ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 11-1467

NORTHERN VALLEY COMMUNICATIONS, LLC

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

Petitioner: Northern Valley Communications, LLC

Respondents: Federal Communications Commission and United States of America

Intervenors: AT&T Corp.; Sprint Communications Co. LP.; Qwest Communications Co., LLC; Verizon.

Before the Commission, Aventure Communication Technology, LLC also filed a petition for reconsideration.

2. Rulings under review.

Qwest Communications Co. v. Northern Valley Communications, 26 FCC Rcd 8332 (2011) (JA 199);

Qwest Communications Co. v. Northern Valley Communications, 26 FCC Rcd 14520 (2011) (JA 365);

Sprint v. Northern Valley Communications, 26 FCC Rcd 10780 (2011) (JA 671);

Sprint v. Northern Valley Communications, 26 FCC Rcd 16549 (2011) (JA 742).

3. Related cases.

This case has not previously been before this Court or any other court. Litigation related to the subject matter involved here is pending between petitioner and several of the intervenors in the cases listed at pages iii-iv of petitioner's brief.

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GLOSSARY

CLEC	Competitive Local Exchange Carrier. A local telephone company that entered the market after 1996 to compete with an ILEC.
ILEC	Incumbent Local Exchange Carrier. A local telephone company that had an exclusive franchise to provide service prior to 1996.
IXC	Interexchange Carrier. A long distance telephone company.
LEC	Local Exchange Carrier. A local telephone company.
SLC	Subscriber Line Charge. A charge imposed by LECs on their local exchange customers to recover a portion of the costs incurred by the LEC in completing interstate calls to local exchange customers.

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JURISDICTION

The Court has subject matter jurisdiction over final orders of the FCC involving the investigation of tariffs under 47 U.S.C. §§ 208(b)(3) & 402(a) and 28 U.S.C. § 2342(1). Petitioner's challenge is timely. As set forth at pages 37-38, the Court should not reach several arguments presented by Northern Valley because they were not properly preserved below; and as set forth at pages 47-48, the Court lacks jurisdiction over one argument because it was not raised at all below.

QUESTIONS PRESENTED

Access charges are fees collected by local telephone companies from long distance companies for completing long-distance calls to their recipients. Competitive local telephone companies, such as petitioner, Northern Valley Communications, may impose interstate switched access charges by tariff only to the extent the tariff complies with FCC Rule 61.26, 47 C.F.R. § 61.26; access charges that are inconsistent with that rule may not be tariffed but instead must be negotiated individually with long distance companies. In the orders on review, the Commission interpreted Rule 61.26 to allow tariffed access charges only for calls completed to a paying customer of the local telephone company. Because Northern Valley's tariff sought to impose access charges for calls delivered to non-paying recipients, the Commission required it to withdraw the tariff and refile it without the unlawful condition.

The Commission also declared unlawful a provision in Northern Valley's tariff that required a long distance carrier to waive any disputes over charges if the carrier did not bring the matter to Northern Valley's attention within 90 days.

The questions presented are:

1) Whether the Commission acted within its discretion in interpreting its rule, 47 C.F.R. § 61.26, to prohibit Northern Valley from imposing access

charges by tariff for calls placed to a recipient that receives service free of charge; and

2) Whether the Commission acted within its discretion in concluding that the provision in Northern Valley's tariff requiring waiver after ninety days of a party's statutory right to dispute charges is inconsistent with the two-year statute of limitations specified in the Communications Act for disputes over tariffed charges.

STATUTES AND REGULATIONS

Pertinent materials are attached to this brief.

COUNTERSTATEMENT

This case involves the FCC's rule governing interstate access tariffs filed by competitive local exchange carriers (CLECs). Such tariffs compel long distance companies (interexchange carriers or IXCs) to pay access charges, which are per-minute fees assessed on interstate calls placed to customers of the CLEC. The Commission regulates interstate access tariffs because CLECs have exclusive control over access to their customers, and IXCs, which are obligated to transport long-distance calls to the CLEC's customers, are captive to tariffed access charges. The access charge regime therefore is prone to abuse, such as when a CLEC sets its rates too high or, as in this case, inflates its revenues above the level assumed in the rate-setting process by taking steps that dramatically increase the amount of calls placed to its facilities. The second practice is called “traffic pumping” or “access stimulation.” *See generally Farmers & Merchants Mutual Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011). Such practices cause IXCs – and ultimately the general public – to bear unfair charges.

In the orders on review, the Commission interpreted the CLEC interstate access tariff rule, FCC Rule 61.26, to mean that a CLEC may impose tariffed interstate access charges only for calls completed to the CLEC’s own “end users,” which the Commission interpreted – in keeping with a long-established understanding – to mean a customer paying the CLEC for service. If a CLEC wishes to provide interstate access service free of charge to call recipients, it may enter into contracts with IXCs for negotiated access charges.

1. Interstate Access Charges And Their Abuse.

When a telephone user places a long-distance call, the call travels from the facilities of the user’s local exchange carrier (LEC) to those of an IXC. The IXC then transports the call to the facilities of the recipient’s LEC, which connects the call to its destination. *See NARUC v. FCC*, 737 F.2d 1095, 1103-1104 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). Both LECs have traditionally recovered a part of the costs of providing interstate switched access service (hereafter, “access service”) by charging the IXC per-minute interstate switched access charges (hereafter, “access charges”) for originating and terminating the call – *i.e.*, for providing access to the LEC’s facilities. *See Access Charge Reform*, 12 FCC Rcd 15982, 15991 (1997).

With the breakup of the Bell System, the FCC began to closely regulate the access charge tariffs. *See Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1192 (1984); *Access and Divestiture Related Tariffs*, 55 Rad. Reg. 2d 869, 870 (1984); 47 C.F.R. Part 69. Regulation is necessary because IXCs are captive to a LEC’s tariffed rates. IXCs may not block calls placed by their customers to specific numbers, *see Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd 11629 (WCB 2007), and may not pass through to individual callers the access charges incurred in any specific call, *see Implementation of Section 254(g) of the Communications Act of 1934*, 11 FCC Rcd 9564, 9568-9569 (1996). Moreover, with respect to any given call recipient, the LEC serving that person holds a “terminating access monopoly,” and the IXC has little or no bargaining power to achieve lower access rates. *Developing A Unified Intercarrier Compensation Regime*, NPRM, 16 FCC Rcd 9610, 9616-9617 (2001).

The Commission has identified two major access charge abuses. First, because the IXC cannot choose which LEC to use for termination, LECs may (in the absence of regulation) set their rates above cost, thereby earning excess profits on every minute of service. *See Access Charge Reform*, 16 FCC Rcd at 9934-9936 ¶¶28-32. The Commission has explained that excessive access rates "shift an inappropriate share of the carriers' costs onto the IXCs and, through them, the long distance market in general." *Id.* ¶22. That cost-shifting can "promote economically inefficient entry into the local markets." *Id*. ¶33.

Second, the per-minute fee structure gives some LECs the incentive to engage in traffic pumping schemes that greatly increase the number and duration of long-distance calls delivered to their facilities. Regulated access rates generally are grounded in the historical costs of providing service. *See generally Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990). If call volumes rise without a proportionate increase in costs, however, average costs fall and each minute of service becomes more profitable. The Commission has explained that average costs usually fall with increasing volume because whereas "there is a large fixed cost to purchasing a local switch," the "incremental cost of increasing the capacity of a local switch is low" and perhaps even zero. *Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd 17989, 17996 (2007).

Those economics of telephone costs and rate structures thus cause some LECs to look for ways to generate higher call volumes. As the Commission has described it:

> Access stimulation occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls. The arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the 'free' service provider, or offers some other benefit to the 'free' service provider. The shared revenues received by the service provider cover its costs, and it therefore may not need to, and typically does not, assess a separate charge for the service it is offering.

Connect America Fund, 26 FCC Rcd 17663, 17874 ¶656. The Commission has found that such "wasteful arbitrage schemes," *id*. at 17873, result in hundreds of millions of dollars in costs imposed on IXCs that ultimately are borne by all telephone users, *id*. at 17875-17876 ¶¶663-665.[1] They also "almost uniformly make the LEC's interstate switched access rates unjust and unreasonable." *Id*. at 17874 ¶657.

