

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

In the Matter of

Petition for Declaratory Ruling Regarding  
Invalidity of Pac-West Telecomm, Inc.  
Tariff Pursuant to Primary Jurisdictional  
Referral

WC Docket No. 11-115

**RESPONSE OF PAC-WEST TELECOMM, INC.  
TO VERIZON'S PETITION FOR DECLARATORY RULING**

Michael B. Hazzard  
Joseph P. Bowser  
Adam D. Bowser  
ARENT FOX LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5369  
(202) 857-6029  
(202) 857-6395  
hazzard.michael@arentfox.com

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*Counsel for Pac-West Telecomm, Inc.*

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Pursuant to the Public Notice<sup>1</sup> released on July 7, 2011 and the June 17, 2011 letter from Mr. Alexander P. Starr, Division Chief, Market Disputes Resolution Division, Enforcement Bureau, to counsel for MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon") and Pac-West Telecomm, Inc. ("Pac-West"), Pac-West respectfully submits this response to Verizon's Petition for Declaratory Ruling Regarding Invalidity of Pac-West Telecomm, Inc. Tariff Pursuant to Primary Jurisdictional Referral ("Verizon Petition").

**I. INTRODUCTION AND SUMMARY**

By order dated April 8, 2011, the United States District Court for the Eastern District of California directed Pac-West to "initiate administrative proceedings and for declaratory relief"

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<sup>1</sup> Public Notice, *Pleading Cycle Established for Comments on Pac-West Telecomm, Inc. and Verizon Petitions for Declaratory Ruling*, WC Docket No. 11-115 (July 7, 2011).

with respect to five discrete and specific issues.<sup>2</sup> On July 17, 2011 the Chief of the Markets Disputes Resolution Bureau issued a letter ruling that, in part, directed Verizon to file a petition for declaratory ruling with respect to one of those five issues, *i.e.*, “whether Pac-West’s federal tariff’s omission of listed rates for switched access rates invalidates the tariff.”<sup>3</sup>

Verizon’s Petition goes well beyond the Pac-West rate issue regarding its pre-June 2010 federal switched access tariff and attacks Pac-West’s tariff on the unrelated ground that it references Commission orders. Verizon also complains that Pac-West has not amended its rates since June 9, 2010.<sup>4</sup> Although Verizon has impermissibly sought to turn its expanded Petition into a motion for summary judgment,<sup>5</sup> Verizon’s Petition provides no legitimate basis for the Commission to find that Pac-West’s tariff was void *ab initio* seven years after it was filed.

Pac-West’s tariffs have always fully complied with the Commission’s streamlined tariff filing requirements for nondominant carriers. With respect to Pac-West’s pre-June 2010 tariff, Pac-West incorporated the specific rates of the competing ILECs in its service territory, as permitted by the Commission’s rules, such that there is no confusion as to exactly what rate Pac-West charges. Pac-West’s tariffs, to ensure compliance with the Commission’s new benchmarking rules, cross-referenced the ILEC tariffed rates which Pac-West was legally bound to adopt. Verizon’s attempt to read ambiguity into this tariff because Pac-West included a policy statement that it would abide by the Commission’s CLEC access charge regime is preposterous.<sup>6</sup>

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<sup>2</sup> *Pac-West Telecomm, Inc. v. MCI Commc’ns Servs., Inc.*, Order on Pac-West’s Motion for Preliminary Jurisdiction Referral and Stay pending FCC Ruling, Case No. 1:10-cv-01051 OWW GSA (Apr. 8, 2011).

<sup>3</sup> Letter from Alexander P. Starr, Division Chief, Market Disputes Resolution Division, Enforcement Bureau, to Curtis L. Groves, Verizon, *et al.* (June 17, 2011) (“Letter Ruling”).

<sup>4</sup> Verizon Petition at 10, 14, 19.

<sup>5</sup> *Id.* at 1.

<sup>6</sup> Indeed, Verizon has never identified even one rate that Pac-West has ever charged in excess of its tariff or the FCC’s benchmark. None exists.

Verizon's interpretation of Pac-West's tariff would defeat the whole purpose of the Commission's streamlined tariff regulations. Indeed, the fact that the Commission never suspended Pac-West's tariff, and Verizon never challenged it until now, demonstrates that Verizon's arguments are simply *post hoc* justifications driven by its new policy position to force smaller carriers to accept its preferred rate of \$0.0007 – the rate it is advocating to take effect July 1, 2017. Verizon wants seven years ago from Pac-West what it seeks from the rest of the industry six years from now.

Verizon's arguments concerning Pac-West's post-June 2010 tariff are even more convoluted and should be rejected by the Commission. In response to Verizon's unlawful refusal to pay Pac-West anything for the access services Pac-West provides it, Pac-West filed tariff revisions to remove even Verizon's irrational, self-serving doubts as to the proper application of its tariff. In so doing, Pac-West explicitly listed the exact rate that will apply when Pac-West provides service to its own end user or when it acts as an intermediate carrier in each applicable ILEC service territory in its nine-state footprint. The Commission's rules require Pac-West to do nothing more. Accordingly, the Commission should deny the relief requested by Verizon in its petition and declare that Pac-West's tariff, both before and after the June 2010 revisions, is fully compliant with the Commission's rules and regulations.

