

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

In the Matter of	)	
	)	
CenturyLink Communications, LLC, as the	)	Proceeding No. 22-172
successor to Qwest Communications Corporation,	)	Bureau ID No. EB-22-MD-002
Level 3 Communications, LLC, WiTel	)	
Communications, LLC, and Global Crossing	)	
Telecommunications, Inc.,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
Peerless Network, Inc.,	)	
	)	
Defendant.	)	

**ORDER ON RECONSIDERATION**

**Adopted: April 2, 2024**

**Released: April 3, 2024**

By the Commission: Commissioner Gomez absent and not participating.

**I. INTRODUCTION**

1. Peerless Network, Inc. (Peerless)—a competitive local exchange carrier (LEC)—seeks reconsideration of the Enforcement Bureau’s (Bureau) March 28, 2023, Memorandum Opinion and Order (*Complaint Order*) in the captioned formal complaint proceeding.<sup>1</sup> The *Complaint Order* addressed whether Peerless lawfully billed access charges to CenturyLink Communications, LLC (CenturyLink)<sup>2</sup>—an interexchange carrier (IXC). Specifically, in its Complaint,<sup>3</sup> CenturyLink alleged, among other things, that Peerless lacked tariff authority to assess end office and tandem access charges on “over-the-top” Voice over Internet Protocol (VoIP) traffic.<sup>4</sup> The Bureau ruled in CenturyLink’s favor as to these contentions, granting Counts II, III, and IV of the Complaint and dismissing Count I of the Complaint

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<sup>1</sup> *CenturyLink Communications, LLC v. Peerless Network, Inc.*, Proceeding No. 22-172, Memorandum Opinion and Order, DA 23-261, 2023 WL 2705610 (EB Mar. 28, 2023) (*Complaint Order*).

<sup>2</sup> CenturyLink is the successor to Qwest Communications Corporation, Level 3 Communications, LLC, WiTel Communications, LLC, and Global Crossing Telecommunications, Inc.

<sup>3</sup> CenturyLink filed its complaint under section 208 of the Communications Act of 1934, as amended (Act). 47 U.S.C. § 208. *See* Formal Complaint of CenturyLink, LLC, as the successor to Qwest Communications Corporation, Level 3 Communications, LLC, WiTel Communications, LLC, and Global Crossing Telecommunications, Inc., Proceeding No. 22-172, Bureau ID No. EB-22-MD-002 (filed July 8, 2022) (Complaint).

<sup>4</sup> Over-the-top VoIP traffic (OTT-VoIP) is a type of VoIP traffic routed to or from an end user “over the top” of a broadband connection provided by a third party not affiliated with the LEC or its VoIP partners. *See Connect America Fund et al.*, Declaratory Ruling, 30 FCC Rcd 1587, 1588, para. 2, 1592, n.35 (2015), *vacated and remanded sub nom. AT&T Corp. v. FCC*, 841 F.3d 1047 (D.C. Cir. 2016) (*2015 VoIP Symmetry Declaratory Ruling*).

without prejudice. Thereafter, Peerless filed a Petition for Reconsideration,<sup>5</sup> which CenturyLink opposes.<sup>6</sup> As explained below, we dismiss the Petition on procedural grounds and, as an independent and alternative basis for this decision, deny it on the merits.<sup>7</sup>

## II. BACKGROUND

2. The *Complaint Order* recites in detail the facts underlying this dispute.<sup>8</sup> To summarize, Peerless purported to provide “End Office Switching” and “Tandem Switching and Transport” access services to CenturyLink under a federal tariff that Peerless filed with the Federal Communications Commission (Commission).<sup>9</sup> The Tariff describes “End Office Switching” as a “rate categor[y]” that applies to “Switched Access Service” and that “provides the local end office switching functions necessary to complete the transmission of Switched Access communications to and from the end users served by the local end office and the Customer.”<sup>10</sup> The Tariff defines “Tandem Switching and Transport” as a “rate categor[y]” that applies to “Switched Access Service” and that “provides for the use of the Company’s tandem switches.”<sup>11</sup> In particular, “Tandem-Switched Transport provides Switched Transport that is switched through a tandem switch, between the customer’s serving wire center and the end offices subtending the tandem” and “is also available between an access tandem and end offices subtending the tandem.”<sup>12</sup>

3. Peerless billed CenturyLink for these services, but CenturyLink refused to pay. CenturyLink sued Peerless in the U.S. District Court for the Northern District of Illinois (Court), alleging that Peerless unlawfully assessed end office and tandem access charges for OTT-VoIP traffic.<sup>13</sup> At CenturyLink’s request, the Court referred to the Commission three issues relating to OTT-VoIP traffic that fell “within the [Commission’s] special competence.”<sup>14</sup> To effectuate the referral, and in accordance with section 1.739 of the Commission’s rules, CenturyLink filed the Complaint.<sup>15</sup> The Complaint asserted four claimed violations of the Communications Act of 1934, as amended (Act) based on allegations that Peerless improperly billed CenturyLink access charges on OTT-VoIP traffic in

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<sup>5</sup> See 47 CFR § 1.106. See also Peerless Network, Inc.’s Petition for Reconsideration [of] the Enforcement Bureau’s March 28, 2023 Memorandum Opinion and Order, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Apr. 27, 2023) (Petition); Peerless Network, Inc.’s Reply in Support of its Petition for Reconsideration of the Enforcement Bureau’s March 28, 2023 Memorandum Opinion and Order, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed May 15, 2023) (Reply).

<sup>6</sup> See Opposition to Petition for Rehearing, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed May 8, 2023) (Opposition).

<sup>7</sup> The Commission is acting upon the Petition pursuant to referral by the Bureau. See 47 CFR § 1.106(a)(1).

<sup>8</sup> See *Complaint Order*, *supra* note 1, at paras. 2-9. See also Complaint, Exh. D, Peerless Network, LLC FCC Tariff No. 4 (Tariff).

