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

In the Matter of	)	
	)	
Qwest Communications Company, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-11-MD-001
	)	
Northern Valley Communications, LLC,	)	
	)	
Defendant.	)	

ORDER ON RECONSIDERATION

Adopted: October 4, 2011 **Released: October 5, 2011**

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we dismiss on procedural grounds and alternatively on independent grounds, deny on the merits the Petition for Reconsideration or Clarification of Northern Valley Communications, LLC ("Northern Valley").[1] We also dismiss on procedural grounds the Petition for Reconsideration of Aventure Communication Technology, L.L.C. ("Aventure").[2]

2. Northern Valley and Aventure filed their petitions under section 405 of the Communications Act of 1934, as amended ("Act"), and section 1.106 of the Commission's rules,[3] challenging the Commission's Memorandum Opinion and Order[4] granting a formal complaint filed by Qwest Communications Company, LLC ("Qwest") against Northern Valley[5] pursuant to section 208 of the Act.[6] In the *Order*, the Commission found that Northern Valley's interstate switched exchange access services tariff ("Tariff") violated section 201(b) of the Act, and ordered Northern Valley to revise the

[1] Petition for Reconsideration or Clarification of Northern Valley Communications, LLC, File No. EB-11-MD-001 (filed July 7, 2011) ("Northern Valley Petition").

[2] Petition for Reconsideration of Aventure Communication Technology, L.L.C., File No. EB-11-MD-001 (filed July 7, 2011) ("Aventure Petition").

[3] 47 U.S.C. § 405; 47 C.F.R. § 1.106.

[4] *See Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 8332 (2011) ("*Order*").

[5] *See* Formal Complaint of Qwest Communications Company, LLC, File No. EB-11-MD-001 (filed Jan. 6, 2011) ("Complaint").

[6] 47 U.S.C. § 208.

Tariff within ten days of the *Order*'s release.[7]

II. BACKGROUND

3. Northern Valley is a competitive local exchange carrier ("CLEC"), providing interstate exchange access services to interexchange carriers ("IXCs") pursuant to tariffs filed with the Commission.[8] Qwest is an IXC providing interstate telecommunications services throughout the United States.[9] The Tariff at issue in the *Order* purported to allow Northern Valley to charge IXCs for originating or terminating calls to individuals or entities to whom Northern Valley offers telecommunications for free.[10]

4. In the *Order*, the Commission found that the Tariff violated Commission rule 61.26,[11] as clarified by the *CLEC Access Charge Reform Reconsideration Order*,[12] and therefore also violated section 201(b) of the Act.[13] Rule 61.26, which is entitled "Tariffing of competitive [LEC] interstate switched exchange access services,"[14] requires that tariffed CLEC charges for "interstate switched exchange access services" be for services that are the "functional equivalent" of ILEC interstate exchange access services.[15] In the *CLEC Access Charge Reform Reconsideration Order*, the Commission clarified that a CLEC provides the "functional equivalent" of an ILEC's access services only if the CLEC transmits the call to its "own *end user*."[16] The Commission reasoned in the *Order* that, because the Tariff purported to charge IXCs for providing access to individuals or entities to whom Northern Valley offered telecommunications for free, the Tariff impermissibly imposed access charges for services that were not the "functional equivalent" of ILEC services.[17] 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."

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[7] *Order*, 26 FCC Rcd at 8341, ¶¶ 15-17.

[8] *See Order* at ¶ 3. The *Order* contains a complete description of the facts underlying this case, which we incorporate by reference. *See Order*, 26 FCC Rcd at 8333-34, ¶¶ 3-4.

[9] *Order*, 26 FCC Rcd at 8333, ¶ 3.

[10] *Order*, 26 FCC Rcd at 8333-36, ¶¶ 4, 7. Specifically, the Tariff's definition of "End User" stated, in relevant part, that an "End User need not purchase any service provided by [Northern Valley]." *Order* at ¶ 4.

[11] 47 C.F.R. § 61.26.

