

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

In the Matter of)	WC Docket No. 20-11
)	
Northern Valley Communications, LLC, Tariff F.C.C. No. 3)	Transmittal No. 12
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 2022

Released: August 18, 2022

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we approve in part, and amend in part, the Updated Refund and Payment Plan submitted by Northern Valley Communications, LLC (Northern Valley) to refund certain interstate access service payments made by interexchange carriers (IXCs) that purchased service under Northern Valley’s unlawful tariff.¹ This Order implements the Commission’s decision in the *Northern Valley Tariff Investigation Order* that concluded the investigation into Northern Valley’s tariffed rates for the delivery of traffic to its end offices, and directed the Wireline Competition Bureau (Bureau) to determine the amounts of the refunds Northern Valley owes its customers.²

II. BACKGROUND

2. Certain local exchange carriers (LECs) have engaged in access stimulation to exploit inefficiently high rates in certain areas and collect excessive access charge revenues from IXCs.³ Access stimulation generates high volumes of inbound calls, resulting in excessive access charges that IXCs, and ultimately their customers, are forced to pay. To combat wasteful arbitrage schemes, the Commission in 2019 adopted the *Access Arbitrage Order* and Access Stimulation Rules, making access-stimulating LECs responsible for the costs of terminating tandem switching and transport services on which IXCs depend to deliver calls to some LECs’ end offices.⁴ The Commission found that this shift of financial

¹ Letter from G. David Carter, Counsel to Northern Valley Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11, Transmittal No. 12 (filed Mar. 3, 2022) (Updated Refund and Payment Plan). *See generally* Letter from G. David Carter, Counsel to Northern Valley Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11, Transmittal No. 12 (filed Sept. 8, 2020) (Refund and Payment Plan) (the first plan submitted by Northern Valley). There is a *Protective Order* in this proceeding. *Northern Valley Communications, LLC, Tariff F.C.C. No. 3*, WC Docket No. 20-11, Transmittal No. 12, Protective Order, 35 FCC Rcd 2773 (WCB 2020) (*Protective Order*).

² *Northern Valley Communications, LLC, Tariff F.C.C. No. 3*, WC Docket No. 20-11, Transmittal No. 12, Memorandum Opinion and Order, 35 FCC Rcd 6198, 6220, para. 52 (2020) (*Northern Valley Tariff Investigation Order*), *pet. for review pending*, *Northern Valley Commc’ns, LLC v. FCC*, No. 20-1287 (D.C. Cir. filed July 29, 2020).

³ “Access charges” are the rates local carriers charge long-distance (interexchange) carriers for the use of their networks to originate and terminate long-distance calls from and to the local carriers’ customers.

⁴ 47 CFR § 51.914; *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Report and Order and Modification of Section 214 Authorizations, 34 FCC Rcd 9035, 9042, para. 17 (2019)

responsibility, from IXCs to access-stimulating LECs, would reduce the incentive to engage in access arbitrage and encourage access-stimulating LECs to make more efficient call-routing decisions.⁵

3. Northern Valley is a self-identified access-stimulating competitive LEC.⁶ Before the Commission adopted the *Access Arbitrage Order*, IXCs could purchase services under Northern Valley's tariff to route telephone calls to end users served by Northern Valley (including Northern Valley's high-volume calling service customers) by interconnecting to the South Dakota Network, LLC (SDN) tandem in Sioux Falls, SD.⁷ In response to the *Access Arbitrage Order*, on December 27, 2019, Northern Valley issued Tariff F.C.C. No. 3, Transmittal No. 12 (Revised Tariff) to unilaterally designate its incumbent LEC affiliate, James Valley Cooperative Telephone Company (James Valley), as its new tandem and interconnection point, and to limit its financial responsibility to paying only James Valley's charges.⁸ On January 10, 2020, the Bureau suspended the Revised Tariff for one day, thereby allowing it to go into effect—without being deemed lawful—on January 11, 2020, adopted an accounting order, and initiated an investigation into the lawfulness of the Revised Tariff.⁹

4. In the *Northern Valley Tariff Investigation Order*, the Commission determined that Northern Valley had unlawfully revised its tariff to evade responsibility for paying terminating tandem switched transport service access charges for the delivery of traffic to its end office, as required by the *Access Arbitrage Order* and Access Stimulation Rules, and that the Revised Tariff was unjust and unreasonable under section 201(b) of the Communications Act of 1934, as amended (the Act).¹⁰ The Commission found that under Northern Valley's Revised Tariff, IXCs were required “to pay the tandem switching and transport charges to reach James Valley or build a direct connection to James Valley to send traffic to Northern Valley . . . without any countervailing benefit.”¹¹ Consequently, the Commission directed Northern Valley to submit tariff revisions consistent with section 201(b) of the Act, the *Access Arbitrage Order*, and the Commission's Access Stimulation Rules.¹² The Commission also directed the Bureau “to determine any refunds that may be required once the newly revised tariff is effective.”¹³ In accordance with the *Northern Valley Tariff Investigation Order*, Northern Valley submitted revised tariff pages on July 10, 2020, which became effective July 25, 2020 (Transmittal No. 14).¹⁴ Thus, the Revised

(*Access Arbitrage Order*), *pets. for review denied sub nom. Great Lakes Commc'ns Corp. et al. v. FCC*, 3 F.4th 470 (D.C. Cir. 2021). Northern Valley was one of the petitioners in *Great Lakes*.

⁵ *Access Arbitrage Order*, 34 FCC Rcd at 9036-37, 9041, 9074, paras. 4, 14, 93.

⁶ *Northern Valley Tariff Investigation Order*, 35 FCC Rcd at 6199, 6202-03, paras. 2, 12 (citing Northern Valley Reply at 1).

⁷ *Id.* at 6202-03, para. 12.

⁸ Northern Valley Communications, LLC, Tariff F.C.C. No. 3, Transmittal No. 12, at 4th Rev. Page No. 46, 1st Rev. Page No. 46.1 (Dec. 27, 2019) (Revised Tariff) (available via the Commission's Electronic Tariff Filing System (ETFS)).

