UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALL AMERICAN TELEPHONE COMPANY, INC. et al.,	:	
Plaintiffs,	:	07 Civ. 861 (WHP)
-against-	:	MEMORANDUM & ORDER
AT&T, INC.,	:	
Defendant.	:	

WILLIAM H. PAULEY III, District Judge:

Plaintiffs/Counterclaim Defendants All American Telephone Company, Inc., Chase Com, and e-Pinnacle Communications, Inc. (collectively, the "CLECs"[1]), bring this action pursuant to federal tariff, 47 U.S.C. §§ 201, 203, and quantum meruit to recover fees for services provided to Defendant/Counterclaimant AT&T Inc. ("AT&T"). AT&T counterclaims for a declaratory judgment that it does not owe the CLECs fees, unjust enrichment, fraudulent and negligent misrepresentation, and civil conspiracy, and seeks relief pursuant to 47 U.S.C. § 201. The CLECs move for judgment on the pleadings as to all claims and counterclaims pursuant to Fed. R. Civ. P. 12(c). For the following reasons, the CLECs' motion is granted.

BACKGROUND

Unless otherwise indicated, this Court accepts the following facts as true. The CLECs are competitive local exchange carriers operating in Utah and other rural areas in the

[1]A CLEC, or competitive local exchange carrier, provides inter- and intra-state exchange access service, as well as local long distance and enhanced service to business and residential customers. (First Am. Compl. dated Mar. 6, 2007 ("Compl.") ¶ 6.)

United States. (First Am. Compl. dated Mar. 6, 2007 ("Compl.") ¶¶ 6-8.) AT&T provides, inter alia, long distance calling services. (Counterclaims of AT&T dated Mar. 26, 2007 ("Counterclaims") ¶ 4.) AT&T contracts with the CLECs to carry calls originating and terminating in the rural areas they cover, where AT&T does not own its own local exchange facilities. (Counterclaims ¶ 12.)

All telecommunications carriers must file tariffs which, upon approval by the Federal Communications Commission ("FCC"), govern their rate structure. 47 U.S.C. § 203. The operative tariffs here cover "Switched Access Service" which "provides for the use of common switching, terminating, and trunking facilities between a Customer Designated Premises and an end user's premises for originating and terminating traffic." (All American Telephone Co., Inc. Access Service Tariff F.C.C. No. 1, issued June 29, 2005 ("All American Access Tariff") at 69; Chase Com Access Service Tariff F.C.C. No. 1, issued Oct. 12, 2005 ("Chase Com Access Tariff") at 70; e-Pinnacle Communications, Inc. Access Service Tariff F.C.C. No. 1, issued Oct. 12, 2005 ("e-Pinnacle Access Tariff") at 71 (collectively, the "Access Tariffs").) The Access Tariffs define "end users" as "[u]sers of local telecommunications carrier's services who are not carriers." (All American Access Tariff at 69; Chase Com Access Tariff at 70; e-Pinnacle Access Tariff at 71.)

The CLECs have entered into agreements with various internet companies (the "Website Companies") to offer free conference calling and pornographic chat line services.[2] (Counterclaims ¶ 27.) The Website Companies direct customers from around the country to certain telephone numbers within the CLECs' local exchange networks, and the CLECs "use

[2]Though the Counterclaims contain allegations that now-dismissed Plaintiff Great Lakes engaged in an international calling scheme (Counterclaims ¶¶ 18-25), there are no international calling-scheme allegations specific to any of the remaining CLECs.

simple telecommunications equipment to create a conferencing or chat line bridge" (Counterclaims ¶ 27), "located in the [CLEC]'s service territories" (Counterclaims ¶ 39). Thus, an AT&T customer who wants to use one of the Website Companies' services places a long-distance call to a telephone number in one of the CLECs' service areas, and the CLEC creates a conference or chat bridge and bills AT&T for access services pursuant to the Access Tariffs. These Internet advertisements generate heavy traffic to the CLECs. (Counterclaims ¶ 42.)

DISCUSSION

I. Motion for Judgment on the Pleadings Standard

A motion for judgment on the pleadings is decided under the same standard as a Rule 12(b)(6) motion. Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). The Court must accept the allegations in the complaint or counterclaims as true and construe all reasonable inferences in the non-movant's favor. Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994). To prevail, the complaint or counterclaims must "plead 'enough facts to state a claim for relief that is plausible on its face.'" Patane v. Clark, 508 F.3d 106, 111-12 (2d Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007)). "[A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S. Ct. at 1964-65 (citations omitted).

A court's "consideration is limited to facts stated on the face of the complaint [and counterclaims], in documents appended to the complaint [and counterclaims], or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

II. Filed Rate Doctrine

Under the filed-rate doctrine, customers of a carrier "are charged with notice of [the tariff], and they as well as the carrier must abide by it, unless it is found by the [FCC] to be unreasonable." AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222 (1998) (internal citations omitted). Because the rate-making role is reserved to federal agencies, plaintiffs may not challenge the validity of a filed tariff in court, even in the face of apparent inequities. F.T.C. v. Verity Intern., Ltd., 443 F.3d 48, 61 (2d Cir. 2006).

A. Sham Entities

Where an entity has filed tariffs with the FCC as a rural CLEC, a claim that the entity is in fact a sham is precluded by the filed rate doctrine, because the claim essentially is a challenge to the validity of the tariff. Sancom, Inc. v. Qwest Comm'ns Corp., No. 07 Civ. 4147 (KES), 2008 WL 2627465, at *6 (D.S.D. June 26, 2008). Accordingly, AT&T's counterclaim that the tariffs are void because the CLECs are sham entities is dismissed.

B. Scope of Access Tariffs

The filed rate doctrine applies only where "the bills in dispute were for services covered by the FCC-approved tariffs." Verity, 443 F.3d at 62 (finding the doctrine did not apply where services billed for under the tariff differed from services provided); see also Sancom, 2008 WL 2627465, at *3-5 (finding that the filed rate doctrine did not apply in similar circumstances because plaintiff "argues that the arrangement . . . results in the provision of services not covered by the tariff"). Accordingly, courts must answer "the fundamental question in the filed-rate-doctrine analysis: the nature of the service for which consumers were billed." Verity, 443 F.3d at 62; Great N. Ry. V. Merchants Elevator Co., 259 U.S. 285, 291 (1922) ("[C]onstruction of a tariff is a matter of law for the Court, being no different than the construction of any other

written document."). Thus, this Court can determine whether the services provided by the CLECs are among those covered by the tariff. See Verity, 443 F.3d at 62; Sancom, 2008 WL 2627465, at *3-5.

The FCC has found that calls to conferencing services terminate at the conference bridge and that conferencing companies are not carriers. Qwest Comm'ns Corp. v. Farmers & Merchants Mutual Tel. Co., 22 FCC Rcd. 17973 ¶¶ 32, 35-38 (2007).[3] This Court affords great deference to the FCC's interpretations of tariff provisions. AT&T Co. v. City of New York, 83 F.3d 549, 553 (2d Cir. 1996); see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Though the Qwest decision is based on the record in that administrative proceeding, 22 FCC Rcd. 17973 ¶¶ 35, 38, this Court sees no relevant factual distinction between the facts in that proceeding and the allegations in this action. The District of South Dakota's recent decision declining to give binding effect to the FCC's determination in Qwest, Sancom, 2008 WL 2627465, at *6, does not alter this Court's decision. In Sancom, the defendant alleged, inter alia, that the conferencing equipment was located outside of the defendant's service territory. Sancom, 2008 WL 2627465, at *6. AT&T has made no such allegations here. Indeed, AT&T asserts only that the CLECs "use simple telecommunications equipment to create a conferencing or chat line bridge" (Counterclaims ¶ 27), "located in the [CLECs]' service territories" (Counterclaims ¶ 39). Thus, the services at issue fall within the Access Tariffs, and AT&T must abide by them. See AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222 (1998) (internal quotation marks omitted).

Accordingly, the CLECs' motion for judgment on the pleadings is granted.

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[3]The FCC is now reconsidering its determination in Qwest because of new evidence relevant to a portion of its analysis that is neither applicable nor dispositive here. See Qwest Comm'ns Corp. v. Farmers & Merchants Mutual Tel. Co., --FCC Rcd.--, File No. EB-07-MD-001 (Jan. 29, 2008).

CONCLUSION

For the foregoing reasons, the CLECs' motion for judgment on the pleadings is granted, and AT&T's counterclaims are dismissed with leave to replead within ten days of the date of this Memorandum & Order.

Dated: July 24, 2008
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J.

Counsel of Record:

Ross A. Buntrock, Esq.
Jonathan E. Canis, Esq.
Womble, Carlyle, Sandridge & Rice, PLLC
1401 Eye Street, N.W.
Seventh Floor
Washington, DC 20005
Counsel for Plaintiffs

Steven M. Bierman, Esq.
Sidely Austin LLP
787 Seventh Avenue
New York, NY 10019
Counsel for Defendant