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.	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 2011 **Released: June 7, 2011**

By the Commission:

I. INTRODUCTION

1. This formal complaint proceeding represents the latest chapter in the ongoing dispute between interexchange carriers ("IXCs") and local exchange carriers ("LECs") involving "access stimulation."[1] Qwest Communications Company, LLC ("Qwest") filed a complaint[2] against Northern Valley Communications, LLC ("Northern Valley") under section 208 of the Communications Act of 1934, as amended ("Act").[3] In short, Qwest alleges that Northern Valley's interstate access service tariff violates section 201(b) of the Act and requests that the Commission order Northern Valley to withdraw the tariff.[4]

2. As explained below, we find that Northern Valley's tariff is unlawful. As Qwest argues, and Northern Valley does not dispute, Northern Valley's tariff purports to allow Northern Valley to impose tariffed switched access charges on IXCs for calls placed or received by individuals or entities to

[1] As described by this Commission, "access stimulation" is an "arbitrage scheme" by which a telecommunications carrier "enters into an arrangement with a provider of high volume operations such as chat lines, adult entertainment calls, and 'free' conference calls" in order to generate elevated traffic volumes and maximize access charge revenues. *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4758, ¶ 636 (2011) ("*Connect America Fund*").

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

[3] 47 U.S.C. § 208.

[4] Complaint at 13-17, ¶¶ 21-31 (citing section 201(b), 47 U.S.C. § 201(b) (prohibiting "unjust and unreasonable practices")); *id.* at 18, ¶ 34 (Prayer for Relief). Qwest's Complaint does not seek damages.

whom Northern Valley offers free services. The tariff therefore violates Commission rule 61.26 as clarified by the *CLEC Access Charge Reform Reconsideration Order*,[5] and accordingly also violates section 201(b) of the Act. Thus, we grant Qwest's Complaint and direct Northern Valley to revise its tariff within ten days of the date of release of this Order.

II. BACKGROUND

A. The Parties

3. Qwest is an IXC providing interstate telecommunications service throughout the United States.[6] Northern Valley is a competitive local exchange carrier ("CLEC"), serving customers in South Dakota.[7] Northern Valley provides interstate exchange access service to IXCs such as Qwest pursuant to tariffs filed with the Commission.[8] Among the entities to which Northern Valley terminates calls are conference calling companies that maintain conference bridges located in Northern Valley's telephone exchange area.[9]

4. On July 8, 2010, Northern Valley filed a revised interstate access service tariff ("Tariff").[10] In particular, Northern Valley revised the Tariff's definition of "End User," which the Tariff previously had defined, in relevant part, as "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier."[11] In the revised Tariff, Northern Valley added the following sentence to the "End User" definition: "An End User need not purchase any service provided by [Northern Valley]."[12] Northern Valley states that it revised the "End User" definition because it

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[5] *See* 47 C.F.R. § 61.26; *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*").

[6] Joint Statement, File No. EB-11-MD-001 (filed Feb. 9, 2011) ("Joint Statement") at 1, ¶ 2; Complaint at 3-4, ¶ 1. Qwest recently merged with CenturyTel, Inc. *See Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, Memorandum Opinion and Order, 2011 WL 972605 (rel. Mar. 18, 2011). *See also* Letter from David H. Solomon, Counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, File No. EB-11-MD-001 (filed Apr. 28, 2011).

[7] Joint Statement at 1, ¶ 3; Answer of Northern Valley Communications, LLC, File No. EB-11-MD-001 (filed Jan. 27, 2011) ("Answer"), Exhibit A (Northern Valley Communications, LLC Legal Analysis in Opposition to Formal Complaint ("Legal Analysis")) at 3.

[8] *See* Joint Statement at 2-3, ¶¶ 3, 4, 7. Northern Valley contends that it is a "rural CLEC." *See* Answer, Legal Analysis at 3. Rural CLECs are permitted under the "rural exemption" contained in the CLEC access charge rules to charge significantly higher rates than a non-rural CLEC. *See* discussion below at paragraph 6 & n.24. Qwest does not concede that Northern Valley qualifies for the "rural exemption." *See* Complaint at 8, n.9.

[9] Answer, Legal Analysis at 3-4.

[10] Joint Statement at 2, ¶ 4. Complaint at 2 & Exhibit B (Northern Valley Communications, LLC Tariff F.C.C. No. 3 ("Tariff")).