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[1] In the *Connect America Fund* order, the Commission took steps to reduce incentives to engage in traffic pumping in the short term, 26 FCC Rcd at 17884-17890, and ultimately to eliminate the access charge system and replace it with an approach in which carriers recover their costs from their own customers and not other carriers, *id*. 17904-17914.

2. ILEC And CLEC Access Charge Regulation.

Prior to 1996, only a single local carrier typically served any given market, and it held an exclusive franchise granted by the state. In 1996, Congress opened up the local exchange marketplace to competition, banning exclusive franchises, 47 U.S.C. § 253(a), and creating a distinction between ILECs, the incumbent carriers, *see* 47 U.S.C. § 251(h) (defining ILEC), and CLECs, the new, competitive providers, *see* 47 C.F.R. § 61.26(a)(1) (defining CLEC).

ILEC access charges remain regulated in nearly every respect. The FCC's detailed rules at 47 C.F.R. Parts 61 and 69 prescribe the contents of ILEC tariffs and the rates that ILECs may charge to IXCs. The Commission also requires ILECs to impose a "subscriber line charge" (SLC) – a charge to the ILEC's customer that represents the customer's share of the costs of providing interstate access service. The SLC is capped at an amount established by the FCC. 47 C.F.R. §§ 69.4(a); 69.104; 69.152.

By contrast, CLEC access charges at first were unregulated. The Commission believed at the time that competition between CLECs and ILECs would discipline rates and avoid abuse of access charges by CLECs. Thus, CLECs were free to set their access rates and practices as they wished and were not subject to the detailed Part 69 tariff regulations imposed on

ILECs. *Access Charge Reform*, 16 FCC Rcd at 9926-9927. CLECs also were free to charge their customers more for access service than ILECs.

During the time CLEC access charges were unregulated, CLECs were free to set their rates and terms of service in tariffs filed publicly with the FCC. *See* 47 U.S.C. § 203(a). Tariffs, which are meant to keep rates just and reasonable under 47 U.S.C. § 201(b), are binding on anyone that uses the service. They are backed up by mechanisms such as a statutory "deemed lawful" status, 47 U.S.C. § 204(a)(3), that protects the carrier from having to make retroactive refunds even if the carrier is later found to have earned an unjust rate of return, *see Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006). ILEC access charges generally must be tariffed. *See* 47 C.F.R. §§ 69.1 *et seq.* In 1996, Congress authorized the Commission to forbear from applying any provision of the Communications Act, including the tariff provisions. 47 U.S.C. § 160(a). As explained below, the FCC has partially exercised that authority with respect to CLEC tariffs.

Until 2001, CLECs could file tariffs with the FCC but were "largely unregulated in the manner that they set their access rates." *Access Charge Reform*, 16 FCC Rcd at 9931 ¶21. In a pair of orders issued in 2001 and 2004, the *Access Charge Reform Order*, 16 FCC Rcd 9923, and the *Access*

Charge Reconsideration Order, 19 FCC Rcd 9108 (together, the *Access Charge Orders*), the Commission restricted the use of CLEC access tariffs.

After finding that some CLECs were abusing the tariff process to "impose excessive access charges on IXCs and their customers," *Access Charge Reform Order* at 9924-9925; *see also id.* at 9934, the Commission decided in the 2001 *Access Charge Reform Order* to "limit the application of [its] tariff rules to CLEC access services," and to regulate more strictly CLEC interstate access tariffs. *Id*. at 9924 ¶2.

Specifically, the Commission promulgated Rule 61.26, 47 C.F.R. § 61.26, entitled "[t]ariffing of competitive interstate switched exchange access services." The Rule sets forth the terms of a permissible CLEC access tariff, including the maximum allowed access rate (pegged to the rate of the competing ILEC) that a CLEC may tariff. 47 C.F.R. § 61.26(c) – (e). Central to this case, the Rule defines "CLEC" and the services that a CLEC may tariff. 47 C.F.R. § 61.26(a)(1) & (3). The Commission detariffed CLEC access service except as set forth in the Rule. *Access Charge Reform Order*, 16 FCC Rcd at 9925 ¶3, 9938 ¶40 ("mandatorily detariff[ing]" CLEC interstate switched access); 47 U.S.C. § 160. Thus, a CLEC may now file an interstate access tariff only if the tariff is consistent with Rule 61.26. To the extent that a CLEC wishes to provide access service on terms that are inconsistent with that Rule, it must do so pursuant to a contract that it has negotiated individually with the IXC outside of the FCC's tariff regime. *Access Charge Reform Order*, 16 FCC Rcd at 9925 ¶3.

As relevant here, Rule 61.26 defines "CLEC" to mean a LEC that "provides some or all of the interstate exchange access services used to send traffic to or from an end user" and is not an ILEC. 47 C.F.R. § 61.26 (a)(1). The Rule defines "interstate switched exchange access services" to mean "[t]he functional equivalent of the ILEC interstate exchange access services." 47 C.F.R. § 61.26(a)(3). The Commission explained in its 2004 *Access Charge Reconsideration Order* that a CLEC provides the "functional equivalent" of ILEC access service when it "originates or terminates traffic to its own end-users." *Access Charge Reconsideration Order*, 19 FCC Rcd at 9114 ¶13; *accord id*. at 9115 ¶15 (a CLEC "that provides access to its own end-users is providing the functional equivalent of" ILEC access).

3. The Orders On Review.

Northern Valley is a CLEC located in South Dakota. Pet. Br. 5. Like other LECs that engage in "traffic pumping (or access stimulation) scheme[s]," *Farmers*, 668 F.3d at 717, Northern Valley serves conference calling companies that generate high incoming call volumes. Northern Valley Legal Analysis (Qwest) at 3 (JA 141). Northern Valley imposes access charges on IXCs pursuant to a tariff filed with the FCC. Prior to the events leading to this case, Northern Valley's tariff entitled it to impose access charges for calls delivered to an "end user," which the tariff defined in pertinent part to mean "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier."

In a 2009 decision involving traffic pumping by an ILEC, the Commission determined that under the definition of end user contained in the carrier's tariff, the recipient of a call must be required to pay a charge for interstate service. *See Qwest v. Farmers & Merchants Mutual Telephone Co.*, 24 FCC Rcd 14801 (2009), *aff'd Farmers*, 668 F.3d 714. After the *Farmers* order, Northern Valley amended its tariff, which had used the same definition of "end user" as the tariff in *Farmers*, to provide: "An End User need not purchase any service provided by [Northern Valley]." Tariff at 8 (JA 62).

Qwest and Sprint, IXCs that are subject to Northern Valley's access tariff, filed complaints with the Commission under 47 U.S.C. § 208 challenging the revised definition of "end user" in Northern Valley's tariff. Qwest Complaint (JA 1); Sprint Complaint (JA 375). They argued that the new definition was unlawful because, as a matter of law, an end user must be a paying customer of a CLEC in order for the CLEC to impose access charges by tariff.

In the two principal orders resolving the dispute, which the agency described as "the latest chapter in the ongoing dispute … involving access stimulation," the Commission held unlawful Northern Valley's revised definition of "end user" and required Northern Valley to refile its tariff without that definition. *Qwest Communications Co. v. Northern Valley Communications*, 26 FCC Rcd 8332 ¶1 (2011) (*Qwest Order*) (JA 199); *accord Sprint Communications Co. v. Northern Valley Communications*, 26 FCC Rcd 10780 (2011) (*Sprint Order*) (JA 671). The Commission ruled that its "access service rules and orders establish that a CLEC may tariff access charges only if those charges are for transporting calls to or from an individual or entity to whom the CLEC offers service *for a fee*." *Qwest Order* ¶7 (JA 203); *see also id.* ¶9 (citing 47 U.S.C. § 153(53)) (JA 204).

a. The *Qwest Order*.

