IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11-2268 (consolidated with 11-2568) & 11-1204 (consolidated with 11-2569)

PAETEC COMMUNICATIONS, INC. ET AL.,

PLAINTIFFS – COUNTERCLAIM DEFENDANTS - APPELLEES – CROSS-APPELLANTS,

V.

MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES;
VERIZON GLOBAL NETWORKS INC.,

DEFENDANTS – COUNTERCLAIM PLAINTIFFS – APPELLANTS – CROSS-APPELLEES.

On Appeal and Interlocutory Review Under 28 U.S.C. § 1292(b) from the United States District Court for the Eastern District of Pennsylvania, No. 09-cv-1639 (SD)

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At this Court's invitation, the Federal Communications Commission ("FCC" or "Commission") respectfully files this brief as amicus curiae.

STATEMENT OF INTEREST

The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* ("the Act"). The FCC has an interest in ensuring that the Act, its implementing rules, and its precedents are correctly interpreted.

QUESTIONS PRESENTED

This Court, pursuant to its Order dated January 25, 2012, invited the FCC to set forth its position on four questions:

1. Is a [CLEC] authorized under the regulations codified at 47 C.F.R. § 61.26 *et seq.*, and the FCC's rulings in the *Eighth Report and Order*, 19 FCC Rcd. 9108 (2004), to include a tandem-switch fee in the composite switched access rate it charges to long-distance carriers for calls to and from the CLEC's end-users in either of the following situations: (a) when the CLEC provides an indirect connection to its end-office switch, and subtends a third party tandem switch?; or [(b)] when the CLEC provides a direct connection to its end-office switch? In neither situation does the CLEC directly operate a tandem switch.

   Answer: As explained in Argument Section I below, the FCC believes the answer to both parts of the question is no.

2. Whether a tariff intended to be filed on a "streamlined basis" pursuant to 47 U.S.C. § 204(a)(3), but received by the FCC 14 days before the "effective date" printed on the tariff, can be "deemed lawful" (*e.g.*, by tolling the "effective date" one day forward to provide a 15 day notice period)?

   Answer: As explained in Argument Section II below, the FCC believes

the answer is no.

3. Whether a CLEC's switched access tariff, filed on a "streamlined" basis pursuant to 47 U.S.C. § 204(a)(3) but subsequently found to violate the FCC's benchmark, can enjoy "deemed lawful" status? Or, is that tariff subject to the mandatory detariffing rule announced in the *Seventh Report and Order*, 16 FCC Rcd. 9923 (2001)?

   Answer: As explained in Argument Section III below, the FCC believes the answer is no to the first question, and yes to the second question.

4. Whether a CLEC is subject to overcharge liability despite charging the rates specified in its "deemed lawful" tariff schedule, when those rates are subsequently found to violate the FCC's benchmark and the tariff contains a provision stating that "notwithstanding any other provision … the rate for Switched Access Service shall equal the maximum rate permitted under 47 C.F.R. § 61.26"?

   Answer: As explained in Argument Section IV below, the FCC believes a CLEC could be subject to overcharge liability under 47 U.S.C. § 203(c) of the Act if the CLEC violates the terms of its tariff.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

1. The Act directs the FCC to ensure that rates for telecommunications services are "just and reasonable," 47 U.S.C. § 201(b), and not unjustly or unreasonably discriminatory. 47 U.S.C. § 202(a). In certain circumstances, a carrier is required to file "schedules of charges" (*i.e.*, "tariffs") with the FCC setting forth the rates (as well as other terms and conditions) upon which it will provide service to customers. 47 U.S.C. § 203(a). When a carrier files a tariff, it may charge only the rate specified in that tariff. *Id.* § 203(c). The

Act, moreover, provides the FCC various tools to ensure that tariffed rates are just and reasonable, as required by section 201(b) of the Act.[1]

Courts have drawn a distinction between "legal" and "lawful" tariffs. "A *legal* tariff is procedurally valid – it has been filed with the Commission, the Commission has allowed it to take effect, and it contains the published rates the carrier is permitted to charge." *Virgin Islands Tel. Corp. v. FCC,* 444 F.3d 666, 669 (D.C. Cir. 2006) ("*Vitelco*") (internal quotations and citations omitted). "A *lawful* tariff," by contrast, "is a tariff that is not only legal, but also contains rates that are 'just and reasonable' within the meaning of § 201(b)." *Id.* (emphasis added).

A legal tariff can become substantively lawful if it is so adjudged in a hearing before the FCC, *see* 47 U.S.C. § 204(a)(1), or it can be "deemed lawful" if it is filed pursuant to a "streamlined" procedure specified in 47 U.S.C. § 204(a)(3). Under that provision, a tariff filed on a streamlined basis "shall be deemed lawful and shall be effective 7 days [for a rate decrease] and

[1] *See, e.g.,* 47 U.S.C. § 205 (the FCC may prescribe a just and reasonable rate "to be thereafter observed" if it determines after a hearing that a carrier's tariffed rate is unlawful); 47 U.S.C. § 208 (the FCC must investigate claims about the lawfulness of rates set forth in effective tariffs); 47 U.S.C. § 206 (the FCC may award damages to a complainant if it finds that a carrier's tariffed rates are unlawful); 47 U.S.C. § 204(a)(1) (the FCC may suspend a new or revised tariff before it becomes effective).

15 days [for a rate increase] after the date on which it is filed with the Commission unless the Commission takes action … before the end of that 7-day or 15-day period."

"A carrier charging a merely *legal* rate may be subject to refund liability if customers can later show that the rate was unreasonable." *ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 411 (D.C. Cir. 2002); *see also Vitelco,* 444 F.3d at 669. "A carrier charging rates under a lawful tariff, however, is immunized from refund liability, even if that tariff is found unlawful in a later complaint [under 47 U.S.C. § 208] or rate prescription proceeding [under 47 U.S.C. § 205]." *Vitelco*, 444 F.3d at 669.