## **II. PAC-WEST'S SWITCHED ACCESS TARIFF IN EFFECT PRIOR TO JUNE 2010 COMPLIES WITH THE COMMISSION'S NONDOMINANT CARRIER TARIFFING RULES**

### **A. The Commission's Regulation Of CLECs And Their Tariffs**

Pac-West's interstate switched access tariff is now, and has always been, compliant with the Commission's streamlined tariff regulations for nondominant common carriers. The regulations relevant here were established in the wake of the D.C. Circuit's vacatur of the

Commission's longstanding forbearance policy concerning nondominant carrier tariff filings.<sup>7</sup> In response to this decision, the Commission first permitted nondominant carriers to file tariffs containing reasonable ranges of rates, as opposed to fixed rates.<sup>8</sup> After carriers successfully challenged this rate-range provision for nondominant carriers, the Commission eliminated that provision but otherwise reinstated the streamlined tariff-filing requirements adopted in the *Nondominant Filing Order*.<sup>9</sup> As the Commission explained, its relaxed rules for nondominant carrier tariff filings:

promot[e] price competition, foster[] service innovation, encourag[e] new entry into various segments of telecommunications markets, and enabl[e] firms to respond quickly to market trends.... We conclude that significantly streamlined tariff filing requirements for nondominant common carriers continue substantially to serve the public interest by affording nondominant common carriers increased flexibility to meet their tariff filing obligations.<sup>10</sup>

In 2001, the Commission addressed for the first time the rates CLECs such as Pac-West can lawfully charge their IXC customers pursuant to their tariffs.<sup>11</sup> With its *Seventh Report and Order*, the Commission established a rate regime that, over time, brought the tariffed rates of CLECs in line with those of the ILECs in their service territories. As the Commission noted, when the IXCs complained that CLECs were engaged in "regulatory arbitrage," the "IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services."<sup>12</sup> The Commission immediately chastised the IXCs for their resort to self-help: "We see these developments as problematic for a variety of reasons. We are

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<sup>7</sup> *AT&T Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992).

<sup>8</sup> *Tariff Filing Requirements for Nondominant Common Carriers*, Memorandum Opinion and Order, 8 FCC Rcd. 6752 (1993) ("*Nondominant Filing Order*").

<sup>9</sup> *In the Matter of Tariff Filing Requirements for Nondominant Carriers*, 10 FCC Rcd. 13653, ¶ 3 (1995) ("*Nondominant Carriers Order*").

<sup>10</sup> *Id.* at ¶¶ 4, 9.

<sup>11</sup> *Seventh Report and Order and Further Notice of Proposed Rulemaking, Access Charge Reform*, 16 FCC Rcd. 9923 (2001) ("*Seventh Report and Order*").

<sup>12</sup> *Id.* at ¶ 23.

concerned that IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts."<sup>13</sup>

And thus, history has repeated itself here. Verizon has settled upon another strategy to challenge the access rates of CLECs – if Verizon suspects that any traffic sent to its long-distance or toll-free subscriber customers for lucrative termination was originated in “VoIP format,” Verizon will withhold payment for *all* switched-access traffic, regardless of the protocol, in the hopes of forcing the smaller CLECs to acquiesce to Verizon's reduced-cost rate of \$0.0007 (even though no one denies that the traffic is Verizon-bound, not ISP-bound). If the CLECs refuse, Verizon simply keeps taking the CLECs' access service without paying for it, and embroils the small carriers in protracted litigation in which they are forced to defend against Verizon's hypertechnical tariff-based arguments while a significant revenue stream in their emergent businesses is cut off.

But the Commission has already resolved the issues raised by Verizon's Petition, and Verizon's decision to flout the tariff system is unlawful. In the *Seventh Report and Order*, the Commission established that if a CLEC mirrors the competing ILEC's rates in that ILEC's service territory, such “rates will be *conclusively presumed* to be just and reasonable.”<sup>14</sup> And thus the Commission explicitly chose to address the IXCs' concern by capping the access charge rates that CLECs can lawfully charge IXCs:

Under the regime we adopt in this order, CLECs will be restricted only in the manner that they recover their costs from those access-service customers [*i.e.*, IXCs] that have no competitive alternative. We implement this restriction on the CLEC's exercise of their monopoly power by establishing a benchmark level at which CLEC access rates *will be conclusively presumed to be just and*

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at ¶ 60 (emphasis added).

