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

In the Matter of	)	
	)	
Sprint Communications Company L.P.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-11-MD-003
	)	
Northern Valley Communications, LLC,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 2011 **Released: July 18, 2011**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in part and denies in part a formal complaint[1] filed by Sprint Communications Company L.P. ("Sprint") against Northern Valley Communications, LLC ("Northern Valley") under section 208 of the Communications Act of 1934, as amended ("Act").[2] The Complaint alleges that Northern Valley's interstate switched access service tariff ("Tariff")[3] violates section 201(b) of the Act, and it requests that the Commission declare the Tariff void *ab initio* or, in the alternative, find that the Tariff's access rates are unreasonable and, therefore, unlawful.[4] As discussed below, we find that the Tariff violates Commission rule 61.26, as clarified by the *CLEC Access Charge Reform Reconsideration Order*;[5] that the Tariff is not "clear and explicit" as

[1] Formal Complaint of Sprint Communications Company L.P., File No. EB-11-MD-003 (filed Feb. 18, 2011) ("Complaint").

[2] 47 U.S.C. § 208.

[3] *See* Complaint Ex. 1 (Northern Valley Communications, LLC Access Service Tariff No. 3, effective July 23, 2010) ("Tariff").

[4] Complaint at 35-37, ¶¶ 73-81 (Count I) (citing 47 U.S.C. §§ 201(b) (prohibiting "unjust and unreasonable practices") and 205 (authorizing Commission to "prescribe just and reasonable charges")); *id.* at 37-38, ¶ 82 (Prayer for Relief). Sprint states that it "is not requesting damages," Complaint at 4, ¶ 5, but adds that it "reserves the right to seek damages at a later time," *id*. at 4 n.8. Sprint's conflicting statements fail to comply with the requirements of Commission rule 1.722(d) regarding requests for damages in a subsequent proceeding. *See* 47 C.F.R. § 1.722(d) (requiring that requests for damages be "clear and unequivocal").

[5] 47 C.F.R. § 61.26; *Access Charge Reform, Reform of Access Charges Imposed by Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004) ("*CLEC Access Charge Reform Reconsideration Order*").

required by Commission rule 61.2(a);[6] and that the Tariff contains a number of unreasonable payment and billing provisions. Accordingly, we grant the Complaint to the extent we find that the Tariff violates section 201(b) of the Act, and we direct Northern Valley to revise its Tariff within ten days of release of this Order. We decline, however, to declare the Tariff void *ab initio* or to set aside its rates.

II. BACKGROUND

A. Factual Background

2. Sprint is an interexchange carrier ("IXC") providing interstate telecommunications service throughout the United States.[7] Northern Valley is a competitive local exchange carrier ("CLEC") serving residential and business customers in South Dakota.[8] In addition, Northern Valley terminates calls to conference calling companies.[9] Northern Valley provides interstate switched exchange access services to IXCs such as Sprint pursuant to tariffs filed with the Commission.[10]

3. On July 8, 2010, Northern Valley filed the Tariff on 15 days' notice, and it became effective on July 23, 2010.[11] Northern Valley states that it filed the Tariff because it believed that the Commission's decision in *Qwest v. Farmers II*[12] created "doubt" as to whether Northern Valley could impose access charges for terminating calls to conference calling companies under its prior, existing tariff.[13]

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[6] 47 C.F.R. § 61.2(a) ("In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.").

[7] Complaint at 4, ¶ 7; Answer of Northern Valley Communications, LLC, File No. EB-11-MD-003 (filed Mar. 21, 2011) ("Answer") at 4, ¶ 7.

[8] Sprint's Proposed Findings of Fact and Conclusions of Law, Ex. 1 (Stipulations of Fact), File No. EB-11-MD-003 (filed Feb. 18, 2011) ("Stipulations") at 1, ¶ 1, 3, ¶¶ 14-16; Complaint at 5, ¶ 8; Answer at 4, ¶ 8; Answer, Legal Analysis at 4.

[9] Answer, Ex. 1 (Tariff); Stipulations at 1, ¶ 1, 2-3, ¶¶ 11-12; Answer, Legal Analysis at 4-5.

[10] Complaint, Ex. 1 (Tariff); Answer, Ex. 1 (Tariff); Stipulations at 3, ¶¶ 17, 19.

[11] Complaint at 8, ¶ 17 & Ex. 1 (Tariff); Answer at 5, ¶ 17 & Ex. 1 (Tariff).

[12] *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801 (2009) ("*Qwest v. Farmers II*").