In certain circumstances, the Commission has exercised its authority under 47 U.S.C. § 160 to forbear from applying the tariff provisions in the Act (including, but not limited to, § 204) and the FCC's implementing regulations. *See, e.g., Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* 16 FCC Rcd 9923, 9956-58 (¶¶ 82-87) (2001) ("*Seventh Report and Order*"); *Petitions of AT&T, Inc. and BellSouth Corp. for Forbearance,* 22 FCC Rcd 18705, 18729 (¶ 42) (2007) ("*AT&T Forbearance Order*"). One exercise of the Commission's forbearance authority has involved a procedure known as "mandatory detariffing." Under that procedure, carriers are *prohibited* from filing tariffs

with the FCC. Instead, they must negotiate rates with their customers without resort to section 203 of the Act and the FCC's rules governing tariffs.[2]

2. This case involves interstate switched "access service" – the service that local telephone companies ("local exchange carriers" or "LECs") provide to connect their end-user subscribers with interexchange carriers ("IXCs") when such subscribers make or receive long-distance calls. The FCC's rules generally require LECs to file tariffs with the Commission that establish the rates, terms, and conditions for their interstate access services, subject to certain exceptions. *See, e.g.*, 47 C.F.R. § 69.1(b).

a. "Historically," the "access charges" levied by incumbent local exchange carriers ("ILECs") "have been the product of an extensive regulatory process." *Seventh Report and Order*, 16 FCC Rcd at 9939 (¶ 41). "This process," the FCC has found, "yield[s] presumptively just and reasonable rates." *Id.* Competing LECS ("CLECs"), by contrast, were "largely unregulated in the manner in which they set their access rates" until 2001, when the FCC adopted the *Seventh Report and Order*. *Id.* at 9931

[2] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Second Report and Order, 11 FCC Rcd 20730 (1996), *recon.,* Order on Reconsideration, 12 FCC Rcd 15014 (1997), *further recon.*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *aff'd, MCI WorldCom, Inc. v. FCC,* 209 F.3d 760 (D.C. Cir. 2000).

(¶ 21). In that *Order*, the FCC "limit[ed] the application of [its] tariff rules to CLEC access services" after finding that some CLECs were "us[ing] the regulatory process to impose excessive access charges on IXCs and their customers." *Id.* at 9924-25 (¶ 2); *see also id.* at 9934 (¶ 27). This anticompetitive practice was possible because the market for these services did not allow competition to discipline rates and CLECs thus enjoyed a monopoly over access charges: in order to originate and terminate long distance traffic, the IXC has no choice but to use the local network of the LEC serving the end-user customer. *See id.* at 9934-36 (¶¶ 28-32).

Responding to the record evidence, the FCC expressed "concern[] that … permitting CLECs to tariff any rate they choose may allow some CLECs inappropriately to shift onto the long distance market … a substantial portion of the CLECs' start-up and network build-out costs." *Id.* at 9936 (¶ 33). That, in turn, "may promote economically inefficient entry into the local markets and may distort the long distance market." *Id.*

"[T]o eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services," the FCC used its forbearance authority under 47 U.S.C. § 160 to impose a "detariffing regime". *Id.* at 9925 (¶ 3). "CLEC access rates that are at or below [a] benchmark … will be presumed to be just and reasonable" and "CLECs may

impose them by tariff." *Id.* But "[a]bove the benchmark," the FCC held that "CLEC access services will be mandatorily detariffed." *Id.; see also id*. at 9938-40, 9956 (¶¶ 40-44, 82). Thus, under this mandatory detariffing regime, a CLEC "must negotiate higher rates with IXCs" outside the tariff process set forth in the Act and the FCC's implementing regulations. *Id.* at 9925 (¶ 3).

The FCC explained that the "benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area." *Id.* at 9941 (¶ 45); *see also* 47 C.F.R. § 61.26(c). The FCC capped CLEC switched access charge rates at those of the competing ILECs because ILEC rates are "presumptively just and reasonable." *Id.* at 9939 (¶ 41). In "moving CLEC tariffs to the 'rate of the competing ILEC,'" the FCC clarified that it "d[id] not intend to restrict CLECs to tariffing solely the per-minute rate that a particular ILEC charges for its switched, interstate access service." *Id.* at 9945 (¶ 54). "The only requirement," the FCC explained, "is that the aggregate charge for these services, however described in [CLEC] tariffs, cannot exceed our benchmark." *Id.* at 9946 (¶ 55).

In the *Seventh Report and Order*, the FCC did not immediately require CLECs to reduce their interstate access rates to the switched access rate of the competing ILEC. Instead, it imposed transitional benchmark rates that

dropped from 2.5 cents per minute to 1.2 cents per minute over the course of three years. *Id.* at 9944-45 (¶ 52); *see also* 47 C.F.R. § 61.26(c). It was only at the end of the transition period, which ended on June 21, 2004, that a CLEC's tariffed interstate access rates were capped at the benchmark rate (*i.e.*, the switched access rate of the competing ILEC). *Id.*

The FCC codified these requirements at 47 C.F.R. § 61.26.