<sup>9</sup> See *Complaint Order*, *supra* note 1, at paras. 5-6. CenturyLink’s dispute relates to charges billed on Peerless’s End Office Billing Account Numbers (E BANS) for services provided between January 2016 through February 2020. See *id.* at n.31.

<sup>10</sup> See *id.* at para. 5 (citing Tariff, p. 47, § 6.1.2(B)).

<sup>11</sup> See *id.* at para. 5 (citing Tariff, p. 52, § 6.1.2(C) and Joint Stipulations at 6, Stipulated Fact No. 26).

<sup>12</sup> See *id.* at para. 5 (citing Tariff, p. 53, § 6.1.2(C)(1) and Joint Stipulations at 6, Stipulated Fact No. 26).

<sup>13</sup> See *id.* at para. 7.

<sup>14</sup> See *id.* at para. 7 (citing Complaint, Exh. C, *CenturyLink Communications, LLC et al. v. Peerless Network, Inc. et al.*, Case No. 1:18-cv-03114, Memorandum Opinion and Order (N.D. Ill. Mar. 1, 2022) (ECF 247) (*Referral Order*) and Joint Stipulations at 2-3, Stipulated Fact No. 8).

<sup>15</sup> 47 CFR § 1.739. See *Complaint Order*, *supra* note 1, at para. 8.

contravention of the Tariff and the Commission's rules and orders,<sup>16</sup> including, but not limited to, the Commission's *2019 VoIP Symmetry Declaratory Ruling*<sup>17</sup> and the Commission's VoIP Symmetry Rule.<sup>18</sup>

4. Counts II, III, and IV of the Complaint—which the *Complaint Order* granted—required interpreting the Tariff. Specifically, Count II alleged that the “plain language of Peerless’s Tariff . . . does not permit Peerless to assess end office charges when it does not provide the physical interconnection with the last-mile facilities connecting to the end user,” and that “assessing charges in contradiction to the language in [the] Tariff” violated section 203 of the Act.<sup>19</sup> Count III alleged that, because Peerless charged tandem switching charges that did not meet the Tariff’s definitions of tandem switching, Peerless violated the prohibition against unjust and unreasonable practices contained in section 201(b) of the Act.<sup>20</sup> And Count IV alleged that Peerless violated section 203 of the Act by charging tandem switching charges “in lieu” of end office charges when the Tariff “did not permit [Peerless] to assess Tandem Switching charges on calls not routed through a tandem switch.”<sup>21</sup> Count I of the Complaint—which the *Complaint Order* dismissed without prejudice as moot—concerned the proper application of the *2019 VoIP Symmetry Declaratory Ruling*.<sup>22</sup>

5. With respect to the Tariff claims, the *Complaint Order* found that Peerless violated sections 201(b) and 203 of the Act by billing CenturyLink for access charges associated with VoIP-PSTN traffic. This conclusion stemmed from the Bureau’s analysis of sections 201(b) and 203 of the Act and well-established precedent regarding the provision of tariffed services, the Commission’s tariffing rules, the “filed-rate” doctrine, and the Commission’s intercarrier compensation regime.<sup>23</sup> The *Complaint Order* found that nothing in the Tariff authorized Peerless to bill end office charges, or tandem switching charges “in lieu” of end office charges, for such traffic.<sup>24</sup> In its Petition, Peerless challenges several aspects of the *Complaint Order*.<sup>25</sup>

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<sup>16</sup> See *Complaint Order*, *supra* note 1, at para. 9.

<sup>17</sup> See *Connect America Fund, et al.*, Order on Remand and Declaratory Ruling, 34 FCC Rcd 12692, 12964, para. 8 (2019) (*2019 VoIP Symmetry Declaratory Ruling*).

<sup>18</sup> See 47 CFR § 51.913(b) (VoIP Symmetry Rule). The Commission’s VoIP Symmetry Rule permits a LEC to assess switched access charges for VoIP-PSTN traffic where the LEC or its VoIP partner provides services that are “functionally equivalent” to traditional access services performed in Time Division Multiplexing (TDM) format regardless of the technology used to perform the functions for which it charges. See also *Complaint Order*, *supra* note 1, at para. 3.

<sup>19</sup> See *Complaint Order*, *supra* note 1, at para. 9.

<sup>20</sup> See *id.* at para. 9.

<sup>21</sup> See *id.*

<sup>22</sup> *Id.* at paras. 9-10. The *Complaint Order* held that granting Counts II, III, and IV afforded CenturyLink all of the relief to which it is entitled. *Id.* at n.75.

<sup>23</sup> *Id.* at paras. 11-13, 15.

<sup>24</sup> *Id.* at para. 10.

<sup>25</sup> In a footnote in its Reply, Peerless asks the Bureau to clarify that the *Complaint Order* reached “no conclusion on whether Peerless’s tariffed tandem switching services may be assessed for calls exchanged between Peerless and Lumen at Peerless’s tandems.” Reply, *supra* note 5, at 4, n.6. To the extent that Peerless seeks clarification that the *Complaint Order* was silent about whether its Tariff allows it to charge tandem switching charges for VoIP-PSTN traffic, we disagree with that interpretation of the *Order*. The *Complaint Order* found that, under Peerless’s current Tariff, “Peerless cannot bill CenturyLink for end office charges—or tandem charges ‘in lieu’ of end office charges—for any of the VoIP traffic at issue.” *Complaint Order*, *supra* note 1, at para. 10 (emphasis added). To the extent that Peerless instead seeks clarification that the *Complaint Order* did not reach the abstract question—divorced from the language of its current Tariff—of whether Peerless can charge tariffed tandem switching charges for VoIP-PSTN traffic when Peerless actually performs tandem switching for that traffic and has tariffs in place that accurately describe those services, we agree that the *Complaint Order* was silent about that hypothetical scenario.