*reasonable and at (or below) which they may therefore be tariffed....* [O]ur approach ensures that IXCs will continue to accept and pay for CLEC switched access services, as long as the CLEC tariffs rates within the Commission's benchmarks.<sup>15</sup>

In 2004, the Commission reaffirmed that a CLEC can charge the competing ILEC's full benchmark rate when it serves the end-user, but clarified that when the CLEC was acting as an "intermediate carrier," it could only charge the ILEC's rates associated with the same functions when the ILEC acted in a similar, "intermediate" role in the call flow.<sup>16</sup> Accordingly, under the Commission's rules and regulations, a CLEC need only mirror a particular ILEC's rates for equivalent functions for the CLEC's rates to be conclusively deemed just and reasonable.

**B. Pac-West's Pre-June 2010 Tariff Explicitly Mirrors The Competing ILECs' Rates As Required By The Commission's Regulations**

To comply with the Commission's benchmarking rules established in the *Seventh Report and Order* and reaffirmed in the *Eighth Report and Order*, Pac-West filed a revised tariff on June 4, 2004, to take effect on 15 days' notice.<sup>17</sup> As clearly stated in § 3.2(A) of this tariff, Pac-West:

concurs with, and Carrier Access Service is provided pursuant to, the Interstate switched access service tariff schedules of the carriers listed below on file with the Commission that are current and in effect as of the effective date of this tariff sheet. Reference is hereby made to those schedules for *all* terms, conditions, and, except as provided herein, *rates applicable* to Interstate Carrier Access Services provided by the Company.<sup>18</sup>

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<sup>15</sup> *Id.* at 9938, ¶¶ 40, 120 (emphasis added).

<sup>16</sup> *Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108, ¶ 9 (2004) ("*Eighth Report and Order*") (a CLEC "is entitled to charge the full benchmark rate if it provides an IXC with access to the competitive LEC's own end-users. We also find that the rate a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.").

<sup>17</sup> See Pac-West Tariff F.C.C. No. 3, First Revised Pages 14-15 (effective June 19, 2004) (attached hereto as Exhibit A).

<sup>18</sup> *Id.* at § 3.2(A).

Section 3.2(A) then lists, as contemplated by Commission Rule 61.25(b), the ILEC tariffs being cross-referenced for each ILEC service territory within the applicable states, identified by carrier name and FCC tariff number.<sup>19</sup> Further, as allowed by Commission Rule 61.25(c), Section 3.2(A) of the tariff incorporates by reference *all* of the rates of the listed ILEC tariffs for the comparable access services provided by Pac-West, such that there is “no doubt” as to what rates apply when Pac-West provides the functional equivalent of an ILEC’s switched access services in the applicable ILEC’s service territory.<sup>20</sup>

Finally, Section 3.2(B) informs carriers taking service pursuant to Pac-West’s tariff that Pac-West will bill in accordance with the Commission’s *Seventh Report and Order* and *Eighth Report and Order*, which together permit Pac-West to charge the competing ILEC’s full benchmark rate when Pac-West serves the end-user, and to charge the ILEC’s rates associated with the same functions when Pac-West acts as an “intermediate” carrier. Read in conjunction with Section 3.2(A), the tariff makes clear that Pac-West will charge the applicable ILEC rates incorporated by reference when it provides service in the associated ILEC service territory. This interpretation is the only “reasonable construction” of the plain language of Pac-West’s tariff.<sup>21</sup>

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<sup>19</sup> See 47 C.F.R. § 61.25(b) (“The issuing carrier must specifically identify in its tariff the rates being cross-referenced by Carrier Name and FCC Tariff Number.”). Pac-West subsequently submitted a revised § 3.2(A) (Second Revised Page 14 to Original Page 14.5) on February 15, 2006 to add additional states and corresponding ILEC tariffs (attached hereto as Exhibit B). These revisions likewise complied with Commission Rule 61.25(b) by listing the carrier name and FCC tariff number for each applicable ILEC tariff cross-referenced.

<sup>20</sup> 47 C.F.R. § 61.25(C) provides in relevant part that a non-dominant carrier such as Pac-West “must specifically identify in its tariff the rates being cross-referenced so as to leave no doubt as to the exact rates that will apply.” By incorporating all of the rates for all of the associated switched access services listed in the cross-referenced ILEC tariffs, there can be no ambiguity as to what rates Pac-West will charge in a given ILEC service territory.

<sup>21</sup> *Qwest Commc’ns Co. v. Northern Valley Commc’ns, LLC*, Memorandum Opinion and Order, File No. EB-11-MD-001, FCC 11-87, at ¶ 13 (June 7, 2011).

In short, the FCC directed CLECs to mirror the tariffed rates charged by competing ILECs, which is precisely what Pac-West has done, and Verizon is now, years later, complaining that Pac-West has done what the Commission has allowed since 2004. Verizon's newly discovered tariff "shortcoming" claims are particularly suspect given that Verizon paid Pac-West's charges under this tariff without incident for approximately *six years* before it contrived these *post hoc* tariff-compliance issues in an attempt to strong-arm Pac-West (as well as Cox Communications, Bright House, Cablevision, PAETEC, etc.) into accepting Verizon's new policy position on intercarrier compensation for VoIP traffic.

