

BRIEF FOR RESPONDENTS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

\_\_\_\_\_  
No. 20-70042  
\_\_\_\_\_

WIDE VOICE, LLC,  
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

RESPONDENTS.

\_\_\_\_\_  
ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
\_\_\_\_\_

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**STATEMENT OF JURISDICTION**

This case involves a complaint filed with the Federal Communications Commission pursuant to 47 U.S.C. § 208. The Commission released the order on review on November 8, 2019. Wide Voice timely petitioned for review of the order on January 6, 2020. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

**QUESTIONS PRESENTED**

In June 2019, Verizon Business Services (“Verizon”), a long distance carrier, filed a complaint against Wide Voice, a local telephone company, alleging

that Wide Voice billed Verizon unlawfully high rates to complete calls to Wide Voice subscribers. In the order on review, the Commission held that Wide Voice's rates for a service called "tandem-switched transport" violated provisions of the Communications Act and the FCC's rules. *MCI Communications Services, Inc. v. Wide Voice, LLC*, 34 FCC Rcd 11010 (2019) ("*Order*") (ER-001).

This appeal presents the following questions:

1. Did the Commission reasonably interpret its rules to require Wide Voice to charge a tariffed rate for tandem-switched transport that is no higher than the rate for similar service charged by the incumbent local exchange carrier in the same area?

2. Did the Commission reasonably conclude that the "deemed lawful" provision of 47 U.S.C. § 204(a)(3) did not apply to Wide Voice's tariff and thus did not shield Wide Voice from damages for violating the FCC's rules?

## **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are set forth in an addendum to this brief.

## **COUNTERSTATEMENT**

### **A. Statutory Framework.**

Section 201(b) of the Communications Act of 1934, as amended (the "Act"), requires that rates for interstate communications services be "just and reasonable." 47 U.S.C. § 201(b). In service of this mandate, carriers in certain circumstances

must file “schedules of charges” – commonly referred to as tariffs – with the Commission listing interstate services and the applicable rates. *Id.* § 203. The FCC may suspend a tariff for a limited time period before the tariff becomes effective to investigate its lawfulness. *Id.* § 204(a). The FCC may also prescribe just and reasonable rates to be charged in the future. *Id.* §§ 154(i), 201-205. “Any person” may file a complaint with the Commission that a carrier’s effective tariff is unlawful, *id.* § 208(a), and request damages. *Id.* §§ 206, 207.

In 1996, Congress amended section 204(a) of the Act by adding subsection (3). It provides that a carrier “may file with the Commission a new or revised charge ... on a streamlined basis” and that “[a]ny such charge ... shall be deemed lawful” if the FCC does not suspend or investigate it within seven days (if the rate decreases) or 15 days (if the rate increases). 47 U.S.C. § 204(a)(3).

## **B. Access Charges and Their Reform.**

1. This case involves tariffed charges that local telephone companies (“local exchange carriers” or “LECs”) impose on long distance carriers for providing access to their local telephone networks to complete calls. “The LEC owns the phone lines that connect directly to end users, and it is through the LEC’s lines that [end] users make local calls.” *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1000 (D.C Cir. 2016). “The long-distance carrier connects end users’ LEC networks to other LEC networks around the country, thus giving end users the

ability to make long-distance calls.” *Id.*

An example illustrates the process. Assume a caller in Virginia wishes to speak to a friend in California. The call begins on the network of the local exchange carrier serving the Virginia caller. The local exchange carrier then hands the call to the calling party’s chosen long distance carrier – say, Verizon. Verizon then carries the call to California and delivers it to the terminating carrier, the local exchange carrier serving the called party – say, Wide Voice. Under the traditional intercarrier compensation system, Verizon would pay access charges to the local exchange carriers in Virginia and in California (Wide Voice).

The Telecommunications Act of 1996 (“1996 Act”) divided local exchange carriers into incumbent LECs and new entrants called competitive LECs. *See, e.g., Fones4All Corp. v. FCC*, 550 F.3d 811, 813 (9th Cir. 2008). Initially, the access rates charged by competitive LECs were largely unregulated. But in 2001, the Commission concluded that competitive LECs exercised market power over access service to the detriment of consumers. *Access Charge Reform*, 16 FCC Rcd 9923, 9938 ¶ 39 (2001).<sup>1</sup>

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<sup>1</sup> The FCC explained: “once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for [long distance carriers] wishing to complete calls to, or carry calls from, that end user.” *Access Charge Reform*, 16 FCC Rcd at 9935 ¶ 30.

To constrain that power, the FCC adopted a “rate benchmark rule,” which limited competitive LEC tariffed access charges to a benchmark at or below the access rate charged for similar services by the “competing incumbent LEC” in the area. *Id.* at 9938-40 ¶¶ 40-44; 47 C.F.R. § 61.26. Competitive LEC rates at or below the benchmark are conclusively presumed to be “reasonable” under the Act and are not subject to refund in a Section 208 complaint proceeding. *Access Charge Reform*, 16 FCC Rcd at 9948 ¶ 60. If a competitive LEC wishes to charge a rate higher than the benchmark, it must negotiate that rate with the individual carrier that it wishes to charge and embody the rate in a contract.