### III. DISCUSSION

#### A. We Dismiss the Petition on Procedural Grounds

6. The Petition repeats arguments that the *Complaint Order* fully considered and rejected. These include Peerless's assertions that (1) the VoIP Symmetry Rule and Commission precedent do not require use of the term "functional equivalent" in the Tariff for Peerless to be able to bill end office charges on VoIP-PSTN traffic,<sup>26</sup> and (2) the Commission was limited to addressing the three specific questions referred by the Court because the Court maintained jurisdiction over the claims.<sup>27</sup> The Petition's repetition of the same arguments here does not provide grounds for reconsideration.<sup>28</sup> We therefore dismiss the Petition to the extent it repeats these and other arguments fully considered and rejected.

#### B. We Deny the Petition on the Merits

7. As an independent and alternative basis for our decision, we deny the Petition on the merits. For the reasons explained below, the Petition offers no grounds warranting reconsideration of the *Complaint Order's* findings.

##### 1. The Bureau Properly Adjudicated the Scope of the Tariff in a Formal Complaint Proceeding

8. Peerless argues that the Bureau erred in adjudicating several legal claims in this formal complaint proceeding that go beyond three specific questions referred by the Court.<sup>29</sup> According to Peerless, the Bureau's decision to adjudicate the referred questions in a formal complaint proceeding "runs afoul of the District Court's referral order" and "the foundational purpose of the primary jurisdiction doctrine because it creates a significant risk of inconsistent rulings between the District Court and the Commission."<sup>30</sup> We disagree. Nothing in the referral order discussed the processes the Commission should use to answer the Court's questions. And there is every indication that the Court was aware that the Commission would rely on its formal complaint procedures because CenturyLink "advised the Court, in its motion seeking a primary jurisdiction referral, that it would effectuate the requested

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<sup>26</sup> Compare Peerless Network, Inc.'s Answer, Proceeding No. 22-172, Bureau ID No. EB-22-MD-002 (filed Aug. 8, 2022) (Answer) at 91-94, paras. 156-58; Peerless Network, Inc.'s Answer Legal Analysis in Support of its Request for Relief on the Court's Referral Order, Proceeding No. 22-172, Bureau ID No. EB-22-MD-002 (filed Aug. 8, 2022) (Answer Legal Analysis) at 58-59, Petition at 5-19 with *Complaint Order*, *supra* note 1, at paras. 13-14, n.61.

<sup>27</sup> Compare Answer at 2-3, 13, paras. 1, 13; Answer Legal Analysis at 81-84, Petition at 22-23 with *Complaint Order*, *supra* note 1, at paras. 17-21.

<sup>28</sup> See 47 CFR § 1.106(p)(3) (providing that petitions for reconsideration of a Commission action that "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding" are among those that "plainly do not warrant consideration by the Commission" and that a bureau may therefore dismiss); *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1606, para. 27 (2011) ("For a similarly procedurally defective or repetitive petition directed to a bureau or office (rather than the full Commission) seeking reconsideration of a staff-level decision, we delegate authority to the relevant bureau or office to dismiss or deny the petition."). See also *AT&T Corp., et al. v. Wide Voice, LLC*, Order on Reconsideration, 36 FCC Rcd 14106, 14108-09 (2021) at para. 4, n.29 (citations omitted) ("repetition of the same arguments here does not provide grounds for reconsideration"); *In the Matter of Walter Olenick and M. Rae Nadler-Olenick Austin, Texas*, Memorandum Opinion and Order, 29 FCC Rcd 10011 (EB 2014) (dismissal of petition for reconsideration of bureau order because it relies on arguments that have been considered and rejected).

<sup>29</sup> Petition, *supra* note 5, at 19-23.

<sup>30</sup> *Id.* at 22.

referral by filing a formal complaint with the Commission.”<sup>31</sup> The Court granted CenturyLink’s motion without qualification.

9. Nevertheless, as it did in its Answer, Peerless maintains that the Bureau should have directed the parties to file a petition for declaratory ruling, not a formal complaint.<sup>32</sup> But Peerless offers no substantive arguments in the Petition beyond those that the *Complaint Order* already considered and rejected. That said, Peerless does take issue with the *Complaint Order*’s reliance on *Reiter v. Cooper*,<sup>33</sup> arguing that the Supreme Court’s decision “does not hold that the absence of a referral mechanism [in the Communications Act] requires the filing of an administrative complaint whereby the agency adjudicates all issues within its purview.”<sup>34</sup> The *Complaint Order* should not be construed so narrowly. It cited *Reiter* to explain the process by which courts “enable a ‘referral’ to [an] agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.”<sup>35</sup> The *Complaint Order* further quoted from note 3 of *Reiter*, where the Supreme Court observed that the Interstate Commerce Act—which was at issue in that case and on which the Communications Act is modeled<sup>36</sup>—“contains no mechanism whereby a court can on its own authority demand or request a determination from the agency; that is left to the adversary system, the court merely staying its proceedings while the [party seeking the referral] files an administrative complaint . . . .”<sup>37</sup>

10. As the *Complaint Order* went on to explain, the Commission possesses broad discretion to structure its proceedings (including primary jurisdiction referrals) to maximize fairness, promote efficiency, and conserve resources, and, in cases involving common carriers, primary jurisdiction referrals “generally are appropriately filed as formal complaints with the Enforcement Bureau pursuant to section 208 . . . of the Act.”<sup>38</sup> It is not the case that primary jurisdiction referrals to the Commission never are decided via a petition for declaratory ruling.<sup>39</sup> But in this matter—after taking into account the extensive factual record specific to the traffic exchanged between these parties and the unique language of the Tariff<sup>40</sup>—the Bureau determined that a formal complaint proceeding was the more appropriate process.<sup>41</sup> The formal complaint rules facilitate the exchange of relevant information and the development of a

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<sup>31</sup> *Complaint Order*, *supra* note 1, at para. 20.

<sup>32</sup> Petition, *supra* note 5, at 23.

<sup>33</sup> *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (*Reiter*).

<sup>34</sup> Petition, *supra* note 5, at 22-23; *Complaint Order*, *supra* note 1, at para. 18.

<sup>35</sup> *Reiter*, 507 U.S. at 268.