[12] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004) ("*CLEC Access Charge Reform Reconsideration Order*").

[13] 47 U.S.C. § 201(b). *See Order*, 26 FCC Rcd at 8332-33, ¶ 2.

[14] 47 C.F.R. § 61.26 (heading).

[15] 47 C.F.R. § 61.26(a)(3).

[16] *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9114, ¶ 13 (emphasis added).

[17] *Order*, 26 FCC Rcd at 8336-37, ¶ 9.

> 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*.[18]

The *Order* required 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*."[19]

III. DISCUSSION

A. We Dismiss the Northern Valley Petition Because It Is Procedurally Defective.

5. The Northern Valley Petition repeats a number of arguments that the Commission addressed and rejected in the *Order*. Northern Valley reargues at length that a CLEC's relationship with its end users is not relevant to determining whether it has provided access to IXCs, and that "the 'fee' relevant to switched access services is the fee a customer pays to the IXC for long-distance traffic."[20] Northern Valley also again argues that the *Order* is inconsistent with the Commission's precedent in *Qwest v. Farmers*, which according to Northern Valley evaluated Northern Valley's tariff "based on the definitions contained therein, not by prior orders or rules …"[21] We decline to revisit these arguments here. It is "settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected."[22]

6. Northern Valley also presents for the first time several new legal arguments regarding the *CLEC Access Charge Orders* and *Qwest v. Farmers* that it previously had an opportunity to present in response to the arguments in Qwest's Complaint.[23] A petition for reconsideration that relies on arguments

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[18] *Order*, 26 FCC Rcd at 8336-37, ¶ 9.

[19] *Order*, 26 FCC Rcd at 8341, ¶ 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). Those later revisions took effect on July 22, 2011, over Qwest's objection. *See* Public Notice, Protested Tariff Transmittal Action Taken, WCB/Pricing File No. 11-09, DA 11-1257 (WCB/CPD rel. July 28, 2011).

[20] *Compare* Northern Valley Petition at i, 5-10 *with Order*, 26 FCC Rcd at 8336-38, ¶¶ 9-11.

[21] *See Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("*Qwest v. Farmers*"). *Compare* Northern Valley Petition at 16-19 *with Order*, 26 FCC Rcd at 8339, ¶ 12.

[22] *S&L Teen Hosp. Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900, ¶ 3 (2002) (citations omitted). *Cf.* 47 C.F.R. § 1.106(p)(3) (a Bureau may dismiss or deny a petition for reconsideration of a Commission action that "plainly do[es] not warrant consideration by the Commission," including petitions that "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding").

[23] *See* Northern Valley Petition at 10-19 (challenging the *Order*'s application of the *CLEC Access Charge Orders* and section 61.26 of the Commission's rules and arguing that the *Order* is inconsistent with those orders and rules, as well as prior precedent). *See also 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 (2001) ("*CLEC Access Charge Reform Order*"), *recon. denied CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd 9108 (collectively, "*CLEC Access Charge Orders*").

not previously presented may be granted only if (1) the petition relies on facts or arguments which relate to events which have occurred or circumstances which have *changed* since the last opportunity to present such matters to the Commission; (2) the petition relies on facts or arguments *unknown* to petitioner until after its last opportunity to present them to the Commission, and it could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or (3) the Commission determines that the public interest requires consideration of the new arguments.[24] The Northern Valley Petition does not argue that it satisfies any of these three criteria.[25] Further, we are aware of no change in facts or circumstances that would warrant reconsideration of the *Order*, and Northern Valley was aware or should have been aware of the arguments it now presents because the Complaint clearly alleged that Northern Valley's Tariff violated rule 61.26 as clarified by the *CLEC Access Charge Reform Reconsideration Order*.[26] Moreover, we see no public interest justification for granting the Northern Valley petition. Accordingly, reconsideration is not warranted, and we dismiss the Northern Valley Petition.