2. Over time, the traditional access charge system became plagued by inefficiencies and gamesmanship. To address these problems, the Commission in 2011 adopted a comprehensive plan “to phase out regulated . . . intercarrier compensation charges,” including access charges. *Connect America Fund*, 26 FCC Rcd 17663, ¶ 736 (2011) (“*Transformation Order*”), *aff’d*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015). In its place, the Commission implemented “a uniform national bill-and-keep framework” – in which each carrier “bills” its own subscribers and “keeps” the revenue.

The Commission found that a gradual transition to bill-and-keep was warranted to minimize disruption. The FCC required incumbent LECs subject to price cap rate regulation to reduce or “step down” their “Tandem-Switched

Transport Access Service” rates. 47 C.F.R. § 51.907(g)(2).<sup>2</sup> Tandem switches “operate much like railway switches, directing traffic” between carriers rather than connecting to customers directly. *AT&T Corp. v. FCC*, 841 F.3d 1047, 1050 (D.C. Cir. 2016). A local exchange carrier provides tandem-switched transport when a long distance carrier delivers a call to a tandem switching facility owned by the local exchange carrier (or its affiliate). The local exchange carrier then “switches” or directs the call and transports it to a terminating end office (which may be owned by the local exchange carrier or a third party) for delivery to the called party. As relevant here, if the local exchange carrier owns the tandem switch and terminates the call through its own end office, tariffed rates for this tandem switched transport service are subject to a rate capped at \$0.0007 per minute as of July 1, 2017, 47 C.F.R. § 51.907(g)(2), and at zero (*i.e.*, bill-and-keep) as of July 1, 2018. *Id.* § 51.907(h).

The rules limit the rates a price cap carrier may charge for calls “traversing a tandem switch that the terminating carrier [that is, a carrier that provides access to complete the call to a customer] or its affiliates owns.” *Id.* § 51.907(g)(2), (h). The FCC has interpreted this language to mean that the call must traverse a tandem

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<sup>2</sup> “Beginning in 1990, ... the FCC substituted ‘price cap’ regulation [for traditional rate-of-return regulation] for the largest LECs. Price cap regulation imposes a ‘cap’ on aggregate prices charged by LECs for certain services in a given area.” *Worldcom, Inc. v. FCC*, 238 F.3d 449, 453 (D.C. Cir. 2001).

switch owned by a price cap carrier or its affiliate and terminate to “a price cap carrier’s end office.” *Level 3 Communications, LLC*, 33 FCC Rcd 2388, 2392 ¶ 11 (2018). The FCC noted that such common ownership “presents the most straightforward scenario for the initial transition to bill-and-keep because such carriers are in a position to recover their tandem costs via end user tariffs, rather than from other carriers.” *Id.* at 2394 n.46. When a carrier owns the tandem switch but not the terminating end office, it cannot recover its costs from the end user.

The FCC, however, did not directly reduce the access rates charged by competitive LECs. Instead, it did so indirectly through the rate benchmark rule. Thus, 47 C.F.R. § 51.911(c) says that competitive LEC rates “shall be no higher than the ... rates charged by the competing incumbent local exchange carrier.” As the Commission explained, “competitive LECs are permitted to tariff interstate access charges at a level no higher than the tariffed rate for such services offered by the incumbent LEC serving the same geographic area (the benchmarking rule).” *See Transformation Order* ¶ 807. For example, in a geographic area where AT&T is the incumbent local exchange carrier, the benchmark rule limits a competitive LEC to tariff access rates no higher than AT&T’s rates for the same services.

### **C. The Proceedings Below.**

On July 14, 2017, Wide Voice filed a tariff at the FCC establishing two separate “terminating Tandem-Switched Transport” rates. Stipulated Fact 7 (ER-

026). Rates for service when the terminating carrier is a Wide Voice-affiliated price cap carrier “are benchmarked to the price cap LEC rates which are subject to the step-down specified in Commission Rules 51.907(g)(2) and 51.907(h).” *Id.* “Standard” rates, in contrast, “are not subject to the step-down.” *Id.* In practice, Wide Voice applies only the higher Standard rates because it has no price cap carrier affiliates. Stipulated Fact 12 (ER-027).

Verizon disputed Wide Voice’s billing of tandem-switched transport service at the Standard rates in areas where Wide Voice competes with an incumbent price cap LEC subject to the Section 51.907(g)(2) and (h) step-down rate caps. The parties stipulated that some of the disputed charges “were assessed on traffic that traversed a tandem switch that Wide Voice owned before being routed through a Wide Voice end office [] for termination.” Stipulated Fact 11 (ER-026).

On June 14, 2019, Verizon filed a complaint with the FCC pursuant to 47 U.S.C. § 208. Verizon argued that Wide Voice’s tariff was unlawful and void *ab initio* because it allowed Wide Voice to charge tandem-switched transport rates exceeding the Section 51.907(g)(2) and (h) rate caps in violation of the rate benchmark rule.