<sup>36</sup> *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) (“The Communications Act, of course, was based upon the [Interstate Commerce Act] and must be read in conjunction with it.”).

<sup>37</sup> *Reiter*, 507 U.S. at 268, n.3.

<sup>38</sup> *Complaint Order*, *supra* note 1, at para. 19 (emphasis added).

<sup>39</sup> See *Primary Jurisdiction Referrals Involving Claims Under the Communications Act*, Public Notice, 29 FCC Rcd 738 (EB Jan. 30, 2014) (“There may be circumstances . . . in which a petition for declaratory ruling . . . is a better vehicle than a formal complaint proceeding.”).

<sup>40</sup> The factual record consists of thousands of pages of exhibits, many of which are subject to the terms of a Protective Order. See Letter Ruling from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, FCC Enforcement Bureau, to Charles W. Steese, Counsel for CenturyLink, and Henry T. Kelly, Counsel for Peerless, Proceeding No. 22-172, Bureau ID No. EB-22-MD-002 (filed May 9, 2022).

<sup>41</sup> Cf. Letter to Anthony J. DeLaurentis, Special Counsel, Market Disputes Resolution Division, FCC Enforcement Bureau, from Charles W. Steese, Counsel for CenturyLink, (dated Apr. 21, 2022) at 3 (describing the issues referred to the Commission as “highly specific to the parties . . . concern[ing] exclusively traffic exchanged between the parties, and specific terms and conditions of Peerless’s interstate tariff” and arguing against addressing the issues “through a petition for declaratory ruling”).

comprehensive record through the use of discovery, joint stipulations, and other filings.<sup>42</sup> By employing the formal complaint process, the Bureau could identify and address the relevant facts and legal issues raised by the questions presented in the Court’s primary jurisdiction referral.<sup>43</sup> We find no grounds warranting reconsideration on this issue.

## 2. The Tariff’s Terms Do Not Unambiguously Apply to VoIP-PSTN Traffic

11. Peerless advances five arguments supporting its contention that the *Complaint Order*’s tariff findings are both factually and legally incorrect.<sup>44</sup> Finding no error in the *Complaint Order*’s conclusions, we deny the relief Peerless requests.

12. To begin, the Petition asserts that the “Tariff unambiguously describes the End Office services Peerless provides, and expressly states that the terms of [the] Tariff apply to VoIP-PSTN traffic.”<sup>45</sup> In particular, Peerless relies—for the first time in this proceeding—on Section 6.7 of its Tariff,<sup>46</sup> captioned “Identification and rating of Voice Over Internet Protocol (VOIP) Traffic.”<sup>47</sup> That provision states in relevant part:

VOIP traffic is defined as traffic that is exchanged between a Company end user and the customer in time division multiplexing (TDM) format that originates and/or terminates in Internet protocol (IP) format. These rules establish the method of separating such traffic from the customer’s traditional intrastate access traffic, so that such relevant VOIP traffic can be billed in accordance with the

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<sup>42</sup> See 47 CFR §§ 1.730 (identifying available discovery as including interrogatories, requests for document production, and depositions), 1.733(b)(2) (requiring parties to file a joint statement of stipulated facts, disputed facts, and key legal issues), 1.732 (according staff discretion to order briefing). These processes are generally unavailable in declaratory ruling proceedings which require the solicitation of comment on the petition via public notice. See *id.* § 1.2(b).

<sup>43</sup> *Complaint Order*, *supra* note 1, at para. 20. Peerless focuses exclusively on the “questions” raised in CenturyLink’s request for referral, without acknowledging the Court’s conclusion that those *questions* “require[ ] the resolution of *issues* which under a regulatory scheme, have been placed within the special competence of an administrative body.” See *Referral Order*, *supra* note 14, at 7-8 (emphasis added). In any case, Peerless does not demonstrate that the use of an adjudicatory declaratory ruling proceeding as the procedural vehicle to effectuate the primary jurisdiction referral rather than an adjudicatory formal complaint proceeding would have altered the scope of the ultimate decision. Whatever the scope of issues that Peerless might hypothesize being raised in a petition for declaratory ruling, the Commission can, in any event, issue a declaratory ruling on an issue “on its own motion.” 47 CFR § 1.2(a). As the *Complaint Order* concluded, “in the circumstances here [ ] addressing those questions [resolving violations of the Act] will assist the Court.” *Complaint Order*, *supra* note 1, at para. 21. Indeed, the statutory implications under sections 201(b) and 203 of the Act provide important context to give the Court a complete understanding of the Commission’s response to the second and third referred questions. See *Referral Order*, *supra* note 14, at 4 (referring the questions “(2) whether Peerless may assess tandem switching charges in lieu of end office charges on OTT-VoIP calls; and (3) whether Peerless’s [Tariff] can be interpreted to permit Peerless to assess tandem switching charges on OTT-VoIP calls”). Further, although Peerless contends that Commission guidance on those issues was not required by the primary jurisdiction referral, *see, e.g.*, Petition, *supra* note 5, at 20-23, it does not demonstrate either that it would not assist the court to understand the agency’s views in that regard or that the Commission’s assessment in that regard would have been different in the context of a declaratory ruling. And to the extent that Peerless expresses concern that reaching those questions “creates a significant risk of inconsistent rulings between the District Court and the Commission,” Petition, *supra* note 5, at 22, it provides no grounds to credit those concerns beyond (implicitly) its own disagreement with the outcome of the *Complaint Order*.

<sup>44</sup> Petition, *supra* note 5, at 5.

<sup>45</sup> *Id.* at 6-7; Reply, *supra* note 5, at 4-8.

<sup>46</sup> See Petition, *supra* note 5, at 6-7; Reply, *supra* note 5, at 5-7.

<sup>47</sup> Petition, *supra* note 5, at 6-7; Reply, *supra* note 5, at 5-7. See Tariff, *supra* note 8, Section 6.7 at page 66.

