

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of

Pac-West Telecomm, Inc. and Verizon
Petitions for Declaratory Ruling

WC Docket No. 11-115

REPLY COMMENTS OF VERIZON

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Pac-West's federal switched access tariff, in effect from July 2008 to the present, violates the Communications Act and three separate Commission rules. The tariff does not set specific rates, but instead impermissibly purports to authorize Pac-West to charge a range of rates, while also containing improper and ambiguous cross-references to ILEC tariffs and Commission orders. Pac-West's attempts to defend its tariff fail.¹ Pac-West offers an interpretation of the tariff that conflicts with its plain language, ignores or misconstrues the requirements of the Act and the Commission's rules, and cannot escape the similarities between its tariff and the one invalidated in the *All American Order*.² The Commission, therefore, can and should find that Pac-West's tariff is patently unlawful and declare that it is void *ab initio*.

That ruling, moreover, would effectively moot all of the other issues the federal court referred, including the one raised in Pac-West's petition for declaratory ruling,³ so that the Commission need not address those issues. If the Commission does not moot Pac-West's

¹ See Response of Pac-West Telecomm, Inc. to Verizon's Petition for Declaratory Ruling, *Pac-West Telecomm, Inc. and Verizon Petitions for Declaratory Ruling*, WC Docket No. 11-115 (Aug. 8, 2011) ("Pac-West Resp.").

² *All American Telephone Co., Inc. Tariff F.C.C. No. 3*, Order, 25 FCC Rcd 5661 (Pricing Policy Division 2010) ("*All American Order*").

³ Pac-West Petition for Declaratory Ruling, *Petition of Pac-West Telecomm, Inc. for Declaratory Ruling Regarding Access Charges Assessed on VolP Traffic*, WC Docket No. 11-115 (June 29, 2011).

petition, it either should incorporate that petition into the USF-ICC Transformation Proceeding⁴ — where the Commission has a full record, rather than the handful of comments filed on this two-party dispute — or deny Pac-West’s petition. Pac-West does not and cannot show that the tariffed switched access charge regime applies to its VoIP 8YY traffic, or to any other IP-originated or IP-terminated traffic. The few commenters supporting Pac-West offer nothing to cure the many flaws in Pac-West’s petition.

I. PAC-WEST’S FEDERAL TARIFF IS VOID *AB INITIO*

A. Pac-West’s Federal Tariff Violates the Communications Act and Three Separate Commission Rules

1. Before June 9, 2010, Pac-West’s tariff did not contain any rates. Instead, it stated that “Pac-West Telecomm’s switched access rate will be billed in accordance with the . . . FCC orders”⁵ establishing and clarifying the CLEC switched access benchmark regime.⁶ Pac-West’s tariff also referenced entire ILEC federal access tariffs in multiple states “for all terms, conditions, and, except as provided herein, rates applicable to” Pac-West’s interstate switched access service.⁷

Pac-West’s tariff cross-referenced ILEC tariffs for the terms and conditions of its switched access service, as well as for the rates. But the tariff did not identify any specific rates in the ILECs’ tariffs that Pac-West would charge, instead stating that Pac-West’s “rate[s] will be

⁴ *Connect America Fund et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011).

⁵ Verizon Petition for Declaratory Ruling, *Petition for Declaratory Ruling Regarding Invalidity of Pac-West Telecomm, Inc. Tariff Pursuant to Primary Jurisdiction Referral*, WC Docket No. 11-115, at Exh. A, Tariff § 3.1.B (June 28, 2011).

⁶ *See Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (“*Seventh Report and Order*”); *Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004) (“*Eighth Report and Order*”).

⁷ Tariff § 3.2.A (Verizon Pet. Exh. A).

billed *in accordance with*” the Commission’s benchmark orders.⁸ Tariffed rates are “in accordance with” those orders if they “are at *or below* the benchmark.”⁹

These provisions of Pac-West’s pre-June 9, 2010 tariff violate Section 203 and three separate Commission rules. First, the promise to charge rates in accordance with — that is, at or below — the benchmark is a range-of-rates provision that violates Section 203, as the Pricing Policy Division held in the *All American Order*, following a decision of the D.C. Circuit.¹⁰

Second, Pac-West’s tariff violates 47 C.F.R. § 61.25, which permits a non-dominant carrier to cross-reference only “the rate provisions of another carrier’s FCC tariff publication” and only if certain conditions are met. Specifically, § 61.25 requires that the carrier *both* “specifically identify . . . the cross-referenced tariff[s] by Carrier Name and FCC Tariff Number,” *and* “specifically identify . . . the rates being cross-referenced” so that the tariff “leave[s] no doubt as to the exact rates that will apply.”¹¹ But Pac-West wholly failed to meet the second of those requirements — its tariff does not identify a single specific rate being cross-referenced.

Third, by cross-referencing entire ILEC tariffs — which contain dozens, if not hundreds, of pages of rates — Pac-West’s tariff is ambiguous and violates 47 C.F.R. § 61.2(a), as the Pricing Policy Division also held in the *All American Order*.¹² That rule requires that tariff

⁸ Tariff § 3.1.B (Verizon Pet. Exh. A).

⁹ *E.g.*, *Seventh Report and Order* ¶ 3 (emphasis added); *accord Eighth Report and Order* ¶ 4.

¹⁰ *See All American Order* ¶ 5 & n.13; *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1520 (D.C. Cir. 1995).

¹¹ 47 C.F.R. § 61.25(b)-(c).