The Commission agreed with Verizon. It held that Wide Voice’s tariffed rate violated the rate benchmark rule by exceeding the stepped-down rates charged by a competing incumbent LEC for the same service. *Order* ¶ 14 (ER-006). At

Verizon's request, the FCC stated that it would determine damages, if any, due to Verizon in a subsequent phase of the proceeding. *Id.* The FCC also ordered Wide Voice to amend its tariff to comply with the rules. *Id.* ¶ 29 (ER-010).

The Commission began its analysis with the rate benchmark rule, which bars a competitive LEC from tariffing rates for access services above “[t]he rate charged for such services by the competing [incumbent LEC].” *Id.* ¶ 16 & n.38 (ER-006) (quoting 47 C.F.R. § 61.26(b)(1)). The pertinent services were terminating tandem-switched transport through a tandem switch owned by the terminating carrier or its affiliate. Under Section 51.907, “a price cap carrier/tandem owner must step down its tariffed rate for tandem-switched transport traffic that terminates to its own end office.” *Id.* ¶ 17 (ER-007) (citing 47 C.F.R. § 51.907(h)).

When a competitive LEC like Wide Voice “benchmarks to a price cap carrier subject to” Section 51.907’s rate caps, the FCC reasoned, the competitive LEC is the “terminating carrier” within the meaning of the rules, *id.* ¶ 18 (ER-007), and the maximum rate that the competitive LEC may charge is the “rate charged for *such service*[]’ by the price cap carrier to which it benchmarks.” *Order* ¶ 18 (ER-007) (quoting 47 C.F.R. § 61.26(b)(1)). Because Wide Voice’s tariff stepped down rates “only for traffic that terminates to a Wide Voice-affiliated price cap carrier (of which there are none),” it was “plainly unlawful.” *Id.* ¶ 20 (ER-008).

The Commission rejected Wide Voice’s argument, based on the *Level 3* decision, that Wide Voice is subject to the rate caps only where it terminates traffic “to a price cap carrier end office.” *Order* ¶ 21 (ER-008) (quoting *Level 3*, 33 FCC Rcd at 2392 ¶ 11). It explained that because “the tariffing carrier in [*Level 3*] was a price cap carrier,” “the Commission had no reason to address – and did not address – the interplay between” section 51.907 and the rate benchmark rule. *Id.* ¶ 22 (ER-008). Moreover, Wide Voice’s argument “misses the point.” *Id.* ¶ 23 (ER-008). “No one claims that” section 51.907 applies directly “to Wide Voice.” *Id.* Instead, Wide Voice “is governed by the” rate benchmark rule. *Id.*

The Commission also addressed Wide Voice’s objection that benchmarking its rates in such circumstances “places Wide Voice in the shoes of a price cap carrier when it is not one.” *Id.* ¶ 24 (ER-008). But the Commission held that the benchmark rule requires exactly that. *Id.* And the FCC disagreed that its rule interpretation allows “the [incumbent LECs] to whom Wide Voice benchmarks to charge their full rates while ... requiring Wide Voice to provide those exact services for free.” *Id.* ¶ 25 (ER-009) (internal citations omitted). To the contrary, the Commission responded, Wide Voice’s tariff, if upheld, would allow it to charge higher rates “while its competing price cap carrier is required to apply the step-down rates for the same type of traffic.” *Id.* If the competing price cap carrier owns the tandem and terminates the call to its end office, its access rate for that

service is zero, whereas under the Wide Voice tariff, if Wide Voice owns the tandem and terminates the call to its end office, it could charge a higher rate.

Finally, the Commission rejected Wide Voice's argument pursuant to 47 U.S.C. § 204(a)(3) that its tariff was "deemed lawful" and not subject to refunds for rule violations because the FCC neither suspended nor investigated the tariff within the time provided under this statute. *Order* ¶ 27 (ER-009-010). Tariffs containing rates that exceed agency-prescribed limits when they are filed cannot become "deemed lawful." *Id.* (citing *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, 33 FCC Rcd 7964 (2018) ("*Aureon Recon. Order*"), and *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, 32 FCC Rcd 9677 (2017) ("*Aureon Order*"), *aff'd in part and rev'd in part on other grounds*, *AT&T Corp. v. FCC*, \_\_\_ F.3d \_\_\_, 2020 WL 4459280 (D.C. Cir. Aug. 4, 2020)).<sup>3</sup> To the extent that the tariff permitted Wide Voice to charge rates exceeding the applicable rate benchmark, the Commission held, the tariff was invalid at the time of filing and, therefore, void *ab initio*. *Id.*

## SUMMARY OF ARGUMENT

I. The Commission reasonably interpreted its rules in applying the rate benchmark rule to Wide Voice's tandem-switched transport rate. Sections

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<sup>3</sup> The Court in *AT&T Corp.* did not reach the "deemed lawful" issue presented in this case. 2020 WL 4459280 \*5, n.5.

51.907(g)(2) and (h) cap the rates a price cap carrier can charge to terminate calls routed through a tandem switch and end office that the price cap carrier owns.