FCC Order (see Report and Order in WC Docket Nos. 10-90, etc. FCC Release No. 11-161 (November 18, 2011) [i.e., the *USF/ICC Transformation Order*]).<sup>48</sup>

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VOIP traffic that is identified in accordance with this tariff section will be bill [sic] at rates equal to the Company's applicable tariffed interstate access rates as specified in this tariff.<sup>49</sup>

The Petition argues that this language is “sufficient to inform Peerless’s customers that the rates and terms for Peerless’s end office access services as described in the Tariff will apply to VoIP-PSTN services.”<sup>50</sup> We disagree.

13. Section 6.7 explains how Peerless calculates and applies a “[p]ercent of VOIP Usage [PVU] Factor” to distinguish “traditional intrastate access traffic” from “VOIP traffic.”<sup>51</sup> To be sure, as part of that explanation, Section 6.7 describes VoIP-PSTN traffic and references billing consistent with the *USF/ICC Transformation Order*.<sup>52</sup> But that is as far as the provision goes, and it is not enough. Section 6.7 does not define the services Peerless furnishes to transmit the VoIP-PSTN traffic or which Tariff sections govern those services. On the contrary, Section 6.7 merely refers the reader to the “applicable tariffed interstate access rates.” As the *Complaint Order* found, this is where the Tariff falls short.<sup>53</sup> Indeed, billing VoIP-PSTN traffic “in accordance with” the *USF/ICC Transformation Order* as specified in Section 6.7 of Peerless’s Tariff would require compliance with the longstanding principles governing tariff interpretation applied in the *Complaint Order*.<sup>54</sup> The *USF/ICC Transformation Order* made clear that “to the extent that these [VoIP-PSTN] charges are imposed via tariff, a carrier may not impose charges other than those provided for under the terms of its tariff.”<sup>55</sup> In connection with that statement, the Commission cited *AT&T v. YMax*,<sup>56</sup> where the Commission evaluated whether charges for certain VoIP traffic were covered by the tariff at issue by determining if the tariff unambiguously described the functions the provider was performing. *AT&T v. YMax* was consistent with the principle

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<sup>48</sup> See Tariff, *supra* note 8, Section 6.7(A)(1) (General) at page 66.

<sup>49</sup> Tariff, *supra* note 8, Section 6.7(B) (Rating of VOIP traffic) at page 66.

<sup>50</sup> Petition, *supra* note 5, at 6-7; Reply, *supra* note 5, at 7-8.

<sup>51</sup> See Tariff, *supra* note 8, Section 6.7(A) (Identification and rating of Voice Over Internet Protocol (VOIP) Traffic) at page 66, (C) (Calculation and Application of Percent of VOIP Usage Factor) at page 66, (D) (Initial PVU Factor) at page 67, (E) (PVU Factor Updates) at page 67, (F) (Verification of PVU) at page 68.

<sup>52</sup> In response to concerns that an intercarrier compensation regime for VoIP-PSTN traffic could lead to further arbitrage or undermine the Commission-established transition for intercarrier compensation more broadly, the Commission permitted LECs to include language in their tariffs to address the identification of VoIP-PSTN traffic, much as they do to identify the jurisdiction of traffic. See *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18011-12, para. 950, 18020-22, para. 963 (2011) (*USF/ICC Transformation Order*), *pets. for review denied*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2050 and 135 S. Ct. 2072 (2015).

<sup>53</sup> *Complaint Order*, *supra* note 1, at para. 15 (“[T]here is a difference between a carrier having authority under the Commission’s rules to assess an access charge and a carrier properly exercising that authority by filing a valid tariff that expressly permits assessment of the charge.”).

<sup>54</sup> We thus reject Peerless’s contention that its Tariff “does exactly what the *Transformation Order* told LECs to do.” Petition, *supra* note 5, at 6.

<sup>55</sup> *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-27, para. 970 n.2026.

<sup>56</sup> *Id.* (citing *AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742 (2011) (*AT&T v. YMax*)).

that ambiguities in a tariff are construed against the filer<sup>57</sup>—the very principles applied in the *Complaint Order*.<sup>58</sup>

14. The Tariff’s provisions regarding end office (or tandem) access service do not clearly and unambiguously authorize Peerless to bill for functionally equivalent access services that either Peerless or its VoIP partner provide using IP technology.<sup>59</sup> Peerless objects to the assertion in the *Complaint Order* that the Tariff “governs [its] provision of traditional, regulated TDM-based access services.”<sup>60</sup> However, as CenturyLink explains,<sup>61</sup> the Tariff’s definition of “End Office Access Service” mirrors provisions in the Commission’s rules,<sup>62</sup> and the National Exchange Carrier Association, Inc. (NECA) tariff applicable to TDM-based switched access services.<sup>63</sup> In contrast, Peerless’s network is “100% IP-based.”<sup>64</sup> For example, the Tariff details that its Tandem-Switched Transport service “provides Switched Transport that is switched through a tandem switch, between the customer’s serving wire center and the end offices subtending the tandem. Tandem Switched Transport is also available between an access tandem and end offices subtending that tandem.”<sup>65</sup> This language clearly defines a service that utilizes physical, network

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<sup>57</sup> *AT&T v. YMax*, 26 FCC Rcd at 5748-49, 5754-55, 5759, paras. 14, 33, 45. Thereafter, the Commission continued to reaffirm the applicability of these longstanding tariffing principles in connection with VoIP-PSTN traffic. See, e.g., *2015 VoIP Symmetry Declaratory Ruling*, *supra* note 4, at 1605, para. 35 (discussing *AT&T v. YMax* and recognizing that “the Commission rule still exists that carriers must accurately describe services offered in their tariffs,” and distinguishing a Fourth Circuit decision addressing billing for VoIP-PSTN traffic as turning on shortcomings in the tariff language at issue there “[b]ecause tariff language may now include compensation for functional equivalent services provided by a competitive LEC or its VoIP provider partner under the VoIP symmetry rule,” observing that “[m]any competitive LECs have incorporated tariff language that describes functionally equivalent services under the VoIP symmetry rule, either by explicitly reciting the VoIP symmetry rule, or by referring to the ‘functional equivalent’ of TDM-based end office switching”).