⁹ *Northern Valley Communications, LLC, Tariff F.C.C. No. 3*, WC Docket No. 20-11, Transmittal No. 12, Order, 35 FCC Rcd 402, 402-03, paras. 1, 5-6 (WCB-PPD 2020) (*Northern Valley Tariff Suspension Order*).

¹⁰ *Northern Valley Tariff Investigation Order*, 35 FCC Rcd at 6207, 6220, paras. 22, 50.

¹¹ *Id.* at 6208-09, para. 24.

¹² 47 U.S.C. § 201(b); *Northern Valley Tariff Investigation Order*, 35 FCC Rcd at 6220-21, paras. 50-51, 54.

¹³ *Northern Valley Tariff Investigation Order*, 35 FCC Rcd at 6220, para. 52.

¹⁴ Letter from G. David Carter, Counsel to Northern Valley Communications, LLC, to Marlene Dortch, Secretary, FCC, Transmittal No. 14 (filed July 10, 2020) (available via ETFS); Northern Valley Communications, LLC, Tariff F.C.C. No. 3, Transmittal No. 14, 11th Rev. Page No. 1 (effective July 25, 2020) (Transmittal No. 14) (filed “[i]n lieu of Transmittal No. 12, rejected by the Federal Communications Commission”) (available via ETFS).

Tariff that was found unlawful was in effect from January 11, 2020, through July 24, 2020 (the Refund Period).

5. Northern Valley filed a Refund and Payment Plan, in which it proposed to reimburse IXCs for terminating tandem switched transport service access charges related to the Revised Tariff.¹⁵ Under the Refund and Payment Plan, Northern Valley proposed to refund to IXCs the total amounts it collected from them for the provision of terminating tandem switched transport service from the SDN tandem in Sioux Falls, SD, to James Valley's tandem in Groton, SD, a distance of 147 miles at a rate of \$0.00003 per minute per mile, for a total of \$0.00441 per minute of use.¹⁶ Northern Valley also proposed to reimburse IXCs for the amounts those IXCs paid for SDN's terminating tariffed interstate switched access service during the Refund Period.¹⁷

6. In its Refund and Payment Plan, Northern Valley identified the amount due as a result of revenue collected from each of the customers that paid Northern Valley pursuant to the Revised Tariff, and calculated interest at the Internal Revenue Service (IRS) non-corporate rate for overpayments.¹⁸ We sought comment on Northern Valley's Refund and Payment Plan.¹⁹ Verizon and AT&T filed an opposition and comments indicating that they each considered Northern Valley's Refund and Payment Plan to be inadequate because it failed to fully compensate Northern Valley's customers for all payments that they made to terminate traffic to Northern Valley while the Revised Tariff was in effect.²⁰ Verizon was particularly concerned that the Refund and Payment Plan did not cover payments carriers made to third-party providers to terminate traffic to Northern Valley.²¹ In its opposition Verizon also argued that Northern Valley should disgorge itself of revenue that Verizon presumed third parties, particularly CarrierX (a third-party Intermediate Access Provider), had shared with Northern Valley during the Refund Period.²² SDN also filed comments in which it complained of being "caught in the middle" of the disagreement between Northern Valley and its IXC customers over which is responsible for SDN's charges.²³

¹⁵ Refund and Payment Plan.

¹⁶ *Id.* at 3, Exh. A (spreadsheet columns labeled "b," "c" and "h," and note 1).

¹⁷ *Id.* at 3, Exh. A.

¹⁸ *Id.*

¹⁹ *Wireline Competition Bureau Seeks Comment on Refund and Payment Plan of Northern Valley Communications, LLC*, WC Docket No. 20-11, Transmittal No. 12, Public Notice, 35 FCC Rcd 9560 (WCB 2020).

²⁰ Verizon Opposition to Refund Plan of Northern Valley Communications, LLC, WC Docket No. 20-11, Transmittal No. 12, at 2, 7 (filed Sept. 24, 2020) (Verizon Opposition) (advocating that the Commission "reject Northern Valley's plan and, instead, require it to refund, with interest, *all* the amounts IXCs paid to route interstate traffic to Northern Valley while its unlawful tariff was in effect"); AT&T Services, Inc.'s Comments on Refund Plan Proposed by Northern Valley Communications, LLC, WC Docket No. 20-11, Transmittal No. 12, at 1 (filed Sept. 23, 2020) (arguing that the Refund Plan "fails to compensate customers for the harms caused by Northern Valley's unreasonable and unilateral change to its point of interconnection with long distance carriers").

²¹ Verizon Opposition at 2, 7. Verizon's Opposition included an Exhibit that briefly discusses a contract between Verizon and third party CarrierX. The Exhibit provides calculations allegedly supporting data provided in the Opposition which Verizon claims are relevant to the refund Northern Valley must make as a result of the tariff investigation. Verizon Opposition at 1-2; *id.* Exh. A, Declaration of James Pachulski. The Exhibit also includes a Verizon employee's recollection of the contract between third party HD Tandem and Northern Valley. Verizon Opposition, Exh. A, Declaration of James Pachulski. For the reasons discussed in this Order, neither contractual agreement is relevant to the refund amount Northern Valley owes pursuant to the terms of its Revised Tariff.

²² Verizon Opposition at 6.

²³ Comments of South Dakota Network, LLC, WC Docket No. 20-11, Transmittal No. 12 (filed Sept. 24, 2020) (SDN Comments).