These rate caps bind Wide Voice through application of the rate benchmark rule, which requires competitive LECs that own both the tandem switch and the terminating end office to charge no more than the rate charged for like service by the incumbent LEC in the same area. Wide Voice's tariff violates the rate benchmark rule because it authorizes higher rates for such service than is allowed by the benchmark rule.

Wide Voice's arguments to the contrary lack merit. Wide Voice relies on the Commission's *Level 3* decision, which held that the rate caps apply only where a price cap carrier owns the end office. But the FCC did not address the rate benchmark rule in *Level 3*. Wide Voice's interpretation also fails to account for the rate benchmark rule's history and purpose of requiring that a competitive LEC not tariff a rate higher than the competing incumbent LEC rate for the same service.

The Commission's interpretation conforms to the plain meaning of its rules. If the Court nevertheless determines that the rules are ambiguous, the Court should defer to the agency's reasonable, authoritative interpretation, which relies on the FCC's expertise and reflects its fair and considered judgment.

**II.** The Commission reasonably interpreted 47 U.S.C. § 204(a)(3) of the Act to preclude "deemed lawful" status for a tariff rate that was invalid when filed.

Section 204(a)(3) establishes a conclusive presumption that legal rates filed by carriers pursuant to a streamlined procedure become “deemed lawful” and immune from refund liability if the Commission does not act within a specified period. But Congress adopted that subsection against the backdrop of the Supreme Court’s *Arizona Grocery* decision, which held that carriers must conform to rate limits fixed in advance by an agency and that filings exceeding these limits – such as Wide Voice’s – are *per se* unlawful. *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370 (1932). Accordingly, the tariff could not become “deemed lawful.” The FCC’s interpretation harmonizes section 204(a)(3) with other provisions of the Act and with Congress’s purpose of providing certainty that *legal* tariff filings that meet the procedural requirements of section 204(a)(3) will not later be subject to refund liability.

### STANDARD OF REVIEW

“We evaluate ... challenges under the Administrative Procedure Act by examining whether ‘an agency’s decreed result [is] within the scope of its lawful authority,’ and whether ‘the process by which it reaches [a given] result [is] logical and rational.’” *City of Portland v. United States*, \_\_\_ F.3d \_\_\_, 2020 WL 4669906, \*6 (9th Cir. Aug. 12, 2020) (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (internal quotations marks omitted); see 5 U.S.C. § 706(2)(A), (C). “This is

a deferential standard that presume[s] the validity of agency action.” *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 257 (D.C. Cir. 2001).

Judicial review of the Commission’s statutory interpretation “is governed by the familiar *Chevron* framework” in which the court utilizes “ordinary tools of the judicial craft” to determine “whether Congress has directly spoken to the precise question at issue.” If not, when “terms of the Telecommunications Act are ambiguous,” the court “defer[s]” to the FCC’s reasonable interpretations” of the statutes it administers. *City of Portland*, 2020 WL 4669906, \*6; accord *Mendez-Garcia v. Lynch*, 840 F.3d 655, 663 (9th Cir. 2016).

As for interpretation of agency regulations, “[i]f the regulation is unambiguous, its plain meaning governs.” *Amazon.com, Inc. v. Comm’r of Internal Revenue*, 934 F.3d 976, 984 (9th Cir. 2019). But courts ““presume that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules.”” *Sec’y of Labor, United States Dep’t of Labor v. Seward Ship’s Drydock, Inc.*, 937 F.3d 1301, 1307 (9th Cir. 2019) (quoting *Kisor v. Wilkie*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2400, 2414 (2019)). To receive such deference, the regulatory interpretation must be reasonable, authoritative, implicate agency expertise, and reflect the agency’s “fair and considered judgment.” *Kisor*, 139 S. Ct. at 2415-18 (internal quotations and citations omitted).

## ARGUMENT

### I. THE FCC REASONABLY INTERPRETED ITS RULES IN APPLYING THE RATE BENCHMARK RULE TO WIDE VOICE'S TANDEM-SWITCHED TRANSPORT RATE.

The Commission's rate benchmark rule provides that "a CLEC shall not file a tariff for its ... access services that prices those services above" the "rate charged for such services by the competing ILEC." 47 C.F.R. § 61.26(b)(1). The step-down rules capped price cap incumbent LEC rates for calls that are routed through a tandem switch and end office that the terminating carrier owns at \$0.0007 per minute as of July 1, 2017, and zero as of July 1, 2018. *Id.* § 51.907(g)(2), (h). Accordingly, competitive LECs like Wide Voice are prohibited by the benchmark rule from tariffing more than the step-down rate for calls terminating to an end office owned by the competitive LEC if the calls traverse a tandem switch owned by the competitive LEC (or its affiliate). Wide Voice's challenges to the Commission's interpretation of its rules are unconvincing.