[11] Joint Statement at 2, ¶ 4. Complaint at 2, 12, ¶ 18 & Exhibit B. *See* Northern Valley F.C.C. Tariff No. 2 at Original Page 2-59 and Complaint, Exhibit A (Legal Analysis in Support of Qwest Communications Company, LLC's Complaint ("Legal Analysis")) at 4-6.

[12] Complaint, Exhibit B (Tariff) at Original Page No. 8.

believes that the Commission's decision in *Qwest v. Farmers II*[13] created "doubt" as to whether Northern Valley could impose access charges for terminating calls to conference calling companies under its existing tariff.[14]

B. The Commission's Access Charge Regime

5. Resolution of the present dispute requires an examination first of the Commission's rules and orders governing incumbent local exchange carrier ("ILEC") access services. ILECs are required to publish the rates, terms, and conditions applicable to their access service in tariffs filed with the Commission.[15] The Commission's rules governing these tariffs provide that ILECs may recover access service costs through charges assessed on both IXCs and "end users."[16] These rules have, since their promulgation in 1983 in anticipation of the AT&T divestiture, defined "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier."[17] The Commission, since 1984, also has *required* that ILEC access tariffs define "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier."[18]

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

[14] Answer, Legal Analysis at 4. 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 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." *Qwest v. Farmers II*, 24 FCC Rcd at 14801, ¶ 1, 14806, ¶ 12.

[15] 47 U.S.C. § 203(a); *see Tariff Filing Requirements for Interstate Common Carriers*, Report and Order, 7 FCC Rcd 8072, 8072-73, ¶¶ 3-8 (1992); *see also Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) ("*Hyperion Forbearance Order*") at 8596-8601, ¶¶ 1-9 (discussing the application of the section 203(a) tariff-filing requirement to ILECs).

[16] *See, e.g.*, 47 C.F.R. §§ 69.4(a) ("The end user charges for access service filed with this Commission shall include charges for the End User Common Line element …."); 69.104 (end user common line charge for non-price cap ILECs); 69.152 (end user common line charge for price cap LECs).

[17] 47 C.F.R. § 69.2(m); *see MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 245-46, ¶ 10 (1983) ("Today we…adopt[ ] rules that will determine the rates interexchange carriers and end users will pay for access to local telephone company facilities used to complete interstate service offerings."), 345, Appendix A, § 69.2(m) (defining "end user" as "any customer of an interstate or foreign telecommunications service … that is not a carrier …").

[18] *See 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*….").

6. In contrast to ILECs, CLECs may impose interstate access charges either through tariffs or contracts negotiated with IXCs.[19] In the *CLEC Access Charge Reform Order*, the Commission found that CLEC access rates were, on average, "well above the rates that ILECs charge for similar service" and acknowledged that some CLECs were "refus[ing] to enter meaningful negotiation on access rates, choosing instead simply to file a tariff and bind IXCs … to the rates therein."[20] 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."[21] Accordingly, the Commission prohibited CLECs from tariffing switched access rates that were higher than the switched access rates of the ILEC serving the same geographic area in which the CLEC was located.[22] In other words, CLEC switched access rates would be "benchmarked" against ILEC rates.[23] If a CLEC wished to impose higher switched access rates, it could do so only by negotiating with the affected IXCs.[24] Finally, as discussed more fully below, 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.

III. DISCUSSION

A. Northern Valley's Tariff Violates Section 201(b) of the Act.

7. As noted above, Northern Valley's tariff previously defined "End User" to mean "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier."[25] Northern Valley revised that definition by adding the statement that "an End User need not purchase any service provided by [Northern Valley]."[26] In its Complaint, Qwest argues that the Tariff is unlawful because this new language purports to allow Northern Valley to impose tariffed charges on Qwest for terminating calls to entities to whom Northern Valley offers free service. We agree with Qwest. Qwest's construction of the language at issue is reasonable, and, moreover, is not disputed by Northern Valley.[27] The Tariff therefore

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[19] *See Hyperion Forbearance Order*, 12 FCC Rcd at 8596, ¶ 1 (granting "permissive detariffing for provision of interstate exchange access services by providers other than the incumbent local exchange carrier").

[20] *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 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.