7. In subsequently filed *ex parte* comments, Northern Valley argued that commenters' attempts to increase Northern Valley's liability exceeded the Commission's refund authority under section 204 of the Act.²⁴ In addition, CarrierX, HD Tandem, (HD Tandem is a wholly-owned subsidiary of CarrierX²⁵), and Verizon filed numerous letters in the docket concerning a contract between Verizon and CarrierX under which Verizon paid CarrierX to deliver interstate traffic to Northern Valley during the Refund Period.²⁶

8. AT&T filed a Motion to Withdraw Comments due to a settlement agreement with Northern Valley.²⁷ Northern Valley filed an Updated Refund and Payment Plan that "eliminates the amounts that would have otherwise been due and paid to AT&T" and "updates the interest calculation to reflect a refund date of March 31, 2022, rather than the original refund date of September 30, 2020."²⁸ On March 28, 2022, Verizon filed an *ex parte* letter in which it again argued that Northern Valley should reimburse Verizon for payments Verizon made specifically to the third-party provider, CarrierX, to transport Northern Valley's traffic while the Revised Tariff was in effect.²⁹

²⁴ *Ex Parte* Comments of Northern Valley Communications, LLC, in Response to AT&T, SDN, and Verizon's Comments, WC Docket No. 20-11, Transmittal No. 12, at 2, 5 (filed Oct. 5, 2020) (Northern Valley *Ex Parte* Comments) (citing *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir 1981)).

²⁵ Letter from Lauren Coppola, On behalf of HD Tandem, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11, at 1 n.1 (filed Sept. 28, 2020) (HD Tandem Sept. 28, 2020 *Ex Parte* Letter) ("HDPSTN, LLC d/b/a HD Tandem, LLC is a wholly owned subsidiary of CarrierX, LLC.").

²⁶ *Id.* at 1 (objecting to disclosure and making the point that services provided by HD Tandem to Verizon "are completely different than the tariff-based services that are the subject of the Accounting Order"); Letter from Lauren Coppola, On behalf of HD Tandem, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11 (filed Sept. 28, 2020) (second letter filed on Sept. 28, 2020; this one filing HD Tandem's "objection to the disclosure of its confidential commercial contract with Verizon") (HD Tandem Sept. 28, 2020 *Ex Parte* Letter - Objection to Disclosure of Confidential Information); Letter from Scott H. Angstreich, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11, at 1 & n.1 (filed Sept. 29, 2020) (providing Verizon's position regarding the alleged contract disclosure) (Verizon Sept. 29, 2020 *Ex Parte* Letter); Letter from Lauren Coppola, On behalf of HD Tandem, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11 (filed Oct. 2, 2020) (HD Tandem Oct. 2, 2020 *Ex Parte* Letter).

²⁷ AT&T filed a motion to withdraw its comments on September 20, 2021, because it reached a settlement agreement with Northern Valley that resolved AT&T's assertion that it was entitled to compensation under Northern Valley's Refund and Payment Plan. AT&T Services, Inc.'s Motion to Withdraw Comments on Refund Plan Proposed by Northern Valley Communications, LLC, WC Docket No. 20-11, Transmittal No. 12, at 1 (filed Sept. 20, 2021) (AT&T Motion to Withdraw Comments).

²⁸ Updated Refund and Payment Plan at 1; AT&T Motion to Withdraw Comments at 1. *See generally* Rev. Rul. 2022-15 (Aug. 15, 2022), <https://www.irs.gov/pub/irs-drop/rr-22-15.pdf> (IRS Non-Corporate Rate for Overpayments and Underpayments) (Table of Interest Rates from January 1, 1999 - Present Noncorporate Overpayments and Underpayments, showing that the 3% rate ended on March 31, 2022); Rev. Rul. 2022-11, 2022-23 I.R.B. 1159 (June 6, 2022), https://www.irs.gov/irb/2022-23_IRB#REV-RUL-2022-11 (same). Rev. Rul. 2022-15 will appear in Internal Revenue Bulletin 2022-35, dated Aug. 29, 2022. I.R.S. News Release IR-2022-150 (Aug. 15, 2022), <https://www.irs.gov/newsroom/irs-announces-interest-rate-increases-for-the-fourth-quarter-of-2022-6-rate-applies-to-most-taxpayers-starting-oct-1>.

²⁹ Letter from Scott H. Angstreich, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11, Transmittal No. 12, at 2-3 (filed Mar. 28, 2022) (Verizon Mar. 28, 2022 *Ex Parte* Letter).

III. DISCUSSION

9. Pursuant to the *Northern Valley Tariff Investigation Order*,³⁰ the accounting order in place in this proceeding,³¹ and the authority set forth in section 204 of the Act,³² we require Northern Valley to issue refunds of payments it collected from its customers while its Revised Tariff was in effect. We find that Northern Valley's Updated Refund and Payment Plan is reasonable, with the changes ordered herein, including the elimination of payments for services provided by SDN. We reject, as beyond the scope of this proceeding, and the refund authority granted the Commission in section 204 of the Act, requests for Northern Valley to reimburse IXCs for amounts the IXCs paid to third-party providers pursuant to commercial agreements, and requests for Northern Valley to disgorge payments it may have received from third-party providers. As explained below, arguments that the Commission must expand the proceeding in consideration of equitable factors are unpersuasive and insufficiently supported. Finally, we order Northern Valley to include interest payments through the date refunds are made.

A. Refunds Limited to Northern Valley's Customers

10. Northern Valley's refund liability applies only to refunds for payments its customers made to Northern Valley for its tariffed terminating interstate access services while the Revised Tariff was in effect, plus interest. We reject arguments to expand Northern Valley's refund liability to include reimbursing its customers for payments those customers may have made to third-party providers, and disgorging payments Northern Valley may have received from third-party providers.

11. *Section 204 of the Act Governs the Refund of Northern Valley's Unlawful Charges.* The determination of refunds at the conclusion of a tariff investigation is governed by section 204 of the Act, which gives the Commission the authority to

require the . . . carrier . . . to keep accurate account of all amounts . . . specifying by whom and in whose behalf such amounts are paid and . . . to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such . . . revised charges as by its decision shall be found not justified.³³

The language of section 204 makes clear that the charges relevant to a tariff investigation are those paid by the carrier's (here Northern Valley's) customers pursuant to the suspended tariff. Thus, the Commission's section 204 authority applies to refunds Northern Valley (the subject of the tariff investigation) must make of payments it collected from its customers ("the persons in whose behalf such amounts were paid") for the provision of tariffed services.

