FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WIDE VOICE, LLC, *Petitioner*, v. FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA, *Respondents*, MCI COMMUNICATIONS SERVICES, LLC, *Respondent-Intervenor*.	No. 20-70042 FCC No. 19-115 OPINION

On Petition for Review of an Order of the Federal Communications Commission

Argued and Submitted February 4, 2021
San Francisco, California

Filed July 30, 2021

Before: Johnnie B. Rawlinson and Patrick J. Bumatay, Circuit Judges, and Stephen J. Murphy III,* District Judge.

Opinion by Judge Rawlinson

SUMMARY**

Federal Communications Commission

The panel granted in part and denied in part a petition for review of the Federal Communications Commission ("FCC")'s order finding that a competitive local exchange carrier's tariffed rate was void *ab initio* because it violated the FCC's benchmarking rule by exceeding the established step-down rates.

This appeal involves tariffed charges that local exchange carriers impose on long-distance carriers for access to services that complete long-distance telephone calls. When customers, known as end users, purchase telephone service, they generally contract with two different entities: a local exchange carrier (LEC) and a long-distance carrier. The LEC owns the phone lines that connect directly to end users, and it is through the LEC's lines that users make local calls. In turn, the long-distance carrier connects end users' LEC

* The Honorable Stephen J. Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

networks to other LEC networks around the country, thus giving end users the ability to make long-distance calls.

The Telecommunications Act of 1996 amended the Communication Act of 1934, 47 U.S.C. § 204(a), by providing “that a carrier “may file with the [FCC] a new or revised charge . . . on a streamlined basis—[and]—[a]ny such charge . . . shall be deemed lawful” if the FCC does not suspend or investigate it within seven days (if the rate decreases) or 15 days (if the rate increases).” 47 U.S.C. § 204(a)(3). The 1996 Act further divided local exchange carriers into incumbent LECs (ILECs) and new entrants called competitive LECs (CLECs). The FCC initially left CLECs’ access rates unregulated. However, after discovering that CLECs’ rates generally exceeded that of ILECs, the FCC changed course to ensure that CLECs’ access charges were just and reasonable as compared to the access charges of ILECs. To achieve this goal, the FCC implemented the “benchmarking rule,” which prohibited a CLEC from pricing its services above the rate charged for such services by the competing ILEC. The FCC also promulgated corollary rules providing for price cap carriers, essentially ILECs, to reduce—or “step down”—their “Tandem-Switched Transport Access Service” rates. Tandem Switched Transport Service is the function of establishing a communications path to complete end users’ long-distance calls.

In 2019, Verizon Business Services filed a complaint with the FCC alleging that Wide Voice’s tariff was unlawful because it charged rates exceeding the step-down rates set forth in 47 CFR § 51.907(g)(2) and (h). Specifically, Verizon sought a declaration that § 51.907 applied to Wide Voice, as a CLEC, and that Wide Voice’s tariff purporting to authorize it to charge rates prohibited by §§ 51.907 and 61.26

was void *ab initio*. The FCC agreed with Verizon, concluding that Wide Voice's tariffed rate violated the benchmarking rule by exceeding the step-down rates charged by a competing ILEC for the same service. It reasoned that "when a benchmarking [CLEC] terminates traffic traversing a tandem owned by it or an affiliate (i.e., the service described in [§§] 51.907(g)(2) and (h)), it too must step down its rate as required by the benchmark." The panel held that the FCC's conclusion that Wide Voice's tariff was unlawful because it violated the benchmarking rule was neither arbitrary nor capricious.

However, the FCC's determination that the tariff was void *ab initio* after being "deemed lawful" in accordance with the governing statute was arbitrary and capricious. Applying § 204(a)(3) to the facts of this case, the panel held that once Wide Voice's tariff took effect without prior suspension or investigation it was "deemed lawful." As a result, only prospective remedies were available to the FCC after its finding that Wide Voice's tariff was unlawful. The panel concluded that the FCC impermissibly disregarded the "deemed lawful" status of Wide Voice's tariffs in contravention of Congress' unambiguously expressed intent to provide a mechanism to achieve that "deemed lawful" status. In addition, the FCC elided its own prior ruling, as well as prior court rulings precluding retrospective remedies for "deemed lawful" rates later determined to be unreasonable. For these reasons, the FCC's characterization of Wide Voice's tariff as void *ab initio* was arbitrary and capricious.

COUNSEL

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OPINION

RAWLINSON, Circuit Judge:

Competitive local exchange carrier (CLEC), Wide Voice, LLC (Wide Voice), petitions for review of an order from the Federal Communications Commission (FCC) finding that Wide Voice's tariffed rate was void *ab initio* because it violated the FCC's benchmarking rule by exceeding the established step-down rates. We hold that the FCC did not err in concluding that Wide Voice's tariff violated the benchmarking rule by deviating from the established step-down rates. However, the FCC's determination that the tariff was void *ab initio* after being "deemed lawful" in accordance with the governing statute was arbitrary and capricious. Therefore, we grant in part and deny in part the petition for review.

I. BACKGROUND

A. Legal Framework

This appeal involves tariffed charges that local exchange carriers (LEC) impose on long-distance carriers for access to services that complete long-distance telephone calls. When customers, known as end users, purchase telephone service, they generally contract with two different entities: a LEC, and a long-distance carrier. "The LEC owns the phone lines that connect directly to end users, and it is through the LEC's lines that users make local calls." *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1000 (D.C. Cir. 2016). In turn, "[t]he long-distance carrier connects end users' LEC networks to other LEC networks around the country, thus giving end users

the ability to make long-distance calls." *Id.* (citation omitted).

As an example, when a caller wishes to speak with a friend across the country, the call travels from the caller's LEC's lines to the long-distance carrier's lines and then from those lines to the friend's LEC's lines, across which it travels to the friend's phone. Under the traditional intercarrier compensation system, the long-distance carrier would pay access charges to the LEC. *See In the Matter of Access Charge Reform*, 16 FCC Rcd. 9923, 9926–27 (2001) (*Access Reform Order*) (explaining that customers pay their long-distance carriers for calls and that those carriers then pay access fees to the caller's LEC and the recipient's LEC).

Under § 201(b) of the Communications Act of 1934, rates for interstate communications services must be "just and reasonable." 47 U.S.C. § 201(b). To ensure compliance with this mandate, carriers must generally file a "schedule [of] charges"—commonly referred to as tariffs—with the FCC, listing interstate services and applicable rates. 47 U.S.C. § 203; *see also CallerID4u, Inc. v. MCI Commc'ns Servs. Inc.*, 880 F.3d 1048, 1052–53 (9th Cir. 2018). The FCC may suspend a tariff for a limited time prior to it becoming effective to investigate its lawfulness. 47 U.S.C. § 204(a)(1).

The Telecommunications Act of 1996 (1996 Act) amended § 204(a) by providing that a carrier "may file with the [FCC] a new or revised charge . . . on a streamlined basis—[and]—[a]ny such charge . . . shall be deemed lawful" if the FCC does not suspend or investigate it within seven days (if the rate decreases) or 15 days (if the rate increases). 47 U.S.C. § 204(a)(3). The 1996 Act also divided local

exchange carriers into incumbent LECs (ILECs)[1] and new entrants called competitive LECs (CLECs). *See* 47 U.S.C. §§ 251, 252; *see also Fones4All Corp,* 550 F.3d at 813.

The FCC initially left CLECs' access rates unregulated. *See Great Lakes Comnet*, 823 F.3d at 1001. However, after discovering that CLECs' rates generally exceeded that of ILECs, the FCC changed course to ensure that CLECs' access charges were just and reasonable as compared to that of ILECs. *See Access Reform Order*, 16 FCC Rcd. at 9931. To achieve this goal, the FCC implemented the "benchmarking rule," which prohibited a CLEC from pricing its services "above . . . [t]he rate charged for such services by the competing ILEC." 47 CFR § 61.26(b)(1); *see also Access Reform Order*, 16 FCC Rcd. at 9939.

In 2011, the FCC initiated comprehensive reforms of its intercarrier compensation regime and adopted a timeline for transitioning to a "bill-and-keep" framework for telecommunications traffic involving LECs. *In the Matter of Level 3 Commc'ns., LLC v. AT&T Inc.*, 33 FCC Rcd. 2388, 2389 (2018); *see also In the Matter of Connect Am. Fund*, 26 FCC Rcd. 17663 (2011) (*Transformation Order*). Under a bill-and-keep arrangement, carriers look to their subscribers, as opposed to other carriers, to recover their costs. *See Level* 3, 33 FCC Rcd. at 2388. In the *Transformation Order*, the FCC adopted a multi-year plan for

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[1] ILECs are carriers who were in existence at the time the 1996 Act took effect. *See Fones4All Corp. v. FCC*, 550 F.3d 811, 813 (9th Cir. 2008).

transitioning the rates of price cap carriers[2] to bill-and-keep by July 1, 2018. *See id.* at 2389.

The FCC promulgated corollary rules providing for price cap carriers to reduce—or "step down"—their "Tandem-Switched Transport Access Service"[3] rates in year six of the transition plan, and to further reduce those same charges to zero (i.e., bill-and-keep) in year seven. 47 CFR §§ 51.907(g)(2), (h). In year six (beginning July 1, 2017), the step-down required price cap carriers to "establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute." 47 CFR § 51.907(g)(2). Effective July 1, 2018, the year seven step-down required price cap carriers to reduce these rates to zero. *See* 47 CFR § 51.907(h). In sum, price cap carriers who owned the equipment at the end of a call could no longer charge other carriers to access that equipment. Instead, the price cap carrier was required to recoup its costs from its subscribers. *See Level 3*, 33 FCC Rcd. at 2388.

B. Procedural History

Wide Voice is a CLEC, and thus is not a price cap carrier. Wide Voice filed a tariff with the FCC setting forth two

[2] A price cap carrier is essentially an ILEC. *See* Cary Adickman, Special Access: The Harm of Premature Deregulation in Telecommunications, 31 Cardozo Arts & Ent. L.J. 113, 132, n.86 (2012).

[3] Tandem Switched Transport Service is the function of establishing a communications path to complete end users' long-distance calls. *See* 47 CFR § 51.903(i); *see also Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 489–90 (2002).

separate "terminating Tandem Switched Transport" rates. One rate was referred to as a "Standard" rate and the other was referred to as an "Affil PCL" rate. The Standard rate of up to $0.03993227 per minute, was "benchmarked to the price cap rates which are not subject to the step-down specified in [FCC] rules." The Affil PCL rate incorporated the year six and year seven step-downs as specified in the *Transformation Order* and in §§ 51.907(g)(2) and (h) of the FCC's rules. However, the step-down Affil PCL rate only applied to terminating traffic that traversed a Wide Voice tandem switch, with the terminating carrier being a Wide Voice-affiliated price cap carrier. However, Wide Voice has never actually charged the step-down Affil PCL rates of $0.0007 per minute (as of July 29, 2017) and $0 per minute (as of August 2, 2018) because Wide Voice has no price cap carrier affiliates. Stated differently, Wide Voice continued to charge other carriers for using Wide Voice's tandem switch even when the terminating carrier was a Wide Voice-affiliate. Wide Voice justified its charges on the basis that the step-down rates only applied if the terminating carrier is also a price cap carrier, which Wide Voice is not.

In 2019, Verizon Business Services (Verizon), a price cap carrier, filed a complaint with the FCC alleging that Wide Voice's tariff was unlawful because it charged rates exceeding the step-down rates set forth in §§ 51.907(g)(2) and (h). Specifically, Verizon sought a "declaration that § 51.907 applie[d] to Wide Voice, as a CLEC, and that Wide Voice's tariff purporting to authorize it to charge rates prohibited by §§ 51.907 and 61.26 [was] void *ab initio*." The FCC agreed with Verizon, concluding that Wide Voice's tariffed rate violated the benchmarking rule by exceeding the step-down rates charged by a competing ILEC for the same

service, and that the tariff was void *ab initio*. Wide Voice filed a timely petition for review of the FCC's decision.

II. STANDARD OF REVIEW

An FCC decision may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *California v. FCC*, 75 F.3d 1350, 1358 (9th Cir. 1996) (citation omitted). Under that standard, we must determine whether the FCC's decision "was a reasonable exercise of its discretion." *Id.* (citation and internal quotation marks omitted).

III. DISCUSSION

A. The Benchmarking Rule

It is undisputed that Wide Voice is a CLEC subject to the benchmarking rule. The benchmarking rule prohibits CLECs like Wide Voice from charging rates higher than those charged by a competing ILEC for the same service, *i.e.*, tandem-switched transport service. *See* 47 CFR § 61.26(b)(1). As the FCC pointed out, "[t]he next logical question is what rate may the competing [ILEC] charge for tandem-switched transport service."

ILECs are obligated to charge the step-down rates promulgated in §§ 51.907(g)(2) and (h). *See Level 3*, 33 FCC Rcd. at 2388–89 (clarifying that the step-down rates apply to tandem-switching and transport traffic that terminates at the end office of a price cap carrier). It naturally follows that a benchmarking CLEC must similarly step down its tandem-switched transport rate for traffic that traverses a tandem-switch owned by the CLEC or its affiliate that terminates at

the CLEC's end office. *See Transformation Order*, 26 FCC Rcd. at para. 807 (explaining that the step-down rates apply to CLECs via the benchmarking rule); *see also In re FCC 11-161*, 753 F.3d 1015, 1113 (10th Cir. 2014) (same).

The FCC concluded that Wide Voice's tariff was unlawful because it violated the benchmarking rule. It reasoned that "when a benchmarking [CLEC] terminates traffic traversing a tandem owned by it or an affiliate (i.e., the service described in [§§] 51.907(g)(2) and (h)), it too must step down its rate as required by the benchmark." This conclusion was neither arbitrary nor capricious. *See Access Reform Order*, 16 FCC Rcd. at 9939 (explaining that a benchmarking approach provides a simple way to determine the reasonableness of a CLEC's access rates).

B. Rates Filed on a "Streamlined" Basis

Wide Voice filed its tariff on a "streamlined" basis pursuant to 47 U.S.C. § 204(a)(3), which provides:

> A local exchange carrier may file with the [FCC] a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the [FCC] unless the [FCC] takes action under

> paragraph (1)[4] before the end of that 7-day or 15-day period, as is appropriate.

A tariff filed pursuant to this provision is "deemed lawful." *Id.* The record here is unequivocal—Wide Voice filed its tariff on a streamlined basis pursuant to § 204(a)(3), and the FCC did not take action within the time frame enumerated in § 204(a)(3). At that point, Wide Voice's streamlined tariff was "deemed lawful." *Id.* Nevertheless, the FCC ruled that the tariff filed by Wide Voice was void *ab initio*. Put simply, the FCC ruled that although Wide Voice's rate was "deemed lawful" under the statute, it was never actually lawful. But that ruling was inconsistent with the FCC's prior *Streamlined Tariff Order*, which prohibited retroactive liability for a "deemed lawful" rate. *See In the Matter of Implementation of Section 402(b)(1) (A) of the Telecommunications Act of 1996*, 12 FCC Rcd. 2170, 2183 (1997) (*Streamlined Tariff Order*) (clarifying that "tariff filings that take effect, without suspension, under [§] 204(a)(3) that are subsequently determined to be unlawful in a [§] 205 investigation or a [§] 208 complaint proceeding would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness").

The FCC seeks to avoid the import of its prior ruling by reasoning that Wide Voice's streamlined tariff did not "even meet the preliminary standard for a legal tariff filing, and

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[4] Paragraph 1 of the statute provides in pertinent part: "Whenever there is filed with the [FCC] any new or revised charge . . . , the [FCC] may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof . . ." 47 U.S.C. § 203(a)(1).

thus, cannot become a deemed lawful tariff by operation of § 204(a)(3)." However, as the D.C. Circuit has opined, "[t]he terms 'legal' rate and 'lawful' rate come to us burdened with (or illuminated by) the Supreme Court's decision in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 348 (1932)."[5] *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002). Thus, a tariff is "legal" if it "is procedurally valid—it has been filed with the [FCC], the [FCC] has allowed it to take effect, and it contains the published rates the carrier is permitted to charge." *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) (citations, alterations, and internal quotation marks omitted). A lawful tariff "is not only legal, but also contains rates that are 'just and reasonable' within the meaning of § 201(b)." *Id.* (citations omitted). Cognizant of this distinction, the FCC in its *Streamlined Tariff Order* acknowledged that "because [§] 204(a)(3) uses the phrase 'deemed lawful,' it must be read to mean that a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect." 12 FCC Rcd. at 2182.

Application of § 204(a)(3) to the facts of this case is straightforward. Once Wide Voice's tariff took effect without prior suspension or investigation it was "deemed lawful." As a result, only prospective remedies were available to the FCC after its finding that Wide Voice's tariff

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[5] In *Arizona Grocery*, the Supreme Court held that the Interstate Commerce Commission could not order a common carrier to pay reparations for charging a rate that the agency had explicitly approved at the time it was collected, but subsequently determined to have been unreasonable. *See* 284 U.S. at 389–90.

was unlawful. *See ACS of Anchorage*, 290 F.3d at 411 ("If a later reexamination shows [the tariffed rates] to be unreasonable, the [FCC's] available remedies will be prospective only. . . .") (citing *Streamlined Tariff Order*, 12 FCC Rcd. at 2181–82). "Refunds from lawful tariffs are impermissible as a form of retroactive ratemaking. . . ." *Virgin Islands Tel. Corp.*, 444 F.3d at 669; *see also Streamlined Tariff Order*, 12 FCC Rcd. at 2175–76 (recognizing Congress' intent to create a conclusive bar to refunds for tariffs "deemed lawful" under § 204(a)(3)) (citation omitted). These rulings unambiguously preclude refunds for tariffs "deemed lawful" and later found to be unreasonable. *ACS of Anchorage*, 290 F.3d at 412.

The D.C. Circuit concluded in *ACS of Anchorage* that "[t]he [FCC] may have been confused by its pre-§ 204(a)(3) habit of retroactively assessing the lawfulness of a rate long after it had taken effect without advance suspension or initiation of hearing." *Id.* at 413 (citation omitted). "But that is not the world of § 204(a)(3), where the rate itself, if filed and not suspended, is 'deemed lawful.'" *Id.*; *see also Streamlined Tariff Order*, 12 FCC Rcd. at 2176 (explaining that § 204(a)(3) effected a radical change from previous practice).

We follow the lead of the D.C. Circuit in concluding that the FCC impermissibly disregarded the "deemed lawful" status of Wide Voice's tariffs in contravention of Congress' unambiguously expressed intent to provide a mechanism to achieve that "deemed lawful" status. In addition, the FCC elided its own prior ruling, as well as prior court rulings precluding retrospective remedies for "deemed lawful" rates later determined to be unreasonable. For these reasons, the

FCC's characterization of Wide Voice's tariff as void *ab initio* was arbitrary and capricious.

IV. CONCLUSION

We **DENY** Wide Voice's petition for review of the FCC's determination that its tariffed rate violated the benchmarking rule; and **GRANT** its petition for review of the FCC's determination that its "deemed lawful" rates were void *ab initio*. Each party shall bear its costs on appeal.