B. In the Alternative, We Deny the Northern Valley Petition on the Merits.

7. Although we dismiss the petition for reconsideration on procedural grounds, in the interest of ensuring a complete consideration of the issues, we address below why we would reject Northern Valley's new legal arguments were we to reach them. We accordingly deny the Northern Valley Petition on the merits as an independent and alternative basis for our decision.

1. The *Order* Is Supported by, and Consistent with, the Commission's *CLEC Access Charge Rules and Orders*.

8. Northern Valley argues that rule 61.26, as clarified by the *CLEC Access Charge Reform Reconsideration Order*, does not require that a CLEC's tariffed access charges be for providing access to an individual or entity to whom telecommunications are offered for a fee.[27] Northern Valley is incorrect. Rule 61.26 defines "CLEC" as "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*…."[28] As discussed in the *Order*, the Commission's ILEC access charge rules have, for more than 25 years, defined "end user" to mean an individual or entity to whom telecommunications are offered for a fee.[29] Consistent with precedent and

[24] *See* 47 C.F.R. § 1.106(c)(1)-(2), (b)(2)(ii). *See also* 47 C.F.R. §§ 1.724(b) and (c) (requiring answer and legal analysis to fully and completely respond specifically to all material allegations and arguments raised in a formal complaint).

[25] *See* Reply at 2-3 (Northern Valley justifies the Petition merely by asserting that the merits of its new arguments warrant reconsideration of the *Order*).

[26] *See, e.g.,* Complaint, Exhibit A (Legal Analysis in Support of Qwest Communications Company, LLC's Complaint ("Legal Analysis")) at 10-12 (discussing the rule 61.26 "functional equivalence" test and asserting that, an "end user" under the Commission's access charge rules, the entity must be charged a fee). *See generally* Reply at 9-16 Complaint at 7-10, ¶¶ 10-14; 13-16, ¶¶ 27;

[27] Northern Valley Petition at 13.

[28] 47 C.F.R. § 61.26(a)(3) (emphasis added). Rule 61.26 also states that "[i]f a CLEC provides some portion of the interstate switched exchange access services used to send traffic to or from an *end user* not served by that CLEC," the CLEC may charge only for those services it provides. 47 C.F.R. § 61.26 (f) (emphasis added).

[29] *See Order* at ¶¶ 5, 9-10 (explaining that the Commission's ILEC access charge rules have, since their promulgation in 1983 in anticipation of the AT&T divestiture, defined "end user" as "any customer of an interstate (continued…)

rules of statutory construction,[30] we find that identical terms used in different but related Commission rules should be construed to mean the same thing, unless the Commission states otherwise. We therefore construe "end user" as used in rule 61.26 to mean an individual or entity to whom telecommunications are offered for a fee. Further, rule 61.26 requires that tariffed CLEC access charges be for services that are the "functional equivalent" of ILEC access services.[31] In the *CLEC Access Charge Reform Reconsideration Order*, the Commission clarified that a CLEC provides the "functional equivalent" of ILEC access charges within the meaning of rule 61.26 only if it provides access to its "end user."[32] Therefore, as the *Order* correctly concludes, a CLEC's access service is "functionally equivalent" only if the CLEC provides access to its end user, or *paying* customer.

9. Northern Valley disagrees with this analysis, contending that, because the *CLEC Access Charge Reform Reconsideration Order* did not have before it, and did not discuss, the question of whether a CLEC's services are "functionally equivalent" if the CLEC provides access to an entity to whom it provides free service, the order has no bearing on that issue.[33] According to Northern Valley, in stating that a CLEC provides "functionally equivalent" service only if it provides access to its "own end user," the *CLEC Access Charge Reform Reconsideration Order* used the term "end user" merely to mean "the intended recipient of a long distance call."[34]