b. Three years after the *Seventh Report and Order*, in 2004, the FCC rejected a request by Qwest Communications Corporation, an IXC, to clarify that "the benchmark rate should be … reduced" when "a carrier other than the [C]LEC" provides part of the switched access services necessary to deliver a long-distance call. *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* 19 FCC Rcd 9108, 9113 (¶ 10) (2004) ("*Eighth Report and Order*"). The FCC held that, so long as the CLEC was providing local telephone service to the person who received that call (the "end user"), the CLEC could tariff a rate equal to the full benchmark rate. *Id.* at 9114 (¶ 13). At the same time, the FCC rejected a request by NewSouth Communications, Inc., a CLEC, to declare "that a [C]LEC should be permitted to charge for all of the competing [I]LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing [I]LEC's tandem." *Id.*

at 9118 (¶ 20).[3] The FCC instead "clarif[ied] that the competing [I]LEC switching rate" used as the benchmark "is the end office switching rate when a [C]LEC originates or terminates calls to end-users and the [ILEC] tandem switching rate when a [C]LEC passes calls between two other carriers." *Id.* at 9119 (¶ 21).

c. A subsequent FCC order reiterated that a CLEC may only charge an IXC for tandem switching when it actually provides tandem switching. *See Access Charge Reform*, 23 FCC Rcd 2556, 2564 (¶ 26) (2008) ("*Clarification Order*"). In that order, the FCC clarified that the earlier *Eighth Report and Order* "does not prevent [C]LECs from charging for both tandem and end office switching when these functions are provided by separate switches." *Id.* Acknowledging its earlier holding that a CLEC may only charge an IXC a single switching rate (*i.e.,* either tandem or end office switching, whichever is applicable) when it uses one switch to provide interstate access service, the FCC found that "[w]hen a [C]LEC performs both functions, … using two separate switches, it may charge for both functions, as would an [I]LEC." *Id.*

[3] A switch is a device used to route telephone calls to their destinations. An end-office switch is a type of switch located in a LEC central office; it serves as the network entry point for the loops, or transmission facilities, that connect a residence or business to the Public Switched Telephone Network. A tandem switch is an intermediate switch located between the end-office switch and the final destination of the call.

II. THE PROCEEDINGS BELOW

1. PAETEC Communications, Inc. ("PAETEC") is a CLEC. Its provision of interstate switched access services to IXCs, including Verizon Business Services ("Verizon"), is governed by PAETEC Tariff No. 3 on file with the FCC. Pls. Br. 18; Defs. Br. 15. Two of those services are in dispute: (1) Switched Access Service ("SWAS"), which applies to long-distance calls that an IXC routes to PAETEC indirectly through an ILEC's tandem switch, and (2) Switched Access Service (Direct Connection) ("SWAS-DC"), which applies to long-distance calls that an IXC routes directly to PAETEC's switch. Pls. Br. 18; Defs. Br. 16-17. Since August 2, 2006, PAETEC has charged a single "composite" rate for SWAS and SWAS-DC, and as relevant to this case, those rates include a charge for tandem switching that is equivalent to the competing ILEC's rate for tandem switching. Pls. Br. 18-19; Defs. Br. 18.

2. On April 17, 2009, PAETEC filed a complaint in which it sought to collect SWAS and SWAS-DC charges that IXC Verizon had disputed and failed to pay. In ruling on cross-motions for summary judgment, the court below interpreted the FCC's rules to permit a CLEC to charge an IXC for tandem switching where the CLEC routes its calls to its own end-user customers through an ILEC tandem switch. (App. 92). Accordingly, the

district court found that PAETEC's SWAS rates complied with the benchmark rate in Rule 61.26. (App. 92). By contrast, where an IXC connects directly to a CLEC switch, the court held that a CLEC may not charge for tandem switching and, as a consequence, that PAETEC's SWAS-DC rate exceeded the benchmark rate in Rule 61.26(c). (App. 92-96).

The district court then addressed two further issues concerning PAETEC's SWAS-DC rates. First, the court found that PAETEC's SWAS-DC rates were not deemed lawful for the period beginning December 24, 2008, because PAETEC's tariff for that period provided the FCC with only 14 days' notice, not the 15 days required by 47 U.S.C. § 204(a)(3). (App. 102-105). Second, it held that PAETEC's SWAS-DC rates for the period August 2, 2006 through December 24, 2008 (App. 24) were "deemed lawful," despite the fact that the FCC's regulations "forbid[] CLECs from filing tariffs in excess of the Benchmark" in Rule 61.26(c). (App. 59-63).

ARGUMENT

An "agency's reading of its own rule is entitled to substantial deference." *Riegel v. Medtronic, Inc.,* 552 U.S. 312, 328 (2008). Indeed, an agency's construction of its own rule is "controlling" when, as in this case, the interpretation reflects a "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S.

452, 461-62 (1997). This rule of deference applies to the FCC's interpretation of its own regulations, as set forth in an amicus brief that (like this brief) reflects the agency's fair and considered view on the question. *Talk Am.*, *Inc. v. Michigan Bell Tel. Co.,* 131 S.Ct. 2254, 2261 (2011) (deferring to FCC rule interpretation contained in amicus brief).

I. IF A CLEC DOES NOT PROVIDE TANDEM SWITCHING, IT MAY NOT CHARGE FOR TANDEM SWITCHING.

Under the rules at issue in this case, if a CLEC does not provide tandem switching functionality, the CLEC may not include a tandem-switching charge in the interstate switched access rates it levies on IXCs for calls to and from the CLEC's end-user customers. This common-sense interpretation – that a carrier may charge only for services that it actually provides – applies irrespective of how the CLEC interconnects with the IXC (*i.e.,* "directly" or "indirectly," as described in Question 1) or how it elects to bill the IXC (*i.e.,* through a composite rate or individual rate elements).

