

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

In the Matter of)
)
Northern Valley Communications, LLC,) WC Docket No. 20-11
Tariff F.C.C. No. 3)
) Transmittal No. 12
)

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 2020

Released: June 11, 2020

By the Commission: Commissioner O’Rielly issuing a statement.

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I. INTRODUCTION

1. For far too long, certain local exchange carriers (LECs) have exploited inefficiently high access charges allowed under the system of intercarrier compensation between local and long-distance providers to engage in a practice known as access stimulation. Access stimulation generates high volumes of inbound calls, resulting in excessive access charges that long-distance providers (known as interexchange carriers or IXCs) are forced to pay. This traffic ultimately costs consumers an estimated \$60 million to \$80 million annually. To combat these wasteful arbitrage schemes, in September 2019, we adopted the *Access Arbitrage Order*, making access-stimulating LECs responsible for the costs of terminating tandem switching and transport services that IXCs depend on to deliver calls to some LECs’ end offices.¹ We found that this shift of financial responsibility, from IXCs to access-stimulating LECs, would eliminate the incentive to engage in access arbitrage and encourage access-stimulating LECs to

¹ *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Report and Order and Modification of Section 214 Authorizations, 34 FCC Rcd 9035, 9042, para. 17 (2019) (*Access Arbitrage Order*), *pets. for review pending sub nom. Great Lakes Commc’ns Corp. et al. v. FCC*, No. 19-1233 (D.C. Cir. filed Oct. 29, 2019) (Northern Valley is one of the appellants.). The term IXC as used in this *Order* encompasses wireless carriers to the extent they are payers of switched access charges.

make more efficient call routing decisions.² We also adopted reforms to enable access-stimulating LECs to designate, if needed, Intermediate Access Providers (tandem providers) from which they would accept traffic.

2. Northern Valley Communications, LLC (Northern Valley) is a self-identified access-stimulating competitive LEC. Before the *Access Arbitrage Order*, IXCs could route telephone calls to Northern Valley customers (including Northern Valley's access-stimulating customers) through a tariffed route by interconnecting to the South Dakota Network, LLC (SDN) tandem in Sioux Falls, South Dakota. IXCs could also route telephone calls bound for Northern Valley customers using commercial or non-tariffed arrangements. In response to the *Access Arbitrage Order*, Northern Valley filed Transmittal No. 12, revising its interstate access service Tariff F.C.C. No. 3 (Revised Tariff) to unilaterally designate its incumbent LEC affiliate, James Valley Cooperative Telephone Company (James Valley), as its new and only Intermediate Access Provider, and to limit its financial responsibility to pay only James Valley's tandem switching and transport charges³ for terminating calls to Northern Valley's end offices.⁴

3. The Wireline Competition Bureau (Bureau) suspended the Revised Tariff for one day, thereby allowing it to go into effect without being "deemed lawful," and released an order designating issues for investigation. In this *Order*, pursuant to our authority in sections 204 and 205 of the Communications Act of 1934, as amended (Act),⁵ we find Northern Valley's Revised Tariff unlawful because it violates section 201(b) of the Act,⁶ the *Access Arbitrage Order*, and the Access Stimulation Rules adopted there.

II. BACKGROUND

A. Access Stimulation

4. Access stimulation occurs when LECs, such as Northern Valley, seek "to artificially increase their access charge revenues" by "stimulat[ing] terminating call volumes through arrangements with entities that offer high-volume calling services" such as "free" conference calling, chat lines, or adult entertainment calls.⁷ Access stimulation schemes generate extraordinarily high numbers of inbound calls,

² See, e.g., *Access Arbitrage Order*, 34 FCC Rcd at 9036-37, 9041, 9074, paras. 4, 14, 93.

³ See *Access Arbitrage Order*, 34 FCC Rcd at 9042, para. 17 n.49 ("Throughout this [*Access Arbitrage*] *Order*, we primarily discuss connections between an access-stimulating LEC and an IXC where those connections go through a tandem. Terminating 'tandem switching and tandem switched transport' are the two key interstate exchange access services that are affected by this *Order*. These access services may be referred to using different terms in a LEC's tariff or applicable contracts. For example, a LEC may have rate elements for tandem switched transport termination and tandem switched transport facility or may have a rate element called 'common transport' as part of its tandem switched transport offering. See 47 CFR § 61.26(a)(3) (defining 'switched exchange access services' for competitive LECs to include '[t]he functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching'); see also 47 CFR § 69.111(a)(2)").

⁴ See Northern Valley Communications, LLC, Tariff F.C.C. No. 3, Transmittal No. 12 (Dec. 27, 2019) (Transmittal No. 12) (available via the Commission's Electronic Tariff Filing System); Reply of Northern Valley Communications, LLC, to Petitions to Reject or to Suspend and Investigate Northern Valley Communications, LLC's Tariff F.C.C. No. 3, Transmittal No. 12, WC Docket No. 20-11, at 1 (filed Jan. 8, 2020), <https://ecfsapi.fcc.gov/file/10114980124612/20-11d.pdf> (Northern Valley Reply).

⁵ 47 U.S.C. §§ 204-205.

⁶ *Id.* at § 201(b) (requiring that all "charges, practices, classifications, and regulations for and in connection with" communications service offered by common carriers "shall be just and reasonable").

⁷ *Access Arbitrage Order*, 34 FCC Rcd at 9035-36, para. 1; *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17874, para. 656 (2011) (continued....)

usually to costly-to-serve, rural areas, forcing IXCs to pay excessive terminating access charges.⁸ This, in turn, results in IXCs' long-distance customers implicitly subsidizing the cost of these high-volume calling services, whether they use them or not.⁹ Consequently, the Commission has long recognized that the public interest requires curbing these abuses by reducing access stimulation.¹⁰

5. The roots of our recent access stimulation work can be found in the *2011 USF/ICC Transformation Order*. In the *Access Arbitrage Order*, the Commission took steps to comprehensively reform the intercarrier compensation regime and established a bill-and-keep methodology as the ultimate end state for all intercarrier compensation.¹¹ The Commission began the process of transitioning to bill-and-keep by capping most intercarrier compensation access charges and adopting a multi-year transition to bill-and-keep for terminating end office charges and some tandem switching and transport charges.¹²

6. As part of reforming the intercarrier compensation system, the Commission found that access-stimulating LECs were "realiz[ing] significant revenue increases and thus inflated profits that almost uniformly [made] their interstate switched access rates unjust and unreasonable."¹³ The Commission therefore adopted a definition of access stimulation and required access-stimulating carriers to either revise their tariffs to reflect the stimulated traffic or to benchmark their rates to the lowest rate charged by the competing price cap LEC in the state.¹⁴

7. Following the *USF/ICC Transformation Order*, access stimulators "adapted . . . to take advantage of access charges that have not yet transitioned or are not transitioning to bill-and-keep," namely tandem switching and transport charges.¹⁵ As a result, the Commission adopted a Notice of Proposed Rulemaking proposing to eliminate the financial incentive to engage in access arbitrage by giving access-stimulating LECs two alternatives for connecting to IXCs: (1) choose to be financially responsible for calls delivered to its network—in this situation, IXCs would no longer pay for the delivery of calls to the access-stimulating LEC's end office or the functional equivalent;¹⁶ or (2) instead of accepting this financial responsibility, the access-stimulating LEC could choose to accept direct connections either from the IXC or an Intermediate Access Provider of the IXC's choice—this alternative would permit IXCs to bypass Intermediate Access Providers selected by the access-stimulating LEC.¹⁷

8. The Commission also recognized that "much of the post-*USF/ICC Transformation Order* access arbitrage activity specifically involve[d] LECs that use[d] centralized equal access (CEA) providers," especially in Iowa and South Dakota.¹⁸ CEA providers are a type of Intermediate Access

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(*USF/ICC Transformation Order*), *aff'd*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2050 and 135 S. Ct. 2072 (2015).

⁸ *USF/ICC Transformation Order*, 26 FCC Rcd at 17875, para. 663.

⁹ *Id.*

¹⁰ *Access Arbitrage Order*, 34 FCC Rcd at 9076, para. 99.

¹¹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17904-05, paras. 736-38 ("Under bill-and-keep arrangements, a carrier generally looks to its end users—which are the entities and individuals making the choice to subscribe to that network—rather than looking to other carriers and their customers to pay for the costs of its network.").

¹² *Id.* at 17677, 17904, 17935, 18114, paras. 35, 739, 801, 1311.

¹³ *Id.* at 17875, para. 662.

¹⁴ *Id.* at 17874, 17885, paras. 657-58, 689.

¹⁵ *Access Arbitrage Order*, 34 FCC Rcd at 9036, para. 3.

¹⁶ *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Notice of Proposed Rulemaking, 33 FCC Rcd 5466, 5467, para. 3 (2018) (*Access Arbitrage Notice*).

¹⁷ *Id.* at 5467, para. 3.

¹⁸ *Id.* at 5469, 5472, paras. 7, 16.

Provider formed in the 1980s and 1990s “to implement long distance equal access obligations” and “to aggregate traffic for connection between rural incumbent LECs” and IXCs.¹⁹ Two CEA providers, SDN and Iowa Network Services, Inc. (d/b/a Aureon), operate under section 214 authorizations that include “mandatory use” provisions.²⁰ These mandatory use provisions require IXCs delivering terminating traffic to a LEC subtending one of these CEA tandems to deliver the traffic to the CEA tandem rather than indirectly through another Intermediate Access Provider or directly to the subtending LEC.²¹ In the *Access Arbitrage Notice*, the Commission proposed to eliminate the mandatory use requirement as it pertains to traffic terminating at access-stimulating LECs because, among other things, delivery of such high volumes of traffic was not the reason that CEA providers were authorized.²²

9. In September 2019, we adopted the *Access Arbitrage Order* making access-stimulating LECs responsible for all interstate and intrastate charges related to terminating tandem switching and tandem switched transport services that IXCs use to deliver calls to the access-stimulating LECs’ end offices.²³ In adopting these rules, we explained that “reversing the financial responsibility for both transport and tandem switching charges” from IXCs to access-stimulating LECs was the most effective approach to eliminating access arbitrage, thereby encouraging access-stimulating LECs to make more efficient call routing decisions.²⁴ This conclusion built on the legal authority cited and policy reforms adopted in the *USF/ICC Transformation Order*, and we found that requiring IXCs to pay tandem switching and tandem switched transport access charges for terminating access-stimulation traffic is unjust and unreasonable under section 201(b) of the Act and therefore prohibited.²⁵

10. The Access Stimulation Rules adopted in the *Access Arbitrage Order* also require an access-stimulating LEC to (1) “designate, if needed, the Intermediate Access Provider(s) that will provide terminating switched access tandem switching and terminating switched access tandem transport services to the local exchange carrier” and (2) “assume financial responsibility for any applicable Intermediate Access Provider’s charges for such services.”²⁶ We also modified the definition of access stimulation to recognize that access stimulation was occurring even in the absence of revenue sharing agreements.²⁷

11. We also eliminated the requirement that IXCs use Aureon and SDN to terminate traffic to access-stimulating LECs, because we found that those CEA providers’ tariffed tandem switching and transport access charge rates served as a “price umbrella” for similar services offered by access-

¹⁹ *Id.* at 5469, para. 7.

²⁰ *Id.* at 5472, para. 16.

²¹ *Application of Iowa Network Access Div.*, File No. W-P-C-6025, Memorandum Opinion, Order and Certificate, 3 FCC Rcd 1468 (CCB 1988); *Application of SDCEA, Inc., to Lease Transmission Facilities to Provide Centralized Equal Access Service to Interexchange Carriers in the State of South Dakota*, File No. W-P-C-6486, Memorandum Opinion, Order and Certificate, 5 FCC Rcd 6978 (CCB 1990). The Iowa and South Dakota commissions also granted authorizations. See *Access Arbitrage Order*, 34 FCC Rcd at 9040, para. 12 n.30.

²² *Access Arbitrage Notice*, 33 FCC Rcd at 5472, paras. 16-17.

²³ *Access Arbitrage Order*, 34 FCC Rcd at 9035-36, 9042, paras. 1, 17.

²⁴ *Id.* at 9050, 9067, paras. 37, 73.

²⁵ *Id.* at 9073-74, para. 92.

²⁶ 47 CFR § 51.914(a)(2); *id.* § 51.914(a)(1) (“[I]f a local exchange carrier is engaged in Access Stimulation . . . it shall . . . [n]ot bill any Interexchange Carrier for terminating switched access tandem switching or terminating switched access transport charges for any traffic between such local exchange carrier’s terminating end office or equivalent and the associated access tandem switch.”). The Access Stimulation Rules require LECs to self-identify as access stimulators, and to notify the Commission, as well as Intermediate Access Providers and IXCs, that they have assumed financial responsibility for terminating tandem switching and transport charges, and to also provide notification if they cease engaging in access stimulation. 47 CFR § 51.914(b)-(c), (e).

²⁷ *Access Arbitrage Order*, 34 FCC Rcd at 9037, para. 4.

stimulating LECs and their partners on an unregulated basis, pursuant to commercial agreements.²⁸ Because “the commercially negotiated rates need only be slightly under the ‘umbrella’ CEA provider rate to be attractive to those purchasing the service(s),” the commercial agreements still included charges “well above the economic cost of providing” the services.²⁹ Accordingly, we eliminated the mandatory use requirements to encourage “accurate price signals.”³⁰ By eliminating the mandatory use requirements for access-stimulating LECs, “we enabl[ed] IXCs to use whatever intermediate access provider an access-stimulating LEC that otherwise subtends Aureon or SDN chooses.”³¹ It also “allow[ed] IXCs to directly connect to access-stimulating LECs where such connections are mutually negotiated and where doing so would be more efficient and cost-effective.”³² We considered but rejected the second option proposed in the *Access Arbitrage Notice* that would have allowed an access-stimulating LEC to avoid paying for tandem switching and tandem switched transport by choosing to accept direct connections from IXCs or from an Intermediate Access Provider of the IXC’s choice.³³ We concluded that this approach would not be effective in curbing arbitrage because it “could allow access-stimulating LECs to avoid financial responsibility by operating in remote locations where direct connections would be prohibitively expensive or infeasible and alternative intermediate access providers may be nonexistent or prohibitively expensive.”³⁴

B. Northern Valley

12. Northern Valley is a self-identified access-stimulating competitive LEC located in South Dakota and is affiliated with James Valley, an incumbent LEC serving rural South Dakota.³⁵ Northern Valley historically has designated CEA provider SDN as its tandem provider.³⁶ Prior to the Revised Tariff, when an IXC sent traffic to Northern Valley using SDN’s regulated, tariffed services, the IXC would deliver that traffic to the SDN tandem switch in Sioux Falls, South Dakota, and the traffic was then delivered to the James Valley switch in Groton, South Dakota, via an SDN fiber facility leased exclusively by Northern Valley.³⁷ Traffic was then transported on a fiber facility leased by Northern

²⁸ *Id.* at 9045, para. 24. We recognize that there is a legal question about the applicability of the mandatory use requirements to traffic delivered to access-stimulating LECs prior to the adoption of *Access Arbitrage Order*. As we did in the *Access Arbitrage Order*, we do not find it necessary to opine on that issue, but instead reaffirm that there was no such obligation after the adoption of the *Access Arbitrage Order*. *Id.* at 9079-80, para. 106.

²⁹ *Id.* at 9042, para. 16 (citation omitted).

³⁰ *Id.*

³¹ *Id.* at 9079-80, para. 106.

³² *Id.*

³³ *Id.* at 9051, para. 40 (citation omitted).

³⁴ *Id.*

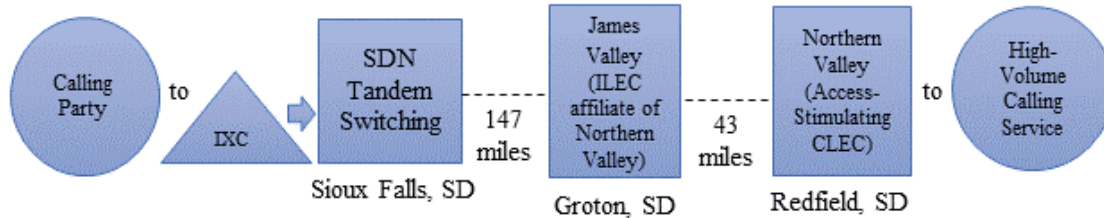
³⁵ Northern Valley Reply at 1.

³⁶ Direct Case of Northern Valley, WC Docket No. 20-11, at 13 (filed Apr. 1, 2020), <https://ecfsapi.fcc.gov/file/104010512221668/2020.04.01%20REDACTED%20PUBLIC%20VERSION%20NVC's%20Direct%20Case.pdf> (Direct Case).

³⁷ *Id.* at 3, 13, 15; AT&T Services, Inc.’s Opposition to Direct Case of Northern Valley Communications, LLC, WC Docket No. 20-11, at 8, 41-42 (filed Apr. 15, 2020), <https://ecfsapi.fcc.gov/file/1041521381073/AT%26T%20Opposition%20%5BPublic%5D.pdf> (AT&T Opposition); *see also* Verizon Petition to Reject or, in the Alternative, Suspend and Investigate, WC Docket No. 20-11, at 1-3 (filed Jan. 3, 2020), <https://ecfsapi.fcc.gov/file/101142766917466/20-11.pdf> (Verizon Petition). A portion of that fiber facility lies within James Valley’s service territory and is owned by James Valley. AT&T Opposition at 45. Prior to the Revised Tariff at issue in this investigation, the James Valley switch in Groton was designated a host office for Northern Valley. AT&T Opposition at 31; Direct Case at 19; Verizon Opposition to Direct Case of Northern Valley Communications, LLC, WC Docket No. 20-11, at 2 n.4 (filed Apr. 15, 2020), <https://ecfsapi.fcc.gov/file/104151897125782/2020%2004%2015%20PUBLIC%20VZ%20Opp%20to%20Direct%20Case.pdf> (Verizon Opposition).

Valley to Northern Valley end offices in Redfield and Aberdeen, South Dakota.³⁸ SDN would bill the IXC for tandem switching, and Northern Valley would bill the IXC for transporting the call about 190 miles on two separate legs – Sioux Falls to Groton (147 miles) and Groton to Redfield (43 miles).³⁹

Diagram 1: Regulated Route Before the Revised Tariff



The dotted line shows the tariffed path of a call from Sioux Falls to Northern Valley’s end office in Redfield before Northern Valley revised its tariff. In this diagram, an IXC could connect at the SDN tandem and pay SDN’s tariffed rate for tandem switching. The IXC would then pay Northern Valley under its tariff to transport the call 147 miles to James Valley in Groton and then 43 more miles to Northern Valley.

13. The vast majority of traffic terminating at Northern Valley, however, was not routed using the tariffed services described above.⁴⁰ Instead, approximately { [] }⁴¹ of the traffic destined for Northern Valley was routed by IP connection pursuant to commercial agreements with { [] }.⁴² The record indicates that IXCs used IP connections because the unregulated contract rates for those connections were less than the SDN and Northern Valley’s tariffed tandem switching and transport rates.⁴³ Thus, the tariffed rates served as a “price umbrella” encouraging IXCs to enter into commercial agreements to transport traffic bound for Northern Valley.

³⁸ Direct Case at 35 (Northern Valley “incur[s] the costs to lease the fiber facilities necessary to transport the traffic to its end offices.”); see AT&T Opposition at 8 (To deliver traffic to Redfield, “Northern Valley has utilized the facilities of its affiliate James Valley to bring the traffic to Groton, and then to complete the interconnection, it has leased circuits on SDN’s fiber facilities between Groton and Sioux Falls.”); *id.* 41-42 (“SDN owns the only fiber facility currently in place between Sioux Falls and Groton, and Northern Valley claims the ‘exclusive right’ to transport all traffic over that route.”). Northern Valley argues that it has an exclusive right to “use” these SDN fiber facilities but not an exclusive right to “transport” traffic from Sioux Falls to Groton. *Ex Parte* Presentation of Northern Valley Communications, LLC Regarding the Opposition of AT&T, WC Docket No. 20-11, at 8 (filed May 22, 2020) (Northern Valley May 22, 2020 *Ex Parte* Response to AT&T). In this *Order*, we focus on traffic to Northern Valley’s end office in Redfield because the record indicates access-stimulation traffic travels to “conference bridges located in Redfield.” AT&T Opposition at 4.

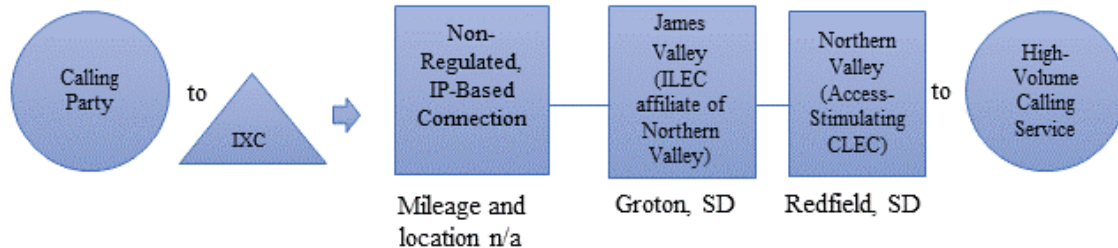
³⁹ AT&T Opposition at 31; Verizon Opposition at 6. These transport charges, which are assessed on a per-minute and per-mile basis, totaled many millions of dollars per year. See, e.g., T-Mobile Opposition to Northern Valley’s Direct Case, WC Docket No. 20-11, at 9 & n.25 (filed Apr. 15, 2020), https://ecfsapi.fcc.gov/file/10416564609341/T-Mobile%20Opposition%20to%20Northern%20Valley%20Redacted_final.pdf (T-Mobile Opposition). Sprint merged with T-Mobile on April 1, 2020, and the combined company now operates under the name T-Mobile. T-Mobile Opposition at 1. The distance of the Sioux Falls-to-Groton route is 147 miles. Direct Case at 17.

⁴⁰ Direct Case at 14, 16.

⁴¹ Material highlighted and set off by double brackets { [] } is redacted from the public version of this document.

⁴² See Direct Case at 31-32 and Confidential-NVC Direct Case Spreadsheets.xlsx (Row 15) (over the 10-month period from March to December 2019).

⁴³ *Access Arbitrage Order*, 34 FCC Rcd at 9042, para. 16; AT&T Opposition at 3, 31-32; T-Mobile Opposition at 10-11; Verizon Opposition at 2-3, 6-7.

Diagram 2: Non-Regulated Route Using IP-Based Connection

An IXC could contract with a provider using an IP-based connection to transport the call through James Valley to Northern Valley's end office (represented by the solid line in this diagram).

14. In addition to transport under its tariff or via IP connection, Northern Valley entered into a contract with AT&T, for delivery of traffic to Northern Valley over SDN.⁴⁴ This traffic represented about {[]} of Northern Valley's terminating traffic.⁴⁵ Consequently, traffic delivered to Northern Valley by way of the tariffed route constituted only around {[]} of its terminating traffic throughout 2019.⁴⁶ AT&T terminated its contract with Northern Valley on December 12, 2019, but continued to use the former contract route,⁴⁷ and Northern Valley filed suit against AT&T over the termination on March 12, 2020.⁴⁸

C. The Revised Tariff

15. On December 27, 2019, Northern Valley filed Transmittal No. 12, revising its interstate access service Tariff F.C.C. No. 3.⁴⁹ The Revised Tariff reflects Northern Valley's intent to change its point of interconnection with IXCs from the SDN tandem to its affiliate, James Valley, on the regulated, tariffed path and identify the James Valley switch as a tandem. Northern Valley's Revised Tariff designates its affiliate, James Valley, as its new Intermediate Access Provider and states that Northern Valley will assume financial responsibility *only* for James Valley's tandem charges and thus will not be financially responsible for any charges to get traffic to James Valley. The following diagram shows how calls destined to Northern Valley's end office may be routed as a result of Northern Valley's Revised Tariff.

⁴⁴ See *Notice of Removal*, Exh. A (Compl., *Northern Valley Commc'ns v. AT&T Corp.*, No. L00035520, paras. 13-15 (Somerset County) (Mar. 13, 2020) (*Northern Valley NJ Complaint*)), *Northern Valley Commc'ns v. AT&T Corp.*, No. 3:20-cv-03271 (D.N.J.) (Mar. 26, 2020); AT&T Opposition at 11 (characterizing the contract between Northern Valley and AT&T as a "Switched Access Service Agreement"); see also Direct Case at 14 ({{

}}).

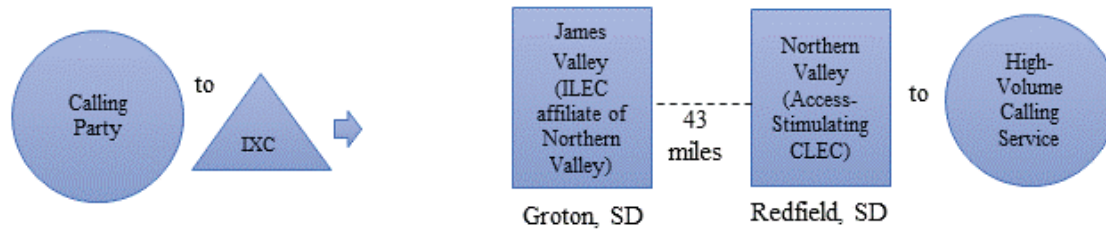
⁴⁵ Direct Case at 31-32 and Confidential-NVC Direct Case Spreadsheets.xlsx (Row 15) (over the 10-month period from March to December 2019).

⁴⁶ Direct Case at 31-32, 52; see also Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 5, 15; *Ex Parte* Presentation of Northern Valley Communications, LLC Regarding the Oppositions of SDN, T-Mobile, and Verizon, WC Docket No. 20-11, at 3 (filed May 22, 2020) (Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon).

⁴⁷ AT&T Opposition at 17; see also Direct Case at 37.

⁴⁸ AT&T Opposition at 18; see also Direct Case at 37; *Northern Valley NJ Complaint*.

⁴⁹ See Transmittal No. 12, 1st Revised Page No. 46.1, § 7.2.2, Note 4.

Diagram 3: Regulated Route after Revised Tariff

This diagram shows the regulated route (dotted line) after Northern Valley revised its tariff. Pursuant to the Revised Tariff, Northern Valley makes no provision for traffic from an IXC to James Valley. IXCs would have to contract to transport the call to James Valley or build their own facilities to reach James Valley, and the call would then be transported to Northern Valley under the Revised Tariff. No IXCs route their calls in this manner.

D. The Tariff Investigation

16. Verizon Communications (Verizon) and Sprint Communications Company L.P. (Sprint) (collectively, Petitioners) each filed a petition (collectively, Petitions) asking the Commission to reject or to suspend and investigate Northern Valley’s Revised Tariff.⁵⁰ Petitioners challenged Northern Valley’s unilateral decision to change its point of interconnection with IXCs from the SDN tandem to the James Valley tandem and its proposed tariff provisions providing that Northern Valley “shall assume financial responsibility only for” James Valley’s tandem switching and transport charges.⁵¹ Sprint described Northern Valley’s tariff revisions as a “routing scheme” designed to relieve Northern Valley of the financial obligation for tandem switching and transport service.⁵² Petitioners argued that the Revised Tariff should be rejected or suspended and investigated because the proposed revisions do nothing more than seek to effectuate an unjust and unreasonable practice.⁵³ Northern Valley filed a Reply to the Petitions, asserting that it has complied with the Act, the *Access Arbitrage Order*, and the Access Stimulation Rules and requesting that the Petitions be denied.⁵⁴

17. Pursuant to section 204 of the Act, the Bureau suspended the proposed tariff revisions, concluding that there were substantial questions of lawfulness regarding Northern Valley’s proposed tariff revisions.⁵⁵ In initiating this investigation, the Bureau advanced the effective date of Northern Valley’s proposed tariff revisions by one day and then suspended the proposed revisions for one day, and imposed

⁵⁰ Petition of Sprint to Reject or to Suspend and Investigate Northern Valley Communications, LLC’s Tariff, WC Docket No. 20-11 (filed Jan. 3, 2020), <https://ecfsapi.fcc.gov/file/1011475300829/20-11.pdf> (Sprint Petition); Verizon Petition.

⁵¹ See generally Sprint Petition; Verizon Petition (referencing the Revised Tariff).

⁵² Sprint Petition at 1-2, 6.

⁵³ *Id.* at 5-7; Verizon Petition at 3-6.

⁵⁴ See generally Northern Valley Reply.

⁵⁵ *Northern Valley Communications, LLC, Tariff F.C.C. No. 3*, WC Docket No. 20-11, Transmittal No. 12, Order, 35 FCC Rcd 402, 402-03, paras. 1, 5 (WCB 2020) (*Suspension Order*) (DA 20-40).

an accounting order on Northern Valley.⁵⁶ Subsequently, Northern Valley submitted a supplemental tariff filing reflecting the suspension.⁵⁷

18. On March 11, 2020, the Bureau released the *Northern Valley Designation Order*, which required Northern Valley to submit a Direct Case allowing us to “understand how calls are and will be routed to Northern Valley for completion” and to “establish how Northern Valley’s tariff revisions will affect the routing of those calls and the financial responsibility for any applicable tandem switching and transport charges.”⁵⁸ Northern Valley was required to demonstrate that its Revised Tariff is lawful and consistent with the Act, the *Access Arbitrage Order*, and the accompanying rules we adopted.⁵⁹

19. Northern Valley filed its Direct Case on April 1, 2020, asserting that the Revised Tariff complies with and implements the text and spirit of the *Access Arbitrage Order* and Access Stimulation Rules; promotes efficiency and competition; and “provide[s] substantial value” to the American public.⁶⁰ Northern Valley contends that the Access Stimulation Rules allow it to designate an Intermediate Access Provider and that it only needs to accept financial responsibility for the tandem switching and tandem switched transport charges for the Intermediate Access Provider it designates.⁶¹

20. AT&T Services, Inc. (AT&T), Verizon, T-Mobile USA, Inc., and SDN⁶² (collectively, Opponents) filed oppositions to Northern Valley’s Direct Case. The Opponents argue that Northern Valley’s Revised Tariff is contrary to both the letter and the spirit of the *Access Arbitrage Order* as well as long-standing Commission policy against access arbitrage. The Opponents contend that the Revised Tariff only serves to further Northern Valley’s access-stimulation scheme.⁶³ Consequently, the Opponents call for the Commission to reject Northern Valley’s Revised Tariff as unjust and unreasonable in violation of section 201(b) of the Act and to require Northern Valley to make tariff revisions designating an Intermediate Access Provider, such as SDN, as its tandem provider going forward.⁶⁴ Northern Valley filed *ex parte* responses to these oppositions reiterating its claims that the Revised Tariff is lawful and complies with the Act, the *Access Arbitrage Order*, and the Access Stimulation Rules.⁶⁵

⁵⁶ *Suspension Order*, 35 FCC Rcd at 403-04, paras. 6, 8, 10. When proposed tariff revisions are advanced by a day, the effective date listed in the proposed revisions is moved to one day earlier so that suspension of the proposed revisions can occur on that day, thereby allowing the proposed revisions to become effective on the original effective date but not to be deemed lawful. 47 U.S.C. § 204(a)(3).

⁵⁷ Letter from Steve Gatto, Authorized Representative for Northern Valley Communications, LLC, to Marlene H. Dortch, Secretary, FCC, Transmittal No. 13, WC Docket No. 20-11 (filed Jan. 17, 2020); *see* 47 CFR § 61.191.

⁵⁸ *Northern Valley Communications, LLC, Tariff F.C.C. No. 3*, WC Docket No. 20-11, Transmittal No. 12, Order Designating Issues for Investigation, DA 20-252, at 4, para. 9 (WCB Mar. 11, 2020) (*Northern Valley Designation Order*).

⁵⁹ *See generally Northern Valley Designation Order*.

⁶⁰ Direct Case at 7.

⁶¹ *Id.* at 11.

⁶² SDN Opposition to Direct Case of Northern Valley Communications, LLC, WC Docket No. 20-11 (filed Apr. 15, 2020), https://ecfsapi.fcc.gov/file/10415249737403/SDN.NVC%20Opposition-signed_Redacted.pdf (SDN Opposition).

⁶³ *See generally* AT&T Opposition; Verizon Opposition; T-Mobile Opposition.

⁶⁴ *Id.*

⁶⁵ Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon; Northern Valley May 22, 2020 *Ex Parte* Response to AT&T. SDN filed an *ex parte* presentation in the docket on June 1, 2020. Letter from Benjamin H. Dickens, Mary J. Sisak, Salvatore Taillefer, Jr., Counsel to SDN, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11 (filed June 1, 2020). Pursuant to instructions provided in the *Northern Valley Designation Order*, all *ex parte* presentations should have been filed no later than May 28, 2020. *Northern Valley Designation Order* at 8-9, para. 26. As such, SDN’s June 1, 2020 *ex parte* filing is late filed and we have not considered it.

Verizon filed a response to Northern Valley's *ex parte* filings reiterating its arguments that the Revised Tariff should be rejected.⁶⁶

E. Legal Standard

21. When a tariff has been suspended, section 204 of the Act places the burden of proof on the tariffing carrier to show that the tariff revisions are just and reasonable.⁶⁷ Section 201(b) of the Act requires that a carrier's "charges, practices, classifications, and regulations for and in connection with [its] communication service, shall be just and reasonable."⁶⁸ Commission precedent is clear that when analyzing compliance with section 201(b), the Commission requires carriers to make reasonable decisions about interconnection and carriage and that in evaluating whether a carrier has done so the Commission will look at the totality of the relevant circumstances.⁶⁹ The Commission has also explained that it is necessary to evaluate the overall public benefits of tariff language that would allow a unilateral change in the location to which IXCs are responsible for delivering traffic to determine whether it satisfies section 201(b) of the Act.⁷⁰ At the conclusion of a tariff investigation, the Commission may, pursuant to section 205, "determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed."⁷¹

III. DISCUSSION

22. We find that Northern Valley has not borne its burden of proving that its Revised Tariff is lawful. In particular, it fails to demonstrate that its Revised Tariff is just and reasonable; or that the Revised Tariff is consistent with the *Access Arbitrage Order*, the long-standing policy goals detailed in the *Access Arbitrage Order*, or the rules adopted therein. We conclude that Northern Valley cannot justify the lawfulness of its Revised Tariff in which it seeks to evade responsibility for the cost implications of its decisions to locate in a remote, expensive-to-serve area and to choose inefficient call paths at inefficiently high prices that force all IXC customers to subsidize Northern Valley's access-stimulating traffic. We will not permit Northern Valley to shirk its financial responsibility, as we find that doing so would be contrary to the Act, the *Access Arbitrage Order* and our Access Stimulation Rules.

A. Northern Valley's Revised Tariff Is Not Just and Reasonable

23. Upon review of the totality of the circumstances, we find that Northern Valley has failed to meet its burden of demonstrating that its Revised Tariff is just and reasonable, as required by section 201(b) of the Act.⁷² Northern Valley admits that it seeks to use its Revised Tariff to effectuate a unilateral

⁶⁶ Letter from Tamara Preiss, VP and Senior Managing Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-11 (filed May 28, 2020) (Verizon May 28, 2020 *Ex Parte* Letter).

⁶⁷ See 47 U.S.C. § 204(a)(1) ("At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier . . ."). Northern Valley's tariff filing revised how access-stimulation traffic will be terminated to it and which entity will be charged for that service.

⁶⁸ 47 U.S.C. § 201(b).

⁶⁹ *North County Communications Corp. v. Cricket Communications, Inc.*, Proceeding Number 14-208, Memorandum Opinion and Order, 31 FCC Rcd 10739, 10746-10747, para. 16 (EB 2016) (*North County Order*).

⁷⁰ See, e.g., *AT&T Corp. v. Alpine Communications et al.*, File No.: EB-12-MD-003, Memorandum Opinion and Order, 27 FCC Rcd 11511, 11528-30, paras. 44-48 (2012) (*Alpine Order*).

⁷¹ 47 U.S.C. § 205(a).

⁷² *Id.* at § 204(a)(1); see also, e.g., *1993 Annual Access Tariff Filings; 1994 Annual Access Tariff Filings*, CC Docket Nos. 93-193, 94-65, Order, 19 FCC Rcd 14949, 14957-58, para. 17 (2004) ("[S]ection 204(a) assigns to the carriers the burden of proving the lawfulness of the filed tariffs under investigation. The LECs do not satisfy that statutorily imposed burden merely by showing that they have not violated explicit regulatory provisions. To the (continued....)

change in the location to which IXCs are responsible—financially and otherwise—for delivering traffic destined for Northern Valley⁷³—the point at which Northern Valley concedes its financial responsibility for the traffic begins.⁷⁴ Northern Valley’s entire case depends on its ability to successfully defend that unilateral change.⁷⁵ Contrary to Northern Valley’s claims,⁷⁶ however, the record does not show that its Revised Tariff is just and reasonable. Instead, through its Revised Tariff, Northern Valley attempts to perpetuate the harms to the intercarrier compensation regime that we sought to eliminate in the *Access Arbitrage Order* and Northern Valley fails to provide any evidence that its Revised Tariff advances an efficient marketplace or network routing—or provides any other net public benefit, factors the Commission has found critical in past analyses under section 201(b) of the Act.⁷⁷

24. *Northern Valley’s Revised Tariff Is Contrary to Section 201(b)*. Northern Valley’s attempt to unilaterally move the location to which IXCs are responsible for delivering traffic destined for it is unjust and unreasonable in violation of section 201(b). Northern Valley’s Revised Tariff would require IXCs to pay the tandem switching and transport charges to reach James Valley or build a direct connection to James Valley to send traffic to Northern Valley and further Northern Valley’s arbitrage scheme without any countervailing benefits. Commission precedent makes clear that the reasonableness of a unilateral change in the location to which IXCs are responsible for delivering traffic, like the one

(Continued from previous page)

contrary, the LECs must affirmatively show that their tariffed ‘charges, practices, classifications, and regulations’ are ‘just and reasonable’ under the Act.” (footnote omitted); AT&T Opposition at 6 (advocating use of the Commission’s “broad authority under Sections 201(b) and 204” to “find that the tariff revision is unreasonable and not lawful”). Note that the “hearing” in this context is the tariff investigation. *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3098, para. 454 n.984 (1989) (“A tariff investigation constitutes a hearing within the meaning of Section 204(a).”).

⁷³ See generally Direct Case. Various parties use differing terminology to refer to Northern Valley’s attempt to shift the point at which IXCs are responsible for delivering traffic destined for Northern Valley. See, e.g., Direct Case at 3, 12, 42 (referring to “re-homing” or “designat[ing] an alternative tandem switch” or “unilaterally establish[ing] its interconnection point via tariff by changes to the LERG”); AT&T Opposition at 26 (referring to “re-hom[ing]” or “unilaterally shift[ing] the location of its point of interconnection”); T-Mobile Opposition at 1 (referring to “unilaterally relocate[ing] Northern Valley’s point of interconnection”); Verizon Opposition at 5, 11 (referring to the “selection of James Valley’s Groton, South Dakota switch” or “mov[ing] its point of interconnection”). Although the *Access Arbitrage Order* also uses various terminology at times, as the *Access Arbitrage Order* makes clear, the crux of the issue relevant here is the location to which IXCs are responsible for delivering traffic destined for an access-stimulating LEC, *Access Arbitrage Order*, 34 FCC Rcd at 9049, paras. 34-35, so we use that (or similar) terminology throughout as a generic and convenient way of referring to the point that Northern Valley has attempted to shift unilaterally.

⁷⁴ See, e.g., Direct Case at 42 (“Northern Valley can unilaterally establish its interconnection point via tariff by changes to the LERG”); *id.* at 48 (“Northern Valley’s designation of James Valley as its tandem switching provider in Groton, South Dakota, is just and reasonable because it is fully consistent with the *Access Stimulation Order* and reinforced by its federally-filed, effective, and legal tariff.”).

⁷⁵ See, e.g., Direct Case at 53-54.

⁷⁶ *Id.* at 5, 7, 47-49, 63.

⁷⁷ 47 U.S.C. § 201(b) (“All charges, practices, classifications, and regulations “for and in connection with” common carrier services “shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful”); *Alpine Order*, 27 FCC Rcd at 11528-30, paras. 44-48 (explaining that it is necessary to evaluate the overall public benefits of tariff language that would allow a unilateral change in the location to which IXCs are responsible for delivering traffic to determine whether it satisfies section 201(b) of the Act); *North County Order*, 31 FCC Rcd at 10746-47, para. 16 (concluding that section 201(b) “requires carriers to make ‘reasonable’ decisions about interconnection and carriage,” evaluated under the “totality of the relevant circumstances”).

attempted by Northern Valley, must be evaluated based on the overall, net public benefits of that shift.⁷⁸ For example, in *Indiana Switch*, the Commission held that if a LEC's proposed unilateral shift in a point of interconnection "significantly increases IXCs' operating costs without significant increases in service choices or benefits to subscribers, or unreasonably designates . . . points of interconnection with IXCs," the Commission could find that unjust and unreasonable under section 201(b).⁷⁹ Applying that precedent in the *Alpine Order*, the Commission found LECs' unilateral decisions to move their interconnection points unjust and unreasonable.⁸⁰ As AT&T explains in its opposition, the *Alpine Order* involved "LECs participating in a [CEA provider] arrangement in Iowa" that "had longstanding points of interconnection with long distance carriers, but then unilaterally changed them."⁸¹ The effect would have been to "authorize billing vastly increased mileage charges" relative to the historical points of interconnection "without corresponding benefit to customers," which rendered the tariff allowing such a change unjust and unreasonable in violation of section 201(b) of the Act.⁸²

25. If we find Northern Valley's Revised Tariff lawful, IXCs will be left shouldering the cost of transporting traffic to James Valley that is bound for Northern Valley. We have already found that "requiring IXCs to pay the tandem switching and tandem switched transport charges for access-stimulation traffic is an unjust and unreasonable practice that we have authority to prohibit pursuant to section 201(b) of the Act."⁸³ Yet, there is no dispute that Northern Valley's Revised Tariff would shield Northern Valley from the costs to get traffic to James Valley. Indeed, in conjunction with its Revised Tariff, Northern Valley is disconnecting its tandem transport circuits to SDN, thereby eliminating the SDN-to-James Valley route under Northern Valley's tariff and avoiding financial responsibility for the

⁷⁸ *Alpine Order*, 27 FCC Rcd at 11526, 11528-30, paras. 39, 44-48; *id.* at 11528-29, para. 44 (discussing and quoting *Application of Indiana Switch Access Div.*, File No. W-P-C-5671, Memorandum Opinion and Order, 1 FCC Rcd 634, 635, para. 5 (1986) (*Indiana Switch*)); *North County Order*, 31 FCC Rcd at 10746-47, para. 16.

⁷⁹ *Indiana Switch*, 1 FCC Rcd at 635, para. 5.

⁸⁰ *Alpine Order*, 27 FCC Rcd at 11526, 11528-30, paras. 39, 44-48.

⁸¹ AT&T Opposition at 56 (citing *Alpine Order*, 27 FCC Rcd at 11512-13, 11515, paras. 5, 11).

⁸² *Alpine Order*, 27 FCC Rcd at 11526, para. 39; *see also AT&T Corp. v. Alpine Communications et al.*, File No.: EB-12-MD-003, Order on Reconsideration, 27 FCC Rcd 16606, 16609, para. 5 (2012) (denying reconsideration and summarizing the *Alpine Order*, in pertinent part, as holding "that, if the NECA Tariff were interpreted to allow the Iowa LECs to change their [points of interconnection] for the sole purpose of inflating mileage charges, the tariff is unreasonable in violation of Section 201(b)"); AT&T Opposition at 56-57 (discussing the *Alpine Order*). We find unavailing Northern Valley's belated attempts to distinguish the facts at issue here from those at issue in the *Alpine Order*. *See* Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 14-16; Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 17-18. Indeed, we find that several of Northern Valley's claimed distinctions are mischaracterizations or overstatements. For example, Northern Valley erroneously claims that the decision in the *Alpine Order* rests "primarily on the language" of the relevant tariff which the Commission found to be ambiguous and therefore construed against the LECs. Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 15; *see also* Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 17-18 (similar). In fact, in the *Alpine Order*, the Commission made clear that construing the relevant tariff language in favor of the LECs resulted in a finding that the LECs violated section 201(b). *Alpine Order*, 27 FCC Rcd at 11526, 11528-30, paras. 39, 44-48. Likewise, we disagree with Northern Valley's assertion that, unlike the *Alpine Order*, the circumstances here involve no increase in mileage charges. Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 15-16; Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 17. If Northern Valley had not attempted to unilaterally shift the location to which IXCs are responsible for delivering traffic destined for it, under the rules adopted in the *Access Arbitrage Order*, Northern Valley—not the IXCs—would be financially responsible for the mileage charges for the regulated path to the James Valley tandem. Northern Valley's Revised Tariff is a blatant attempt to avoid that outcome by unilaterally foisting those mileage charges for the regulated path onto IXCs.

⁸³ *Access Arbitrage Order*, 34 FCC Rcd at 9073-74, para. 92; *see also* AT&T Opposition at 12-13, 21, 25 (discussing various holdings in the *Access Arbitrage Order*); T-Mobile Opposition at 12-13 (similar).

switching and transport charges to deliver traffic from SDN to James Valley.⁸⁴ Rather than assuming financial responsibility for the tandem switching and transport of traffic to James Valley, Northern Valley through its Revised Tariff instead continues to saddle IXCs, and by extension their customers with a substantial portion of the financial cost of carrying access stimulation traffic to remote areas of the country—the exact inequity that the *Access Arbitrage Order* sought to remedy.⁸⁵

26. What is more, Northern Valley attempts to execute this shift in financial liability back to IXCs even though regulated traffic will follow the *exact same route* it did before.⁸⁶ In its Direct Case, Northern Valley concedes that regulated traffic from James Valley to Northern Valley would first go through SDN.⁸⁷ And we find that, absent evidence of a feasible route using alternative facilities, the only viable federally tariffed path in the record for traffic bound for Northern Valley continues to be from the SDN tandem switch in Sioux Falls, South Dakota, to the James Valley switch in Groton, South Dakota, by way of an SDN fiber facility leased exclusively by Northern Valley.⁸⁸ Evidence in the record shows that even the option of relying on alternative providers pursuant to contract as cited by Northern Valley

{ } contrary to the purpose and provisions of the *Access Arbitrage Order*.⁸⁹

27. Northern Valley argues that its Revised Tariff would not cause any harm because IXCs typically send only around { } of traffic destined to Northern Valley by a tariffed path.⁹⁰ But, of course, this ignores the fundamental question of what path the traffic would take if Northern Valley were paying for all tandem switching and transport charges over the regulated path. Any regulated path to get traffic to Northern Valley must be just and reasonable irrespective of the claimed reasonableness of alternatives that might also be available.

⁸⁴ See, e.g., Direct Case at 11, 32-33, 40, 43, 53 (explaining that Northern Valley will discontinue accepting traffic sent through SDN's tariffed service and that IXCs instead could elect to use a non-regulated route); Sprint Petition Attach. A, at 1-2, Letter from James Groft, CEO, Northern Valley, titled "Northern Valley Communications, LLC-Tandem Rehome, Immediate Attention Required" ("Northern Valley anticipates disconnecting the SDN terminating tandem circuits after the re-homing arrangement has taken effect and carriers have had a reasonable opportunity to transition their traffic.").

⁸⁵ See Transmittal No. 12, 1st Revised Page No. 46.1, § 7.2.2, Note 4.

⁸⁶ We use the terminology "regulated path," "regulated traffic" and the like to refer to traffic being delivered to Northern Valley that ultimately will be subject to its Revised Tariff, whether in whole or in part. Similarly, we use the terminology "non-regulated path," "contract route" and the like to refer to traffic being delivered to Northern Valley via a contractual arrangement not directly implicating its Revised Tariff.

⁸⁷ Direct Case at 3, 13, 15, 43; see also Verizon Opposition at 16-17 ("Northern Valley also admits that the 'Northern Valley network is structured in a way that IXCs' traffic *needs to go through James Valley*, and then the traffic would be routed to Northern Valley.' Northern Valley offers no explanation *why* the network is structured that way. The James Valley switch does not operate in any meaningful sense as a tandem. Carriers cannot route traffic destined for multiple carriers through the James Valley switch, as they could through an ILEC tandem or a true third-party tandem, such as those Level 3 operates.") (internal citations omitted; emphasis in original).

⁸⁸ Direct Case at 43; AT&T Opposition at 8, 41-42.

⁸⁹ AT&T Opposition at 3, 36-40, 43-44, 48-49; T-Mobile Opposition at 9-10; Verizon Opposition at 3-4, 6-10, 17-18; Verizon May 28, 2020 *Ex Parte* Letter at 1-2.

⁹⁰ Direct Case at 11-12; see also Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 5; Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 3. Historically, in addition to contract options for IP delivery of traffic, Northern Valley had a contract arrangement with AT&T. Direct Case at 14; Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 5. AT&T Opposition at 11-12 (characterizing the contract between Northern Valley and AT&T as a "Switched Access Service Agreement."); Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 22; see also *Northern Valley NJ Complaint*, paras. 13-14.

28. Similarly, we are not swayed by Northern Valley's suggestion that IXCs would not be harmed by its Revised Tariff if those IXCs simply availed themselves of alternative commercially-available options identified by Northern Valley.⁹¹ We find that the fundamental result of Northern Valley's Revised Tariff would be to recreate a version of the price umbrella that existed prior to the *Access Arbitrage Order* and that encouraged IXCs to enter into commercially negotiated agreements to transport their traffic to Northern Valley to avoid the cost of the tariffed route.⁹² And we already determined in the *Access Arbitrage Order* that such price umbrellas used in connection with access-stimulation schemes allowed implicit subsidies that are contrary to the Act and to the public interest.⁹³ Contrary to Northern Valley's assertions, the record does not indicate that its Revised Tariff will lead to greater competition, new traffic flow options, or more efficient routing and exchange of traffic.⁹⁴ Further, no IXCs currently are directly connected to the newly designated James Valley tandem. Nor does the record sufficiently establish that IXCs could deploy such direct connections readily or that requiring them to do so would be rational or beneficial.⁹⁵ Indeed, Northern Valley concedes that "no carrier has requested to route traffic in accordance with the revised tariff."⁹⁶

29. Other statutory provisions that guided our actions in the *Access Arbitrage Order* support our assessment of the harms flowing from Northern Valley's approach. In particular, sections 251(a),

⁹¹ Direct Case at 11-12, 14, 18-19, 22-24, 36-37, 38, 47, 48, 50; Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 5, 7-8, 10, 13; Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 12, 15-16. Northern Valley argues that an IXC has a number of options to send traffic to James Valley: build its own facilities; contract with Northern Valley, which leases capacity on the SDN fiber facility; contract to use an IP-based connection; purchase circuits from SDN or CenturyLink; or a combination of these options. Direct Case at 22-23. The record reveals a prior contract between Northern Valley and AT&T resulted from a settlement of litigation involving the two companies. AT&T Opposition at 11; *see also Northern Valley NJ Complaint*, paras. 13-14. Particularly in light of that context, we see no basis to presume that the existence of that prior contract between Northern Valley and AT&T would shed light on the commercial alternatives IXCs in general could obtain.

⁹² *Access Arbitrage Order*, 34 FCC Rcd at 9042, para. 16.

⁹³ *Id.* at 9073-74, para. 92; *see also* AT&T Opposition at 3, 10 n.21, 20; T-Mobile Opposition at 11-12; Verizon May 28, 2020 *Ex Parte* Letter at 1; *see also, e.g., Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5328-29, para. 206 n.618 (2011) ("Standard economic theories of bargaining predict that each party will consider its best alternative to a negotiated agreement when negotiating.").

⁹⁴ *See, e.g.,* AT&T Opposition at 36-49 (discrediting Northern Valley's claims of competition, alternative options, and efficient routing).

⁹⁵ The record provides no grounds to believe that self-deployment of facilities by IXCs to the James Valley tandem would be a viable option. To begin with, IXCs are not already directly connected at the newly designated traffic hand-off point. AT&T Opposition at 25. The IXC Opponents further explain that it would be uneconomic to newly deploy a direct connection and that it also would be irrational for them to do so given the risk of stranded costs if Northern Valley and/or the entities engaged in access stimulation change their operations so that IXCs are responsible for delivering that traffic to a different location. AT&T Opposition at 25-26, 42; T-Mobile Opposition at 11; Verizon Opposition at 3, 5, 13, 17 n.55. Northern Valley does not meaningfully rebut these contentions. Instead, it identifies a single carrier that it says began routing traffic bound for Northern Valley through James Valley within "a matter of only a few days," but does not explain what facilities that carrier uses to reach James Valley. Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 15. According to AT&T, {

} and Northern Valley does not rebut that claim. AT&T Opposition at 43-44. Beyond self-deployment, other than the purportedly viable IP-based alternatives it cites, Northern Valley's references to other possible alternatives are so inconsistent and undeveloped that we give them no weight. *See, e.g.,* AT&T Opposition at 42-43 (detailing how "Northern Valley's Direct Case is highly inconsistent on who these [alternative] providers truly are").

⁹⁶ Direct Case at 34.

256, and 262 of the Act reinforce Northern Valley’s obligation to demonstrate the overall public benefits of its Revised Tariff.⁹⁷ We agree with Verizon that “in the *Access Arbitrage Order*, the Commission recognized that its decision to require CLECs ‘to make efficient choices in the context of access stimulation schemes’—efficient, that is, in the economic sense that considers overall welfare, rather than in the CLEC’s own self-interest—was consistent with the policies underlying § 251(a).”⁹⁸ Further, as we similarly recognized in the *Access Arbitrage Order*, our conclusions here are consistent with Congress’ direction in section 254 of the Act to eliminate implicit subsidies.⁹⁹

30. We conclude that Northern Valley’s Revised Tariff is at odds with section 201(b) as discussed in the *Access Arbitrage Order* itself. The record persuasively demonstrates that Northern Valley’s attempt to unilaterally shift to a new location at which IXCs have responsibility for delivering traffic destined for Northern Valley—the James Valley tandem—would perpetuate the very harms that we sought to eliminate in the *Access Arbitrage Order*.¹⁰⁰ As we recognized in the *Access Arbitrage Order*, IXCs have no legal requirement to agree to a new point of interconnection should an access-stimulating LEC attempt such a shift unilaterally.¹⁰¹ Northern Valley cannot establish such a requirement simply by filing a tariff that, absent our suspension, would have been “deemed lawful.”¹⁰²

31. *Northern Valley Does Not Demonstrate Public Policy Benefits That Would Justify Its Actions Under Section 201(b)*. To the extent that Northern Valley attempts to muster policy arguments to support its attempt to unilaterally shift the location where IXCs must deliver traffic destined for Northern Valley and require IXCs to bear financial responsibility for the traffic, those efforts fall short as well. Fundamentally, Northern Valley’s policy arguments either focus on private, self-serving benefits or amount to underdeveloped and unsupported assertions that are insufficient to overcome the evidence that Northern Valley’s Revised Tariff constitutes an attempt to evade the regulatory regime established in the *Access Arbitrage Order*. Northern Valley does not establish any public benefits to counter the costs it is

⁹⁷ *Access Arbitrage Order*, 34 FCC Rcd at 9074, para. 94 (explaining how the policies we enunciated in the *Access Arbitrage Order* advance the objective “that carriers should be permitted to employ direct or indirect interconnection to satisfy their obligations under section 251(a)(1) of the Act ‘based upon their most efficient technical and economic choices’” and “section 256 of the Act which requires the Commission to oversee and promote interconnection by providers of telecommunications services that is not only ‘effective’ but also ‘efficient’”); *id.* at 9074-75, para. 95 (addressing access-stimulating LECs’ anomalous location and traffic-routing decisions helps address risks to completion of calls, consistent with section 262 of the Act).

⁹⁸ Verizon Opposition at 12. Although Northern Valley contends that it has not violated section 251(a), *see* Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 15-17, we need not resolve that dispute and instead conclude merely that our determination here better advances the policies of section 251(a), consistent with the *Access Arbitrage Order*.

⁹⁹ *Access Arbitrage Order*, 34 FCC Rcd at 9074-76, paras. 93, 97.

¹⁰⁰ AT&T Opposition at 5-6, 15, 18-24, 34, 36-39, 55-56, 58-59; T-Mobile Opposition at 7-12, 15; Verizon Opposition at 3-4, 6-10, 17-18 (asserting that Northern Valley’s tariff change “exacerbates” incentives for access-stimulating LECs to switch and route stimulated traffic inefficiently); *see also* *Access Arbitrage Order*, 34 FCC Rcd at 9073-74, para. 92 (“[R]equiring IXCs to pay the tandem switching and tandem switched transport charges for access-stimulation traffic is an unjust and unreasonable practice that we have authority to prohibit pursuant to section 201(b) of the Act.”).

¹⁰¹ *Access Arbitrage Order*, 34 FCC Rcd at 9049, para. 34; *see also, e.g.*, AT&T Opposition at 19, 26-27, 49-50 (discussing the *Access Arbitrage Order*); Verizon Opposition at 10 (similar).

¹⁰² AT&T Opposition at 58; Sprint Petition at 6; *see also* 47 U.S.C. § 204(a)(3) (“A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission” suspends the tariff filing for investigation under section 201(a)(1)).

imposing on IXCs, long-distance customers, and the marketplace and thus does not establish that its tariff revisions are just and reasonable.

32. We find no merit to Northern Valley’s arguments about the benefits created by its Revised Tariff because they are merely recitations of the private benefits that Northern Valley seeks for itself and/or its affiliates, rather than the type of net, public benefit required to satisfy section 201(b) in the case of the unilateral change Northern Valley is attempting here. In particular, Northern Valley claims that it revised its tariff to avoid IXCs imposing “unnecessary” expenses on Northern Valley,¹⁰³ that its actions maximize Northern Valley’s and James Valley’s benefits from sunk costs,¹⁰⁴ and prevent IXCs from reverting to routing traffic in a “less efficient” manner through SDN to Northern Valley.¹⁰⁵ These “benefits,” to the extent they exist, accrue only to Northern Valley and its affiliates.¹⁰⁶ Northern Valley does not appear even to attempt to justify its claims through an analysis of whether its actions benefit the public as a whole.¹⁰⁷ In fact, Northern Valley acknowledges that its decision was merely to allow *it* to avoid what it claims are “unnecessary costs”—by shifting those same costs onto others.¹⁰⁸ Even beyond

¹⁰³ Direct Case at 32-33, 37, 43, 52-53, 53-54, 56, 62; *see also id.* at 9 (claiming a benefit based on its assertion that the newly designated switch is “closer to its end offices”); Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 12-13; Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 3, 12-14.

¹⁰⁴ Direct Case at 56.

¹⁰⁵ *Id.* at 32-33, 63. We agree with the Opponents that Northern Valley’s claims that its “tariff change was essential to avoiding the vast majority of IXCs from intentionally reverting to less efficient routing options that would have needlessly imposed costs on Northern Valley” are self-serving and demonstrate Northern Valley’s intent to shift costs back to the IXCs that would only perpetuate the very inefficiencies the Commission sought to eliminate in the *Access Arbitrage Order*. Compare, e.g., Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 3, 12 (“[S]ince all carriers have the ability to route traffic directly in IP format to the Groton tandem switch, IXCs cannot intentionally utilize less efficient routing technology solely for the purpose of increasing Northern Valley’s costs.”) with, e.g., Verizon May 28, 2020 *Ex Parte* Letter at 1-2 (“Northern Valley’s excessive tariffed transport charges” form a “price umbrella” that promotes continued implicit subsidies that IXCs pay to alternative providers like HD Tandem to route access stimulation traffic to Northern Valley.); *id.* at 2 (“Northern Valley’s choice of James Valley [for interconnection] is inefficient. . . . [I]t perpetuates the subsidization of ‘free’ calling services and reduces overall welfare.”).

¹⁰⁶ AT&T Opposition at 40 (arguing that “Northern Valley’s decision here is profit-centric”); Verizon May 28, 2020 *Ex Parte* Letter at 1.

¹⁰⁷ We thus likewise reject Northern Valley’s attempts to rely on such considerations to claim its actions are consistent with statutory provisions such as sections 251 and 256 of the Act. Direct Case at 49-53. Nor are we persuaded by Northern Valley’s attempts to rely on arguments made by AT&T in prior Commission proceedings. Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 3, 11-13. Those arguments, describing AT&T’s recommended regulatory approach to traffic delivery, were made by AT&T in connection with the possible adoption of a bill-and-keep methodology for intercarrier compensation, including issues related to the network edge. By contrast, the rules adopted in the *Access Arbitrage Order* that provide the governing baseline here did “not purport to adopt a bill-and-keep regime for access-stimulation traffic, but continue[] the Commission’s efforts to address arbitrage or other concerns on an interim basis pending the completion of comprehensive intercarrier compensation reform.” *Access Arbitrage Order*, 34 FCC Rcd at 9077, para. 101. Nor did the reforms adopted in the *Access Arbitrage Order* affect or prejudice issues related to the network edge. *Id.* at 9049-50, 9079, paras. 35 n.97, 105. And in any case, a party’s filings in a prior proceeding do not preclude us from reaching our own conclusions based on overall legal and policy considerations.

¹⁰⁸ Direct Case at 56 (alleging that it “is making a reasonable economic decision to avoid unnecessary costs”); *see also, e.g.*, Direct Case at 32-33 (declaring that its Revised Tariff would allow the company to “realize significant economic benefit” and avoid bearing the additional costs Northern Valley otherwise would have borne due to IXCs using the regulated path to deliver traffic); Verizon Opposition at 17-18 (arguing Northern Valley “shifted” certain “cost[s] it was obligated to assume . . . back to the IXCs”); T-Mobile Opposition at 7 (arguing that Northern Valley is seeking to “avoid financial responsibility” and instead “shift the economic burden of transport to extremely ‘remote locations’ back to the IXCs and wireless carriers”).

the self-serving nature of these claimed private benefits, it is apparent from our analysis in this section that the Revised Tariff is fundamentally at odds with our policy goals, explicit actions, and conclusions in the *Access Arbitrage Order*. In particular, the Revised Tariff represents an attempted evasion of that regulatory framework and perpetuates the harms to IXCs and their customers that we determined to eliminate in the *Access Arbitrage Order*. Such a result is not just and reasonable under the Act.

33. *Northern Valley Does Not Persuade Us to Revisit Our Legal and Policy Analyses of the Just and Reasonable Standard.* We also are unpersuaded by Northern Valley’s reliance on miscellaneous other arguments that were, in material respects, already considered and rejected in the *Access Arbitrage* proceeding. As to each of these issues, Northern Valley does not persuasively demonstrate any different facts or raise any new concerns not already considered that should lead to a different policy evaluation here.

34. *First*, we previously weighed and rejected in the *Access Arbitrage Order*¹⁰⁹ theories like Northern Valley’s claim that its actions would promote the IP transition by eliminating incentives for IXCs to rely on TDM transmission.¹¹⁰ Not only does Northern Valley fail to demonstrate anything new or different warranting a different policy outcome here, it does not even demonstrate that the existing IP transmission agreements are beneficial, given that those agreements were negotiated against the backdrop of a price umbrella that we ultimately found to be unjust and unreasonable in the *Access Arbitrage Order*.¹¹¹

35. *Second*, we reject Northern Valley’s claim that it would be “discriminatory, and a violation of Section 254(g), for the Commission to permit urban carriers to provide free conference calling services (and thus ‘stimulate’ traffic), while preventing rural carriers from having the same opportunity.”¹¹² We considered and rejected those concerns in the *Access Arbitrage Order* and the Bureau’s *Stay Denial Order* and we need not say more about them here.¹¹³

36. *Third*, Northern Valley’s references to the public’s use of communications services in response to the COVID-19 pandemic amount to little more than an attempt to distract from the fundamental flaws in its position.¹¹⁴ The Bureau decided to investigate Northern Valley’s Revised Tariff

¹⁰⁹ *Access Arbitrage Order*, 34 FCC Rcd at 9072, para. 88 & n.280.

¹¹⁰ Direct Case at 15, 56. Indeed, Northern Valley subsequently emphasizes that even on the regulated path, the transmission occurs in IP format. Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 5.

¹¹¹ See *Access Arbitrage Order*, 34 FCC Rcd at 9042, para. 16 (explaining how agreements negotiated against the backdrop of high tariffed rates “permits the access stimulation LEC to overcharge for transport service” and yield a marketplace where “tandem switching and transport providers for access stimulation have no economic incentives to meaningfully compete on price”) (internal citation omitted); see also AT&T Opposition at 39-40; T-Mobile Opposition at 10-11; Verizon Opposition at 2.

¹¹² Direct Case at 51; see also *id.* at 50-52 (elaborating on this argument); Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 4; Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 5-6.

¹¹³ *Access Arbitrage Order*, 34 FCC Rcd at 9067-68, para. 73 n.241; *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Order Denying Stay Petition, 34 FCC Rcd 9584, 9589-90, paras. 14-15 (WCB 2019) (DA 19-1093).

¹¹⁴ Direct Case at 4-7, 25, 49; Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 4; Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 1-3. To the extent that Northern Valley seeks to rely on claims of benefits for the users of “the free conferencing services hosted at Northern Valley” (Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 4; see also Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 3), we continue to reject the idea that providing “free” conference calling services provides a basis for imposing costs on all IXCs and the customers they serve. *Access Arbitrage Order*, 34 FCC Rcd at 9045-46, paras. 25-27.

well before the pandemic was declared.¹¹⁵ And, as the Bureau has explained, even in these circumstances, it remains important to advance the policy concerns underlying the *Access Arbitrage Order*.¹¹⁶ Finally, the record does not demonstrate any relationship between Northern Valley's actions and the pandemic.¹¹⁷

37. In sum, Northern Valley has failed to carry its burden to justify the attempted unilateral change in the location to which IXCs are responsible for delivering traffic destined for Northern Valley as just and reasonable under section 201(b). Indeed, Northern Valley's true motivation to preserve the financial status quo is laid bare by its claim that the Revised Tariff is necessary to enable it to maintain its relationships with high-volume calling service providers.¹¹⁸ Northern Valley's attempted unilateral shift is unjust and unreasonable and its Revised Tariff is, therefore, unlawful.

B. Northern Valley's Revised Tariff Violates the *Access Arbitrage Order* and the Rules Adopted Therein

38. *Northern Valley Evades Our Adopted Reforms and Our Rationale for Adopting Them.* Northern Valley asserts that it complies with the "text and spirit" of the *Access Arbitrage Order*.¹¹⁹ We find that it complies with neither. Instead, our investigation and review of the record confirm that Northern Valley's Revised Tariff is a transparent attempt to evade the reforms we adopted in the *Access Arbitrage Order*, which we explicitly designed to "eliminat[e] the financial incentives [for LECs] to engage in access arbitrage."¹²⁰ We agree with Opponents that Northern Valley is using its Revised Tariff to shirk the financial responsibility for tandem switching and transport services we required it to assume for the delivery of calls to high-volume calling providers served out of end offices located in remote and expensive-to-serve areas of South Dakota.¹²¹

39. Before the effective date of the *Access Arbitrage Order*, IXCs using the regulated, federally tariffed path for traffic bound for Northern Valley had to pay to transport calls 147 miles from SDN's tandem in Sioux Falls to James Valley in Groton and then 43 more miles to Northern Valley in Redfield. By attempting to unilaterally change its interconnection point from the SDN tandem to the James Valley switch in Groton and revising its tariff to assume financial responsibility only for the much shorter Groton-to-Redfield leg of the route, Northern Valley is attempting to shift the financial responsibility back to IXCs for the costs of using the SDN switch and transporting calls from Sioux Falls

¹¹⁵ Domenico Cucinotta, Maurizio Vanelli, *WHO Declares COVID-19 A Pandemic*, (Mar. 19, 2020) <https://pubmed.ncbi.nlm.nih.gov/32191675/>.

¹¹⁶ *Petition of Onvoy d/b/a Inteliquent, Inc., for Temporary Waiver of Section 61.3(bbb)(1)(ii) of the Commission's Rules*, WC Docket No. 18-155, Order, DA 20-349, at 5, para. 14 (WCB Mar. 27, 2020); *see also, e.g.*, AT&T Opposition at 6 n.12 ("[T]he changes in demand from the coronavirus provide no justification for not enforcing the Commission's pro-consumer, anti-arbitrage rules.").

¹¹⁷ No persuasive evidence has been presented to corroborate the claim that Northern Valley's tariff revisions were made in response to COVID-19; that the nature, scope, or duration of those revisions is tied in any way to the public response to COVID-19; or that those revisions were required by the public response to COVID-19. AT&T Opposition at 6 n.12; Verizon Opposition at 10-11.

¹¹⁸ Verizon Opposition at 18 (citing Direct Case at 49).

¹¹⁹ Direct Case at 7.

¹²⁰ *Access Arbitrage Order*, 34 FCC Rcd at 9041, para. 14.

¹²¹ *See, e.g.*, AT&T Opposition at 5; T-Mobile Opposition at 2; Verizon Opposition at 3; *see also Access Arbitrage Order*, 34 FCC Rcd at 9037-38, para. 7 (finding that "because access stimulation increased access minutes-of-use and access payments . . . it also increased the average cost of long distance calling," and explaining that "all customers of these long-distance providers bear these costs, even though many . . . do not use the access stimulator's services") (citing *USF/ICC Transformation Order*, 26 FCC Rcd at 17875, para. 663); *Access Arbitrage Order*, 34 FCC Rcd at 9039, 9043-46, paras. 11, 20, 24-25 ("Access stimulators typically operate in those areas of the country where tandem switching and transport charges remain high. . .").

to Groton.¹²² Yet, in so doing, Northern Valley has designed a tariffed route that is too costly for IXCs to reach and use and that it says has no IXC traffic.¹²³ As a result, rather than bearing financial responsibility for tariffed traffic terminating at its end office, Northern Valley has designed a route that prevents it from having to bear financial responsibility for any traffic to its end offices.

40. Northern Valley's attempt to impose by tariff a unilateral change to its point of interconnection from SDN to James Valley directly conflicts with our finding in the *Access Arbitrage Order* that there are "not any existing legal requirements that an IXC must agree to a new point of interconnection designated by an access-stimulating LEC should the access-stimulating LEC unilaterally attempt to move the point of interconnection."¹²⁴ Northern Valley cites no precedent to the contrary.

41. Northern Valley does not—and cannot—explain how purposely moving its interconnection point and imposing on IXCs the cost of transporting traffic to that new interconnection point complies with our express intent to no longer allow access-stimulating LECs "to choose expensive and inefficient call paths for access-stimulation traffic" and "avoid the cost implications of their decisions."¹²⁵ Requiring access-stimulating LECs to be financially responsible for all interstate and intrastate terminating tandem switching and transport charges was key to ensuring that calls are routed more efficiently.¹²⁶

42. Yet, in its Direct Case, Northern Valley incorrectly asserts that its Revised Tariff is the "natural result of the clear holdings of paragraphs 106 through 108" of the *Access Arbitrage Order* which modified the mandatory use requirements related to CEA providers.¹²⁷ Northern Valley maintains that the purpose of the *Access Arbitrage Order* was merely to "[b]reak[] the CEA monopoly" by eliminating the "mandatory use" requirements, thereby allowing "access-stimulating CLECs . . . to designate the tandem of their choosing" and to stop routing traffic through the SDN CEA tandem switch."¹²⁸ Northern Valley's

¹²² AT&T Opposition at 21; T-Mobile Opposition at 7; Verizon Opposition at 3.

¹²³ Direct Case at 20; AT&T Opposition at 25; Verizon Opposition at 5-6.

¹²⁴ *Access Arbitrage Order*, 34 FCC Rcd at 9049, para. 34; *see also, e.g.*, AT&T Opposition at 19, 26-27, 49-50 (discussing the *Access Arbitrage Order*); Verizon Opposition at 10 (similar). Consistent with the reasoning of that paragraph, the reference to "existing legal requirements" means that neither legal requirements in place prior to the *Access Arbitrage Order* nor legal requirements resulting from the *Access Arbitrage Order* require "that an IXC must agree to a new point of interconnection designated by an access-stimulating LEC should the access-stimulating LEC unilaterally attempt to move the point of interconnection." *Access Arbitrage Order*, 34 FCC Rcd at 9049, para. 34.

¹²⁵ *See Access Arbitrage Order*, 34 FCC Rcd at 9074, para. 93 ("Allowing access-stimulating LECs to continue to avoid the cost implications of their decisions . . . drives inefficiencies and leaves IXCs to pass the resultant inflated costs on to their customer bases."); *id.* at 9048-49, para. 33 ("[W]e are attacking implicit subsidies that allow high-volume calling services to be offered for free, sending incorrect pricing signals and distorting competition.").

¹²⁶ *Access Arbitrage Order*, 34 FCC Rcd at 9040, 9042, 9046, paras. 13, 17, 25-26.

¹²⁷ Direct Case at 8-9; *see also, e.g.*, Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 4 (asserting that Northern Valley complies with the "plain meaning" of these paragraphs, and "the Commission's decision to amend SDN's Section 214 authority [] make[s] clear that Northern Valley was *not* required to interconnect with SDN any longer") (emphasis in original); Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 1-2, 6 (same).

¹²⁸ Direct Case at 9-12. Throughout its Direct Case, Northern Valley principally relies on language in the *Access Arbitrage Order* discussing the elimination of mandatory use obligations for two centralized equal access providers. *Access Arbitrage Order*, 34 FCC Rcd at 9079-80, paras. 106-08; 47 CFR § 51.914 (adopted in the *Access Arbitrage Order*). Northern Valley also briefly references language in the *Access Arbitrage Order* summarizing the new financial responsibility rules adopted there, Direct Case at 54 n.67 (quoting *Access Arbitrage Order*, 34 FCC Rcd at 9042, para. 17), and language discussing when an IXC can be confident that it has discharged its traffic carriage obligations, Direct Case at 58 (quoting *Access Arbitrage Order*, 34 FCC Rcd at 9049, para. 35); *see also* Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 2, 13 ("paragraphs 106-113 of the *Access [Arbitrage] Order* . . . expressly eliminated SDN's monopoly and permitted interconnecting CLECs, like Northern (continued....)

arguments rely on statements it takes out of context. Northern Valley also misinterprets the intent of the paragraphs it cites from the *Access Arbitrage Order* and ignores the real world consequences of its attempts unilaterally to choose its affiliate, James Valley, as its only tandem provider—namely, to send tariffed traffic to Northern Valley, an IXC must either pay the tandem switching and transport charges to reach James Valley or build a direct connection to James Valley. Either result is wholly inconsistent with the *Access Arbitrage Order*.

43. It is true that by eliminating the mandatory use requirements for traffic bound for access-stimulating LECs, we provided access-stimulating LECs the flexibility “to move their traffic off of a CEA network.”¹²⁹ This change to the mandatory use requirements was not designed to benefit access-stimulating LECs or to facilitate access-stimulation schemes. The modification reflects our express intent throughout the *Access Arbitrage Order* to reduce access-stimulating LECs’ ability to “force IXCs, wireless carriers, and their customers [to subsidize] via revenues derived from inefficient transport routes, the costs of access-stimulation schemes.”¹³⁰

44. Consistent with this provision in the *Access Arbitrage Order*, we also declined to restrict IXCs’ traffic delivery obligations to only those tandem switches in existence as of January 1, 2019 because we sought to encourage access-stimulating LECs to route calls more efficiently.¹³¹ As a result, an access-stimulating LEC can choose to designate one or more new call paths for IXCs to use to reach the access-stimulating LEC.¹³² At the same time, we were clear that there is no legal basis for an access-stimulating LEC to unilaterally impose new interconnection obligations on IXCs. The elimination of the mandatory use requirements for traffic bound to access-stimulating LECs was designed to facilitate the implementation of the adopted rules, facilitate more efficient traffic routing decisions, and benefit IXCs and ultimately the consumers that indirectly pay for these calls.¹³³ Allowing access-stimulating LECs to unilaterally change their means of interconnection with IXCs would accomplish none of those goals.

45. Thus, Northern Valley’s argument that it may limit its responsibility to paying for any tandem it unilaterally chooses because we “rejected AT&T’s request to . . . mandat[e] that [access-stimulating LECs] use only tandem switches in existence as of January 1, 2019” misreads the *Access Arbitrage Order*.¹³⁴ We find this argument puzzling. AT&T foreshadowed the precise behavior of Northern Valley in this case (an access-stimulating LEC unilaterally changing its point of interconnection) and offered one particular solution (prohibiting access-stimulating LECs from adding new points of interconnection or changing its point of interconnection under any circumstances). And

(Continued from previous page) _____
Valley, to choose to by-pass the SDN tandem”); Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 1-2, 6.

¹²⁹ *Access Arbitrage Order*, 34 FCC Rcd at 9080-81, para. 109; Verizon May 28, 2020 *Ex Parte* Letter at 3 (“But the Commission also did not prohibit Northern Valley from continuing to use that tandem. If Northern Valley wants to bypass SDN’s tandem, it must select an Intermediate Access Provider that complies with the Commission’s rules[,] the Communications Act,” and *Access Arbitrage Order*.)

¹³⁰ *Access Arbitrage Order*, 34 FCC Rcd at 9044, para. 22 (quoting Letter from Matthew Nodine, Assistant Vice President, Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 07-135, 10-90 and 18-155, at 1 (filed June 12, 2019)); AT&T Opposition at 49 (The modification of the Aureon and SDN section 214 authorizations does not give access-stimulating LECs the right to unilaterally “choose any tandem switch at any location, and force IXCs to carry their traffic to that tandem.”).

¹³¹ *Access Arbitrage Order*, 34 FCC Rcd at 9049, para. 34.

¹³² *Id.* at 9080-81, para. 109. Thus, Northern Valley could build its own direct connection to the SDN tandem or lease alternative facilities to connect to the SDN tandem if it wanted to avoid paying SDN for transport over SDN’s network.

¹³³ *Id.* at 9079-80, para. 106.

¹³⁴ Direct Case at 11.

though we rejected that proposed solution, we agreed with AT&T that a unilateral change of an access-stimulating LEC's point of interconnection would be against the public interest.¹³⁵ As such we clarified that an access-stimulating LEC could *not* impose a unilateral change on IXCs—and that there are no “existing legal requirements that an IXC must agree to a new point of interconnection designated by an access-stimulating LEC should the access-stimulating LEC unilaterally attempt to move the point of interconnection.”¹³⁶

46. Northern Valley's attempt to place two Intermediate Access Providers (SDN and James Valley) in the regulated call path, but accept financial responsibility for only the tandem switching provided by its affiliate James Valley is also wholly inconsistent with our *Access Arbitrage Order*.¹³⁷ In the *Access Arbitrage Order* we explicitly recognized “that there may be more than one intermediate access provider in a call path” and therefore defined the term “intermediate access provider” to mean “any entity that carries or processes traffic at any point between the final Interexchange Carrier in a call path and a local exchange carrier engaged in access stimulation.”¹³⁸ Thus, Northern Valley's attempt to justify accepting financial responsibility only for the James Valley tandem by arguing that we “never indicated that an access stimulating CLEC would be required to pay for *two* tandem switching services” is baseless.¹³⁹

47. Notably, Northern Valley has always required traffic sent to Northern Valley from the SDN tandem in Sioux Falls to go through the James Valley switch in Groton.¹⁴⁰ Northern Valley's Revised Tariff changing the name of its affiliate James Valley's switch from a host to a tandem does not change the call path.¹⁴¹ Nothing in our rules prohibits Northern Valley from inserting a second Intermediate Access Provider in its regulated call path. At the same time, our Access Stimulation Rules clearly require Northern Valley (as an access-stimulating LEC) to pay for all tandem switching and transport services between an IXC and Northern Valley's end office(s) or functional equivalents. Northern Valley argues that all carriers have the ability to route traffic in IP to the James Valley switch in Groton, and therefore its Revised Tariff ensures that any IXC “that opts to needlessly impose a redundant,

¹³⁵ Consequently, we reject Northern Valley's contrary interpretation of that discussion in the *Access Arbitrage Order*. See Direct Case at 11. For these same reasons, we do not read paragraph 35 of the *Access Arbitrage Order* to establish the broad rights that Northern Valley seeks to claim here. While we made clear in that paragraph that IXCs' call completion duties are satisfied by delivering a call to the tandem designated by the access-stimulating LEC in the LERG or a contract, there is nothing in that paragraph suggesting that an access-stimulating LEC can unilaterally designate any tandem it chooses. Indeed, that discussion follows immediately after our statement in the preceding paragraph that “AT&T does not point to any existing legal requirements that an IXC must agree to a new point of interconnection designated by an access-stimulating LEC should the access-stimulating LEC unilaterally attempt to move the point of interconnection.” We therefore find it most reasonable to interpret the language of paragraph 35 in harmony with that in paragraph 34, rather than as establishing a new legal right for access-stimulating LECs to unilaterally shift the location to which IXCs are responsible for delivering traffic destined for Northern Valley, an interpretation that would conflict with the reasoning of the immediately-preceding paragraph of the *Access Arbitrage Order*.

¹³⁶ *Access Arbitrage Order*, 34 FCC Rcd at 9049, para. 34; see also, e.g., AT&T Opposition at 19, 26-27, 49-50 (discussing the *Access Arbitrage Order*); Verizon Opposition at 10 (similar). Nor does the mere fact that SDN and others wished to have access-stimulating LECs cease using SDN's network demonstrate that we did more than open the door to that possibility under appropriate circumstances (even assuming *arguendo* it had been precluded in the past)—rather than at the whim of access-stimulating LECs. Direct Case at 10-11.

¹³⁷ See Direct Case at 54.

¹³⁸ *Access Arbitrage Order*, 34 FCC Rcd at 9060-61, para. 58; 47 CFR § 61.3(ccc).

¹³⁹ Direct Case at 54.

¹⁴⁰ *Id.* at 22.

¹⁴¹ AT&T Opposition at 38-39.

unnecessary tandem switch in the call path (SDN's tandem switch) shall be responsible for that choice."¹⁴² In so arguing, Northern Valley ignores the question of how carriers get traffic to the James Valley switch in Groton, mischaracterizes the SDN switch as redundant, and misstates SDN's importance in delivering traffic to Northern Valley pursuant to the tariffed regulated call path. Northern Valley's argument is further vitiated by our finding that its underlying premise—that it can unilaterally move its point of interconnection and designate any tandem of its choice to shift tandem switching and transport costs back to IXCs—violates section 201(b) of the Act, the *Access Arbitrage Order*, and the Access Stimulation Rules.

48. *Northern Valley Misinterprets Our Rules.* We also reject Northern Valley's reading of section 51.914 of our rules as granting it the legal right unilaterally to shift the location at which IXCs must deliver traffic destined for Northern Valley. Section 51.914(a)(2) provides that the access-stimulating LEC "[s]hall designate, *if needed*, the Intermediate Access Provider(s) that will provide" tandem switching and transport to the access-stimulating LEC.¹⁴³ The qualifying "if needed" language would be entirely out of place if, as Northern Valley contends, section 51.914 established the unqualified right of access-stimulating LECs unilaterally to shift the location at which IXCs are responsible for delivering traffic destined for Northern Valley.¹⁴⁴ We agree with AT&T that "[b]ecause [Northern Valley] has facilities to the existing hand-off point in Sioux Falls, no designation of an interconnection point in Groton is 'needed.'"¹⁴⁵ In fact, "Northern Valley concedes that it has facilities between Sioux Falls and SDN's tandem switch in Groton."¹⁴⁶ In light of that concession, Northern Valley does not need tandem switching at Groton since it already has facilities that connect it from Sioux Falls to Groton.¹⁴⁷

49. Northern Valley also misreads section 51.914(b)(2) of our rules as providing it the ability unilaterally to designate the only tandem provider that it will use. That rule section requires access-stimulating LECs to give notice in writing to "the Commission, all Intermediate Access Providers that it subtends, and Interexchange Carriers with which it does business of the following: . . . (2) that it shall designate the Intermediate Access Provider(s) that will provide the terminating switched access tandem switching and terminating switched access tandem transport services to the local exchange carriers

¹⁴² Northern Valley May 22, 2020 *Ex Parte* Response to SDN/T-Mobile/Verizon at 12, 13 (disagreeing with T-Mobile and asserting that neither the *Access Arbitrage Order* nor the Commission's rules "permits IXCs to needlessly impose multiple tandem switching costs on Northern Valley merely because it is an access-stimulating LEC" or "contemplate[s] this type of inefficient routing"); *id.* at 14 (If an IXC chooses to route its traffic "that unnecessarily utilizes SDN's tandem switch, the IXC is free to do so, but it cannot require Northern Valley to pay for the IXC's decision."); *see also* Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 10, 13 (disagreeing with AT&T's position "that Northern Valley must acquire and pay SDN for duplicative tandem switching, as well as transport from Sioux Falls to Groton").

¹⁴³ 47 CFR § 51.914(a)(2) (emphasis added).

¹⁴⁴ *See, e.g.*, AT&T Opposition at 24. Nor does Northern Valley demonstrate that its switch was "needed" within the meaning of that rule. For example, consistent with Commission precedent under section 201(b) and our analysis in the *Access Arbitrage Order*, we find the evaluation of "need" appropriately focused on the broader public interest, rather than solely on the proprietary interests of an access-stimulating LEC—a standard Northern Valley has not met here. Even beyond that, we observe, for example, that Northern Valley already has facilities between Sioux Falls and Groton, further undercutting any claim that there was a need to designate James Valley as a new tandem provider. AT&T Opposition at 30, 40-42.

¹⁴⁵ AT&T Opposition at 24 (internal citations omitted).

¹⁴⁶ *Id.* at 24. AT&T explains that "SDN owns the only fiber facility currently in place between Sioux Falls and Groton, and Northern Valley claims the 'exclusive right' to transport all traffic over that route." *Id.* at 41-42, 46. Northern Valley argues that it has an exclusive right to "use" these SDN fiber facilities but not an exclusive right to "transport" traffic from Sioux Falls to Groton. Northern Valley May 22, 2020 *Ex Parte* Response to AT&T at 8.

¹⁴⁷ AT&T Opposition at 24 (internal citations omitted).

engaged in access stimulation and that it shall pay for those services as of that date.”¹⁴⁸ In so doing, section 51.914(b)(2) simply addresses what information must be included in notices provided to the Commission, Intermediate Access Providers, and IXC. Since the operation of our rules hinges on key parties’ knowledge of the relevant Intermediate Access Provider(s) associated with a given access-stimulating LEC, it is natural for our rules to establish mechanisms for identifying the relevant Intermediate Access Provider(s).¹⁴⁹ We do not interpret the language relied upon by Northern Valley to go any further than that. Section 51.914(b) does not speak to the substantive rights or obligations of carriers in the marketplace.¹⁵⁰ Indeed, interpreting the notice requirement of section 51.914(b) to establish the broad legal right claimed by Northern Valley notwithstanding the absence of such a right in other rules—and despite the internal inconsistency it would create within the *Access Arbitrage Order*—would be a quintessential case of the tail wagging the dog.¹⁵¹ Significantly, Northern Valley’s interpretation is fundamentally at odds with the broad policy goal in the *Access Arbitrage Order* of “eliminat[ing] the incentives that access-stimulating LECs have to switch and route stimulated traffic inefficiently.”¹⁵²

50. In sum, we find that Northern Valley’s Revised Tariff is no more than a renewed effort to “avoid financial responsibility” by relocating its interconnection point to shift the economic burden of transport to extremely remote locations back to IXCs and wireless carriers. As such, it is unjust and unreasonable under section 201(b) of the Act and violates the *Access Arbitrage Order* and Access Stimulation Rules. Northern Valley has failed to satisfy its burden of proving otherwise under section 204 of the Act.

IV. PROCEDURAL MATTERS

51. We find that Northern Valley’s Revised Tariff designating James Valley as its Intermediate Access Provider and accepting financial responsibility *only* for James Valley’s tandem switching and transport charges, thereby continuing to impose tandem switching and transport charges associated with access-stimulation traffic on IXCs, is unlawful. We require Northern Valley to remove the tariff revisions made in Transmittal No. 12 and submit tariff revisions consistent with the Act, the *Access Arbitrage Order*, and our rules no later than 30 calendar days from the release date of this *Memorandum Opinion and Order*.

52. Given the complexities associated with implementation of the findings made in this *Memorandum Opinion and Order*, we direct the Wireline Competition Bureau to ensure that the Commission’s findings are properly reflected in Northern Valley’s newly revised tariff. We further direct the Wireline Competition Bureau to determine any refunds that may be required once the newly revised tariff is effective.

V. ORDERING CLAUSES

53. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 1, 2, 4(i)–(j), 201(b), 202(a), 203, 204(a), 205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151,

¹⁴⁸ 47 CFR § 51.914(b)(2).

¹⁴⁹ *Id.* at § 51.914(b).

¹⁵⁰ *Id.* (Access-stimulating LECs must “notify in writing the Commission, all Intermediate Access Providers that it subtends, and Interexchange Carriers with which it does business” of the listed information.).

¹⁵¹ *Cf. Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001) (Congress does not “hide elephants in mouseholes.”). For these same reasons we reject any suggestion that language in the *Access Arbitrage Order* merely summarizing the new financial responsibility rules explained and justified in detail in the discussion that followed should be read to give rise to the legal right Northern Valley suggests. *See* Direct Case at 54 n.67 (quoting *Access Arbitrage Order*, 34 FCC Rcd at 9042, para. 17).

¹⁵² *Access Arbitrage Order*, 34 FCC Rcd at 9044, para. 21.

152, 154(i)–(j), 201(b), 202(a), 203, 204(a), 205, 303(r), and 403 this *Memorandum Opinion and Order* IS ADOPTED.

54. IT IS FURTHER ORDERED that, pursuant to sections 203, 204(a) and 205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 203, 204(a), and 205, Northern Valley Communications, LLC, SHALL REVISE ITS TARIFF by removing the provisions we find unjust and unreasonable under the Act and in violation of the *Access Arbitrage Order*, and replacing them with provisions that comply with the Act, the *Access Arbitrage Order*, and the Commission's rules by no later than thirty (30) calendar days from the release date of this *Memorandum Opinion and Order*.

55. IT IS FURTHER ORDERED that, pursuant to sections 203, 204(a) and 205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 203, 204(a), and 205, the tariff investigation, initiated in WC Docket No. 20-11, is TERMINATED.

56. IT IS FURTHER ORDERED that the accounting order applicable to Northern Valley Communications, LLC, shall remain in effect until such time as its tariff revisions required by this *Memorandum Opinion and Order* become effective.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Northern Valley Communications, LLC, Tariff F.C.C. No. 3*, WC Docket No. 20-11

Make no mistake: Northern Valley's Revised Tariff is clearly an attempt to game our rules on access stimulation and evade financial responsibility for terminating tandem switching and transport charges that last fall's *Access Arbitrage Order* meant to shift to access stimulating LECs. At the same time, I do find it curious that the item relies primarily on section 201(b)—the underlying statutory provision for our access stimulation rules—to find the Revised Tariff unlawful, rather than on any specific pricing rule adopted by the Commission. To the extent our rules do not explicitly prohibit the revision, in terms of both spirit *and* letter, this reliance seems overly discretionary and to lack a limiting principle. Overall, the lesson seems to be: our time and resources would be better spent transitioning the entire intercarrier compensation system to bill-and-keep, rather than establishing temporary and partial fixes against inefficient routing schemes that take advantage of high access charges. As I have said before, I hope such comprehensive reform will happen sooner rather than later.