¹² *See All American Order* ¶ 5 n.12.

language “contain clear and explicit explanatory statements regarding the rates,” in order to “remove all doubt” about the applicable rates.¹³

Fourth, Pac-West’s tariff violates 47 C.F.R. § 61.74(a), which generally prohibits a tariff from “mak[ing] reference to any other tariff publication or to any other document or instrument.”¹⁴ Although § 61.25 provides a limited exception to this rule, as explained above, Pac-West did not comply with the requirements of § 61.25. In addition, § 61.25 applies “only [to] the rate provisions of another carrier’s FCC tariff,”¹⁵ and Pac-West’s tariff cross-references the terms and conditions of ILEC tariffs, as well as the rates. Pac-West’s tariff also violates § 61.74(a) because it “is not self-contained, but instead cross references, impermissibly,” two “exogenous document[s]”¹⁶ — namely, the Commission’s benchmark orders.

Each of these grounds provides a sufficient basis to find that Pac-West’s pre-June 9, 2010 tariff is patently unlawful and, therefore, void *ab initio*. Together, the conclusion that Pac-West’s pre-June 9, 2010 tariff is void *ab initio* is inescapable.¹⁷

2. As for the period since June 9, 2010, Pac-West’s tariff remains patently unlawful and, therefore, void *ab initio*. One week after the Division released the *All American Order* — and the same day that All American, represented by the same law firm as Pac-West, filed a tariff

¹³ 47 C.F.R. § 61.2(a).

¹⁴ *Id.* § 61.74(a).

¹⁵ *Id.* § 61.25.

¹⁶ *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12946, ¶ 24 (1999) (“*Global NAPs Order*”), *recon. denied*, 15 FCC Red 5997 (2000), *petition for review denied*, *Global NAPs, Inc. v. FCC*, 247 F.3d 252 (D.C. Cir. 2001).

¹⁷ Pac-West suggests that the only question before the Commission is whether the omission of rates renders the tariff invalid. *See* Pac-West Resp. at 2. It plainly does, for the reasons Verizon has set forth. But Pac-West claims that its tariff is valid *because of* its cross-references to ILEC tariffs and Commission orders, despite the absence of rates; therefore, the lawfulness of those cross-references is properly before the Commission as well.

amendment in response to that order — Pac-West filed a tariff amendment in which it sought to cure the flaws its tariff shared with All American’s tariff.¹⁸ Pac-West failed.

Although Pac-West finally included in its tariff specific rates for certain ILEC territories in nine states, the tariff continues to state in § 3.2.B that “Pac-West Telecomm’s switched access rate *will be billed* in accordance with” the Commission’s benchmark orders.¹⁹ The mandatory language of this provision — which states how Pac-West’s rates “will be billed”²⁰ — means that Pac-West must bill rates that are at or below the benchmark *and not* the rates listed in § 3.2.C or § 3.2.D, if those rates are above the benchmark — as they appear to be.

In particular, as Verizon explained in its petition, Pac-West appears to have included both tandem and end office switching rates in its composite rates, even though it only switches calls once.²¹ Pac-West also claimed, in the district court, that it employs “geographically averaged composite rates,” based on “all of the ILEC rates” in the “multiple ILEC service territories” that its switches serve.²² In each of these respects, the rates listed in § 3.2.C and § 3.2.D violate the benchmark rules, under which a CLEC can “charge only for those services that [it] provide[s]” and can tariff rates that, in the aggregate, are no higher than the rates a specific ILEC would have

¹⁸ Pac-West denies that its tariff amendment was filed in response to the *All American Order*. See *id.* at 16-17. As shown below, its denial is not credible.

¹⁹ Tariff § 3.2.B (emphasis added) (Verizon Pet. Exh. C).

²⁰ See *Scotland Mem’l Hosp., Inc. v. Integrated Informatics, Inc.*, No. 02-civ-796, 2003 WL 151852, at *4 n.5 (M.D.N.C. Jan. 8, 2003) (“The phrase ‘will be,’ like the phrase ‘shall be,’ indicates mandatory intent.”); see *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 755 (8th Cir. 2000) (“The verb ‘will’ is defined, in part, as a ‘word of certainty.’”) (quoting Black’s Law Dictionary 1598 (6th ed. 1990)), *aff’d in part, rev’d in part, Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

²¹ See Verizon Pet. at 18 n.80.

²² Pac-West Reply Mem. at 5-6, *Pac-West Telecomm, Inc. v. MCI Communications Services Inc.*, No. 1:10-cv-1051-OWW-GSA (E.D. Cal. Mar. 7, 2011) (Dkt. No. 46).

charged had it provided those same services.²³ Pac-West tellingly offers no defense of these clearly unlawful practices, despite asserting that all of its listed rates comply with the Commission’s benchmark rules.²⁴

In all events, under the amended tariff, § 3.2.B — not § 3.2.C or § 3.2.D — sets Pac-West’s rates, because it specifies how Pac-West’s rates “will be billed”: namely, at some point within a range of rates. That section — and, therefore, the tariff — continues to violate Section 203 and §§ 61.2(a), 61.25 and 61.74(a), for all the reasons set forth above.

Finally, a section Pac-West added to its tariff in July 2010 to address 40 states, in addition to the nine addressed in its June 2010 amendment, violates 47 C.F.R. §§ 61.2(a) and 61.25.²⁵ The tariff contains no rates for any of those states, instead providing only that Pac-West will “mirror” rates found somewhere in the hundreds of pages of ILEC tariffs. As explained above with respect to Pac-West’s pre-June 9, 2010 tariff, this provision violates § 61.25 because it does not “specifically identify” the “exact rates that will apply.”²⁶ Likewise, the provision also

²³ *Eighth Report* ¶ 21.

²⁴ *See* Pac-West Resp. at 2 n.6. Pac-West also ignores that it refused to respond to Verizon’s discovery requests before the district court in which Verizon sought an explanation of how Pac-West calculated the composite rates on its invoices and in its post-June 9, 2010 tariff. Pac-West also refused to respond to discovery requests asking Pac-West to identify the work it performed in routing the calls for which it billed Verizon. Both pieces of information are necessary for a complete assessment of whether Pac-West complied with the benchmark. In all events, the Bureau deferred consideration of whether Pac-West’s rates comply with the benchmark — one of the issues the federal court referred — until after the Commission rules on these petitions.

²⁵ Tariff § 3.2.G (Verizon Pet. Exh. D).

²⁶ 47 C.F.R. § 61.25(c). This provision also violates § 61.25(a), because it references a Verizon tariff for seven states in which that tariff does not apply at all. *See* Verizon Pet. at 21-22.

violates § 61.2(a) because it is impermissibly ambiguous, no different from the invalidated All American tariff.²⁷

For all of these reasons, Pac-West’s effort to fix its tariff fell short and its tariff continues to be patently unlawful and, therefore, void *ab initio*.

B. Pac-West’s Defense of Its Tariff in Effect Before June 9, 2010 Fails

1. Pac-West’s Tariff, Like All American’s, Contains a Range-of-Rates Provision that Violates Section 203

a. In disputing that its pre-June 9, 2010 tariff contains an impermissible range-of-rates provision, Pac-West claims that the key provision is § 3.2.A, in which the tariff references ILEC tariffs “for all terms, conditions, and, except as provided herein, rates applicable” to Pac-West’s interstate switched access service.²⁸ Pac-West claims that this section identifies the precise rates it will charge, and that the statement in § 3.1.B (which Pac-West later re-numbered as § 3.2.B) that Pac-West’s “switched access rate will be billed in accordance with” the Commission’s benchmark orders means only that Pac-West will charge different rates depending on whether it is acting as an intermediate carrier or serving an end-user.²⁹

Although Pac-West asserts that this is “the only ‘reasonable construction’ of the plain language” of the tariff, its construction is not reasonable at all, because it gives no weight to key language in the tariff.³⁰ Specifically, Pac-West ignores that § 3.2.A references rates in the ILEC tariffs “*except as provided herein*”; the tariff “provide[s] herein” in § 3.1.B, which states in mandatory language what Pac-West’s rate “will be.” Therefore, Pac-West gets it backwards when it invokes the canon that the specific controls the general: § 3.1.B is the specific provision

²⁷ See *All American Order* ¶ 5 n.12.

²⁸ See *Pac-West Resp.* at 6-7.

²⁹ See *id.* at 7.

³⁰ *Id.*

defining what Pac-West's rate "will be," while § 3.2.A is the general provision cross-referencing every single one of the dozens (or hundreds) of rates in numerous ILEC tariffs.³¹ Even if there were any ambiguity about this — and there is none — that ambiguity must be construed against Pac-West, as the drafter of the tariff.³²

Pac-West, however, further claims that § 3.1.B is not a range-of-rates provision because, while the invalidated All American tariff included the words "at or below," "[t]here simply is no 'at or below' provision in Pac-West's tariff[]." ³³ As an initial matter, this does nothing to remedy Pac-West's failure to set out a specific rate, rather than to cross-reference rates found elsewhere in other carriers' tariffs, which itself violates §§ 61.2(a), 61.25, and 61.74(a) and is fatal to Pac-West's tariff as addressed further below. Even aside from that, Pac-West misinterprets § 3.1.B. That section states that Pac-West's "switched access rate will be billed *in accordance with*" the Commission's benchmark orders.³⁴ Any rate "at or below" the benchmark is a rate "in accordance with" the Commission's orders; Pac-West's commitment to charge a rate "in accordance with" those orders is a commitment to charge some rate within the range of rates permitted under the Commission's orders, not a specific rate. Therefore, although the words "at or below" are not found in § 3.1.B, that section is a range-of-rates provision, just like the similar provision in All American's tariff, and renders Pac-West's tariff invalid for the same reasons.

b. Indeed, by its actions, Pac-West acknowledged that its tariff shared the same flaw as All American's tariff. Pac-West acted immediately — although inadequately — to attempt to cure that shared flaw, filing a tariff amendment on one-day's notice a week after the release of

³¹ See Pac-West Resp. at 12.

³² See *AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742, ¶¶ 33, 45 (2011) ("*YMax Order*").

³³ See Pac-West Resp. at 8-9.

³⁴ Tariff § 3.1.B (Verizon Pet. Exh. B).

the *All American Order*. Although Pac-West denies that it was the *All American Order* that led it to file that amendment and add rates to its tariff,³⁵ its denial is based on two misleading statements and is not credible.

First, Pac-West initially filed its tariff amendment on one-day's notice on May 28, 2010,³⁶ not June 8, 2010, as Pac-West claims.³⁷ All American also filed its tariff revisions on one-day's notice on May 28, 2010, as the *All American Order* required.³⁸ The same law firm represents both All American and Pac-West, and the same lawyer at that firm signed the cover letter for both tariff filings.³⁹

Second, Pac-West initially filed suit against Verizon on May 12, 2010,⁴⁰ not June 10, 2010, as Pac-West claims.⁴¹ After a judge was assigned to the case, but before Verizon filed its answer, Pac-West withdrew its complaint on June 10, 2010⁴² and later that same day filed an identical complaint against Verizon in a different federal district in California.⁴³

³⁵ See Pac-West Resp. at 3, 16-17.

³⁶ See Verizon Pet. Exh. F.

³⁷ See Pac-West Resp. at 16. “[D]ue to a rejection from US Bank” — presumably of Pac-West’s filing fee — Pac-West on June 8, 2010, “refil[ed] . . . the[] revisions filed on May 28, 2010.” Verizon Pet. Exh. G. But for the bank’s rejection, Pac-West’s tariff amendment would have taken effect on May 29, 2010, just like All American’s tariff revisions.

³⁸ See *All American Order* ¶ 7 (ordering All American to file tariff revisions on one-day’s notice within 5 business days of May 21, 2010, which is May 28, 2010).

³⁹ Compare Verizon Pet. Exh. F with Verizon Reply Comments Exh. A.

⁴⁰ See Complaint, *Pac-West Telecomm., Inc. v. Verizon Business Global, LLC*, No. 10-2043 (N.D. Cal. May 12, 2010).

⁴¹ Pac-West Resp. at 17 & n.52.

⁴² See Notice of Dismissal Without Prejudice, *Pac-West Telecomm., Inc. v. Verizon Business Global, LLC*, No. 10-2043 (N.D. Cal. June 10, 2010).

⁴³ See Complaint, *Pac-West Telecomm., Inc. v. Verizon Business Global, LLC*, No. 10-1051 (E.D. Cal. June 10, 2010). On July 27, 2010, Pac-West amended its complaint to name the correct defendant, MCI Communications Services, Inc., and dismissed Verizon Business Global.

In short, Pac-West’s story — that it amended its tariff in response to Verizon’s dispute and filed suit against Verizon just days after amending the tariff — is based on misleading statements about the timing of its own actions. In reality, Pac-West amended its tariff on May 28, 2010, the *same day* All American amended its tariff, which was more than two weeks *after* Pac-West filed suit against Verizon. Pac-West therefore clearly understood that the *All American Order* applied equally to its tariff.

2. *Pac-West’s Tariff Lacks Any Rates and Independently Violates Three Commission Rules*

Pac-West also attempts to square its tariff with the Commission’s rules, but each of its attempts fail.

First, Pac-West never directly addresses 47 C.F.R. § 61.2(a), which requires that tariffs “contain clear and explicit explanatory statements regarding the rates,” in order to “remove all doubt as to their proper application.” In invalidating All American’s tariff, the Division found that the tariff independently violated this rule because the tariff’s “cross reference” to “over 300 pages of rates” in the ILEC’s tariff was “ambiguous.”⁴⁴ Pac-West simply denies that the Division reached this holding, asserting that what the Division “did not do . . . is reject the tariff because All American attempted to incorporate by reference *all* of the *specific* rates contained in the identified ILEC[’s] tariff.”⁴⁵ But that is exactly what the Division did. Pac-West’s cross-references to the entirety of ILEC tariffs suffer from the same ambiguity as All American’s cross-references.

⁴⁴ *All American Order* ¶ 5 n.12.

⁴⁵ Pac-West Resp. at 9.

Second, Pac-West asserts that 47 C.F.R. § 61.25 permits a CLEC to file a tariff that incorporates every single rate that appears in an ILEC tariff.⁴⁶ Even aside from the fact that, as shown above, the Division found in the *All American Order* that such a cross-reference is ambiguous and violates § 61.2(a), the plain language of § 61.25 permits no such thing. That rule allows a CLEC to cross-reference “the rate provisions of another carrier’s” tariff if it *both* “specifically identif[ies]” the “cross-referenced tariff by Carrier Name and FCC Tariff Number” *and* “specifically identif[ies]” the “rates being cross-referenced so as to leave no doubt as to the exact rates that will apply.”⁴⁷ Pac-West’s position — that by cross-referencing entire ILEC access tariffs by carrier name and tariff number it has satisfied *both* of those requirements, rather than just the first one — renders the second requirement pure surplusage.⁴⁸ Nor does cross-referencing an entire tariff by carrier name and tariff number, as Pac-West did, “specifically identify” the “exact rates that will apply.” A customer seeking to learn those exact rates must review pages upon pages of ILEC tariffs and guess which of those rates Pac-West intends to charge.

Third, Pac-West claims that the general prohibition on cross-references in 47 C.F.R. § 61.74(a) is irrelevant here, both because § 61.25 authorizes additional cross-references and because § 61.74(a) only prohibits “references to publicly *unavailable* instruments.”⁴⁹ Again, Pac-West is wrong.

⁴⁶ *Id.*

⁴⁷ 47 C.F.R. § 61.25(b)-(c).

⁴⁸ *See, e.g., National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668 (2007) (rejecting interpretation that “would render the regulation entirely superfluous”); *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (“This Court will not adopt an interpretation of a statute or regulation when such an interpretation would render the particular law meaningless.”).

⁴⁹ *See* Pac-West Resp. at 10-12.

Rule 61.74(a) applies here for two reasons. First, § 61.25 permits cross-references “only [to] the rate provisions” of a tariff. Yet Pac-West cross-referenced the ILEC tariffs not only for their rates, but also for “all [the] terms [and] conditions . . . applicable to” Pac-West’s interstate switched access service.⁵⁰ Rule 61.25 provides no authority for those cross-references in Pac-West’s tariff, which plainly violate § 61.74(a). Furthermore, as shown above, § 61.25 authorizes cross-references to rates only if they “specifically identify” the “exact rates” that will apply. Because Pac-West did not comply with this condition, as shown above, even its cross-references to ILECs’ rates are barred by the general prohibition on cross-references in § 61.74(a).

Furthermore, Pac-West’s suggestion that § 61.74(a) bars only cross-references to non-public documents cannot be squared with the text of the rule or the *Global NAPs Order*. Rule 61.74(a) prohibits cross-references to “any other tariff publication or to any other document or instrument.” Tariffs are publicly available documents, as are interconnection agreements, which federal law requires state commissions to make “available for public inspection.”⁵¹ The Commission found — and the D.C. Circuit agreed — that Global NAPs’ cross-reference of such a publicly available interconnection agreement violated § 61.74(a).⁵² Accordingly, Pac-West’s cross-reference to the *Seventh Report and Order* and *Eighth Report and Order* — which a customer would have to review and interpret to determine the rates Pac-West’s tariff authorizes it to charge — violates § 61.74(a), even though those orders are publicly available. Although Pac-West was required to tariff rates that *comply with* the rules the Commission adopted in those

⁵⁰ Tariff § 3.2.A (Verizon Pet. Exh. A).

⁵¹ 47 U.S.C. § 252(h).

⁵² See *Global NAPs Order* ¶ 24; *Global NAPs*, 247 F.3d at 258.

orders, it was not allowed — much less required, as Pac-West claims — to “incorporate the rules and regulations contained in those orders” in lieu of specifying its rates in its tariff.⁵³

C. Pac-West’s June 2004 Tariff Filing Is Not Deemed Lawful

There is no dispute that the Commission received Pac-West’s June 2004 tariff amendment on June 7, 2004,⁵⁴ and that the tariff filing took effect on June 19, 2004 — only 12 days later.⁵⁵ The Commission’s rules make clear that a tariff is not “filed with the Commission” until it is “received by the Commission.”⁵⁶ Therefore, that tariff filing did not take effect 15 days “after the date on which it is filed with the Commission” and so was never deemed lawful.⁵⁷ Relying on the Commission’s interpretation of the statute, a district court similarly found that a CLEC switched access tariff filing that arrived at the Commission less than 15 days before it took effect is not deemed lawful.⁵⁸

Ignoring the Commission’s rules, Pac-West argues that it is somehow the Commission’s fault that Pac-West’s tariff filing “wasn’t inspected and date stamped by the Commission’s

⁵³ Pac-West Resp. at 17. Contrary to Pac-West’s claim, *see id.* at 11 n.31, Verizon’s Tariff F.C.C. No. 16 does not cross-reference a Commission order. The cover page to that tariff states: “Pursuant to the Common Carrier Bureau’s Order, DA 01-1417, released June 14, 2001, all tariff material originally filed under Transmittal No. 46 is suspended for one day from June 16, 2001 to June 17, 2001.” That Bureau order had directed Verizon to “cite the ‘DA’ number of this Order as [its] authority to make th[e] tariff filing.” *Investigation of Bell Atlantic’s New Expanded Interconnection Offerings*, Order, 16 FCC Rcd 12450, ¶ 4 (2001). Nor is Verizon’s compliance with the Bureau’s order a cross-reference: a customer has no need to refer to the Bureau order to know that the Bureau suspended for one day certain of the pages of the tariff; that information appears on the face of the tariff. None of this is true of Pac-West’s cross-reference to the Commission’s benchmark orders.

⁵⁴ *See* Verizon Pet. Exh. E.

⁵⁵ *See id.* Exh. A.

⁵⁶ 47 C.F.R. § 61.23(b); *accord id.* § 61.58(a)(1).

⁵⁷ 47 U.S.C. § 204(a)(3).

⁵⁸ *See PAETEC Communications v. MCI Communications Servs., Inc.*, 712 F. Supp. 2d 405, 419-20 (E.D. Pa. 2010), *appeals pending*, Nos. 11-2268 *et al.* (3d Cir.).

mailroom until” Monday, June 7, 2004.⁵⁹ But Pac-West sent its tariff to the Commission “[v]ia Federal Express” on Friday, June 4, 2004.⁶⁰ Pac-West had no reason to believe the Commission would receive or begin reviewing that filing any earlier than the following Monday. In fact, it is surprising that the Commission received the filing so quickly, because Pac-West apparently sent its tariff to the wrong address. Pac-West’s cover letter is addressed to “1919 M Street, N.W.,”⁶¹ which not only is a building the Commission had left years earlier, but also is not the correct address for overnight deliveries.⁶²

Pac-West has no one but itself to blame for its failure to provide the Commission with the full 15-day notice period necessary to obtain deemed lawful status for a tariff filing.⁶³ The Commission did nothing to lead Pac-West to believe that its tariff was deemed lawful. Nor did the Commission — as Pac-West suggests — have an obligation to inform Pac-West of the fact that the 15-day notice period starts on the date the Commission receives a tariff filing, not the date a carrier gives the filing to Federal Express.⁶⁴ If Pac-West were seeking the benefit of

⁵⁹ Pac-West Resp. at 13-14.

⁶⁰ Verizon Pet. Exh. E.

⁶¹ *Id.*

⁶² *See FCC Announces a New Filing Location for Paper Documents*, Public Notice, 16 FCC Rcd 22165 (2001).

⁶³ Pac-West asserts that Verizon had the obligation to bring Pac-West’s failure to follow the Commission’s rules to its attention earlier, *see* Pac-West Resp. at 13 n.41, but that is absurd. Section 204(a)(3) provides a carrier with an *affirmative defense* to a claim for refunds by a customer. As with any affirmative defense, the carrier bears the burden of alleging and proving its defense; the customer has no obligation to point out, in advance (and even before a claim arises), that the affirmative defense is unavailable to the carrier.

⁶⁴ This case is therefore nothing like the one on which Pac-West relies, *see* Pac-West Resp. at 14 & n.43, in which a carrier expressly made the Commission aware it was exceeding its prescribed rate of return and the Commission took no action; even there, however, the Commission stressed that its inaction in the face of that affirmative evidence did not give rise to a legal defense to a claim that the carrier violated its prescribed rate of return (the case also did

deemed lawful status — and its cover letter submitting the June 2004 tariff amendment makes no mention of § 204(a)(3) — it was Pac-West’s obligation to ensure that it complied with the statute and the Commission’s rules.

Therefore, Pac-West’s claim that the Commission cannot declare its tariff void *ab initio* because it was deemed lawful fails. Pac-West’s remaining arguments that the Commission should not declare that its tariff is void *ab initio* also fail. Pac-West first claims that principles of equity counsel against a declaration that the tariff is void *ab initio*.⁶⁵ But where, as here, a carrier “had no rates on file because its tariff lacked an essential element,” the filed rate doctrine precludes a carrier from relying on equity to save its invalid tariff.⁶⁶ Pac-West next relies on the Commission’s recent decision not to declare a Northern Valley tariff void *ab initio*.⁶⁷ But unlike Pac-West’s tariff, Northern Valley’s tariff had become deemed lawful because Northern Valley had complied with the requirements of § 204(a)(3) and the Commission’s rules implementing that section in filing its (otherwise invalid) tariff.⁶⁸ Therefore, the Commission’s reasons for rejecting Sprint’s arguments that Northern Valley’s deemed lawful (but actually unlawful) tariff should be declared void *ab initio* cannot help Pac-West here.

D. Pac-West’s Defense of Its Tariff in Effect as of June 9, 2010 Fails

In defending its tariff, as amended effect June 9, 2010, Pac-West claims that new § 3.2.C and § 3.2.D “list[] the exact rate” Pac-West will charge for certain ILEC territories in nine

not involve a tariff claimed to be deemed lawful). *See Communications Satellite Corp.*, Memorandum Opinion and Order, 3 FCC Rcd 2643, ¶¶ 22-23 (1998).

⁶⁵ *See* Pac-West Resp. at 14-15.

⁶⁶ *Security Servs., Inc. v. Kmart Corp.*, 511 U.S. 431, 440 (1994).

⁶⁷ *See* Pac-West Resp. at 15-16.

⁶⁸ *See Sprint Communications Co. v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, File No. EB-11- MD-003, FCC 11-111, ¶ 17 (rel. July 18, 2011).

states.⁶⁹ Pac-West claims further that § 3.1.B — which it renumbered as § 3.2.B, but did not substantively change — “does not permit Pac-West to charge any rates other than those specifically listed.”⁷⁰

Pac-West’s claims cannot be squared with the plain text of § 3.2.B. As shown above, that section states that Pac-West’s “switched access rate will be billed in accordance with” the Commission’s benchmark orders. “Will be” is *mandatory* language⁷¹ — a fact Pac-West nowhere discusses or disputes — and therefore § 3.2.B requires Pac-West to charge rates that are at or below the benchmark, *regardless of* the “[r]ates . . . listed” in § 3.2.C and § 3.2.D. Indeed, as explained above, those listed rates appear to violate the benchmark for at least two reasons — Pac-West includes two switching rates while using only one switch and charges rates averaged over multiple ILEC territories — that Pac-West never addresses. Therefore, § 3.2.B precludes Pac-West from charging those listed rates, requiring it instead to charge some rate within the range of rates at or below the benchmark. Customers therefore, cannot rely on the rate charts in § 3.2.C and § 3.2.D to determine the rate the tariff requires Pac-West to charge.

At best for Pac-West, the interplay between § 3.2.B, § 3.2.C, and § 3.2.D in the tariff creates an ambiguity. But any ambiguity in the tariff must be construed against Pac-West, and in favor of Verizon and the natural reading of § 3.2.B.⁷² Nor is it relevant to the interpretation of the tariff that Pac-West has “charge[d] only the listed rate[s]” in § 3.2.C and § 3.2.D.⁷³ As the Commission recently reiterated, “[t]ariffs are to be interpreted according to the reasonable

⁶⁹ Pac-West Resp. at 17-18.

⁷⁰ *Id.* at 17.

⁷¹ *See supra* note 20.

⁷² *See YMax Order* ¶¶ 33, 45.

⁷³ Pac-West Resp. at 18.

construction of their language; neither the intent of the framers nor the practice of the carrier controls.”⁷⁴

Pac-West also offers no serious defense of its July 2010 addition of § 3.2.G, which purports to set the rates Pac-West will charge in 40 states but lists no rates for any of those states. Instead, Pac-West again claims that it is sufficient under § 61.2(a) and § 61.25 to reference ILEC tariff sections containing hundreds of pages, without ever identifying any of the specific rates being cross-referenced. Pac-West is wrong for all the reasons set forth above.⁷⁵ Although, as Pac-West notes, these 40 states are not at issue in the federal court litigation,⁷⁶ that does not change the fact that the provision purporting to set rates for those states is patently unlawful.

Finally, Pac-West suggests that, by demonstrating that Pac-West’s June and July 2010 tariff amendments did not cure the flaws in its tariff, Verizon’s petition goes beyond the scope of the district court’s primary jurisdiction referral.⁷⁷ Not so. The fourth issue the district court referred — and the one as to which the Enforcement Bureau directed Verizon to file a petition — is “whether Pac-West’s federal tariff’s omission of listed rates for switched access rates invalidates the tariff.”⁷⁸ That issue, by its terms, is not limited to Pac-West’s pre-June 9, 2010 tariff. And Pac-West’s tariff continues to “omi[t] . . . listed rates” both in § 3.2.G — which applies to 40 states for which Pac-West’s tariff lists no rates at all — and in § 3.2.B, which states

⁷⁴ *Qwest Communications Co. v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 8332, ¶ 13 (June 7, 2011).

⁷⁵ See Pac-West Resp. at 17 n.55. Pac-West also ignores that its cross-reference to Verizon’s Tariff F.C.C. No. 1 violates § 61.25(a) because seven of the thirteen states Pac-West lists with respect to that tariff were not covered by that tariff at the time Pac-West filed its amendment. See Verizon Pet. at 21-22 & n.91.

⁷⁶ See Pac-West Resp. at 17 n.55.

⁷⁷ See *id.* at 2.

⁷⁸ Order at 2, *Pac-West Telecomm, Inc. v. MCI Communications Services, Inc.*, No. 1:10-cv-1051-OWW-GSA (E.D. Cal. Apr. 8, 2011).

that Pac-West's "switched access rate will be" at an unspecified point within the range of rates at or below the benchmark.

II. THE COMMISSION SHOULD DENY PAC-WEST'S PETITION, EITHER BECAUSE IT IS MOOT OR ON THE MERITS

A. Granting Verizon's Petition Will Moot Pac-West's Petition

A ruling that Pac-West's federal switched access tariff, in effect from July 2008 to the present, is void *ab initio*, would leave Pac-West with no basis to continue to assess or attempt to collect charges based on a tariff that the Commission determined to be unlawful. Such a ruling would effectively moot Pac-West's claims in its petition and in the federal court litigation, and the Commission would have no need to address Pac-West's petition or the other issues the district court referred. This is the most sensible and efficient way for the Commission to proceed on the primary jurisdiction referral here.

In particular, this approach would enable the Commission to continue to avoid a piecemeal approach to dealing with the hotly contested issue of intercarrier compensation for VoIP traffic. Although the Commission must act — immediately — to reform intercarrier compensation and to address the treatment of VoIP services in particular, the Commission should make those decisions in the USF-ICC Transformation Proceeding, on the record compiled in that industry-wide docket, and not in the context of a two-party proceeding, in which only a handful of comments have been filed. The Commission took a similar approach earlier this year in the *YMax Order*, finding that, because YMax had violated the terms of its tariff, the Commission had no need to address AT&T's claims that YMax was providing an information service and therefore could not collect its tariffed switched access charges for VoIP traffic even if YMax had complied with its tariff.⁷⁹

⁷⁹ See *YMax Order* ¶ 1 & n.7.

Pac-West does not dispute that the Commission need not address Pac-West’s petition — or any of the other issues the district court referred — if the Commission grants Verizon’s petition. Instead, Pac-West briefly asserts that Verizon is “impermissibly” asking the Commission to grant “summary judgment.”⁸⁰ There is nothing impermissible about informing the Commission about the necessary — and undisputed — consequences of a ruling in Verizon’s favor. Nor is it at all uncommon for the Commission, as it did in the *YMax Order*, to resolve a two-party dispute on a threshold issue, while leaving other matters raised as part of that dispute — that are of industry-wide concern — to a rulemaking proceeding.

B. If the Commission Reaches the Merits, It Should Deny Pac-West’s Petition

As Verizon has shown, Pac-West’s petition — which asserts that tariffed access charges apply to its VoIP 8YY traffic because they (supposedly) always have — ignores the Commission’s repeated statements that it has never established either what intercarrier compensation, if any, is due on *any* interconnected VoIP traffic or the regulatory classification of VoIP, which is at the heart of the question whether the current tariffed access charge regime applies to VoIP traffic.⁸¹ In addition, although Pac-West relies on Commission decisions and rules that apply to traditional 8YY services, Pac-West does not provide traditional 8YY service, but instead aggregates VoIP traffic that originates on the Internet in many different locations and performs something that at best resembles a transit service, not an access service.⁸² Indeed, as AT&T notes, Pac-West provides only a “meager description” of the service it provides when handling VoIP 8YY traffic, which is not enough to determine whether it is providing a service that is compensable under the Commission’s rules governing CLEC switched access charges or

⁸⁰ See Pac-West Resp. at 2.

⁸¹ See Verizon Comments at 4-8.

⁸² See *id.* at 8-10.

the terms of Pac-West's tariff (aside from the fact that the tariff is void *ab initio*).⁸³ All of these reasons provide a sufficient basis to deny Pac-West's petition — which is limited to its VoIP 8YY traffic — on the merits, without the need to resolve in this docket broader issues about the regulatory classification of VoIP services and intercarrier compensation for VoIP traffic.

Alternatively, the Commission should incorporate Pac-West's petition, and the few comments filed regarding that petition, into the USF-ICC Transformation Proceeding. That industry-wide proceeding — in which the Commission has compiled an extensive record — is far better suited for reaching decisions on the questions of the regulatory classification of VoIP and the intercarrier compensation rules, if any, applicable to VoIP traffic.⁸⁴

Nonetheless, if the Commission were to address those questions here, it should find that VoIP services are information services and that existing tariffed switched access charges do not apply. As Verizon explained in its comments, VoIP services are information service for two independent reasons. First, VoIP services offer the capability to perform a net protocol conversion.⁸⁵ Second, VoIP services offer consumers an integrated suite of services that include

⁸³ See AT&T Comments at 2-4. Cox/Midcontinent's claim that VoIP traffic originated using "fixed services" is not "inherently or exclusively interstate," therefore, is irrelevant here, because there is neither evidence nor reason to believe that Pac-West's VoIP 8YY traffic is originated using fixed services. Cox Comments at 4-5. That claim is doubly irrelevant here because, as Verizon demonstrates, existing tariffed switched access charges do not apply to VoIP services because they are information services, not because they are jurisdictionally interstate. See Verizon Comments at 15-18. In all events, for reasons Verizon has explained elsewhere, all VoIP services *are* inseverable and, therefore, interstate for jurisdictional purposes. See, e.g., Comments of Verizon and Verizon Wireless, *Connect America Fund*, WC Docket No. 10-90 *et al.*, at 19-31 (Apr. 1, 2011).

⁸⁴ As Verizon noted in its comments, on July 29, 2011, Verizon and five other carriers submitted America's Broadband Connectivity Plan ("ABC Plan") in the USF-ICC Transformation Proceeding. This is a prospective plan and does not take a position on the appropriate intercarrier compensation treatment of VoIP traffic under the existing, broken intercarrier compensation system.

⁸⁵ See Verizon Comments at 11-13.

information-processing capabilities.⁸⁶ The Commission has found that the current tariffed access charge regime does not apply to information services or information service providers; it follows that existing tariffed access charges do not apply Pac-West VoIP 8YY traffic.⁸⁷

The few commenters supporting Pac-West's petition do nothing to refute these points. Instead, they criticize Verizon for disputing CLECs' invoices on the ground that VoIP services are information services to which existing tariffed switched access charges do not apply.⁸⁸ But multiple district courts have reached those same conclusions,⁸⁹ as have many other industry participants,⁹⁰ while the Commission, as explained above, has never reached the opposite conclusions. The Commission, however, has rejected the claim — repeated by two of the commenters supporting Pac-West — that Verizon violates the Communications Act by refusing to pay Pac-West's invoices seeking to assess its tariffed access charges for IP-originated or IP-

⁸⁶ *See id.* at 13-14.

⁸⁷ *See id.* at 15-18.

⁸⁸ *See* COMPTTEL Comments at 2-4; National Cable & Telecommunications Association (NCTA) Comments at 2-3; Cox Comments at 2-4.

⁸⁹ *PAETEC Commc'ns, Inc. v. CommPartners, LLC*, No. 08-Civ-0397, 2010 U.S. Dist. Lexis 51926 (D.D.C. Feb. 18, 2010); *Manhattan Telecomms. Corp. v. Global NAPs, Inc.*, No. 08-Civ-3829, 2010 U.S. Dist. Lexis 32315 (S.D.N.Y. Mar. 31, 2010); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp.2d 1055, 1081-83 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003), *aff'd*, 394 F.3d 568 (8th Cir. 2004).

⁹⁰ *See, e.g.*, Comments of Sprint Nextel, *Connect America Fund*, WC Docket No. 10-90 *et al.*, at 3-7 (Apr. 1, 2011); Comments of the Voice on the Net Coalition, *Connect America Fund*, WC Docket No. 10-90 *et al.*, at 4-5, 7-9 (Apr. 1, 2011); Comments of Global Crossing North America, Inc., *High-Cost Universal Service Support*, WC Docket No. 05-337 *et al.*, at 6-10 (Nov. 26, 2008); Comments of Google Inc., *Petitions of Embarq and Feature Group IP for Forbearance*, WC Docket Nos. 08-8 & 07-256, at 5-8 (Feb. 19, 2008).

terminated traffic.⁹¹ As the Commission reiterated earlier this year, the Act and the Commission’s rules “govern only what the provider may charge, not what the customer must pay”; therefore, a customer’s refusal to pay invoices on the ground that the tariffed charges are not, in fact, due “does not breach any provisions of the Act or Commission rules.”⁹²

⁹¹ See NCTA Comments at 3; Cox Comments at 3. Contrary to the claims of Cox, Verizon is not disputing Pac-West’s invoices because the traffic is “IP-in-the-middle.” See *id.* at 4.

⁹² *All American Tel. Co. v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723, ¶ 18 (2011).

CONCLUSION

The Commission should grant Verizon’s Petition and moot Pac-West’s Petition, but if it does not, it should either incorporate Pac-West’s Petition in to the ICC-USF Transformation Proceeding or deny it outright.

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August 23, 2011

REPLY EXHIBIT A

Arent Fox

May 28, 2010

VIA HAND DELIVERY AND FEDERAL EXPRESS

Transmittal No. 6

Marlene Dortch
Secretary
Federal Communications Commission
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Attn: Wireline Competition Bureau

Re: All American Telephone Company, Inc. – Filing of FCC Tariff No. 4 – Cancels and Replaces FCC Tariffs Nos. 1 and 2 - FRN: 009636713

Dear Ms. Dortch:

Enclosed please find, for filing, All American Telephone Company, Inc.'s ("All American") FCC Tariff No. 4, which cancels and replaces FCC Tariff No. 1 and FCC Tariff No. 2 in their entirety. This tariff is being filed on one day's notice. This FCC Tariff No. 4 is also filed in lieu of FCC Tariff No. 3, which was rejected in WCB/Pricing File No. 10-07, issued on May 21, 2010, and clarifies the pricing language and citation to the National Exchange Carrier Association Tariff No. 5, which Beehive Telephone Company, Inc., Nevada, the incumbent carrier where All American operates, is a participating member. In addition, Tariff No. 4 has been revised to reflect that All American is presently only offering service in Nevada.

The Company is a non-dominant carrier and therefore supporting documentation under Part 61.38 of the Commission's Rules is not required.

In accordance with Part 61.20(b)(1) of the Commission's Rules, this original Transmittal Letter, without attachments, FCC Form 159 and a check in the amount of \$815.00 have been sent via overnight delivery to U.S. Bank in St. Louis, MO as of this date.

A CD-ROM containing an electronic version of this filing is also included, pursuant to Part 61.20(c). Further, a copy of this filing and CD-ROM has been submitted to Best Copy and Printing, Inc., the Commission's printing service.

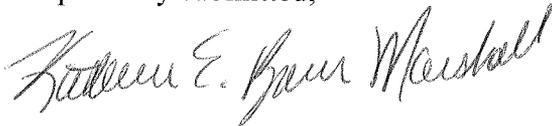
Arent Fox

Questions relating to this filing should be directed to:

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Please date stamp the duplicate of this filing and return to the undersigned in the enclosed envelope.

Respectfully submitted,



Katherine E. Barker Marshall

Enclosure

cc: Best Copy Services, Inc.
Chief, Tariff Bureau, Federal Communications Commission