[13] Answer, Legal Analysis at 5. In *Qwest v. Farmers II*, the Commission granted a section 208 complaint against Farmers and Merchants Mutual Telephone Company of Wayland, Iowa ("Farmers"), a rural LEC that was engaged in access stimulation. Farmers' tariff imposed access charges for transporting calls to or from an "end user's premises" and defined "end user" as "any customer of an interstate or foreign telecommunications service other than a carrier." *Qwest v. Farmers II*, 24 FCC Rcd at 14801, ¶ 1, 14805, ¶ 10. The Commission concluded that, because the conference calling companies did not purchase any services from Farmers, they were not "end users" within the meaning of Farmers' tariff. Accordingly, the Commission found that Farmers had violated sections 201(b) and 203(c) of the Act because it had imposed charges that were inconsistent with its tariff: "[N]othing in the contracts [between Farmers and the conference calling companies] suggests that the conference calling companies would subscribe to any tariffed Farmers' service or pay Farmers for their connections to the interexchange network, as would ordinary end-user customers under the tariff." *Id.* at 14801, ¶ 1, 14806, ¶ 12.

B. Legal Background

4. Since 1997, CLECs have been allowed to assess interstate switched exchange access service charges upon IXCs either by filing tariffs with the Commission or by negotiating contracts with the affected IXCs. (In contrast, incumbent local exchange carriers ("ILECs") may assess interstate switched exchange access charges only by filing federal tariffs.)[14] Section 204(a)(3) of the Act provides that LEC tariffs are "deemed lawful" unless suspended by the Commission within certain time periods.[15]

5. In 2001, the Commission found that CLEC access rates were, on average, "well above the rates that ILECs charge for similar service" and noted that some CLECs "refused to enter meaningful negotiations on access rates, choosing instead simply to file a tariff and bind IXCs … to the rates therein."[16] Accordingly, the *CLEC Access Charge Reform Order* promulgated rule 61.26, which provides that a CLEC may tariff access charges only for services that are the "functional equivalent" of ILEC access services, and only if the rates are no higher than those of the ILEC serving the same geographic area in which the CLEC is located.[17] In this way, CLEC access rates are "benchmarked" against ILEC access rates. If a CLEC wishes to impose higher rates, it may do so only by negotiating with the affected IXCs.[18] Subsequently, in the *CLEC Access Charge Reform Reconsideration Order*, the Commission clarified that a CLEC may assess tariffed switched access charges at the appropriate benchmark rate only for calls to or from the CLEC's own end users.[19]

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[14] *See Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8596, ¶ 1 (1997) ("*Hyperion Forbearance Order*") (granting "permissive detariffing for provision of interstate exchange access services by providers other than the incumbent local exchange carrier").

[15] 47 U.S.C. § 204(a)(3) ("A [LEC] 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 … before the end of that 7-day or 15-day period … ").

[16] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9931, ¶ 22, 9934, ¶ 28 (2001) ("*CLEC Access Charge Reform Order*"). The Commission declared further that its goal was "ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC switched access services." *Id.* at 9925, ¶ 3. The Commission expressed concern that CLECs were using high access rates to shift a substantial portion of their costs onto long distance carriers and subscribers who chose an access provider with lower rates. *Id.* at 9948, ¶ 59. Recently, moreover, the Commission sought comment on revisions to the CLEC benchmarking rule for CLECs engaging in revenue sharing agreements. *See Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) ("*Connect America Fund*").

[17] 47 C.F.R. § 61.26. *See CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, ¶ 3, 9938, ¶¶ 40-41 (describing the "bright line" that a "benchmark" would provide). The Commission made an exception for those small rural CLECs whose rates would otherwise be benchmarked against those of larger ILECs serving both rural and more urban communities. The Commission permitted these "rural CLECs" to benchmark their rates against the significantly higher rates found in the tariff to which small, generally rural ILECs subscribe. *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9953, ¶ 73; 47 C.F.R. § 61.26 (e) (rural exemption).

[18] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, ¶ 3, 9938, ¶ 40; 47 C.F.R. § 61.26.

[19] *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd 9114, ¶ 13, 9115, ¶ 15.

6. Very recently, the Commission found that the Tariff at issue here violated rule 61.26, as clarified by the *CLEC Access Charge Reform Reconsideration Order*.[20] The Commission reasoned that, to the extent the Tariff purported to charge for providing access to individuals or entities to whom Northern Valley offered its services for free, it impermissibly charged for services that were not being offered to "end users" and thus were not the "functional equivalent" of ILEC services. The Commission explained:

> [U]nder the Commission's ILEC access charge regime, an "end user" is a customer of a service that is offered for a fee. The Commission provided no alternative definition for "end user" when stating, in the *CLEC Access Charge Reform Reconsideration Order*, that a CLEC provides the functional equivalent of ILEC services [within the meaning of rule 61.26] only if the CLEC provides access to its "own end users." Accordingly, that order establishes that a CLEC's access service is functionally equivalent only if the CLEC provides access to customers to whom the CLEC offers its services *for a fee*.[21]

The Commission ordered Northern Valley to "file tariff revisions … to provide that interstate switched access service charges will apply only to the origination or termination of calls to or from an individual or entity to whom Northern Valley offers telecommunications services *for a fee*."[22]

III. DISCUSSION

A. The Tariff Violates Section 201(b) of the Act.

1. The Tariff Violates Commission Rule 61.26.

7. In its Complaint, Sprint contends that the Tariff violates Commission rule 61.26 because it purports to charge IXCs for calls to or from individuals or entities to whom Northern Valley offers its services for free.[23] Sprint is correct. As the Commission explained in finding the Tariff unlawful in *Qwest v. Northern Valley*, rule 61.26 (as clarified by the *CLEC Access Charge Reform Reconsideration Order*) establishes that a CLEC may assess tariffed access charges at the appropriate benchmark rate only for calls that are to or from an individual or entity to whom the CLEC offers its services for a fee.