The Commission explained that Rule 61.26 permits CLECs to file tariffs for "interstate switched exchange access services." The rule defines that term to mean services that are "the functional equivalent" of ILEC interstate switched access services. 47 C.F.R. § 61.26(a)(3); *see Qwest Order* ¶8 (JA 203). In the *Access Charge Reconsideration Order*, 19 FCC Rcd at

9114, the Commission had determined that a CLEC "provides the functional equivalent" of ILEC switched access service when a CLEC "originates or terminates traffic to its own end-users" as that term is defined in the ILEC access charge rules. *Qwest Order* ¶8 (citing 19 FCC Rcd at 9114, 9115) (JA 203).

Under the ILEC access charge rules, the agency explained, "'end user' has been defined … for more than 25 years as a 'customer of an interstate or foreign *telecommunications service*,'" which in turn is defined in the Communications Act to mean "the offering of telecommunications *for a fee*." *Qwest Order* ¶9 (citing 47 U.S.C. § 153(53)) (JA 203). Thus, the Commission explained, "under the … ILEC access charge regime, an 'end user' is a customer of a service that is offered for a fee." *Qwest Order* ¶9 (JA 204). Under the corresponding CLEC rule, end user therefore "do[es] not include entities that receive free services." *Id*. (JA 203). By defining "end user" to mean something other than a paying customer, the agency ruled, Northern Valley's tariff "violates the Commission's CLEC access charge rules as clarified by" the *Access Charge Reconsideration Order*. *Qwest Order* ¶9 (JA 204). That violation of Rule 61.26 constitutes an unjust and unreasonable practice under 47 U.S.C. § 201(b). *Ibid*. If Northern Valley "wishes to charge IXCs for terminating calls to entities that pay no fees," the

Commission emphasized, it may not do so through a tariff, but only "through a negotiated contract." *Id*. ¶11 (JA 205).

The Commission explained that the requirement of a paying end user "furthers the … goal of ensuring that neither IXCs nor end users are charged an unfair share of the LEC's costs in transporting interstate calls." *Qwest Order* n.38 (JA 204). In order for both entities to bear a portion of the cost, the end user must pay a share.

b. The *Sprint Order*.

Because Sprint's complaint against Northern Valley turned, in large part, on the same tariff provision (defining "end user") that the Commission had found unlawful in its order in the *Qwest* proceeding, the agency granted Sprint's complaint for the reasons set forth in the *Qwest Order*. *Sprint Order* ¶7 (JA 674-675). The Commission also invalidated the "Billing Disputes" provision, section 3.1.7.1(a) (JA 86) of Northern Valley's tariff, which required an IXC to dispute a bill within 90 days or waive any claims with respect to the bill. That requirement is "unreasonable," the Commission explained, because it "contravenes the two-year statute of limitations in the Communications Act [47 U.S.C. § 415(b)] and, by its terms, purports unilaterally to bar a customer from exercising its statutory right to file a complaint within that limitation period." *Sprint Order* ¶14 (JA 677-678).

The Commission also held that Northern Valley's tariff was not "clear and explicit" as required by 47 C.F.R. § 61.2 because the definition of "end user" was self-contradictory. By defining an end user as the customer of a "telecommunications service," a fee-based service, the tariff necessarily required a paying customer. At the same time, however, the tariff stated that an end user could receive service free of charge. The definition thus was "internally inconsistent" and therefore violated the rule requiring "clear and explicit" terms. *Sprint Order* ¶9 (JA 675-676).

c. The Reconsideration Orders.

The Commission dismissed Northern Valley's requests for reconsideration. *Qwest Communications Co.*, 26 FCC Rcd 14520 (2011) (*Qwest Reconsideration*) (JA 365); *Sprint Communications Co.*, 26 FCC Rcd 16549 (2011) (*Sprint Reconsideration*) (JA 742). Relying on "settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected," the agency dismissed several of Northern Valley's arguments as repetitive. *Qwest Reconsideration* ¶5 (citing *S&L Teen Hosp. Shuttle*, 17 FCC Rcd 7899 (2002)) (JA 367).

The Commission dismissed the remainder of Northern Valley's arguments because Northern Valley could have raised them earlier in the proceeding but failed to do so. *Qwest Reconsideration* ¶6 (JA 367-368). Under the FCC's rules, a petition for reconsideration may raise new arguments only if there has been an intervening change of circumstances, if the party was unable to raise the argument initially, or if the public interest requires consideration of the new arguments. 47 C.F.R. § 1.106(c). Northern Valley did not claim to have satisfied any of those criteria. *Qwest Reconsideration* ¶6 (JA 368).

In the alternative, the Commission addressed the merits of the arguments that were procedurally barred. It rejected Northern Valley's claim that Rule 61.26 requires only that an "end user" be the intended recipient of a call, without regard to payment. The Commission again explained that for more than 25 years it has defined "end user" to mean a fee-paying customer, *Qwest Reconsideration* ¶8 (JA 368-369), and that the term has "a clear and established meaning in the context of the … access charge regime," *id*. ¶10 (JA 370). "[I]dentical terms used in different but related … rules," the Commission observed, "should be construed to mean the same thing." *Id*. ¶8 (JA 369). The Commission also noted its "longstanding policy" that "users of the local telephone network for interstate calls should be responsible for a reasonable portion of the costs that they cause," and that policy is advanced by construing "end user" to mean a paying customer. *Id*. ¶11 (JA 370).

The Commission also rejected Northern Valley's claim that the agency's interpretation of "end user" amounts to impermissible regulation of the CLEC-local exchange customer relationship. That claim fails, the Commission explained, because Northern Valley has options that allow it to "offer its services … for any fee (or no fee)." *Qwest Reconsideration* ¶12 (JA 370). As the Commission underscored, the *Qwest Order* held only that if Northern Valley "chooses to assess access charges upon IXCs by *tariff*, the individual or entities who [receive] access must be [paying] 'end users.'" *Ibid*. Northern Valley may negotiate terms for service with IXCs if it wishes not to charge end users.

The Commission denied reconsideration of the *Sprint Order* "[f]or the same reasons." *Sprint Reconsideration*, 26 FCC Rcd 16549-16550 ¶2 (JA 742-743).

Northern Valley now asks the Court to vacate the orders on review.

SUMMARY OF ARGUMENT

After years of abuse of FCC access charge tariffs by CLECs that engaged in regulatory arbitrage, the Commission in 2001 reformed its access charge regime by issuing Rule 61.26. That rule limits the circumstances under which a CLEC may file an interstate switched access tariff with the Commission. If a CLEC wishes to provide access service without complying with Rule 61.26, it may not rely on a tariff to impose access charges on IXCs that are obligated to transport calls to the CLEC's customers. The CLEC may, however, collect those charges pursuant to a private contract it has negotiated with the IXC outside of the tariff system.

In this case, the agency interpreted Rule 61.26 consistently with the text of the rule and the agency's policy that traffic pumping is an economically inefficient and abusive practice that should be discouraged. Rule 61.26 allows an access tariff to be filed only when a CLEC is providing the "functional equivalent" of ILEC switched access service. The Commission previously had determined that functional equivalence means the provision of service to an "end user." Further, a longstanding Commission switched access rule provides that "end user" means a paying customer. Thus, the agency explained in the orders on review, a CLEC may not tariff access service for calls placed to non-paying customers – such as the conference calling companies that facilitate Northern Valley's traffic pumping scheme. The Commission's reasonable construction of its own rule is "controlling." *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011).

Northern Valley does not dispute that calls must be delivered to end users or that the Commission has defined "end user" to mean a paying customer, nor does it dispute that it may not file an access tariff except under Rule 61.26. Rather, Northern Valley contends that "functional equivalence" means only that a CLEC is providing the same physical function as an ILEC when it switches a call to its recipient. Northern Valley waived that claim, however, by failing to timely raise it before the Commission. The claim fails on its merits in any event because it is inconsistent with the *Access Charge Reconsideration Order*, in which the Commission explained that functional equivalence means the completion of a call to a CLEC's "end user," a term that has a longstanding specific meaning as a paying customer.

Equally unavailing is Northern Valley's contention that the Commission's interpretation of Rule 61.26 improperly subjects the CLEC-local exchange customer relationship to regulation that the agency had earlier disavowed. That claim, too, is procedurally barred. It is also without merit. The orders on review do not regulate the CLEC-local exchange customer relationship. Instead, they specify when a CLEC may lawfully file a tariff that imposes access charges *on an IXC*. The CLEC remains free to define its relationship with its local exchange customers in a manner unrestricted by Rule 61.26 – by specifying, for example, that conference calling companies will receive free services – provided that it assesses its associated access charges under private contracts executed outside of the FCC tariff system.

For the same reason, Northern Valley is wrong in contending that the Commission intruded on state regulatory prerogatives by regulating the intrastate relationship between CLECs and local exchange customers – a claim that also is not properly before the Court because Northern Valley never presented it to the Commission.

Nor is Northern Valley's position advanced by the claim that it provides its conference calling company customers with "exchange access service" as defined in the Communications Act. The statutory definition of "exchange access service" does not create a right to charge an IXC for the provision of that service by tariff, without also charging an end user for interstate service. The filing of a CLEC access tariff is addressed solely by Rule 61.26, which precludes the tariffing of access service for calls delivered to non-paying recipients.

Contrary to Northern Valley's claim, the Commission responded to its argument that the relevant payment under Rule 61.26 is from the IXC's customer and not from the CLEC's own customer. The Commission explained in detail that the CLEC access tariff regime requires that the CLEC's own end user be a paying customer. That reasoning adequately disposed of Northern Valley's argument.

Like several of its other arguments, Northern Valley's contention that the Commission's decisions in this case were inconsistent with its earlier decisions in the *Farmers* matter is not properly before the Court and is in any event misconceived. As in this case, the Commission in *Farmers* held that there must be payments from the end user to the carrier for a LEC to collect access charges from an IXC. Thus, the orders on review were fully consistent with the agency's *Farmers* precedent.

Finally, the Commission acted well within its discretion in concluding that Northern Valley could not, consistent with the applicable two-year statute of limitations, require a carrier to forfeit its right to complain to the FCC about a bill if it failed to dispute the bill with Northern Valley within 90 days of receipt. This Court has found a substantially similar provision to violate an equivalent statute of limitations, and other courts have invalidated the same type of provisions in FCC tariffs.

ARGUMENT

I. THE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL.

The Commission's "interpretation of its own orders and rules," is "entitled to substantial deference," *AT&T Corp. v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006), and is "controlling" unless it is "plainly erroneous or inconsistent with the regulation," *Auer v. Robbins*, 519 U.S. 452, 461 (1997);

accord Talk America, Inc. v. Michigan Bell Tel. Co., 131 S.Ct. 2254, 2261 (2011).

Northern Valley is wrong in contending that the deferential standard is inapplicable here. Br. 16. It relies on a concurring opinion in *Talk America*, 131 S.Ct. at 2265-2266, in which the concurring Justice questioned whether the Court should continue to adhere to the deferential standard of review set forth in *Auer*. *See* Br. 16 & nn.35, 115. The majority, however, reaffirmed the principle in *Auer* that courts "defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" 131 S.Ct. at 2261 (citations omitted). Indeed, Northern Valley acknowledges as much elsewhere in its brief. Br. 36 n.76.

Judicial review of the Commission's interpretation of a tariff is similarly deferential. The Court "will uphold the Commission's interpretation where it is 'reasonable [and] based upon factors within the Commission's expertise.'" *Farmers*, 668 F.3d at 719, quoting *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001). "Reversing an FCC tariff interpretation should only occur where it is not supported by substantial evidence, or the [Commission] has made a clear error in judgment." *Global NAPS*, 247 F.3d at 258 (quotation marks and citation omitted).

Review of the Commission's resolution of complaints under 47 U.S.C. § 208 is equally deferential. *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 790 (D.C. Cir. 2000). Under the Administrative Procedure Act, the Court may reverse the Commission only if its decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court will "presume the validity" of the agency's decision and will overturn it only if the Commission "has made a clear error in judgment." *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994).

II. THE COMMISSION REASONABLY INTERPRETED ITS ACCESS CHARGE RULES AND ORDERS.

ILECs must file tariffs under a comprehensive regulatory framework, but the Commission has "mandatorily detariffed" CLECs, except as provided for by Rule 61.26. *Access Charge Reform*, 16 FCC Rcd 9925 ¶3. As explained below, the Commission correctly determined that Rule 61.26 does not allow the filing of a tariff that imposes access charges on IXCs for calls delivered to recipients that pay nothing to the CLEC for service. The

Commission therefore properly held that Northern Valley's tariff, which defined "end user" to include a non-paying customer, violated Rule 61.26.[2]

A. The Commission Reasonably Determined That Rule 61.26 Allows The Imposition Of Tariffed Charges Only For Service To An "End User" Who Is A Paying Customer.

The Commission construed Rule 61.26 in four steps. First, the rule defines interstate access service subject to a CLEC tariff to mean the "functional equivalent" of ILEC access service. Second, in the *Access Charge Orders*, the Commission defined "functional equivalent" to mean service provided to an "end user." Third, "end user" is defined by longstanding Commission rules to mean the recipient of a "telecommunications service." Fourth, the Communications Act defines "telecommunications service" as a service provided for a fee. Applying that logical progression of established definitions, the FCC reasonably construed its own rule to mean that a CLEC may tariff service only if a call is delivered to a paying end user. *Qwest Order* ¶¶8-9 (JA 203-204). That reading of

[2] Rule 61.26(f), 47 C.F.R. § 61.26(f), addresses a CLEC's providing some, but not all, of the sub-elements of switched access service in order to complete a call to another CLEC's end user. Neither that provision nor the situation to which it pertains is at issue here. The only relevant end user in this case would be Northern Valley's own end user. *See Qwest Reconsideration Order* ¶16 (JA 372).

Rule 61.26 is consistent with its language, the traditional understanding of common-carriage tariffs, and longstanding Commission policy.

1. The Commission Reasonably Determined That Rule 61.26 Establishes A Paying "End User" Requirement.

Rule 61.26 defines "interstate switched exchange access service" eligible for tariffing by a CLEC as "the functional equivalent of the ILEC interstate exchange access services." 47 C.F.R. § 61.26(a)(3). In the *Access Charge Reconsideration Order*, the Commission ruled that the "functional equivalent" of ILEC access service is the provision of "access to the competitive LEC's own end-users." *Access Charge Reconsideration*, 19 FCC Rcd at 9112 ¶¶9, 15 ("a competitive LEC that provides access to its own end-users is providing the functional equivalent" of ILEC access service). Thus, a CLEC may tariff interstate access service only for calls that are completed to an "end user."

That interpretation is firmly supported by the text of section 61.26(a)(1). For purposes of the tariffing rule, that provision defines a CLEC as a LEC that (a) "provides some or all of the interstate exchange access services used to send traffic *to or from an end user*," and (b) is not an ILEC. 47 C.F.R. § 61.26(a)(1) (emphasis added); *see Qwest Reconsideration* ¶8 (JA 368). Indeed, Northern Valley itself told the Commission that for tariffed access charges to apply, "the call must be originated or terminated to an "end user." Northern Valley Legal Analysis (Sprint) at 16 (JA 561).

The Commission reasonably interpreted "end user" to mean a paying customer of the CLEC. The only definition of "end user" established by the Commission, Rule 69.2(m), which appears in the provisions governing ILEC tariffs, defines that term as "any customer of an interstate or foreign *telecommunications service* that is not a carrier." 47 C.F.R. § 69.2(m) (emphasis added). "Telecommunications service" is, in turn, defined by the Communications Act to mean "the offering of telecommunications *for a fee* directly to the public." 47 U.S.C. § 153(53) (emphasis added). *Qwest Order* ¶¶7-8 (JA 202-203). Thus, the Commission reasonably found that an "end user" of a CLEC is a customer of the CLEC that pays a fee for an interstate service.

The Commission correctly determined that "end user" has the same meaning for CLECs that it does for ILECs, as set forth in Rule 69.2(m). Northern Valley does not – and cannot – identify any Commission rule or order that defines that term differently for CLECs than ILECs. The Commission explained that, had it "intended the term to have a meaning [in the CLEC] rule other than" its traditional one, it would have "specifically redefine[d] 'end user'" in Rule 61.26. *Qwest Reconsideration* ¶10 (JA 369).

But "there is no indication that the term … as used in [the CLEC context] was intended to incorporate any different meaning than that which the Commission has given it for more than 25 years" in the ILEC context. *Ibid*. Any other reading, the Commission stated, would "def[y] logic." *Ibid*.

Because the Commission's construction of its own rule reflects its "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation," its construction is "controlling." *Talk Am.*, 131 S. Ct. at 2261 (quoting *Auer*, 519 U.S. at 461-462).

2. The Commission's Reading Of Rule 61.26 Supports Important Policy Goals.

Requiring an end user to be a paying customer under an interstate access tariff promotes two important Commission policies. First, as the Commission explained, "defining 'end user' as a customer of a service offered for a fee furthers the … goal of ensuring that neither the IXCs nor end users are charged an unfair share of the LEC's costs in transporting interstate calls." *Qwest Order* n.38 (JA 204-205). If a LEC does not recover part of its costs from an end user, it will have an incentive to seek a disproportionate share from the IXC. It has been "a longstanding policy of the Commission that users of the local telephone network for interstate calls should be responsible for a reasonable portion of the costs that they cause." *Qwest Reconsideration* ¶11 (JA 370). Indeed, when the Commission first imposed regulation on CLEC access charges, it expressed its concern that CLECs not be able to "shift an inappropriate share of [their] costs onto the IXCs and, through them, the long distance market in general." *Access Charge Reform*, 16 FCC Rcd 9931 ¶22.

Second, requiring a paying end user supports the Commission's efforts to combat access charge abuse by traffic pumping. Traffic pumping presents a slew of policy harms. It relies on an economic model in which LECs vastly increase their minutes of use, but do not reduce their per-minute rates to reflect lower average costs. "The combination of significant increases in switched access traffic with unchanged access rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable." *Connect America Fund*, 26 FCC Rcd at 17874 ¶657. The result is a "wasteful arbitrage practice[]," *id*. at 17676 ¶33, that "imposes undue costs on consumers, inefficiently diverting … away from more productive uses" hundreds of millions of dollars annually, *id*. ¶¶663-664. Because scarce resources are siphoned off into unproductive uses, more socially useful projects such as deployment of broadband facilities suffer. *Id*. ¶663-664. Moreover, all users of the interstate telephone system are effectively forced to "support businesses designed to take advantage of … above-cost" switched access rates. *Ibid*. The conference companies that take advantage of traffic pumping also gain an unfair competitive edge over companies that are not parties to arbitrage practices. *Id*. ¶665.

The Commission has taken steps to reduce the incentives to engage in traffic pumping, *Connect America Fund* ¶¶679-691, and ultimately to eliminate access charges entirely, *id*. ¶¶736-759. As the Commission recognized, this case is "the latest chapter in the ongoing dispute" between IXCs and LECs over such practices. *Qwest Order* ¶1 (JA 199). A reduction in access stimulation will itself further the Commission's policy that both IXCs and end users of access service bear the cost of service and implement the statutory mandate that interstate rates and practices be just and reasonable. *See* 47 U.S.C. § 201(b). The FCC's interpretation of Rule 61.26 thus represents a "reasonable policy choice" that the Court should uphold. *American Council on Educ. v. FCC*, 451 F.3d 226, 232 (D.C. Cir. 2006).

3. The Commission's Reading Of Rule 61.26 Is Consistent With Traditional Concepts Of Common Carriage.

The Commission's logical reading of "end user" is consistent with the traditional understanding of tariffs and common carriers. FCC rules define "tariff" to mean a "[s]chedul[e] of rates and regulations filed by [a] common carrier[]." 47 C.F.R. § 61.3(ss). As relevant here, the Communications Act defines a "common carrier" as a "person engaged as a common carrier *for hire*." 47 U.S.C. § 153(11) (emphasis added). Thus, a tariff is filed by an entity that (a) otherwise qualifies as a common carrier, and (b) provides service for a fee. That understanding is reflected throughout the Commission's rules. *See* 47 C.F.R. § 22.99 (defining "telecommunications common carrier" as an entity "engaged in rendering radio telecommunications services to the general public for hire"); 47 C.F.R. § 25.103(a) (same definition for "communications common carrier"); 47 C.F.R. § 32.9000 (same); 47 C.F.R. § 51.5 ("A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing telecommunications services."); 47 C.F.R. § 54.5 (same).

Indeed, the Supreme Court has recognized that the filing of tariffs and the provision of common carriage are intimately linked: "[t]he tariff-filing requirement is … the heart of the common-carrier section of the Communications Act." *MCI v. AT&T*, 512 U.S. 218, 229 (1994). This Court has recognized the corollary proposition that "[a]ll of the described regulation of tariffs under title II of the Act … hinges upon the premise that the regulated entity is a common carrier." *Southwestern Bell Tel. Co. v. FCC,* 19 F.3d 1475, 1480 (D.C. Cir. 1994). Thus, inherent in the very nature of a tariffed service offered by a common carrier is that the users of the service will pay for it.

Several FCC programs are predicated on a similar understanding of "end user" to mean a paying customer. For example, universal service contributions are assessed on the basis of "end-user telecommunications revenues." 47 C.F.R. § 54.706(b); *see also* 47 C.F.R. § 54.706(a) ("[e]ntities that provide interstate telecommunications to the public … for a fee will be considered telecommunications carriers providing interstate telecommunications services"). Likewise, contributions to the Telecommunications Relay Services fund that provides communications services for the hearing and vision impaired are calculated "on the basis of interstate end-user revenues." 47 C.F.R. § 64.604(c)(5)(iii)(A). The premise of those regulations is that a carrier will charge – and an end user will pay – for interstate services, so that regulatory fees may be calculated from the payments to the service providers.

B. Northern Valley's Arguments Are Unavailing.

All of Northern Valley's challenges to the Commission's interpretation of Rule 61.26 fail on their merits; in addition, two of them should not be considered by this Court because they were not properly preserved before the Commission.

1. Northern Valley Is Wrong That The Communications Act Allows The Tariffing Of Charges To Non-Paying Customers.

Northern Valley first contends that, whether or not it charges call recipients for service, it provides IXCs with "exchange access service" within the meaning of 47 U.S.C. § 153(20) and thus may tariff that service. Br. 17-18. According to Northern Valley, the Communications Act unambiguously provides that no charge to the call recipient is required for a service to constitute exchange access service, and the Commission's contrary determination was "clear error." Br. 19-20.

Even if Northern Valley's understanding of the term "exchange access service" were correct,[3] its argument fails. The statutory definition of "exchange access service" says nothing about a CLEC's right to charge an IXC for the provision of that service, by tariff or otherwise. Under the Commission's detariffing policy, however, CLECs may file interstate access tariffs only in conformance with Rule 61.26. Thus, as the Commission observed, Northern Valley "must comply not only with the Act, but also with

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[3] The Act defines "exchange access" to mean the offering of access to a telephone exchange "for the purpose of origination or termination of telephone toll services." 47 U.S.C. § 153(20). It defines "telephone toll service" as service between stations in different local exchanges "for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(55). The reference to a "separate charge" implies that exchange service would be a fee-based service.

the Commission's rules and orders." *Qwest Order* ¶11 (JA 205). Under Rule 61.26, "a CLEC may not impose switched access charges *pursuant to tariff* unless it is providing interstate switched exchange access services to its own end users," which do not include non-paying customers. *Ibid*. Thus, if Northern Valley chooses to provide service to a non-paying call recipient, the Commission ruled, it may collect access fees from IXCs only "through a negotiated contract" outside of the tariff framework. *Qwest Order* ¶11 (JA 205).

The essence of Northern Valley's claim is that it is entitled to collect access charges by tariff for switching calls to *any* recipients. In a deregulated market such as the one for CLEC services, however, no such right exists. Access charges for cellular telephone companies, for example, have been mandatorily detariffed entirely, *see* 47 C.F.R. § 20.15(c), and those companies may collect access charges from an IXC only if both parties agree by contract. *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, 13198 ¶12 (2002), *petitions for review dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003). The absence of a right to collect switched access charges from IXCs is underscored by the Commission's eventual elimination of tariffed access charges (and thus access tariffs), *Connect America Fund*, 26 FCC Rcd at 17904-17914.

2. Northern Valley Is Wrong That The Commission Improperly Failed To Respond To One Of Its Claims.

Northern Valley next asserts that the agency improperly ignored its argument that the relevant "fee" for purposes of determining whether a "telecommunications service" has been provided is not that paid by the call recipient, but rather by the call originator. Br. 20-22. Not so.

As the Commission pointed out on reconsideration, that argument had been "advanced *and rejected*." *Qwest Reconsideration* ¶5 & n.20 (JA 367) (emphasis added). The Commission cited paragraphs 9-11 of the underlying *Qwest Order*, in which the agency explained in detail the basis for its conclusion that the CLEC access tariff regime requires that a CLEC's end user be a paying customer. That reasoning disposed of Northern Valley's contrary argument. As the Commission observed, under the access charge regime, "an 'end user' is a customer of a service that is offered for a fee." *Qwest Order* ¶9 (citing 47 U.S.C. § 153(53)) (JA 204).[4]

[4] *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 98 (2d Cir. 2006), is not to the contrary. The issue in that case was whether telephone calls were local or long distance; it had nothing to do with the meaning of "end user" or the Commission's CLEC tariff rules.

Here, the "customer" to which Northern Valley completes calls is the conference calling company, which therefore must be charged for service to qualify as an end user. Indeed, Northern Valley's tariff indicates as much – it defined an "end user" as the "Customer of an Interstate or Foreign Telecommunications Service that is not a carrier;" *i.e.*, not the IXC. Tariff at 8 (JA 62). The tariff further makes clear Northern Valley's understanding that the "end user" in this context refers to its own customers – the conference calling companies – because it maintained that they need not purchase any services from Northern Valley to fall within that regulatory definition. *See* Br. 17 (noting that "[t]here is also no dispute that a conferencing service provider can be an 'end user'"); *see also id.* at 19 ("Northern Valley's Tariff … simply mirrors the plain language of the Act, which does not make the payment of a fee by an End User part of the analysis"). In short, it does not matter if the call placed to the conference company was made by a fee-paying caller, because that caller is not the relevant "end user" of Northern Valley's service.

3. Northern Valley's Remaining Arguments Regarding The "End User" Definition Are Procedurally Barred And, In Any Event, Meritless.

a. Northern Valley's Contentions That The Commission Acted Inconsistently With Its Rules and Precedents Are Barred By FCC Rule 1.106(c).

Northern Valley argues that the Commission acted inconsistently with Rule 61.26 and the *Access Charge Orders* (Br. 23-38), and that the Commission erroneously ignored its earlier decision in *Qwest v. Farmers & Merchants Mutual Tel. Co.*, 22 FCC Rcd 17973 (2007) (Br. 38-45). Because Northern Valley raised those claims for the first time in its petition for reconsideration before the agency, the Commission properly dismissed them. Northern Valley is now precluded from presenting the claims to this Court.

"Simple fairness to those who are engaged in the tasks of administration … requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection *made at the time appropriate under its practice*." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (emphasis added); *accord Woodford v. Ngo*, 548 U.S. 81, 90 (2006). The "time appropriate" for a defendant to raise its legal arguments in a complaint proceeding before the FCC is its response to the complaint. In keeping with the *Tucker* principle, FCC Rule 1.106(c) bars arguments raised for the first time in petitions for reconsideration, with exceptions not pertinent here. 47 C.F.R. §§ 1.106(b)(2)(ii), (c)(1), (c)(2); *see Qwest Reconsideration* ¶6 (JA 367-368).

Northern Valley did not raise its arguments concerning Rule 61.26, the *Access Charge Orders*, or the *Farmers* decision in response to either Qwest's or Sprint's complaint, *Qwest Reconsideration* n.23 (JA 367). The Commission thus properly dismissed those portions of the petition for reconsideration as procedurally improper. Northern Valley does not challenge the validity of that procedural ruling, and the Court should not address its forfeited arguments.

b. Northern Valley Is Wrong That The FCC Acted Inconsistently With The *Access Charge Orders* And Rule 61.26.

Even if Northern Valley's arguments concerning the *Access Charge Orders* and Rule 61.26 were not procedurally barred, they lack merit. Northern Valley contends that in the *Access Charge Orders* the Commission deregulated the relationship between a CLEC and its local exchange customers, but that by requiring a paying end-user customer as a prerequisite to filing an access tariff, the Commission unlawfully subjected the relationship between the CLEC and its local exchange customer to the very regulation the agency had disavowed. Br. 24-26; 28-29; 30-32; 37-38.

Northern Valley's argument rests on the faulty premise that the orders on review regulate the relationship between the CLEC and its local exchange customer. In fact, they specify when a CLEC may lawfully file a *tariff* that imposes access charges *on an IXC*. As the Commission pointed out, "Northern Valley may offer its services to individuals and businesses for any fee (or no fee)." But "if Northern Valley chooses to assess access charges upon IXCs by *tariff*" – rather than by negotiated contract – there must be a paying end user. *Qwest Reconsideration* ¶12 (JA 370). Northern Valley's reliance on statements in prior Commission orders that the agency would not regulate end user charges, Br. 31, 33, 38, is thus misplaced: nothing in the orders on review is inconsistent with that policy. Indeed, the orders make clear that CLECs are free to negotiate contracts with IXCs that define the specific nature of their end-user relationships; what they may not do, however, is rely on the FCC's tariff regime and its associated benefits (*see* p.9, *supra*) to impose access charges on IXCs in the absence of a paying end user.

Northern Valley does not claim that under the *Access Charge Orders* the FCC may not regulate the CLEC-IXC relationship. Indeed, such regulation is at the heart of those orders. The *Access Charge Orders* were prompted by the abuse of tariffs by then-unregulated CLECs that unfairly shifted costs onto IXCs and the public. 16 FCC Rcd at 9924-9925, 9934. In light of such abuse, the Commission "limit[ed] the application of [its] tariff rules to CLEC access services," and regulated more strictly CLEC interstate access tariffs. *Id*. at 9924 ¶2. An essential part of that limitation was the agency's exercise of its forbearance authority to detariff CLEC access charges except as set forth in Rule 61.26. That approach, the Commission determined, would allow both parties that benefit from access service – the IXC and the end user – to share the costs fairly. 16 FCC Rcd at 9931 ¶22, 9938 ¶38; *see Qwest Reconsideration Order* ¶11 (JA 370).

To be sure, the Commission's decision may discourage some CLECs from providing free, subsidized service to companies that generate large volumes of incoming calls. But that effect does not amount to regulation of the CLEC-customer relationship. Regulation of matters within the Commission's reach is not rendered impermissible because it affects matters that it has declined to regulate. For example, where the Commission granted a spectrum permit to a domestic television station conditioned upon the provision of certain types of programming by a foreign station, the Court held that the Commission had not regulated the foreign station. *Radio-Televisión S.A. de C.V. v. FCC*, 130 F.3d 1078, 1082 (D.C. Cir. 1997). Similarly, in *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999), the

Court held that despite "the practical effect" of the Commission's order on unregulated foreign entities, "the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences." Here too, the FCC has not impermissibly regulated the relationship between CLECs and their local exchange customers merely because its rules governing CLEC access tariffs may cause CLECs to charge end users in order to obtain the benefits of filing an FCC tariff that governs their relationship with IXCs.

Moreover, the *Access Charge Orders* did not determine that CLECs could tariff access charges for services provided free of charge. Rather, those orders contemplated that deregulation of the CLEC-customer relationship would allow CLECs to charge their local exchange customers *more* for interstate service than ILECs were allowed to. CLECs had contended that their costs were higher than those of ILECs, and the Commission declined to "stand in the way of their recovering those costs. … CLECs remain free to recover from their end users any greater costs that they incur in providing either originating or terminating access services." *Access Charge Order*, 16 FCC Rcd at 9938 ¶39. Contrary to Northern Valley's contention, in deregulating the CLEC-customer relationship the Commission still assumed a paying customer.

Northern Valley is also mistaken in asserting that the Commission misinterpreted the term "functional equivalence" in Rule 61.26. According to Northern Valley, a CLEC provides "interstate switched access service" under the rule as long as it performs the same physical function – the switching of a call to its intended recipient – as an ILEC, without regard to the existence of a paying customer. Br. 33-38.

That claim conflicts with the *Access Reform Reconsideration Order*, where the Commission made clear that, as used in Rule 61.26, functional equivalence between CLEC and ILEC access service exists "only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users." 19 FCC Rcd at 9114 ¶15; *see also id*. at 9115 ¶13 ("[w]hen a competitive LEC originates or terminates traffic to its own end-users, it is providing the functional equivalent of" ILEC switched access services within the meaning of Rule). *See Qwest Order* ¶8 (JA 203); *Qwest Reconsideration Order* ¶8 (JA 368). As explained at page 26 above, under the functional equivalence test, a CLEC may tariff the same types of charges that an ILEC may tariff – and an ILEC must have a paying end user. The agency thus reasonably interpreted its rules and orders to discourage Northern Valley's economically inefficient arbitrage scheme and to further its policies promoting the fair sharing of access costs and disfavoring traffic pumping.

See MobileTel, Inc. v. FCC, 107 F.3d 888, 896 (D.C. Cir. 1997) (upholding interpretation of regulation that "was reasonable and consistent with several of the Commission's relevant policies"); *Southwestern Elec. Co-op., Inc. v. FERC*, 347 F.3d 975, 984 (D.C. Cir. 2003) (upholding interpretation that was reasonable and "paid heed to public policy priorities").[5]

Similarly, there is no merit to Northern Valley's argument (Br. 34) that the orders on review are undermined by FCC Rule 69.5(b), 47 C.F.R. § 69.5(b), which does not use the phrase "end user" in requiring ILECs to tariff all use of local switching facilities. It is not surprising that Rule 69.5(b) does not mention a paying end user – ILECs are required to charge each customer a SLC and thus will always have a paying end user. *See* 47 C.F.R. § 69.4(a).

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[5] Northern Valley's reliance on an FCC amicus brief in *Paetec Communications Inc. v. MCI Communications Servs. Inc.*, Third Cir. No. 11-2268 (filed March 14, 2012), is misplaced. The FCC's brief did not address the meaning of "end user" and focused instead on an issue that has no bearing here: the type of services for which a CLEC could recover payment from an IXC (specifically, whether a CLEC that does not provide "tandem switching" may nevertheless charge for that service). Nothing in the FCC's brief suggests that switching a call to a non-paying customer amounts to a service functionally equivalent to switched access within the meaning of Rule 61.26.

c. The Commission's Holding Is Consistent With Its *Farmers* Precedent.

Even if Northern Valley had not waived its argument (Br. 38-45) that the *Qwest* and *Sprint* orders are inconsistent with the Commission's decision in *Farmers*, 22 FCC Rcd 17973 (*see* pp 37-38, *supra*), the claim is wrong.

Farmers involved a traffic pumping scheme in which Farmers & Merchants, an ILEC, filed a tariff that entitled it to collect access charges from "end users" as defined in the tariff. Farmers initially falsely informed the Commission that it had billed conference calling companies (with which it was splitting the proceeds from its inflated access charges) for the SLC and other charges. 22 FCC Rcd 17973 (*Farmers I*). On the basis of that misrepresentation, the agency initially determined that Farmers was entitled to collect access charges for calls delivered to the conference companies because they were "end users" under the relevant tariff definitions. 22 FCC Rcd 17973. The Commission found further that the conference companies could be end users even if they did not make *net* payments to Farmers. *Id*. ¶38.

Once the truth emerged that Farmers had not billed the conference companies for the SLC or any other service, and thus were not end users as defined in the tariff, the Commission reversed its earlier determination, which was "based entirely" on the premise that the end users had been billed for service and the SLC. *Qwest v. Farmers*, 24 FCC Rcd 14801, 14805 ¶11 (2009) (*Farmers II*). The Commission ruled instead that "the flow of money … is essential to analyzing their relationship because the tariff expressly contemplates and requires payments to Farmers, not payments that flow in the reverse direction." *Farmers II* n.49.

Northern Valley's reliance on the outcome in *Farmers I* is mistaken because – as it concedes (Br. 40) – that decision was reversed after the agency discovered the true facts. Just as *Farmers II* held that there must be payments from the end user to the carrier, so here Northern Valley's end user must be responsible for payment if Northern Valley wishes to tariff its access service. There is thus no inconsistency between the two decisions. *See Qwest Order* ¶14 (JA 207-208).

Furthermore, *Farmers* involved the interpretation and application of a tariff, whereas this case involves the interpretation and application of the agency's own rule governing when a CLEC may file a tariff. The Commission had no need in *Farmers* to consider whether its rules permit any LEC to define "end user" to mean a non-paying customer, and it had no need here to look to Northern Valley's tariff in interpreting Rule 61.26. Contrary to Northern Valley's contention, the Commission in *Farmers* did not establish a generally applicable principle that "a customer's 'end user' status depends on the language of the carrier's tariff." Br. 41. The terms of Farmers' tariff resolved *that* dispute, while Rule 61.26 resolves *this* one.

Northern Valley is also wrong in claiming (Br. 41) that the Commission's access charge regime turns on the "formalism" of "whether an end user remits some fee … just so that the CLEC can return it to that same customer." The Commission specifically declined to decide whether the *Qwest Order* created a "net payments" requirement because Northern Valley charged nothing for service. *Qwest Reconsideration* ¶16 (JA 372).[6] Nor has the Commission addressed the amount of payment that would render a call recipient a legitimate end user. The Commission has approached all such questions through case-by-case resolutions of specific disputes before it. That approach is well within the agency's discretion to "make reasonable decisions" about how best to structure its decision-making processes to "deal with an actual problem." *Tennessee Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992); *see also U.S. West Commc'ns, Inc. v. FCC*, 177 F.3d 1057, 1061 (D.C. Cir. 1999) (approving FCC's decision to "proceed

[6] We note that 47 U.S.C. § 203(c)(2) forbids carriers from "refund[ing] or remit[ting] by any means or device any portion of the charges" set forth in a tariff. The Commission has not addressed directly how that provision applies to traffic pumping, but has indicated that it may apply. *Connect America Fund*, 26 FCC Rcd at 17889 n.1183.

through case-by-case judgments of a questioned action's likely effect"), *cert. denied*, 528 U.S. 1188 (2000).

Finally, that the Commission has declined to prohibit revenue sharing between LECs and their customers does not support Northern Valley's position. Br. 42-45. The Commission has recognized that there may be some circumstances in which such an arrangement could be beneficial. *Connect America Fund*, 26 FCC Rcd at 17879 ¶672. The Commission has decided, however, that traffic pumping schemes like Northern Valley's are unfair and economically wasteful and ordinarily result in outcomes that are unjust and unreasonable. *Id*. at 17875 ¶662. The Commission may properly interpret its rules and orders to deter such practices.

4. The Court Lacks Jurisdiction Over Northern Valley's Claim That The Commission Has Improperly Invaded State Authority, Which Is Wrong In Any Event.

Northern Valley argues that because the Commission has "regulated the relationship between CLECs and their end users," Br. 45, it has violated 47 U.S.C. § 152(b), which forbids the FCC from regulating intrastate communication services.

At the outset, Northern Valley never raised that claim before the Commission and it is now statutorily barred. Section 405(a) of the Communications Act makes it a "condition precedent to judicial review" that a party give the Commission an "opportunity to pass" on any "question of fact or law." 47 U.S.C. § 405(a). Under that provision, the Court lacks jurisdiction over arguments not raised before the agency. *Bartholdi Cable v. FCC*, 114 F.3d 274 (D.C. Cir. 1997).

Even if the Court were to reach the issue, the argument is meritless because it rests entirely on the false premise that the Commission has regulated intrastate service. As shown at pages 39-41 above, the Commission has regulated only the switched access charges that CLECs may impose upon IXCs for the CLEC's completion of interstate long-distance calls; it has not regulated the relationship between CLECs and their local customers. Thus, the Commission has regulated *interstate* access service over which Congress has expressly granted it jurisdiction. 47 U.S.C. § 152(a).

III. THE COMMISSION ACTED WITHIN ITS DISCRETION IN INVALIDATING NORTHERN VALLEY'S TARIFF PROVISION REQUIRING WAIVER OF BILLING DISPUTE CLAIMS FILED WITHIN THE STATUTORY LIMITATIONS PERIOD.

Congress has established that "[a]ll complaints against carriers … shall be filed with the Commission within two years from the time the cause of action accrues." 47 U.S.C. § 415(b). Notwithstanding that statutory two-year limitations period, Section 3.1.7.1(a) of Northern Valley's tariff required that IXCs dispute any charge in writing within 90 days of the bill or be "*deemed* *to have waived* any and all rights and claims with respect to both the bill and the underlying dispute." JA 86 (emphasis added). The Commission found that the tariff "contravene[d]" the two-year statutory limitations period and thus was unlawful. *Sprint Order* ¶14 (JA 678).

Northern Valley's contrary arguments lack merit. Northern Valley first asserts that the notification provision is necessary and reasonable because in its absence, "IXCs could remain silent for two years" before starting litigation. Br. 53. But that is precisely what a statute of limitations allows. Northern Valley may believe that Congress should have chosen a shorter limitation period, but that policy argument should be addressed to the Legislature and not a court

Courts, including this one, have struck down similar tariff provisions for violating statutory limitations periods. In *Kraft Foods v. Federal Maritime Comm'n*, 538 F.2d 445, 447 (D.C. Cir. 1976), for example, this Court struck down a similar tariff condition in the face of an equivalent statute of limitations. In *MCI WorldCom Network Services, Inc. v. Paetec Communications, Inc.*, No. 04-1479 slip op. (E.D. Va. Mar. 16, 2005), *aff'd* 204 Fed. Appx. 271, 272 (4th Cir. 2006), the court struck down as inconsistent with section 415 the same type of notification and waiver term at issue here. In doing so, the court explained that carriers may not "unilaterally void federally codified consumer protections simply by filing a tariff." *Id*. 2-3; *see Paetec Communications, Inc. v. MCI Communications Services, Inc.*, 712 F. Supp. 2d 405, 416-417 (E.D. Pa. 2010) (giving earlier *Paetec* case preclusive effect); *see also Sprint Order* n.47 (JA 678).

Northern Valley is wrong in contending that courts "have regularly upheld" such notification and cut-off requirements. Br. 54. In *Viking Communications, Inc. v. AT&T Corp.*, 2006 WL 1128723 (D. N.J. 2006), and *Powers Law Offices v. Cable & Wireless USA, Inc.*, 326 F. Supp. 2d 190 (D. Mass 2004), the courts applied such a provision, but there was no challenge to its lawfulness under 47 U.S.C. § 415(b) and the court did not address the matter. In *MFS International, Inc. v. International Telecom, Ltd.*, 50 F. Supp. 2d 517 (E.D. Va. 1999), the notification and cutoff provision was established by mutually agreed private contract, *not* by tariff.[7]

[7] Northern Valley suggests – at page 13 of its brief in the discussion of standing and at footnote 94 – that it challenges the Commission's finding that the tariff was not "clear and explicit." *See* p. 16, *supra*. Such perfunctory and undeveloped references to an argument, however, are insufficient to preserve it for appellate review. *See Railway Labor Executives' Ass'n v. U.S. R.R. Retirement Bd.*, 749 F.2d 856, 859 n.6 (D.C. Cir. 1984) (three sentences in brief do not preserve claim); *Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (en banc) ("cursory arguments made only in a footnote" do not preserve claim).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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July 23, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHERN VALLEY COMMUNICATIONS, LLC PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 11-1467

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 10,879 words.

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July 23, 2012

STATUTORY AND REGULATORY APPENDIX

47 U.S.C. § 153(11)
47 U.S.C. § 153(53)
47 U.S.C. § 201(b)
47 U.S.C. § 203(c)

47 C.F.R. § 1.106(a)-(c)
47 C.F.R. § 61.3(ss)
47 C.F.R. § 61.26
47 C.F.R. § 69.2(m)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 -- WIRE OR RADIO COMMUNICATION
SUBCHAPTER I -- GENERAL PROVISIONS

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires--

* * * * *

(11) Common carrier

The term “common carrier” or “carrier” means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * * *

(53) Telecommunications service

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

* * * * *

47 U.S.C. § 201(b)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 201. Service and charges

* * * * * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 203(c)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 203. Schedules of charges

* * * * * *

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) 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, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

* * * * *

47 C.F.R. § 1.106(a)-(c)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE
RECONSIDERATION AND REVIEW OF ACTIONS TAKEN BY THE COMMISSION AND PURSUANT TO DELEGATED AUTHORITY; EFFECTIVE DATES AND FINALITY DATES OF ACTIONS

§ 1.106 Petitions for reconsideration in non-rulemaking proceedings

(a)(1) Except as provided in paragraphs (b)(3) and (p) of this section, petitions requesting reconsideration of a final Commission action in non-rulemaking proceedings will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained. (For provisions governing reconsideration of Commission action in notice and comment rulemaking proceedings, see § 1.429. This § 1.106 does not govern reconsideration of such actions.)

(2) Within the period allowed for filing a petition for reconsideration, any party to the proceeding may request the presiding officer to certify to the Commission the question as to whether, on policy in effect at the time of designation or adopted since designation, and undisputed facts, a hearing should be held. If the presiding officer finds that there is substantial doubt, on established policy and undisputed facts, that a hearing should be held, he will certify the policy question to the Commission with a

statement to that effect. No appeal may be filed from an order denying such a request. See also, §§ 1.229 and 1.251.

(b)(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:

(i) The petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; or

(ii) The petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity.

(3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

(c) In the case of any order other than an order denying an application for review, a petition for reconsideration which relies on facts or arguments not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

(1) The facts or arguments fall within one or more of the categories set forth in § 1.106(b)(2); or

(2) The Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest.

* * * * * *

47 C.F.R. § 61.3(ss)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 61. TARIFFS
SUBPART A. GENERAL

§ 61.3 Definitions

*   *   *   *   *   *

(ss) Tariff. Schedules of rates and regulations filed by common carriers.

*   *   *   *   *   *

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 61. TARIFFS
SUBPART C. GENERAL RULES FOR NONDOMINANT CARRIERS

§ 61.26 Tariffing of competitive interstate switched exchange access services.

(a) Definitions. For purposes of this section, the following definitions shall apply:

(1) CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of “incumbent local exchange carrier” in 47 U.S.C. 251(h).

(2) Competing ILEC shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

(3) Switched exchange access services shall include:

(i) The functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching;

(ii) The termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.

(4) Non-rural ILEC shall mean an incumbent local exchange carrier that is not a rural telephone company under 47 U.S.C. 153(44).

(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.

(6) Rural CLEC shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c), (e), and (g) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) of this section or

(ii) In the case of interstate switched exchange access service, the lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding June 20, 2001.

(c) The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate.

(d) Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) and (c) of this section, in the event that, after June 20, 2001, a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption. Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to that NECA rate, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge. Beginning July 1, 2013, all CLEC reciprocal compensation rates for intrastate switched exchange access services subject to this subpart also shall be no higher than that NECA rate.

(f) If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by § 51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

47 C.F.R. § 61.26 (cont'd)

(g) Notwithstanding paragraphs (b) through (e) of this section:

(1) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state.

(2) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall file revised interstate switched access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in § 61.3(bbb), or within forty-five (45) days of [date] if the CLEC on that date is engaged in access stimulation, as that term is defined in § 61.3(bbb).

47 C.F.R. § 69.2(m)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 69. ACCESS CHARGES
SUBPART A. GENERAL

§ 69.2 Definitions.

*** * * * * ***

(m) End user means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an “end user” when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an “end user” if all resale transmissions offered by such reseller originate on the premises of such reseller.

* * * * * *

11-1467 AND 11-1468

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Northern Valley Communications, LLC,
Petitioner,

v.

Federal Communications Commission
and United States of America,
Respondents.

CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that I directed that, the foregoing Brief for Respondents be electronically filed on July 23, 2012, with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. All counsel in this case are registered CM/ECF users and will be served by the CM/ECF system.

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