is whether Budget possessed adequate or sufficient call detail to determine the actual jurisdiction of the [Platform 8XX Traffic].")

<sup>38</sup> Complaint at 14, para. 17. *See id.* at 2 and 14–15, paras. 17–19; Qwest Opening Final Br. at 2, 7.

<sup>39</sup> *See* Reply, Larson Dec'n, Ex. A (ATIS Multiple Exchange Carrier Access Billing Guidelines) at 5–3 ("Current requirements for usage billing displays at end office and summary levels remain unchanged."), 4–17 ("End office detail must be provided by Common Language Location Identification (CLLI) Code."), 5–2 ("Prior to implementing [Meet Point Billing], providers must exchange End Office identifiers that appear on the bill...."). *See also* Answer, Robertson Dec'n, at Ex. 1 (Budget access bill for Qwest dated Feb. 26, 2007) (showing minutes (continued...))

originating traffic “by end office.” Subsection 3 states:

When a customer [*i.e.*, Qwest] orders... 8XX Toll Free..., the Telephone Company [*i.e.*, Budget], where the jurisdiction can be determined from the call detail, will determine the interstate percentage as follows. For originating access minutes, the interstate percentage will be developed on a monthly basis *by end office*...when the call detail is adequate to determine the appropriate jurisdiction.<sup>40</sup>

This language requires Budget to “develop the interstate percentage” of originating traffic only if Budget can do so “by end office.” Therefore, under subsection 3, determinate traffic is traffic whose jurisdiction *can* be determined by end office. Subsection 3 provides further that a PIU applies, “[w]hen originating call details are insufficient to determine the jurisdiction for the call” – that is, when Budget cannot determine jurisdiction “by end office.” In short, Budget is obligated to determine the *actual* jurisdiction of originating traffic only if it can do so “by end office.” Otherwise, the traffic is indeterminate and is billed by applying a PIU.

15. The record is clear that Budget could not determine the jurisdiction of the Platform 8XX Traffic “by end office,” and Qwest does not contend otherwise. In accordance with the CABS process, the underlying incumbent LEC, not Budget, recorded the originating call detail used to generate the access charge bills at issue, and this call detail would have included minutes of use “by end office.”<sup>41</sup> Yet this call detail necessarily would not reveal the jurisdiction of the Platform 8XX Traffic because Budget’s end users did not dial the called party’s number until the call had left the underlying LEC’s network and reached Budget’s platform. As a result, the underlying LEC had no information as to the called party number, and therefore could not generate records revealing whether the call was interstate or intrastate.<sup>42</sup>

16. Qwest asserts, however, that Budget was required to determine the actual jurisdiction of the traffic regardless of whether it could do so “by end office.” Qwest argues first that the “the language [in subsection 3] referencing ‘end office’ is [merely] part of a basic description of how an interstate

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of use and other information by end office). An “end office” is the point at which an end user’s loop connects with the LEC switch. *See, e.g.*, 47 C.F.R. § 69.2(pp) (defining “end office”).

<sup>40</sup> Complaint Ex. A (Tariff) at 31, § 2.3.3.A.3 (emphasis added). Subsection 3 governs Qwest’s initial access services order: “When a customer orders...8XX Toll Free...”. *Id.* Subsequent periods are governed by Tariff subsection 6, which requires Qwest to submit quarterly PIU reports except where Budget is able to determine the actual jurisdiction of the traffic “as set forth in [subsection] 3. preceding.” *Id.* at 31, § 2.3.3.A.6. Subsection 6 provides further that, if Qwest fails to fulfill its quarterly PIU report obligation, a default 50% PIU applies. *Id.*

<sup>41</sup> *See* Answer, Marnell Dec’n, at 2–4, paras. 6–11, 6, para. 19; Reply, Canfield Dec’n, at 7–8, para. 10.

<sup>42</sup> *See* Joint Statement at 17–18, paras. 3–11, 20, para. 2(f); Final Brief of Budget Prepay, Inc., File no. EB-08-MD-012 (filed Nov. 12, 2010) (“Budget Final Br.”) at 4–7; Qwest Complaint, Legal Analysis, at 9 (“[T]he jurisdiction of calls within the [Platform] 8XX Traffic could not be ascertained by reference solely to the call records provided by the facilities-based local exchange carrier associated with [the first] leg of the call...”). Further, Budget’s platform did not identify the end office associated with the call. *See* Joint Statement at 28–30, paras. 1–17 (describing the call detail recorded at Budget’s platform). Moreover, even if Budget’s platform records did have call detail by end office, this information could not reasonably have been integrated into the CABS process because, as noted, the underlying ILEC, not Budget, generates the records used to bill IXC’s such as Qwest. *See, e.g.*, Answer, Robertson Dec’n, at 2–6, paras. 5–18 (explaining the generation of Exchange Message Interface (EMI) records).

percentage is developed or implemented into billing.”<sup>43</sup> Qwest is mistaken. The language at issue is not descriptive (there is no “such as” or “for example”), but mandatory: “the interstate percentage *will be* developed...by end office.” Indeed, as stated above, the requirement that the jurisdiction of traffic be measured “by end office” is consistent with the industry-standard CABS process.<sup>44</sup> Qwest argues next that the phrase “adequate call detail” is ambiguous and should be read in Qwest’s favor.<sup>45</sup> We find no ambiguity. In effect, Qwest asks us to read the reference in subsection 3 to “adequate” call detail in isolation, ignoring the subsection 3’s statement that jurisdiction “will be developed...by end office.” Yet a tariff is to be construed in its entirety, and a construction that would render a word or phrase meaningless should be avoided.<sup>46</sup>

17. Thus, under subsection 3, Budget could not measure the actual jurisdiction of the Platform 8XX Traffic because the interstate percentage of that traffic could not be measured “by end office.” Accordingly, Qwest’s assertion that Budget submitted a 100% PIU report for the Platform Traffic and that, therefore, Budget knew the actual jurisdiction of the traffic, also falls wide of the mark. Qwest does not argue that the contract pursuant to which Budget allegedly submitted the PIU report obligated Budget to measure traffic “by end office.” Moreover, any such PIU report would be, by definition, an *estimate* of interstate use, and therefore could not establish that Budget could measure the *actual* percentage of interstate traffic.<sup>47</sup>

18. In conclusion, Qwest’s Complaint does not succeed. Qwest’s claims are time-barred for the initial period at issue in the Complaint, when Budget had no federal tariff. With respect to the remaining period at issue, Qwest fails to show that Budget violated its Tariff, and therefore also fails to establish that Budget violated Sections 201(b) or 203(c) of the Act.

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<sup>43</sup> Qwest Communications Company, LLC’s Reply Final Brief, File No. EB-08-MD-012 (filed Nov. 19, 2010) (“Qwest Reply Final Br.”) at 2. *See* Qwest Opening Final Br. at 5 n.12 (arguing that the Tariff’s “end office” language “simply describes basic characteristics of an interstate percentage and how it is developed or implemented into billing”).

<sup>44</sup> *See supra* para. 14 (noting that, under CABS, originating access charges are billed by end office).

<sup>45</sup> *See* Complaint, Legal Analysis, at 11 (citing *Durbin Paper Stock Co. v. ICC*, 585 F.2d 543, 544 (D.C. Cir. 1978) for the proposition that ambiguities in a tariff are construed against the drafter); Qwest Opening Final Br. at 5, 12–13; Qwest Reply Final Br. at 3.

<sup>46</sup> *See, e.g., U.S. v. Missouri-Kansas-Texas Ry. Co.*, 194 F.2d 777, 778–779 (5<sup>th</sup> Cir. 1952); *Christensen v. No. Pacific Ry. Co.*, 184 F.2d 534, 536 (8<sup>th</sup> Cir. 1950); *Burrus Mill & Elevator Co. of Oklahoma v. Chicago, Rock Island & Pac. Ry. Co.*, 131 F.2d 532, 534 (10<sup>th</sup> Cir. 1942). *See also Restatement (Second) of Contracts* § 203 (1981) (“In the interpretation of a promise..., the following standards of preference are generally applicable: (a) an interpretation which gives a[n]...effective meaning to all the terms is preferred to an interpretation which leaves a part...of no effect.”).

<sup>47</sup> As Qwest itself repeatedly emphasizes, a PIU is an *estimate* of jurisdiction. *See, e.g.,* Reply at 46 (“PIUs are not supposed to be applied to determinate traffic...”); *id.* at 47 (“Budget’s tariff...call[s] for Qwest to be billed for traffic of determinate jurisdiction based on its actual and known jurisdictional mix and to be billed for traffic of indeterminate jurisdiction based on PIUs... PIUs used for the second category of traffic (indeterminate traffic)...do not impact the first category (determinate traffic).”). Qwest does not establish that Budget did, in fact, file such a report. *See* Budget Final Br. at 2–3 (arguing that the only evidence of Budget’s 100% PIU report is equally consistent with Qwest itself having input a 100% Budget PIU into its computer system). *See also* Qwest Opening Final Br. at 9 (arguing for the first time that Budget could have developed a PIU for the Platform 8XX Traffic without explaining how that PIU would have satisfied Budget’s obligation to determine the *actual* jurisdiction of the traffic); Qwest Reply Final Br. at 2–3 (same).



**IV. ORDERING CLAUSE**

19. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 208 and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208 and 415 that the Complaint is DISMISSED to the extent indicated and otherwise DENIED, and that THIS PROCEEDING IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison  
Chief, Enforcement Bureau