³⁰ *Northern Valley Tariff Investigation Order*, 35 FCC Rcd at 6199, 6207, paras. 3, 22 (finding that Northern Valley had not demonstrated its Revised Tariff to be just and reasonable or consistent with the Commission's orders and rules).

³¹ *Northern Valley Tariff Suspension Order*, 35 FCC Rcd at 403, para. 6 (suspending Northern Valley's revised tariff for one day and establishing an accounting order in the proceeding).

³² 47 U.S.C. § 204(a)(1) ("[T]he Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified.").

³³ 47 U.S.C. § 204; *Northern Valley Tariff Suspension Order*, 35 FCC Rcd at 403-04, paras. 6, 10; *Northern Valley Tariff Investigation Order*, 35 FCC Rcd at 6199, para. 3.

12. This view is consistent with the common definition of “refund” which is “to give or put back.”³⁴ For example, a “refund” is “a repayment of funds from the original payee to the original payer.”³⁵ Under section 204 of the Act, Northern Valley cannot “refund” (or give back) to its customers money that it did not receive from those customers (i.e., money that was collected and retained by third parties or money that was allegedly shared with Northern Valley by third parties).³⁶ This interpretation of the use of the word “refund” in section 204 of the Act is consistent with the fact that the statute provides aggrieved parties other avenues they can use to try to recover payments made to third parties, as well as potential damages.³⁷ For example, Verizon appears to be aware that it can bring a complaint, pursuant to section 208 of the Act, to seek additional amounts from Northern Valley, beyond the refunds that are available pursuant to section 204.³⁸ Thus, our interpretation of the word “refund,” as used in section 204 of the Act, does not prevent customers that believe they incurred unnecessary costs or damages while Northern Valley’s unlawful tariff was in effect from ultimately being made whole.

13. *No Refund Liability for Payments IXCs Made to Third Parties or for Payments Northern Valley May Have Received from Third Parties.* We reject Verizon’s attempts to expand Northern Valley’s refund liability to include amounts IXCs paid to third parties to route interstate access-stimulation traffic to Northern Valley while the Revised Tariff was in effect. Verizon contends that Northern Valley should make Verizon and other IXCs whole by “refund[ing], with interest, *all* the amounts IXCs paid to route interstate traffic to Northern Valley while its unlawful tariff was in effect.”³⁹

14. Verizon argues that, due to equitable considerations, we should interpret the refund language in section 204 of the Act expansively,⁴⁰ to require Northern Valley to reimburse Verizon for services Verizon purchased from CarrierX, pursuant to a contract between Verizon and CarrierX,⁴¹ as well as the amounts Northern Valley’s customers paid to other third-party providers—whether pursuant to tariffs or contracts—to route interstate access stimulation traffic to Northern Valley while the Revised Tariff was in effect.⁴² But, a payment from Northern Valley to Verizon to compensate Verizon for money paid to a third party for services provided by that third party, based on rates set by that third party, would not constitute a “refund,” as that term is used in the Act⁴³ or in common discourse.

15. Verizon also claims there was a revenue-sharing agreement between HD Tandem and Northern Valley and asserts that HD Tandem was required to pay Northern Valley a portion of the

³⁴ Refund, *Merriam-Webster Dictionary* (2022), <https://www.merriam-webster.com/dictionary/refund>.

³⁵ Refund Definition, *Accounting Tools* (May 23, 2022), <https://www.accountingtools.com/articles/refund>.

³⁶ Northern Valley *Ex Parte* Comments at 2 (“The plain language of the Act thus unambiguously limits the Commission’s authority to order refunds of amounts paid *pursuant to tariff* to the carrier that is the subject of the [Tariff Investigation] Order.” (emphasis in original)).

³⁷ 47 U.S.C. §§ 206-209.

³⁸ Verizon Mar. 28, 2022 *Ex Parte* Letter at 3.

³⁹ Verizon Opposition at 2, 5-6; Letter from Scott H. Angstreich, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Oct. 8, 2020) (Verizon Oct. 8, 2020 *Ex Parte* Letter). Verizon, in general, does not question the amount of the refunds that Northern Valley proposed to make to Verizon for the tariffed charges Verizon paid to Northern Valley. Verizon Opposition at 4. We do not interpret Verizon’s arguments about equitable considerations to challenge the amount or calculation of the refunds Northern Valley proposed.

⁴⁰ Verizon Oct. 8, 2020 *Ex Parte* Letter at 2-3.

⁴¹ Verizon Opposition at 4-5.

⁴² *Id.* at 6-7 (“In sum, the Commission should reject Northern Valley’s refund plan in substantial part and order Northern Valley in addition to refund with interest, the amounts that IXCs paid third parties to route interstate access stimulation traffic to Northern Valley while Northern Valley’s unlawful tariff was in effect.”).

⁴³ 47 U.S.C. § 204.

proceeds HD Tandem earned from the services it provided Verizon and others during the Refund Period.⁴⁴ Verizon asks that we take into account equitable factors to justify expanding Northern Valley's refund liability and require Northern Valley to "refund[], with interest, . . . any amounts Northern Valley was entitled to receive from those third parties" while the Revised Tariff was in effect.⁴⁵ Verizon argues that expanding Northern Valley's liability, as it suggests, will serve as a deterrent and "ensure that Northern Valley and other access stimulation LECs selecting Intermediate Access Providers in the future are aware that they will bear the full costs of an unlawful choice."⁴⁶