**C. Verizon Seeks To Introduce Ambiguity Into Pac-West's Tariff Where None Exists**

Verizon's tortured interpretation of Pac-West's tariff relies almost exclusively on attempting to analogize Pac-West's distinct tariff language to two inapposite decisions concerning markedly different tariff provisions:<sup>22</sup> the Pricing Policy Division's *All American Order*<sup>23</sup> and the Commission's *Global NAPs Order*.<sup>24</sup> If the Commission accepted Verizon's invitation to extend the reasoning of these two inapplicable cases to Pac-West's tariff, it would defeat the entire purpose of the Commission's streamlined tariff regulations that require a CLEC to do nothing more than benchmark its rates to the competing ILECs' to be conclusively reasonable.

As explained in the *All American Order*, All American Telephone Company ("All American") explicitly tariffed a "range of rates" provision that Verizon pretends Pac-West's

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<sup>22</sup> See Verizon Petition at 11-15.

<sup>23</sup> Order, *All American Telephone Co. Tariff F.C.C. No. 3*, 25 FCC Rcd. 5661 (Pricing Policy Div. 2010) ("*All American Order*").

<sup>24</sup> Memorandum Opinion and Order, *Bell-Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, 15 FCC Rcd. 12946 ("*Global NAPs Order*"), *recon. Denied*, 15 FCC Rcd. 5997 (1999), *petition for review denied*, *Global NAPs, Inc. v. FCC*, 247 F.3d 252 (D.C. Cir. 2001).

tariff implicitly contains.<sup>25</sup> Specifically, All American’s tariff stated that its “rates for recurring services are set *at or below* the rates for equivalent services tariffed by the following Incumbent Local Exchange Carriers.”<sup>26</sup> There simply is no “at or below” provision in Pac-West’s tariffs, so Verizon’s reliance on *All American* is completely misplaced. If a merchant advertises that it will “meet or beat” a competitor’s price for a given product, the consumer knows the price ceiling, but not the actual price. That’s what animated the Pricing Policy Division’s concerns with All American’s tariff. But when, as Pac-West has done, a company advertises that it will charge the same price as its competitors, the consumer knows exactly what will be charged.

The Pricing Policy Division rejected All American’s tariff based on what it found to be overt vagueness as to what rates All American would charge, as the “at or below” language could not conceivably put carriers on notice as to the exact rates that All American would charge, since the tariff itself contemplated more than one charge for the same service.<sup>27</sup> What the Pricing Policy Division did not do, however, as suggested by Verizon, is reject the tariff because All American attempted to incorporate by reference *all* of the *specific* rates contained in the identified ILECs’ tariffs, as permitted by Commission Rule 61.25.

As explained above, Pac-West’s tariff does not permit it to charge anything but the full switched access rate listed in the applicable ILEC’s tariff incorporated by reference when Pac-West provides access to its own end users in that ILEC’s service territory. Similarly, Pac-West’s tariff does not permit it to charge rates other than the specific rates associated with the same ILEC functions when Pac-West acts as an intermediate carrier in that ILEC’s service territory referenced in its tariff. There is simply no “range of rates” contemplated in Pac-West’s tariff.

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<sup>25</sup> *All American Order* at ¶ 5.

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> *Id.*

Pac-West is entitled to bill – and to receive – the same amount as the competing ILEC would for providing the same service.

Verizon’s reliance on the *Global NAPs Order* is also self-defeating to its access-charge-avoidance scheme. Verizon asserts that this decision stands for the proposition that Pac-West’s reference to the *Seventh Report and Order* and *Eighth Report and Order* in § 3.2(B) of its tariff is an impermissible cross-reference to “exogenous documents” and thus a violation of Commission Rule 61.74 – References to Other Instruments.<sup>28</sup> As a practical matter, Verizon is essentially arguing that Pac-West’s stated commitment to abide by the Commission’s CLEC access charge regime makes it impossible for Pac-West to abide by the Commission’s CLEC access charge regime. This is pure sophistry. As the Commission stated in the *Global NAPs Order*, the Commission “speaks through its orders,” such that any lawful CLEC tariff must necessarily incorporate the rules and regulations contained in the *Seventh Report and Order* and *Eighth Report and Order*.<sup>29</sup>

As a threshold matter, Pac-West’s compliance with Rule 61.25 is perfectly in accord with Rule 61.74. Rule 61.25 explicitly *enlarges* the cross-references already allowed under Rule 61.74, by providing that Rule 61.25’s ILEC-rate-referencing authority is “[i]n addition to the cross-references permitted pursuant to § 61.74.”<sup>30</sup> These provisions, linked as they are, must be read *in pari materia*. And thus Verizon’s argument fails from the start by using 61.74 to limit 61.25, when the opposite conclusion is explicitly envisioned by the plain language of the Commission’s rules.

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<sup>28</sup> Verizon Petition at 14.

<sup>29</sup> *Global NAPs Order* at ¶ 20.

<sup>30</sup> 47 C.F.R. § 61.25 (emphasis added).

To the extent the Commission gives any credence to this line of argument, however, a plain reading of Rule 61.74 indicates that the intent of this regulation is to prohibit references to publicly *unavailable* instruments that could potentially trigger a customer’s liability pursuant to that instrument, rather than the tariff referencing the instrument.<sup>31</sup> Indeed, this was exactly what was at issue in the *Global NAPs Order*. As the Commission explained, Global NAPs’ tariff “purport[ed] to charge an interstate rate of \$.008 per minute for all ISP-bound calls for which Global NAPs does not receive compensation under an interconnection agreement.”<sup>32</sup> In finding that the tariff was unlawful, the Commission reasoned that Global NAPs was attempting to use “the tariff process to circumvent the section 251 and 252 processes,” as the Massachusetts commission was still in the process of deciding whether ISP-bound traffic was subject to Bell Atlantic and Global NAPs’ interconnection agreement.<sup>33</sup> Moreover, the contested provision in Global NAPs’ tariff would “apply the tariff even when a valid interconnection agreement could be in place” if Global NAPs had agreed to a bill-and-keep arrangement with another carrier with respect to ISP-bound traffic. Before the D.C. Circuit, Verizon too argued that this tariff provision was unreasonable precisely because it made “the tariff [] conditional on another document – the referenced interconnection agreement.”<sup>34</sup>

With respect to Pac-West’s tariff, there is no such contingency. Pac-West’s tariff applies, and no other instrument, when it provides switched access service as defined in its tariff and at the ILEC rates incorporated by reference. By incorporating the applicable ILEC’s rates in

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<sup>31</sup> It is quite common in the industry for carrier’s switched access tariffs to reference Commission orders. If Verizon is arguing that Pac-West’s tariff is facially invalid because it references the *Seventh Report and Order* and *Eighth Report and Order*, Verizon’s tariffs likewise are invalid. See, e.g., Verizon Telephone Tariff FCC No. 16 (issued June 19, 2001) (referencing Common Carrier Bureau Order DA 01-1417).

<sup>32</sup> *Id.* at ¶ 11.

<sup>33</sup> *Id.* at ¶ 23

<sup>34</sup> *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001).

Section 3.2(A), Pac-West is necessarily in compliance with these orders when it bills these specific rates in accordance with Section 3.2(B). Contrary to Verizon’s litigation-driven interpretation of the interplay between Section 3.2(A) and Section 3.2(B), these provisions can reasonably only be read in harmony with each other, and not one contingent upon the other’s application.<sup>35</sup>

As one federal court has explained, “a tariff is essentially an offer to contract, [and] an action [to enforce the terms of a tariff] is simply one for the enforcement of a contract.”<sup>36</sup> General rules of contract construction provide that a specific provision in a tariff will take precedence over a general one.<sup>37</sup> Effect is to be given, wherever possible, to every word, clause, and sentence.<sup>38</sup> An elementary rule of contract or tariff interpretation is “that general and specific provisions in apparent contradiction may subsist together – *the specific qualifying and supplying exceptions to the general.*”<sup>39</sup> Verizon’s interpretation is not reasonable, and does the opposite. Verizon’s absurd construction causes a general provision – Section 3.2(B)’s policy provision that Pac-West’s “switched access rate will be billed in accordance” with the Commission’s access charge orders – to control the specific provision of Section 3.2(A) that actually incorporates the specific rates that will be billed.

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<sup>35</sup> Verizon Petition at 18. Although Verizon’s argument here pertains to Pac-West’s post-June 2010 tariff which lists specific rates, the same reasoning applies as to why Verizon’s interpretation of Pac-West’s reference to the *Seventh Report and Order* and *Eighth Report and Order* is unreasonable.

<sup>36</sup> *Advantel, LLC v. AT&T Corp.*, 105 F. Supp. 2d 507, 510 (E.D. Va. 2000) (citations omitted).

<sup>37</sup> *Mutual Life Ins. Co. of N.Y. v. Hill*, 193 U.S. 551, 558 (1904); *Pillsbury Flour Mills Co. v. Great Northern Ry. Co.*, 25 F.2d 66, 69 (8th Cir. 1928).

<sup>38</sup> *Pillsbury Flour Mills*, 25 F.2d at 69; *see also, e.g., Seaboard Coast Line R.R. Co. v. United States*, 192 Ct. Cl. 48 (1970).

<sup>39</sup> *Id.* (citing *Townsend v. Little*, 109 U.S. 504, 512 (1883); *Kepner v. United States*, 195 U.S. 100 (1904) (other citations omitted)).

As demonstrated above, Verizon's argument that Pac-West's pre-June 2010 tariff is somehow deficient is predicated entirely on two inapposite decisions and Verizon's facially unreasonable interpretation of the interplay between Pac-West's tariff provisions. Accordingly, Verizon has not carried its burden to prove that Pac-West's tariff is unlawful, and the Commission should deny Verizon's request to declare that Pac-West's pre-June 2010 tariff was invalid.

**D. Pac-West's Pre-June 2010 Tariff Should Be Deemed Lawful And Not Subject To Retroactive Invalidation**

Even if the Commission were to decide that Pac-West's pre-June 2010 tariff was somehow defective – which it should not – it should not find that the tariff was void *ab initio* as requested by Verizon.<sup>40</sup> As noted above, Pac-West's June 4, 2004 tariff revisions – which included Section 3.2(A)'s ILEC-tariff cross-references and Section 3.2(B)'s reference to the *Seventh Report and Order* and *Eighth Report and Order* – were filed on 15 days' notice. Pursuant to 47 U.S.C. § 204(a)(3), Pac-West's tariff is therefore deemed lawful. Verizon argues outside of the four corners of Pac-West's tariff, however, asserting that because Pac-West's tariff wasn't inspected and date stamped by the Commission's mailroom until the following Monday, June 7, 2004, Pac-West's tariff loses its deemed lawful status.

Tellingly, Verizon cites no authority in support of this attempt to play “gotcha” more than seven years after Pac-West filed its tariff.<sup>41</sup> The plain language of section 204(a)(3), however,

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<sup>40</sup> Verizon Petition at 16.

<sup>41</sup> Verizon has been taking service pursuant to Pac-West's tariff during this entire 7-year period, and yet has only now claimed Pac-West's tariff cannot be afforded deemed lawful status because of a delay in processing (and similarly, that it violates the Commission's cross-referencing rules). As the D.C. Circuit has ruled, such delayed claims should be disregarded. *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 884-85 (D.C. Cir. 2009) (noting that “eight years is a long time” to delay and that “equity aids the vigilant and not those who slumber on their rights.”) (citation omitted); *see also Communications Satellite Corp.*, 3 FCC. Rcd. 2643, ¶¶ 19, 23 (1998)

states that a tariff filed pursuant to the Commission’s streamlined tariff-filing regulations “shall be deemed lawful and shall be effective ... 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission *unless the Commission takes action* ... before the end of that ... 15-day period.”<sup>42</sup> Here, the Commission took no action to suspend or investigate Pac-West’s tariff or to inform Pac-West that it should refile the tariff to avail itself of section 204(a)(3)’s deemed lawful protection if the Commission considered the delay in processing material.<sup>43</sup> Accordingly, Pac-West’s pre-June 2010 tariff should be deemed lawful by operation of section 204(a)(3) and not subject to retroactive invalidation.

To the extent the Commission finds Pac-West’s tariff is not subject to deemed lawful protection, it should nevertheless find that the tariff was not void *ab initio*. As explained above, it would be inequitable for Verizon to remain silent about Pac-West’s tariff’s purported deficiencies for years – years in which Verizon paid Pac-West’s tariffed charges without dispute – only to employ these arguments as a *post hoc* justification for Verizon’s true purpose: forcing carriers to accept a \$0.0007 rate for VoIP traffic.<sup>44</sup> It defies credulity that a sophisticated

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(carrier “customers’ failure to file petitions or complaints pursuant to Section 208” when unlawful tariff was filed was a “relevant factor” in exercising Commission’s equitable powers to reduce retroactive refunds. “Comsat provides most of its services to other carriers who knew, or should have known, that Comsat’s rates, although substantially reduced, were nevertheless targeted to exceed the prescribed return.”).

<sup>42</sup> 47 U.S.C. § 204(a)(3) (emphasis added).

<sup>43</sup> See *Communications Satellite Corp.*, 3 FCC. Rcd. 2643, ¶ 22 (noting that Commission’s inaction could have misled carrier into assuming its tariff was lawful).

<sup>44</sup> Such conduct has unfortunately become epidemic in the industry. The U.S. District Court for the Eastern District of Virginia recently chastised Sprint for indistinguishable self-help tactics, stating:

Sprint’s justifications for refusing to pay access on VoIP-originated traffic, and its underlying interpretation of the ICAs, defy credulity. The record is unmistakable: Sprint entered into contracts with Plaintiffs wherein it agreed to pay access charges on VoIP-originated traffic. Sprint’s defense is founded on post hoc rationalizations developed by its in-house counsel and billing division as part of Sprint’s cost cutting efforts, and the witnesses who testified in support of the

telecommunications conglomerate like Verizon would suddenly discover after seven years that it could not understand Pac-West's cross-references to the ILEC rates for the service territories listed in its tariff, especially when Verizon is billed by those very same ILECs for the same services provided by Pac-West (or in many cases, Verizon's LEC affiliate *is* the ILEC). The fact that the Commission did not suspend Pac-West's tariff when it was filed and that no carrier, including Verizon, has ever challenged the lawfulness of Pac-West's tariff until this late date speaks volumes.