<sup>58</sup> *Complaint Order*, *supra* note 1, at para. 15.

<sup>59</sup> *Id.* at para. 13.

<sup>60</sup> Petition, *supra* note 5, at 12 n.14 (citing *Complaint Order*, *supra* note 1, at para. 13). Time-division multiplexed (TDM) technology is a circuit-switched technology that connects to the public switched telephone network, or PSTN, as opposed to a packet-switched technology in an IP format. See *Technology Transitions, et al.*, GN Docket No. 13-5, et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433, 1435, 1440, paras. 1, 16-17 (2014).

<sup>61</sup> Opposition, *supra* note 6, at 11-16.

<sup>62</sup> See *id.* at 14-15 (citing 47 CFR §§ 69.2(pp) (defining “End Office” as an “exchange service”); see also 47 CFR §§ 69.2 (ss) (defining “tandem-switched transport” as a circuit-switched service), 69.111 (defining tandem-switched transport and tandem charges as circuit-switched services)).

<sup>63</sup> Opposition, *supra* note 6, at 15-16 (comparing Peerless F.C.C. Tariff No. 4, § 6.1.2(B) to NECA F.C.C. Tariff No. 5, see also 47 CFR § 6.1.3(B)). Compare Peerless F.C.C. Tariff No. 4, § 6.1.2(B) with NECA F.C.C. Tariff No. 5, § 6.1.3(B) (defining the end office rate category as providing the local end office switching functions necessary to complete the transmission of switched access communications to and from the end users served by the local end office and the customer). The NECA tariff that CenturyLink cited is filed on behalf of incumbent LECs that do not file their own tariffs. 47 CFR §§ 69.601-10 (Commission rules applicable to the exchange carrier association, i.e., National Exchange Carrier Association, or NECA). Peerless’s comparison of language in Level 3’s tariff with the NECA tariff (see Reply, *supra* note 5, at 6-7) does not address the shortcomings of Peerless’s Tariff. See *Core Communications, Inc., et al. Tariff F.C.C. No. 3*, Memorandum Opinion and Order, 36 FCC Rcd 15128, 15156-57, para. 67 (2021) (*Core Tariff Order*).

<sup>64</sup> *Qwest Corporation, et al. v. Peerless Network, Inc. et al.*, Case No. 21-cv-03004, Response to Lumen’s Motion to Stay the Case and Refer Issues to the FCC (D. Colo. Oct. 7, 2022) (ECF 46) at 6 (“Peerless’ network is . . . 100% IP-based”); *Id.*, Exhibit 1, Declaration of John McCluskey in Support of Plaintiff’s Motion to Stay the Case and Refer Issues to the FCC, at 3, para. 5 (“Peerless’ network[] use[s] Internet-Protocol based (“IP”) technology”).

<sup>65</sup> Tariff, *supra* note 8, at p. 53, Section 6.1.2(C)(1); *Complaint Order*, *supra* note 1, at para. 6 & n.25.



switching equipment to transport telecommunications traffic. Peerless, however, attempts to impose these tariffed Tandem-Switched Transport charges on services it provided via OTT-VoIP. OTT-VoIP service does not traverse the TDM network and, most importantly, does not pass through a switch. Rather, this traffic is provided over IP and is directed via routers instead of switches. Consequently, OTT-VoIP service is not a service offered in the Tariff,<sup>66</sup> and, therefore Peerless may not assess its tariffed access charges on these services. Stated differently, although the VoIP Symmetry Rule might allow Peerless to charge a tariffed rate for services that are “functionally equivalent” to the TDM access described in its Tariff, Peerless could only do so *if* the Tariff contained clear language extending those charges to functionally equivalent services.<sup>67</sup> Because the Tariff does not, Peerless may not assess switched access charges detailed in its Tariff for the OTT-VoIP service it provides.

15. Thus, Peerless’s argument that the *Complaint Order* “fails to explain why Peerless’s tariff is not ‘clear and explicit,’ other than noting that the Tariff does not use the phrase functionally equivalent”<sup>68</sup> is wrong, as is its claim that the *Complaint Order* failed to make any findings that the services Peerless actually performed differed from the definitions in its Tariff.<sup>69</sup> The *Complaint Order* properly found that the Tariff fails to clearly explain or state that the defined access services would be provided by Peerless using IP technology or that the services Peerless provided would be “functionally equivalent” to the TDM services defined in its Tariff. The *Complaint Order* appropriately construed this ambiguity against Peerless, as the drafter of the Tariff.<sup>70</sup>

### 3. The Language of Other Carriers’ Tariffs is Not Determinative

16. Peerless contends that “[s]ome of the largest carriers in the country have language incorporating the terms of the *USF/ICC Transformation Order* and the VoIP Symmetry rule into their tariffs that is virtually identical to Peerless’s tariff.”<sup>71</sup> Specifically, Peerless cites to language in CenturyLink’s tariff that “establishes the method of separating VoIP-PSTN Traffic from the customer’s traditional intrastate access traffic, so that VoIP-PSTN Traffic can be billed in accordance with the [*USF/ICC Transformation Order*]”<sup>72</sup> and to language in Verizon’s tariff that defines VoIP-PSTN traffic as “traffic that is exchanged in time division multiplexing format between the Telephone Company and the customer that originates and/or terminates in Internet Protocol format.”<sup>73</sup> Whatever the similarities between these provisions and Section 6.7 of the Tariff, they shed no light on the key inquiry in this case: whether the Tariff contains language clearly implementing the charges authorized by the VoIP Symmetry

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<sup>66</sup> In fact, services involving IP-to-IP traffic generally cannot be tariffed. *Complaint Order*, *supra* note 1, at para. 13. Peerless states that “Level 3 purchases SIP trunking services from Peerless, and calls are exchanged in IP format,” citing the District Court, which “held that Peerless and Level 3 exchange traffic in IP format by agreement and through Level 3’s purchase of Peerless’s tariffed SIP trunking services.” Reply, *supra* note 5, at 9 (citing *CenturyLink Communications, LLC v. Peerless Network Inc.*, 2023 WL 2477535, at \*8 (N.D. Ill., 2023)). However, Peerless cannot tariff rates for IP-IP services. *Teliax Colorado, LLC Tariff F.C.C. No. 1*, Order, 36 FCC Rcd 8285, 8287-88, paras. 8-9 (WCB-PPD 2021) (*Teliax Tariff Order*) (carriers cannot impose tariffed charges under the Commission’s intercarrier compensation rules for pure IP-IP traffic exchange).