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[20] *Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 2011 WL 2258081 (June 7, 2011), *petition for recon. filed* ("*Qwest v. Northern Valley*").

[21] *Qwest v. Northern Valley* at ¶ 9.

[22] *Qwest v. Northern Valley* at ¶ 17 (emphasis added). On June 14, 2011, Northern Valley filed revisions to the Tariff, which the Pricing Policy Division of the Wireline Competition Bureau rejected on June 28, 2011. *See Northern Valley Communications, LLC Revisions to Tariff No. 3*, Memorandum Opinion and Order, 2011 WL 2577786 (WCB/PPD rel. June 28, 2011). Northern Valley again filed revisions to the Tariff on July 7, 2011. Letter from G. David Carter, Counsel for Northern Valley Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 7 (filed July 7, 2011). Sprint's Complaint, and this order, address the Tariff that took effect on July 23, 2010, and do not address any Tariff revisions attempted or effected after that date.

[23] Complaint at 1-2, ¶ 2, 10, ¶ 21, 16-20, ¶¶ 34-41, 23-26, ¶¶ 49-52; Complaint, Legal Analysis at 10-12; Sprint Communications Company L.P.'s Reply in Support of Formal Complaint, File No. EB-11-MD-003 (filed Apr. 4, 2011("Reply") at 17-20.

Therefore, we grant Sprint's claim that the Tariff violates rule 61.26,[24] and, accordingly, violates section 201(b) of the Act.[25]

2. The Tariff Terms Are Not Clear and Explicit.

8. Commission rule 61.2(a) requires that tariffs contain "clear and explicit explanatory statements regarding rates and regulations."[26] The Complaint asserts that the Tariff violates the rule 61.2(a) stricture in a number of ways, most significantly with respect to its definition of "End User."[27] We agree.

9. The Tariff defines "End User" in a contradictory manner. On the one hand, the first sentence of the "End User" definition states that an "End User" is "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier."[28] Under the Act, "telecommunications service" is the "offering of telecommunications for a fee."[29] Thus, according to the first sentence of the

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[24] In an effort to defeat Sprint's rule 61.26 claim, Northern Valley repeats many of the same arguments it made in *Qwest v. Northern Valley*. Thus, Northern Valley argues here, as in *Qwest v. Northern Valley*, that the question of whether the Tariff purports to charge for providing access to users who have purchased services from Northern Valley is irrelevant as a matter of law and logic; that the Commission should evaluate the Tariff solely on the basis of the definitions contained therein, not in the light of Commission orders and rules; that Sprint has not alleged that Northern Valley has in fact imposed charges for entities that have not purchased services from Northern Valley; and that the Wireline Competition Bureau did not act on various IXC petitions to reject or suspend the Tariff. *See* Answer, Legal Analysis at 12-26. We reject these arguments for the same reasons we rejected them in *Qwest v. Northern Valley*. *See Qwest v. Northern Valley* at ¶¶ 10-14.

[25] The *CLEC Access Charge Reform Reconsideration Order* was promulgated pursuant to, among other provisions, section 201 of the Act, *see CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9166, ¶ 136, in furtherance of the Commission's obligation to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with … communication service [are] just and reasonable." 47 U.S.C. § 201(b).

[26] 47 C.F.R. § 61.2(a). This rule was promulgated pursuant to, among other provisions, section 201 of the Act, 47 U.S.C. § 201. *See CLEC Access Charge Reform Order*, 16 FCC Rcd at 9975, ¶ 145; *id*. at 9931, ¶ 21 ("section 201 gives us the authority to ensure that CLEC rates are just and reasonable.").

[27] *See* Complaint at 11-12, ¶ 24, 13, ¶ 28; Complaint, Legal Analysis at 8-10; Reply at 11-13.

[28] Tariff, Original Page No. 8, Definitions.