The FCC decided this issue in the *Eighth Report and Order*, where it rejected NewSouth's proposal "that a [C]LEC should be permitted to charge for all of the competing [I]LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing [I]LEC's tandem." *Id.* at 9118 (¶ 20). In that *Order*, the FCC explained that its "long-standing policy with respect to [I]LECs is that they

should charge only for those services that they provide." *Id.* at 9118-19 (¶ 21). The FCC noted that "[u]nder this policy, if an [I]LEC switch is capable of performing both tandem and end office functions, the applicable switching rate should reflect only the function(s) actually provided to the IXC." *Id.* It then reasoned that "a similar policy should apply to [C]LECs." *Id.*

The FCC's *Clarification Order* supports this conclusion. There, the FCC considered the applicable benchmark rate where a CLEC uses both a tandem switch and an end-office switch to connect calls from IXCs to its end-user customers. Citing paragraph 21 of the *Eighth Report and Order*, the FCC reiterated that "where a single switch is capable of providing tandem and end office functions, … [C]LECs can charge the end office switching rate when they originate or terminate calls to end users, and the tandem switching rate when they pass calls between two other carriers." *Id.*, 23 FCC Rcd at 2565 (¶ 26). Yet it also emphasized that "[w]hen a [C]LEC performs both functions, … using two separate switches, it may charge for both functions, as would an [I]LEC." *Id.*[4]

[4] Verizon thus reaches the right result under the wrong theory in this case. Relying on paragraph 19 of the *Eighth Report and Order*, Verizon claims that paragraph 13 applies only to the transitional benchmark rates, whereas

Footnote continued on the next page.

The first question this Court has posed to the FCC appears to perceive some tension between paragraphs 13 and 21 of the *Eighth Report and Order*, 19 FCC Rcd at 9114, 9118-19 (¶¶ 13, 21). *See* Jan. 25, 2012 Order at 1, n.1. Properly construed, however, the two paragraphs are harmonious. In paragraph 13 of that *Order*, the FCC "den[ied] Qwest's request for clarification that the full benchmark rate is not available in situations when a [C]LEC does not provide the entire connection between the end user and the IXC." *Id.* at 9114 (¶ 13). The FCC so held in order to enable a CLEC to charge the "full benchmark rate" in Rule 61.26(c), 47 C.F.R.§ 61.26(c), in the circumstance where a CLEC and an ILEC provide the same access element (*e.g.,* tandem switching) in the call path between an IXC and the CLEC's end-user customer. Paragraph 21 is thus entirely consistent with paragraph 13 in that it also holds that a CLEC may charge an IXC for the services it actually provides – or, more specifically, a CLEC may charge for tandem switching when it provides tandem switching in addition to end-office switching to terminate an IXC's long-distance traffic with the CLEC's end-

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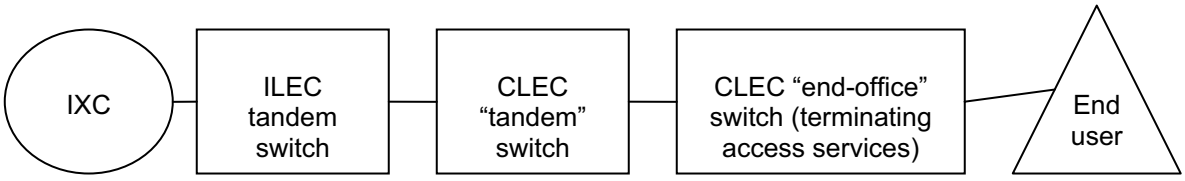
paragraph 21 of that *Order* and the subsequent *Clarification Order* apply to the final benchmark rate. Defs. Br. 41-44. The *Eighth Report and Order* does not establish such a dichotomy. Paragraph 19 explains that "the arguments presented by Qwest to support its request are equally applicable to the transitional benchmark rates" and the final benchmark rates. 19 FCC Rcd at 9117-18.

user customers. *Id.* at 9118-19 (¶ 21); *see also Clarification Order,* 23 FCC Rcd at 2564 (¶ 26).

By way of example, an IXC could send its traffic through two tandem switches to reach an end user customer served by a CLEC. As shown in the diagram below, the IXC would interconnect with an ILEC tandem switch, which would be interconnected with a CLEC's switch. A call from the IXC to the CLEC end user customer would thus pass through the ILEC's tandem switch, to the CLEC's switch, and then to a different CLEC switch before being terminated with the end user customer. In that circumstance, the CLEC is performing all of the functions encompassed by the full benchmark rate (from tandem switching to termination with the end user customer), even though there also is an ILEC performing some functions between the IXC and the CLEC.



Qwest's request for clarification effectively asked the FCC to determine that an IXC is *never* required to pay a CLEC for tandem switching where that service is provided by a different carrier, including in the scenario described above. Specifically, Qwest argued that "when one or more of the

services necessary to originate or terminate an interexchange call is provided by a carrier other than a [C]LEC, … the benchmark rate should be correspondingly reduced." *Eighth Report and Order,* 19 FCC Rcd at 9113 (¶ 10). So, for example, "where the [I]LEC still provides tandem switching," Qwest asserted that "the IXC should have to pay that charge to the [I]LEC only, and not to both the [I]LEC and the [C]LEC" – even where the CLEC also provides tandem switching service with its own switch.[5] *Id.* The FCC, in paragraph 13, disagreed. "When a [C]LEC originates or terminates traffic to its own end users," the FCC explained, "it is providing the functional equivalent of those services, even if the call is routed from the [C]LEC to the IXC through an [I]LEC tandem." *Eighth Report and Order,* 19 FCC Rcd at 9114 (¶ 13). Paragraph 13 thus confirms the common-sense principle that where a CLEC provides a functionality such as tandem switching, it can charge for it, even if an ILEC also provides the same functionality in the call path between an IXC and a CLEC end-user customer.

[5] Qwest specifically argued that "if an ILEC provides (and directly bills an IXC for) tandem switching used to originate and terminate long distance calls to a CLEC's end user [customers], the ILEC's rate for tandem switching should be subtracted from the 'competing ILEC rate' used in the applicable benchmark," irrespective of whether the CLEC also provides tandem switching to complete the long-distance call. *See* Qwest Communications Corporation Petition for Clarification Or, In the Alternative, Reconsideration, CC Docket No. 96-262 at 3 (filed June 20, 2001).