10. Despite its efforts to cabin the language of the *CLEC Access Charge Reform Reconsideration Order*, Northern Valley does not explain why the Commission did not specifically redefine "end user" in that order if it intended the term to have a meaning other than "a paying customer." As the *Order* explains, there is no indication that the term "end user" as used in the *CLEC Access Charge Reform Reconsideration Order* was intended to incorporate any different meaning than that which the Commission has given it for more than 25 years.[35] Moreover, the *CLEC Access Charge Reform Reconsideration Order*'s use of the term "end user" is neither isolated nor serendipitous. The Commission in the *CLEC Access Charge Reform Reconsideration Order* was clarifying rule 61.26, which, as discussed, uses "end user" to define the individual or entity to whom a CLEC provides tariffed access. It defies logic to conclude that the Commission in the *CLEC Access Charge Reform*

(Continued from previous page)

or foreign telecommunications service that is not a carrier," and that a "customer of a … telecommunications service" is an individual or entity to whom telecommunications are offered for a fee).

[30] *See, e.g.,* 73 Am. Jur. 2d Statutes § 148 (2004) ("Ordinarily, the same words used in different statutes on the same subject are interpreted to have the same meaning. Indeed, if a special meaning is attached to certain words in a prior act, there is a presumption of some force that the legislature intended that they should have the same signification when used in a subsequent act in relation to the same subject matter."); *McLean v. U.S.A.*, 566 F.3d 391, 396 (4th Cir. 2009) ("When Congress directly incorporates language with an established legal meaning into a statute, we may infer that Congress intended the language to take on its established meaning."); *Platt v. Wilmot*, 193 U.S. 602, 611, 24 S. Ct. 542, 545 (1904) (a term defined in one statutory provision means the same thing when used in another provision).

[31] *Order* at ¶ 8.

[32] *See Order* at ¶¶ 8-9.

[33] Northern Valley Petition at 10-12.

[34] Northern Valley Petition at 10-13.

[35] *Order* at ¶¶ 7-9. Certainly, if the Commission had intended a different meaning, it could have employed a different word or phrase that does not mean an individual or entity to whom services are offered *for a fee*. But it did not do so. *Cf. Florida Power & Light Co. v. Belcher Oil Co.*, 82 F.R.D. 78 (D.S.D. Fla. 1979) ("we should not be quick to assume accidental or careless language on the part of the Congress ….") (citing *Griffin v. U.S.*, 537 F.2d 1130 (T.E.C.A. 1976), *cert. denied*, 429 U.S. 919).

Reconsideration Order would have used "end user" differently from how that term was used in the very rule it was clarifying. In short, "end user" has a clear and established meaning in the context of the Commission's access charge regime, and we therefore decline Northern Valley's invitation to ignore the term's full import by disregarding its "fee" requirement.

11. We note that it has been a longstanding policy of the Commission that users of the local telephone network for interstate calls should be responsible for a reasonable portion of the costs that they cause. Thus, construing "end user" to mean a customer of a telecommunications services offered for a fee is consistent with the Commission's goal of ensuring that neither IXCs nor end users are charged an unfair share of the LEC's costs in transporting interstate calls.[36]

12. In addition to arguing that the Commission's CLEC access charge rules do not address the facts at issue, Northern Valley contends that the *Order*'s requirement that tariffed CLEC access charges be for transporting traffic to an end user "conflicts with the Commission's long-standing precedent establishing that it does not regulate the CLEC-end user relationship."[37] According to Northern Valley, the *Order* "demand[s]" that CLECs assess a fee on end users.[38] The *Order* does no such thing. Under the *Order*, Northern Valley may offer its services to individuals and businesses for any fee (or no fee). The *Order* provides only that, if Northern Valley chooses to assess access charges upon IXCs by *tariff*, the individuals or entities to whom Northern Valley provides access must be "end users" (*i.e.*, paying customers).

2. The *Order* Is Consistent with the Commission's *Farmers and Merchants* Precedent.

13. In Northern Valley's view, the Commission concluded in *Qwest v. Farmers* that "a LEC could provide a 'free subscription' to its local exchange customer, so long as its tariff so provides."[39] Northern Valley maintains that this legal determination became final and is still the law.[40] According to Northern Valley, the *Order* "clearly conflicts with the Commission's prior [*Qwest v. Farmers*] precedent, and the Commission has offered no explanation for this departure."[41] We disagree with Northern Valley.