1. There is no dispute that, under section 51.907 of the rules, to implement the transition to a bill-and-keep system, a price cap carrier must reduce its tandem-switched transport rates when it owns the tandem switch and the terminating end office. Subsection (g)(2) provides that "[e]ach Price Cap Carrier shall establish, for ... terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than

\$0.0007 per minute.” 47 C.F.R. § 51.907(g)(2). Subsection (h) likewise requires zero rates (*i.e.*, bill-and-keep) for traffic “traversing a tandem switch that the terminating carrier or its affiliate owns.” *Id.* § 51.907(h). Under these provisions, “a price cap carrier/tandem owner must step down its tariffed rate for tandem-switched transport traffic that terminates to its own end office.” *Order* ¶ 17 (ER-007).

The rate benchmark rule extends these requirements to competitive LECs that own the tandem switch and end office through which calls are terminated, as Wide Voice concededly does for some of the disputed charges here. Under the rate benchmark rule, a competitive LEC “shall not file a tariff for its ... access services that prices those services above ... [t]he rate charged for such services by the competing ILEC.” 47 C.F.R. § 61.26(b)(1). When a competitive LEC benchmarks to a price cap carrier, “[t]he tariffed service remains as described” in section 51.907(g)(2) and (h), “and the maximum rate that the competitive LEC may lawfully charge is the ‘rate charged for *such service*[.]’ by the price cap carrier to which it benchmarks.” *Order* ¶ 18 (ER-007) (quoting 47 C.F.R. § 61.26(b)(1)).

The Commission’s application of the rate benchmark rule in this case is “straightforward[.]” *Id.* Wide Voice does not dispute that it provided tandem-switched transport service to Verizon for calls terminated through a Wide Voice-owned tandem switch and end office. *See* Stipulated Fact 11 (ER-026). But Wide

Voice's tariff did not step down the rate for such service in areas where Wide Voice benchmarks to a price cap LEC subject to the step-down rates. *Order* ¶¶ 19-20 (ER-007-008). “Instead, by stepping down its rate only for traffic that terminates to a Wide Voice-affiliated price cap carrier (of which there are none),” the tariff “ensure[s] that the step-down rates *never* apply” to Wide Voice. *Id.* ¶ 20 (ER-008).

2. The FCC's interpretation is faithful to the rate benchmark rule's history and purpose. *See id.* ¶¶ 23-24 (ER-008). The rule was adopted to help ensure that the tariffed rates charged by competitive LECs' were “just and reasonable” under Section 201(b) of the Act by tying those rates to those charged by incumbent LECs, which were “the product of an extensive regulatory process.” *Access Charge Reform*, 16 FCC Rcd at 9939-40 ¶¶ 40-44. In section 51.911(c), the Commission made clear that the bill-and-keep transition rules – including section 51.907, which is written in terms of actions that “Price Cap Carriers” must take – apply to competitive LECs through the benchmark rule. 47 C.F.R. § 51.911(c) (competitive LEC rates “shall be no higher than the ... rates charged by the competing incumbent [LEC], in accordance with the same procedures specified in § 61.26 of this chapter.”); *Transformation Order* ¶¶ 801, 807. Even as it phased out the access charge system, the FCC sought to prevent competitive LECs from tariffing higher rates than the competing incumbent LEC rates for the same service.

*Id.* ¶ 808 (“we conclude that a uniform approach for all LECs is preferable and do not find compelling evidence to depart from the important policy objectives underlying the CLEC benchmarking rule.”).

Wide Voice, however, argues that the Commission’s rule interpretation creates “a competitive disadvantage” by reducing the rate that a competitive LEC can charge “when that CLEC owns the end office and the tandem switch,” whereas an incumbent LEC “can charge a full tandem rate when it terminates traffic to its own CLEC.” Wide Voice Br. 23. Not so. Wide Voice’s rate is reduced only when the same rate charged by the competing incumbent LEC in the area is reduced. *See Order* ¶ 25 (ER-009). The FCC’s rule thus achieves *parity* of rates, not *disparity*.<sup>4</sup>

3. Wide Voice (Br. 24-29) misplaces reliance on the Commission’s 2018 decision in *Level 3*. 33 FCC Rcd at 2388. Unlike this case, *Level 3* involved a complaint against the access rates charged by a price cap carrier, not a competitive LEC. The Commission found that the section 51.907(g)(2) rate cap applies to a price cap carrier only when that carrier provides tandem-switched transport “that terminates to a price cap carrier end office.” *Level 3*, 33 FCC Rcd 2388 ¶ 3. But

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<sup>4</sup> Wide Voice complains (Br. 23) that the Commission’s rule interpretation requires competitive LECs to offer tandem-switched transport service “free of charge.” As set forth above, bill-and-keep requires carriers to bill their end users – rather than other carriers – for their services to promote efficiency and prevent gamesmanship. *See* pg. 5 *supra*. It does not require carriers to provide service free of charge.

because *Level 3* involved direct application of section 51.907(g)(2) to a price cap LEC, the Commission had no occasion to address the rule's indirect application to a competitive LEC through the rate benchmark rule. *Order* ¶ 22 (ER-008). Because *Level 3* did not involve the application of the rate benchmark rule, it is inapposite.