[29] 47 U.S.C. § 153(53). *See Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3312-13, ¶ 10 (2004) ("In order to be a telecommunications service, the service provider must assess a fee for its service."). The Act's definition of "telecommunications service" applies to our construction of the Tariff's "end user" definition. 17A Am. Jur. 2d *Contracts* § 359 (2004) ("where words or terms having a definite legal meaning and effect are knowingly used in a contract or other instrument, the parties thereto will be presumed to have intended such words or terms to have their proper legal meaning and effect …."). *See also id*. at § 371 ("Contracting parties are presumed to contract in reference to the existing law, and to have in mind all the existing laws relating to the contract …."). These principles apply with particular force here, because the Tariff adopts the precise definition of "end user" found in Commission rules and orders governing ILEC tariffs. *See* 47 C.F.R. § 69.2(m) (defining "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier …"); *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, 97 FCC 2d 1082, 1192, § 2.6 (1984) ("*ECA Tariff Order*") (requiring that the Exchange Carriers' Association tariff, as the model tariff for exchange access tariffs, so define "end user"); *Access and Divestiture Related Tariffs (Non-ECA Filings)*, Memorandum Opinion and Order, 55 Rad. Reg. 2d 869, 870, ¶ 2 (1984) (requiring Bell Operating Companies and independent LECs "to implement the directives of the *ECA Tariff Order* ...").

Tariff's "End User" definition, an "End User" is a user to whom Northern Valley offers its services *for a fee*. On the other hand, the last sentence of the Tariff's "End User" definition states that "[a]n End User need not purchase any service provided by [Northern Valley]."[30] Unlike the first sentence, this last sentence seems to define "End User" as an individual or entity to whom Northern Valley offers its services *free of charge*.[31] Thus, the Tariff's "End User" definition is internally inconsistent and therefore is not "clear and explicit" as required by rule 61.2(a).

10. Moreover, other Tariff provisions repeatedly use the term "End User," or define other terms with reference to "End User." Thus, for example, the Tariff defines "Access Charge" as "Charges assessed to the Buyer," and defines "Buyer" as an IXC "utilizing [Northern Valley's] Access Service to complete a call to or from *End Users*."[32] Similarly, the Tariff purports to charge IXCs for originating or terminating traffic to "Volume *End Users.*"[33] In short, the lack of clarity in the "End User" definition has a significant impact upon the entire Tariff. Accordingly, we find that the Tariff is not "clear and explicit" as required by rule 61.2(a), and, therefore, that the Tariff violates section 201(b) of the Act.[34]

3. The Tariff's Payment and Billing Provisions Are Unreasonable.

11. Sprint contends that several provisions of the "Payment and Billing" section of the Tariff violate section 201(b).[35] We review these provisions to determine whether they are reasonable in compliance with the requirements of section 201 of the Act and the Commission's rules.[36]

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[30] Tariff, Original Page No. 8, Definitions.

[31] Similarly, the Tariff defines "Customer of an Interstate or Foreign Telecommunications Service" as "any person or entity who sends or receives an interstate or foreign Telecommunications service transmitted to or from a Buyer across the Company's network, *without regard to whether ... payment is tendered to ... [Northern Valley]*." Tariff, Original Page No. 7, Definitions (emphasis added).

[32] Tariff, Original Page No. 7, Definitions (emphasis added).

[33] Tariff, Original Page No. 46, § 7.2.2 (emphasis added). *See also, e.g.*, Tariff at Original Page No. 8 ("*End User* Designated Premises") (emphasis added); *id.* (defining "Minutes of Use" as "the number of minutes for which a *Buyer* is billed" while, as noted, defining "Buyer" as an IXC that completes a call to *End Users*") (emphasis added); *id*. at Original Page 36, § 5.1 (stating that "Switched Access Service" will "enable a *Buyer* to utilize [Northern Valley's] network") (emphasis added).

[34] *See 1998 Biennial Regulatory Review – Part 61 of the Commission's Rules and Related Tariffing Requirements*, Report and Order and First Order on Reconsideration, 14 FCC Rcd 12293, 12326, ¶¶ 98-99 (1999) (adopting rule 61.2 pursuant to section 201, among other provisions); *Halprin, Temple, Goodman & Sugrue v. MCI Telecomm. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22574-76, ¶¶ 8-13 (1998) (finding that "the Tariff is not clear and explicit as required by section 61.2 of the Commission's rules, which renders the Tariff unreasonable in violation of section 201(b) of the Act"). Sprint argues that additional Tariff provisions, which also purport to charge for calls to entities that do not purchase services from Northern Valley, violate rule 61.2(a). *See* Complaint at 11-16, ¶¶ 23-33; Complaint, Legal Analysis at 4-14; Reply at 7-14. We do not address these provisions here, because our finding that the Tariff must be revised to make "clear and explicit" that it imposes access charges only for providing access to Northern Valley's own, paying end users will afford Sprint all the relief to which it is entitled.

[35] *See* Complaint at 31-35, ¶¶ 64-72.

[36] Contrary to Northern Valley's contention (*see* Answer, Legal Analysis at 49), the Commission has determined that CLEC access tariffs are subject to the just and reasonable standard of section 201. *See In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16141, ¶ 363 (1997); *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9929, ¶ 15; *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9117, ¶ 18 (continued…)

12. Sprint alleges that Northern Valley's "Jurisdictional Reporting Requirements"[37] are unreasonably vague and violate section 201(b) of the Act.[38] Under those provisions, when the jurisdiction of a call is indeterminate, Northern Valley *may* request a percent of interstate use factor ("PIU Factor")[39] from its IXC customer. Northern Valley is not obligated to use the PIU Factor supplied by the IXC, however, and "at its sole discretion, may use a different PIU Factor."[40] Northern Valley contends that the Tariff reserves Northern Valley's right to use a different PIU Factor than that provided by the IXC only when Northern Valley believes the IXC's PIU Factor is inaccurate.[41] But the Tariff language is not so limited. It gives Northern Valley unfettered discretion to use a different PIU Factor and, therefore, the ability to rely on unspecified and potentially arbitrary and discriminatory factors to establish the jurisdiction of the traffic. This may result in a PIU Factor that bears no relationship to the actual percentage of the Buyer's interstate and intrastate traffic, and allows Northern Valley to manipulate the PIU Factor so as to maximize its access charges by choosing the jurisdiction with higher rates for most or all of the traffic. Accordingly, the Jurisdictional Reporting Requirements provisions are unreasonable under section 201(b) of the Act.

13. Sprint further challenges the "Deposit" provisions in the Tariff, which provide in part that "[t]o safeguard its interests, the company may require a Buyer to make a deposit to be held as a guarantee for the payment of charges. A deposit may be requested prior to providing Service(s) or at any time after the provision of service to a Buyer."[42] These provisions establish no standard as to when a deposit will be required.[43] Such unconstrained ability to impose deposit obligations is susceptible to potentially discriminatory application. Consequently, we conclude that the provisions are unreasonable under section 201.[44]

14. In addition, Northern Valley's "Billing Disputes" provision requiring carriers to dispute bills within 90 days or waive "any and all rights and claims with respect to the bill and the underlying

(Continued from previous page)
& n.61. *See, e.g.*, 47 C.F.R. § 61, Subpart A (General), Subpart C (General Rules for Nondominant Carriers), Subpart F (Specific Rules for Tariff Publications of Dominant and Nondominant Carriers), Subpart G (Concurrences), and Subpart J (Suspensions).

[37] *See* Tariff, Original Page No. 29, §§ 3.1.4.1 & 3.1.4.2 ("Jurisdictional Reporting Requirements").

[38] Complaint at 34-35, ¶ 72.

[39] The Tariff describes the PIU Factor as a projected estimate by the Buyer of the split between the Buyer's interstate and intrastate traffic. *See* Tariff, Original Page 29, § 3.1.4.1.

[40] *See* Tariff, Original Page No. 29, § 3.1.4.2 .

[41] Answer, Legal Analysis at 50.

[42] Tariff, Original Page No. 30, § 3.1.5.1. *See* Complaint at 34, ¶ 71; Complaint, Legal Analysis at 44-45; Reply at 32.

[43] Tariff, Original Page No. 30, § 3.1.5.

[44] The Commission has determined that deposit requirements should be "narrowly tailored" to address specific risks of nonpayment and to eliminate broad authority to require deposits without objective criteria, which "are particularly susceptible to discriminatory application." *In re Verizon Petition for Emergency Declaratory and Other Relief*, Policy Statement, 17 FCC Rcd 26884, 26894, ¶¶ 21-22 (2002) ("*Verizon Declaratory Policy Statement*") (tariffs are not properly drafted when they provide LECs a "great deal of discretion in determining which customers will or will not be subjected to these [deposit] burdens"). Because we find Northern Valley's deposit provisions unreasonable, we also find the deposit provisions in section 3.2.3.1 to be unreasonable. *See* Tariff, Original Page No. 35, § 3.2.3.1 ("Service may be suspended or terminated for nonpayment of any bill or deposit until such bill or deposit is paid."). *See also Investigation of Access and Divestiture Related Tariffs*, Phase I Order, 97 FCC 2d 1082, 1169 (1984).

dispute" is unreasonable.[45] This provision contravenes the two-year statute of limitations in the Communications Act,[46] and, by its terms, purports unilaterally to bar a customer from exercising its statutory right to file a complaint within that limitations period.[47] Similarly, the Tariff provision that requires all disputed charges to be paid "in full prior to or at the time of submitting a good faith dispute" is unreasonable.[48] As written, this provision requires everyone to whom Northern Valley sends an access bill to pay that bill, no matter what the circumstances (including, for example, if no services were provided at all), in order to dispute a charge. Further, the Billing Disputes provision states that Northern Valley is "the *sole judge* of whether any bill dispute has merit."[49] This provision is unreasonable, because it conflicts with sections 206 to 208 of the Act, which allow a customer to complain to the Commission or bring suit in federal district court for the recovery of damages regarding a carrier's alleged violation of the Act.[50]

15. In contrast, however, we conclude that Northern Valley's "Late Payment Fee" provision regarding "Adjustments or Refunds to the Buyer" is reasonable.[51] Sprint maintains that the Tariff imposes late fees on withheld amounts even if it is ultimately decided that Northern Valley's billing is erroneous.[52] We read the challenged Tariff provision, however, to require Northern Valley to refund and pay simple interest on *all* disputed amounts paid pursuant to the Tariff, including any associated late payment fees.[53]

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[45] *See* Tariff, Original Page No. 32, § 3.1.7.1(a) (the "Buyer shall be deemed to have waived any and all rights and claims … if a good faith dispute is not timely filed").

[46] 47 U.S.C. § 415.

[47] *See* 47 U.S.C. § 415. Northern Valley's contention that the dispute notice provision does not modify the statute of limitations period is inconsistent with the waiver language of the provision. *See* Answer, Legal Analysis at 45. Indeed, this tariff language is indistinguishable from tariff language that a federal district court recently invalidated. *See Paetec Communications, Inc. v. MCI Communications Services, Inc.*, 712 F. Supp. 2d 405, 416-17 (E.D. Pa. 2010) (construing identical tariff language and finding that "the 90-day dispute resolution provision in Paetec's tariff could not preempt the federal statute of limitations in the context of a tariff because the terms of a tariff are not negotiated like the terms of a contract. If a term in the tariff could supersede the statute of limitations, it would mean that a carrier could unilaterally void federally codified consumer protections simply by filing a tariff."). *See also MCI WorldCom Network Services, Inc. v. Paetec Communications, Inc.*, 204 Fed.Appx. 271, 272 (4th Cir. 2006) ("a party could not use a tariff to shorten unilaterally the two-year statute of limitations"). None of the cases cited by Northern Valley involved a challenge to the reasonableness of a tariff provision under section 201(b) of the Act. *See* Answer, Legal Analysis at 43-45.

[48] *See* Tariff, Original Page No. 32, § 3.1.7.1(b) ("Any disputed charges must be paid in full prior to or at the time of submitting a good faith dispute and failure to tender payment for disputed invoices … is sufficient basis … to deny a dispute ….").

[49] *See* Tariff, Original Page No. 33, § 3.1.7.1(d) (emphasis added).

[50] 47 U.S.C. §§ 206-208.

[51] *See* Tariff, Original Page No. 33, § 3.1.7.1(c) ("Buyer will incur a Late Payment Fee on the unpaid amount at the rate of 1.5% per month on the total unpaid balance"). *See also* Tariff, Original Page No. 33, § 3.1.73 ("Adjustments or Refunds to the Buyer").

[52] Reply at 31.

[53] *See* Tariff, Original Page No. 33, § 3.1.7.3(a) ("In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as required by this Tariff, the Company will credit the Buyer's account for any overpayment by the Buyer, together with Simple Interest"). *See also* Tariff Original Page No. 33, § 3.1.7.3.(b).

16. Finally, we conclude that Northern Valley's "Attorneys' Fees" provision is unreasonable because it permits Northern Valley to recover its attorneys' fees regardless of whether Northern Valley prevails on a claim.[54] A Buyer who successfully demonstrates in litigation that Northern Valley improperly billed should not be obligated to pay Northern Valley's attorneys' fees.

B. We Deny Sprint's Remaining Claims.

17. Citing the Tariff's numerous flaws, Sprint requests that the Commission declare the Tariff void *ab initio*.[55] We decline to do so. Pursuant to section 204(a)(3) of the Act, the Tariff is "deemed lawful" until found otherwise by this Commission or a court of law.[56] Sprint argues that "there are limits to the scope of the deemed lawful provision," and that a "deemed lawful" tariff may be declared void *ab initio* in a section 208 complaint proceeding.[57] Even if Sprint is correct, Sprint has not established that Northern Valley engaged in furtive concealment, or any other deceptive conduct that might justify removing the protection afforded by section 204(a)(3).[58]

18. In the alternative, Sprint requests that, if the Commission does not declare the Tariff void *ab initio*, it find that the Tariff's rates are excessive and prescribe lower rates "on a going-forward basis."[59] We deny this request. As Sprint admits, the Tariff's rates are no higher than the ILEC rates against which they are benchmarked pursuant to rule 61.26.[60] The Commission has emphasized that tariffed rates within the rule 61.26 benchmark are accorded a "conclusive presumption of reasonableness."[61] This Order requires Northern Valley to revise the Tariff to state "clear[ly] and explicit[ly]" that charges will be imposed only for providing access to individuals or entities to whom

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[54] *See* Tariff Original Page No. 34, § 3.1.7.4 ("In the event that [Northern Valley] pursues a claim in Court or before any regulatory body … Buyer shall be liable for the payment of [Northern Valley's] … attorneys' fees").

[55] Complaint at 37, ¶ 82 (Count I); Complaint, Legal Analysis at 3-4; Reply at 23-26.

[56] *See Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973-80, ¶¶ 26-27 & n.52 (2007) ("*Qwest v. Farmers I*"); *Virgin Islands Tel. Co. v. FCC*, 444 F.3d 666, 673 (D.C. Cir. 2006).

[57] Reply at 34. *See generally* Reply at 33-36.

[58] *See ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 412 (D.C. Cir. 2002) (the court, in reversing a Commission decision finding that a tariff did not qualify for "deemed lawful" status, notes that it was not addressing "the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate-of-return violations").

[59] Complaint, Legal Analysis at 33. *Accord id.* at 30-39. *See also* Complaint at 27-31, ¶¶ 56-64, 36, ¶ 77; Reply at 22-26. A tariff's rates may not be set aside during the time that the tariff enjoyed "deemed lawful" status under section 204(a)(3). *Qwest v. Farmers I*, 22 FCC Rcd at 17978 n.52 ("Since the passage of section 204(a)(3) of the Act, the Commission cannot award refunds in connection with tariffs that are 'deemed lawful.'").

[60] Complaint, Legal Analysis at 32 ("Northern Valley has set its new rates below the benchmark rate in 47 C.F.R. § 61.26 ….").

[61] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9948, ¶ 60. *Accord id.* at 9938, ¶ 40 (stating that the order "establish[es] a benchmark level at which CLEC access rates will be *conclusively presumed* to be just and reasonable …") (emphasis added).

Northern Valley offers its services for a fee. As so revised, the Tariff will comport with rule 61.26, and its rates will therefore be conclusively presumed reasonable.[62]

19. Sprint disagrees with this analysis, arguing that Northern Valley's rates may be challenged in a formal complaint proceeding.[63] We need not decide whether Sprint is correct, because Sprint has not shown in this proceeding that Northern Valley's rates will prove to be unreasonable after Northern Valley revises its Tariff.[64] Sprint asserts that Northern Valley's rates are excessive given Northern Valley's high traffic volumes.[65] Yet Sprint has not established that Northern Valley's traffic volume will remain high after the Tariff is revised, in accordance with this Order, to impose access charges only for calls to or from paying end users. Indeed, Sprint alleges that Northern Valley's traffic volume is elevated precisely because the Tariff charges for providing access to entities that do not pay Northern Valley for its services.[66]

C. Northern Valley's Affirmative Defenses Lack Merit.

20. Northern Valley asserts as an affirmative defense that Sprint has "unclean hands," alleging that Sprint has not paid Northern Valley amounts owing under Northern Valleys' tariffs.[67] Even if this defense were available in a section 208 formal complaint proceeding,[68] it would fail in this case. The unclean hands doctrine does not apply unless the alleged misconduct relates directly to the

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[62] Sprint's argument that the Tariff's rates are not presumed reasonable because the Tariff violates rule 61.26 therefore does not succeed. *See* Complaint, Legal Analysis at 32-34; Reply at 26. Northern Valley filed Tariff revisions on June 14, 2011, which the Pricing Policy Division of the Wireline Competition Bureau rejected on June 28, 2011. Northern Valley then filed Tariff revisions on July 7, 2011. *See* n.22, *supra*.

[63] *See* Complaint, Legal Analysis at 32-33; Reply at 22-26 (citing *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9955, ¶ 77 (the Commission "will be able to address, on a case-by-case basis, the improper exploitation of [the rural exemption]…"); *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9143-44, ¶ 72) (if a carrier "believes that any particular LEC rate or practice is unlawful, it may bring a challenge under section 208 of the Act").

[64] A complainant in a section 208 complaint proceeding must show a violation of the Act "by a preponderance of the evidence." *Contel of the South, Inc. v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548, 552, ¶ 10 (2008). *See, e.g.*, *Consumer.Net v. AT&T Corp.*, Order, 15 FCC Rcd 281, 284-85, ¶ 6 (1999); *Consumer.Net, LLC and Russ Smith v. Verizon Communications, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 2737, 2740, ¶ 10 (Enf. Bur. Apr. 1, 2010).

[65] *See* Complaint, Legal Analysis at 35-39; Reply at 22-26.

[66] Sprint alleges that Northern Valley's traffic volume is elevated because Northern Valley enters into "traffic-pumping schemes" with providers of high-volume services such as a conference calling companies and chat lines (collectively "CCCs") that direct large volumes of interstate traffic to Northern Valley. Northern Valley allegedly uses the Tariff to force IXCs to pay excessive access charges for terminating this traffic, and then pays a portion of its concomitantly increased access revenues to the CCCs. *See* Complaint at 2-3, ¶ 3, 5-7, ¶¶ 10-15; Complaint, Legal Analysis at 1-2, 31-32, 35, 39; Reply at 25. Thus, the arrangements described by Sprint require that Northern Valley be able to impose charges upon IXCs by tariff rather than negotiation, and that those charges are for terminating calls to entities (*i.e.*, the CCCs) to which Northern Valley offers its services for free.

[67] *See* Answer at 19, ¶ 4 (Affirmative Defenses); *id.*, Legal Analysis at 7-9.

[68] *See Marzec v. Power*, Order, 15 FCC Rcd 4475, 4480 n.35 (2000) ("the Commission has expressed doubt that the unclean hands defense is available in section 208 proceedings") (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 598 & n.233 (1998) (same)).

transaction that is the subject of the complaint.[69] Northern Valley has not established that Sprint refuses to pay amounts invoiced pursuant to the Tariff at issue here, as opposed to prior Northern Valley tariffs.[70]

21. Northern Valley further argues that Sprint failed to negotiate in good faith because the pre-complaint letter that Sprint sent Northern Valley pursuant to Commission rule 1.721(a)(8) stated that a complaint would not be filed if Northern Valley withdrew the Tariff.[71] Northern Valley views this statement as a "precondition" that is inconsistent with "good faith negotiations."[72] This defense also fails. Before filing the Complaint, Sprint informed Northern Valley that it was "willing to listen" to "other idea[s] of how the issues we raise can be resolved."[73] Further, Sprint's letter complied with rule 1.721(a)(8), because it outlined the allegations that form the basis of the Complaint and gave Northern Valley a reasonable opportunity to respond.[74]

22. In conclusion, Northern Valley's Tariff violates Commission rule 61.26, as clarified by the *CLEC Access Charge Reform Reconsideration Order*, because it purports to charge for providing access to individuals or entities to whom Northern Valley offers its services for free. Moreover, the Tariff's terms are not "clear and explicit" as required by Commission rule 61.2(a). Finally, the Tariff contains a number of unreasonable payment and billing provisions. Accordingly, we conclude that the Tariff violates section 201(b) of the Act,[75] and Northern Valley must revise it to make "clear and explicit" that Northern Valley will charge IXCs for providing access only to individuals or entities to whom Northern Valley offers its services for a fee, and to remove the Tariff's unreasonable payment and billing provisions.[76]

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[69] *See, e.g.*, *Marzec*, 15 FCC Rcd at 4480 (rejecting unclean hands defense because the complainant's alleged misconduct was "irrelevant" to the defendant's violations); *Wolff v. Westwood Management, LLC*, 558 F.3d 517, 521 (D.C. Cir. 2009) (assertion of unclean hands as defense against claim that dispute is subject to arbitration cannot succeed where "[t]here is no allegation that appellees have unclean hands with respect to the agreement to arbitrate itself"); *Sellar Agency Council, Inc. v. Kennedy Center for Real Estate Education, Inc.*, 621 F.3d 981, 986 (9th Cir. 2010) ("It is fundamental to the operation of the [unclean hands] doctrine that the alleged misconduct by the party relate directly to the transaction concerning which the complaint is made.") (citations and brackets omitted).

[70] *See* Answer, Legal Analysis at 8 (stating that Sprint began paying Northern Valley's invoices "at the end of 2010"); *id*. at 25 (arguing that Sprint has not shown that Northern Valley has charged Sprint for calls to entities that do not purchase services from Northern Valley). In any event, Sprint's alleged "unclean hands" may not defeat a challenge to a tariff that applies to an entire industry, not just to Sprint. *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361 (1995) (unclean hands doctrine does not apply "'where a private suit serves important public purposes'") (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138 (1968)).

[71] *See* Answer, Legal Analysis at 10 (citing 47 C.F.R. § 1.721(a)(8), which requires that complaints include "certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement," as well as a statement that the complainant mailed a letter to the defendant outlining the allegations of the complaint).

[72] Answer, Legal Analysis at 10.

[73] Complaint, Ex. 12 (email from counsel to Sprint to counsel to Northern Valley sent Jan. 5, 2011).

[74] *See* Complaint, Ex. 10 (outlining the allegations that form the basis of the Complaint).

[75] *See, e.g., Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 52-55 (2007) (citations omitted) ("The FCC has long implemented § 201(b) through the issuance of rules and regulations"). *See also* nn. 25 & 34 above.

[76] Because this Order provides Sprint all the relief to which it would be entitled if we were to grant Sprint's claim that Northern Valley violates sections 251 and 252 of the Act, 47 U.S.C. §§ 251-252, we need not address that (continued…)

IV. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, 204, 205, 206, 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 204, 205, 206, 208, and 415, and sections 61.2 and 61.26 of the Commission's rules, 47 C.F.R. §§ 61.2 and 61.26, that the Complaint is GRANTED in part and DENIED in part.

24. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, 204, 205, 206, 208, and 415 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 204, 205, 206, 208, and 415, and sections 61.2 and 61.26 of the Commission's rules, 47 C.F.R. §§ 61.2 and 61.26, that Northern Valley Communications, LLC SHALL FILE tariff revisions consistent with this Order within ten days of the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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claim. *See* Complaint at 16-17, ¶ 34, 26, ¶ 55, 36, ¶ 76, Complaint, Legal Analysis at 29-30; Reply at 20-22 (arguing that, to the extent that the Tariff purports to charge IXCs for providing access to entities that are not Northern Valley's end users, it violates the reciprocal compensation requirements of sections 251 and 252).