14. To begin with, there is no inconsistency between our initial decision in *Qwest v. Farmers* and our decision here. The initial *Qwest v. Farmers* decision was predicated on the understanding that the

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[36] *See, e.g., Order* at nn. 38-39 (discussing *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 686, ¶ 7 (1983) ("The concept that users of the local telephone network [for interstate calls] should be responsible for the costs they actually cause is sound from a public policy perspective and rings of fundamental fairness. It assures that ratepayers will be able to make rational choices in their use of telephone service, and it allows the burgeoning telecommunications industry to develop in a way that best serves the needs of the country."); *CLEC Access Charge Reform Order*, 15 FCC Rcd at 9939, ¶ 39 (stating that CLECs should recover from their end users, not IXCs, their costs in providing interstate access service that exceed those of the competing ILEC).

[37] Northern Valley Petition at 13-14 (capitalizations omitted).

[38] Northern Valley Petition at 14. Northern Valley further notes that the Commission does not require CLECs to impose the subscriber line charge (SLC). Northern Valley Petition at 14-16. The *June 7 Order* does not require CLECs to impose the SLC, and therefore does not conflict with Commission precedent on that point.

[39] Northern Valley Petition at 17. *See* n.21 *supra*.

[40] Northern Valley Petition at 18.

[41] Northern Valley Petition at 18.

conference calling companies were obligated to pay both for service and the applicable subscriber line charge.[42] Here, by contrast, the tariff contains no requirement that the conference calling companies pay anything at all for services. The initial decision in *Qwest v. Farmers* thus has no bearing here. Even if the initial decision in *Qwest v. Farmers* were somehow inconsistent with the current holding, however, the Commission expressly reconsidered its finding in *Qwest v. Farmers* that "[t]he question of whether the conference calling companies paid Farmers more than Farmers paid them is … irrelevant to their status as end users."[43] Upon reconsideration, the Commission concluded that "the flow of money between [Farmers and the conference calling companies] is essential to analyzing their relationship."[44] In so holding, the Commission specifically addressed the "free subscription" language in *Qwest v. Farmers* (which Northern Valley cites here), finding Farmers' "reliance on" the "free subscriptions" characterization to be "unavailing" because new facts demonstrated that the conference calling companies "did not subscribe" at all to any tariffed service offered by Farmers.[45] Thus, the Commission fully explained the basis for its reconsideration of the initial decision.[46]

15. Northern Valley nevertheless appears to argue that the Commission's reconsideration of the *Qwest v. Farmers* had no effect because it was issued more than 90 days after the initial decision and because the Commission did not suspend the effectiveness of the initial order in the meantime.[47] That contention is beside the point because, as explained, there is no inconsistency between the initial decision in *Qwest v. Farmers* and any decision we render here. In any event, the claim fails on its merits. The Commission complied with Section 405(b)(2) by granting reconsideration within 90 days.[48] Even if the Commission had not met the statutory deadline, that would not nullify the effect of a subsequent reconsideration order. Section 405(b)(2) of the Act says nothing about the Commission losing jurisdiction over the underlying order if the Commission does not act within 90 days.[49] Northern Valley

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[42] *Qwest v. Farmers*, 22 FCC Rcd at 17987, ¶¶ 37-38.

[43] *See Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801, 14806, ¶ 12 n.49 (2009) ("*Qwest v. Farmers Recon. II*").

[44] *Qwest v. Farmers Recon. II*, 24 FCC Rcd at 14806, ¶ 12 n.49.

[45] *Qwest v. Farmers Recon. II*, 24 FCC Rcd at 14805, ¶ 10 n.44.

[46] *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (any agency departing from a past position must supply a reasoned explanation for its change). Farmers sought reconsideration of *Qwest v. Farmers Recon. II*, which the Commission denied. *See Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Third Order on Reconsideration, 25 FCC Rcd 3422, 3422, ¶ 1 ("*Qwest v. Farmers Recon. III*"). Although Farmers appealed that decision, unless and until it is reversed, it remains the law. *See Farmers & Merchants Mut. Tel. Co. of Wayland, Iowa v. FCC*, No. 10-193 (D.C. Cir. filed May 10, 2010).

[47] Northern Valley Petition at 18 & n.47 (citing 47 U.S.C. § 405(b); 47 C.F.R. § 1.106(n)). Northern Valley's argument is difficult to follow, in large part because instead of articulating its argument fully, Northern Valley relies on the brief it filed as an intervenor in the *Qwest v. Farmers* appeal. The record in that appeal is not part of the record in this case, however and we therefore decline to consider it in deciding this case.

[48] Pursuant to rule 1.106(k)(1)(iii), the Commission ordered additional proceedings to take place subsequent to the grant of reconsideration. *See* 47 C.F.R. § 1.106(k)(1)(iii) ("If the Commission … grants the petition for reconsideration in whole or in part, it may, in its decision … [o]rder such other proceedings as may be necessary or appropriate.") Those additional proceedings did not trigger a second 90-day statutory deadline. *See* 47 C.F.R. § 1.106(k)(2) (if the Commission initiates such further proceedings on grant of reconsideration, "a ruling on the merits of the matter will be deferred pending completion of such proceedings."); *see also Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Third Order on Reconsideration, 25 FCC Rcd 3422, 3424 ¶ 6(2010).

[49] *See Gottliev v. Peña*, 41 F.3d 730, 733 (D.C. Cir. 1994).

is also wrong that rule 1.106(n) required the Commission to suspend the effectiveness of the initial *Qwest v. Farmers* decision in order to retain authority to reconsider that decision. That rule requires regulated entities to comply with an order that is subject to a pending reconsideration proceeding unless the Commission has suspended the effectiveness of the order. It has nothing to do with suspension as a prerequisite for reconsideration. As the Commission has explained, it "appropriately deferred ruling on the merits [of Qwest's petition for reconsideration of *Qwest v. Farmers*] pending completion of the Commission-initiated additional proceedings" to compel production of and to consider previously undisclosed evidence regarding Farmers' relationships with the conference calling companies.

3. Northern Valley Fails to Demonstrate that the *Order* Should Be Clarified.

16. Northern Valley makes two requests for clarification.[50] First, Northern Valley asks the Commission to clarify that the *Order* does not create a "net payments" requirement.[51] Because the question of "net payments" was not at issue in the Complaint, and not necessary to our determination, we do not address this issue here. Second, Northern Valley asks the Commission to clarify the *Order*'s declaration that, "a CLEC may not impose switched access charges *pursuant to tariff* unless it is providing interstate switched exchange access services to its own end users, and … an entity to whom the CLEC offers free service is not an end user."[52] Northern Valley is concerned that this language "could be argued to prevent CLECs from offering any tariffed access services, unless the CLEC serves its *own* end user."[53] Northern Valley's concern is unwarranted, as the Commission specifically noted in the *Order* that a CLEC may offer tariffed access services to send traffic to an end user not served by that CLEC under rule 61.26(f).[54] Accordingly, because the *Order* addressed and explained the very issue about which Northern Valley seeks clarification, Northern Valley's request is denied.

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17. In conclusion, we dismiss Northern Valley's Petition because it is procedurally defective. On independent and alternate grounds, we deny the Northern Valley Petition because the *Order* is entirely consistent with, and supported by, the Commission's *CLEC Access Charge Orders* and its *Qwest v. Farmers* precedent. Accordingly, there is no basis to reverse or clarify any aspect of the *Order*.