Wide Voice points out that the price cap-affiliated end office owners in *Level 3* included competitive LECs. *See* Wide Voice Br. at 27 (quoting *Level 3*, 33 FCC Rcd at 2394); Am. Br. 22-24. That is beside the point. No one disputes that section 51.907 does not apply to competitive LECs. But “Wide Voice’s conduct is governed by the benchmark rule.” *Order* ¶ 23 (ER-008).

4. The FCC interpreted its rules in accordance with their plain meaning. But if the Court nevertheless determines that the rules are ambiguous, it should defer to the FCC’s interpretation, which is at the least reasonable. The bill-and-keep transition rules are at the heart of the agency’s efforts to fulfill its statutory mandate to ensure “just and reasonable” rates, 47 U.S.C. § 201, by reforming intercarrier compensation between long distance and local exchange carriers. *See Allnet Comm’n Svc., Inc. v. Nat’l Exchange Carrier Ass’n, Inc.*, 965 F.2d 1118, 1123 (D.C. Cir. 1992) (claim that tariff violated the Commission’s regulations was “a matter squarely within its expertise.”). The agency’s ““fair and considered judgment”” regarding the meaning its rules therefore deserves deference. *Kisor*, 139 S. Ct. at 2417.

**II. THE FCC REASONABLY DETERMINED THAT THE “DEEMED LAWFUL” PROVISION OF 47 U.S.C. § 204(A)(3) DID NOT IMMUNIZE WIDE VOICE FROM DAMAGES FOR ITS VIOLATIONS OF THE FCC’S RULES.**

The Commission found that Wide Voice’s tariff is invalid and void *ab initio* because it purports to allow Wide Voice to charge tandem-switched transport rates that are prohibited by the Commission’s rules. *Order* ¶¶ 26-27 (ER009-010). Wide Voice argues that 47 U.S.C. § 204(a)(3) bars retroactive application of the FCC’s finding. In effect, Wide Voice maintains that even it did violate the FCC’s rules, it cannot be required to pay damages for its misconduct. But, as the FCC correctly concluded, above-benchmark rates that it has prohibited a competitive LEC from filing in a tariff cannot become “deemed lawful” under the statute.

1. The terms of section 204(a)(3) “come to us burdened with (or illuminated by) the Supreme Court’s decision in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932).” *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410-11 (D.C. Cir. 2002). That decision, interpreting the predecessor provisions of the Interstate Commerce Act, made a distinction between “legal” and “lawful” tariffs – a framework that applies with equal force to the Communications Act. *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) (“The Communications Act, of course, was based upon the [Interstate Commerce Act] and must be read in conjunction with it.”). Under *Arizona Grocery*, rates must be “legal,” meaning among other things that they “contain[] the published rates the

carrier is permitted to charge.” *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006); *see Arizona Grocery*, 284 U.S. at 384, 387.

A rate that is minimally legal may nevertheless violate the duty, existing at common law and “expressly affirmed” by statute, “to charge no more than a reasonable rate.” *Id.* at 384. In that circumstance, the rate is not “lawful” because – in the parlance of the current Act – it is not substantively “just and reasonable” under section 201(b). *Virgin Islands Tel. Corp.*, 444 F.3d at 668. According to the Supreme Court, rates could become “lawful” in one of two ways. Rates could be prescribed in advance via an agency’s “quasi-legislative” or rulemaking authority (as the FCC did here), in which case, “there is ... no difference between the legal or published tariff rate and the lawful rate.” *Arizona Grocery*, 284 U.S. at 387. Alternatively, a carrier could submit a “legal” rate that could later be adjudged reasonable – and thus “lawful” – and not subject to refunds. *ACS*, 290 F.3d at 411. Either way, legality is a necessary predicate to lawfulness. Section 204(a)(3) altered the second path to lawfulness, applicable to carrier-initiated rates, in one important respect. In specified circumstances, a legal and effective rate would become “deemed lawful” if not suspended and investigated (or rejected) by the agency within a prescribed amount of time. “In accordance with *Arizona Grocery*, these ‘deemed lawful’ tariffs are not subject to refunds” – even if the agency subsequently determines that they are unlawful. *ACS*, 290 F.3d at 411 (citing

*Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2182-83 ¶¶ 20-21 (1997)).

When a carrier files a tariff that violates the Communications Act and the FCC’s rules – as Wide Voice did here – the tariffed rate is *not* a legal rate within the meaning of *Arizona Grocery*, because the carrier has not filed a rate that “it is permitted to charge.” *Virgin Island Tel. Corp.*, 444 F.3d at 669. Section 204(a)(3) did not eliminate the requirement that a rate must be minimally legal when filed, before “deemed lawful” status may attach to it. “[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 501 (1986). In the absence of such specific intent, section 204(a)(3) therefore is most appropriately read as preserving the longstanding common law requirement that a tariff must be legal when filed with the agency. *See Am. Fed’n of Gov’t Emp., Local 3295 v. Fed. Labor Relations Auth.*, 46 F.3d 73, 78 (D.C. Cir. 1995) (recognizing “the familiar principle that Congress legislates with a full understanding of existing law.”).