<sup>67</sup> As discussed below, Peerless’s Tariff does not include *any* language indicating that its OTT-VoIP service is functionally equivalent (regardless of the terminology used) to any switched access service offered in its Tariff. *Infra* Section III.B.5.

<sup>68</sup> Petition, *supra* note 5, at 15.

<sup>69</sup> Reply, *supra* note 5, at 8-10.

<sup>70</sup> *Complaint Order*, *supra* note 1, at para. 15, n.72.

<sup>71</sup> Petition, *supra* note 5, at 7.

<sup>72</sup> See *id.* at 7-8.

<sup>73</sup> See *id.* at 8.

Rule such that Peerless has a right to bill for the services it or its VoIP partners actually provide.<sup>74</sup> The *Complaint Order* correctly found that the Tariff does not.<sup>75</sup>

**4. Comparisons Between the Tariff's and the VoIP Symmetry Rule's Definitions of "End Office Access Service" Support the *Complaint Order's* Findings**

17. In another argument, Peerless maintains that it is entitled to bill for VoIP-PSTN traffic because the Tariff's definition of End Office Access Service "mirrors" the definition of "End Office Access Service" in the VoIP Symmetry Rule.<sup>76</sup> Specifically, Peerless contends that, although its Tariff language is not identical to the language in the Commission's rules, the Tariff's definitions of "End Office Switch" and "End Office" are similar to the language in section 51.903(d)(1) and (2) of the Commission's rules.<sup>77</sup> Peerless also contends that the Tariff's definition of the "End Office rate category" includes the Local Switching and Common Trunk Port rate elements," which "is similar to the language in section 51.903(d)(3)."<sup>78</sup>

18. Peerless misapprehends the purpose of the VoIP Symmetry Rule. Although the VoIP Symmetry Rule authorizes carriers to tariff certain charges consistent with longstanding tariffing principles,<sup>79</sup> it does not itself represent tariff language that invariably reflects the specific functions a particular carrier actually performs.<sup>80</sup> It is up to the carrier to make certain the description in its tariff matches the services it actually provides in any given situation.<sup>81</sup> Peerless has not done so in its Tariff. This is especially true given that Peerless, whose network operates exclusively in IP,<sup>82</sup> cannot tariff a purely IP-IP traffic exchange under the Commission's intercarrier compensation rules.<sup>83</sup> As the *Complaint Order* correctly found,<sup>84</sup> the Tariff lacks clear and unambiguous language conveying the

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<sup>74</sup> The fact that another carrier's tariff may include language similar to Peerless's Tariff does not address the shortcomings identified in the Tariff. See *Core Tariff Order*, *supra* note 63, at 15156-57, para. 67.

<sup>75</sup> *Complaint Order*, *supra* note 1, at para. 15.

<sup>76</sup> See *Petition*, *supra* note 5, at 8-12; *Reply*, *supra* note 5, at 7-8.

<sup>77</sup> *Petition*, *supra* note 5, at 10-11 (citing Tariff, *supra* note 8, at pages 6, 52). Tariff at page 6 defines "End Office Switch" as "[a] local telephone switching system established to provide local exchange service and/or exchange access services." Tariff at page 52 defines "End Office rate category" as "the local switching functions necessary to complete the transmission of Switched Access communications to and from the end users service by the local end office and the Customer. The End Office rate category includes the Local Switching and Common Trunk Port rate elements."

<sup>78</sup> *Petition*, *supra* note 5, at 11 (citing Tariff, *supra* note 8, at page 52).

<sup>79</sup> See *USF/ICC Transformation Order*, *supra* note 52, at 18026-27, para. 970, n.2026 (stating that a carrier may not impose charges for functionally equivalent services that are not provided for in its tariff). See also *id.* at 18019-18022, paras. 961-63 (discussing the role of tariffs during the transition of the intercarrier compensation reform); *2019 VoIP Symmetry Declaratory Ruling*, *supra* note 17, at 12701, n.65 ("We leave carriers to determine the appropriate compensation for such services in accordance with their agreements and applicable tariffs."); 47 CFR §§ 51.905(b), 51.913(b) (referencing a carrier's entitlement to assess and collect transitional access rates set forth in a carrier's tariff).

<sup>80</sup> See 47 CFR § 51.913(b) ("This rule does not permit a [LEC] to charge for functions not performed by the [LEC] itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service.").

<sup>81</sup> See *Complaint Order*, *supra* note 1, at paras. 10-11.

<sup>82</sup> See *supra* paragraph 14 and note 64.

<sup>83</sup> See *Teliax Tariff Order*, *supra* note 66, at 8287-88, paras. 8-9.