C. We Dismiss the Aventure Petition.

18. Aventure, a rural CLEC that is not a party to this proceeding, also asks the Commission to reconsider the *Order*.[55] To seek reconsideration of a Commission order in an adjudicatory proceeding to which it was not a party, a petitioner must demonstrate that (1) the petitioner's "interests are adversely affected" by the order; and (2) the petitioner has "good reason why it was not possible for [the petitioner] to participate in the earlier stages of the proceeding."[56] Aventure makes neither showing. Accordingly,

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[50] Northern Valley Petition at i-ii, 19-23; Reply in Support of Petition for Reconsideration or Clarification of Northern Valley Communications, LLC, File No. EB-11-MD-003 (filed July 25, 2011) ("Reply") at 6-10.

[51] Northern Valley Petition at 20-23.

[52] Northern Valley Petition at 20 (citing *Order* at ¶ 11).

[53] Northern Valley Petition at 20 (emphasis added).

[54] *Order*, 26 FCC Rcd at 8336, ¶ 8 n.30. 47 C.F.R. § 61.26(f).

[55] *See* Aventure Petition at 2.

[56] 47 C.F.R. § 1.106(b)(1).

we deny the Aventure Petition.

19. To begin, Aventure claims that it is adversely affected by the *Order* because Aventure recently revised its tariff in a manner similar to the Northern Valley tariff revisions at issue in this litigation, and several IXCs have opposed the Aventure tariff revisions on the ground that they violate the *Order*.[57] According to Aventure, it is "now compelled to incur the cost of replying to these oppositions, and may be subjected to the same erroneous rulings that the Commission made" in the *Order*.[58] The mere precedential value of an adjudicatory order in a section 208 complaint proceeding, however, does not "adversely affect" a non-party to the adjudication within the meaning of section 405(a) of the Act and section 1.106 of the Commission's rules.[59]

20. Aventure further claims that it had "no notice or opportunity to participate in the proceeding that ultimately led to the issuance" of the *Order*, because it was a "party-specific adjudication" that was "restricted" for purposes of the Commission's *ex parte* rules.[60] The "restricted" nature of the proceeding means that all parties to the proceeding must be included in "presentations" to Commission decision-making personnel.[61] It does not mean that the proceeding is secret. Indeed, the Commission's website lists all pending section 208 formal complaint proceedings,[62] and the pleadings filed in those cases are available for review in the Commission's Reference Information Center. Thus, with minimal effort, Aventure could have ascertained the matters at issue in this proceeding and sought leave at a much earlier stage to file an *amicus* brief or supporting memorandum of law to the extent it believed it had or might have a stake in the outcome.[63]

IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, and 405, and sections 1.106 and 61.26 of the Commission's rules, 47 C.F.R. §§ 1.106 and 61.26, that the Petition for Reconsideration or Clarification filed by Northern Valley is DISMISSED to the extent indicated and is otherwise DENIED.

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[57] Aventure Petition at 4-5.

[58] Aventure Petition at 5.

[59] *AT&T Corp. v. Business Telecom, Inc.*, Order on Reconsideration, 16 FCC Rcd 21750, 21752-53, ¶¶ 6-7 (2001) (finding that "the adverse impact of a Commission action on a person's litigation strategy in another Commission proceeding does not meet the 'adversely affected' test") (citations omitted). Moreover, the Commission has held that "to grant non-party requests to reconsider Commission adjudicatory orders based upon the [precedential effect of an adjudicatory order] would open the 'floodgates' to non-party participation in adjudicatory proceedings, and thus effectively convert every adjudicatory proceeding into a rulemaking proceeding." *Id.* at 21753, ¶ 7 (citations omitted).

[60] Aventure Petition at 5.

[61] *See* 47 C.F.R. §§ 1.1202(b), 1.1208.

[62] *See* http://transition.fcc.gov/eb/mdrd/c208.html.

[63] We note that Aventure does not claim that it lacked awareness of this proceeding. Indeed, counsel for Aventure and counsel for Northern Valley are partners on the twelve-person "Telecommunications Team" in the same law firm. *See* http://www.arentfox.com/practices/telecom/index.cfm?fa=team.

22. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Aventure is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary