

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Charter Fiberlink - Illinois, LLC)	
)	
v.)	
)	
MCI Communications Services, Inc.)	Docket No. 12-0073
d/b/a Verizon Business Services)	
)	
Complaint pursuant to § 5/10-108 and § 5/13-101)	

CHARTER’S OPPOSITION TO VERIZON’S MOTION TO DISMISS

Charter Fiberlink - Illinois, LLC (“Charter”) hereby submits this Opposition to the Motion to Dismiss filed by MCI Communications Services, Inc., d/b/a Verizon Business Services (“Verizon”), in accordance with the briefing schedule adopted at the February 21, 2012 prehearing conference in this docket.

INTRODUCTION

Charter’s Complaint presents a straightforward claim for payment based on Verizon’s unjustified refusal to pay the tariffed rates for Charter’s intrastate telecommunications services. Those telecommunications services fall squarely within this Commission’s jurisdiction, and the dispute is within the Commission’s power to resolve. As explained in the Complaint, Charter provides intrastate access services in Illinois to interexchange carriers such as Verizon pursuant to an intrastate access tariff on file with this Commission. Verizon—alone among all carriers that interconnect with Charter—has now decided to dispute those charges by substantially underpaying the amounts billed by Charter between August 2010 and December 2011. This Commission already has held that it has jurisdiction over such disputes, and has required carriers

that disregarded the tariffed rates for intrastate, carrier-to-carrier services to pay those rates in full. Under state and federal law, Charter is entitled to the same relief here.

Because Charter's entitlement to relief follows directly from settled law, Verizon does its best to change the subject. Rather than addressing its failure to pay the tariffed rate for the intrastate exchange access service it obtained over the last two years, Verizon focuses on the regulatory classification of Charter's *retail* voice service—which is *not* at issue in this proceeding. The central theory underpinning Verizon's unwillingness to pay is that the exchange access service at issue is an “interconnected VoIP service” or an “information service,” and that Verizon is therefore exempt from paying the tariffed rates for that service. But those characterizations of Charter's intrastate access service are simply wrong. As explained below, this Commission and the FCC both have made clear that the carrier-to-carrier exchange access service Charter provides between its switching facilities and Verizon's point of presence is a distinct wholesale telecommunications service, and that the classification of a carrier's separate retail service—in this case, Charter's retail VoIP service—has no bearing on intercarrier rights and obligations. Verizon's effort to conflate the retail service that Charter provides to consumers with the wholesale service it provides to interexchange carriers is disingenuous, as evidenced by Verizon's past recognition of the Section 251 rights of telecommunications carriers like Charter that transmit voice traffic that originates or terminates in Internet Protocol (“IP”) format.¹

Many of the arguments in Verizon's motion proceed directly from this erroneous attempt to redefine Charter's intrastate access service as “VoIP.” For instance, Verizon argues that

¹ See, e.g., Comments of Verizon, WC Docket Nos. 06-44 and 06-55, at 3 (filed Apr. 10, 2006) (“Verizon 2006 Declaratory Ruling Comments”) (noting that Verizon interconnects and exchanges traffic as a wholesale carrier on behalf of retail VoIP providers, and arguing that the classification of the retail VoIP services “has no bearing on Verizon's rights or on the obligations of the independent LECs with which Verizon seeks to interconnect and exchange traffic”).

Section 13-804 deprives this Commission of jurisdiction in this case because the provision precludes regulation of “Interconnected VoIP services” or “information services.” But that is not the service at issue in this proceeding. Verizon entirely ignores the fact that the tariffed access service it purchases from Charter is a wholesale, non-VoIP telecommunications service. Verizon makes the same mistake in arguing that the FCC’s *Vonage Order*, which preempts state regulation of nomadic retail VoIP services, should preempt Commission action in this case. Because the wholesale exchange access service that Charter provides to Verizon is not a retail VoIP service, the *Vonage Order* has no bearing here. Verizon similarly attempts to pull the wool over the Commission’s eyes in arguing that Charter’s exchange access service is an “information service” to which “state access charge rules cannot apply,” apparently under the so-called “ESP exemption.” But, again, both this Commission and the FCC have held otherwise—by classifying exchange access services as “telecommunications services” and by imposing access charges on telecommunications traffic terminated in IP format.

Verizon likewise tries its hand at recharacterizing the relief Charter seeks. Verizon either misunderstands Charter’s Complaint or is engaging in deliberate obfuscation. Contrary to Verizon’s contentions, Charter does not seek “prospective” relief under its previously applicable tariff, but rather seeks only retrospective relief in the form of full payment of the bills that Verizon substantially underpaid between August 2010 and December 2011—a period in which the rates in Charter’s pre-2012 tariff were in effect. Verizon also suggests at various points that the FCC’s recent *ICC Reform Order*,² which established a new intercarrier compensation regime effective December 29, 2011, and the new intrastate access tariff filed by Charter to implement

² See *Connect America Fund; Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 10-90, CC Docket No. 01-92, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (“*ICC Reform Order*”).

that *Order* should govern the access charges at issue here.³ But the *ICC Reform Order* makes clear that its new “intercarrier compensation framework for VoIP-PSTN traffic will apply prospectively” and does not affect “preexisting law.”⁴ The *Order* does not affect (much less preempt) this Commission’s authority to require payment of the access charges accrued between August 2010 and December 2011, which are the only charges in dispute in this case.⁵ Accordingly, the operative tariff is the one attached to Charter’s Complaint, as it contains the applicable rates during the period of Verizon’s substantial underpayment.

Verizon further claims that the Illinois Public Utilities Act prevents the Commission from issuing a “declaratory ruling” of general applicability, but Charter seeks no such thing. Rather, Charter’s Complaint seeks a case-specific determination that Verizon’s underpayment violates Charter’s duly filed and presumptively reasonable tariff. The Complaint also does not seek to recover for consequential damages, punitive damages, or other forms of “damages” prohibited by the Public Utilities Act; instead, it requests the same relief the Commission has granted in other access charge disputes—an order directing the delinquent party to pay its outstanding bills. Finally, the Complaint does not seek retroactive ratemaking, but rather the enforcement of rates *previously established* as a matter of law under Charter’s intrastate access tariff.

Despite Verizon’s attempts to muddy the waters, Charter’s request is clear and simple: the Complaint merely seeks to collect payment from Verizon for the purchase of intrastate access services provided by Charter between August 2010 and December 2011 at the rates established

³ See, e.g., Verizon Mot. to Dismiss at 2, 3, 5, 7.

⁴ *ICC Reform Order* ¶ 945.

⁵ Cf. Verizon Mot. to Dismiss at 8 (“Any dispute between Charter and Verizon is . . . solely retrospective.”). In any event, Verizon glosses over the fact that its unilateral decision to pay \$.0007 per minute rather than the tariffed interstate access rate still resulted in substantial underpayments, even apart from its failure to pay the then-applicable *intrastate* rate.

by the tariff in force during that period. This Commission plainly has authority to order Verizon to pay Charter the tariffed rates for these intrastate wholesale telecommunications services, and it should do so here to remedy Verizon's unjustifiable resort to self-help.

DISCUSSION

I. THIS COMMISSION HAS JURISDICTION TO GRANT THE REQUESTED RELIEF

Verizon devotes the lion's share of its motion to conjuring up jurisdictional bars to the Complaint under state and federal law—arguing not only that Charter is proceeding under the wrong statute, but also that, because its intrastate access service is supposedly “VoIP” or an “information service,” Charter cannot seek relief under *any* provision of Illinois law. But as Charter pointed out in its Complaint, and as discussed in greater detail below, the Commission's 2009 order in the *Global NAPs* case is squarely on point and thus forecloses Verizon's arguments. Although Verizon certainly was aware of this case from Charter's Complaint, Verizon fails even to cite it, much less distinguish it. Verizon thus cannot establish that the Commission lacks jurisdiction over this case.

A. Illinois Law Authorizes This Commission to Grant the Requested Relief

1. Charter's Complaint Was Properly Brought Under Section 10-108 of the PUA

Verizon begins by arguing that the Complaint's reliance on Section 10-108 of Public Utilities Act prevents the Commission from exercising jurisdiction and granting the relief Charter seeks.⁶ According to Verizon, because Section 10-108 refers to violations of “this Act, or of any order or rule of the Commission,” and because the Public Utilities Act purportedly “imposes no requirement to pay intrastate switched access charges,” Charter cannot seek relief

⁶ Verizon Mot. to Dismiss at 10-12.

under Section 10-108 and is without a remedy before this Commission.⁷ That argument cannot be squared with the relevant precedent. This Commission has recognized its broad authority to consider complaints brought under Section 10-108, and has confirmed in particular that Section 10-108 is the proper vehicle for pursuing general claims related to unpaid or underpaid access charges.

In construing Section 10-108, the Commission has held that the provision grants it broad “jurisdiction to hear complaints involving the entities it regulates.”⁸ This jurisdiction plainly extends to a complaint such as Charter’s, which seeks a Commission order directing a carrier regulated by the Commission to pay the intrastate access rates filed with the Commission. Nor can Verizon evade the Commission’s jurisdiction by asserting that there is “no requirement to pay intrastate switched access charges” under Illinois law, and therefore no duty to comply with Charter’s intrastate access tariff.⁹ As this Commission and Illinois courts have repeatedly recognized, a duly filed public utility tariff is, for all intents and purposes, “a statute, not a contract, and has the force and effect of a statute.”¹⁰

It should come as no surprise, therefore, that this Commission has allowed parties to bring claims for unpaid access charges under Section 10-108. A recent and particularly relevant example is the *Global NAPs* case, in which AT&T brought a complaint under Sections 10-108 and 4-101 seeking payment of tariffed intrastate access charges—just as Charter is doing in this

⁷ *Id.* at 10-11.

⁸ *See, e.g., CBeyond Communications, LLC v. Illinois Bell Telephones Co.*, I.C.C. Docket No. 10-0188, Proposed Order, 2011 WL 2113242 (rel. May 15, 2011).

⁹ Verizon Mot. to Dismiss at 11.

¹⁰ *Globalcom, Inc. v. Illinois Commerce Commission*, 347 Ill. App. 3d 592, 600 (2004); *see also Sage Telecom, Inc.*, Arbitration Decision, I.C.C. Docket No. 03-0570, 2003 WL 23472834, at *12 (2003); *Illinois Central Gulf Railroad Co. v. Sankey Brothers*, 67 Ill. App. 3d 435, 439 (1978), *aff’d*, 78 Ill. 2d 56 (1979).

case.¹¹ There, it was sufficient for AT&T to allege that Global NAPs “had violated the parties’ interconnection agreement (‘ICA’) and AT&T Illinois’ ICC Tariff No. 21 by refusing to pay any of the amounts billed by AT&T Illinois for certain intrastate services.”¹² Nowhere did the Commission suggest that AT&T’s decision to proceed under Section 10-108 was improper; to the contrary, it expressly concluded that “the Commission has jurisdiction over the parties and the subject matter herein.”¹³ Indeed, the Commission went on to grant the relief AT&T sought and to direct Global NAPs to pay its outstanding bills to AT&T.¹⁴ Charter’s Complaint proceeds under the same provisions and seeks the same relief; Verizon’s Section 10-108 arguments thus must fail.

In any event, Verizon is wrong when it suggests that Charter is invoking the Commission’s jurisdiction *only* under Section 10-108. The Complaint also locates the Commission’s jurisdiction over this case in Section 4-101 of the Public Utilities Act, which provides that the Commission has “general supervision of all public utilities,”¹⁵ as well as in Section 13-101 of the Act, which expressly extends the Commission’s jurisdiction to matters concerning “telecommunications rates and services and the regulation thereof.”¹⁶ Verizon does not challenge these alternative bases for jurisdiction, and thus concedes by its silence that these provisions do grant the Commission authority to consider and grant the relief requested.

¹¹ See *Illinois Bell Telephone Company, Inc. v. Global NAPs Illinois, Inc.*, I.C.C. Docket No. 08-0105, Order (rel. Feb. 11, 2009) (“*Global NAPs*”), *aff’d*, *Global NAPs Illinois, Inc. v. Illinois Commerce Commission*, 749 F. Supp. 2d 804 (N.D. Ill. 2010).

¹² *Id.* at 1.

¹³ *Id.* at 62.

¹⁴ *Id.*

¹⁵ Complaint ¶ 8 (quoting 220 ILCS 5/4-101).

¹⁶ *Id.* (quoting 220 ILCS 5/13-101).

2. Section 13-804 of the PUA Does Not Divest the Commission of Jurisdiction over This Case

Verizon then argues Section 13-804 of the Public Utilities Act, codified at 220 ILCS 5/13-804, deprives the Commission of jurisdiction in this case.¹⁷ But the statute does no such thing. The statute provides only that the Commission lacks jurisdiction to “regulate the rates, terms, conditions, quality of service, availability, classification, or any other aspect of service regarding . . . Interconnected VoIP services [or] . . . information services, as defined in 47 U.S.C. § 153(2[4]).”¹⁸ The statute says nothing about the Commission’s authority to regulate the wholesale exchange access services—which are telecommunications services under federal and state law—at issue here.

Verizon nevertheless asserts without basis that the services that Charter provides to Verizon “are both ‘interconnected VoIP services’ and ‘information services.’”¹⁹ That argument ignores the operative federal definitions of those terms referenced in the Illinois statute. Federal law defines “interconnected VoIP service” as a *retail* offering to *end-user* consumers, that “[e]nables real-time, two-way voice communications,” “[r]equires a broadband connection from the user’s location,” “[r]equires Internet protocol-compatible customer premises equipment,” and “[p]ermits users generally to receive calls that originate on the public switched telephone network.”²⁰ By contrast, the service that Charter provides to Verizon, and for which Charter has billed Verizon under its intrastate access tariffs, is “exchange access” service. The definition of “exchange access”—“the offering of access to telephone exchange services or facilities for the

¹⁷ Verizon Mot. to Dismiss at 9-10.

¹⁸ 220 ILCS 5/13-804. Recent amendments to the Communications Act have moved the definition of “information service” from 47 U.S.C. § 153(20) to § 153(24).

¹⁹ Verizon Mot. to Dismiss at 10.

²⁰ 47 C.F.R. § 9.3; *see also* 47 U.S.C. § 153(25) (adopting the definition appearing in 47 C.F.R. § 9.3).

purpose of the origination or termination of telephone toll services”—makes clear that it is a *wholesale*, carrier-to-carrier telecommunications service, and is separate and apart from whatever *retail* services a carrier may also provide.²¹ To be sure, Charter offers its end-user customers an interconnected VoIP service that falls within Section 13-804, but that is *not* the service that Charter provides to Verizon.

Nor can Verizon prevail on its theory that Charter’s exchange access service is an “information service” exempt from Commission jurisdiction. The FCC has squarely held to the contrary, explaining that exchange access and other intercarrier services offered on a common carrier basis are “telecommunications services,” not “information services.”²² In any event, the format of the traffic exchanged between Charter and Verizon does not resemble “information services” traffic in any way. As Charter explained in its Complaint, “[t]he wholesale carrier-to-carrier service that Charter provides to Verizon involves the exchange of traffic in Time Division Multiplexed (‘TDM’) format, which is used for traditional circuit-switched telephone service.”²³ Verizon does not dispute this fact, admitting in a parallel case that it “exchanges traffic with Charter in traditional TDM format, whether a call originates or terminates as a VoIP call or a circuit-switched telephone call.”²⁴ There is thus no doubt that the wholesale service at issue here

²¹ 47 U.S.C. § 153(20).

²² *Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 ¶¶ 11-12 (2007) (“*TWC Declaratory Ruling*”) (holding that the definition of ‘telecommunications services’ . . . includes wholesale services when offered on a common carrier basis,” such as “exchange access service”).

²³ Complaint ¶ 12.

²⁴ Answer of MCI Communications Services, Inc. ¶ 12, *Charter Fiberlink-Georgia, LLC v. MCI Communications Services, Inc. d/b/a Verizon Business Services*, Ga. PSC Docket No. 35269 (filed Feb. 24, 2012); *see also* Verizon 2006 Declaratory Ruling Comments at

is simply the exchange of voice traffic in traditional TDM format—a quintessential telecommunications service.²⁵

Verizon attempts to sidestep this clear precedent by suggesting elsewhere in its motion that, because VoIP purportedly “is an information service,” such a classification of Charter’s *retail* service somehow affects Charter’s ability to seek relief before this Commission regarding its *wholesale* exchange access service.²⁶ But this argument is doubly wrong. First, the FCC has made clear that “[t]he regulatory classification of the service provided to the ultimate end user *has no bearing* on the wholesale provider’s rights as a telecommunications carrier.”²⁷ Second, even if the classification of Charter’s retail VoIP service were relevant, the FCC has studiously declined repeated invitations to classify retail VoIP as an “information service”²⁸—most recently

10 n.19 (noting that the retail VoIP providers to which Verizon provides wholesale services often “hand[] off traffic to (and receive[] it from) Verizon in TDM-format”).

²⁵ To the extent Verizon is suggesting that a service can be a “telecommunications service” and an “information service” at the same time, it is mistaken; the FCC has categorically held that “the Act’s ‘information service’ and ‘telecommunications service’ definitions establish mutually exclusive categories of service.” *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 41 (2002), *aff’d sub nom. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

²⁶ Verizon Mot. to Dismiss 16 (emphasis added).

²⁷ *TWC Declaratory Ruling* ¶ 15 (emphasis added); *see also* ¶ 9 (“[T]he statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier’s rights.”); *Petition of CRC Communications of Maine, Inc.*, Declaratory Ruling, 26 FCC Rcd 8259 ¶ 27 n.96 (2011) (“*CRC Declaratory Ruling*”) (“[T]he regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider’s rights as a telecommunications carrier.”).

²⁸ *See, e.g., IP-Enabled Services; 911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 ¶ 24 (2005), *aff’d, Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶ 35 (2006); *Telephone Number Requirements for IP-Enabled Services*

in the *ICC Reform Order*.²⁹ And although Verizon invites this Commission to get ahead of the FCC and wade into the classification morass regarding retail VoIP, Verizon neglects to mention that the very statute on which it relies precludes the Commission from doing so.³⁰ Because Charter's exchange access service is neither an information service nor an interconnected VoIP service, it does not fall within the jurisdictional carve-outs of Section 13-804 of the Public Utilities Act.

B. The FCC's *Vonage Order* Does Not Preempt This Commission From Granting the Requested Relief

Failing to establish a jurisdictional bar to Charter's claims under state law, Verizon attempts to argue that federal law preempts this Commission's authority to grant the relief Charter seeks. But that argument suffers from the same fatal defects.

Verizon begins by pointing to the FCC's *Vonage Order*,³¹ and argues that because Charter's retail VoIP service is supposedly "inherently interstate," state commissions "are preempted from regulating the rates, terms, and conditions under which VoIP providers operate."³² But this argument mischaracterizes the *Vonage Order* and ignores dispositive differences between the retail VoIP services at issue in that case and the wholesale telecommunications services at issue here.

Providers, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 ¶ 18 n.50 (2007); *Vonage Order* ¶ 14.

²⁹ See *ICC Reform Order* ¶¶ 970, 975 (explaining that "the Commission has not broadly addressed the classification of VoIP services" and "declin[ing] to address the classification of VoIP services generally at this time").

³⁰ See 220 ILCS 5/13-804 (precluding the Commission from "regulat[ing]" the "classification" of "Interconnected VoIP service").

³¹ *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 14 ("*Vonage Order*"), aff'd, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

³² Verizon Mot. to Dismiss at 14.

As an initial matter, the *Vonage Order* preempted only certain forms of *retail* VoIP regulation, and did not disturb this Commission’s ability to regulate the wholesale access charges that form the basis of Charter’s claims.³³ After finding that nomadic VoIP services such as Vonage’s are “jurisdictionally mixed,”³⁴ the FCC preempted Minnesota’s imposition of *entry* regulation on Vonage’s retail VoIP service, based on its findings that certification and tariffing requirements conflicted with the FCC’s deregulatory entry policy and that it was impossible to determine the end points of calls carried by Vonage.³⁵ In its recent *ICC Reform Order*, the FCC confirmed that the *Vonage Order* addressed only “a retail VoIP service,” and that, “[b]y contrast, VoIP-PSTN intercarrier compensation typically involves the exchange of traffic between two carriers,” and “not the retail VoIP service itself.”³⁶ The FCC thus confirmed that the *Vonage Order* has no relevance in a case such as this one, in which Charter’s wholesale exchange access service, not its retail VoIP service, is at issue.

This Commission has reached the very same conclusion. In the 2009 *Global NAPs* decision, this Commission rejected the contention that the *Vonage Order* preempted state regulation of intercarrier access charges for traffic that may have originated or terminated in IP format.³⁷ The Commission recognized that “[t]he *Vonage Order* says nothing about compensation between carriers for terminating traffic, including IP-enabled or enhanced services traffic.”³⁸ The Commission accordingly concluded that the *Vonage Order* only preempted state

³³ *Vonage Order* ¶ 20.

³⁴ *Id.* ¶ 18.

³⁵ *Id.* ¶¶ 20-23.

³⁶ *ICC Reform Order* ¶ 959.

³⁷ *Global NAPs* at 44.

³⁸ *Id.*

regulation of nomadic retail VoIP services.³⁹ Given this limited focus, “the term ‘access charges’ does not even appear in the *Vonage Order* and for good reason.”⁴⁰ The Commission concluded that because the complainant in the *Global NAPs* case sought “compensation from another carrier,” the *Vonage Order* was wholly inapposite.⁴¹ Verizon does not even address, let alone attempt to distinguish, this controlling precedent.⁴²

C. Verizon Cannot Avoid Access Charges by Mischaracterizing the Toll Traffic It Exchanges with Charter as “Information Services Traffic”

Verizon similarly seeks to present federal law as a bar on the ground that “traffic that originates or terminates in IP format is information services traffic to which state access charge rules cannot apply.”⁴³ Just as Charter’s exchange access service is not an information service,⁴⁴ the traffic that Charter and Verizon exchange is not “information services *traffic*.” Although Verizon does not identify any federal rule establishing that “state access charge rules cannot apply” in this case, it appears to be invoking the so-called “ESP exemption,” which historically allowed providers of “information services” (once known as “enhanced services”) to purchase local business lines on a flat-rated basis rather than paying per-minute access charges.⁴⁵ As

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Moreover, the Commission held that the *Vonage Order* applies only “in the situation where separating the service into interstate and intrastate communications is impossible or impractical,” *id.*, in contrast to fixed VoIP services such as Charter’s. The Eighth Circuit’s decision affirming the *Vonage Order* likewise indicated that the *Order* applies only to nomadic VoIP services. *See Minn. PUC v. FCC*, 483 F.3d 570, 582-83 (8th Cir. 2007) (stating that the FCC did “not purport to . . . preempt fixed VoIP services”).

⁴³ Verizon Mot. to Dismiss at 16.

⁴⁴ *See supra* at 9-11.

⁴⁵ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 ¶ 27 (2001).

discussed at length in Charter’s Complaint, the ESP exemption is inapposite to the facts of this case for several reasons.⁴⁶

As a threshold matter, Verizon overlooks the self-evident fact that the “telecommunications service” classification of Charter’s exchange access service makes the traffic at issue “telecommunications service” traffic. In any event, Verizon does not contest its *own* classification as a telecommunications carrier, and the ESP exemption plainly does not authorize telecommunications carriers to avoid access charge payments.⁴⁷ As this Commission explained in the *Global NAPs* case, the ESP exemption “applies to *ESPs themselves*, exempting *ESPs* from certain interstate access charges,” and “does not apply to [telecommunications carriers].”⁴⁸ This holding is entirely consistent with the FCC’s orders, which clarify that the ESP exemption addresses only the obligations of ESPs to pay access charges to carriers, and says nothing about the obligations of a carrier such as Verizon to pay access charges to ESPs for traffic terminated to that ESP’s customers.⁴⁹ Indeed, when describing the existing intercarrier compensation regime in the *ICC Reform Order*, the FCC explained that the ESP exemption is aimed solely at permitting “information service providers . . . to purchase access to the exchange

⁴⁶ See Complaint ¶¶ 22-32.

⁴⁷ Verizon Mot. to Dismiss at 17-18.

⁴⁸ *Global NAPs* at 44 (emphasis in original, quotation marks omitted).

⁴⁹ See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982 ¶ 343 (1997) (explaining that the purpose of the exemption was that ESPs “should not be subjected to [a] . . . regulatory system designed for circuit-switched interexchange voice telephone solely because [they] use incumbent LEC networks to receive calls from their customers”).

as end users,” and that “[i]nterexchange VoIP-PSTN traffic is subject to the access regime regardless of whether the underlying communication contained information-service elements.”⁵⁰

The *Paetec* and *MetTel* cases cited by Verizon are not to the contrary. Each case dealt with the situation where a *VoIP provider* sought to avoid access charges when it terminated traffic to a traditional, TDM-based carrier, and did not address whether an interexchange carrier such as Verizon can avoid access charges for traffic terminated to a CLEC’s VoIP customers.⁵¹ Moreover, in the *Southwestern Bell* case cited by Verizon, the state commission decision on review had concluded that the IP-based traffic at issue was *not* subject to access charges, and the court accordingly deferred to the agency’s analysis.⁵² Here, by contrast, this Commission has concluded that access charges *do* apply to IP-originated and IP-terminated telecommunications traffic exchanged on the public switched telephone network.⁵³ To the extent that these cases purported to hold more broadly that that “information service traffic” is not “subject to access charges,”⁵⁴ they are not based on a correct understanding of FCC precedent, as the FCC recently

⁵⁰ *ICC Reform Order* ¶ 957 & n.1955.

⁵¹ *See Paetec v. CommPartners, LLC*, No. 08-0397, slip op., 2010 WL 1767193 (D.D.C. Feb. 18, 2010); *MetTel v. GNAPs*, No. 08-cv-3829, slip op., 2010 WL 1326095, (S.D.N.Y. Mar. 31, 2010).

⁵² *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1079 (E.D. Mo. 2006) (concluding that “the MPSC’s decision subjecting IP-PSTN traffic to reciprocal compensation [was] consistent with the Act and the FCC’s rules, and [was] not arbitrary or capricious”). The other case cited by Verizon, *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993 (D. Minn. 2003), did not even discuss access charges.

⁵³ *See Global NAPs* at 44.

⁵⁴ *See, e.g., Paetec*, 2010 WL 1767193, at *2; *Southwestern Bell*, 461 F. Supp. 2d at 1081-83.

recognized in clarifying that “[i]nterexchange VoIP-PSTN traffic is subject to the access regime.”⁵⁵

Finally, Verizon’s argument ignores the fact that the ESP exemption applies only to *interstate* access charges, not to the *intrastate* access charges at issue in this case. The FCC has long held that while Internet service providers and other ESPs do not pay access charges to local exchange carriers under federal interstate tariffs, “ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs.”⁵⁶ This Commission acknowledged this distinction in the *Global NAPs* case, explaining that the ESP exemption “is only an exemption from certain (*i.e.*, originating) ‘interstate access charges,’” and has “no application to the charges at issue here, which are all *intrastate* charges.”⁵⁷ Thus, even apart from Verizon’s failure to establish that Charter’s wholesale access service is an “information service,” and notwithstanding its disingenuous effort to turn the ESP exemption on its head to apply to access charges payable in the opposite direction, Verizon still would be unable to claim such an exemption for the *intrastate* access charges at issue under Charter’s Complaint.

II. VERIZON’S REMAINING ARGUMENTS REST ON MISSTATEMENTS OF LAW AND MISCHARACTERIZATIONS OF CHARTER’S COMPLAINT

Just as Verizon mischaracterizes the exchange access service at issue in this case, it also mischaracterizes the relief Charter seeks. Contrary to Verizon’s assertions, the Complaint does not seek “prospective” relief under its pre-2012 tariff, nor does it seek a “declaratory ruling,”

⁵⁵ *ICC Reform Order* ¶ 957 & n.1955.

⁵⁶ *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 ¶ 346 (1997); *see also Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5987 (1987) (explaining that the FCC has not “require[d] states to exempt enhanced service providers from intrastate access charges, or any other intrastate charges, when such enhanced service providers are using jurisdictionally intrastate basic services in their enhanced service offerings”).

⁵⁷ *Global NAPs* at 44.

“damages,” or “retroactive ratemaking.” The Complaint thus does not trigger any of the rules or statutes that purportedly preclude such relief.

A. Charter Is Not Seeking “Prospective” Relief Under Its Pre-2012 Tariff

Verizon’s attempts to portray the Complaint as seeking “prospective” relief under Charter’s pre-2012 tariff are a smokescreen meant to distract the Commission from the actual dispute in this case.⁵⁸ Charter’s claims under its pre-2012 tariff are retrospective, and seek full payment from Verizon for the intrastate access services it purchased while the pre-2012 tariff remained effective. Verizon does not dispute that it failed to pay the full tariffed rates for Charter’s intrastate access services from August 2010 to December 2011, and it does not dispute that, throughout that period, the applicable rates for Charter’s intrastate access services were those appearing in the tariff attached to Charter’s Complaint.⁵⁹ Accordingly, Verizon’s repeated characterization of Charter’s pre-2012 tariff as “superseded” is entirely beside the point. Charter seeks to enforce the rates in that tariff during the period in which that tariff was effective—not after—and Charter filed the Complaint well within the statute of limitations applicable to such claims. That is the beginning and the end of the relevant analysis.

B. Charter Is Not Seeking a “Declaratory Ruling” of General Applicability

Verizon next attempts to characterize Count Two of Charter’s Complaint as a request for an “industry-wide declaratory ruling[,]” and argues that because Charter did not style its Complaint according to Commission rules governing “declaratory rulings,” the Complaint must

⁵⁸ Verizon Mot. to Dismiss at 7-8.

⁵⁹ *Id.*

be dismissed.⁶⁰ That is a red herring, as Charter has not sought an industry-wide declaratory ruling.

The law is clear that simply applying the Public Utilities Act in the context of resolving a carrier-to-carrier dispute does not constitute a “declaratory ruling”—or else virtually every dispute the Commission resolves would involve a “declaratory ruling.” In *Resource Tech. Corp. v. Commonwealth Edison Co.*,⁶¹ the court rejected the notion that a mere determination of rights or obligations by the Commission in a particular case constitutes a “declaratory ruling” triggering Rule 200.220. In that case, Commonwealth Edison requested that the Commission issue a ruling determining its “obligations” under various provisions of the Public Utilities Act “to pay the retail rate for purchases of energy” from a particular energy supplier, and even styled its request as one for a “declaratory ruling.”⁶² The Commission then issued the requested ruling, and on appeal, Commonwealth Edison argued that the ruling was a “declaratory ruling” under Rule 200.220 and was therefore insulated from appellate review. But the court “decline[d] to give Rule 200.220 the broad meaning suggested by” Commonwealth Edison.⁶³ The court explained that “[j]ust about everything the Commission does involves, in one way or another, applicability of the Public Utilit[ies] Act,” and that Commonwealth Edison’s position was no different from “argu[ing] for a declaratory ruling each time the Commission makes a decision concerning the Public Utilities Act.”⁶⁴

⁶⁰ Verizon Mot. to Dismiss at 18-21.

⁶¹ *Resource Tech. Corp. v. Commonwealth Edison Co.*, 343 Ill. App. 3d 36 (2003).

⁶² *Id.* at 40-41.

⁶³ *Id.* at 44.

⁶⁴ *Id.*

The Complaint in this proceeding, by its clear terms, does not seek an “industry-wide declaratory ruling” of general applicability. In the language cited by Verizon, the Complaint merely asks the Commission to confirm that Charter’s tariff is “fully enforceable” against Verizon, and that the rates therein are protected from challenge under the “filed rate” doctrine. The Commission necessarily will address the enforceability of Charter’s tariffed charges in addressing Charter’s access charge claims against Verizon.⁶⁵ The Commission need not issue a “declaratory ruling” to make these determinations, and the Complaint certainly does not ask it to do so.

Verizon’s related argument—that Count Two is “substantively deficient” because it seeks to establish the ongoing enforceability of a superseded tariff—fails for the reasons discussed above in Section II.A. Count Two properly seeks a determination that Verizon was required to pay for the exchange access services it obtained pursuant to whichever intrastate access tariff was “on file with the Commission” during the relevant time period.⁶⁶ During the period of underpayment at issue in this case, the “tariff on file with the Commission” and containing the applicable rates was Charter’s pre-2012 tariff. The Commission need not address the validity of the tariff that Charter now has on file as Verizon does not dispute its obligation to pay the charges set forth in that tariff (which, notably, are considerably *higher* than the \$.0007 rate that Verizon contends was all it owed under Charter’s pre-2012 tariff). Rather, the only live issue before the Commission concerns Verizon’s obligations under the tariff that was in effect between August 2010 and December 29, 2011 when Verizon chose to engage in self-help and refused to pay the charges that all other interexchange carriers recognized as valid. There is nothing in

⁶⁵ See *id.* at 18 (quoting Complaint ¶¶ 49-50).

⁶⁶ Complaint ¶ 49 (emphasis added).

Rule 200.220 or any other provision of law that prevents the Commission from resolving this dispute.

C. Charter’s Complaint Does Not Seek “Damages”

Verizon asserts that the Complaint seeks “damages” under Section 5-201 of the Public Utilities Act, and that such a request must be pursued in court rather than before the Commission.⁶⁷ Nowhere in the Complaint does Charter ask the Commission to award it “damages” such as consequential damages, punitive damages, or any other form of remuneration for “loss” or “injury.”⁶⁸ Instead, Charter simply asks the Commission to require Verizon to pay its bills for using Charter’s intrastate access services pursuant to Charter’s tariff.⁶⁹ This is precisely the relief granted by the Commission in the *Global NAPs* case, where the Commission directed Global NAPs to pay its outstanding intercarrier compensation bills to AT&T.⁷⁰ The Commission plainly has authority to grant the same relief here.

D. The Complaint Does Not Request Retroactive Ratemaking

Finally, the Commission should reject Verizon’s specious argument that Count Three of Charter’s Complaint “amounts to a request for retroactive ratemaking.”⁷¹ Contrary to Verizon’s suggestion, the Complaint does not request that the Commission establish the rates for Charter’s exchange access services. Those rates were already established as a matter of law under

⁶⁷ Verizon Mot. to Dismiss at 12-13.

⁶⁸ 220 ILCS 5/5-201.

⁶⁹ Complaint ¶ 56. Those bills include late-payment charges assessed under Section 6.7 of Charter’s intrastate access tariff. *See id.*; Charter IL C.C. Tariff No. 2, § 6.7, attached as Exhibit A to Charter’s Complaint.

⁷⁰ *Global NAPs* at 62 (“AT&T will submit a bill or invoice to Global Illinois, file a copy in this docket and provide a copy thereof to Commission Staff, all within five days of the date of entry of this Order, with payment to be made by Global Illinois within 5 days thereafter.”).

⁷¹ Verizon Mot. to Dismiss at 14.

Charter's intrastate access tariff.⁷² Count Three simply requests that this Commission hold Verizon to those lawfully assessed access charges and direct it to compensate Charter "for the fair and reasonable value of the services provided."⁷³ Of course, the Commission could achieve the same result by granting the relief sought in Count One—that is, by issuing "an order directing Verizon to pay its outstanding intrastate access bills."⁷⁴ But however the Commission finds it proper to fashion that relief, Charter's entitlement to payment for its tariffed intrastate access services is clear, for the reasons discussed above and in the Complaint.

CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's Motion to Dismiss.

Respectfully submitted,

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Dated: March 30, 2012

⁷² *Globalcom, Inc. v. Illinois Commerce Commission*, 347 Ill. App. 3d 592, 600 (2004) ("[A] tariff is a statute, not a contract, and has the force and effect of a statute."); *see also Illinois Central Gulf Railroad Co. v. Sankey Brothers*, 67 Ill. App. 3d 435, 439 (1978), *aff'd*, 78 Ill. 2d 56 (1979).

⁷³ Complaint ¶ 54.

⁷⁴ *Id.* ¶ 47.

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Charter Fiberlink - Illinois, LLC)	
)	
v.)	
)	
MCI Communications Services, Inc.)	Docket No. 12-0073
d/b/a Verizon Business Services)	
)	
Complaint pursuant to § 5/10-108 and § 5/13-101)	
)	

NOTICE OF FILING

Please take notice that on March 30, 2012, I caused the foregoing “Charter’s Opposition to Verizon’s Motion to Dismiss” in the above-captioned matter to be filed electronically with the Illinois Commerce Commission via its e-Docket system.

/s/ Daniel Glad
_____ Daniel Glad

CERTIFICATE OF SERVICE

I, Matthew T. Murchison, certify that I caused the foregoing “Charter’s Opposition to Verizon’s Motion to Dismiss,” together with a Notice of Filing, to be served upon all parties on the attached service list on this 30th day of March, 2012, by electronic mail.

/s/ Matthew T. Murchison
_____ Matthew T. Murchison

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