The FCC’s bill-and-keep transition rules, including section 51.907 and the rate benchmark rule, establish “[s]pecific rates prescribed for the future,” which *Arizona Grocery* recognized “take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal

rate.” 284 U.S. at 387. A “carrier cannot change a rate so prescribed ... It is bound to conform to the order of the Commission.” *Id.* Moreover, the Commission affirmatively *prohibited* competitive LECs from filing tariffs with above-benchmark rates. *Access Charge Reform*, 16 FCC Rcd at 9956-58 ¶¶ 82-87; *see* 47 U.S.C. § 160 (authorizing Commission to forbear from applying the Act’s tariff provisions if it finds that certain criteria are satisfied). Because Wide Voice’s tariff violated the rate benchmark rule, the tariff contained “rates that the carrier is not permitted to charge.” *Order* ¶ 27 (ER-009-010) (quoting *Aureon Recon. Order*, 33 FCC Rcd at 7969 ¶ 15). Accordingly, the tariff did “not even meet the preliminary standard for a legal tariff filing” and, therefore, “cannot become a ‘deemed lawful’ tariff by operation of Section 204(a)(3).” *Id.*

2. The FCC’s interpretation makes sense of section 204(a)(3) in the context of the Act’s other provisions. The rate caps at issue here implement the Commission’s authority under 47 U.S.C. § 201(b) to prohibit “unjust or unreasonable” rates. *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 53 (2007) (FCC rules “obviously” implement § 201(b) when they “take the form of FCC approval or prescription for the future of rates that exclusively are ‘reasonable.’”). Interpreting section 204(a)(3) to override FCC authority to implement section 201(b) by prescribing rates or rate caps for the future would require “clear and manifest” evidence of legislative intent. *Rodriguez*

*v. United States*, 480 U.S. 522, 525 (1987) (repeal by implication will not be found absent “clear and manifest” evidence of intent).

Section 204(a)(3) contains no such evidence; indeed, it is silent on this question. As the FCC has reasoned, “nothing in the [statutory] language ... suggests that a rate that was prohibited ... could be one that a carrier ‘may’ file” under Section 204(a)(3).” *Aureon Recon. Order*, 33 FCC Rcd at 7968 ¶ 14.<sup>5</sup> Instead, section 204(a)(3) can be harmonized with FCC authority to prescribe rates for the future by construing section 204(a)(3) to prohibit streamlined tariff filing of rates that the FCC already has prohibited by rule.

While the Commission’s interpretation harmonizes the Act’s provisions, Wide Voice’s interpretation would effectively enable tariff filers to violate FCC rate prescriptions with impunity – and to override the Commission’s “mandatory detariffing” of above-benchmark rates, *Ting v. AT&T*, 319 F.3d 1126, 1131-32 (9th Cir. 2003) – by invoking “deemed lawful” status. Carriers could do what the FCC cannot: “ignore its own pronouncement promulgated in its quasi legislative

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<sup>5</sup> In contrast, the D.C. Circuit found that a statute authorizing railroads to increase “*any rate* over which the [Interstate Commerce] Commission has jurisdiction” conflicted with, and thus reflected Congress’s intent to repeal, the agency’s authority to prescribe maximum rates for the future. *CSX Transp. v. United States*, 867 F.2d 1439, 1442-43 (D.C. Cir. 1989) (emphasis in original).

capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.” *Arizona Grocery*, 284 U.S. at 389.

Importantly, the pre-effective tariff review process provided by section 204(a)(3) does not justify granting carriers such license. The FCC receives thousands of tariff filings annually. *See Aureon Recon. Order*, 33 FCC Rcd at 7969 ¶ 14 (acknowledging the agency’s “practical inability to review and, if necessary, suspend within 15 days, each of the well over 6,000 tariff filings it receives annually”). Some inevitably slip through the cracks. Interpreting the statute to convert prohibited tariff rates into lawful ones would exacerbate the situation by encouraging unscrupulous carriers to try to submit illegal tariffs in the hope they will not be identified in time. *Accord In re Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) (“We are, in the absence of compelling evidence that such was Congress’ intention, unwilling to” interpret a statute so as to undercut “administrative action imperative for the achievement of an agency’s ultimate purposes.”).

**3.** The FCC’s interpretation also comports with the legislative purpose. Congress intended section 204(a)(3) to “speed up FCC action for phone companies” by providing certainty that legal tariff filings will not later be subject to refund liability. *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd at 2172 n.2. Under rate-of-return regulation, for example, carriers set rates designed to

achieve no higher than a prescribed maximum rate of return (*e.g.*, 11.25 percent) over a two-year period. *See ACS*, 290 F.3d at 407. But “it is virtually impossible to tell in advance just what rate of return a given rate may yield.” *Id.* at 413, and assumptions involving projected demand upon which such rates are based may prove inaccurate over time. If a carrier ultimately earns a rate of return in excess of the prescribed return, the FCC has authority to seek return of the overearnings – *unless* the tariff is “deemed lawful.” *See id.* at 411 (“§ 204(a)(3) effected a considerable change in the regulatory regime.”). The above-benchmark rates at issue here were prohibited *before* the tariff was filed. Congress did not intend section 204(a)(3) to immunize tariffs that are invalid from the outset.