<sup>84</sup> *Complaint Order*, *supra* note 1, at paras. 13, 15.

concept of functional equivalence in the context of Peerless's network, and the result is that Peerless cannot assess access charges for VoIP-PSTN traffic.<sup>85</sup>

**5. Although Tariffs Need Not Use the Exact Words “Functional Equivalent” to Bill End Office Charges on VoIP-PSTN Traffic, They Must Unambiguously Convey that Concept**

19. Peerless takes issue with the *Complaint Order*'s purported finding that the Tariff must use the precise term “functional equivalent” for Peerless to bill end office charges on VoIP-PSTN traffic.<sup>86</sup> That is not what the *Complaint Order* held. The Commission's rules set the limits carriers may exercise through their tariffs. As relevant here, they permit carriers to impose certain charges for transmitting telecommunications “using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier [and thus] constitutes the functional equivalent of the incumbent local exchange carrier access service.”<sup>87</sup> But although the rules allow carriers to bill in certain circumstances for providing “the functional equivalent” of an ILEC access service, to avail themselves of that right carriers still must ensure that their tariffs clearly apply to those activities. As the *Complaint Order* found, Peerless's Tariff describes actions performed by a TDM network.<sup>88</sup> By contrast, Peerless operates an IP network, and as the *Complaint Order* found,<sup>89</sup> and as we explain in greater detail above,<sup>90</sup> the actions performed by that network are not reasonably understood to fall within the scope of the Tariff language geared to TDM networks. Thus, even if the actions Peerless performed arguably could constitute the functional equivalent of an ILEC access service under the Commission's rules, Peerless still could not bill for those actions because, as the *Complaint Order* found, its Tariff did not clearly encompass those actions. The key point, then, is not that “functional equivalent” constitutes magic words that must appear in a tariff, but rather that, in Peerless's case, the Tariff needed to somehow clearly reflect that Peerless would be billing for certain actions that are the functional equivalent to those performed by a TDM network. In defining their tariffed services, carriers often use language that tracks the Commission's rules—such as “functional equivalent” here—to make clear that

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<sup>85</sup> *Complaint Order*, *supra* note 1, at para. 12, n.50 (citing the *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-27, para. 970, n.2026), at para. 14 (citing *2015 VoIP Symmetry Declaratory Ruling*, *supra* note 4, at 1596, n.64).

<sup>86</sup> Petition, *supra* note 5, at 5 (“The *Order*'s finding that [the words ‘functional equivalent’] are required to entitle a carrier to charge for services that are functionally equivalent is unlawful.”), 12-15 (“There is no Commission rule or order that requires Peerless's Tariff use the terms “functionally equivalent” to qualify as end office access services under the VoIP Symmetry Rule.”); Reply, *supra* note 5, at 4-8.

<sup>87</sup> 47 CFR § 51.913(b); *see also* 47 CFR § 51.903(d) (defining “end office access service” for purposes of the Commission's Part 51, Subpart J rules).

<sup>88</sup> *Complaint Order*, *supra* note 1, at para. 13.

<sup>89</sup> *Id.* at para. 13.

<sup>90</sup> *See supra* para. 14.

the tariff authority extends exactly as far as the Commission's rules permit.<sup>91</sup> Carriers are free to seek to use different language instead,<sup>92</sup> but do so at the risk of creating ambiguities.<sup>93</sup>

20. The broader point, however, is that the Tariff contains no indication—through the phrase “functional equivalent” or otherwise—that Peerless and its VoIP partners are providing something other than traditional TDM-based services. It is this shortcoming that the *Complaint Order* found violates section 203 of the Act, the “filed-rate” doctrine, and well-established Commission precedent.<sup>94</sup>

**6. The Tariff Does Not Permit Peerless to Bill for VoIP-PSTN Traffic Regardless of the Configuration**

21. Finally, the Petition contends that the Bureau erred in not determining as a factual matter how Peerless connects to its customers before ruling on the tariff question.<sup>95</sup> But any such factual inquiry is beside the point. Even assuming the traffic is as Peerless describes, the language in its Tariff is not adequate to permit Peerless to charge for the functional equivalent of end office services.<sup>96</sup>

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<sup>91</sup> See Opposition, *supra* note 6, at 9-10. See also *Complaint Order*, *supra* note 1, at n.61.

<sup>92</sup> Indeed, although acknowledging that the wording of a competitive LEC's tariff does not have to be identical to that of an incumbent LEC's tariff, the *Complaint Order* observed that other carriers “have amended their tariffs to contain the term ‘functional equivalent’ or *similar language that clearly implements the charges authorized by the VoIP Symmetry Rule.*” *Complaint Order*, *supra* note 1, at n.61 (emphasis added). Regardless, Peerless's suggestion that the Commission must find that the language in its Tariff violated a rule is without merit; the Commission's authority under section 201(b) of the Act is not limited to a determination that a particular rule has been violated. See *Wide Voice, LLC v. FCC*, 61 F.4th 1018, 1025-27 (9th Cir. 2023) (holding that the Commission could find unjust and unreasonable conduct by local exchange carrier without finding breach of an existing regulation or order).

<sup>93</sup> Opposition, *supra* note 6, at 9-10.

<sup>94</sup> *Complaint Order*, *supra* note 1, at paras. 11-15. Peerless argues that the Commission's reliance on section 61.2 of its rules is somehow flawed because “there is no standard for what is a sufficiently ‘clear and explicit explanatory statement’ in terms of the physical network or protocol that is used to provide end office access services.” Petition, *supra* note 5, at 14. However, it is both reasonable and understandable that what is sufficiently clear and explicit will depend on the circumstances. The operation of that standard is further guided by the fact that ambiguities in a tariff are construed against the filer. This means that a tariff filer must understand that its tariff needs to be sufficiently clear and explicit to overcome alternative interpretations—not merely be one of multiple arguably plausible interpretations. Nor does Peerless not put forward its own, alternative interpretation of the standard in section 6.2 of the rules let alone one that would persuade us to depart from our longstanding case-by-case approach to that rule.

<sup>95</sup> Petition, *supra* note 5, at 15-19.

<sup>96</sup> See *Complaint Order*, *supra* note 1, at para. 14.

**IV. ORDERING CLAUSE**

22. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 4(i), 4(j), 201, 203, 204, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 204, 208, 405, and sections 1.106 and 51.913(b) of the Commission's rules, 47 CFR §§ 1.106, 51.913(b), that Peerless's Petition for Reconsideration is **DISMISSED** on procedural grounds, to the extent it repeats arguments previously considered and rejected by the Enforcement Bureau and, as an independent and alternative basis, **DENIED** for the reasons stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary