

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Bluegrass Telephone Company, Inc., )  
D/B/A Kentucky Telephone Company ) WC Docket No. 10-227  
 )  
Transmittal No. 3, Tariff F.C.C. No. 3 )

**REPLY COMMENTS  
OF  
QWEST COMMUNICATIONS COMPANY, LLC**

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**I. INTRODUCTION AND SUMMARY.**

Pursuant to the *Public Notice* in the above-referenced docket,<sup>1</sup> Qwest Communications Company, LLC (“Qwest”) submits these reply comments on the response (the “*Response*”)<sup>2</sup> in this proceeding by Bluegrass Telephone Company, Inc., D/B/A Kentucky Telephone Company (“Bluegrass”), a traffic-pumping competitive LEC (“CLEC”). In the *Response*, Bluegrass opposed Qwest’s emergency application for review filed on November 8, 2010 (the “*Application*”). The *Application* seeks full Commission review of the Wireline Competition Bureau’s (“Bureau’s”) decision (the “*Bureau Decision*”) denying Qwest’s petition below to

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<sup>1</sup> See *Comment Sought On Qwest Communications Company, LLC, Emergency Application For Review Of The Bluegrass Telephone Company, Inc. Tariff*, Public Notice, WC Docket No. 10-227, DA 10-2219 (Nov. 19, 2010) (“*Public Notice*”). The Commission staff has informally advised that the *Public Notice* supersedes the pleading schedule and page limits of Section 1.115 of the Rules, 47 C.F.R. § 1.115.

<sup>2</sup> See Bluegrass Telephone Company, Inc.’s Response to Qwest Communications Company, LLC’s Emergency Application for Review and Sprint Communications Company, L.P.’s Application for Review, WCB/Pricing File No. 10-10, WC Docket No. 10-227 (Nov. 18, 2010; resubmitted, Dec. 6, 2010). Qwest also supports the application for review filed in this proceeding by Sprint Communications Company, L.P (“Sprint”).

reject or, in the alternative, suspend and investigate Bluegrass' Tariff F.C.C. No. 3, Transmittal No. 3 (the "Tariff").<sup>3</sup>

As the *Application* makes clear, the Tariff is part of an illicit traffic-pumping scheme by Bluegrass to collect inflated charges from Qwest and other interexchange carriers ("IXCs") for traffic sent to Bluegrass' free conferencing business partners, similar to that in the *Qwest v. Farmers and Merchants* ("*Farmers*") proceeding.<sup>4</sup> The Tariff contained multiple fatal defects, ranging from complex language that causes the Tariff to violate the Commission's access charge rules to blatantly slanted provisions such as requiring the payment of attorneys' fees for unsuccessful collection actions by Bluegrass. The Qwest and Sprint petitions below raised significant legal and policy issues that demanded reasoned decision-making by the Bureau. This is because Bluegrass filed the Tariff on fifteen days' notice, seeking "deemed lawful" status under Section 204(a)(3) of the Communications Act of 1934, as amended (the "Act") in order to insulate Bluegrass from damages, in essence achieving the status of a tariff prescription.<sup>5</sup> Thus, the normal rule – that a decision not to reject or suspend a tariff is interlocutory – does not apply in this case, where the customary damages remedy may not be available. Nevertheless, the *Bureau Decision* simply brushed aside the petitions and allowed the Tariff to take effect with no

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<sup>3</sup> See *Protested Tariff Transmittal Action Taken*, Public Notice, 25 FCC Rcd 14395 (Pricing Pol. Div., WCB 2010) ("*Bureau Decision*"); *Bluegrass Tel. Co., Inc., D/B/A Kentucky Tel. Co.*, Petition of Qwest to Reject, or in the Alternative, Suspend and Investigate, FCC Tariff No. 3, Transmittal No. 3 (Sept. 30, 2010) ("*Qwest Petition*"). Bluegrass filed a response to the *Qwest Petition* with the Bureau on October 4, 2010 ("*Bluegrass Bureau Response*").

<sup>4</sup> See *Qwest Commc'ns. Corp. v. Farmers and Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("*Farmers Order*"), *on recon.*, 23 FCC Rcd 1615 (2008) ("*First Farmers Recon. Order*"), *on further recon.*, 24 FCC Rcd 14801, *on further recon.*, 25 FCC Rcd 3422 (2010), *pet. for review pending sub nom. Farmers and Merchants Mutual Telephone Co. of Wayland, Iowa v. FCC*, No. 10-1093 (D.C. Cir filed May 7, 2010).

<sup>5</sup> See *Response* at 3; see also 47 U.S.C. § 204(a)(3).

analysis. This analytical breakdown itself, in the context of a fifteen-day tariff filing, violates the Administrative Procedure Act (“APA”).

This procedural failure was aggravated by the fact that the Tariff supports Bluegrass’ traffic pumping scheme. The Commission and others have repeatedly held such schemes to be contrary to the public interest. The repeated expressions of concern that the Commission has made regarding the practice of traffic pumping should themselves lead the Commission at the very least to suspend and investigate tariffs filed by traffic-pumping CLECs, as it has done for traffic-pumping ILECs.<sup>6</sup>

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<sup>6</sup> In 2007, the Bureau held that the bills generated by ILEC traffic-pumping schemes are “inconsistent with the economies of scale generally accepted for local switching, tandem switching, or transport functions.” *Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 22 FCC Rcd 16109, 16114 ¶ 9 (Pricing Pol. Div., WCB 2007). As the *National Broadband Plan* states:

[C]ompanies have established “free” conference calling services, which provide free services to consumers while the carrier and conference call company share the ICC [intercarrier compensation] revenues paid by interexchange carriers. Because the arbitrage opportunity exists, investment is directed to free conference calling and similar schemes for adult entertainment that ultimately cost consumers money, rather than to other, more productive endeavors.

*Connecting America: The National Broadband Plan*, at 142 (Mar. 16, 2010) (citations omitted).

On November 17, 2010, after Qwest filed the *Application*, the National Association of Regulatory Utility Commissioners (“NARUC”) adopted a resolution supporting expeditious FCC action against traffic pumping schemes. See NARUC, *Resolution Supporting Expeditious FCC Action on Traffic Pumping Schemes*, at 2 (adopted Nov. 17, 2010), available at <http://www.naruc.org/Resolutions/Resolution%20Supporting%20FCC%20Action%20on%20Traffic%20Pumping.pdf> (“NARUC Resolution”). See also *Qwest Commc’ns Corp. v. Superior Tel. Coop. et al.*, Final Order, Docket No. FCU-2007-0002 at 8 (Iowa Utils. Bd. Sept. 21, 2009); *High Volume Access Service*, Order Adopting Rules, Docket No. RMU-2009-0009 (Iowa Utils Bd. June 7, 2010).

Bluegrass' *Response* is meritless. The *Response* claims that the Qwest and Sprint applications for review of the Tariff are making the same arguments for the "third time,"<sup>7</sup> apparently because Qwest and Sprint petitioned below for the Bureau to reject or, in the alternative, suspend and investigate both the instant Tariff and an earlier, essentially identical tariff ("Tariff No. 2") that Bluegrass filed on sixteen days notice.<sup>8</sup> Bluegrass fails to acknowledge that its repetitive filings of nearly identical tariffs prompted the protests filed below. Bluegrass also shows no respect for the Commission's independent duty and authority under Section 5(c)(4) of the Act to review actions performed under authority delegated from the Commission itself.<sup>9</sup> This is the *first time* the lawfulness of Bluegrass' tariff has been presented to the Commission.

Immediate grant of the *Application* is needed because the *Bureau Decision* permitted the Tariff to take effect on fifteen days' notice, allowing Bluegrass to claim that the Tariff gained "deemed lawful" status pursuant to Section 204(a)(3) of the Act. Reversal of the *Bureau Decision* is necessary to prevent Bluegrass from improperly using Section 204(a)(3) to claim immunity from damages for services provided under the Tariff. Because the Tariff is part of a traffic-pumping scheme, Qwest will suffer irreparable harm – the inability to obtain damages

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<sup>7</sup> See *Response* at 3 ("[T]he question ... is whether it is 'three strikes, and you're out,' or whether the 'third time's a charm' for Qwest and Sprint.").

<sup>8</sup> The Tariff is basically identical to Tariff No. 2, which Bluegrass had filed on sixteen days notice and that took effect on September 20, 2010, only three days before Bluegrass filed the Tariff. The Bureau ruled that Tariff No. 2 was not eligible for "deemed lawful" status because it was not filed on fifteen days' notice. *Protested Tariff Transmittal Action Taken*, Public Notice, 25 FCC Rcd 13327, 13327 n.1 (Pricing Pol. Div., WCB 2010).

<sup>9</sup> 47 U.S.C. § 155(c)(4) (Section 5(c)(4) provides that any person aggrieved by an "order, decision, report, or action" made on delegated authority may file an application for review of that action, and that "every such application shall be passed on by the Commission.").

from Bluegrass for service under the Tariff – so long as the Tariff remains in effect. Contrary to Bluegrass’ claims, the Tariff is not, and never was, eligible for “deemed lawful” status because it fails to satisfy the terms of Section 204(a)(3) or the Commission’s implementing requirements. As the *Qwest Petition* explained, the Tariff is essentially identical to the preceding Tariff No. 2, which did not qualify as a “deemed lawful” tariff.

Bluegrass mischaracterizes or ignores several issues raised in the *Application* in arguing that the Bureau did not have an opportunity to pass on them. Despite the claims of the *Response*, the Bureau had ample “opportunity to pass” on all of the issues that Qwest raised in the *Application*.<sup>10</sup> First, the *Qwest Petition* specifically stated that it would be “arbitrary and capricious” if the Bureau allowed the Tariff to take effect “without providing a reasoned explanation as to why, in light of the objections submitted [in the *Petition*], the tariff was nevertheless permitted to take effect.”<sup>11</sup> Second, the Bureau had full opportunity below to determine that the Tariff’s definition of “End User” is inconsistent with the Commission’s requirement that “end users” are customers that pay for service. Bluegrass itself, as well as Qwest, raised this issue before the Bureau. Third, the *Qwest Petition* raised to the Bureau the Tariff’s role in supporting Bluegrass’ violation of Section 254(k) of the Act while discussing how the Tariff advances that violation. Contrary to the *Response*’s claims, Section 254(k) applies to CLECs, particularly ones like Bluegrass that are subsidizing the competitive services of their business partners.

Bluegrass attempts to recast the issues raised by the *Application* as essentially being whether traffic is compensable under a CLEC’s tariff, as the Commission addressed in the

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<sup>10</sup> *Response* at 4; see also 47 C.F.R. § 1.115(c).

<sup>11</sup> *Qwest Petition* at 9.

*Farmers* proceeding.<sup>12</sup> To the contrary, the essential issue posed by the Tariff is that it is patently unlawful under the Act and the Commission's rules. As the *Application* and the *Qwest Petition* show, the Tariff is patently unlawful because it attempts to redefine switched access service in a manner not consistent with the Commission's rules.

Bluegrass' other arguments against the *Application* are retreads of its positions in the *Bluegrass Bureau Response*, which, as demonstrated in the *Application*, are inadequate to prop up this patently unlawful Tariff. The Tariff seeks to further Bluegrass' traffic pumping by, among other things, charging unlawfully high rates for processing artificially pumped traffic. The Tariff also seeks to impose unlawful billing and attorneys' fees provisions designed to take advantage of its captive and unwilling IXC customers. As the *Application* shows, even though the *Petition* discussed these issues in detail, the *Bureau Decision* denied it without explanation.

## **II. THE COMMISSION SHOULD GRANT THE APPLICATION ON AN EXPEDITED BASIS.**

Although the *Response* questions the emergency nature of the *Application*,<sup>13</sup> immediate grant of the *Application* is essential because the *Bureau Decision* permitted the Tariff to take effect on fifteen days' notice on October 8, 2010. The *Bureau Decision* thus allowed Bluegrass to claim that the Tariff gained "deemed lawful" status pursuant to Section 204(a)(3) of the Act.<sup>14</sup> Unless the Commission reverses the *Bureau Decision*, Bluegrass will be able to use Section 204(a)(3) to claim immunity from damages for services provided under the Tariff until the Commission finds the Tariff to be unlawful in a Section 205 investigation or a Section 208

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<sup>12</sup> See *Response* at 10.

<sup>13</sup> See *id.* at 3.

<sup>14</sup> See 47 U.S.C. § 204(a)(3).

complaint proceeding.<sup>15</sup> Because the Tariff is part of an illegitimate traffic-pumping scheme by Bluegrass, Qwest will suffer irreparable harm – the inability to obtain damages from Bluegrass for service under the Tariff – so long as the Tariff remains in effect. Emergency reversal of the *Bureau Decision* therefore is needed.

As discussed in the *Application*, Qwest requests the Commission either to reject the Tariff or investigate it in order to declare it unlawful.<sup>16</sup> Although Bluegrass argues that the Commission cannot reject the Tariff pursuant to the *Global NAPs* decision because of the Tariff’s alleged “deemed lawful” status,<sup>17</sup> it fails to recognize that the Tariff only has a claim to such status because the *Bureau Decision* did not reject or, at the very least, suspend and investigate the Tariff.<sup>18</sup> Consistent with the test enunciated by the Supreme Court in *American Trucking* and applied by the D.C. Circuit in *Global NAPs*, rejection of the Tariff upon reversal of the *Bureau Decision* would further the specific statutory mandates of Sections 201(b) and 254(k) and is “directly and closely tied” to those mandates.<sup>19</sup> The *Application* claims that the Tariff is unlawful, not that it is improperly interpreted. The Commission thus has authority to reject the

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<sup>15</sup> See *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2182-83 ¶ 20 (1997) (“*Streamlined Tariff Order*”); 47 U.S.C. §§ 205, 208.

<sup>16</sup> See *Application* at 3-4, 24.

<sup>17</sup> See *Response* at 7-8; see also *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) (“*Global NAPs*”); *ICC v. American Trucking Ass’ns.*, 467 U.S. 354, 367 (1984) (“*American Trucking*”).

<sup>18</sup> Reversal of the *Bureau Decision* means that “deemed lawful” status should never have attached to the Tariff because the Bureau should have rejected (or suspended) the Tariff in the first place. As explained in Section III herein, the Tariff independently was never entitled to “deemed lawful” status in the first place because it did not satisfy the terms of Section 204(a)(3) of the Act or the Commission’s requirements thereunder.

<sup>19</sup> *American Trucking*, 467 U.S. at 367; see also *Global NAPs*, 247 F.3d at 259-60.

Tariff and should do so. Alternatively, the Commission should immediately investigate the Tariff under Section 205 of the Act in order to declare it unlawful.<sup>20</sup>

**III. THE COMMISSION SHOULD FIND THAT THE TARIFF WAS NEVER ENTITLED TO “DEEMED LAWFUL” STATUS.**

Contrary to Bluegrass’ claims, the Tariff is and was not eligible, *ab initio*, for “deemed lawful” status because the Tariff is essentially identical to a preceding Bluegrass tariff, filed on 16 days notice, that did not qualify as a “deemed lawful” tariff.<sup>21</sup> The allegedly “material changes” to the preceding tariff claimed in the *Response* are minimal at most. As such, they are inadequate to satisfy the terms of Section 204(a)(3), which provides for “deemed lawful” status when either a rate reduction is filed on seven days’ notice or a rate increase is filed on fifteen days notice.<sup>22</sup> The Commission has applied the fifteen-day notice period to tariffs that **significantly** change terms and conditions or apply to new services even when there is no rate increase or decrease.<sup>23</sup> The Tariff does not apply to a new service and the changes from the previous tariff are **insignificant**. The Tariff never qualified for “deemed lawful” status.

**IV. THE BUREAU HAD AN OPPORTUNITY BELOW TO CONSIDER ALL OF THE ISSUES RAISED IN QWEST’S APPLICATION AND THE COMMISSION SHOULD CONSIDER AND AGREE WITH QWEST’S ARGUMENTS.**

Bluegrass contends that three arguments in the *Application* contravene Section 1.115(c) of the Commission’s rules, which provides that “[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no

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<sup>20</sup> 47 U.S.C. § 205.

<sup>21</sup> See *Response* at 2, 8-9; *Application* at 2, 11-12.

<sup>22</sup> 47 U.S.C. § 204(a)(3).

<sup>23</sup> See *Streamlined Tariff Order*, 12 FCC Rcd at 2203 ¶ 68 (“If there are other **significant** changes, the tariff transmittal will be subject to a 15-day notice period.” (emphasis added)).

opportunity to pass.”<sup>24</sup> As discussed in this section, the Bureau had a full opportunity to pass on all three issues raised by the *Response*. Moreover, Bluegrass misapprehends the scope of Section 1.115(c). That section of the rules mirrors Section 405(a) of the Act, which the D.C. Circuit has interpreted as follows:

[I]n our section 405 cases we have asked whether the issue that a petitioner brings to us was “flagged,” or to use a sports metaphor, “teed up,” before the Commission. But if petitioner complains of only a technical or procedural mistake, such as an obvious violation of a specific APA requirement, we have insisted that a party raise the precise claim before the Commission--if necessary, in a motion for reconsideration--because we assume the Commission simply overlooked the requirement. In those instances, we are concerned that the petitioner, by bringing the issue first to us, is playing a game of “gotcha.” If, however, a petitioner makes a basic challenge to a Commission policy, but the formulation of the issue presented to us was not precisely as presented to the Commission, we ask whether a reasonable Commission *necessarily* would have seen the question raised before us as part of the case presented to it.<sup>25</sup>

Under the Commission’s rules and Section 405 of the Act, the decision-maker below must have had a meaningful opportunity to address an issue in order for an injured party to appeal the decision to the next highest level of authority. It does not mean, as Bluegrass implies, that an arbitrary and capricious decision cannot be appealed because no one had told the decision-maker that the decision was arbitrary and capricious prior to its issuance.

Bluegrass’ failure to grasp the meaning of Section 1.115(c) is well illustrated by its claim in the *Response* that arguments regarding a potential violation of the APA must be presented to the Pricing Policy Division of the Bureau or they are barred by that section, citing the

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<sup>24</sup> See *Response* at 4 (citing 47 C.F.R. § 1.115(c)); see also *id.* at 4-6.

<sup>25</sup> *Time Warner Entertainment Co. v FCC*, 144 F. 3d 75, 81 (D.C. Cir. 1998) (“*Time Warner Entertainment*”).

Commission’s *American Mobilphone* decision.<sup>26</sup> *American Mobilphone* does not stand for the general proposition that APA challenges cannot be leveled against an arbitrary decision under delegated authority. In *American Mobilphone*, the specific challenge was that the chief of the division that had issued the decision below had “previously participated in an enforcement proceeding concerning [the petitioner].”<sup>27</sup>

In order for the *Application* to be considered, all that is required is that the Bureau had a meaningful “opportunity to pass” on the issues raised, and this standard has been met. All issues in the *Application* are properly before the Commission and merit immediate favorable action.<sup>28</sup>

**A. Qwest Expressly Sought A Reasoned Explanation, Which The Bureau Decision Did Not Provide, Of Why The Bureau Permitted The Tariff To Take Effect.**

Bluegrass initially claims that Qwest’s argument regarding the sufficiency of the *Bureau Decision* cannot be considered because it raises APA issues not presented to the Bureau.<sup>29</sup> As noted above, this argument is based on an erroneous legal interpretation under *Time Warner Entertainment*. Moreover, the *Petition* specifically stated that it would be “arbitrary and capricious” if the Bureau allowed the Tariff to take effect “without providing a reasoned explanation as to why, in light of the objections submitted [in the *Petition*], the tariff was

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<sup>26</sup> *Response* at 4-5 (citing *Application of American Mobilphone, Inc. and RAM Technologies, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 16638, 16639 ¶ 3 (2000) (“*American Mobilphone*”)).

<sup>27</sup> *American Mobilphone*, 15 FCC Rcd at 16639 ¶ 3.

<sup>28</sup> The Commission also is justified in addressing each of the issues contested by Bluegrass because doing so would advance the public interest and the issues are related to the same “purported facts” that were before the Bureau. *See Brookfield Development, Inc. and Colorado Callcom*, Memorandum Opinion and Order, 19 FCC Rcd 14385, 14388 n. 34 (2004); *see also Beasley Broadcast Group, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 15949, 15954 n. 37 (2008).

<sup>29</sup> *Response* at 4.

nevertheless permitted to take effect.”<sup>30</sup> Qwest thus raised before the Bureau the issue of the sufficiency of the *Bureau Decision*. There is no “game of ‘gotcha’” here.<sup>31</sup> The Commission should deny Bluegrass’ request to strike Qwest’s arguments on pages 2, 3, 9 (together with issue presented 1(b)), and 12-15 of the *Application*.<sup>32</sup>

Although Bluegrass’ concern here seems to be that Qwest failed to mention or cite the “Administrative Procedures [sic] Act” in the *Petition*,<sup>33</sup> Bluegrass itself concedes that the real issue before the Bureau was the sufficiency of its explanation for its decision about the Tariff. That issue was squarely before the Bureau, and the *Application* merely explained that issue in detail for the Commission’s review. Qwest was under no obligation to petition the Bureau for reconsideration of this issue before seeking review from the Commission. As the *Application* showed, the Bureau failed to provide the reasoned explanation required under the APA. In point of fact, the Bureau provided no explanation at all for its action. Particularly because the Tariff nominally received “deemed lawful” status under Section 204(a)(3) of the Act, the conclusory *Bureau Decision* does not meet the procedural requirements of Sections 555(e) and 706(2)(A) of the APA as interpreted by the D.C. Circuit.<sup>34</sup>

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<sup>30</sup> *Qwest Petition* at 9; see also *id.* at 10-11 (A decision allowing a “deemed lawful” tariff to take effect is prescriptive, and thus a final decision subject to judicial review under Section 402 of the Act).

<sup>31</sup> See *Time Warner Entertainment*, 144 F.3d at 81.

<sup>32</sup> See *Response* at 4. The *Response*, at 4-5, relies on the inapposite *American Mobilphone* decision, *supra*, in which a party did not initially present its argument to the Bureau (as Qwest did here) and that did not involve an issue of inadequate explanation of a decision by a bureau.

<sup>33</sup> See *Response* at 4-5.

<sup>34</sup> See 5 U.S.C. §§ 555(e), 706(2)(A); *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010); *Dickson v. Sec’y of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995). The *Response* cites no appellate authority to the contrary, but relies in a footnote on a 1993 Commission holding that the Commission has “heightened discretion” in the case of tariff filings “not to provide a detailed  
(continued on next page)

**B. Bluegrass Itself Raised the Issue Below Of The Adequacy Of The Tariff's Definition Of End User Under The Commission's Rules, As Did Qwest.**

Bluegrass next contends that another Qwest argument – that the Tariff's definitions violated the Commission's switched access rules – should not be heard because the argument implicates the definition of "telecommunications service," which according to the *Response*, Qwest seeks for the first time to "rely on" in the *Application*.<sup>35</sup> Bluegrass asks the Commission to strike the "argument regarding the requirement for an end user to pay for 'telecommunications service' on pages 17-19 of the *Application*'s argument on this point.<sup>36</sup> The Commission should deny this request. Bluegrass' claim is not valid under *Time Warner Entertainment*.<sup>37</sup> Bluegrass itself admits that Qwest argued that the Tariff's definitions are defective because they do not require end users to pay for the services they receive from Bluegrass,<sup>38</sup> which necessarily raised Qwest's argument as formulated in the *Application*.

In fact, Bluegrass again seeks to obfuscate an issue that was squarely before the Bureau. That issue was and is the unlawful nature of the *Tariff's* definitions, which do not comport with the Commission's rules. Prominent among the Tariff's patently unlawful definitions is its definition of "End User." The Bureau had full opportunity to consider the point that the Tariff's definition of "End User" is inconsistent with the Commission's requirement that "end users" are

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exposition of its reasoning." *Response* at 5 n.6 (citing *Bell Atlantic Tel. Co. Tariff FCC No. 1*, 8 FCC Rcd 2732, 2733 ¶ 8 (1993)). That general statement cannot save the conclusory and incorrect *Bureau Decision*, which, among other things, referred to tariff "transmittals" even though it was addressing only one transmittal. The Commission holding also predates the enactment of Section 204(a)(3) and the creation of prescriptive "deemed lawful" status.

<sup>35</sup> *Response* at 5.

<sup>36</sup> *See id.* at 5-6.

<sup>37</sup> *See Time Warner Entertainment*, 144 F. 3d at 81.

<sup>38</sup> *See Response* at 5.

customers that pay for service. Bluegrass itself raised this issue when it argued incorrectly to the Bureau that the Tariff’s definition of “End User” is basically the same as the definition in the access charge rules.<sup>39</sup> However, Bluegrass admitted below that the Tariff’s definition of “End User” provides that “[a]n End User need not purchase any service provided by the Company.”<sup>40</sup> This is contrary to the definition of “End User” in the access charge rules. In this regard, as the *Qwest Petition* said below, “even the most basic rudiment of common carriage, that the carriage be ‘for hire,’ has been eliminated” from the Tariff.<sup>41</sup> And Bluegrass itself used the term “telecommunications service” in its discussion of the “End User” issue before the Bureau.<sup>42</sup> The Bureau thus had ample opportunity to pass on the issue of the lawfulness of the Tariff’s “End User” definition in light of the Commission’s and the Act’s requirements and definitions, including that of “telecommunications service.”

Although Bluegrass argued before the Bureau that the Tariff’s definition of “End User” is basically the same as in the Commission’s access charge rules,<sup>43</sup> that assertion is incorrect. Rather, the Tariff definition guts the Commission’s requirement that “end users” must be customers that pay for service. The Commission’s access charge rules define “end user” in the

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<sup>39</sup> See *Bluegrass Bureau Response* at 10-12 (discussing Tariff definition of “End User”). Under 47 C.F.R. § 1.773, Qwest had no opportunity below to reply to this argument, but Bluegrass raised it for the Bureau’s consideration. The *Bureau Decision* is so cryptic that Qwest has no way to determine the extent to which the Bureau relied on, or even considered, this argument.

<sup>40</sup> *Bluegrass Bureau Response* at 11 (emphasis added).

<sup>41</sup> See *Qwest Petition* at 12.

<sup>42</sup> See *Bluegrass Bureau Response* at 12 (“[T]he term ‘end user’ [in other access tariffs] appeared to define both the user of access services and the user of retail *telecommunications service*.” (emphasis added)).

<sup>43</sup> See *id.* at 10-12.

non-carrier context as a “customer of an interstate or foreign *telecommunications service*....”<sup>44</sup> The statutory definition of “telecommunications service,” in turn, requires “the offering of telecommunications *for a fee* directly to the public.”<sup>45</sup> Thus, under the Commission’s access charge rules, to qualify as an “end user” of a LEC, an entity must be the customer of a telecommunications service provided by the LEC and be charged a “fee” for the service.

By providing that “[a]n end user need not purchase any service provided by the Company,”<sup>46</sup> the Tariff’s definition of “End User” is inconsistent with the access charge rules. Under those rules, a LEC may not impose access charges for calls that are not delivered to or received from its “end users,” as defined in those rules, and attempting to impose access charges

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<sup>44</sup> 47 C.F.R. § 69.2(m) (emphasis added). More generally, the Commission has defined the term “customer” and related terms throughout its rules as referring to an entity that pays for a service. *See, e.g.*, 47 C.F.R. § 54.706(b) (universal service contributions assessed based on “end-user telecommunications revenues” paid by “end user” “customers”); *id.* § 64.1100(h) (a “subscriber” under the Commission’s slamming rules is the party “responsible for payment of the telephone bill” or a person authorized by or representing such party). *See also High Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6681 App. B ¶ 65 (2008) (Commission proposed “contin[uing] to define an ‘end user’ for universal service contributions purposes as any *purchaser* of interstate services”) (emphasis added).

<sup>45</sup> 47 U.S.C. § 153(53) (emphasis added). *See id.* § 153(11) (common carrier defined as involving service “for hire”). For more than a century, American law has recognized that a service offered without charge cannot be common carriage. *N. Pac. Ry. Co. v. Adams*, 192 U.S. 440, 453 (1904); *see Francis v. Southern Pacific Co.* 333 U.S. 445, 449 n.2 (1948).

<sup>46</sup> Tariff at 8. Although the first sentence of the Tariff definition of “End User” resembles the definition in the Commission’s rules, *see Bluegrass Bureau Response* at 11, terms used in the Tariff definition such as “Customer of an Interstate or Foreign Telecommunications Service” and “Telecommunications” are themselves defined terms in the Tariff, rather than terms defined in the Commission’s rules.

in a manner inconsistent with the rules violates those rules.<sup>47</sup> The Tariff’s definition of “End User” is inconsistent with the Act and the Commission’s rules.<sup>48</sup>

**C. The *Petition* Demonstrated That The Tariff Violates Section 254(k).**

Finally, Bluegrass contends that the *Qwest Petition* mentioned Qwest’s Section 254(k) argument “in passing on a few occasions,” giving “no explanation of its theory about how 254(k) could by [sic] violated by Kentucky Telephone’s tariff.”<sup>49</sup> The *Qwest Petition* raised directly to the Bureau the Tariff’s role in supporting Bluegrass’ violation of Section 254(k) of the Act. The *Petition* stated that the Tariff “is in furtherance of a scheme to violate Section 254(k) ... by providing a subsidy to competitive services from services that are not subject to competition,” and it discussed in detail how the Tariff advances that violation.<sup>50</sup> The *Petition* spelled out all elements of a Section 254 violation. The Bureau had ample opportunity to determine that the

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<sup>47</sup> See *Bell Atlantic Telephone Companies Revisions to Tariff F.C.C. No. 1, Transmittal No. 418*, Order, 6 FCC Rcd 4794, 4794-95 ¶ 9 (CCB 1991) (LECs may not assess access charges for calls that they do not deliver to “end users.”).

<sup>48</sup> The Commission’s holdings in the *Farmers* proceeding are distinguishable from, but not inconsistent with, this analysis. In the *Farmers Order*, 22 FCC Rcd at 17987-88 ¶ 38, the Commission found that the defendant LEC’s payment of marketing fees to certain service providers did not affect their status as “customers,” and thus “end users” under the LEC’s interstate access tariff. In that order, however, the Commission assumed that the service providers in fact did pay for the LEC’s interstate services and that the only factual issue therefore was “whether the [service providers] paid [the LEC] more than [the LEC] paid them.” *Id.* at 17988 ¶ 38. The Commission held that it did not matter whether the service providers “made net payments to [the LEC];” they were end users in either case. *Id.* at 17987-88 ¶ 38. The Commission stressed that plaintiff “failed to prove that the [service providers] do not pay [the LEC] for service because the marketing fees cancel out the *tariff payments*.” *Id.* at 17988 ¶ 38 n.125. Under the Tariff, there are no “tariff payments” by end users. In the *First Farmers Recon. Order*, 23 FCC Rcd at 1618 ¶ 7 (emphasis added), the Commission confirmed that the *Farmers Order* was based on “Farmers’ representation that [the service providers] *purchased* interstate End User Access Service and *paid* the federal subscriber line charge.” “End User[s]” under the Tariff need not purchase or pay for any Bluegrass service.

<sup>49</sup> *Response* at 6.

<sup>50</sup> *Qwest Petition* at 4; see *id.* at 19-20.

Tariff furthered Bluegrass' scheme to violate Section 254(k) and, for example, suspend the Tariff and investigate it on this ground, as the Petition requested. The Commission should deny Bluegrass' request to strike pages 23-24 of the *Application*.

Section 254(k) applies to CLECs, particularly ones like Bluegrass that are subsidizing the competitive services of their business partners with revenues from services that are not competitive.<sup>51</sup> Bluegrass' substantive defense to the contrary is contrary to the statutory language itself – which applies to “services” provided by a telecommunications carrier, regardless of the regulatory classification of the carrier. If a CLEC is providing services that are not subject to competition, Section 254(k) prohibits the CLEC from subsidizing competitive services with the revenues from the non-competitive services. Even if (i) the CLEC may provide other services that are competitive, and (ii) the competitive service is provided by a business partner rather than directly by the CLEC, Section 254(k) applies.

Thus, the Commission specifically held in the *BTI* complaint case that BTI, a CLEC, “is subject to section 254(k)’s prohibition against cross-subsidization.”<sup>52</sup> Contrary to Bluegrass' claims,<sup>53</sup> in *BTI* the Commission declined to grant complainant AT&T's claim for relief under Section 254(k), not because Section 254(k) does not apply to CLECs, but because the relief already granted to AT&T – reduction of BTI's access rate by about one half during the period at issue – caused AT&T's claim under Section 254(k) to fail for insufficient evidence.<sup>54</sup> Although the rules implementing Section 254(k) apply specifically to ILECs, this does not alter the fact

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<sup>51</sup> See *Application* at 23-24.

<sup>52</sup> *AT&T Corp. v Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12340 ¶ 61 (2001) (“*BTF*”).

<sup>53</sup> See *Response* at 23-24.

<sup>54</sup> See *BTI*, 16 FCC Rcd at 12340 ¶ 61.

that the Commission “emphasize[d]” in adopting those rules that Section 254(k) applies to “all telecommunications carriers.”<sup>55</sup>

Section 254(k) also does not exclude situations where the service being subsidized is not provided by the subsidizing carrier, but instead, as here, is being provided by a business partner of the carrier. The language of the Act does not permit such a limited reading. The “services subject to competition” that a telecommunications carrier may not subsidize are not limited to the services of the telecommunications carrier itself. The fact that the Commission’s implementing rules address ILECs’ intra-corporate activities does not mean that the Act itself is so limited. Rather when adopting the rules in 1997, the Commission simply focused them on the most common potential problem under the Act – intra-corporate situations involving ILECs. The Commission has ample latitude to proceed by either adjudication or rulemaking to implement the Act,<sup>56</sup> including the prohibition against cross-subsidization in Section 254(k).<sup>57</sup>

## **V. THE ACCESS DEFINITIONS IN THE TARIFF VIOLATE THE COMMISSION’S RULES.**

According to Bluegrass, the “pervasive theme” of the *Application* is that Bluegrass “is not permitted to define its own access services,” and that this theme contravenes the Commission’s reasoning in *Farmers* that “the question whether traffic is compensable is answered in *Farmers*’ access tariff,” and not in other precedent.<sup>58</sup> In so arguing, Bluegrass misstates the issue posed by the *Application*, which is that the *Bureau Decision* should be

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<sup>55</sup> *Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, Order, 12 FCC Rcd 6415, 6421 ¶ 9 (1997).

<sup>56</sup> *See Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007).

<sup>57</sup> While the Commission has authority to forbear from enforcing provisions of the Act following the procedures of Section 10 of the Act, it has not done so with respect to Section 254(k).

<sup>58</sup> *See Response* at 10.

reversed because the Tariff is patently unlawful.<sup>59</sup> Although Bluegrass goes on to argue that the Tariff's terms comply with applicable federal law, the *Application* and the *Qwest Petition* show that the Tariff is patently unlawful because it attempts to redefine switched access service in a manner not consistent with the Commission's rules.

Bluegrass fundamentally misunderstands Qwest's position. Qwest agrees that Bluegrass can define its own access services so long as it complies with the Commission's rules. What Qwest disputes is Bluegrass' ability to misuse the Commission's tariff system to present unfounded demands to IXCs such as Qwest for exorbitant charges for "services," not requested or desired by Qwest, based on regulatory arbitrage. If Bluegrass had chosen to negotiate access contracts with IXCs instead of attempting to abuse the tariff system, this case would not have arisen.

Although the Commission does not require CLECs to tariff their interstate services, if CLECs choose to tariff their interstate access services, those tariffs must comport with the applicable access charge rules.<sup>60</sup> The Commission's decisions in the *Farmers* proceeding did not upset this principle. CLECs such as Bluegrass are permitted to tariff their interstate access services only if they charge no higher than a "benchmark" rate pegged to the relevant ILEC access rate and provide "the functional equivalent" of the access services offered by the ILEC

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<sup>59</sup> Bluegrass thus ignores the fundamental principal that, to be lawful, a tariff must be consistent with the Act and the Commission's rules. See, e.g., *Capital Network System v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("The Commission's authority to reject filings extends to those that are 'patent nullities as a matter of substantive law'" (citation omitted)); *RCA American Commc'ns.*, Memorandum Opinion and Order, 89 FCC 2d 1070, 1076 n.12 (1982); *AT&T Revisions to Tariff FCC Nos. 258 and 267*, Memorandum Opinion and Order, 69 FCC 2d 1696, 1698 n.2 (1978).

<sup>60</sup> See *Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004) ("*CLEC Access Recon. Order*"); 47 C.F.R. § 61.26.

serving the same area.<sup>61</sup> The access charge system, codified in Parts 61 and 69 of the Commission's rules, determines, *inter alia*, the tariffs' terms and overall rate structure.<sup>62</sup> Bluegrass is permitted to tariff interstate access charges so long as it complies with the Commission's rules and the Act. If Bluegrass seeks to tariff what it calls "switched access" charges inconsistently with the Commission's rules, the action is unlawful and the Commission must halt it.<sup>63</sup>

As demonstrated in the *Qwest Petition* and the *Application*, the Tariff's convoluted definitions of "Call," "End User," "Switched Access Service," and "Traffic" seek to expand the types of traffic covered by the Tariff, presumably to ensure that Bluegrass may claim a broad right to assess tariffed "access charges" on traffic delivered to Bluegrass' free conferencing business partners. This so-called "access tariff" violates the Commission's access charge rules in order to facilitate Bluegrass' traffic pumping activities. Violating the access charge rules is an unjust and unreasonable practice under Section 201(b) of the Act.<sup>64</sup>

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<sup>61</sup> *CLEC Access Recon. Order*, 19 FCC Rcd at 9115 ¶ 15.

<sup>62</sup> 47 C.F.R. §§ 61.26; 69.1 *et seq.* See *MCI Telecommunications Corp. v. Pacific Northwest Bell Tel. Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, 226 n.13 (1990) (subsequent history omitted).

<sup>63</sup> The binding nature of the access charge structure for all LECs – CLECs and ILECs – that file tariffs is inherent in the Commission's access service policy. In order to prevent discrimination, one of the stated goals of the access charge regime is to bring about uniformity among all carriers' access charge tariffs. See *MTS and WATS Market-Structure*, 93 FCC2d 241, 246, 250 (1982), *mod. on recon.*, 97 FCC2d 682 (1983), *mod. on further recon.*, 97 FCC2d 834 (1984), *remanded in part on other grounds sub nom. National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

<sup>64</sup> "[T]o violate a regulation that lawfully implements § 201(b)'s requirements *is* to violate the statute." *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 54 (2007). See *AT&T Corp. v. Bell Atlantic – Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 594 ¶ 87 (1998) ("*Bell Atlantic Complaint Order*"), *recon. denied*, 15 FCC Rcd 7467 (2000) (stating that the access charge rules were promulgated to "ensure" "just and (continued on next page)

The service defined in the Tariff does not satisfy the basic requirement for interstate switched access service: that it is offered in conjunction with the origination or termination of interstate calls. Under the rules, access service refers to “services and facilities provided for the origination or termination of any interstate or foreign telecommunication.”<sup>65</sup> The Tariff violates this requirement by defining “Switched Access Service” as “Access to the Network of the Company for the purpose of receiving or delivering Calls,”<sup>66</sup> thereby assessing access charges for all “Calls,” a term defined so broadly in the Tariff that it includes almost any communication processed by Bluegrass.<sup>67</sup> By defining “switched access service” so broadly, the Tariff ignores the Commission’s definition of “access service.”

The Tariff’s definitions also are inconsistent with the provisions of the Commission’s rules under which “switched access service” describes only services provided in connection with traffic originated by, or terminated to, a LEC’s end user customer. The Commission’s definitions of “[a]ccess minutes” and “[a]ccess minutes of use,” for example, state that “[o]n the originating end of an interstate or foreign call, usage is to be measured from the time the

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reasonable” services, and holding that access charges (specifically carrier common line charges) “that do not reflect origination or termination of interstate calls” “violate Section 201(b)”.

<sup>65</sup> 47 C.F.R. § 69.2(b). See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9174 ¶ 48 (2001); *Access Charge Reform*, Order, 12 FCC Rcd 10175, 10179-80 ¶ 10 (1997); *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5155 n.2 (1994).

<sup>66</sup> Tariff at 9.

<sup>67</sup> *Id.* at 7 (The Tariff defines “Call” as a “communication attempt for which the complete address code (e.g., 0-, 911, or 10 digits) is provided to the Company’s switch or equivalent facility. The term ‘Call’ expressly includes communications that are delivered to, or received from, persons or entities that include, but are not limited to: conference call providers, chat line providers, calling card providers, call centers, help desk providers, and residential and/or business users.”).

originating end user's call is delivered by the telephone company ...."<sup>68</sup> Likewise, "[o]n the terminating end of an interstate or foreign call, usage is to be measured from the time the call is received *by the end user* in the terminating exchange."<sup>69</sup>

As discussed in Section IV-B above, contrary to the claims of the *Response*, the Tariff's definition of "End User" contradicts the definition of "End User" in the Commission's rules by providing that "[a]n end user need not purchase any service provided by the Company."<sup>70</sup> Moreover, the Tariff's definition of "Switched Access Service" refers to "Calls," which are *not* limited to traffic originated by, or terminated to, Bluegrass' end user customers as defined in the Commission's rules. As used in the Tariff, the term "Calls" refers, not to "end users" as defined by the Commission, but specifically to the types of business partners that consistently are part of traffic pumping schemes: "conference call providers, chat line providers, calling card providers, call centers, help desk providers," among others, with no requirement that these entities pay for or even subscribe to Bluegrass service.<sup>71</sup>

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<sup>68</sup> 47 C.F.R. § 69.2(a).

<sup>69</sup> *Id.* (emphasis added). See also *Bell Atlantic Complaint Order*, 14 FCC Rcd at 573 ¶ 34 ("Section 69.2(a) of our rules explains how access minutes of use must be measured on the *originating and terminating* ends of an interexchange call; it does not provide for intermediate switching or common line 'use.'").

<sup>70</sup> Tariff at 8.

<sup>71</sup> The Tariff also defines "Traffic" as:

Another term for Calls. These terms expressly include communications that are delivered to, or received from, persons or entities that include, but are not limited to: conference call providers, chat line providers, calling card providers, call centers, help desk providers, and residential and/or business users.

Tariff at 9. Here too, the definition says nothing about the persons or entities listed being end user customers of the Tariff's services.

**VI. BLUEGRASS RECYCLES OTHER INVALID ARGUMENTS FROM ITS RESPONSE BELOW.**

**A. The Rate Specified For Processing So-Called “Volume End User” Traffic Is Excessive, And Thus Neither Just Nor Reasonable.**

Qwest demonstrated in the *Qwest Petition* and the *Application* that the Tariff’s rate for Volume End User (“VEU”) traffic is far in excess of any reasonable level at the traffic levels specified in the Tariff. The *Response* essentially repeats Bluegrass’ flawed arguments below.<sup>72</sup>

Bluegrass thus has no answer to Qwest’s analysis in the *Application* of this unlawfully high rate. For the first 500,000 minutes of use per Buyer, the Tariff ‘s VEU rate appears to be set at the NECA rate, including tandem switching and transport, and the highest NECA band for local switching. This is far in excess of a reasonable rate for traffic at the 500,000 MOU level.<sup>73</sup>

When the VEU rate of \$0.015 takes effect (above 500,000 MOU per month per customer), that rate is unreasonable. The Average Traffic Sensitive (“ATS”) tariffed rate for interstate access (which includes tandem switching) of Qwest Corporation (the ILEC associated with Qwest) is far less than the Tariff’s VEU rate: \$0.005839/MOU.<sup>74</sup> The *Bureau Decision* did not even hint whether the Bureau considered Qwest’s contention below that Bluegrass’ cost per minute of traffic processed cannot be in excess of the costs incurred by Qwest Corporation for processing the same level of traffic,<sup>75</sup> and that the Qwest Corporation rate is the highest appropriate rate for FSP calls.

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<sup>72</sup> See *Response* at 17-18; *Bluegrass Bureau Response* at 15-16.

<sup>73</sup> The situation is analogous to the *Farmers* matter, where the Commission held that the NECA average schedule formulae likely overstate a carrier’s revenue requirement if it experiences tremendous traffic growth. See *Farmers Order*, 22 FCC Rcd at 17981 ¶ 22 n.78.

<sup>74</sup> See Qwest Corp. Tariff FCC No. 1, at Section 6.8.2.A.1 (Nov. 11, 2003).

<sup>75</sup> See *Qwest Petition* at 17.

However, as Qwest has shown, Qwest's ATS rate (including tandem switching) was derived as required in the *CALLS Order*, which found that the ATS target rates are "just and reasonable" and "within the range of estimated costs of switched access."<sup>76</sup> Qwest's rate is as appropriate for Bluegrass as it is for Qwest, given the high traffic volumes that the Tariff anticipates. There is no indication that Bluegrass' costs will increase with the high traffic volumes associated with the VEU rate. As a general matter, increased traffic volumes permit a provider to spread its fixed costs among more MOUs, resulting in a lower per-MOU rate. Because Bluegrass' costs cannot reasonably be expected to exceed the costs for processing traffic of LECs with similar volumes of traffic, Bluegrass' reasonable tariffed rate cannot exceed the rate of ILECs such as Qwest Corporation.

**B. The Tariff's Billing Provision Is Unjust And Unreasonable.**

Qwest showed in the *Petition* and the *Application* that the Tariff's billing provision, Section 3.1.7.1(b), is unjust and unreasonable.<sup>77</sup> The *Response* essentially repeats Bluegrass' arguments before the Bureau.<sup>78</sup> As Qwest explained below, this provision is unlawful under Section 201(b) because it is overbroad – it would apply to bills that Bluegrass sent for traffic or services *not even covered* by the Tariff.<sup>79</sup> This provision thus seeks to control all relations between Bluegrass and IXC's like Qwest, even those not subject to the Tariff.

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<sup>76</sup> *Access Charge Reform*, 15 FCC Rcd 12962, 13035 ¶ 176 (2000) ("*CALLS Order*") (subsequent history omitted); *see id.* at 13036-37 ¶¶ 177-178 (2000).

<sup>77</sup> *See* Tariff at 33, Section 3.1.7.1(b). That provision requires a "Buyer" (*i.e.*, an IXC), that challenges a bill to pay the bill or Bluegrass can peremptorily deny the challenge.

<sup>78</sup> *See Response* at 19-20; *Bluegrass Bureau Response* at 16-18.

<sup>79</sup> *See Qwest Petition* at 17-18.

The *Response* failed to cite any precedent for such a tariff provision but rather argued shrilly against instances of alleged IXC “self-help” in billing disputes.<sup>80</sup> It also failed to address Qwest’s point about the overbreadth of this provision by only discussing cases in which a carrier actually provided the service under tariff for which there was a billing dispute.<sup>81</sup>

**C. The Tariff’s Provision Regarding Attorneys’ Fees Is Unjust And Unreasonable.**

The *Application* demonstrated that Section 3.1.7.4 of the Tariff, involving attorneys’ fees is unjust and unreasonable.<sup>82</sup> Again, the *Response* merely repeats Bluegrass’ arguments below.<sup>83</sup>

Qwest replies that Section 3.1.7.4 is unlawful as an unjust and unreasonable practice because Section 206 of the Act provides for attorneys’ fees only when a complainant demonstrates to a court that a carrier violated the Act,<sup>84</sup> and because permitting Bluegrass to assess attorneys’ fees for a collection lawsuit it brought even if it loses the suit is manifestly unjust and unreasonable. The *Response* cited cases in which *successful* litigants were awarded

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<sup>80</sup> See *Iowa Network Servs. v. Qwest Corp.*, 385 F. Supp. 2d 850, 903-904 (S.D. Iowa, 2005) (finding that when Qwest was not liable to another carrier under federal tariffs, it followed that the carrier’s claim regarding self-help by Qwest was likewise not applicable), *aff’d* 466 F.3d 1091 (8th Cir. 2006); *cert. denied*, 550 U.S. 935 (2007) (intermediate history omitted).

<sup>81</sup> See *Response* at 20. For example, in *Tel-Central of Jefferson City, Missouri, Inc. v. United Tel. Co. of Missouri, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 8338 (1989), the Commission was able to discern that the service at issue was that described in AT&T’s interstate WATS tariff. See *id.* at 8339-40 ¶ 11. Similarly, in *Business WATS Inc. v. AT&T*, 7 FCC Rcd 7942 (1989), the Commission addressed a situation involving “tariffed services duly performed.”

<sup>82</sup> See Tariff at 34, Section 3.1.7.4. That section states that Bluegrass may assess reasonable attorneys’ fees if a Buyer refuses to make payments under the tariff, including payments for artificially stimulated traffic, and Bluegrass brings a collection action against that particular Buyer, regardless of whether Bluegrass is successful in such an action.

<sup>83</sup> See *Response* at 20-22; *Bluegrass Bureau Response* at 18-19.

<sup>84</sup> See 47 U.S.C. § 206.

attorneys' fees pursuant to language in their tariffs,<sup>85</sup> but cited no case that supported such an award to an *unsuccessful* litigant. That is not surprising – the notion that an unsuccessful litigant can collect attorneys' fees from the winning side is not only patently unlawful, but patently absurd.

## VII. CONCLUSION.

For the reasons set forth above, the Commission should reverse the *Bureau Decision* and grant the relief requested in the *Application*.

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<sup>85</sup> See *Response* at 21 n.15.

## CERTIFICATE OF SERVICE

I, Christopher K. Calvert, do hereby certify that the foregoing Reply Comments were served this 16th day of December, 2010 by delivering true and correct copies thereof, first class postage prepaid, to the United States Postal Service, and electronic mail, as indicated below:

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