4. The D.C. Court’s decisions regarding section 204(a)(3) are not to the contrary. *See Wide Voice Br.* at 18-19. Those decisions limit the relief available in complaint cases where the carrier has set a rate that is minimally legal and “deemed lawful”—but the rate is later found to be unreasonable on the ground that it violates rate-of-return prescriptions. *See Virgin Islands Tel. Corp.*, 444 F.3d at 669; *ACS*, 290 F.3d at 413. Neither *ACS* nor *Virgin Islands* addressed the issue here of whether a rate that violates the rate benchmark rule, and therefore is *not* legal as filed, may nonetheless become “deemed lawful.” Likewise, contrary to *Wide Voice*’s suggestion, *see Wide Voice Br.* at 19-20, the FCC did not address

the issue here when it implemented section 204(a)(3). *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd at 2182-83 ¶¶ 20-21.

Wide Voice also is mistaken in arguing that agency precedent rests the FCC's statutory interpretation on *Global NAPs*, 247 F.3d at 252, which did not address section 204(a)(3). *See* Wide Voice Br. at 20-21. The FCC relied on its *Aureon* decisions, *Order* ¶ 27 nn.59-60 and accompanying text (ER-009-010), which set forth the statutory analysis in the preceding discussion. *See Aureon Recon. Order*, 33 FCC Rcd at 7968-79 ¶¶ 12-15; *Aureon Order*, 32 FCC Rcd at 9677 ¶ 29.<sup>6</sup>

## CONCLUSION

The Court should deny the petition for review.

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<sup>6</sup> Amici (but not Wide Voice) argue that retroactive application of the *Order* violates the fair notice doctrine and would lead to a manifest injustice. These arguments are not properly before the Court because Wide Voice did not raise them in its opening brief. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) (argument raised by amicus curiae but not by appellant except in reply was not before the court) (citing *United States v. Gementera*, 379 F.3d 596, 607-08 (9th Cir. 2004) and *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)). In all events, Amici's arguments lack merit. The fair notice doctrine applies in cases, unlike this one, in which an agency sanctions a party. *See Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986). Amici's manifest injustice argument rests on a misunderstanding of the *Order*. *See* Am. Br. 17-29. The *Order* did not hold that the rate benchmark rule steps down tariffed rates where the competitive LEC does not own the end office (*i.e.*, is not the terminating carrier). A competitive LEC must step down its tariffed rates only where it does own the end office. *See* § I *supra*.

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# Statutory Addendum

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**47 U.S.C. § 154**  
**Federal Communications Commission**

\* \* \*

**(i) Duties and powers**

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

**47 U.S.C. § 160**  
**Competition in provision of telecommunications service**

**(a) Regulatory flexibility**

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

- (1)** enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2)** enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3)** forbearance from applying such provision or regulation is consistent with the public interest.

**47 U.S.C. § 201**  
**Service and charges**

**(a)** It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the

divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

**(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** **Schedules of charges**

**(a) Filing; public display**

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting

carriers shall keep such schedules open for inspection in such public places as the Commission may require.

**(b) Changes in schedule; discretion of Commission to modify requirements**

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

**(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.

**(d) Rejection or refusal**

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

**(e) Penalty for violations**

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder,

such carrier shall forfeit to the United States the sum of \$6,000 for each such offense, and \$300 for each and every day of the continuance of such offense.

**47 U.S.C. § 204**

**Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing**

**(a)(1)** Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

**(2)(A)** Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

#### **47 U.S.C. § 205**

#### **Commission authorized to prescribe just and reasonable charges; penalties for violations**

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of \$12,000 for each offense. Every distinct violation shall be a

separate offense, and in case of continuing violation each day shall be deemed a separate offense.

**47 U.S.C. § 206**  
**Carriers' liability for damages**

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

**47 U.S.C. § 207**  
**Recovery of damages**

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

**47 U.S.C. § 208**  
**Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation**

**(a)** Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there

shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

**(b)(1)** Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

**(2)** The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

**(3)** Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

#### **47 C.F.R. § 51.907**

#### **Transition of price cap carrier access charges.**

\* \* \*

(g) Step 6. Beginning July 1, 2017, notwithstanding any other provision of the Commission's rules:

\* \* \*

(2) Each Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than \$0.0007 per minute.

(h) Step 7. Beginning July 1, 2018, notwithstanding any other provision of the Commission's rules, each Price Cap carrier shall, in accordance with bill-and-keep, as defined in § 51.713, revise and refile its interstate switched access tariffs and any state tariffs to remove any intercarrier charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns.

**47 C.F.R. § 51.911**

**Access reciprocal compensation rates for competitive LECs.**

\* \* \*

(c) Beginning July 1, 2013, notwithstanding any other provision of the Commission's rules, all Competitive Local Exchange Carrier Access Reciprocal Compensation rates for switched exchange access services subject to this subpart shall be no higher than the Access Reciprocal Compensation rates charged by the competing incumbent local exchange carrier, in accordance with the same procedures specified in § 61.26 of this chapter.

**47 C.F.R. § 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.

\* \* \*

(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.