After Verizon filed its Petition, the Commission refused a similar invitation by an IXC to find that a LEC's tariff was void *ab initio* in the *Northern Valley Order*.<sup>45</sup> In that case, Sprint argued, as Verizon does here, that Northern Valley Communications, LLC's ("Northern Valley") tariff did not contain "clear and explicit explanatory statements regarding rates and regulations" as required by Commission Rule 61.2(a).<sup>46</sup> And similar to Verizon's argument that Pac-West's reference to the *Seventh Report and Order* and *Eighth Report and Order* creates a hypothetical conflict with the specific rates incorporated by reference, Sprint argued that Northern Valley's definition of "end user" was ambiguous as it could be interpreted to allow Northern Valley to charge the full benchmark rate for providing access to a customer that did not pay a fee for Northern Valley's service.<sup>47</sup>

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defense were not at all credible.

Memorandum Opinion, *Central Telephone of Virginia, et al. v. Sprint Communications Co. of Virginia, Inc. et al.*, U.S. District Court, Eastern District of Virginia, Richmond Division, Civil Action No. 3:09-cv-720, at 3 (March 2, 2011).

<sup>45</sup> *Sprint Commc 'ns Co. L.P. v. Northern Valley Commc 'ns, LLC*, EB-11-MD-003, FCC 11-111 (July 18, 2011).

<sup>46</sup> *Id.* at ¶ 8.

<sup>47</sup> *Id.* at ¶ 9.

Although the Commission found Northern Valley’s tariff was unlawful, it nevertheless refused to declare that it was void *ab initio*.<sup>48</sup> The Commission reasoned that “Sprint has not established that Northern Valley engaged in furtive concealment, or any other deceptive conduct” that would support retroactively invalidating the tariff.<sup>49</sup> As the Commission stated, “the Tariff’s rates are no higher than the ILEC rates against which they are benchmarked pursuant to rule 61.26. The Commission has emphasized that tariffed rates within the rule 61.26 benchmark are accorded a ‘conclusive presumption of reasonableness.’”<sup>50</sup>

To the extent the Commission finds any deficiencies in Pac-West’s tariff – which it should not – it should come to the same conclusion here and deny Verizon’s request to find the tariff retroactively invalid. Verizon cannot credibly argue that Pac-West engaged in any “furtive concealment” – Pac-West’s tariffs have been on file with the Commission and published on its website, and Verizon was paying Pac-West’s tariffed charges for years without complaint. Further, Pac-West incorporated all of the ILEC rates for each applicable competing ILEC service territory, which by definition means that Pac-West’s rates have a “conclusive presumption of reasonableness.” Accordingly, the Commission should find that Pac-West’s tariff is deemed lawful. But in no circumstances should the Commission find that Pac-West’s tariff was void *ab initio*.

### **III. PAC-WEST’S POST-JUNE 2010 TARIFF ALSO COMPLIES WITH THE COMMISSION’S RULES**

Ignoring the scope of the Letter Ruling, Verizon disingenuously asserts that Pac-West filed an amended switched access tariff on June 8, 2010 in response to the *All American Order*.<sup>51</sup>

As explained above, because Pac-West’s pre-June 2010 tariff incorporated all of the specific

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<sup>48</sup> *Id.* at ¶ 17.

<sup>49</sup> *Id.* at ¶ 17.

<sup>50</sup> *Id.* at ¶ 18.

<sup>51</sup> Verizon Petition at 17.

rates contained in the competing ILECs' tariffs – and did not contain a provision that Pac-West would bill “at or below” these rates – Pac-West had no need to amend its tariff in response to the *All American Order*, which simply reaffirmed the Commission's 1995 *Nondominant Carriers Order* that prohibited carriers from tariffing a “range of rates.” Rather, as Verizon undoubtedly knows, Pac-West updated its tariff at this time to address *Verizon's* non-payment of Pac-West's access charges and the various hypertechnical tariff arguments that Verizon claimed excused it from paying anything to Pac-West for the services it provides to Verizon.<sup>52</sup>

Verizon argues, however, that Pac-West's June 2010 tariff revisions – which explicitly lists the rates it will charge for Switched Access Service and Local Transport Service by ILEC territory in its nine-state footprint<sup>53</sup> – are purportedly unlawful for the same reason as Pac-West's previous tariff, *i.e.*, Pac-West's stated commitment to bill pursuant to the *Seventh Report and Order* and *Eighth Report and Order* at Section 3.2(B) of its revised tariff.<sup>54</sup> As demonstrated above, this is a specious argument in terms of both the Commission's CLEC access charge regime in general and Pac-West's tariff in particular.<sup>55</sup> Any lawful CLEC tariff must necessarily incorporate the rules and regulations contained in these orders, and Section 3.2(B) does not permit Pac-West to charge any other rates than those specifically listed in Pac-West's post-June

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<sup>52</sup> Pac-West filed suit against Verizon in the Eastern District of California on June 10, 2010, two days after it filed these tariff amendments.

<sup>53</sup> Pac-West Tariff F.C.C. No. 3, §§ 3.2(C)-(D) (effective June 9, 2010) (attached hereto as Exhibit C).

<sup>54</sup> Verizon Petition at 18.

<sup>55</sup> Verizon also employs the same argument that Pac-West's July 16, 2010 tariff revision, which adds Section 3.2(G), is invalid because Pac-West incorporates all of the specific rates listed in the specific subsections of the cross-referenced ILEC tariffs identified in that section. Verizon Petition at 20-21; Pac-West Tariff F.C.C. No. 3, § 3.2(G) (effective July 17, 2010) (attached hereto as Exhibit D). Although this tariff provision is not even relevant to Pac-West's dispute with Verizon, Pac-West's incorporation of all of the specific rates of the identified ILECs leaves no doubt as to exactly what rates will be charged if Section 3.2(G) is implicated, for the same reasons identified above.

2010 tariff.

The Plain language of Sections 3.2(C) and 3.2(D) makes this clear. These sections provide that

Switched Access Service provides for all or any part of the transmission and switching of calls originating or terminating from the End User designated premises to the switch(es) and beyond to where the End User traffic is transported by Pac-West when the End User is served by Pac-West. Rates for Switched Access Service are listed by ILEC territory below:<sup>56</sup>

Local Transport Service provides for all or any part of the transmission and switching of call originating or terminating from the End User designated premises to the switch(es) and beyond to where the End User traffic is transported by Pac-West when the End User is served by a Carrier other than Pac-West. Rates for Local Transport are listed by ILEC territory below:<sup>57</sup>

Pac-West's tariff then lists the exact rate that will apply when it provides either Switched Access Service to its own end user or Local Transport Service when it is acting as an intermediate carrier in one of the applicable ILEC service territories listed in the chart. Any child that has played Battleship could calculate Verizon's liability under Pac-West's tariff with certainty for any given call because Pac-West can and does charge only the listed rate. The presence of Section 3.2(B) does not change this fact. Pursuant to the *Seventh Report and Order* and *Eighth Report and Order*, Pac-West will charge the applicable rate listed in Section 3.2(C), depending on the ILEC service territory, when it serves the end user, or it will charge the applicable rate listed in Section 3.2(D), again depending on the ILEC service territory, when it is acting as an intermediate carrier. There are no doubts as to Pac-West's tariff's proper application, as it contains "clear and explicit explanatory statements regarding" its rates and regulations.<sup>58</sup>

Verizon's metaphysical doubts about its potential liability to Pac-West is simply a

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<sup>56</sup> Pac-West Tariff F.C.C. No. 3, § 3.2(C).

<sup>57</sup> Pac-West Tariff F.C.C. No. 3, § 3.2(D).

<sup>58</sup> 47 C.F.R. § 61.2.

feigned ignorance based on its litigation and policy strategy to force carriers to accept its preferred \$0.0007 rate, rather than the conclusively reasonable rates contained in Pac-West's lawful tariff. Accordingly, Pac-West's post-June 2010 tariff is lawful and entirely consistent with the Commission's streamlined tariff filing requirements for nondominant carriers such as Pac-West. Therefore the Commission should not find that Pac-West's tariff was void *ab initio*.

#### **IV. CONCLUSION**

For all these reasons, the Commission should deny the relief requested by Verizon in its Petition.

Dated: August 8, 2011

Respectfully submitted,

/s/

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Michael B. Hazzard  
Joseph P. Bowser  
Adam D. Bowser  
ARENT FOX LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5369  
(202) 857-6029  
(202) 857-6395  
hazzard.michael@arentfox.com

*Counsel for Pac-West Telecomm, Inc.*

**CERTIFICATE OF SERVICE**

I, Edilma Carr, hereby certify that on this 8<sup>th</sup> day of August 2011, a true and correct copy of the foregoing **RESPONSE OF PAC-WEST TELECOMM, INC. TO VERIZON'S PETITION FOR DECLARATORY RULING** was served by electronic mail to the following individuals:

*(by ECFS)*

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

*(by E-mail)*

Curtis L. Groves  
Assistant General Counsel  
Verizon  
1320 N. Courthouse Road  
Arlington, VA 222101  
Curtis.Groves@verizon.com

*(by Email)*

Alexander P. Starr, Division Chief  
Anthony J. DeLaurentis, Special Counsel  
Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554  
Alex.Starr@fcc.gov  
Anthony.DeLaurentis@fcc.gov

*(by E-mail)*

Scott H. Angstreich  
Andrew Hetherington  
W. Josh Nichols  
Kellog Huber Hansen Todd Evans & Figel  
1615 M Street, NW  
Suite 400  
Washington, DC 20036  
sangstreich@khhte.com  
ahetherington@khhte.com  
jnichols@khhte.com

*(by Email)*

Albert Lewis, Division Chief  
Belinda Nixon  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554  
Albert.Lewis@fcc.gov  
Belinda.Nixon@fcc.gov

*(By Email)*

Best Copy & Printing, Inc.  
445 12th Street, S.W.  
Room CY-B402  
Washington, D.C. 20554  
fcc@bcpiweb.com

/s/

\_\_\_\_\_  
Edilma Carr