16. We reject Verizon's attempts to justify its far-reaching claims as equitable or the result of "equitable considerations."⁴⁷ As an initial matter, Verizon's requests that we expand the proceeding to require Northern Valley to reimburse Verizon for payments Verizon made to HD Tandem and that we require Northern Valley to disgorge any revenue HD Tandem may have shared with Northern Valley are based on speculation about contracts: (1) to which Northern Valley was not a party (a contract between Verizon and HD Tandem) or to which Verizon was not a party (a contract between Northern Valley and HD Tandem);⁴⁸ and (2) that are outside the scope of this proceeding, which is limited to determining the refunds Northern Valley owes pursuant to the tariff revisions that the Commission found to be unlawful.⁴⁹ Questions of fact exist regarding the terms of the agreements on which Verizon would have us rely, and we refuse to improperly expand this proceeding to include a debate about the terms of contracts between Verizon and its third-party providers, or between Northern Valley and HD Tandem.⁵⁰ We are not required, or authorized, to expand the scope of this tariff investigation to include an investigation of the terms of contracts between Northern Valley's other customers and their third-party providers, and perhaps contracts between Northern Valley and other third-party providers, if such contracts exist. Expanding this proceeding as Verizon requests would take us far afield from what the Commission directed us to do: determine the refunds Northern Valley owes for charges it collected from its customers pursuant to the Revised Tariff.⁵¹

⁴⁴ Verizon Opposition at 6.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 5.

⁴⁷ *E.g.*, Verizon Opposition at 4 (citing *Am. Tel. Relay, Inc.*, Docket 19609, Memorandum Opinion and Order, 67 F.C.C.2d 703, 706, para. 9 (1978)).

⁴⁸ Verizon Opposition at 3 (arguing that while Northern Valley "may" have shared money with its access stimulation partners, it "likely" retained some of the amount HD Tandem was contractually required to pay Northern Valley).

⁴⁹ *Id.*; Northern Valley *Ex Parte* Comments at 8 ("Further, Northern Valley does not have access to Verizon's contract with Carrier X. Therefore, it does not know when the contract terminates and/or if Verizon agreed to an exclusive deal that prevented it from utilizing alternative routes to deliver traffic.").

⁵⁰ HD Tandem Oct. 2, 2020 *Ex Parte* Letter at 1 ("[T]he agency risks issuing refunds without the necessary context required to ensure that the refunds are rationally related to the stated goals of the Accounting Order. For example, it is not uncommon for carriers to renegotiate rates to include refunds or rebates to address changed circumstances, new regulatory requirements, or new business arrangements or partnerships. The record will show that happened in this case.").

⁵¹ Any contract between Verizon and CarrierX or HD Tandem is unrelated to the issue of refunds Northern Valley must make to its customers pursuant to the findings in this proceeding. *See* HD Tandem Oct. 2, 2020 *Ex Parte* Letter at 1 ("Because the service definitions are a product of sophisticated parties bargaining, they cannot be relied upon for any other purpose than the purpose the parties intended in the contract. This negotiated relationship [between Verizon and HD Tandem] has no relevance to this refund inquiry which is defined by Northern Valley's tariffs."); *id.* at 2 ("Indeed, if the agency expands its scope to cover the agreement between HD Tandem and Verizon it will have opened a Pandora's box of contract disclosures that will threaten settled contractual expectations and divert the Bureau's focus away from the narrow refund questions before it."). The dispute in the record between

(continued....)

17. The cases cited by Verizon do not support its proposition that a carrier under investigation for an unlawful tariff must, pursuant to section 204 of the Act, also reimburse customers for payments made to third-party providers. Indeed, we have not identified any case, and Verizon has not cited any case, under section 204 of the Act, that *requires* the Commission to reimburse customers for payments made to third-party providers regardless of any consideration of equitable factors. At most, the cases Verizon cites indicate that the Commission has the discretion to factor in equitable considerations, if it chooses to do so.⁵² We find that expanding Northern Valley’s liability to include payments made by Northern Valley’s customers to third parties, or payments that may have been made by third parties to Northern Valley, but not for services provided pursuant to tariff, are beyond the scope of determining the refunds due to Northern Valley’s customers for paying tariffed charges that were later found unlawful. The focus of the tariff investigation proceeding is Northern Valley and its customers.

18. Two of the cases Verizon relies on—*Virgin Islands Tel. Corp. v. FCC* and *Las Cruces TV Cable v. FCC*—are inapposite.⁵³ In both cases, the Commission considered equitable factors in determining the *amount* of a refund not whether a carrier must reimburse customers for services those customers purchased from third-party providers.⁵⁴ Verizon relies on a third case, *New England Tel. & Tel. Co. v. FCC*, to argue that the Commission has the authority under section 4(i) of the Act, to develop remedies, such as refunds, as necessary to ensure the Commission’s rules are not violated.⁵⁵ But that case concerned rate reductions due to overearnings, which are not specifically provided for in the Act. Therefore, in that case, the Commission invoked its section 4(i) authority to order the rate reductions.⁵⁶ Although we recognize the authority the Commission possesses under section 4(i),⁵⁷ section 204 of the Act provides a clear remedy at the conclusion of a tariff investigation—refunds by the carrier to its customers. Neither Verizon’s arguments nor cited cases require us to stray from the path provided by the Act.

19. The Federal Trade Commission (FTC) cases Verizon relies on also fail to help its cause. Those cases involve issues such as marketing and deceptive trade practices that violate a statute other than the Act, and the remedies available under that statute are far different from those provided in section 204

Verizon and HD Tandem or CarrierX over an alleged disclosure of confidential information is unrelated to this proceeding, is moot because no party requested the information pursuant to the *Protective Order* in this proceeding, and is a distraction to the issue of Northern Valley’s refund liability. HD Tandem Sept. 28, 2020 *Ex Parte* Letter at 1 (objecting to perceived inappropriate disclosure); HD Tandem Sept. 28, 2020 *Ex Parte* Letter - Objection to Disclosure of Confidential Information at 1 (same); Verizon Sept. 29, 2020 *Ex Parte* Letter at 1 & n.1 (providing Verizon’s position regarding the alleged disclosure).

⁵² *Moog Indus. v. FTC*, 355 U.S. 411, 413-14 (1958) (explaining the administrative discretion to determine remedies); *see also, e.g., Am. Tel. Relay, Inc.*, 67 F.C.C.2d at 705, para. 7 (“The courts have specifically recognized the discretionary authority of this Commission to award refunds pursuant to Section 204.”).

⁵³ Verizon Opposition at 2 (citing *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1240 (D.C. Cir. 1993)); *id.* at 4 (citing *Las Cruces TV Cable v. FCC*, 645 F.2d at 1047).

⁵⁴ *Las Cruces TV Cable v. FCC*, 645 F.2d at 1046-47 (In a case subsequent to *Am. Tel. Relay, Inc.*, the court mentioned equity in determining the amount of refunds to be given to “customers of the carrier.”); *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d at 1240 (citing the *Las Cruces* court’s statement about “equitable considerations” in reviewing the time used for calculating the amount of a refund, not which companies should receive payments).

⁵⁵ Verizon Mar. 28, 2022 *Ex Parte* Letter (citing *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1106-08 (D.C. Cir. 1987)); 47 U.S.C. § 154(i).

⁵⁶ *New England Tel. & Tel. Co. v. FCC*, 826 F.2d at 1107-08.

⁵⁷ *Id.* at 1109 (finding that once the Commission correctly determined a rate-of-return carrier had violated the Commission’s rules by charging rates higher than permissible, the Commission properly exercised its authority to require the carrier to issue refunds to its customers for the direct harm caused by the excessive rates at issue).

of the Act.⁵⁸ In both *FTC v. Stefanchik* and *FTC v. Febre*, the appellate courts agreed that the damage awards would include consumers' losses instead of just the defendants' profits.⁵⁹ But this proceeding is being conducted pursuant to section 204 of the Act, which concerns solely the tariffed rates charged by a carrier, not payments customers may have made to third parties or the disgorgement of profits.⁶⁰ Furthermore, the FTC cases cited by Verizon do not expand liability to include third parties; at most, they indicate that the FTC may take equitable considerations into account to determine damages.⁶¹ There are no "damages" in a tariff investigation, however; there are only refunds of amounts customers paid the carrier pursuant to that carrier's unlawful tariff provisions.⁶² Thus, *Stefanchik* and *Febre* have no precedential value here.⁶³

20. Verizon also relies on trademark infringement cases—*Klein-Becker USA, LLC v. Englert* and *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*—to support its efforts to expand the scope of this proceeding.⁶⁴ But Verizon's reliance on those cases is as misguided as its reliance on the FTC cases it cites. The trademark cases involved the disgorgement of profits, which was an equitable remedy available under the governing statute, the Lanham Act.⁶⁵ In *Klein-Becker USA, LLC*, the appellate court held that because the disgorgement of profits was an equitable remedy, the district court properly weighed principles of equity.⁶⁶ In this proceeding, by contrast, section 204 of the Act limits the Commission's authority to ordering refunds, regardless of any other considerations such as bad acts on the part of the carrier, or lost profits by the customer.⁶⁷ Thus, these trademark cases do not support Verizon's attempts to expand Northern Valley's financial liability, under section 204 of the Act.

21. Verizon's arguments that Northern Valley should reimburse it and other IXCs for payments they made to third-party providers or disgorge itself of amounts Northern Valley may have received from third parties, are not supported by the language of section 204 of the Act, the record in this proceeding, or the cases cited by Verizon. Tariff proceedings are generally not the vehicles for punitive damages. Verizon has other avenues it can pursue if it wants to seek damages from Northern Valley. We

⁵⁸ Verizon Opposition at 5 (citing *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997)).

⁵⁹ *FTC v. Stefanchik*, 559 F.3d at 931-32; *FTC v. Febre*, 128 F.3d at 536-37.

⁶⁰ 47 U.S.C. § 204.

⁶¹ *FTC v. Stefanchik*, 559 F.3d at 931 (discussing equity in considering the *amount* of relief); *FTC v. Febre*, 128 F.3d at 536 (discussing equity in considering the *amount* of relief); *Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1161-62 (10th Cir. 2013) (discussing equity in considering the *amount* of relief).

⁶² See *MCI Telecommunications Corp. v. Pacific Bell Tel. Co. et al.*, File No. E-88-46S et al., Memorandum Opinion and Order, 8 FCC Rcd 1517, 1521, para. 14 (1993) ("[R]efunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208.").

⁶³ Another case cited by Verizon, in which an agency other than the Commission considered equitable factors, was about determining who would disgorge insider trading profits, and has no relevance to this proceeding. Verizon Opposition at 6 & n.21 (citing *SEC v. Contorinis*, 743 F.3d 296, 302-04 (2d Cir. 2014)). Here, the payor is clear—it is the carrier, Northern Valley—and the remedy is clear—refunds under section 204 of the Communications Act.

⁶⁴ *Id.* (citing *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d 1343, 1359 (11th Cir. 2019) (trademark infringement); *Klein-Becker USA, LLC v. Englert*, 711 F.3d at 1161-63 (trademark infringement)).

⁶⁵ *Klein-Becker USA, LLC v. Englert*, 711 F.3d at 1161-63; *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d at 1358.

⁶⁶ *Klein-Becker USA, LLC v. Englert*, 711 F.3d at 1161, 1163. In *Hard Candy, LLC*, the appellate court similarly held that the disgorgement of profits was an equitable remedy, but that determination was made only to conclude that the plaintiff had no right to a jury trial—a determination that is completely irrelevant to this proceeding. *Hard Candy, LLC v. Anastasia Beverly Hills, Inc.*, 921 F.3d at 1348, 1359.

⁶⁷ 47 U.S.C. § 204.

therefore reject those arguments and limit Northern Valley's refund liability to the payments it received from its customers pursuant to the Revised Tariff.

22. *No Liability for SDN's Charges.* In its Refund and Payment Plan and Updated Refund and Payment Plan, Northern Valley included refund amounts "to carriers that paid [it] for tariffed access services" as well as amounts Commission staff asked it to calculate to show what "carriers paid for SDN's tariffed CEA [(centralized equal access)] service" during the Refund Period.⁶⁸ Northern Valley provided staff with the requested information to use if we decided to include refunds for amounts paid to SDN, pursuant to SDN's tariff. However, in keeping with the authority provided under section 204 of the Act, we find that Northern Valley is not required to reimburse carriers for services those carriers purchased from any third parties, including SDN.⁶⁹ The tariff investigation was limited to charges paid to Northern Valley by its customers pursuant to Northern Valley's Revised Tariff.⁷⁰ Therefore, any reimbursement of charges IXC's may have paid to SDN is beyond the scope of this proceeding.⁷¹ Accordingly, we remove from Northern Valley's Refund and Payment Plan, as well as the Updated Refund and Payment Plan, any proposed payments to IXC's designed to reimburse those IXC's for the charges they paid to SDN.

23. *Comments of SDN.* In its comments, SDN complains about commercial and financial issues it has with Northern Valley's actions, and argues that the Commission should "ensure that SDN is able to bill IXC's and receive payment for the continued use of its tandem."⁷² SDN's complaints are unrelated to the refunds that are the subject of this Order. In fact, they are beyond the scope of this tariff investigation proceeding. As a result, we do not address the merits of those complaints here.

24. In sum, we reject Verizon's and SDN's attempts to expand this proceeding beyond the refunds of charges paid pursuant to Northern Valley's Revised Tariff. If Verizon or SDN wants to pursue claims not addressed by this Order, they can consider bringing a complaint against Northern Valley in a forum in which they may seek damages beyond the refund liability that is the subject of this proceeding, as authorized by the Act.⁷³ Verizon appears to be aware that its requested remedy may be better suited to

⁶⁸ Refund and Payment Plan at 2-3, Exh. A (spreadsheet); Updated Refund and Payment Plan, Exh. A (spreadsheet).

⁶⁹ For these reasons, we also reject Verizon's suggestion that, by including amounts carriers paid to SDN in its Refund Plan, Northern Valley recognized that it should be required to make payments to Verizon and other IXC's for the amounts they paid for SDN's tariffed services. Verizon Oct. 8, 2020 *Ex Parte* Letter at 1-2; Verizon Opposition at 5; Refund and Payment Plan, Exh. A.

⁷⁰ *Northern Valley Tariff Investigation Order*, 35 FCC Rcd at 6199, 6220, paras. 2-3, 51-52 (explaining the process whereby Northern Valley filed its tariff, and the tariff was suspended and investigated, and determined to be unlawful, and the Commission directed the Bureau to determine any *refunds* that may be required); *see, e.g., July 1, 2018 Annual Access Charge Tariff Filings; South Dakota Network, LLC, Tariff F.C.C. No. 1*, WC Docket No. 18-100; Transmittal No. 13, Memorandum Opinion and Order, 34 FCC Rcd 1525, 1526, 1528-30, paras. 2, 8, 10, 12, 15 (2019) (focusing on SDN's proposed tariff revisions which were found to be unlawful); *Core Communications, Inc., et al. Tariff F.C.C. No. 3*, WC Docket No. 21-191, Transmittal No. 17, Memorandum Opinion and Order, FCC 21-109, at 13, para. 29 (Oct. 7, 2021) (explaining that "[p]ursuant to section 204 of the Act, the scope of a tariff investigation is limited to 'the lawfulness' of the 'revised charge . . . or practice' of the carrier being investigated," and pointing out AT&T's agreement that, in that case, "'Core's tariff, and Core's tariff alone, [was] under investigation'"), *appeal dismissed per stipulation, Coretel Delaware, Inc. v. FCC*, No. 21-3170 (3d Cir. Nov. 22, 2021).

⁷¹ *Northern Valley Tariff Investigation Order*, 35 FCC Rcd at 6220, para. 52; *see generally Alliant Energy Corp. v. FERC*, 253 F.3d 748, 754 n.7 (D.C. Cir. 2001) (suggesting that the agency is unable to order refunds of charges that were collected and retained by third parties).

⁷² SDN Comments at 2.

⁷³ 47 U.S.C. §§ 206-208 (the portions of the Communications Act that establish the rights of parties to bring complaints in court or to the Commission); *see Implementation of the Telecommunications Act of 1996 et al.*, CC

(continued....)

a complaint proceeding brought before the Commission pursuant to section 208 of the Act, yet still encourages us to grant its requests to “not needlessly duplicate proceedings when [the Commission] can grant complete relief in this [proceeding].”⁷⁴ We will not expand Northern Valley’s refund liability in this proceeding in the manner Verizon suggests.

B. Issuing Refunds

25. Northern Valley owes refunds for charges it collected pursuant to its unlawful tariff provisions while the Revised Tariff was in effect—that is, from January 11, 2020, through July 24, 2020.⁷⁵ The Refund and Payment Plan and the Updated Refund and Payment Plan showed refunds for amounts Northern Valley collected for bills issued from February 5, 2020, through June 5, 2020, covering services provided from January through May 2020.⁷⁶ Verizon objected to the omission of June and July 2020 charges from the refund calculations in the Refund and Payment Plan.⁷⁷ However, Northern Valley explained that it proposed refunds of the amounts it actually “collected,” and later specified that it stopped billing after the release of the *Northern Valley Tariff Investigation Order* in June 2020.⁷⁸ We accept Northern Valley’s responses for the purpose of determining the amounts to be refunded, and approve the Updated Refund and Payment Plan, as amended by this Order.⁷⁹

26. We find reasonable Northern Valley’s proposal to use the IRS non-corporate overpayment rate for calculating the applicable interest for refunds, because Northern Valley is a limited liability company and not a corporation.⁸⁰ As noted by Northern Valley, this rate is 5% compounded daily for January 2020 through June 30, 2020, and 3% compounded daily beginning July 1, 2020.⁸¹ The 3% rate ended on March 31, 2022.⁸² The IRS established non-corporate overpayment rates of 4% for

Docket No. 96-238, Notice of Proposed Rulemaking, 11 FCC Rcd 20823, 20874, para. 120 (1996) (noting that full discovery is available in federal court).

⁷⁴ Verizon Mar. 28, 2022 *Ex Parte* Letter at 3.

⁷⁵ Revised Tariff; Transmittal No. 14.

⁷⁶ Refund and Payment Plan, Exh. A; Updated Refund and Payment Plan, Exh. A.

⁷⁷ Verizon Opposition at 4 & n.14; Refund and Payment Plan, Exh. A (“Usage Month” column in the spreadsheet).

⁷⁸ Refund and Payment Plan at 3; Letter from G. David Carter, Counsel to Northern Valley Communications, LLC, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Apr. 8, 2022) (Northern Valley Apr. 8, 2022 *Ex Parte* Letter).

⁷⁹ Updated Refund and Payment Plan, Exh. A; Northern Valley Apr. 8, 2022 *Ex Parte* Letter. Northern Valley’s decision to stop billing its customers after its tariff revisions were deemed unlawful raises the question of whether that decision complied with section 203(c) of the Act, which requires carriers to charge the rates in their tariffs. 47 U.S.C. § 203(c). However, we find that issue to be outside the scope of this proceeding, which concerns the unlawfulness of Transmittal No. 12. Therefore, we do not address in this Order Northern Valley’s decision to stop billing its customers.

⁸⁰ Updated Refund and Payment Plan, Exh. A (columns labeled “j” and “n”); Refund and Payment Plan at 3; *cf. July 1, 2018 Annual Access Charge Tariff Filings; South Dakota Network, LLC, Tariff F.C.C. No. 1*, WC Docket No. 18-100; Transmittal No. 13, Memorandum Opinion and Order, 34 FCC Rcd 3671, 3672, para. 5 (WCB 2019) (*SDN Refund Order*) (using the IRS non-corporate overpayment rate for calculating the applicable interest); *1993 Annual Access Tariff Filings; 1994 Annual Access Tariff Filings*, CC Docket No. 93-133 et al., Order, 20 FCC Rcd 6077, 6086-87, para. 18 & n.69 (WCB 2005) (accepting the IRS corporate overpayment rates for corporations making refunds, and acknowledging that the “non-corporate overpayment rate would apply to any entity that did not purchase access as a corporation”). No commenters objected to the use of the IRS non-corporate overpayment rate.

⁸¹ Refund and Payment Plan at 3; *see also* IRS Non-Corporate Rate for Overpayments and Underpayments (Table of Interest Rates from January 1, 1999 - Present Noncorporate Overpayments and Underpayments, showing the rates from January 2020 forward).

⁸² IRS Non-Corporate Rate for Overpayments and Underpayments (Table of Interest Rates from January 1, 1999 - Present Noncorporate Overpayments and Underpayments).

April 1, 2022, through June 30, 2022, 5% for July 1, 2022, through September 30, 2022, and 6% for October 1, 2022 through December 31, 2022.⁸³ Although in its Updated Refund and Payment Plan, Northern Valley projected a payment date of March 31, 2022, this Order is being released after that date.⁸⁴ Accordingly, we direct Northern Valley to pay interest on the refund amounts due to each affected IXC from the date of that IXC's first payment to Northern Valley, until the date Northern Valley pays the full refund amount due to that IXC.⁸⁵ Northern Valley must compute interest compounded on a daily basis at the applicable IRS non-corporate overpayment rate, as reflected in Northern Valley's Updated Refund and Payment Plan and supplemented by the new IRS non-corporate overpayment rates of 4% for April 1, 2022, through June 30, 2022, 5% for July 1, 2022, through September 30, 2022, and 6% for October 1, 2022 through December 31, 2022.

27. We do not order Northern Valley to make payments to IXCs for services provided by SDN. We grant AT&T's Motion to Withdraw, and therefore do not consider AT&T's Comments on the Refund and Payment Plan, and no refunds or other payments shall be made to AT&T.⁸⁶ We direct Northern Valley to issue the refunds in the form of checks payable to the affected IXCs, as Northern Valley proposed in the Refund and Payment Plan.⁸⁷

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to sections 5 and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 155 and 201-205, and through the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 CFR §§ 0.91 and 0.291, that the updated refund plan filed by Northern Valley Communications, LLC, on March 3, 2022, as amended, in part, herein, and subject to the application of interest as delineated in paragraph 26 of this Order, IS APPROVED.

29. IT IS ORDERED that AT&T's Motion to Withdraw Comments, filed September 20, 2021, IS GRANTED.

30. IT IS ORDERED that Northern Valley Communications, LLC, must issue refund checks in accordance with this Memorandum Opinion and Order within 45 days of the release date of this Memorandum Opinion and Order.

⁸³ *Id.* (Table of Interest Rates from January 1, 1999 - Present Noncorporate Overpayments and Underpayments, showing the rates for April 1, 2022, through December 31, 2022).

⁸⁴ Updated Refund and Payment Plan at 1.

⁸⁵ See *SDN Refund Order*, 34 FCC Red at 3672, para. 5 ("Requiring SDN to pay interest on refund amounts due to each affected customer until it has paid the full amount due to that customer removes any incentive to delay refund payments.").

⁸⁶ Updated Refund and Payment Plan at 1; AT&T Motion to Withdraw Comments at 1.

⁸⁷ Refund and Payment Plan at 3.

31. IT IS ORDERED pursuant to section 1.102(b) of the Commission's rules, 47 CFR § 1.102(b), that this MEMORANDUM OPINION AND ORDER shall be EFFECTIVE ON RELEASE.

FEDERAL COMMUNICATIONS COMMISSION

Trent Harkrader
Chief
Wireline Competition Bureau