

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF CALIFORNIA  
3

4 PAC-WEST TELECOMM, INC.,

5 Plaintiff,

6 v.

7 MCI COMMUNICATIONS SERVICES, INC.  
8 d/b/a VERIZON BUSINESS SERVICES,

9 Defendant.

1:10-cv-01051 OWW GSA

MEMORANDUM DECISION AND ORDER  
RE PLAINTIFF'S MOTION FOR  
PRIMARY JURISDICTION REFERRAL  
AND STAY PENDING FCC RULING.

(DOC. 32)

10 I. INTRODUCTION

11 Before the court is Plaintiff Pac-West Telecomm, Inc.'s  
12 ("Plaintiff") Motion for Primary Jurisdiction Referral and Stay  
13 Pending FCC Ruling. Doc. 32. Defendant MCI Communications  
14 Services, Inc. d/b/a Verizon Business Services ("Defendant")  
15 filed an Opposition (Doc. 45), to which Plaintiff replied (Doc.  
16 46).

17 II. FACTUAL BACKGROUND

18 Plaintiff is a competitive local exchange carrier that  
19 provides (1) interstate and intrastate exchange access service,  
20 and (2) local, long-distance and enhanced services on a wholesale  
21 basis to communication service providers. Doc. 17, ¶ 4. Defendant  
22 is an interexchange carrier, i.e., a long-distance carrier, that  
23 provides interstate and intrastate interexchange services. Doc.  
24 8, ¶ 74.

25 Plaintiff filed a Complaint against Defendant June 10, 2010  
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1 (Doc. 1) and a First Amended Complaint ("FAC") on July 27, 2010  
2 asserting five claims for relief: (1) collection action pursuant  
3 to federal tariff, (2) 47 U.S.C. § 206 - violation of 47 U.S.C. §  
4 201, (3) collection action pursuant to state tariffs, (4) quantum  
5 meruit, and (5) declaratory judgment. Doc. 17. Plaintiff alleges  
6 that it provides interstate exchange access under federal tariffs  
7 that are valid, fully compliant with legal requirements, and  
8 filed with the Federal Communications Commission ("FCC"). Doc.  
9 17, ¶¶ 23-26. Plaintiff alleges that it allowed Defendant to  
10 utilize its network to originate calls, but Defendant has refused  
11 to pay Plaintiff's tariff rates. Doc. 17, ¶ 2.

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13 Defendant filed an Answer to Complaint and Counterclaim on  
14 July 6, 2010 seeking relief from Plaintiff's alleged persistent  
15 billing and past collection of unlawful charges allegedly  
16 authorized by its tariffs. Doc. 8, ¶ 73. Defendant alleges that  
17 it does not owe Plaintiff the disputed amounts because: (1) the  
18 invoices contain a significant amount for charges associated with  
19 central offices that Plaintiff does not own (Doc. 8, ¶ 105); (2)  
20 Plaintiff's tariff was void on its face because, at least before  
21 the June 2010 amendment, (i) it was missing an essential element,  
22 i.e., the rate for a tariffed service, in violation of 47 C.F.R.  
23 § 61.2(a) (Doc. 8, ¶ 89), and (ii) it referenced other tariffs in  
24 violation of 47 C.F.R. § 61.74 (Doc. 8, ¶ 90); (3) Plaintiff was  
25 not permitted to charge Defendant its tariffed rates for calls  
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1 initiated or received by entities, including voice over Internal  
2 protocol ("VoIP"), that are not Plaintiff's end-user customers  
3 (Doc. 8, ¶¶ 119-124); (4) Plaintiff regularly billed Defendant at  
4 rates exceeding the legal maximum rate (Doc. 8, ¶¶ 126-127); (5)  
5 Plaintiff billed Defendant for work not performed (*Id.*); and (6)  
6 Plaintiff charged Defendant intrastate rates for interstate  
7 traffic (Doc. 8, ¶ 131).

### 9 III. LEGAL STANDARD

10 Primary jurisdiction "is a prudential doctrine under which  
11 courts may, under appropriate circumstances, determine that the  
12 initial decision making responsibility should be performed by the  
13 relevant agency rather than the courts." *Syntek Semiconductor*  
14 *Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir.  
15 2002). The primary jurisdiction doctrine may apply where "a court  
16 determines that an otherwise cognizable claim implicates  
17 technical and policy questions that should be addressed in the  
18 first instance by the agency with regulatory authority over the  
19 relevant industry rather than by the judicial branch." *Clark v.*  
20 *Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). "The  
21 doctrine does not require that all claims within an agency's  
22 purview be decided by the agency." *Brown v. MCI Worldcom Network*  
23 *Servs., Inc.*, 277 F.3d 1166, 1172 (9<sup>th</sup> Cir. 2002). "Nor is it  
24 intended to 'secure expert advice' for the courts from regulatory  
25 agencies every time a court is presented with an issue  
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1 conceivably within the agency's ambit." *Id.* (quoting *U.S. v. Gen.*  
2 *Dynamics Corp.*, 828 F.2d 1356, 1365 (9<sup>th</sup> Cir. 1987). It is  
3 appropriate where a case presents "(1) the need to resolve an  
4 issue that (2) has been placed by Congress within the  
5 jurisdiction of an administrative body having regulatory  
6 authority (3) pursuant to a statute that subjects an industry or  
7 activity to a comprehensive regulatory authority that (4)  
8 requires expertise or uniformity in administration." *Syntek*, 307  
9 F.3d at 781.

#### 11 IV. ANALYSIS

12 Prudential considerations of the primary jurisdiction  
13 doctrine applicable to this case make it appropriate to refer  
14 this case to the FCC.

15 First, the Ninth Circuit recognizes that "the primary  
16 jurisdiction doctrine is designed to protect agencies possessing  
17 'quasi-legislative powers' and that are 'actively involved in the  
18 administration of regulatory statutes.'" *Clark*, 523 F.3d at 1115  
19 (quoting *Gen. Dynamics*, 828 F.2d at 1365). "Charged with the  
20 administration of the Telecommunications and Federal  
21 Communications Acts, the FCC is such an agency." *Clark*, 523 F.3d  
22 at 1115. Here, the FCC is considering the VoIP rules.

23 Second, the "central focus of the primary jurisdiction  
24 doctrine" is "the desirability of uniform determination and  
25 administration of federal policy embodied in the agency's  
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1 orders." *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1089  
2 (9<sup>th</sup> Cir. 2006). This case presents the question of whether  
3 Plaintiff is entitled to charge tariffed rates for VoIP traffic.  
4 On February 9, 2011, the FCC issued a Notice of Proposed  
5 Rulemaking that states its intent to clarify this issue:

6 [W]e seek comment on the appropriate intercarrier  
7 compensation framework for voice over Internet protocol  
8 (VoIP) traffic. The Commission has never addressed whether  
9 interconnected VoIP is subject to intercarrier compensation  
10 rules and, if so, the applicable rate for such traffic.  
11 There is mounting evidence that this lack of clarity has not  
12 only led to billing disputes and litigation, but may also be  
13 deterring innovation and introduction of new IP services to  
14 consumers.

15 F.C.C. Notice of Proposed Rulemaking and Further Notice of  
16 Proposed Rulemaking, 2011 WL 466775, \* 157 (February 9, 2011).  
17 The Ninth Circuit has stated that the FCC's "development of a  
18 uniform regulatory framework to confront this emerging technology  
19 [i.e., VoIP] is important to federal telecommunications policy."  
20 *Clark*, 523 F.3d at 1115. Invoking the primary jurisdiction  
21 doctrine would facilitate uniformity of administration.

22 Third, this case requires resolution of highly technical  
23 telecommunications "issue[s] within the special competence of an  
24 administrative agency." *N. Cnty. Commc'ns Corp. v. Cal. Catalog &*  
25 *Tech.*, 594 F.3d 1149, 1155-1156 (9<sup>th</sup> Cir. 2010) (quoting *W. Radio*  
26 *Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1200 (9<sup>th</sup> Cir. 2008)).  
27 Defendant contends that the issues in this case are no more  
28 complex than those posed in any contract case and can be resolved

1 through a fact-specific inquiry into Plaintiff's tariffs and FCC  
2 rules and regulations. However, opining on the compensation of  
3 VoIP technology, calculating and allocating tariff rates, and  
4 interpreting technical terms such as "end user," "customer," and  
5 "carrier" require the expertise of the FCC. See *U.S. v. W. Pac.*  
6 *R.R. Co.*, 352 U.S. 59, 66 (1956) ("[W]here words in a tariff are  
7 used in a peculiar or technical sense, and where extrinsic  
8 evidence is necessary to determine their meaning or proper  
9 application, so that the inquiry is essentially one of fact and  
10 of discretion in technical matters, then the issue of tariff  
11 application must first go to the Commission.") (internal  
12 quotations omitted); *AT&T Corp. v. Bus. Telecom, Inc.*, 16  
13 F.C.C.R. 12312, 12325 (2001) ("In fact, courts are 'particularly  
14 deferential' when reviewing the Commission's evaluation of rates,  
15 because such agency action is far from an exact science and  
16 involves 'policy determinations in which the agency is  
17 acknowledged to have expertise.'").

20 Fourth, "[u]nder the filed-rate doctrine, no one may bring a  
21 judicial challenge to the validity of a filed tariff. As a  
22 corollary, no one may bring a judicial proceeding to enforce any  
23 rate other than the rate established by the filed tariff." *Brown*,  
24 277 F.3d at 1171. In its counterclaim, Defendant alleges that it  
25 does not owe Plaintiff the disputed amounts in part because  
26 Plaintiff's federal tariff is void on its face. Doc. 8, ¶ 142.

1 While a district court can interpret the terms of a tariff, a  
2 challenge to a federal tariff's validity must be brought to the  
3 FCC. See *Brown*, 277 F.3d at 1171-1172 ("The filed-rate doctrine  
4 precludes courts from deciding whether a tariff is reasonable,  
5 reserving the evaluation of tariffs to the FCC, but it does not  
6 preclude courts from interpreting the provisions of a tariff and  
7 enforcing that tariff.").

9 "In sum, this case requires the resolution of an issue  
10 within the jurisdiction of an administrative body exercising  
11 statutory and comprehensive regulatory authority over a national  
12 activity that requires expertise and uniformity in  
13 administration." *Syntek*, 307 F.3d at 782. Under these  
14 circumstances, the application of the primary jurisdiction  
15 doctrine is appropriate, and the matter is referred to the FCC.  
16 See *id.*

18 Where a court defers to an administrative agency under the  
19 primary jurisdiction doctrine, the court "has discretion either  
20 to retain jurisdiction or, if the parties would not be unfairly  
21 disadvantaged, to dismiss the case without prejudice." *Reiter v.*  
22 *Cooper*, 507 U.S. 258, 268-69, 113 S.Ct. 1213 (1993). Here, the  
23 statute of limitations may prevent Plaintiff from refiling its  
24 claim at the conclusion of its proceedings with the FCC. See  
25 *Syntek*, 307 F.3d at 782. "Also, where the court suspends  
26 proceedings to give preliminary deference to an administrative  
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1 agency but further judicial proceedings are contemplated, then  
2 jurisdiction should ordinarily be retained via a stay of  
3 proceedings, not relinquished via a dismissal." *Davel Commc'ns*,  
4 460 F.3d at 1091. Defendant agrees that any FCC decision would  
5 leave key issues unresolved (Doc. 45, 17), and further judicial  
6 proceedings may be necessary to resolve the claims for the unpaid  
7 tariffs after the FCC's disposition. See *U.S. Telepacific Corp.*  
8 *v. Tel-Amer. of Salt Lake City, Inc.*, 19 F.C.C.R. 24552, 24555  
9 (2004) ("[L]ong-standing Commission precedent holds that 'under  
10 sections 206-209 of the Act, the Commission does not act as a  
11 collection agent for carriers with respect to unpaid tariff  
12 charges, and that such claims should be filed in the appropriate  
13 state or federal courts.'"). The proceedings are STAYED pending  
14 the outcome of the FCC administrative process.  
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16  
17 Plaintiff asks the court to direct the FCC to decide the  
18 issues on a timely basis, not to exceed six months. Plaintiff,  
19 however, does not cite any authority that vests this authority in  
20 district courts. There is no formal transfer mechanism between  
21 the courts and the FCC, and the parties are responsible for  
22 initiating administrative proceedings and pursuing administrative  
23 remedies themselves. *Clark*, 523 F.3d at 1115.  
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25 Defendant does not oppose extending the dispositive motion  
26 filing deadline by six months; however, it does oppose extending  
27 the discovery deadlines by six months. Plaintiff contends that a  
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1 referral to the FCC will reduce the unresolved issues in this  
2 case and narrow the scope of discovery. Efficiency requires  
3 staying this case, including discovery, for six months in light  
4 of the 2011 NPRM; however, the stay shall not affect outstanding  
5 discovery requests, which must be resolved.

6  
7 It is recognized that the court lacks jurisdiction to order  
8 the FCC to hear or decide Plaintiff's claims. The state claims  
9 are incidentally affected by FCC review. Discovery shall continue  
10 as to state claims unless amounts claimed to be owed will be  
11 entirely decided by FCC review.

12 V. CONCLUSION

13 For the reasons stated:

- 14 1. Plaintiff's Motion for Primary Jurisdiction Referral and  
15 Stay Pending FCC Ruling is GRANTED. This case is STAYED for  
16 six months. This shall include the entire case schedule and  
17 trial date.  
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19 2. Plaintiff shall immediately initiate administrative  
20 proceedings before the FCC to address the tariff and billing  
21 dispute.  
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23 3. Plaintiff shall submit a proposed form of Order consistent  
24 with this Memorandum Decision within five days of electronic  
25 service of this memorandum decision.  
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27 4. The parties shall submit a status report within 120 days to  
28 inform the court of the progress of the administrative

1 proceedings before the FCC.

2 SO ORDERED.

3 DATED: March 22, 2011.

4 /s/ Oliver W. Wanger  
5 Oliver W. Wanger  
6 United States District Judge  
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