Contrary to PAETEC's position, Paragraph 13 of the *Eighth Report and Order* does not support the counter-intuitive proposition that a CLEC may charge an IXC for tandem switching when it does not provide that service. *See* Pls. Br. 30. PAETEC misconstrues that paragraph when it broadly asserts that "the FCC confirmed that a CLEC can charge a composite rate based on the aggregate total of what an ILEC charges, *specifically including the ILEC's charge for the ILEC tandem switch,* even if the CLEC does not itself use a tandem switch to deliver its access service." Pls. Br. 18.[6] In so arguing, PAETEC overlooks that the FCC's holding in paragraph 13 of the *Eighth Report and Order* is qualified: "because there *may* be situations" (such as the relatively rare double-tandem scenario described above) "when a [C]LEC does not provide the entire connection between the end user and the IXC, but is nevertheless providing the functional equivalent of the [I]LEC interstate exchange access services, we deny Qwest's petition." *Id.* (emphasis

[6] Relying on rule 61.26(a)(3), as quoted in paragraph 13 of the *Eighth Report and Order,* PAETEC contends that "when CLECs deliver switched access service, the CLECs are providing the functional equivalent of all the elements – including tandem switching – that ILECs may use to provide switched access service." Pls. Br. 28. That statement is correct only insofar as the CLEC actually provides the IXC with the access service elements listed in the rule. To the extent that the CLEC does not provide those service elements, PAETEC's interpretation would violate the FCC's "long-standing policy" that LECs "should charge only for those services that they provide." *Eighth Report and Order,* 19 FCC Rcd 9118 (¶ 21).

added). Instead, PAETEC effectively replaces the qualified "may" in paragraph 13 with an unqualified "will," so that in PAETEC's view a CLEC "will" be permitted to charge an IXC the full benchmark rate in *any* "situation[] when a [C]LEC does not provide the entire connection between the end user and the IXC." *Id.* This reading is contrary to the text of the *Eighth Report and Order* and it is impossible to square with the FCC's holding in paragraph 21 that CLECs "should charge only for those services that they provide." *Id.* at 9118 (¶ 21).[7]

The district court thus erred when it found that a CLEC may charge IXCs for tandem switching if it provides an indirect connection to its end-

[7] PAETEC claims that this interpretation would "nullify" the distinction between "the amount a CLEC can charge when it is acting as an intermediate carrier from the amount a CLEC can charge when it is serving its own end-user customers." Pls. Reply 9, citing 47 C.F.R. § 61.26(b), (c), and (f). Not so. The FCC added new subsection (f) to Rule 61.26 in the *Eighth Report and Order,* 19 FCC Rcd at 9117 (¶ 18), to address confusion surrounding application of the benchmark rate when a CLEC is *not* serving the end-user customer. Some carriers, including PAETEC's predecessor in interest, argued that CLECs "should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end user to an IXC." *Id.* at 9115 (¶ 14). The FCC disagreed, explaining "that the rate that a [C]LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing [I]LEC for the same functions." *Id.* at 9116 (¶ 17). Subsection (f), which codified that holding, was therefore necessary to clarify that CLECs that do not serve end-user customers (like those that do) "should charge only for those services that they provide." *Id.* at 9118 (¶ 21).

office switch (*i.e.,* when the CLEC's end office switch subtends a third-party's tandem switch). As both PAETEC and Verizon point out (Defs. Br. 39-45; Pls. Br. 45-46; Pls. Reply 17), the FCC's rules and orders do not establish different benchmark rates based on the manner in which the CLEC and the IXC interconnect. Rather, the FCC's orders have established a single benchmark rate, and that rate is computed based on the ILEC's rates for the services that a CLEC actually provides an IXC. *Eighth Report and Order,* 19 FCC Rcd at 9118 (¶ 21); *Clarification Order,* 23 FCC Rcd 2565 (¶ 26). The district court's holding undermines that policy because it would allow a CLEC to charge an IXC the ILEC rate for tandem switching provided by the ILEC, and not the CLEC itself.

For similar reasons, there is no merit to PAETEC's contention that a CLEC may charge an IXC for tandem switching, so long as it charges the IXC a "composite rate" (*i.e.,* a single, combined rate) for exchange access rather than an individual tandem switching rate element. Pls. Br. 23-24, 37-41; Pls. Reply 18-23. This novel distinction finds no support in the FCC's rules and orders. For example, FCC Rule 61.26 defines a single rate benchmark – and that benchmark does not vary based on how the CLEC elects to bill an IXC. *See* 47 C.F.R. § 61.26(a)(5) ("The *rate* for interstate switched exchange access services shall mean the composite, per-minute rate

for these services, including all applicable fixed and traffic-sensitive charges.") (emphasis added). Similarly, in the *Seventh Report and Order,* 16 FCC Rcd at 9946 (¶ 55), the FCC explained that "[t]he only requirement is that the aggregate charge for these services, however described in [CLEC] tariffs, cannot exceed our benchmark." In other words, the rate *structure* a CLEC chooses for its tariff has no bearing on the maximum rate *level* established by Rule 61.26(c).

PAETEC's position is also inconsistent with the FCC's holdings in the *Eighth Report and Order* (19 FCC Rcd at 9118-19 (¶ 21)) and the *Clarification Order* (23 FCC Rcd 2565 (¶ 26)). The FCC in those decisions held that where a CLEC uses a single switch for access service, it may only charge an IXC a single switching rate (*i.e.,* either tandem or end office switching, but not both). *Clarification Order,* 23 FCC Rcd 2565 (¶ 26); *see also Eighth Report and Order,* 19 FCC Rcd at 9118-19 (¶ 21). It would be contrary to those orders to find that a CLEC may include in its composite rate a tandem switching fee that it would be prohibited from billing separately.