[21] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, ¶ 3.

[22] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9944-45, ¶ 52.

[23] *Id.* The Commission has sought comment on revising the CLEC benchmark rule for carriers with revenue-sharing arrangements. *See Connect American Fund*, 26 FCC Rcd at 4762, ¶¶ 649-50.

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

[25] *See* Northern Valley F.C.C. Tariff No. 2 at Original Page 2-59 and Complaint, Exhibit B (Tariff No. 3) at Original Page No. 8.

[26] Complaint, Exhibit B (Tariff) at Original Page No. 8.

[27] See Answer, Legal Analysis at 12-14. *See also* n.34 below.

is unlawful, because, as explained below, the Commission's access service rules and orders establish that a CLEC may tariff access charges only if those charges are for transporting calls to or from an individual or entity to whom the CLEC offers service *for a fee*.

8. The Commission in the *CLEC Access Charge Reform Order* promulgated rules entitled "Tariffing of competitive [LEC] interstate switched exchange access services."[28] Section 61.26(a)(3) of these rules states that "Interstate switched exchange access services shall include the functional equivalent of the ILEC interstate exchange access services typically associated with the … rate elements [found in ILEC access service tariffs.]"[29] Thus, the Commission's rules require that tariffed CLEC charges for "interstate switched exchange access services" be for services that are "the functional equivalent" of ILEC interstate switched exchange access services. As the Commission subsequently explained in the *CLEC Access Charge Reform Reconsideration Order*, a CLEC provides the "functional equivalent" of an ILEC's access services only if the CLEC transmits the call to its own end user:

> The rate elements identified in [the section defining "Interstate switched exchange access services"] reflect those services needed to originate or terminate a call to a LEC's end-user. When a competitive LEC originates or terminates traffic *to its own end-users* it is providing the functional equivalent of those services….[30]

Moreover, the Commission has made clear that when a CLEC is *not* transporting traffic to or from its own end user, the CLEC is *not* providing the functional equivalent of ILEC access services and thus not entitled to charge the full tariffed benchmark rate. The *CLEC Access Charge Reform Reconsideration Order* explains:

> [T]here have been a number of disputes regarding the appropriate compensation to be paid by IXCs when a competitive LEC handles interexchange traffic that is not originated or terminated by the competitive LEC's own end-users…. [W]e now conclude that the benchmark rate established in the *CLEC Access Reform Order* is available only when a competitive LEC provides an IXC with access *to the competitive LEC's own end-users*. As explained above, a competitive LEC that provides access *to its own end-users* is providing the functional equivalent of the services associated with the rate elements listed in section 61.26(a)(3) [*i.e.*, ILEC interstate access services] and therefore is entitled to the full benchmark rate.[31]

9. A CLEC's "own end-users" do not include entities that receive free services from the CLEC. As noted earlier, "end user" has been defined by the Commission's ILEC access charge rules and

[28] 47 C.F.R. § 61.26 (heading).

[29] 47 C.F.R. § 61.26(a)(3).

[30] *Access Charge Reform Reconsideration Order,* 19 FCC Rcd at 9114, ¶ 13 (emphasis added). Commission rule 61.26(f), 47 C.F.R. § 61.26(f), applying when "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…" is not at issue here.

[31] *CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9115, ¶ 15 (emphasis added).

orders for more than 25 years as a "customer of an interstate or foreign *telecommunications service*."[32] The Act, in turn, defines "telecommunications service" as "the offering of telecommunications *for a fee*."[33] Thus, under 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 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*. Northern Valley's Tariff, however, purports to permit Northern Valley to charge IXCs for calls to or from entities to whom Northern Valley offers its services free of charge, because it states that "an End User need not purchase any service provided by [Northern Valley]".[34] Therefore, the Tariff violates the Commission's CLEC access charge rules as clarified by the *CLEC Access Charge Reform Reconsideration Order*, and consequently also violates section 201(b) of the Act.[35]

10. Northern Valley disagrees with this analysis, arguing first that a "customer of … telecommunications service" need not pay for such service.[36] According to Northern Valley, the "*Collins English Dictionary* recognizes that, in addition to 'a person who buys,' a customer may also be 'a person with whom one has dealings.'"[37] In the context relevant to this dispute, however, "customer" clearly means a *paying* customer. As discussed, the Commission defines "end user" to mean a customer of a "telecommunications service," which, under the statute, is "the offering of telecommunications *for a fee*."[38] The Commission has explained that, "in order to be a telecommunications service, the service

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[32] *See* above at II.B. ("The Commission's Access Charge Regime") ¶ 5 (citing 47 C.F.R. § 69.2(m), *ECA Tariff Order*, 97 FCC 2d at 1192, § 2.6).

[33] 47 U.S.C. § 153(53) (emphasis added).

[34] Complaint, Exhibit B (Tariff) at Original Page No. 8. The Tariff's definition of "End User" may be so inconsistent as to be ambiguous. On the one hand, it defines "end user" as a paying customer (an end user is "any customer of an interstate or foreign telecommunications service"). Complaint, Exhibit B (Tariff) at Original Page No. 8. On the other hand, it defines "end user" as an entity that does not pay (an end user "need not purchase any service provided by [Northern Valley]"). *Id.* This inconsistency may violate the Commission's requirement that tariffs be "clear and explicit." *See* 47 C.F.R. § 61.2(a). We do not address this issue, however, because Qwest did not raise it, and both parties assert that the Tariff's "end user" definition establishes that Northern Valley may impose charges for calls to or from parties that have not purchased services from Northern Valley.

[35] *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"). The *CLEC Access Charge Reform Reconsideration Order* was promulgated pursuant to section 201, *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). *See also Halprin, Temple, Goodman & Sugrue v. MCI Telecomm. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568, 22574-76, ¶¶ 8-13 ("*Halprin*") (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 violations of section 201(b) of the Act…").

[36] Answer, Legal Analysis at 18-22.

[37] Answer, Legal Analysis at 19 (citing *Collins English Dictionary – Complete & Unabridged* (10th ed. 2009)).

[38] 47 C.F.R. § 69.2(m) (emphasis added); 47 U.S.C. § 153(53) (emphasis added). The Commission's defining "end user" as a customer of a service offered for a fee furthers 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. The Commission has concluded that, to the extent consistent with universal service, a reasonable portion of a LEC's (continued…)

provider must assess a fee for its service."[39]

11. Northern Valley argues further that the question of whether it charges end users "is both logically and legally inapposite to a determination of whether Qwest should be obligated to pay for the Access Service that it receives."[40] Northern Valley asserts that the Tariff is lawful even if Northern Valley does not provide the "functional equivalent" of ILEC exchange access, because Northern Valley provides "exchange access" within the meaning of the Act.[41] Specifically, Northern Valley notes that the Act's "exchange access" definition imposes no requirement that a LEC receive payment from the individual or entity placing or receiving the call.[42] Instead, the Act defines the term as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services,"[43] and defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[44] Northern Valley, however, must comply not only with the Act, but also with the Commission's rules and orders.[45] As discussed, the Commission has determined 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 that an entity to whom the CLEC offers free service is not an end user.[46] Thus, if Northern Valley wishes to charge IXCs for terminating calls to entities that pay no fees, it must do so through a negotiated contract.

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costs in providing the facilities linking a particular individual or entity to a CLEC's central office (*i.e.*, the "common line") should be paid by that individual or entity: "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." *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 686, ¶ 7 (1983) (discussing the decision to impose the common line charge on end users); *see also CLEC Access Charge Reform Reconsideration Order*, 19 FCC Rcd at 9127, n.132 (noting that price cap carriers "recover the majority of interstate common line costs from their end users" and that rate-of-return carriers "recover all of their interstate common line costs through a combination of end-user charges and universal service") (citations omitted).

[39] *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). Thus, Northern Valley's reliance on cases construing "customer" in dissimilar contexts is misplaced. *See* Answer, Legal Analysis at 19 (citing *Alhambra-Grantfork Tel. Co. v. Ill. Commc'ns Comm'n*, 832 N.E.2d 869, 873 (Ill. App. Ct. 2005) (construing an Illinois statute permitting tariff revisions only if adequate notice is given to "all potentially affected customers")); *id.* at 20 (citing *Am. States Ins. Co. v. Hartford Cas. Ins. Co.*, 950 F. Supp. 885, 887 (C.D. Ill. 1997) (construing a car dealer's liability insurance policy pursuant to Illinois law to determine whether a person who test-drives a car is the car dealer's "customer")).

[40] Answer, Legal Analysis at 14.

[41] *See* Answer, Legal Analysis at 12, 15-16 & n.42 (citing 47 U.S.C. § 153(20), (55)).

[42] Answer, Legal Analysis at 12-13.

[43] Answer, Legal Analysis at 12; 47 U.S.C. § 153(20).

[44] Answer, Legal Analysis at 12; 47 U.S.C. § 153(55).

[45] 47 U.S.C. § 416(c).

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

B. Northern Valley's Remaining Defenses Are Not Valid.

12. Northern Valley asserts that the Tariff is lawful regardless of Commission orders or rules. According to Northern Valley, there is no "authority for why the definitions in Northern Valley's tariff must mimic word-for-word the definitions in the Commission rules, or be invalid."[47] Rather, Northern Valley contends, the Commission is required "to evaluate [Northern Valley's] tariff based on the definitions contained therein, not by prior orders or rules…."[48] As an example, Northern Valley cites *Qwest v. Farmers I*, asserting that "the Commission analyzed Qwest's complaint there, by reference to the terms of the tariff at issue."[49] Northern Valley's argument misses the mark. LEC tariffs must comply with the Act and the Commission's rules and orders; those that do not are subject to suspension, mandatory withdrawal, revision, or challenge by formal complaint.[50] The question in *Qwest v. Farmers I* was whether Farmers' practices conformed to the terms of its otherwise lawful tariff.[51] There was no contention – as there is in this case[52] – that the terms of Farmers' tariff were unlawful, and thus the Commission did not address that issue.[53]

13. In addition, Northern Valley argues that the Complaint should be denied because Qwest does not allege that Northern Valley has *in fact* imposed charges for calls to entities that have not purchased services from Northern Valley, or will do so in the future.[54] Qwest is not required to make any such showing. "Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls…."[55] The Tariff states "[a]n End User need not purchase any service provided by [Northern Valley]." This language is reasonably construed to include entities to whom Northern Valley offers service free of charge. As discussed,

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[47] Answer, Legal Analysis at 9-10.

[48] Answer, Legal Analysis at 7-11. *Id.* at 10-11.

[49] Answer, Legal Analysis at 9 (citing *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("*Qwest v. Farmers I*"), *recon. granted in part Qwest v. Farmers II*, 24 FCC Rcd 14801).

[50] *See* 47 C.F.R. § 1.773 (establishing procedures for suspending entire tariffs or particular provisions in a tariff); *see also*, *e.g.*, *Ameritech Operating Companies Transmittal No. 1430, Revisions to Tariff F.C.C. No. 2*, Order, 19 FCC Rcd 24932 (2004) (suspending tariffs for investigation); *Bell Atlantic Tel. Cos. Transmittal No. 418, Revisions to Tariff F.C.C. No. 1*, Order, 6 FCC Rcd 4794, 4795, ¶ 12 (Common Carrier Bur. 1991) (rejecting an access tariff because it "would apply Carrier Common Line Charges to a service which does not use common line facilities" even though the tariff was filed precisely to authorize such charges); *Halprin*, 13 FCC Rcd at 22568, ¶ 1 (ordering tariff revisions in the context of a section 208 proceeding).

[51] *Farmers I*, 22 FCC Rcd at 17977, ¶ 13.

[52] *See* Complaint at 1 ("The Complaint raises … one issue of law: May a … LEC … consistent with the existing access charge rules, tariff the full panoply of switched access services (including 'end office' switched access services) covering the delivery of traffic to entities that are not its end-user customers?").

[53] *See Qwest v. Farmers I*, 22 FCC Rcd at 17987, ¶ 38 ("We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff.").

[54] Answer, Legal Analysis at 21 ("Qwest cannot meet its burden to show … that Northern Valley has violated the Act by merely arguing that Northern Valley's Tariff *could be* unlawful under a contrived set of circumstances and without any showing that those circumstances have actually occurred or will occur.").

[55] *The Associated Press Request for Declaratory Ruling*, Memorandum Opinion and Order, 72 FCC2d 760, 762, ¶ 2 (1979).

imposing tariffed charges on IXCs for terminating calls to such entities violates the Commission's access charge regime; therefore, the Tariff is unlawful. In any event, Northern Valley's argument rings hollow. Northern Valley admits that it revised its Tariff because *Qwest v. Farmers II* created "doubt" as to whether Northern Valley could continue to impose access charges on "portions of the traffic that Qwest was sending to Northern Valley" (*i.e.*, calls to conference calling companies).[56] Further, in order to meet its burden of proof, Qwest is not obligated to establish that Northern Valley already has imposed unlawful access charges upon Qwest. Section 208(a) of the Act states that complaints may not be dismissed "because of the absence of direct damage to the complainant."[57]

14. Northern Valley's remaining defenses likewise are unavailing. Contrary to Northern Valley's assertion,[58] the fact that the Wireline Competition Bureau did not act on Qwest's Petition to Reject or, in the Alternative, Suspend and Investigate the Tariff presents no impediment to granting the Complaint.[59] As Northern Valley acknowledges, a petitioner's burden of proof when seeking rejection or suspension of a CLEC tariff is more demanding than a complainant's burden in a section 208 complaint proceeding.[60] Similarly, there is no merit to Northern Valley's assertion that Qwest, by failing to follow the dispute resolution provisions of the Tariff (*i.e.*, pay disputed charges) violated Commission rule 1.721(a)(8).[61] Compliance with the dispute resolution provisions of a tariff is not the standard for determining whether a complainant has satisfied rule 1.721(a)(8). Finally, Northern Valley offers no

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[56] Answer, Legal Analysis at 4. Revenue sharing is a key component of access stimulation arrangements: Far from purchasing services from the LEC, the conference calling company or other entity is *paid by the LEC* for the increased revenues generated by the arrangement. *See Connect America Fund*, 26 FCC Rcd at 4758, ¶ 636; *see also Farmers II*, 24 FCC Rcd at 14809, ¶ 17. These inflated access costs are paid by unwilling IXCs – and "ultimately borne by consumers" of interexchange services. *See Connect America Fund*, 26 FCC Rcd at 4559, ¶ 7; *see also id.* at 4710, ¶ 507 ("The record indicates that the impact of these arbitrage opportunities is significant and may cost the industry hundreds of millions of dollars each year.").

[57] 47 U.S.C. § 208(a).

[58] *See* Answer, Legal Analysis at 5; *see also* Joint Statement at 2, ¶ 5.

[59] *See Graphnet, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 1131, 1146, ¶ 43 (2002) ("*Graphnet*").

[60] *See* Answer, Legal Analysis at 5, n.8; 47 C.F.R. § 1.773(a)(ii) (providing that tariff filings by nondominant carriers will be considered *prima facie* lawful, and will not be suspended by the Commission unless the petition requesting suspension shows: (a) that there is a high probability the tariff would be found unlawful after investigation; (b) that the harm alleged to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing; (c) that irreparable injury will result if the tariff filing is not suspended; and (d) that the suspension would not otherwise be contrary to the public interest). In contrast, a complainant in a section 208 complaint proceeding need show a violation of the Act only "by a preponderance of the evidence." *Contel of the South, Inc., et al. v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548, 552, ¶ 10 (2008); *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); *Paul Demoss, Paul Demoss Trading As 1-800-America, and America's Gift Foundation, Inc. v. Sprint Communications Company, L.P.*, Memorandum Opinion and Order, 23 FCC Rcd 5547, 5550, ¶ 15 (Enf. Bur. Apr. 7, 2008). *See also Graphnet,* 17 FCC Rcd at 1146, ¶ 43.

[61] 47 C.F.R. § 1.721(a)(8) (requiring complaints to contain a certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with the defendant prior to the filing of the formal complaint). *See* Answer at 9.

factual or legal support whatsoever for its affirmative defense that Qwest has "unclean hands."[62]

15. In conclusion, we grant Qwest's Complaint because the Tariff's revised "end user" definition allows Northern Valley to violate the Commission's CLEC access rules and orders by imposing tariffed switched access charges for terminating calls to entities to whom Northern Valley offers free service. Accordingly, we conclude that the Tariff violates section 201(b) of the Act, and must be revised.[63]

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, and 208, that the Complaint is GRANTED.

17. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, and 208, that Northern Valley Communications, LLC SHALL FILE tariff revisions within ten days of the release of this Order 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.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[62] *See* Answer at 8 (Affirmative Defenses), ¶ 4.

[63] *See* n.35 above.