Indeed, PAETEC's element-specific pricing versus composite rate distinction is inconsistent with its own theory of the case. Throughout its briefs, PAETEC claims that the FCC permits CLECs to charge IXCs for tandem switching that they concededly do not provide in order to "foster the

equality of access charge revenue" between ILECs and CLECs. Pls. Br. 24; *see also id.* at 17, 46-47; Pls. Reply at 15.[8] That claim is incorrect: the FCC enacted the CLEC access charge regime at issue to address the CLECs' misuse of market power by "eliminat[ing] from [its] rules opportunities for arbitrage and incentives for inefficient market entry." *Seventh Report and Order,* 16 FCC Rcd at 9936 (¶ 33); *see also id.* at 9924 (¶¶ 2-3). But even assuming *arguendo* that the FCC intended to maximize CLEC access charge revenue, it would make little sense for the Commission to enact regulations that force CLECs to charge less simply because they elect "a la carte" or element-specific pricing over a single, composite price.

II. A TARIFF FILED ON FEWER THAN 15 DAYS' NOTICE IS NOT ENTITLED TO "DEEMED LAWFUL" STATUS UNDER 47 U.S.C. § 204(a)(3).

A tariff filed in a streamlined manner pursuant to 47 U.S.C. § 204(a)(3) "shall be deemed lawful and shall be effective 7 days [for a rate decrease] or 15 days [for a rate increase] after the date on which it is filed with the

[8] In practice, PAETEC's theory actually promotes revenue inequality. Under PAETEC's theory, the CLEC could collect more than an ILEC for a given call because the ILEC can only charge an IXC for the services it provides, while a CLEC charging the composite rate would be permitted to bill an IXC for every access element listed in Rule 61.26(a)(3), even including elements it does not provide itself. Rather than equalize revenue opportunities between ILECs and CLECs, this would give the CLEC a competitive advantage over the ILEC.

Commission unless the Commission takes action … before the end of that 7-day or 15-day period." Therefore, a tariff proposing a rate increase will not be "deemed lawful" for purposes of section 204(a)(3) of the Act unless it is filed with 15 days' notice from its effective date.

Under the FCC rules then in effect,[9] a carrier must specify an effective date on the face of a new or revised tariff. *See* 47 C.F.R. § 61.23(a). The notice period required by section 204(a)(3) "begins on and includes the date the tariff is received by the Commission, but does not include the effective date." 47 C.F.R. § 61.23(b). Thus, in response to the Court's second question, Jan. 25, 2002 Order at 2, a tariff filed only 14 days before the carrier-designated "effective date" could not be "deemed lawful" under section 204(a)(3).

With respect to the Court's question about potential tolling of the "effective date," nothing in section 204(a)(3) of the Act or the FCC rules then in effect provides for such tolling. Contrary to PAETEC's claims, section 204(a)(3) does not set the effective date of the tariff filing "without regard to the 'Effective Date' written on the tariff pages being filed" so that a tariff

[9] 47 C.F.R. § 61.23, which was the operative rule at the time of this dispute, was removed from the Code of Federal Regulations effective November 17, 2011.

filed on a streamlined basis "'shall be deemed lawful' and 'shall be effective' 15 days after filing." Pls. Br. 64-65. Rather, the FCC's rules expressly provided that "[e]very proposed tariff filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least the number of days notice specified in this section." In other words, the tariff's effective date marked the end of the notice period, 47 C.F.R. § 61.23(a), and the carrier determined that "effective date" under the FCC's former rules by filing within the periods specified by section 204(a)(3).

Indeed, the FCC has unequivocally stated that "all LEC tariff transmittals, other than those that solely reduce rates, shall be filed on 15 days notice" to receive "deemed lawful" treatment. *Implementation of Section 402(b)(1) of the Telecommunications Act of 1996,* 12 FCC Rcd 2170, 2203 (1997) (¶ 68). Moreover, the agency repeatedly has held that tariffs filed outside the statutory notice period, while permitted by the FCC's rules and

precedent, do not qualify for "deemed lawful" treatment.[10] And this rule is widely understood by LECs.[11]

PAETEC's remaining arguments are no more persuasive. *See* Pls. Br. 65-66. As Verizon points out, PAETEC cannot rely on the FCC's treatment of tariffs filed during the 1995 federal government shutdown because "the government was not closed when PAETEC filed its December 2008 tariff"; rather, "PAETEC simply sent the tariff to the wrong address." Defs. Reply at 41. Likewise, PAETEC's reliance on cases involving contract interpretation and the FCC's rules requiring notice of discontinuance of service are inapposite because they do not involve the statutory notice requirements in section 204(a)(3) of the Act. Pls. Br. 65-66.

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[10] *See, e.g.*, *Administration of the North American Numbering Plan*, 20 FCC Rcd 2957, 2960 (¶ 7 n.31) (2005) (tariff filed on one day's notice was "not 'deemed lawful' under section 204(a)(3)"); *Protested Tariff Transmittal Action Taken*, 25 FCC Rcd 13327 (n.1) (Wir. Comp. Bur. 2010) (same for tariff filed on 16 days' notice); *Long-Term Telephone Number Portability Tariff Filings*, 14 FCC Rcd 3306, 3306-07 (¶ 2) (Com. Car. Bur. 1999) (same for tariff filed on 17 days' notice); *1997 Annual Access Tariff Filings*, 13 FCC Rcd. 5677, 5706 (¶ 78) (Com. Car. Bur. 1997) ("LEC tariffs not filed on either 7-days' or 15-days' notice will not be 'deemed lawful.'").

[11] *See, e.g.,* Letter from Consolidated Communications to FCC (Dec. 19, 2011) (conceding that a tariff filed on 16 days' notice is not subject to 47 U.S.C. § 204(a)(3)); Letter from Frontier Communications Solutions to FCC (Feb. 17, 2010) (explaining that "because the original tariff was not filed on 15 days' notice, Frontier foregoes … deemed lawful status.") (attached as Appendix A).

III. CLEC SWITCHED ACCESS RATES ABOVE THE BENCHMARK ARE SUBJECT TO MANDATORY DETARIFFING AND CANNOT BE "DEEMED LAWFUL" PURSUANT TO 47 U.S.C. § 204(a)(3).

A CLEC tariff for interstate switched access services that includes rates in excess of the benchmark in Rule 61.26 is subject to mandatory detariffing. Under that regime, a carrier is *prohibited* from filing a tariff; any attempt to do so would violate the FCC's rules and render the prohibited tariff *void ab initio* if filed with the Commission. *Cf. Global NAPS, Inc. v. FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) ("Merely because a tariff is presumed lawful upon filing does not mean that it is lawful"; rather, "[s]uch tariffs still must comply with the applicable statutory and regulatory requirements" and "[t]hose that do not may be declared invalid."). Thus, such a tariff cannot benefit from "deemed lawful" status pursuant to section 204(a)(3) of the Act.

In the *Seventh Report and Order*, 16 FCC Rcd at 9956 (¶ 82), the FCC explained:

> [A] CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark. During the pendency of these negotiations, or to the extent the parties cannot agree, the CLEC may charge the IXC only the benchmark rate. In order to implement this approach, we adopt mandatory detariffing for access rates in excess of the benchmark. That is, we exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark.

The FCC's implementing rule, 47 C.F.R. § 61.26(b)(1), specifies that "a CLEC *shall not* file a tariff for its interstate switched exchange access services that prices those services … higher [than t]he rate charged for such services by the competing ILEC" (emphasis added).

Section 204(a)(3) is one of "the Act's tariff requirements" subject to the FCC's forbearance action, so "deemed lawful" status under that statutory provision is not available for CLEC switched access charges above the benchmark in Rule 61.26(c). Indeed, in an analogous context, the FCC has explained that it utilizes mandatory detariffing to "restrict" a LEC's "ability to assert 'deemed lawful' status." *AT&T Forbearance Order,* 22 FCC Rcd at 18729 (¶ 42) (conditioning forbearance relief granted to AT&T on its not filing or maintaining any interstate tariffs for certain broadband services); *cf. Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, (47 U.S.C. § 160(c)), for Forbearance*, 22 FCC Rcd 16304, 16331-32 (¶¶ 59-61) (2007) (explaining that "the Commission imposed a permissive detariffing regime through [Rule] 61.26 that permits the filing of tariffs … where the rates are *at or below* a benchmark that is 'the rate of the competing ILEC,'" and holding that the relevant ILEC could "obtain deemed lawful treatment of its tariffed rates," if it "compli[ed] with the … condition … that the rates for [its]

switched access services not increase" above the benchmark rate) (emphasis added).

Relying on its forbearance authority under 47 U.S.C. § 160, the FCC found that the mandatory detariffing of above-benchmark rates would serve the public interest because "CLECs are positioned to wield market power with respect to access service." 16 FCC Rcd at 9957 (¶ 84). Mandatory detariffing, the FCC explained, "will provide greater assurance that [CLEC switched access charge] rates are just and reasonable and will likely prevent CLECs from using long distance ratepayers to subsidize their operational and build-out expenses." *Id.* at 9958 (¶ 86).

As noted above (*see* n.1), the FCC has authority to suspend and investigate streamlined tariffs filed pursuant to section 204(a)(3). *See* 47 U.S.C. § 204(a)(1). But it is not possible, as a practical matter, for the FCC to examine each of the hundreds of CLEC access tariffs filed with the agency within the 15 days before those tariffs go into effect. Once those tariffs become effective, moreover, the "deemed lawful" provision in the statute insulates the CLEC from refund liability should the FCC later find that its access rates exceed the benchmark in Rule 61.26. *Vitelco,* 444 F.3d at 669. That is why the FCC mandatorily detariffed CLEC access charge rates in excess of the benchmark: prohibiting those presumptively unreasonable

rates from being tariffed in the first instance better serves the public interest by according IXCs (and, ultimately, consumers) more protection from unreasonably high interstate access rates than attempting to identify such unreasonable rates on an *ad hoc* basis after the tariffs are filed. *See Seventh Report and Order*, 16 FCC Rcd at 9958 (¶¶ 86-87).

If the Court were to find that a CLEC access tariff that includes rates exceeding the benchmark can enjoy "deemed lawful" status, it would undermine the mandatory detariffing regime imposed by the FCC. *Cf. Global NAPS,* 247 F.3d at 259-60 (affirming FCC's determination that a CLEC's federal tariff was *void ab initio* because the FCC had not authorized the tariff filing and instead directed the carrier to negotiate intercarrier compensation rates with other LECs).[12]

[12] Relying on *Sprint Communications Co. L.P. v. Northern Valley Communications, LLC,* 26 FCC Rcd 10780, 10788 (¶ 17) (2011) ("*Northern Valley Order*"), PAETEC claims that "[a]bsent wrongdoing, deemed lawfulness applies." Br. 62. That is not the case with respect to CLEC switched access charge rates that exceed the benchmark rate in Rule 61.26(c). The *Northern Valley Order* did not address that issue, *see* 26 FCC Rcd at 10783-10788 (¶¶ 7-16), and Sprint (the complainant IXC) "admi[tted] [that] the Tariff rates [at issue] are no higher than the ILEC rates against which they are benchmarked pursuant to rule 61.26." *Id.* at 10788 (¶ 18).

IV. A CARRIER THAT VIOLATES ITS TARIFF CAN BE SUBJECT TO OVERCHARGE LIABILITY.

If a carrier fails to comply with the terms of its own tariff, it is subject to liability under 47 U.S.C. § 203(c). That statutory provision holds that "no carrier shall … charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect." *Id.*

In the FCC's view, a CLEC could be subject to liability under section 203(c) if its tariff prohibited it from charging interstate switched access rates that are higher than the maximum rate permitted by Rule 61.26(c), and the CLEC nevertheless charged rates exceeding that benchmark. *See, e.g., Chesapeake and Potomac Tel. Co. of Maryland; Am. Tel. & Tel. Co.; Petition for Declaratory Ruling Regarding Intrastate Private Lines Used in Interstate Communications*, 2 F.C.C.R. 3528, 3532 (1987) (tariff filer "would apparently violate its statutory duties under Section 203(c) … if it refrained from billing and collecting the applicable rate for these lines.").

CONCLUSION

As set forth above, the Court should affirm the district court's conclusion that a CLEC may not charge an IXC for tandem switching when the IXC directly connects with the CLEC. The Court should, however,

reverse the district court's conclusion that a CLEC may charge an IXC for tandem switching functionality that the CLEC does not actually provide when an IXC indirectly connects to the CLEC through an ILEC tandem switch. This Court should reach both dispositions applying the reasoning set forth in Argument Section I, above.

The Court should also affirm the district court's holding that a tariff filed on 14-days' notice does not enjoy "deemed lawful" status pursuant to 47 U.S.C. § 204(a)(3).

Finally, the Court should reverse the district court's holding that a CLEC tariff that contains interstate switched access rates above the benchmark rate in Rule 61.26(c) enjoys "deemed lawful" status pursuant to section 204(a)(3) of the Act. Instead, the Court should find that such a tariff is *void ab initio* when filed.

Respectfully submitted,

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March 14, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PAETEC COMMUNICATIONS, INC. ET AL., Plaintiffs – Counterclaim Defendants - Appellees – Cross-Appellants, v. MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES; VERIZON GLOBAL NETWORKS INC., Defendants – Counterclaim Plaintiffs – Appellants – Cross-Appellees.	Nos. 11-2268 (consolidated with 11-2568) & 11-1204 (consolidated with 11-2569)

CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 7,256 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Pursuant to Third Circuit Rule 31.1(c), I further certify that the text of the electronic brief is identical to the text in the paper copies and that a virus detection program, Symantec Endpoint Protection version 11.0.4014.26, has been run on the file and that no virus was detected.

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March 14, 2012

APPENDIX A

Consolidated communications

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Amended Transmittal No. 34

December 19, 2011

FRN #0010-1553-98

Marlene H. Dortch, Secretary
Federal Communications Commission
Washington, DC

Attention: Wireline Competition Bureau

This letter is an amended Transmittal Letter #34 to say we did not file Transmittal #34 pursuant to Section 204(a)(3). Transmittal #34 was filed on a 16 days notice and asked to become effective Jan 1, 2012.

All petitions, correspondence and inquiries in connection with this filing should be addressed to me at wendy.williams@consolidated.com or 936-633-6657.

Sincerely,

Wendy Williams
Regulatory Relations Specialist

Frontier Telephone Companies
180 South Clinton Avenue
Rochester, NY 14646

February 17, 2010

Second Amended Transmittal No. 2

Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

ATTENTION: WIRELINE COMPETITION BUREAU

Dear Secretary:

On February 12, 2010, Frontier filed its Transmittal No. 2, deferring the effective date of material filed under Transmittal No. 1 from February 23, 2010 to February 27, 2010. In Transmittal No. 2, Frontier stated that Transmittal No. 1 was being deferred in order to achieve the required 15-day statutory notice. Frontier acknowledges that, because the original tariff was not filed on 15 days' notice, Frontier foregoes the deemed lawful status that would otherwise be available under §203(a)(3) of the Communications Act.

Frontier Telephone Companies
180 South Clinton Avenue
Rochester, NY 14646

In accordance with the requirements of Section 61.21(a)(3) of the Commission's Rules, the FCC Registration Number (FRN) for Frontier is 0003-5763-52. Frontier is making this filing on behalf of issuing carriers with the following FRNs:

FRNs for participants in Tariff FCC No. 1

0003-5726-17	0003-5839-37	0003-5743-16
0003-5745-89	0003-5745-63	0001-5968-81
0003-5745-48	0003-5745-22	0003-5733-91
0004-2605-68	0003-5745-06	0004-0549-38
0004-0367-03	0001-6713-20	0004-3410-95
0003-9342-05	0002-7227-42	0003-4132-42

FRNs for participants in Tariff FCC No. 2

0003-4074-91	0003-4558-96	0003-2732-40
0003-2233-85	0004-9663-54	0003-2712-36
0005-0613-38	0004-1323-38	0005-0603-71
0004-1561-62	0005-0604-13	0005-0402-66
0004-9663-62	0004-2439-52	0005-0604-96
0005-0605-12	0003-2222-21	0005-0604-08
0005-0603-14	0003-3996-80	0005-0610-64
0005-0605-87	0005-0611-14	0002-7189-71

FRNs for participants in Tariff FCC No. 3

0002-6246-41	0002-5749-60

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Questions regarding this filing may be directed to me at:

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Rochester, New York 14646

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Personal or facsimile service of any petitions which may be filed against this transmittal should use the above name, address, and fax number.

Respectfully Submitted,

Kevin Clinefelter
Manager, Pricing & Tariffs

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Paetec Communications, Inc., et al., Plaintiffs

v.

MCI Communications Services, Inc. d/b/a Verizon Business Services, et al., Defendants

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on March 14, 2012, I electronically filed the foregoing Brief for Amicus Curiae Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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