UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALL AMERICAN TELEPHONE COMPANY, INC., ET AL. Plaintiffs, -against- AT&T, INC., Defendant	)	07 Civ. 861 (WHP) ECF CASE **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

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Plaintiffs All American Telephone Co., Inc.; ChaseCom, and e-Pinnacle Communications, Inc. ("Plaintiffs"), by their undersigned counsel, hereby submit their memorandum of law in support of judgment on the pleadings, pursuant to Rule 12(c). As demonstrated in this Memorandum, judgment on the pleadings is proper because there are no questions of fact before this Court and Plaintiffs are entitled to judgment as a matter of law.

Moreover, admissions made by Defendant AT&T, Inc. ("AT&T" or "Defendant") in its Answer to Plaintiffs' first amended Complaint, and its admissions in other public documents of which this Court can take judicial notice, further support Plaintiffs' claims for judgment under the filed rate doctrine. Similarly, AT&T's asserted counterclaims against Plaintiffs must be dismissed for failure to plead actionable violations of law, and for failure to raise any questions of fact that this Court can hear. Because there are no questions of fact that can be considered by this Court, judgment on the pleadings is required.

I. THE STANDARDS FOR GRANT OF JUDGMENT ON THE PLEADINGS

The standards governing motions for judgment on the pleadings are well established in this Court:

> The same standards govern both a Rule 12(c) motion for judgment on the pleadings and [] a Rule 12(b)(6) motion to dismiss for failure to state a claim. . . . The Court 'must view the pleadings in the light most favorable to, and draw all reasonable inference in favor of, the nonmoving party.' . . . Accordingly, judgment on the pleadings is appropriate only if . . . it is apparent from the pleadings that no material issues of fact are unresolved and that the moving party is entitled to judgment as a matter of law.

Stellan Holm, Inc. v. Malmberg International Art, AB, No. 01 CIV. 1053(WHP), 2002 WL 392294, at 2-3 (S.D.N.Y., March 13, 2002), *citing, e.g., Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir. 1994) and *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994). "In deciding a motion on the pleadings, courts may consider exhibits, statements or documents attached to or incorporated by reference in the pleadings." *Holm v. Malmberg*, 2002 WL 392294, at 3 (citing *Brass v. American Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)).

Applying this standard, Plaintiffs demonstrate that all relevant facts necessary to compel judgment in favor of Plaintiffs on their collection action have been established by the parties' admissions and in statements in public documents, of which this Court may take judicial notice. Notably, averments made by Defendant in its affirmative defenses and counterclaims are summary (and erroneous) legal conclusions, and do not preclude immediate judgment in favor of Plaintiffs. Defendant's averments do not suffice to support any actionable claim, and raise no issue of fact that could be heard by a jury. Even when all factual assertions made by Defendant are assumed correct, and all reasonable inferences in favor of Defendant are granted, there remain no issues of fact that can support a defense against Plaintiffs' collection action, or that could support a counterclaim against Plaintiffs. As a result, judgment should be entered for Plaintiffs as a matter of law.

II. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THE PLEADINGS, AWARDING FULL PAYMENT OF ACCESS CHARGES WITHHELD BY AT&T, AND OTHER RELATED DAMAGES

A. JUDGMENT IN FAVOR OF PLAINTIFFS IS COMPELLED BY THE FILED RATE DOCTRINE

As the Plaintiffs' Complaint explains, this collection action is governed by the filed rate doctrine. Complaint, ¶¶ 23-26. That common law construct protects against discrimination in the provision of regulated services, and preserves the role of expert regulatory agencies as the only bodies empowered to set rates for regulated services under their jurisdiction. "The filed rate doctrine is applied strictly, and it requires a party that receives tariffed services to pay the filed rates, even if that party is dissatisfied with the rates or alleges fraud." Complaint, ¶ 24 (citing *Marcus v. AT&T Corp.*, 138 F.3d 46, 58-59 (2d Cir. 1998)).

The filed rate doctrine analysis consists of a straightforward and simple inquiry: Was service provided? Was a valid tariff on file? If these two issues are determined, the tariffed rate must be enforced. "Thus, if a carrier acquires services under a filed tariff, only the rate contained in the tariff for that service will apply." Complaint, ¶ 24 (citing *Marcus*, 138 F.3d at 58-59). The filed rate doctrine is strictly enforced:

> [T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. . . . This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

WorldCom Technologies, Inc. v. ACS Telecom, Inc., No. 00 CIV., 3200(LLS), 2001 WL 1537696, at 2 (S.D.N.Y. Dec. 3, 2001) (J. Stanton) (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915)).

B. AT&T ADMITS ALL FACTS NECESSARY TO INVOKE THE FILED RATE DOCTRINE

In its Answer, AT&T makes a series of admissions that confirm that it took service from Plaintiffs pursuant to valid tariffs. AT&T admits:

- That Plaintiffs are local exchange carriers ("LECs") that provide local and long distance services in their service territories. Answer, ¶ 12.
- That Plaintiffs had tariffs on file. Answer, ¶¶ 43, 50, 57. (AT&T admits the All American and ChaseCom tariffs; in the case of e-Pinnacle, AT&T refers the court to the filed tariff).
- That Plaintiffs billed AT&T for access services. Answer, ¶¶ 41, 44, 57.
- That AT&T initially paid under the tariffs, but then stopped payment. Answer, ¶¶ 42, 45, 52, 58, 59.

These admissions prove Plaintiff's claims, and provide the factual basis for awarding Plaintiffs the damages they seek. Complaint, ¶¶ 43-62, and Counts I - III.

Moreover, nowhere in its Answer does AT&T aver that Plaintiffs' tariffs were incorrectly filed, ineffective, or otherwise invalid, or that Plaintiffs' bills were inaccurate, and it does not deny receiving service from Plaintiffs. Only such averments can defeat the mandatory application of the filed rate doctrine at this stage of litigation, and the immediate award of specified damages to Plaintiffs. Because Defendant raises no such issues in its Answer, no questions of fact exist that could prevent immediate judgment under the filed rate doctrine. By its own admissions, therefore, AT&T is precluded from contesting the validity of Plaintiffs' tariffs, denying it received service from Plaintiffs, or denying that it was invoiced for the services it took at validly tariffed rates. The preconditions for judgment under the filed rate doctrine have therefore been met, and are fully evidenced in the pleadings.

C. AT&T Does Not – And Cannot – Demonstrate That Plaintiffs' Tariffs Are Unreasonable; Absent Such a Showing, the Tariffed Rate Must Be Enforced

AT&T's Answer and counterclaims do not present a coherent legal theory for invalidating Plaintiffs' tariffs. Indeed, AT&T's entire argument is based on an unsubstantiated claim that Plaintiff's services are not "access services" subject to tariffed access rates. However, while AT&T admits that it took service from Plaintiffs and has not paid for it, it never once asserts what the services <u>are</u>, and what rates should apply. Rather, AT&T appears to take the position that it need only assert – without <u>any</u> support – that the services that Plaintiffs provided and that AT&T took do not constitute "access services," and that by doing so, it can prevent enforcement of the tariffed rates and circumvent the filed rate doctrine. However, established law on the filed rate doctrine – including multiple rulings from the Southern District of New York – make clear that this theory must be rejected.

1. Plaintiffs' Tariffs Have the Force of Law, and Are Presumptively Binding on AT&T

The filed rate doctrine firmly establishes that a lawfully filed tariff has the force of law. Complaint, ¶ 24 (citing *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990)); *e.g.*, *Telecom International America, Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 216-17 (S.D.N.Y. 1999) (Hellerstein, J.) (filed rate doctrine precludes defenses to claim for tariffed rates); *AT&T Corp. v. Public Service Enterprises of Pennsylvania, Inc.*, No. 98 CIV., 6133(LAP), 1999 WL 672543, at 5 (S.D.N.Y. Aug. 26, 1999) (Preska, J.) (tariff must be enforced unless it has been found to violate the Communications Act).

Consonant with the legal status of tariffs, the courts have found that customers that take tariffed services are "'conclusively presumed' to have constructive knowledge of the filed tariff under which they have received service." *Fax Telecommunicaciones Inc. v. AT&T,* 138 F.3d 497, 489 & *passim.* (2d Cir.1998) (citing *Kansas City Southern Ry. Co. v. Carl,* 227 U.S. 639 (1913)). "Since customers are "'conclusively presumed' to have constructive knowledge of the filed tariff," they cannot assert a defense that the common carrier misrepresented or misquoted its rates." *WorldCom Technologies, Inc. v. ACS Telecom, Inc.*, No. 00 Civ. 3200 (LLS), 2001 WL 1537696, at 3 (S.D.N.Y., Dec. 3, 2001) (Stanton, J.) (citing *Fax v. AT&T*, 138 F.3d at 489). Given such precedent, a large and sophisticated telecommunications carrier such as AT&T is conclusively presumed to know its obligations under Plaintiffs' tariffs, and cannot be heard to challenge the application of the tariffed rates.

2. AT&T'S AVERMENTS THAT PLAINTIFF'S SERVICES DO NOT MEET THE TARIFF OR STATUTORY DEFINITIONS OF "ACCESS SERVICES" IS AN INDIRECT, AND PROHIBITED, ATTACK ON TARIFFED RATES

In the Southern District of New York, and elsewhere, this strict adherence to the filed rate doctrine has led courts to reject claims based on challenges to service terms and service definitions, because they constituted indirect attacks on the tariffed rates. In *WorldCom v. ACS*, ACS was a reseller that took tariffed service from WorldCom, but also signed a separate contract for larger volumes of the resold service, subject to different terms. *WorldCom v. ACS*, 2001 WL 1537696, at 2. When ACS' resale volumes fell below the minimum amount required by the WorldCom tariff, ACS refused to pay WorldCom's tariffed "deficiency charges," arguing that the provisions of its contract superseded the minimum ordering provision of the tariff. *Id.* ACS argued that the filed rate doctrine did not compel payment because the contract superseded the terms of the tariff, but not any tariffed rate. *Id.* This Court rejected the ACS complaint, finding that "[the filed rate] doctrine applies to all privileges and services covered by the [tariff] and is not limited to rates." *Id.* at 3. In so finding, the Court quoted the Supreme Court in *AT&T v. Central Office Telephone*:

> Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. "If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge. . . . The Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices, and regulations affecting such charges."

Worldom v. ACS, 2001 WL 1537696, at 3, *citing American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998) (emphasis added). *See also*, *Fax v. AT&T*, 138 F.3d at 489 (rejecting argument to accept a letter as a constructive contract that supersedes the tariff, on the grounds that such easy circumvention of the filed rate doctrine would enable widespread manipulation that would undermine the antidiscrimination purpose of the filed rate doctrine).

These decisions make clear that AT&T's attempt to circumvent the filed rate doctrine in the instant case must be rejected. AT&T has attempted to prevent the enforcement of tariffed rates by making baseless and unsupported allegations that the service that it took from Plaintiffs is not the service reflected in their tariff. The courts, however, have long recognized that such simple definitional games could easily be manipulated and result in the discrimination that the filed rate doctrine is designed to prevent. Consistent with the precedent discussed above, this Court should find that

AT&T's arguments are clearly an attack on the Plaintiff's tariffed rates. These arguments cannot serve to defeat a collection action under the filed rate doctrine.

3. AT&T'S COUNTERCLAIMS ASK THIS COURT TO VOID PLAINTIFF'S TARIFFED RATES, IN VIOLATION OF THE FILED RATE DOCTRINE

All of AT&T's affirmative defenses and counterclaims are focused on a single outcome – AT&T wants to be absolved of any obligation to pay the tariffed rate for the services it knowingly took from Plaintiffs. AT&T's goals are summarized in its request for declaratory relief in Count VII of its Answer and counterclaims, where it seeks a Court declaration that:

> (i) . . . [Plaintiffs] are not providing terminating switched access services to AT&T in connection with the international calling, chat line, and conferencing schemes, (ii) the interstate and intrastate access charges that appear in the bills rendered by [Plaintiffs] to AT&T violate their interstate and intrastate tariffs, the Communications Act and the FCC's implementing rules, and Iowa law, and (iii) <u>AT&T is not obligated to pay the interstate or intrastate access charges that appear in the bills rendered by [Plaintiffs] to AT&T that contain charges for chat line or conferencing calls or other calls made using the service of a Website Company</u>.

Answer, ¶ 76 (emphasis added).

This Court has consistently found that it cannot provide the type of relief that AT&T seeks. *Telecom International America, Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189 (S.D.N.Y. 1999) (Hellerstein, J.) involved a complaint by a reseller against AT&T, contesting the Shortfall Charges imposed by AT&T's tariff in cases where resellers did not meet the volume sales commitments to which they agreed. TIA argued, *inter alia*, that the tariffed charges were "unenforceable penalty provisions void as against public policy; . . . the filed rate doctrine is inapplicable in situations where the customer disputes liability; and because AT&T made numerous representations . . . ." Id. at 219. Judge

Hellerstein rejected TIA's arguments and granted summary judgment to AT&T, stating: "In short, I cannot void the Shortfall Charges because <u>I would be substituting my judgment as to what would be a reasonable rate – something prohibited by the filed rate doctrine</u> and the doctrine of primary jurisdiction. Moreover, I would also be providing TIA with an extra-tariff benefit, unavailable to any other potential subscriber to [the tariff]." *Id. (emphasis added).*

This Court made a similar finding in *WorldCom v. ACS.* In that case, ACS, another reseller, filed counterclaims to a WorldCom collection action. Some of the counterclaims sought "recission and damages, claiming fraudulent inducement to enter [the reseller contract]." This Court dismissed these counterclaims, stating: "To the extent ACS seeks to avoid payment obligations under the filed tariffs . . . it is barred by the filed rate doctrine." *WorldCom v. ACS*, 2001 WL 1537696, at 3. This Court has long recognized that the filed rate doctrine does not allow courts to absolve customers of the obligation to pay tariffed rates, regardless of their claims of illegality, fraud or mistake. As AT&T's Answer and counterclaims amount to a request to the Court to void the Plaintiffs' tariffed rates, they must be rejected, and cannot prevent a judgment for Plaintiffs, pursuant to the filed rate doctrine.

4. ABSENT A SHOWING OF LEGAL SUPPORT, THE COURT MUST REJECT AT&T'S ASSERTIONS THAT PLAINTIFFS' CONDUCT IS UNLAWFUL OR THEIR TARIFFS ARE UNREASONABLE

The long line of precedent that consistently and strictly applies the filed rate doctrine has led this Court to reject claims based on service terms and definitions <u>unless they were specifically supported by an order by the Federal Communications Commission ruling that the tariff was unreasonable</u>. In *AT&T v. PSE*, PSE, a reseller, sought to overturn an arbitration ruling that awarded AT&T payment of its tariffed rates for Penalty for Shortfall (a tariffed charge that applies if a reseller did not sell the volume of services it committed to sell). *AT&T Corp. v. Public Service Enterprises of Pennsylvania, Inc.*, No. 98 CIV., 6133(LAP), 1999 WL 672543, at 2 (S.D.N.Y., Aug. 26, 1999) (Preska, J.) PSE argued that the award of the Shortfall Penalty amounts should be reversed, because the Penalty did not constitute a tariffed rate, but rather an arbitrator's award. PSE cited precedent asserting that courts could reverse arbitration awards if they violated established public policy, and cited numerous court cases finding that the payment of penalties violated public policy. *Id.* at 4-5. The Court rejected this argument, however, finding that the Shortfall Penalty was a tariffed rate, and its payment was compelled by the filed rate doctrine. *Id.* at 5. Judge Preska found that, "under the filed rate doctrine, courts must give effect to a tariff provision unless it has been found to violate the [Communications] Act. . . . Accordingly, because neither party has brought to this Court's attention a ruling by the FCC declaring the filed tariff unreasonable, I presume, for purposes of this decision, that the tariff is reasonable and has the force of law." *Id.*

In the case at bar, AT&T has cited no FCC precedent to support its allegations that the services provided by Plaintiffs were incorrectly classified as "access" service, much less presented an FCC ruling that Plaintiffs' tariffs are unreasonable. And no such precedent exists. To the contrary, the FCC has on no fewer than four occasions rejected arguments that chatline and conference services identical to the services provided by Plaintiffs violate the Communications Act. Three of these rulings rejected formal complaints brought by AT&T against rural LECs that provided conference and chat services. *AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd 16130 (2001); *AT&T*

Corp. v. Frontier Communications of Mt. Pulaski, Inc., 17 FCC Rcd 4041 (2002); *AT&T v. Beehive Telephone Co.,* 17 FCC Rcd 11641 (2002). Copies of these FCC decisions are appended to this Memorandum as Exhibits 1, 2 and 3, respectively.

The FCC's most recent decision in this line of cases was issued last October in *Qwest Communications Corporation v. Farmers & Merchants Mutual Telephone Company*, 22 FCC Rcd 17973 (Oct. 2, 2007). AT&T brought that decision to the Court's attention in a letter filed on January 4, 2008, because that FCC decision "pertain[ed] to the traffic pumping schemes that underlie both these cases [including the case at bar] and the Iowa cases." In *Qwest v. Farmers*, Qwest filed a formal complaint, asking the FCC to find that "traffic pumping schemes" — in which a rural LEC partnered with conference and chat operators in order to generate access traffic, and access revenues — and paid the conference and chat operators a commission based on these access revenues, violated the Communications Act. The FCC rejected all of Qwest's arguments, finding:

- "Farmers did not violate Sections 203 or 201(b) of the Act by imposing terminating access charges on traffic bound for conference calling companies." *Id.* at ¶ 30.

- "Qwest argues that traffic delivered to the conference calling companies does not terminate . . . [w]e find, however, that Farmers does terminate the traffic at issue . . . ." *Id.*

- "Qwest also argues that Farmers' tariff does not allow Farmers to assess terminating access charges on calls to the conference calling companies. . . . The record indicates, however, that the conference calling companies *are* end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with its tariff." *Id.* at ¶ 35 (emphasis in original).

- "We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff. . . . The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users." *Id.* at ¶ 38.

- "Qwest has failed to prove that the conference calling company-bound calls do not terminate in Farmers' exchange, and has failed to prove that Farmers' imposition of terminating access charges is inconsistent with its tariff." *Id.* at ¶ 39.

The FCC did find that Farmers & Merchants exceeded its allowed maximum rate of return. This decision is irrelevant to the case at bar, however, because Plaintiffs are competitive LECs, not incumbent LECs, and so are not subject to rate of return regulation. Qwest has sought reconsideration of the FCC's ruling, on the grounds that Farmers did not disclose relevant information during discovery, and that reconsideration process remains pending. A copy of the *Qwest v. Farmers* decision is appended to this Memorandum as Exhibit 4.

The FCC decisions cited above are dispositive of the legality of Plaintiff's conduct. However, they need not be dispositive to overcome AT&T's claims. Rather, the existence of four FCC decisions relating to issues virtually identical to those raised in the instant case, demonstrate that Plaintiff's conduct is fully consistent with the Communications Act. This precedent is submitted to this Court, not to prove the legality of Plaintiffs' conduct, but to demonstrate that AT&T has failed to produce any FCC decisions that support its claims that Plaintiff's conduct is unlawful and that Plaintiffs' tariffed rates are inapplicable. This is not an oversight on AT&T's part. Defendant cannot provide precedential support for its arguments because none exists – all of the existing FCC precedent has been decided against AT&T's position.

III. AT&T's AFFIRMATIVE DEFENSES AND COUNTERCLAIMS FAIL TO RAISE ANY JUSTICIABLE ISSUES OF FACT, OR ANY ACTIONABLE CLAIMS

A. AT&T's Counterclaims Fail to Present Factual Allegations Sufficient to Support a Claim for Relief – Its Arguments Are Mere Assertions of Legal Conclusions

All of the arguments and counterclaims in AT&T's Answer rely on one assertion – the services provided by Plaintiffs, and taken by AT&T, do not constitute "access service" as defined by Plaintiffs' tariffs, FCC rules, and the Communications Act, and so Plaintiffs cannot bill access charges. This assertion is not factual – it is an obvious attempt to recast a legal conclusion as a factual question for the sole purpose of evading the filed rate doctrine. AT&T tries to make its arguments sound like they raise issues of fact, but they do not – they are all summary legal conclusions.

AT&T does not cite a single FCC decision to support its assertions that Plaintiffs have violated any provision of the Communications Act. Instead, it merely quotes passages from the Act, and asserts that Plaintiff's behavior violates it. However, without reference to decisions by the expert agency – the FCC – or a court, AT&T's arguments are baseless legal conclusions asserting its interpretation of the statute.

The Courts have found that such conclusory legal statements cannot support a claim for relief. The most recent and definitive statement of the law is found in *Bell Atlantic Corporation v. William Twombly*, ___ U.S. ___; 127 S. Ct. 1955 (2007). In the *Twombly* case, the Supreme Court reviewed at length the standards for addressing the "question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act" sufficient to survive a motion to dismiss under Rule 12(b)(6). *Id.* at 1964. The Court found that "a plaintiff's obligation . . . requires more than labels and conclusions . . . ." *Id.* at 1965 (citing *Sanjuan v. American Board of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994)). "[O]n a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id. (*citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id. (*citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004)).

The Twombly standard has been adopted by the Second Circuit in reviewing 12(b)(6) motions in cases outside of antitrust. "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Communications, Inc. v. The Shaar Fund, Ltd.*, 493 F.3d 87 (2nd Cir. 2007) (citing *Twombley*, 127 S. Ct. at 1969).

Below, Plaintiffs prove that the arguments raised by AT&T in its Answer and counterclaims present no triable questions of fact, and instead simply assert baseless legal conclusions that are inadequate to support counterclaims against Plaintiffs.

B. AT&T'S COUNTERCLAIMS DO NOT RAISE ANY TRIABLE ISSUES OF FACT

Pursuant to the standards enunciated in *Holm v. Malmberg* and related cases, below, Plaintiffs present AT&T's "factual" assertions as if they were presumed correct, and draws all inferences in favor of AT&T:

- Plaintiffs exist for the sole purpose of generating large volumes of conference and chat traffic, and provide no services to regular residential telephone customers. Answer, ¶ 16.
- All of these chat and conference services are "free" – meaning that callers do not pay a charge for them, and the only revenues from the services come from access charges billed to AT&T and other long distance carriers. Answer, ¶¶ 18, 28.
- Plaintiffs access charges are exorbitant – much higher than those charge by other local telephone companies. Answer, ¶¶ 26, 28.

- Plaintiffs partner with "Website Companies" and others that generate massive volumes of chat and conference traffic. These include pornographic chat lines. Plaintiffs use "simple telecommunications equipment" to set up conference and chat bridges. Plaintiffs enter into contracts with website companies, chat and conference service operators. Plaintiffs assign telephone numbers to them, and share access revenues with them. Answer, ¶¶ 27, 67 (Count VI).

- Plaintiffs charge the same access charges for chat and conference services that other carriers charge for traditional telephone service to rural residential customers. Answer, ¶ 28.

Assuming that all of the above assertions by AT&T are proven in discovery, and placed before a jury, what would they prove? Is a jury going to determine whether Plaintiff's telephone networks are functionally equivalent to those of other carriers? That Plaintiffs fail to provide "all elements" of an access service? That access charges cannot be imposed on traffic that carriers pornographic conversations? That Plaintiffs are prohibited from paying a share of the access revenues they collect to conference and chatline operators?

Of course, these are rhetorical questions. The issues presented by AT&T present highly technical matters of telecommunications engineering and public policy that must be addressed by the expert regulatory agency. Moreover, the line of questioning proposed by AT&T cannot be undertaken by the court, because AT&T's sole purpose in presenting these "questions" is to have the court void Plaintiff's tariffed rates, and the Court cannot do so.

A jury, and this Court, are not competent to determine such highly technical matters of telecommunications engineering, ratemaking and policy. These clearly are questions for the expert agency – the FCC – to determine. And in fact, the FCC has already ruled dispositively on the legality of collecting access charges for chatline and conference services. As discussed in Section II(c)(4), above, the FCC has issued its decision in *Qwest v. Farmers & Merchants*, and is currently considering Qwest's petition for review of that decision. By its letter to the Court dated January 4, 2008, AT&T acknowledges that this case is directly relevant to the issues in the case at bar.

In addition, at the behest of AT&T and other long distance carriers, the FCC initiated Wireline Competition Bureau Docket 07-135 to consider whether it should, on a prospective basis, make changes to its existing rules concerning how access rates are computed, and whether it should impose any restrictions on LECs' provision of conferencing or chatline services. That proceeding was created expressly to consider exactly the issues that AT&T's counterclaims and affirmative defenses bring before this Court.

AT&T is an active participant in FCC's Docket 07-135. *E.g.*, Comments of AT&T Inc., FCC, WC Docket No. 07-135, filed December 17, 2007. A copy of AT&T's initial Comments in Docket 07-135 is attached as Exhibit 5. In fact, in that proceeding, AT&T takes positions that are directly contrary to the arguments it makes before this court. Specifically, while the gravamen of AT&T's counterclaims in the instant case is its assertion that Plaintiffs' service is not "access service," and so tariffed access rates cannot apply, AT&T's comments to the FCC freely acknowledge that services to conference and chatline operators <u>is</u> access traffic (Comments, pp. 8 -10, 12, 17 and *passim*). Indeed, this fact underlies all of AT&T's requests for relief from the FCC. AT&T asks the FCC to establish new rules that prescribe rate levels for CLEC access services (Comments, pp. 20, 29), set maximum levels of growth in volumes for their access services (Comments, pp. 20, 28), and require detailed reporting of "access minutes" and "access revenues" (Comments, pp. 20, 21) in order to protect AT&T from precisely the type of "traffic pumping" it describes to this Court. AT&T's comments are similar to those filed by the dozens of parties who are active in FCC Docket 07-135 – including both long distance carriers and LECs: these commentors take for granted that the services described as "traffic pumping" services that carry chat and conference traffic are all access services, subject to tariffed access charges. These comments belie AT&T's assertions before this Court. Moreover, these comments prove that the FCC has considered, or is currently considering, all of the questions that AT&T is attempting to bring before this Court, that such questions raise highly technical issues of telecommunications technology and policy that must be addressed by the expert regulatory body, and that the resolution of these questions inescapably affects tariffed rates.

Finally, if a jury were to consider these issues, the only form of relief that AT&T seeks is based on a jury finding that Plaintiffs' tariffed access rates do not apply to the services that Plaintiffs provided and that AT&T took. The jury would be determining that some other rate – or perhaps no rate at all – should apply instead. As discussed under Section II above, the filed rate doctrine prohibits a jury from considering such matters, and prevents this Court from awarding the relief sought by AT&T.

C. THE OTHER ASSERTIONS IN AT&T'S COUNTS AND AFFIRMATIVE DEFENSES ARE UNFOUNDED CONCLUSIONS OF LAW, AND DO NOT RAISE ANY TRIABLE ISSUES OF FACT

The remaining assertions in AT&T's counterclaims are unequivocally conclusions of law, and do not allow of any factual analysis. AT&T does not cite any FCC decision or court case in support of any of these assertions:

- The conference, chat and international calls do not terminate in Plaintiff's service areas. Answer, Counts I and II, ¶¶ 32, 39.

- Plaintiffs do not provide "the elements of switched access service." Answer, Count I, ¶ 32.

- The Plaintiff's local networks are not functionally equivalent to the local networks of carriers that provide primarily traditional, residential telephone service. Answer, Count I, ¶ 32.

- Because Plaintiffs' services are not "access service" they cannot charge tariffed "access rates." Answer, Count II, ¶¶ 40.

- It is a violation of § 201 of the Communications Act to form a CLEC solely for the purpose of generating massive volumes of chat and conference services. Answer, Count II, ¶ 42.

- "Retention of [access charges by Plaintiffs] would be unjust because, inter alia, AT&T did not receive the access services for which it is being billed." Answer, Count IV, ¶ 56.

- Plaintiffs' access bills contain false information because they bill AT&T for access charges, but Plaintiffs' did not provide access service. Answer, Count V, ¶ 60; Count VI, ¶ 68; Count VII, ¶ 74.

These statements are legal conclusions on their face, and do not raise triable issues of fact.

For the reasons discussed above, AT&T's Answer raises no triable issues of fact. Under the standard established in *Twombly* and related cases, the AT&T counterclaims should be dismissed under Rule 12(b)(6) for failure to state a claim, and Plaintiff's motion for judgment on the pleadings should be granted.

IV. AT&T HAS OFFERED NO DEFENSE OF ITS UNLAWFUL SELF-HELP IN REFUSING TO PAY PLAINTIFF'S TARIFFED ACCESS CHARGES

As Plaintiffs demonstrated in their Complaint, AT&T's self-help campaign of withholding payment of access charges to Plaintiffs is unquestionably unlawful. Parties cannot take the law into their own hands and simply refuse to pay for services they have taken from a carrier – such action constitutes unlawful self-help, and violates §§ 201(b) and 203(c) of the Communications Act. *E.g., MGC Communications, Inc. v. AT&T Corp,* 14 FCC Rcd 11647 (1999) (§ 201(b) violation); *MCI Telecommunications Corp., American Telephone and Telegraph Co. and the Pacific Telephone and Telegraph Co.*, 62 FCC 2d 703 (1976)(§ 203(c) violation). Rather, if a carrier has a dispute against a tariffed rate, it must pay that rate while pursuing a complaint before the FCC or other appropriate regulatory body. Complaint, ¶ 24 (citing *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998)); Complaint, ¶¶ 27-34 (citing, *inter alia, MGC Communications, Inc. v. AT&T Corp.*, 15 FCC Rcd. 308 (1999)). "The proper way for an IXC to challenge a LEC's [rate] is to initiate a Section 208 [complaint] proceeding at the Commission." *Bell Atlantic – Delaware v. Frontier Communications Services, Inc.* 15 FCC Rcd 7475, ¶ 9 (2000).

In its Answer, AT&T admits that it has refused to pay the access charges invoiced by all three Plaintiffs. Answer, ¶¶ 42, 52, 59. AT&T attempts to justify this action solely by asserting – without citing <u>any</u> authority – that Plaintiffs' services cannot be defined as "access services." Answer, ¶¶ 41, 42. AT&T completely ignores Plaintiff's demonstration that AT&T's refusal to pay the invoiced access charges constitutes unlawful self-help, which violates Sections 201(b) and 203(c) of the Communications Act. Complaint, ¶¶ 27-36, 43-62.

AT&T raises no justifiable questions of fact in answer to Plaintiff's Complaint. It does not assert that Plaintiffs' tariffs were invalid, that it did not take service from Plaintiffs, or that Plaintiffs' invoices were inaccurate. Instead, it simply asserts – without any support – that it is not obligated to pay Plaintiffs' tariffed rates because the services it took from Plaintiffs do not constitute "access services." As Plaintiffs demonstrate above, Plaintiffs' tariffs are valid and enforceable as a matter of law, and AT&T cannot contest the definitional characterization of their services before this Court. As a result, AT&T has presented no legally cognizable defense to Plaintiffs claims, and Plaintiffs are entitled to an award of the damages they have claimed. Specifically, Plaintiffs are entitled to an immediate award of the amounts of unpaid access charges identified in their Complaint: $2,025,470.80 for All American (Complaint, ¶ 49); $57,189.85 for ChaseCom (Complaint, ¶ 55); and $193,009.86 for e-Pinnacle (Complaint, ¶ 62). AT&T has not contested these fees, and has admitted nonpayment. The remainder of Plaintiffs' damages should be determined at hearing at the earliest practicable opportunity.

At the time Plaintiffs filed their complaint, AT&T had completely ceased making any payments to Plaintiffs for a period of nine months. AT&T has continued its practice of self-help uninterrupted since that time. Currently, AT&T has not made any payments of any access charges to Plaintiffs for a period of <u>23 months</u>. The interests of justice require an award of damages to Plaintiffs at the earliest practicable date.

V. CONCLUSION: PLAINTIFFS ARE ENTITLED TO JUDGMENT ON AT&T'S LIABILITY FOR VIOLATION OF THE COMMUNICATIONS ACT, AND AN AWARD OF THEIR REQUESTED DAMAGES

For the reasons discussed above, Plaintiffs are entitled to a judgment on the pleadings, finding that AT&T has violated the Communications Act by conducting a self-help campaign of refusing to pay invoiced access charges, and awarding the following damages.

- An immediate award of the unpaid access charges specified in the Complaint. Complaint, ¶¶ 49, 55, 62. Counts I, II, III.
- An award of amounts withheld by AT&T since the filing of the Complaint, to be determined at a subsequent hearing. Count I.
- A finding of liability – that AT&T's self-help violates §§ 201 and 203 of the Communications Act. Counts II and III.

- Punitive damages, to be determined at a subsequent hearing. Counts II, III.
- Attorneys' fees, to be determined at a subsequent hearing. Counts II and III.
- Consequential damages, to be determined at a subsequent hearing. Complaint, p. 20.
- Preliminary and permanent injunction barring continued self-help. Complaint, p. 21.

Plaintiffs are also entitled to a Rule 12(b)(6) dismissal of AT&T's counterclaims on the grounds that AT&T has not stated a claim on which relief can be granted.

For the reasons discussed above, Plaintiffs are entitled to judgment on the pleadings on liability, and an immediate award of amounts of unpaid access charges due at the time their Complaint was filed, and dismissal of AT&T's counterclaims. Plaintiffs will seek to schedule proceedings at the earliest practicable date to determine the amounts of the remaining damages.

Respectfully Submitted,

By: ______________________

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Dated: March 14, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALL AMERICAN TELEPHONE COMPANY, INC., ET AL. Plaintiffs, -against- AT&T, INC., Defendant	07 Civ. 861 (WHP) **PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS**

PLAINTIFFS' EXHIBITS

EXHIBIT 1

Memorandum Opinion and Order
August 24, 2001

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-07
	)	
Jefferson Telephone Company,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 2001 Released: August 31, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we deny a formal complaint filed by AT&T Corporation ("AT&T") against Jefferson Telephone Company ("Jefferson") pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").[1] AT&T challenges the lawfulness of an access revenue-sharing arrangement that Jefferson entered into with an information provider to which Jefferson terminated traffic. On the basis of the facts and arguments presented in this record, we conclude that AT&T has failed to meet its burden of demonstrating that Jefferson (i) engaged in discrimination prohibited by section 202(a) of the Act,[2] or (ii) violated section 201(b) of the Act[3] by breaching its duty as a common carrier to serve, in AT&T's words, as an "objective conduit" of communications services. Accordingly, we deny AT&T's complaint.[4]

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1 47 U.S.C. § 208.

2 47 U.S.C. § 202(a).

3 47 U.S.C. § 201(b).

4 *See generally Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the burden of proof is on the complainant in a proceeding conducted under 47 U.S.C. § 208).

II. BACKGROUND

2. At all relevant times, Jefferson was an incumbent local exchange carrier ("LEC") located in Jefferson, Iowa that served approximately 3,400 access lines.[5] Jefferson provided local exchange service to end user customers, and originating and terminating exchange access services to AT&T and other interexchange carriers ("IXCs").[6] During 1994 and 1995, Jefferson charged IXCs access rates specified by the National Exchange Carrier Association ("NECA") pursuant to a tariff filed at the Commission.[7]

3. During the period at issue in this dispute, one of Jefferson's end-user customers was an information provider called International Audiotext Network ("IAN").[8] IAN provided its customers a kind of multiple voice bridging service commonly known as "chat-line" service. This service connects incoming calls so that two or more callers can talk with each other simultaneously.[9] This differs from traditional conference call service in that callers to the chat line are randomly paired with other callers. In addition, unlike many chat-line operators, IAN did not impose any charges on callers. Instead, IAN obtained all of its revenues from Jefferson,

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[5] *AT&T Corp. v. Jefferson Telephone Company*, Complaint, File No. E-97-07 (filed Dec. 23, 1996) at 2, ¶ 4 ("Complaint"); *AT&T Corp. v. Jefferson Telephone Company*, Answer of Jefferson Telephone Company, File No. E-97-07 (filed Feb. 18, 1997) at 1, ¶ 4 ("Answer"); *AT&T Corp. v. Jefferson Telephone Company*, Initial Brief of AT&T Corp., File No. E-97-07 (filed Oct. 31, 1997) at 1 ("AT&T Brief"). Jefferson claims that it was a connecting carrier within the meaning of section 2(b)(2) of the Act. Jefferson Brief at 3-4, *citing* 47 U.S.C. § 152(b)(2). Section 2(b)(2) of the Act provides, in pertinent part: "[N]othing in the Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier . . . , except that sections 201 through 205 of this Act, both inclusive, shall . . . apply to [such] carriers . . . ." 47 U.S.C. § 152(b)(2). Jefferson asserts that it is engaged in interstate communication solely through physical connection with other carriers, so section 2(b)(2) immunizes it from complaints filed pursuant to section 208 of the Act; in Jefferson's view, only sections 201 through 205 of the Act apply to it, and not section 208. Jefferson Brief at 3-4, *citing Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701, 704-07 (1st Cir. 1977). The Commission has consistently rejected this interpretation of section 2(b)(2) of the Act, and held that section 208 applies even to connecting carriers. *See, e.g., Com Services, Inc. v. The Murraysville Telephone Co.*, Memorandum Opinion and Order, 100 FCC 2d 210, 217, ¶ 16 (1985); *TPI Transmission Services, Inc. v. Puerto Rico Telephone Co.*, Memorandum Opinion and Order, 4 FCC Rcd 2246, 2248 n.19 (Com. Car. Bur. 1989)(both declining to follow *Comtronics*, and relying on *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816, 819-21 (6th Cir. 1962), instead). Accordingly, even assuming, *arguendo*, that Jefferson was a "connecting carrier" under section 2(b)(2) of the Act, we reject Jefferson's assertion that it is immune from complaints filed pursuant to section 208.

[6] Complaint at 2, ¶ 4; Answer at 1, ¶ 4.

[7] Complaint at 2, ¶ 5; Answer at 1, ¶ 5; AT&T Brief at 1; *AT&T Corp. v. Jefferson Telephone Company*, Initial Brief of Jefferson Telephone Company, File No. E-97-07 (filed Oct. 31, 1997) at 2 ("Jefferson Brief). The applicable NECA rate for terminating access service at that time was between $.06 and $.07 per minute. Complaint at 2, ¶ 5; Answer at 1, ¶ 5.

[8] AT&T Brief at 2, Ex. 2; Jefferson Brief at 1-2.

[9] Complaint at 3, ¶ 6 n.1; Answer at 1-2, ¶ 6; AT&T Brief at 3; Jefferson Brief at 2.

as described below. Thus, callers to IAN paid only their designated IXC for the calls, and paid only the IXC's tariffed, long-distance toll charges.[10]

4. During the time period at issue here, a long distance call by an AT&T subscriber to IAN was first routed to the subscriber's local telephone company. Next, the call was routed to AT&T, which transported the call across AT&T's long distance network. AT&T then handed the call to Jefferson (the "terminating access provider"). As the "terminating access provider," Jefferson routed the call to its end-user customer, IAN.[11] Jefferson then billed AT&T for terminating access services at the tariffed rate.[12]

5. Towards the end of 1992, Jefferson entered an agreement with IAN whereby Jefferson would make payments to IAN based on the amount of access revenues that Jefferson received for terminating calls to IAN.[13] In return, IAN would market and otherwise aid the chat-line operations.[14] As mentioned above, the payments that Jefferson paid to IAN based on terminating access revenues constituted IAN's only source of revenue.[15] On July 31, 1995, the agreement between Jefferson and the chat line ended.[16]

6. In December 1996, AT&T filed the instant complaint.[17] According to AT&T,

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[10] Complaint at 3, ¶ 6; Answer at 2, ¶ 6; Jefferson Brief at 2; AT&T Brief at 3. *See* Jefferson Brief at Exhibit 1, Declaration of James L. Daubendiek, at 2-3, ¶ 6 ("Daubendiek Declaration") (stating that "[t]he caller paid the tariffed long-distance rates assessed by whichever interexchange carrier the caller chose to use.").

[11] *See generally Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, FCC 01-84, 16 FCC Rcd 5726, 5729, ¶ 6 (2001).

[12] Complaint at 4, ¶ 8; AT&T Brief at 4; Jefferson Brief at 2; Daubendiek Declaration at 2-3, ¶ 6.

[13] Complaint at 2-3, ¶ 6; Answer at 2, ¶ 6; AT&T Brief at 1-2; Jefferson Brief at 2. *See* Daubendiek Declaration at 2, ¶ 5.

[14] *See* AT&T Brief at Confidential Exhibit 4, paragraph 2, detailing the obligations of IAN pursuant to the agreement between Jefferson and IAN. In a letter dated June 11, 2001, Jefferson explicitly granted the Commission permission to discuss publicly this section of the agreement. *See AT&T Corp. v. Jefferson Telephone Company*, Letter from James U. Troup and James H. Lister, Counsel for Jefferson Telephone Co., to Warren Firschein, Attorney, Enforcement Bureau, FCC, File No. E-97-07 (dated June 11, 2001).

[15] This arrangement stimulated traffic and boosted Jefferson's terminating access revenues. While the arrangement was in place, Jefferson terminated as much as 2,000,000 minutes per month, whereas after the arrangement ended, Jefferson terminated about 130,000 minutes per month. Complaint at 3-4, ¶ 7; Answer at 2, ¶ 7; AT&T Brief at 4; AT&T Brief at Ex. 9, *AT&T Corp. v. Jefferson Telephone Company*, Defendant's Response to AT&T Corp.'s First Set of Interrogatories, File No. E-97-07 (filed Apr. 21, 1997), Response to Interrogatory No. 4.

[16] Jefferson Brief at 1; Daubendiek Declaration at 2, ¶ 4.

[17] Jefferson argues that AT&T's claims are time-barred because AT&T knew or should have known of Jefferson's revenue-sharing arrangement with IAN more than two years prior to the filing of the complaint. *AT&T Corp. v. Jefferson Telephone Company*, Reply Brief of Jefferson Telephone Company, File No. E-97-07 (filed Nov. 7, 1997) at 3-4 ("Jefferson Reply"). *See* 47 U.S.C. § 415(a) (providing that an action to recover charges

Jefferson's access revenue-sharing arrangement with IAN violated section 201(b) by contravening the "basic principle of common carriage" that a carrier may only serve as an objective conduit of communications service, "without influenc[ing] or control[ling] . . . the destination of a customer's calls within its authorized service area."[18] Such contravention occurred, in AT&T's view, because Jefferson "acquired a direct interest in promoting the delivery of calls to specific telephone numbers for the provision of a specific communication."[19] AT&T also contends that Jefferson's access revenue-sharing arrangement with IAN discriminated against Jefferson's other end user customers, in violation of section 202(a), because the arrangement "caused access revenues, which are intended to cover Jefferson's legitimate costs of service and its ability to maintain high quality service in the areas in which it operates, to be directed elsewhere."[20] AT&T requests an order (i) declaring that Jefferson's access revenue-sharing arrangement with IAN was unlawful, and (ii) awarding damages in the amount of the access fees that AT&T paid for calls to IAN, with interest.[21]

III. DISCUSSION

A. AT&T Has Not Demonstrated that the Access Revenue-Sharing Arrangement Between Jefferson and IAN Violated Section 201(b) of the Act by Breaching Jefferson's Duty as a Common Carrier.

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must be initiated within two years from the time the cause of action accrues). In support of its argument, Jefferson relies solely on the fact that AT&T appended to its Initial Brief a newspaper article from the San Diego Union-Tribune dated November 14, 1994 that describes the revenue-sharing arrangement. Jefferson Reply at 3. *See* AT&T Brief at Ex. 2. Thus, according to Jefferson, "the window of opportunity to file a complaint closed on November 14, 1996." Jefferson Reply at 3. We disagree. Just because AT&T submitted the newspaper article in this record does not demonstrate that an AT&T representative read the article at the time it was published. Without more, it would be equally reasonable to conclude that AT&T first learned of the article in the course of prosecuting this case. Thus, the record does not support a conclusion that AT&T's claims are time-barred.

[18] Complaint at 4, ¶ 10. *See id.* at 4-6, ¶¶ 11-16. AT&T asserts this claim in two substantively identical causes of action (Counts One and Two), which we consider collectively. In its Initial Brief, AT&T cursorily maintains for the first time that the revenue-sharing arrangement between Jefferson and IAN also violated section 201(b) by "evading the requirements" of section 228 of the Act, 47 U.S.C. § 228, known as the Telephone Disclosure and Dispute Resolution Act ("TDDRA"). AT&T Brief at 15-17. AT&T failed to raise this issue in its Complaint, however. Therefore, the record provides an inadequate basis on which to assess the merits of this potentially challenging argument. *See, e.g., Consumer.Net v. AT&T Corp.*, Order, 15 FCC Rcd 281, 300, ¶ 40 n.93 (1999) (declining to consider an argument raised for the first time in the briefs); *Building Owners and Managers Association International v. FCC*, — F.3d —, 2001 WL 754910, n.14 (D.C. Cir. 2001) (declining to address an issue raised cursorily in the brief). Accordingly, we decline to address this issue, and restrict our discussion of section 201(b) to AT&T's "common carriage" claim.

[19] Complaint at 4, ¶ 11. *See id.* at 4-6, ¶¶ 11-16.

[20] Complaint at 7, ¶ 20. *See id.* at 6-7, ¶¶ 18-21.

[21] Complaint at 7-8.

7. According to AT&T, there are "two essential prerequisites" for common carriage.[22] First, a common carrier must "hold[ ] itself out to serve indifferently with regard to the service in question."[23] Second, a common carrier must "allow[ ] customers to transmit intelligence of their own design and choosing."[24] AT&T maintains that Jefferson violated the first of these fundamental principles (and, thus, section 201(b)) when it entered into the revenue-sharing arrangement with IAN and acquired a direct economic interest in terminating traffic to IAN.[25]

8. We agree with AT&T's general description of the fundamentals of common carriage.[26] We disagree with AT&T, however, that Jefferson violated the first of those fundamentals when it entered the revenue-sharing agreement with IAN.

9. AT&T alleges that Jefferson violated the "indifference" requirement of common carriage, because the revenue-sharing arrangement with IAN "caused Jefferson to have a direct, and greater, economic interest in delivering calls to one set of destination telephone numbers in its service area than to other destination numbers."[27] In AT&T's view, "it became Jefferson's prerogative, pursuant to the agreement, to transmit calls to IAN as opposed to transmitting calls to other destinations in its territory."[28]

10. AT&T mischaracterizes the "indifference" requirement as turning on a carrier's motive for providing service to a particular customer. This requirement hinges not on such intent, but rather on the carrier's conduct in actually serving customers. The critical inquiry is whether a carrier makes *ad hoc* determinations about the provision of service to particular

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[22] AT&T Brief at 7-15. *See* Complaint at 4-5, ¶¶ 10-12; AT&T Reply at 5-8.

[23] AT&T Brief at 7, *relying on Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994); *National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976); *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976).

[24] AT&T Brief at 7-8, *relying on Southwestern Bell Telephone Co. v. FCC*, 19 F.3d at 1480; *NARUC v. FCC*, 525 F.2d at 640-42.

[25] Complaint at 4-5, ¶¶ 10-13; AT&T Brief at 7-15; AT&T Reply at 5-9; *AT&T Corp. v. Jefferson Telephone Company*, Opposition to Motion to Dismiss, File No. E-97-07 (filed Mar. 5, 1997) at 3-4 ("Opposition to Motion to Dismiss").

[26] *See Southwestern Bell v. FCC*, 19 F.3d at 1480-81 (stating that, "[i]f the carrier chooses its clients on an individualized basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entry is a private carrier for that particular service."). *See also NARUC v. FCC*, 525 F.2d at 640-42.

[27] AT&T Brief at 5. *See* Complaint at 5, ¶ 12.

[28] AT&T Brief at 9. *See* Complaint at 4-5, ¶¶ 10-13; AT&T Brief at 7-15; AT&T Reply at 5-9; Opposition to Motion to Dismiss at 3-4.

customers.[29] Stated another way, "a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve."[30] Thus, as Jefferson asserts, the crux of the 'indifference' inquiry is the manner in which service is offered to customers, *not* the carrier's interest in increasing the traffic carried on its network.[31] As long as a carrier provides service indifferently and indiscriminately to all who request it, the first prong of the common carriage test is satisfied.

11. The record does not demonstrate that Jefferson failed to remain appropriately "indifferent" as a common carrier, notwithstanding its access revenue-sharing arrangement with IAN. In particular, the record contains no evidence that Jefferson ever made any individualized decisions in specific cases concerning whether and on what terms to provide interstate access services. Jefferson provided interstate access service at the same rate to all IXCs who ordered it pursuant to a tariff filed with the Commission. Moreover, Jefferson provided terminating interstate access service with respect to calls placed to all of the telephone numbers in Jefferson's exchange, not just to those numbers assigned to IAN. Finally, the record contains no indication that Jefferson ever deliberately routed to IAN an interstate call intended for a different end user.

12. AT&T points to the fact that the agreement between Jefferson and IAN required IAN to engage in certain marketing practices, and required Jefferson to block certain local calls to IAN.[32] These circumstances fall far short of giving Jefferson an unlawful interest in IAN, given that, as stated above, Jefferson provided interstate access services indifferently and indiscriminately to all who requested them.

13. We note that AT&T relies for support on a 1996 Notice of Proposed Rulemaking and a 1995 advisory letter issued by the Chief of the former Enforcement Division of the Common Carrier Bureau.[33] In the 1996 NPRM, the Commission sought comment on whether the practice at issue at here "could be interpreted as not being just and reasonable under section 201(b)."[34] The *Marlowe Letter* opined that an international long distance carrier would violate section 201(b) if it were to share with an information provider the toll revenues collected on calls

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[29] *See Southwestern Bell v. FCC*, 19 F.3d at 1480-81; *NARUC v. FCC*, 533 F.2d at 608-09; *NARUC v. FCC*, 525 F.2d at 641.

[30] *NARUC v. FCC*, 533 F.2d at 608-09. *See NARUC v. FCC*, 525 F.2d at 641 (stating that "to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve . . . .").

[31] Jefferson Brief at 7.

[32] *See* note 16, *supra*.

[33] *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, Order and Notice of Proposed Rule Making, 11 FCC Rcd 14738 (1996) ("*Pay-Per-Call NPRM*"); *Ronald J. Marlowe*, 10 FCC Rcd 10945 (CCB-ED 1995), *application for review pending* ("*Marlowe Letter*").

[34] *Pay-Per-Call NPRM*, 11 FCC Rcd at 14752, ¶ 41. *See id.* at 14755-56, ¶¶ 47-48.

to the information provider.[35] Neither item persuades us here.[36] For the reasons set forth above, based on the record in this case, in which AT&T argues that Jefferson's access revenue-sharing arrangement with IAN violated section 201(b) solely because it allegedly breaches common carriage duties, we conclude that AT&T has not met its burden of demonstrating that Jefferson's practice here is unjust and unreasonable. To the extent the former Enforcement Division's advisory letter is inconsistent with our holding here, we overrule the Division's letter.

14. For these reasons, we find that AT&T has not demonstrated that Jefferson violated its duty as a common carrier upon entering the revenue-sharing arrangement with IAN. Accordingly, we deny Counts One and Two of the Complaint.[37]

B. AT&T Has Not Demonstrated that the Access Revenue-Sharing Arrangement Between Jefferson and IAN Violated Section 202(a) of the Act.

15. AT&T cursorily contends that Jefferson discriminated against its end users, in violation of section 202(a) of the Act,[38] by failing to use all of its access revenues to maintain its network.[39] AT&T's contention fails to state a discrimination claim under section 202(a), because AT&T fails to allege that Jefferson treated one customer differently from another.[40] Notably, AT&T fails to allege either that (i) Jefferson offered a better deal to IAN than to other similarly situated end-user customers, or (ii) Jefferson treated one IXC differently than others in its provision of interstate access services. AT&T simply argues that Jefferson's network as a whole could have been better, had Jefferson not shared revenues with IAN. Whatever claim this odd argument may state, it is not one under section 202(a). Thus, we deny Count Three of AT&T's

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[35] *See Marlowe Letter*, 10 FCC Rcd at 10945.

[36] For example, the *Marlowe Letter* suggested that, "[t]hrough payments to an information provider . . . , a carrier would abandon objectivity and acquire a direct interest in promoting the delivery of calls to a particular number for the provision of a particular communication." *Marlowe Letter*, 10 FCC Rcd at 10945. As described above, we disagree. As long as a carrier does not make individualized decisions in specific cases concerning whether and on what terms to provide service, a carrier does not abandon the requisite "objectivity" by sharing revenues with an information provider.

[37] We note that AT&T explicitly disavowed any claim that the terminating access rate charged by Jefferson was unjust and unreasonable under section 201(b). AT&T Brief at 12. We express no view on the reasonableness of Jefferson's rates.

[38] Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services . . . or to make or give any undue or unreasonable preference or advantage to any particular person." 47 U.S.C. § 202(a).

[39] Complaint at 6-7, ¶¶ 17-21; AT&T Brief at 17-19.

[40] *See generally PanAmSat Corp. v. COMSAT Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 6952, 6965, ¶ 34 (1997); *American Message Centers v. FCC*, 50 F.3d 35, 40 (D.C. Cir. 1995); *Competitive Telecommunications Association v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993).

Complaint.[41]

IV. CONCLUSION

16. Although we deny AT&T's complaint, we emphasize the narrowness of our holding in this proceeding. We find simply that, based on the specific facts and arguments presented here, AT&T has failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement with an end-user information provider. We express no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end user customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements.

V. ORDERING CLAUSES

17. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 202, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, and 208, that the above-captioned complaint filed by AT&T IS DENIED IN ITS ENTIRETY, and this proceeding is TERMINATED WITH PREJUDICE.

18. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 202, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, and 208, that Jefferson's Motion to Dismiss (filed February 18, 1997), Jefferson's Motion to Compel (filed May 6, 1997), and AT&T's Motion to Compel (filed May 6, 1997) are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[41] In light of all of the foregoing rulings, Jefferson's Motion to Dismiss, Jefferson's Motion to Compel, and AT&T's Motion to Compel are denied as moot. *AT&T Corp. v. Jefferson Telephone Company*, Motion to Dismiss, File No. E-97-07 (filed Feb. 18, 1997) ("Jefferson's Motion to Dismiss"); *AT&T Corp. v Jefferson Telephone Company*, Motion to Compel, File No. E-97-07 (filed May 6, 1997) ("Jefferson's Motion to Compel"); *AT&T Corp. v. Jefferson Telephone Company*, Motion to Compel, File No. E-97-07 (filed May 6, 1997) ("AT&T's Motion to Compel").

EXHIBIT 2

Memorandum Opinion and Order
February 21, 2002

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-96-36
	)	
Frontier Communications of Mt. Pulaski, Inc.,	)	
Frontier Communications-Schuyler, Inc.,	)	
Frontier Communications-Midland, Inc.,	)	
Frontier Telephone of Rochester, Inc., and	)	
Global Crossing North America, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 2002 Released: February 27, 2002

By the Commission:

1. In this Memorandum Opinion and Order ("Order"), we deny a formal complaint that AT&T Corporation ("AT&T") filed against Frontier Communications of Mt. Pulaski, Inc. ("Frontier-MP"), Frontier Communications of Schuyler, Inc. ("Frontier-Schuyler"), Frontier Communications-Midland, Inc. (Frontier-Midland"), Frontier Telephone of Rochester, Inc. ("Frontier Telephone"), and Global Crossing North America, Inc. ("Global Crossing") (collectively, "Defendants") pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").[1] AT&T alleges that access revenue-sharing arrangements between Defendants and certain information providers to which Defendants terminated traffic constituted unreasonable discrimination, in violation of section 202(a) of the Act,[2] and breached Defendants' common carrier duties, in violation of section 201(b) of the Act.[3]

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[1] 47 U.S.C. § 208. *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc. et al.*, Verified Complaint, File No. E-96-36 (filed July 15, 1996) ("Complaint").

[2] 47 U.S.C. § 202(a). Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in connection with like communication service . . . or to make or give any undue or unreasonable preference or advantage to any particular person." 47 U.S.C. § 202(a).

The issues raised in this Complaint are identical to those raised and denied in *AT&T Corp. v. Jefferson Telephone Co.*[4] Thus, for the reasons explained therein, we conclude that AT&T has failed to meet its burden of demonstrating that Defendants violated either section 202(a) or section 201(b) of the Act,[5] and therefore deny AT&T's complaint in its entirety. Moreover, we decline to reach three issues that AT&T raised for the first time in its briefs, because the tardy raising of these issues renders the record insufficient to permit a reasoned decision.[6]

2. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 202(a), and 208, that the above-captioned complaint filed by AT&T IS DENIED IN ITS ENTIRETY, and this proceeding is TERMINATED WITH PREJUDICE.

3. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 202(a), and 208, that Frontier's Motion to Dismiss, and Frontier's Motion to Dismiss Supplement to Verified Complaint are DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] 47 U.S.C. § 201(b). Section 201(b) of the Act provides, in pertinent part, that "[a]ll . . . practices . . . in connection with such communication service shall be just and reasonable, and any such . . . practice . . . that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b).

[4] *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) ("*AT&T v. Jefferson*").

[5] *See generally Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the complainant in a proceeding conducted under section 208 of the Act bears the burden of proof).

[6] *See, e.g., AT&T v. Jefferson*, 16 FCC Rcd at 16133 n.18; *Consumer.Net v. AT&T Corp.*, Order, 15 FCC Rcd 281, 300, ¶ 40 n.93 (1999) (declining to consider an argument raised for the first time in the briefs). *Cf., Building Owners and Managers Association International v. FCC*, 254 F.3d 89, 100 n.14 (D.C. Cir. 2001) (declining to address an issue raised cursorily in the brief).

EXHIBIT 3

Memorandum Opinion and Order
June 14, 2002

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
AT&T Corporation,	)	
Complainant,	)	
v.	)	File No. E-97-04
Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada,	)	
Defendants.	)	
- and -	)	
Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada,	)	
Complainants,	)	
v.	)	File No. E-97-14
AT&T Corp.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 2002 **Released: June 20, 2002**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we resolve two complaint proceedings that we have consolidated for administrative convenience.[1] First, we grant in part

[1] *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, and *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Letter from Russell D. Lukas, Counsel for Beehive Telephone Co., to Thomas D. Wyatt, Associate Chief, Enforcement Division, Common Carrier Bureau, FCC, File Nos. E-97-04, E-97-14 (dated Jan. 21, 1998) (confirming that the parties agreed to the consolidation of

and dismiss and deny in part a formal complaint that AT&T Corporation ("AT&T") filed against Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively, "Beehive") pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").[2] Second, we dismiss and deny in its entirety a formal complaint that Beehive filed against AT&T pursuant to section 208 of the Act.[3]

2. In its complaint, AT&T alleges that Beehive exceeded its authorized rate of return and engaged in various unlawful billing practices, in violation of sections 201(b)[4] and 203(c)[5] of the Act.[6] In addition, AT&T alleges that an access revenue-sharing arrangement between Beehive and an information service provider to which Beehive terminated traffic breached Beehive's common carrier duties, in violation of section 201(b) of the Act,[7] and constituted unreasonable discrimination, in violation of section 202(a) of the Act.[8] We grant AT&T's claims that Beehive violated section 203(c) of the Act by failing to comply with various billing requirements of Beehive's effective tariff. We also grant AT&T's claims that Beehive violated section 203(c) of the Act by failing to comply with its tariff's requirements regarding billing access charges based upon call attempts, but only as to liability and not as to damages. We further grant AT&T's claims that Beehive exceeded its authorized rate of return, but only as to liability and not as to damages. Finally, on the basis of the facts and arguments presented in this record, we deny AT&T's claims regarding the access revenue-sharing arrangement between Beehive and the information service provider, because AT&T has failed to meet its burden of demonstrating that this arrangement violated either section 201(b) or section 202(a) of the Act.[9]

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these complaint proceedings during a conference call held with Commission staff on January 9, 1998).

[2] 47 U.S.C. § 208. *See AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Verified Complaint, File No. E-97-04 (filed October 29, 1996) ("AT&T Complaint").

[3] *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone, Inc. Nevada*, Cross Complaint, File E-97-14 (filed March 25, 1997) ("Beehive Complaint").

[4] 47 U.S.C. § 201(b). Section 201(b) of the Act provides, in pertinent part, that "[a]ll charges [and] practices . . . in connection with such communication service shall be just and reasonable, and any such charge [or] practice . . . that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b).

[5] 47 U.S.C. § 203(c). Section 203(c) of the Act states that a carrier must provide communications services in strict accordance with the terms and conditions contained in its tariff. 47 U.S.C. § 203(c).

[6] AT&T Complaint at 9-12, ¶¶ 28-47.

[7] AT&T Complaint at 6-8, ¶¶ 16-23.

[8] 47 U.S.C. § 202(a). *See* AT&T Complaint at 8, ¶¶ 24-27. Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in connection with like communication service . . . or to make or give any undue or unreasonable preference or advantage to any particular person." 47 U.S.C. § 202(a).

[9] *See generally Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the complainant in a proceeding conducted under section 208 of the Act bears the burden of proof). We also dismiss as moot AT&T's billing claims under section 201(b) of the Act, because they are based on the same facts, and seek the same relief, as the claims under section 203(c) that we grant.

3. In its complaint, Beehive alleges conditionally that, if (and only if) the Commission grants AT&T's claims that Beehive's access revenue-sharing arrangement was unlawful, then the Commission must also grant Beehive's claims that certain of AT&T's billing arrangements with customers violated sections 201(b), 203, and 228 (the Telephone Disclosure and Dispute Resolution Act ("TDDRA")) of the Act for precisely the same reasons.[10] Beehive also alleges that AT&T violated sections 1.17[11] and 1.729(b)[12] of the Commission's rules by failing to disclose certain information in the AT&T Complaint proceeding.[13] Because we deny AT&T's claims that Beehive's access revenue-sharing arrangement was unlawful, the condition precedent pled by Beehive has not been satisfied, and thus we dismiss Beehive's claims under sections 201(b), 203, and 228 of the Act. In addition, we deny Beehive's claims under sections 1.17 and 1.729(b) of the Commission's rules, because Beehive has failed to meet its burden of demonstrating that AT&T deliberately failed to disclose material information in the AT&T Complaint proceeding.

II. BACKGROUND

4. At all relevant times, Beehive was an incumbent local exchange carrier ("LEC") located in rural Utah and Nevada that served approximately 700 access lines.[14] Beehive provided local exchange service to end user customers, and exchange access services to AT&T and other interexchange carriers ("IXCs").[15]

5. Prior to March 31, 1994, Beehive charged IXCs access rates at the levels contained in the interstate access tariff filed by the National Exchange Carrier Association ("NECA") on behalf of its member companies.[16] The NECA tariff specified a rate of

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[10] Beehive Complaint at 9-10, 12-13, ¶¶ 34-40, 54-61.

[11] 47 C.F.R. § 1.17. Section 1.17 of the Commission's rules forbids a carrier from making "any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." 47 C.F.R. § 1.17.

[12] 47 C.F.R. § 1.729(b) (1996). At the relevant time, section 1.729(b) of the Commission's rules required interrogatories to be answered "fully in writing under oath or affirmation." *Id.* That obligation now appears in section 1.729(c) of our rules. 47 C.F.R. § 1.729(c) (2001).

[13] Beehive Complaint at 10-12, ¶¶ 41-53.

[14] AT&T Complaint at 2-3, ¶¶ 2-3, 5; *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Answer, File No. E-97-04 (filed December 18, 1996) at 1-2, ¶¶ 2-3, 5 ("Beehive Answer"); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Brief for Defendants, File No. E-97-04 (filed June 5, 1997) at 3 ("Beehive Initial Brief"); Beehive Complaint at 1, ¶¶ 1-2.

[15] AT&T Complaint at 2-3, ¶¶ 2-3, 5; Beehive Answer at 1-2, ¶¶ 2-3, 5; *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Initial Brief of AT&T Corp., File No. E-97-04 (filed June 5, 1997) at 1 ("AT&T Initial Brief").

[16] AT&T Complaint at 3, ¶ 6; Beehive Answer at 2, ¶ 6; AT&T Initial Brief at 1.

approximately $.07 per terminating access minute.[17] On March 31, 1994, pursuant to section 61.39 of the Commission's rules,[18] Beehive withdrew from the NECA tariff and filed its own interstate access tariff ("Tariff") specifying a terminating interstate access rate of $.47 per minute.[19] That Tariff became effective on July 1, 1994.[20] Although it contained its own access rates, Beehive's Tariff explicitly incorporated the non-rate regulations, terms, and conditions for access services set forth in NECA's Tariff F.C.C. No. 5.[21] As of July 1, 1995, Beehive reduced its interstate access rate to $0.14 per terminating minute.[22]

6. In October, 1994, Beehive entered into an access revenue-sharing arrangement with Joy Enterprises, Inc. ("Joy"), an information service provider to which Beehive terminated traffic.[23] Initially, the compensation arrangement required Beehive to pay Joy $.04 per access minute for each long distance call terminated to Joy; eventually, in October, 1995, the compensation was adjusted to a flat-rate of $84,000 per month.[24] Subsequently, in January, 1997, the amount was reduced to $42,000 per month.[25]

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17 AT&T Complaint at 3, ¶ 6; Beehive Answer at 2, ¶ 6; AT&T Initial Brief at 1-2.

18 47 C.F.R. § 61.39 (permitting certain small local exchange carriers to base their tariffed access rates upon historic costs and revenues).

19 AT&T Complaint at 3, ¶¶ 6-7; Beehive Answer at 2, ¶¶ 6-7; AT&T Initial Brief at 1-2; Beehive Initial Brief at 3.

20 AT&T Complaint at 3, ¶ 7; Beehive Answer at 2, ¶ 7; AT&T Initial Brief at 2.

21 AT&T Complaint at 11, ¶ 44; Beehive Answer at 7-8, ¶ 44; Beehive Initial Brief at 23-24; AT&T Initial Brief at 22. Beehive's current Tariff is available on the Commission web site at http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/webpublic/search.hts.

22 AT&T Complaint at 4, ¶ 11; Beehive Answer at 3, ¶ 11; AT&T Initial Brief at 4. At about that same time, AT&T began to refuse to pay some or all of Beehive's interstate terminating access charges. Beehive Answer at 3-4, ¶ 12; Beehive Initial Brief at 6. Five months later, on December 5, 1995, Beehive filed suit against AT&T in federal district court in Utah seeking to recover access charges allegedly withheld unlawfully by AT&T (the "Utah Court Action"). Beehive Answer at 3-4, ¶ 12; Beehive Initial Brief at 6. On January 5, 1996, pursuant to Fed.R.Civ.P. 12(b), AT&T filed, in lieu of an answer, a motion to dismiss or stay the complaint on primary jurisdiction grounds. *See AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Reply Brief of AT&T Corp., File No. E-97-04 (filed July 2, 1997) ("AT&T Reply Brief") at Exhibits C, D. On April 29, 1997, the federal district court stayed the Utah Court Action pending a ruling by the Commission in this proceeding. *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Letter from Peter H. Jacoby, Counsel for AT&T Corp., to Greg Lipscomb, Attorney, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, FCC, File No. E-97-04 (dated May 6, 1997), Attachment; AT&T Reply Brief at 14-15.

23 AT&T Complaint at 3-4, ¶ 9; Beehive Answer at 2-3, ¶ 9; AT&T Initial Brief at 3.

24 Beehive Initial Brief at 4 n.4; AT&T Initial Brief at Exhibit 4 (Defendant's Response to Complainant's First Set of Interrogatories), Response to Interrogatory No. 1.

25 *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Reply Brief For Defendants, File No. E-97-04 (filed July 2, 1997) at 6 ("Beehive Reply Brief").

III. DISCUSSION

A. Beehive Violated Section 203(c) of the Act By Imposing Access Charges on AT&T For Unsuccessful Call Attempts.

7. AT&T alleges — and Beehive admits — that Beehive charged AT&T for terminating unsuccessful long-distance call attempts, *i.e.*, calls that did not terminate to the end user, due to either a "no answer" or "busy signal" at the called number.[26] AT&T maintains that this practice contradicted the terms of Beehive's Tariff, in violation of section 203(c).[27] For the following reasons, we agree.

8. As the parties acknowledge, Beehive "was absolutely bound by section 203(c) . . . to provide access services in exact accordance with its tariff."[28] The parties also agree that section 2.6 of NECA Tariff F.C.C. No. 5 governed whether Beehive could properly impose access charges for terminating unsuccessful call attempts.[29] This Tariff section provided, in pertinent part:

> For the purpose of calculating chargeable usage, the term 'Access Minutes' denotes customer usage of exchange facilities in the provision of interstate or foreign service. . . . On the terminating end of an interstate or foreign call, usage is measured from the time the call is *received* by the end user in the terminating exchange. Timing of usage at both originating and terminating ends of an interstate or foreign call shall terminate when the calling or called party disconnects, whichever event is recognized first in the originating and terminating exchanges, as applicable.[30]

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[26] AT&T Complaint at 5, 11-12, ¶¶ 14, 43-47; Beehive Answer at 4, ¶ 14; Beehive Initial Brief at 23-24. *See* AT&T Initial Brief at 23-26; AT&T Reply Brief at 24-25.

[27] AT&T Complaint at 11-12, ¶¶ 43-47; AT&T Initial Brief at 23-26.

[28] Beehive Initial Brief at 11. *See, e.g.*, *Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 10 FCC Rcd 8390, 8402 (1995) (stating that "[s]ection 203 is intended primarily to insure that carriers file all rates and regulations in their tariffs and abide by them upon all occasions."), *vacated and remanded on other grounds*, *AT&T Corp. v. FCC*, 86 F.3d 242 (1996). *See also Philippine Long Distance Telephone v. World Communications, Inc.*, Order and Notice of Apparent Liability for Forfeitures, 8 FCC Rcd 755, 759 n.35 (1993), *recon. granted on other grounds*, *Philippine Long Distance Telephone v. World Communications, Inc.*, Order, 13 FCC Rcd 21520 (1998).

[29] *See* AT&T Complaint at 11, ¶ 44; Beehive Answer at 7-8, ¶ 44; Beehive Initial Brief at 23-24; AT&T Initial Brief at 22. We note that AT&T failed to enter into the record section 2.6 of NECA Tariff F.C.C. No. 5. This did not violate any existing rule, however. At the time the complaint was filed in this proceeding, section 1.720(h) of the Commission's rules merely encouraged parties to provide copies of any relevant tariff provisions. 47 C.F.R. § 1.720(h) (1996). This rule has since been revised to *require* that parties provide copies of relevant tariff provisions. 47 C.F.R. § 1.720(h) (2001).

[30] NECA Tariff F.C.C. No. 5, Section 2.6, Definitions, Access Minutes (emphasis added). Because

9. We interpret this Tariff provision to mean that usage for which Beehive may impose access charges on AT&T does not begin to accrue until a called party "receives" a call. Under this provision, a called party does not "receive" a call that goes uncompleted (generally due to a no answer or busy signal at the called number); rather, a called party "receives" a call only when that party actually answers it. Our interpretation of the tariff term "receive" comports with the common understanding of the word. For example, the dictionary definition of "receive" is, in pertinent part: "1. take or accept (something offered or given) into one's hands or possession. . . . 3. accept delivery of (something sent).[31] A called party does not "take", "accept", or "accept delivery of" a call until he/she answers it. Thus, under the pertinent tariff provision, an uncompleted call generates no usage for which Beehive may impose access charges on AT&T.

10. To try to counter this reading, Beehive only points out that, under the Tariff, the timing of usage "terminate[s] when the *calling or* called party disconnects. . . ."[32] Based on this observation, Beehive argues that it can, in fact, charge for uncompleted calls, because a calling party can "disconnect" a call even when the called party never picks up.[33] This reading of the Tariff fatally ignores the fact that the standard for determining when usage *terminates* does not even apply unless and until the standard for determining when usage *begins* has been met. As explained above, an uncompleted call does not meet that latter standard. Consequently, Beehive's practice of imposing access charges on AT&T for terminating uncompleted calls violated Beehive's Tariff and, thus, section 203(c) of the Act.

11. AT&T's Complaint requests an order requiring Beehive "to refund AT&T all amounts which [Beehive] has unlawfully charged [AT&T] in connection with" uncompleted calls.[34] However, AT&T has neither submitted evidence regarding the appropriate amount of such a refund, nor sought bifurcation of this proceeding to make a complete damages showing in a subsequent action.[35] Perhaps this is because the parties have agreed to an arbitration mechanism to resolve billing disputes, or because AT&T can assert these unlawful charges as a claim or an offset in the Utah Court Action.[36] In any event, based on this record, we find that

neither party submitted into the record the version of section 2.6 of NECA Tariff F.C.C. No. 5 that was effective during the relevant period, we quote from the currently effective version of NECA Tariff No. 5 (which is available on the Commission web site at http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/webpublic/search.hts), and assume that the current version does not materially differ from the version in effect at the relevant time.

[31] The Oxford American Dictionary of Current English (Oxford University Press 1999) at 665.

[32] Beehive Initial Brief at 23, *quoting* NECA Tariff F.C.C. No. 5, § 2.6 at 2-61 (emphasis added).

[33] Beehive Initial Brief at 23-24.

[34] AT&T Complaint at 13.

[35] *See* 47 C.F.R. § 1.722 (1996).

[36] Beehive Initial Brief at 22; AT&T Reply Brief at 23-24; Beehive Reply Brief at 27.

AT&T has established that Beehive's conduct regarding uncompleted calls violated section 203(c) of the Act but has not proven damages.[37]

12. Accordingly, we grant Count Nine of AT&T's Complaint as to liability, but deny Count Nine as to damages.[38] We express no opinion, however, as to whether AT&T may pursue a damages claim in the Utah Court Action or in the parties' arbitration.[39]

B. Beehive Violated Section 203(c) of the Act By Failing to Comply With Certain Other Billing Requirements of Its Tariff.

13. AT&T argues that Beehive violated section 203(c) of the Act by "consistently and intentionally"[40] submitting bills to AT&T for access services that were "seriously inaccurate,"[41] confusing, and non-compliant with the billing requirements of Beehive's own Tariff.[42] According to AT&T, the most egregious problems were "inconsistent and overlapping time periods contained in each bill and the intentionally deceptive manner in which Beehive identifies the days on which terminating usage accrued."[43] Specifically, AT&T maintains that Beehive's bill dates varied, Beehive's billing periods ranged from three days to thirty-eight days, Beehive's bills often included charges for usage incurred outside the billing period, and Beehive billed some days twice or not at all.[44] Moreover, AT&T asserts that Beehive identified some of the dates on its bills through the use of the Julian calendar, instead of the modern calendar, which is known as the Gregorian calendar.[45] According to AT&T, the Julian calendar is approximately 13

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[37] Beehive alleges that the Filed Rate Doctrine bars AT&T's claim of overcharges based on charges for uncompleted calls. Beehive Answer at 8, ¶¶ 50-52. This defense is patently meritless. To the extent that Beehive billed AT&T in violation of its Tariff and the Act, the Filed Rate Doctrine provides no shelter. *See, e.g., AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12317-18, ¶ 9 (2001).

[38] In addition, we dismiss as moot Count Eight of AT&T's Complaint because, although based on section 201(b) rather than section 203(c), Count Eight is identical in all other material respects to Count Nine.

[39] This is because this proceeding stems from a primary jurisdiction referral. *See* paragraph 24, *infra*.

[40] AT&T Initial Brief at 19.

[41] AT&T Initial Brief at 19.

[42] AT&T Complaint at 5, 10-11, ¶¶ 13, 38-42.

[43] AT&T Initial Brief at 19. *See* AT&T Complaint at 5, ¶ 13.

[44] AT&T Complaint at 5, ¶ 13; AT&T Initial Brief at 19-23; AT&T Reply Brief at 22-23.

[45] AT&T Complaint at 5, ¶ 13; AT&T Initial Brief at 20; AT&T Reply Brief at 23. The Julian calendar was adopted by Julius Caesar in 46 B.C.E. The Julian calendar closely resembles the Gregorian calendar, as both derive from 365 days divided into twelve months. By the thirteenth century, however, scholars realized that the Julian calendar included a minor flaw, which resulted in the calendar slowly becoming out of sync with the solar year. The flaw was this: under the Julian calendar, a year was 365.25 days long (*i.e.*, an extra day was inserted every fourth year, typically known as a "leap year"). This significantly differs from the "real" length of the solar year, which is approximately 365.242199 days long. This error amounted to slightly more than 11 minutes per year. As a

days ahead of the Gregorian calendar, and has not been observed since the 16th century.[46] As evidence of all these practices, AT&T submits three bills it received from Beehive and an AT&T staff analysis of alleged discrepancies in 173 Beehive bills ("AT&T Chart").[47]

14. As explained above, section 203(c) of the Act requires that a carrier adhere to the terms of its published tariff.[48] As also explained above, Beehive's Tariff incorporated by reference the non-rate terms and conditions set forth in NECA Tariff F.C.C. No. 5.[49] That Tariff clearly specified that the minimum billing period would be one month; that Beehive would establish a uniform bill date each month that would not change except upon sixty days' notice to AT&T; and that Beehive would not double-bill for the same usage.[50] Beehive admits that it failed to comply with the first two of these requirements.[51] Beehive explains that it could not adhere to a standard billing cycle of at least one month because (i) it depended on data from US West, which data often arrived out of sequence and overdue, and (ii) its billing systems experienced problems.[52] Even if factually correct, these explanations do not excuse Beehive from the obligation to comply with its Tariff. Moreover, AT&T has submitted substantial

result, as the centuries passed, the Julian calendar became increasingly inaccurate with respect to the seasons. By the 16th century, the Julian calendar was running nearly two weeks late. To fix this growing problem, astronomers proposed eliminating ten days from the calendar and changing the rules regarding leap years. Pope Gregory XIII adopted this proposal in 1582. Thus, under the Gregorian calendar, "leap year" is skipped three times every four hundred years. *See* "Calendar," 15 ENCYCLOPEDIA BRITANNICA 432, 444-46 (15th ed., 1991); Peter Meyer, "The Julian and Gregorian Calendars," http://serendipity.magnet.ch/hermetic/cal_stud/cal_art.htm; L. E. Doggett, "Calendars," http://astro.nmsu.edu/~lhuber/leaphist.html.

[46] AT&T Complaint at 5, ¶ 13; AT&T Initial Brief at 20. AT&T is incorrect. Although Pope Gregory XIII issued a papal decree establishing the Gregorian calendar in 1582, several nations continued to use the Julian calendar for some time thereafter. For example, Britain (and the British colonies, such as America) continued to use the Julian calendar until 1752. Other countries that continued to use the Julian calendar include Sweden (switched in 1753), Japan (1873), Egypt (1875), the Soviet Union (1918), and Turkey (1927), to name just a few. Alaska retained the Julian calendar until 1867, when it was transferred from Russia to the United States. *See* "Calendar," 15 ENCYCLOPEDIA BRITANNICA 432, 444-46 (15th ed., 1991); Peter Meyer, "The Julian and Gregorian Calendars," http://serendipity.magnet.ch/hermetic/cal_stud/cal_art.htm.

[47] AT&T Reply Brief at Exhibit I; AT&T Initial Brief at Exhibit 3, Attachment A.

[48] 47 U.S.C. § 203(c). *See* n.28, *supra*.

[49] *See* ¶ 8 and n.29, *supra*.

[50] NECA Tariff F.C.C. No. 5, sections 2.4.1, 2.4.2 (appended to AT&T's Initial Brief at Exhibit 7). Although no provision of the NECA tariff expressly prohibits double billing, this duty is implied throughout section 2.4.1. For example, section 2.4.1(B) states that Beehive "shall bill on a current basis all charges incurred by and credits due to the customer under this tariff . . . ." NECA Tariff F.C.C. No. 5, section 2.4.1(B).

[51] *See* AT&T Initial Brief at Exhibit 4, Response to Interrogatory No. 10. For example, three Beehive bills submitted into the record by AT&T indicate billing periods of six, five, and four days. *See* AT&T Reply Brief at Exhibit I.

[52] Beehive Reply Brief at 26.

evidence of numerous and prolonged billing errors, which Beehive does not refute.[53] Thus, AT&T has met its burden of proving that Beehive violated section 203 of the Act by committing numerous billing errors and by failing to adhere to a standard billing cycle of at least one month.[54]

15. We further find, however, that the record fails to support a finding that Beehive committed anything more than a *de minimus* violation of either section 203(c) or 201(b) by rendering access bills based upon the Julian calendar. The evidence submitted by AT&T is underwhelming. There is no allegation (much less proof) that any of the three bills submitted by AT&T into the record fails to properly identify the billing period based upon the Gregorian calendar.[55] Moreover, the AT&T Chart that purports to summarize errors discovered on 173 bills indicates that almost all of those bills expressed dates based upon both the Julian and Gregorian calendars.[56] Finally, although Beehive admits that it submitted five invoices to AT&T between February and May 1995 that referred only to Julian calendar dates, Beehive denies that this practice continued thereafter,[57] and there is no evidence in the record to the contrary. Thus, assuming, *arguendo*, that billing based solely on the Julian calendar would violate sections 201(b) and 203(c), we conclude that any such violations here were too trivial to warrant any adverse Commission finding.[58]

16. In sum, we conclude that AT&T has met its burden of proving that Beehive violated section 203 with respect to all of the billing practices alleged, except the use of the Julian calendar. Therefore, we largely grant and partially deny Counts Six and Seven of AT&T's Complaint accordingly.[59] We note that AT&T neither requested nor sought to prove damages arising from the billing practices alleged in Counts Six and Seven.

C. Beehive's Access Rates Violated Section 201(b) by Generating Earnings Above the Prescribed Rate of Return in 1994, 1995, and 1996.

17. AT&T alleges that Beehive's $.47 per minute and $.14 per minute rates for terminating interstate access services violated section 201(b) of the Act, because they caused

[53] *See* AT&T Initial Brief at Exhibit 3, Attachment A.

[54] Because of this holding, we dismiss as moot AT&T's claim in Count Seven that Beehive violated section 201(b), based on the same conduct.

[55] *See* AT&T Reply Brief at Exhibit I.

[56] *See* AT&T Initial Brief at Exhibit 3, Attachment A.

[57] Beehive Answer at 4, ¶ 13.

[58] In order to minimize uncertainty and confusion in interstate access billing matters, we strongly encourage carriers to use the standard, generally accepted calendar.

[59] Beehive alleges that the Filed Rate Doctrine bars AT&T's claims of unlawful billing practices. Beehive Answer at 8, ¶¶ 50-52. This defense is patently meritless. *See supra*, n.37.

Beehive to exceed its prescribed rate of return of 11.25% in 1994, 1995, and 1996.[60] AT&T did very little to seek or submit in this proceeding's record evidence to substantiate its allegations of overearnings.[61] AT&T did eventually request, however, that we take official notice of Beehive's acknowledgment in another Commission proceeding that Beehive's interstate access charges exceeded the prescribed rate of return in 1994, 1995, and 1996.[62] For the reasons explained below, we accede to AT&T's request and, as a result, conclude that AT&T has met its burden of showing that Beehive exceeded the prescribed rate of return in 1994, 1995, and 1996.

18. On August 5, 1997, pursuant to section 204(a) of the Act,[63] the Common Carrier Bureau's Competitive Pricing Division suspended the interstate access tariff that Beehive had belatedly filed on July 22, 1997 for the 1997-1999 period ("Transmittal No. 6").[64] In doing so, the Suspension Order stated that Transmittal No. 6 raised "significant questions of lawfulness" about, *inter alia*, whether it contained rates violative of section 201(b) of the Act.[65] On December 2, 1997, the Common Carrier Bureau designated for investigation various issues regarding Transmittal No. 6 and directed Beehive to provide to the Commission detailed information concerning its costs and revenues during 1994, 1995, and 1996.[66]

19. On December 15, 1997, in response to the Designation Order, Beehive submitted to the Commission its "Direct Case" containing cost and revenue information for 1994, 1995, and 1996.[67] This information indicated that, for interstate services, Beehive had earned a 15.18% rate of return in 1994, a 62.60% rate of return in 1995, and a 67.95% rate of return in 1996, all

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[60] AT&T Complaint at 9-10, ¶¶ 28-37; AT&T Initial Brief at 26-29; AT&T Reply Brief at 20-22; *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Initial Brief of AT&T Corp., File Nos. E-97-04, E-97-14 (filed Apr. 20, 1998) at 8-11, 24-15 ("AT&T Supplemental Brief"); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Reply Brief of AT&T Corp., File Nos. E-97-04, E-97-14 (filed May 4, 1998) at 7-13 ("AT&T Supplemental Reply Brief"). *See Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd 7507, 7509, ¶ 13 (1990) (prescribing a rate of return of 11.25% for certain incumbent LECs, including Beehive).

[61] *See generally* AT&T Reply Brief at 20-22 (acknowledging that, based on the record evidence at that time, the Commission could not be "completely certain" that Beehive had exceeded its prescribed rate of return).

[62] AT&T Supplemental Brief at 24-25; AT&T Supplemental Reply Brief at 3-11.

[63] 47 U.S.C. § 204(a) (authorizing the Commission to suspend a tariff and to determine whether new or revised charges contained in the tariff are just and reasonable).

[64] *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Suspension Order, 12 FCC Rcd 11695 (Com. Car. Bur., Com. Pric. Div. 1997) ("*Suspension Order*").

[65] *Suspension Order*, 12 FCC Rcd at 11697, ¶ 6.

[66] *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Order Designating Issues for Investigation, 12 FCC Rcd 20249 (Com. Car. Bur. 1997) ("*Designation Order*").

[67] *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Direct Case, CC Docket No. 97-237 (filed Dec. 15, 1997) ("Direct Case").

well above the prescribed rate of return of 11.25%.[68] Two weeks later, on December 29, 1997, Beehive filed another pleading in that proceeding acknowledging the accuracy of those excessive rates of return.[69]

20. The Commission has broad discretion in its adjudicatory proceedings to take official notice of factual issues "related directly to the agency's expertise or relate[d] to certain aspects of the parties' situation of which the commission has a good deal of prior knowledge."[70] The historic rate-of-return information submitted by Beehive in the Commission's investigation of Beehive's Transmittal No. 6 falls well within such discretion.[71] Consequently, we agree with AT&T that we should take official notice of Beehive's acknowledgement in the Commission's proceeding investigating Beehive's Transmittal No. 6 that Beehive exceeded its prescribed interstate access rate of return in 1994, 1995, and 1996.

21. Beehive proffers several reasons why we should refrain from considering AT&T's overearnings claims or taking official notice of Beehive's prior statements that Beehive exceeded its prescribed interstate access rate of return in 1994, 1995, and 1996.[72] All of those reasons lack merit.

22. First, Beehive argues that the two-year statute of limitations in section 415(c) of

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68 Direct Case at 4, 7, 11.

69 *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Rebuttal to Opposition to Direct Case, CC Docket No. 97-237 (filed Dec. 29, 1997) at 13 ("Rebuttal"). The Commission ultimately determined that Beehive's switching rates in Transmittal No. 6 were excessive, and thus prescribed lower switching rates and ordered refunds. *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) ("*Refund Order*"), *modified on recon.*, Order on Reconsideration, 13 FCC Rcd 11795 (1998), *aff'd, Beehive Telephone Co., Inc. v. FCC*, 180 F.3d 314 (1999). In so ruling, the Commission determined that Beehive's rate of return on switching alone was 12.2% in 1994, 111% in 1995, and 65% in 1996. *Refund Order*, 13 FCC Rcd at 2741, ¶ 13.

70 Aman & Mayton, *Administrative Law* § 8.4.8 at 232 (West 1993). *See* 5 U.S.C. § 556(e); 47 C.F.R. §§ 1.361, 1.727(b); Fed. R. Evid. 201.

71 *See, e.g., Bachow/Coastel, L.L.C. v. GTE Wireless of the South, Inc.*, Order on Review, 16 FCC Rcd 4967, 4968-69, ¶ 5 (2001); *In Re Applications of Chesapeake and Potomac Company of Virginia*, Memorandum Opinion and Order, 98 F.C.C. 2d 238, 239 n.4 (1984); *Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television "Cross Ownership Rules,"* Memorandum Opinion and Order, 82 F.C.C. 2d 254, 260-61 & n.6 (1980), *recon. granted in part on other grounds, Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television "Cross Ownership Rules,"* Memorandum Opinion and Order, 86 FCC 2d 983 (1981).

72 *AT&T Corp v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Supplemental Brief for Defendants in File No. E-97-04 and Initial Brief for Complainants in File No. E-97-14, File Nos. E-97-04, E-97-14 (filed Apr. 20, 1998) at 17-26 ("Beehive Supplemental Brief"); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Reply Brief, File Nos. E-97-04, E-97-14 (filed May 4, 1998) at 8-12, 27-28 ("Beehive Supplemental Reply Brief").

the Act[73] bars AT&T's claim regarding Beehive's $.47 rate, because AT&T knew or should have known of the grounds for the claim when the rate took effect on July 1, 1994, more than two years before AT&T filed its complaint on October 29, 1996.[74] Beehive argues that section 415 also bars AT&T's claim regarding Beehive's $.14 rate, because AT&T knew or should have known of the grounds for the claim when the rate took effect on July 1, 1995, more than two years before AT&T submitted supporting evidence on July 2, 1997.[75] It is well established, however, that the statute of limitations on a claim alleging overearnings does not even begin to run until the defendant carrier files with the Commission final information indicating that it did, in fact, overearn during a particular period.[76] The record contains no evidence that Beehive filed such information with the Commission more than two years before AT&T filed the instant complaint.[77] Thus, Beehive's statute of limitations defense fails.[78]

23. Second, Beehive maintains that we should not take official notice of information submitted in the Commission's investigation of Transmittal No. 6, because such submissions occurred after a statutory deadline for resolving AT&T's claims in this proceeding had lapsed.[79] Even assuming, *arguendo*, the validity of Beehive's premise, Beehive's conclusion does not follow. It is well established that the expiration of a statutory deadline for the Commission to act does not divest the Commission of authority to continue moving toward resolution of a proceeding.[80] Accordingly, we have authority to take official notice of information submitted in the Commission's investigation of Transmittal No. 6, whether or not such submissions occurred after a statutory deadline for resolving AT&T's claims in this proceeding had lapsed.[81] Thus,

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73 47 U.S.C. § 415.

74 Beehive Supplemental Brief at 17-20; Beehive Supplemental Reply Brief at 22.

75 Beehive Supplemental Brief at 20-23.

76 *See, e.g., MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1416-17 (D.C. Cir. 1995), *cert. dismissed sub nom. BellSouth Telecommunications, Inc. v. FCC*, 517 U.S. 1129 (1996), *cert. denied sub nom. BellSouth Telecommunications, Inc. v. FCC*, 517 U.S. 1240 (1996); *General Communication, Inc. v. Alaska Communications Systems Holdings, Inc., et al.*, Memorandum Opinion and Order, 16 FCC Rcd 2834, 2860-61, ¶¶ 67-68 (2001), *appeal pending, ACS of Anchorage, Inc. v. Federal Communications Commission*, No. 01-1059 (D.C. Cir., filed Feb. 7, 2001).

77 *See generally* 47 C.F.R. § 65.600 (requiring local exchange carriers not subject to price cap regulation to file with the Commission an annual rate-of-return monitoring report).

78 For the same reasons, Beehive's laches defense also fails. Answer at 9-12, ¶¶ 57-71.

79 Beehive Supplemental Brief at 20-23 (citing 47 U.S.C. § 208(b)(1)).

80 *See, e.g., Contract Freighters, Inc. v. Dep't of Transportation*, 260 F.3d 858, 860 n.3 (8th Cir. 2001); *Southwestern Bell Telephone Co. v. FCC*, 138 F.3d 746, 749-50 (8th Cir. 1998); *Gottleib v. Pena*, 41 F.3d 730, 733-37 (D.C. Cir. 1994); *800 Data Base Access Tariffs and the 800 Service Management System Tariff*, Order on Reconsideration, 12 FCC Rcd 5188, 5193-94, ¶ 15 (1997).

81 Given this conclusion, we need not and do not decide whether the submissions at issue here occurred after a statutory deadline for resolving AT&T's claims in this proceeding had lapsed.

Beehive's statutory deadline defense fails.

24. Third, Beehive contends that section 207 of the Act bars AT&T's claims regarding the lawfulness of Beehive's rates, because AT&T previously alleged the unlawfulness of Beehive's rates as a defense in the Utah Court Action.[82] Section 207 provides, in pertinent part, that "[a]ny person claiming to be damaged by any common carrier . . . may either make complaint to the Commission . . . or may bring suit for the recovery of the damages for which such common carrier may be liable . . . in any district court of the United States . . .; but such person shall not have the right to pursue both such remedies."[83] Beehive overlooks the key facts, however, that AT&T raised this defense in the context of a motion to dismiss or stay the matter on primary jurisdiction grounds,[84] and that ultimately the federal court essentially granted AT&T's motion.[85] It is well established that section 207 does not apply in the context of a primary jurisdiction referral.[86] Thus, Beehive's section 207 defense fails.[87]

25. Fourth, Beehive asserts that we should not look to the Commission's investigation of Transmittal No. 6 for any purpose here, because the procedural rules governing the investigation were ad hoc and different from formal complaint procedures; the investigation included ex parte presentations; the investigation proceeded on an unlawfully abbreviated schedule; the investigation concerned Beehive's 1997 interstate switching rates, not its 1994-1996 overall access rates; and the investigation record contained no data concerning Beehive's costs and demand in 1993.[88] All of these assertions miss the point.[89] None of these assertions

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[82] 47 U.S.C. § 207. *See* Beehive Initial Brief at 15-16.

[83] 47 U.S.C. § 207.

[84] AT&T Reply Brief at Exhibits D, C.

[85] *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Letter from Peter H. Jacoby, Counsel for AT&T Corp., to Greg Lipscomb, Attorney, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, FCC, File No. E-97-04 (dated May 6, 1997), Attachment. *See* Beehive Initial Brief at 10; AT&T Reply Brief at 14-15.

[86] *See, e.g., Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc.*, 965 F.2d 1118, 1122 (D.C. Cir. 1992).

[87] It is true that AT&T filed its complaint here perhaps a bit prematurely, a few months before the federal court granted AT&T's primary jurisdiction motion. At this point, however, long after the court has granted AT&T's motion, dismissing AT&T's complaint on that basis would unduly exalt form over substance. This is especially true, given that Beehive has alleged no prejudice arising from AT&T's filing of the complaint in anticipation of the court's order granting referral. Indeed, section 207 might not even apply here, because AT&T raised the issue of rate reasonableness in the context of a Rule 12(b) motion, not in the context of an affirmative defense or counterclaim. Nevertheless, we caution future complainants that the mere filing of a primary jurisdiction motion in court does not vitiate section 207 concerns.

[88] Beehive Supplemental Brief at 23-26; Beehive Supplemental Reply Brief at 11-12, 27-28.

[89] We note that the D.C. Circuit affirmed the Commission's order concluding the investigation of Transmittal No. 6, which found that Beehive's interstate rate of return for local switching in 1994-1996 was

changes the fact that, during the course of the Commission's investigation of Transmittal No. 6, Beehive itself submitted information to the Commission clearly indicating that Beehive exceeded its prescribed interstate access rate of return in 1994, 1995, and 1996; and Beehive has shown nothing in the investigation proceeding or in this proceeding that undermines the validity of Beehive's submissions. Thus, Beehive's defense based on the nature and content of the Commission's investigation of Transmittal No. 6 fails.

26. Finally, Beehive argues that AT&T cannot challenge the lawfulness of Beehive's interstate access rates in 1995-1996, because AT&T refused during that time to first pay all of the charges based on those rates.[90] Beehive's argument fatally ignores the fact that its own Tariff contemplates that a customer may withhold payment of disputed charges pending resolution of the dispute.[91] Under the filed rate doctrine, therefore, Beehive's argument fails.[92]

27. In sum, Beehive presents no valid argument why we should refrain from considering AT&T's overearnings claims and taking official notice of information submitted by Beehive during the Commission's investigation of Transmittal No. 6. Consequently, we take official notice of the fact that, according to Beehive's own records, Beehive earned interstate access revenues above its prescribed rate of return in 1994, 1995, and 1996. Moreover, nothing in the record refutes this evidence. Thus, AT&T has met its burden of demonstrating that Beehive's access rates during those years were unjust and unreasonable, in violation of section 201(b) of the Act.[93]

excessive, and which rejected the "due process" arguments raised here. *Beehive Telephone Company, Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998), *modified on recon.*, Order on Reconsideration, 13 FCC Rcd 11795 (1998), *aff'd, Beehive Telephone Co., Inc.*, 180 F.3d 314 (D.C. Cir. 1999).

90 Beehive Initial Brief at 16-17.

91 NECA Tariff F.C.C. No. 5, section 2.4.1(D). Given this result, we need not decide whether Beehive's defense has any other flaws.

92 *See, e.g., AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998). Beehive also seems to argue that the filed rate doctrine precludes AT&T from challenging the reasonableness of Beehive's tariffed access rates. Beehive Answer at 8, ¶¶ 50-52; Beehive Initial Brief at 16-17. That argument is patently meritless. It is well established that the Commission has the authority to determine the reasonableness of a tariffed rate in the context of a section 208 complaint proceeding. *See, e.g., AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12317-20, ¶¶ 9-12 (2001).

93 We must assess the lawfulness of Beehive's rates and earnings in 1994 in combination with Beehive's rates and earnings in 1993. *See* 47 C.F.R. §§ 65.600(b), 65.702(b). *See also Virgin Islands Telephone Corp v FCC*, 989 F.2d 1231 (D.C. Cir. 1993). Here, we conclude that Beehive's rates in 1994 were unlawful based, in part, on an assumption that Beehive did not materially underearn in 1993. This assumption is reasonable, because Beehive knew that AT&T was urging us to consider information regarding Beehive's rates and earnings in 1994, yet offered no evidence (such as monitoring reports) indicating that any overearnings in 1994 had been offset by underearnings in 1993. This assumption is especially appropriate because (i) Beehive participated in the NECA tariff during 1993 and half of 1994, and (ii) the record contains some evidence that Beehive actually overearned in the 1993-94 period. *See* AT&T Reply Brief at Exhibit H (a Beehive preliminary report indicating that its interstate

28. AT&T has not met its burden, however, of demonstrating the extent to which it was damaged by Beehive's unlawful rates. Although the record contains some pertinent information, the record does not contain everything needed to make a precise damage calculation. Moreover, nowhere in the record does AT&T explain exactly how much it believes we should award due to these violations or precisely how it would calculate such an amount based on record evidence. Thus, we grant AT&T's overearnings claims in Counts Four and Five of the Complaint as to liability, but deny those claims as to damages. Again, however, we express no opinion as to whether AT&T may pursue a damages claim in the Utah Court Action or in the parties' arbitration.[94]

D. AT&T Has Not Demonstrated on This Record that the Access Revenue-Sharing Arrangement Between Beehive and Joy Violated Section 201(b) or 202(a) of the Act.

29. AT&T alleges in its Complaint that the access revenue-sharing arrangement between Beehive and Joy breached Beehive's common carrier duties, in violation of section 201(b) of the Act, and constituted unreasonable discrimination, in violation of section 202(a) of the Act.[95] AT&T's allegations and arguments are identical to those raised and denied in *AT&T v. Jefferson*[96] and *AT&T v. Frontier*.[97] Thus, for the reasons explained in those orders, we conclude that AT&T has failed on this record to meet its burden of demonstrating that Beehive violated either section 201(b) or section 202(a) of the Act.[98] Therefore, we deny Counts One, Two, and Three of AT&T's Complaint.[99]

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rate of return during 1993-94 would be 16.93%). Beehive moves us to strike this (and other) evidence as untimely filed, *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Letter from Russell D. Lukas, Counsel for Beehive Telephone Co., to Greg Lipscomb, Attorney, Enforcement Division, Common Carrier Bureau, FCC, File No. E-97-04 (dated Jul. 16, 1997), but we deny that motion, because Beehive had ample opportunity in its briefs filed in 1998 to respond to this (and other) evidence, which AT&T filed in 1997.

[94] *See* n.39, *supra*.

[95] AT&T Complaint at 6-8, ¶¶ 16-27. *See* AT&T Initial Brief at 5-19; AT&T Reply Brief at 9-12, 15-20.

[96] *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) ("*AT&T v. Jefferson*").

[97] *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc. et al.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2002) ("*AT&T v. Frontier*").

[98] *See generally Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the complainant in a proceeding conducted under section 208 of the Act bears the burden of proof). We note that, although AT&T suggests that Beehive's corporate relationship with Joy was somehow improper, *see, e.g.*, AT&T Initial Brief at 2, 5, AT&T asserts no claim on this basis.

[99] Moreover, we decline to reach two issues that AT&T raised for the first time in its briefs, because the tardy raising of these issues renders the record insufficient to permit a reasoned decision. *See, e.g.*, *AT&T v. Jefferson*, 16 FCC Rcd at 16133 n.18; *Consumer.Net v. AT&T Corp.*, Order, 15 FCC Rcd 281, 300, ¶ 40 n.93 (1999)

E. Beehive's Complaint Lacks Merit.

30. In its Complaint, Beehive alleges that, if (and only if) the Commission were to find in this consolidated proceeding that its access revenue-sharing arrangement with Joy was unlawful, then the Commission must also find that AT&T's use of so-called Terminating Switched Access Arrangements ("TSAAs") with AT&T's end user customers is unlawful.[100] Elsewhere in this Order, we find that, based on the record in this proceeding, AT&T has failed to meet its burden of proving that Beehive's access revenue-sharing arrangement with Joy was unlawful.[101] Therefore, the condition precedent pled by Beehive has not been satisfied, and Beehive's claims must fail.[102] Accordingly, we dismiss the First and Second Causes of Action of Beehive's Complaint.[103]

31. Beehive further alleges that, if (and only if) the Commission were to find in a different pending proceeding that a similar access revenue-sharing arrangement between another carrier (Total Telecommunications Services, Inc.) and an information provider was an unlawful attempt to evade the requirements TDDRA, then the Commission must also find that AT&T's

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(declining to consider an argument raised for the first time in the briefs). *Cf.*, *Building Owners and Managers Association International v. FCC*, 254 F.3d 89, 100 n.14 (D.C. Cir. 2001) (declining to address an issue raised cursorily in the brief). Specifically, in its briefs, AT&T maintains for the first time that the revenue-sharing arrangement between Beehive and Joy also violated section 201(b) by "evading the requirements" of TDDRA. AT&T Initial Brief at 14-16; AT&T Reply Brief at 9-12. In addition, in its briefs, AT&T argues for the first time that Beehive's practice of billing AT&T for traffic terminated to Joy violated the Commission's tariff regulations. AT&T Initial Brief at 10-13; AT&T Reply Brief at 8-9.

[100] Beehive Complaint at 2, 9-10, 12-13, ¶¶ 5, 34-40, 54-61. *See* Beehive Supplemental Brief at 26-30; Beehive Supplemental Reply Brief at 12-18; *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Opposition to Motion to Dismiss, File No. E-97-14 (filed June 4, 1997) at 4-5.

[101] *See* section III.D, *supra*.

[102] Beehive filed a petition for reconsideration of a staff discovery ruling regarding information about AT&T's TSAAs. *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Petition For Reconsideration, File No. E-97-14 (filed Mar. 26, 1998); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, and *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Letter from Deena M. Shetler, Attorney, Enforcement Division, Common Carrier Bureau, FCC, to Peter H. Jacoby, Counsel for AT&T Corp., and Russell D. Lukas, Counsel for Beehive Telephone Co., File Nos. E-97-04, E-97-14 (dated Mar. 16, 1998); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, and *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Letter from Deena M. Shetler, Attorney, Enforcement Division, Common Carrier Bureau, FCC, to Peter H. Jacoby, Counsel for AT&T Corp., and Russell D. Lukas, Counsel for Beehive Telephone Co., File Nos. E-97-04, E-97-14 (dated Mar. 24, 1998). As this Order makes clear, such information was not germane to our resolution of any of the claims by either party. Thus, we dismiss Beehive's petition as moot.

[103] Because we dismiss these claims on other grounds, we need not reach the arguably antecedent question whether these claims should be dismissed due to their conditional nature.

use of TSAAs constituted an unlawful evasion of TDDRA, as well.[104] In *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, we rejected this TDDRA claim as moot,[105] and AT&T did not raise a TDDRA claim in its Complaint here. Therefore, again, the condition precedent pled by Beehive has not been satisfied, so Beehive's claim must fail. Accordingly, we dismiss the Fifth Cause of Action of Beehive's Complaint.[106]

32. Finally, Beehive alleges that AT&T concealed material facts in this complaint proceeding, in violation of sections 1.17 and 1.729(b) of the Commission's rules.[107] These facts dealt with the existence and details of certain of AT&T's TSAAs. Based on our review of the entire record in this proceeding, we conclude that Beehive has failed to meet its burden of proving that AT&T willfully withheld material information. Accordingly, we deny the Third and Fourth Causes of Action of Beehive's Complaint.[108]

IV. ORDERING CLAUSES

33. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), 203(c), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 202(a), 203(c), and 208, that the above-captioned complaint filed by AT&T IS GRANTED IN PART AND DISMISSED OR DENIED IN PART to the extent described herein.

34. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), 203(c), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 202(a), 203(c), and 208, that the above-captioned complaint filed by Beehive IS DISMISSED AND DENIED IN ITS ENTIRETY WITH PREJUDICE.

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104 Beehive Complaint at 12-13, ¶¶ 54-61. *See* Beehive Supplemental Brief at 26-30; Beehive Supplemental Reply Brief at 18-19.

105 *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, 5744 ¶ 41 (2001), *appeal pending*, AT&T Corp. v. FCC, Case Nos. 01-1188, 01-1201 (D.C. Cir., filed Apr. 20, 2001).

106 Again, because we dismiss this claim on other grounds, we need not reach the arguably antecedent question whether this claim should be dismissed due to its conditional nature.

107 Beehive Complaint at 2, 10-11, ¶¶ 5, 41-53. *See* Beehive Supplemental Brief at 14-15, 30-32; Beehive Supplemental Reply Brief at 6-8, 23-27.

108 Because we deny these claims on other grounds, we need not reach the arguably antecedent question whether alleged violations of sections 1.17 and 1.729(b) of our rules — which govern carriers' dealings with the Commission, not their provision of telecommunication services — state a claim under section 208 of the Act. In addition, because we deny Beehive's Complaint in its entirety, we also dismiss as moot AT&T's Motion to Dismiss Beehive's Complaint. *See AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Motion to Dismiss, File No. E-97-14 (filed May 20, 1997).

35. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), 203(c), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 202(a), 203(c), and 208, that AT&T's May 20, 1997 Motion to Dismiss, Beehive's July 16, 1997 Motion to Strike, and Beehive's March 16, 1998 Petition for Reconsideration are DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

EXHIBIT 4

Memorandum Opinion and Order
October 2, 2007

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

In the Matter of	)	
Qwest Communications Corporation,	)	
Complainant,	)	
v.	)	**File No. EB-07-MD-001**
Farmers and Merchants Mutual Telephone Company,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2007 **Released: October 2, 2007**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in part a formal complaint[1] that Qwest Communications Corporation ("Qwest") filed against Farmers and Merchants Mutual Telephone Company ("Farmers") under section 208 of the Communications Act of 1934, as amended ("Act").[2] Qwest alleges that Farmers violated section 201(b) of the Act[3] by earning an excessive rate of return. According to Qwest, this violation resulted from Farmers' deliberate plan to increase dramatically the amount of terminating access traffic delivered to its exchange, via agreements with conference calling companies. Qwest also alleges that Farmers violated sections 203(c) and 201(b) of the Act[4] by assessing switched access charges for services that were not, in fact, switched access.

2. As explained below, we agree with Qwest that Farmers earned an excessive rate of return during the July 2005 to June 2007 period ("Complaint Period"). However, we reject Qwest's contention that the Farmers tariff then in effect should be denied "deemed lawful" status. Accordingly, Qwest may not recover damages from Farmers. In addition, we deny Qwest's claim that Farmers acted unlawfully by

[1] Formal Complaint of Qwest Communications Corp., File No. EB-07-MD-001 (filed May 2, 2007) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. § 201(b).

[4] 47 U.S.C. §§ 203(c), 201(b). 47 U.S.C. § 203(c) prohibits carriers from imposing any charge not specified in their tariffs ("no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect"). 47 U.S.C. § 201(b) requires that "all charges, practices, classifications, and regulations for and in connection with . . . communication service shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful."

imposing interstate access charges for the services at issue.

II. BACKGROUND

A. The Parties

3. Qwest provides interexchange ("IXC") service, also known as long distance service, to customers throughout the United States.[5] Farmers is the incumbent local exchange carrier ("LEC") in Wayland, Iowa (population 838), serving approximately 800 access lines for local residents.[6] Farmers provides local exchange and exchange access services pursuant to tariffs filed with the Iowa Utilities Board and this Commission.[7] Qwest purchases access service from Farmers, which enables Qwest's long distance customers to terminate calls to customers located in Farmers' exchange.[8]

B. Access Charge Regime for Small Carriers

4. The Commission regulates access charges (which are contained in federal access tariffs) that LECs apply to interstate calls.[9] To reduce the administrative costs and burdens of filing and maintaining tariffs, the Commission provides small carriers the options of utilizing tariffs administered by the National Exchange Carrier Association ("NECA") or filing their own streamlined "small-carrier" tariffs.[10] Qualifying carriers are permitted to participate in the traffic-sensitive cost and revenue pool that NECA administers on behalf of the vast majority of small telephone companies.[11] NECA files tariffed access rates that apply whenever an IXC uses any pool member's NECA-tariffed access services.[12] IXCs making payments pursuant to the NECA tariff remit them directly to the carriers providing the access service, which in turn report receipts to NECA.[13] NECA then computes final settlements due to pool members based upon the members' settlement status with NECA.[14]

5. NECA pool members may submit company-specific monthly cost data to NECA to calculate "settlements."[15] NECA pool members that choose not to file company-specific cost data operate as "average schedule" carriers and receive settlements determined via formulas proposed annually by NECA and approved by the Commission.[16] NECA develops the average schedule formulas to simulate the revenue requirements and authorized rate of return of a sample of cost companies.[17] During the Complaint Period, the prescribed rate of return for interstate switched access rates charged by rate-of-

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[5] Complaint at 4, ¶ 4; Joint Statement, File No. EB-07-MD-001 (filed June 6, 2007) ("Joint Statement") at 1, ¶ 2.

[6] Joint Statement at 1-2, ¶ 4.

[7] Joint Statement at 2, ¶ 5.

[8] Joint Statement at 1-2, ¶ 4.

[9] 47 C.F.R. §§ 69.1-69.2.

[10] Complaint at 6, ¶ 8; Answer of Farmers & Merchants Mutual Telephone Company, File No. EB-07-MD-001 (filed May 29, 2007) ("Answer") at 12, ¶ 8.

[11] *See* 47 C.F.R. §§ 69.601-69.612.

[12] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9; *see* 47 C.F.R. § 69.3(d).

[13] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9; *see* 47 C.F.R. §§ 69.604, 69.605.

[14] *See* 47 C.F.R. §§ 69.605, 69.606.

[15] 47 C.F.R. § 69.605(a).

[16] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9. *See* 47 C.F.R. § 69.606; *In the Matter of National Exchange Carrier Association, Inc. 2006 Modification of Average Schedules*, Order, 21 FCC Rcd 6220 (Wireline Comp. Bur. 2006).

[17] Joint Statement at 2, ¶ 7; 47 C.F.R. § 69.606(a).

return carriers was 11.25 percent.[18]

6. As an alternative to participating in the NECA pool, the Commission established an exception for carriers that want to file their own rates and are non-Bell Operating Companies with 50,000 or fewer access lines and $40 million or less in annual operating revenues.[19] These small carriers may establish individual tariff rates based on the carriers' own historical costs and demand figures.[20] Under this option, the traffic sensitive rates for average schedule carriers, which do not report monthly cost figures, are based initially on the carriers' most recent annual settlement from the NECA pool.[21] In subsequent tariffs, average schedule carriers' rates are based on the settlements the carriers would have received had they continued to participate in the NECA pool.[22] Small carriers filing tariffs under this provision remain subject to the 11.25 percent rate of return.[23]

C. Farmers' Access Tariffs and the Increase in Traffic

7. During the Complaint Period, Farmers qualified as a "small" carrier.[24] Prior to July 1, 2005, Farmers participated in the traffic-sensitive portion of NECA FCC Tariff No. 5 ("NECA Tariff").[25] Farmers thus received compensation based on the average schedule formulas approved by the Commission, and not on the basis of Farmers' actual costs, actual revenue from end users, or actual rate of return.[26]

8. Effective July 1, 2005, Farmers left the NECA pool and became an issuing carrier for Kiesling Associates LLP Tariff F.C.C. No. 5 ("Kiesling Tariff"), which is governed by Commission rule 61.39(b)(2).[27] The Kiesling Tariff contained separate switched access rates for Farmers.[28] Farmers' interstate switched access service rates were filed on 15 days notice pursuant to section 204(a)(3) of the

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[18] *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd 7507, 7507, ¶ 1, 7532, ¶ 216, 7533, ¶ 231 (1990), *recon. granted on other grounds*, 6 FCC Rcd 7193 (1991), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993); *AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 15978, 15979, ¶ 3 (2004), *rev'd on other grounds*, *Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666 (D.C. Cir. 2006).

[19] 47 C.F.R. § 61.39; *Regulation of Small Telephone Companies*, Report and Order, 2 FCC Rcd 3811, 3812, ¶ 11 (1987) ("*Small Carrier Tariff Order*"). *See* Complaint at 8, ¶ 11; Answer at 3, ¶ 11. During the Complaint Period, carriers were required to file access tariffs at least once every two years, although they were permitted to file new tariffs more often. *See generally* 47 C.F.R. § 61.39.

[20] *See* 47 C.F.R. §§ 61.39(a), 69.602(a)(3). A carrier may also establish individual tariff rates based on the carrier's projected costs and demand under section 61.38 of the Commission's rules. 47 C.F.R. § 61.38(b).

[21] 47 C.F.R. § 61.39(b)(2)(i).

[22] 47 C.F.R. § 61.39(b)(2)(ii).

[23] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[24] Complaint at 10-11, ¶ 16; Answer at 15, ¶ 16. In addition, as the independent incumbent LEC in its serving area, Farmers was a "dominant" carrier and therefore required to file tariffs. *See* 47 C.F.R. § 61.31. The Commission has forborne from tariffing requirements for non-dominant carriers. *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Detariffing Order*, Second Report and Order, 11 FCC Rcd 20730 (1996).

[25] Joint Statement at 2, ¶ 6.

[26] Joint Statement at 2, ¶ 6.

[27] 47 C.F.R. § 61.39(b)(2). *See* Joint Statement at 3, ¶ 8. Complaint, Exhibit B, Declaration of Lisa Hensley Eckert at 8, ¶ 18 (referencing Complaint Exhibit 9, Kiesling Tariff).

[28] Complaint at 11, ¶ 18; Answer at 15, ¶ 18. *See* Joint Statement at 3, ¶ 8.

Act.[29]

9. During the time period relevant to the Complaint, Farmers entered into a number of commercial arrangements with conference calling companies as a means to increase its interstate switched access traffic and revenues.[30] Farmers, in turn, paid the companies money or other consideration in certain circumstances.[31]

10. The Complaint alleges that Farmers "pursued a *premeditated plan* to inflate its access-charge revenues by entering into agreements with [conference calling companies] resulting in vastly increased usage of Farmers' network, *at or about the same time that Farmers exited the NECA access pool*."[32] Discovery confirmed this assertion. [Redacted confidential information regarding Farmers' business relationships with conference calling companies.]

11. As a result of these arrangements with conference calling companies, the number of minutes delivered to the Farmers exchange increased dramatically.[33] [Redacted confidential information regarding Farmers' interstate access minutes of use and bills for various months during the Complaint Period.] This sharp increase in the number of MOUs was not attributable to an increase in the number of lines serviced by Farmers, but rather to the significant amount of traffic delivered to the conference calling companies.[34]

12. Section 61.39(a) of the Commission's rules would have required Farmers to revise its tariff in June 2007 if it wanted to continue to file its own access tariff based on traffic for the two prior years (which would necessarily result in lower rates).[35] Rather than updating its individual access tariff rates pursuant to rule 61.39, however, Farmers elected to operate again as an issuing carrier in the traffic-sensitive portion of the NECA Tariff, effective June 30, 2007.[36]

D. The Complaint

13. Faced with soaring monthly access charges, Qwest ceased paying Farmers' invoices in full,[37] and it filed the Complaint with the Commission on May 2, 2007. In Count I, Qwest alleges that, beginning July 1, 2005, Farmers earned a rate of return far in excess of the prescribed maximum, and that

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[29] 47 U.S.C. § 204(a)(3); Joint Statement at 4, ¶ 10.

[30] Joint Statement at 4, ¶ 13.

[31] Joint Statement at 4, ¶ 13.

[32] Complaint at 18, ¶ 33 (emphasis added).

[33] Joint Statement at 4, ¶ 13.

[34] Joint Statement at 4, ¶ 12.

[35] 47 C.F.R. §§ 61.39(a), 61.39(b)(2)(ii); *see also Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 12.

[36] Joint Statement at 5, ¶ 15. Although Farmers' individual access tariff no longer is in effect, a ruling addressing whether Farmers earned an unlawfully high rate of return through its efforts to enhance access charge revenue will provide important guidance to the telecommunications industry. *See Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, Order on Reconsideration, 15 FCC Rcd 5997, 6000, ¶ 8 (2000) (the Commission's "adjudication of cases generates precedents and clarifies the law, providing benefits to the public at large"), *petition for review denied, Global NAPs, Inc. v. FCC*, 347 F.3d 252 (D.C. Cir. 2001). *See also MCI Telecommunications Corp. v. Southern Bell Telephone and Telegraph*, Memorandum Opinion and Order, 4 FCC Rcd 8135, 8136, ¶ 7 (1989) (holding that revision of a contested tariff did not render moot a formal complaint challenging the reasonableness of the tariff).

[37] *See* Joint Statement at 9, ¶ 35; Initial Brief of Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001 ("Farmers' Opening Brief") at 13 & Exhibit J, Declaration of Rex McGuire ("McGuire Opening Brief Declaration") at 3, ¶ 7; Qwest Communication Corporation's Reply Brief, File No. EB-07-MD-001 (filed July 24, 2007) ("Qwest's Reply Brief") at 4-5 n.22.

Farmers' access rates were therefore unjust and unreasonable in violation of section 201(b) of the Act.[38] Qwest further contends that Farmers' tariff rates are not entitled to "deemed lawful" protection, because Farmers' actions "smack of a deliberate, bad-faith plan to increase dramatically Farmers' access revenues and to earn a rate of return vastly in excess of the Commission's prescription."[39] According to Qwest, Farmers' rates should be declared void *ab initio*, and Farmers should be held liable for retrospective damages in an amount to be proven during a subsequent proceeding.[40] Alternatively, Qwest contends that the traffic at issue is not "terminating access" traffic as defined in the tariff, and that Farmers violated section 203(c) (Count II) and 201(b) (Count III) of the Act, by applying charges not consistent with its tariff.[41]

III. DISCUSSION

A. Farmers' Access Rates During the Complaint Period Are Subject to Rate of Return Review.

14. Qwest argues that, during the Complaint Period, Farmers' interstate switched access rates resulted in returns exceeding the maximum allowable return for the rate category including rates for Line Termination, Intercept, Local Switching, Transport, and Information, and/or exceeding the maximum allowable return for interstate access charges overall.[42] According to Qwest, the vast increase in demand that Farmers experienced after it left the NECA pool in July 2005 and established its own tariff was not accompanied by an equivalent increase in costs.[43] In Qwest's view, this fact establishes that Farmers' interstate switched access rates exceed the authorized rate of return "many times over."[44] Qwest further contends that rates exceeding the authorized rate of return are *per se* unlawful and violate section 201(b) of the Act.[45]

15. Farmers maintains that it is not required to calculate its interstate access rates on the basis of its own costs or to calculate an individual rate of return, because it is an average schedule company.[46] According to Farmers, subjecting it to individual rate of return review is inconsistent with its average

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[38] Complaint at 20-22, ¶¶ 37-41.

[39] Complaint at 18, ¶ 33.

[40] Complaint at 22, ¶ 41. Qwest initially argued that the Commission should order Farmers to continue to offer its own tariff relying on "company specific rates reflecting recent volume figures in its new tariff, rather than reentering the NECA pool." Reply at 4. *See* Complaint at 27, ¶ 60 (asking the Commission to "direct[] Farmers to immediately amend its access tariffs to reflect its current demand and costs"). Qwest subsequently withdrew that request. Qwest's Reply Brief at 4 n.21.

[41] Complaint at 22-26, ¶¶ 42-55.

[42] Complaint at 1-2, 6, ¶ 7 & n.3, 15, ¶ 26, 20-21, ¶¶ 38-39; Complaint, Exhibit A (Legal Analysis in Support of Qwest Communications Corp.'s Complaint ["Qwest's Legal Analysis"]) at ii, 3-6, 11-17; Reply of Qwest Communications Corp., File No. EB-07-MD-001 (filed June 1, 2007) ("Reply") at 2; Qwest's Opening Brief at 9.

[43] Complaint at 2, 14-15, ¶¶ 24-26, 21, ¶ 38; Qwest's Legal Analysis at ii, 3, 12-13; Reply at 2; Qwest's Opening Brief at 7.

[44] Complaint at 21, ¶ 38; Qwest's Legal Analysis at 14.

[45] Complaint at 2, 20, ¶ 38; Qwest's Legal Analysis at 5, 7; Reply at 9; Qwest's Opening Brief at 9. *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513, 1519-20 (2007); *Virgin Islands Telephone v. FCC*, 444 F.3d 666, 669-70 (D.C. Cir. 2006); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 2005).

[46] Answer at iii, 2-3, 12, ¶ 7, 23, ¶ 39, 30, ¶ 60, 32. *See also* Answer, Exhibit E (Legal Analysis of Farmers and Merchants Mutual Telephone Company ["Farmers' Legal Analysis"]) at 7-8; Farmers' Opening Brief at 5; Farmers' Reply Brief at 7.

schedule status.[47] Farmers contends that "individual rate of return regulation" applies "to only 'companies electing to use the historical cost approach,'" and that Farmers is not such a company because it uses the "historical average schedule settlement approach set forth in Section 61.39(b)(2) [of the Commission's rules]," rather than the "historical cost approach set forth in Section 61.39(b)(1) [of the Commission's rules]."[48] Farmers also contends that, going forward, the Commission's regulatory regime will cause Farmers' rates to decline in subsequent tariff filings.[49] Thus, Farmers maintains that it has "fully complied with the authorized rate of return by calculating its access service rates on the basis of the average schedule formulas approved by the Commission to earn the authorized rate of return."[50]

16. Farmers' average schedule status does not immunize it from rate of return review. As explained above, the Commission in 1987 adopted rules permitting small carriers to establish their access rates based on the prior year's costs and demand or their NECA settlements. Those rules were designed to "reduce federal regulatory burdens on small telephone companies," while simultaneously eliminating "incentives for small companies to file access tariffs producing excessive returns."[51] To further the latter goal, the Commission clarified that small carriers "remain subject to the [established] rate of return," and that the Commission retains the right to "enforce its rate of return prescription by appropriate action, including the imposition of refunds."[52] Thus, if the use of historical figures proves not to be "rate neutral," the Commission "may request that carrier to submit the data specified by the data filing provisions in the Commission's Rules . . . to monitor that carrier's earnings."[53] This allows the Commission to "assess the need for corrective action."[54] The Commission's rules accordingly require small carriers to adhere to the prescribed rate of return and, upon request, to submit to the Commission information necessary to monitor the carrier's earnings.[55]

17. Farmers' contention that it is not a company that employs the "historical cost approach" (and, therefore, is not subject to rate of return review) is unfounded. The phrase "historical cost approach" that appears in footnote 27 of the *Small Carrier Tariff Order* refers to the Commission's

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[47] Answer at 3, 12, ¶ 7, 22, ¶ 38; Farmers' Legal Analysis at 8; Farmers' Opening Brief at 5.

[48] Farmers' Opening Brief at 5 (quoting *Small Carrier Tariff Order*, 2 FCC Rcd at 3813 n.27).

[49] Answer at 18, ¶ 26.

[50] Answer at 3, 12, ¶ 7, 23, ¶ 39; Farmers' Legal Analysis at 9. *See* Answer at 16, ¶ 20, 18, ¶ 26, 22, ¶ 38. Farmers also disputes Qwest's purported contention that Farmers "should have calculated its access rates based on demand projections." Answer at 4, 24-25, ¶ 41, 32; Farmers' Legal Analysis at 8; Farmers' Opening Brief at 7. In its Reply Brief, however, Qwest clarified its position that Farmers had three choices in the face of its plan to increase traffic volumes: "(1) remain in the NECA pool, (2) rely on projections pursuant to section 61.38, or (3) seek Commission guidance on how best to account in its filing for its knowledge that volumes were about to skyrocket." Qwest's Reply Brief at 3.

[51] *Small Carrier Tariff Order*, 2 FCC Rcd at 3811-12, ¶¶ 1, 7.

[52] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18. In 1987, the Commission could order a carrier that over-earned to pay refunds. Since the passage of section 204(a)(3) of the Act, the Commission cannot award refunds in connection with tariffs that are "deemed lawful." *See* discussion at paragraph 20, below. However, that does not preclude the Commission from awarding prospective relief in a complaint proceeding. *Id.* *See Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 13 n.23 (noting that rates under a section 61.39 tariff "would, of course, be subject to challenge in a Section 208 complaint proceeding").

[53] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[54] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[55] 47 C.F.R. § 61.39(c) ("The Commission may require any carrier to submit . . . information if it deems it necessary to monitor the carrier's earnings. However, rates must be calculated based on the local exchange carrier's prescribed rate of return applicable to the period during which the rates are effective."). *See also* 47 C.F.R. § 61.38(a) (stating that the Commission may require any carrier that has submitted a tariff filing under rule 61.39 "to submit such information as may be necessary for a review of a tariff filing").

decision to allow small carriers to use historical cost figures, rather than projections, to calculate rates.[56] The Commission did not draw a distinction between cost carriers' use of historical cost figures and average schedule carriers' use of historical settlement data. Indeed, rule 61.39 discusses both types of carriers.

18. Farmers correctly notes that carriers participating in the NECA pool do not prepare cost studies and are not subject to individual rate of return scrutiny.[57] That is not the case, however, for carriers that have left the NECA pool. At that point, a carrier's receipts are not calculated pursuant to Commission-approved settlement formulas (although its prior years' settlements are used as a proxy for its costs), and its rates are subject to company-specific review. For that reason, Farmers' repeated reliance on a Commission Order approving NECA-proposed modifications to average schedule formulas is inapposite,[58] because, during the relevant period, Farmers did not participate in the NECA pool.[59]

19. The Commission has investigated and invalidated access rates charged by a carrier pursuant to a section 61.39 tariff. Specifically, in 1998, the Commission invalidated access rate increases proposed by Beehive Telephone Company, Inc. of Nevada ("Beehive"), a LEC, which had filed its own tariff under section 61.39 but had failed to demonstrate increased capital- or business-related costs.[60] The Commission found that Beehive had earned an excessive rate of return, prescribed new rates for prospective application based in part on costs for the services at issue, and ordered Beehive to pay refunds.[61] In 2002, the Commission in a section 208 complaint proceeding determined that Beehive's access rates (set under section 61.39) for a period preceding the rates at issue in the above-described tariff

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[56] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 13 ("We conclude in this Order that permitting small carriers to file access tariffs using *historical cost* and demand data to set rates appropriately reduces the regulatory burdens faced by these companies.") (emphasis added); *id.* at 3815, ¶ 33 ("We have determined in this Order that the reduction of the administrative and regulatory burdens on small telephone companies is warranted . . . The rules adopted herein reduce the frequency of required filings and provide small companies the option of choosing to file interstate access tariffs based on *historical cost* and demand data, or to participate in NECA's pooling arrangements.") (emphasis added).

[57] *See July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd 23877, 23878, ¶ 2 n.4 (2004) ("The pool revenues of average schedule companies are determined on the basis of a series of formulas . . . For qualifying small companies, the average schedule option avoids the expense of preparing cost studies.").

[58] *See* Answer at 3, 12, ¶ 7, 22, ¶ 38; Farmers' Legal Analysis at 8 (citing *National Exchange Carrier Ass'n, Inc. Proposed Modifications to the Interstate Average Schedules*, Memorandum Opinion and Order, 8 FCC Rcd 4861, 4863, ¶ 17 (1993) (rejecting MCI's assertion regarding the possibility of overearnings by individual average schedule companies participating in the NECA pool and noting that requiring individual companies to produce a cost study "would be inconsistent with the purpose of having interstate average schedule formulas")). Farmers' reliance on the Commission's decision in the *Joint Cost Reconsideration Order* similarly is inapposite. Farmers' Legal Analysis at 7-8. *See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions between Telephone Companies and Their Affiliates*, Order on Reconsideration, 2 FCC Rcd 6283 (1987) ("*Joint Cost Reconsideration Order*"). There, the Commission declined to require average schedule carriers to separate their nonregulated costs from their regulated costs because it "would be a meaningless exercise, . . . would create an unnecessary regulatory burden[, and] . . . would have no resulting impact on interstate rates." *Joint Cost Reconsideration Order*, 2 FCC Rcd at 6300, ¶ 155. In that rulemaking proceeding, the Commission was not addressing the scenario contemplated by rule 61.39(c) – promulgated that same year – where a *particular carrier's earnings* are at issue.

[59] Joint Statement at 3, ¶ 8.

[60] *Beehive Telephone Company, Inc., Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) ("*Beehive I*"), *modified on recon.*, 13 FCC Rcd 11795 (1998), *aff'd*, *Beehive Telephone Co., Inc. v. FCC*, 180 F.3d 314 (1999).

[61] *Beehive I*, 13 FCC Rcd at 2742-46, ¶¶ 17-26.

investigation were unjust and unreasonable.[62] The Commission found that "Beehive had earned a 15.18 percent rate of return in 1994, a 62.60 percent rate of return in 1996, and a 67.95 percent rate of return in 1996, all well above the prescribed rate of return of 11.25%."[63]

20. In addition, Farmers asserts that section 204(a)(3) of the Act (enacted in 1996) results in its tariffed access rates being "deemed lawful" as a matter of law and, therefore, that no claim for overcharges can be brought against it based on statements in the *Small Carrier Tariff Order* (released in 1987).[64] Farmers is incorrect with respect to prospective relief.[65] "[S]ection 204(a)(3) does not mean that tariff provisions that are deemed lawful when they take effect may not be found unlawful subsequently in section 205 or 208 proceedings."[66] In other words, the Commission retains its ability "to find under section 208 that a rate will be unlawful if charged in the future."[67] And, in such circumstances, the Commission "may prescribe a new rate to be effective prospectively."[68] The D.C. Circuit has upheld these principles in the context of section 208 complaint proceedings.[69] Consequently, the rate of return review discussed by the Commission in the *Small Carrier Tariff Order* is entirely consistent with a prospective review of rates deemed lawful under section 204(a)(3). Indeed, as noted above, rule 61.39(c), which provides for such review, remains intact.

B. Farmers Earned an Unlawful Rate of Return During the Complaint Period.

21. Qwest argues that Farmers earned revenues greatly in excess of the Commission-prescribed rate of return.[70] In this litigation, Farmers chose not to produce its actual cost data or a

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[62] *AT&T Corporation v. Beehive Telephone Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11641 (2002) ("*Beehive II*").

[63] *Beehive II*, 17 FCC Rcd at 11650-51, ¶ 19.

[64] Answer at iii, v, 5-6, 14, ¶ 14, 18, ¶ 26, 22, ¶ 38, 23, ¶ 39, 24, ¶ 41, 30, ¶ 60, 31; Farmers' Legal Analysis at 8-9. *See also* Farmers' Opening Brief at 3-4 (arguing that, because Farmers filed its tariff rates pursuant to section 204(a)(3) of the Act, they "are, as a matter of law, 'just and reasonable' within the meaning of 47 U.S.C. § 201(b)" and that "[e]ven a very high rate of return does not state a cognizable cause of action under Section 201(b) if the rates are just and reasonable"). Farmers disputes the relevance of the *Beehive* decisions, discussed above, on this basis, because the tariffs at issue in those cases were not filed under section 204(a)(3). Reply Brief of Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001 (filed July 24, 2007) ("Farmers' Reply Brief") at 5.

[65] *See* discussion at paragraph 27, below, regarding retrospective relief.

[66] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2183, ¶ 21 (1997) ("*Streamlined Tariff Order*").

[67] *Streamlined Tariff Order*, 12 FCC Rcd at 2183, ¶ 21 (emphasis added). *Id.* at 2182, ¶ 19 ("[W]e do not find, however, that the Commission is precluded from finding, under section 208, that a rate will be unlawful if a carrier continues to charge it during a future period or from prescribing a reasonable rate as to the future under section 205.").

[68] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Order on Reconsideration, 17 FCC Rcd 17040, 17043, ¶ 6 (2002) ("*2002 Deemed Lawful Order*").

[69] *See Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) (holding that, under the "deemed lawful" regime, "[r]emedies against carriers charging lawful rates later found unreasonable must be prospective only"); *id.* at 671 n.4 ("The Commission may still impose its own remedy for overearnings during 1998; this remedy, if any, must be prospective rather than retrospective."); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 406, 411 (D.C. Cir. 2002) ("*ACS of Anchorage*") (holding that, even with respect to a rate deemed lawful under section 204(a)(3), prospective remedies are available if "later examination shows" the rate "to be unreasonable"). *See also 2002 Deemed Lawful Order*, 17 FCC Rcd at 17042, ¶ 6 ("The [*ACS of Anchorage*] court's holding was limited to the question of refund liability for rates that were 'deemed lawful'; it in fact acknowledged that the Commission might order prospective relief 'if a later reexamination shows them to be unreasonable.'").

[70] Qwest's Opening Brief at 11-12.

calculation of its rate of return as established by Commission rules. Instead, Farmers provided NECA settlement figures in lieu of actual cost data.[71] Consequently, to estimate Farmers' rate of return, Qwest argues that we should compare Farmers' interstate switched access bills during the Complaint Period (which represent its revenues) and Farmers' revenue requirements had it remained in the NECA pool (which Qwest argues serves as a useful surrogate for Farmers' costs plus a reasonable rate of return.)[72] [Redacted confidential information comparing Farmers' total interstate switched access bills for the Complaint Period with Farmers' aggregate traffic-sensitive revenue requirement had it remained in the NECA pool for the same period.]

22. Farmers disputes the propriety of relying on the NECA average schedule formula in assessing its rate of return.[73] According to Farmers, although average schedule carriers participating in the NECA tariff are compensated and regulated on the basis of NECA's formula,[74] these companies do not calculate a rate of return and are not required to perform the cost studies that would be necessary to calculate a rate of return.[75] As shown above, Farmers did not produce actual cost data that could be used to calculate a rate of return, but instead provided NECA settlement figures.[76] In adopting rule 61.39, the Commission recognized that average schedule formula settlements could be used by average schedule companies instead of actual costs in setting rates.[77] As such, although it might not be appropriate to compare Farmers' earnings with the results of the settlement formula when determining refund liability,[78]

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[71] As noted above, under rule 61.39(c), a carrier may be required to submit information the Commission deems necessary to monitor the carrier's earnings. 47 C.F.R. § 61.39(c). Farmers objected to providing actual cost data in response to Qwest's discovery requests. *See* Farmers & Merchants Mutual Telephone Company's Objections to Complainant's Interrogatories and Document Requests, File No. EB-07-MD-001 (filed May 14, 2007) at 7-9. Consequently, Farmers was given the option of responding to Qwest's discovery requests targeted at Farmers' costs by providing: (1) the amount that Farmers' NECA settlement would have been had Farmers participated in the NECA traffic-sensitive switched access pool for the month at issue; or (2) its actual cost and demand figures for the month at issue as a surrogate for its expenses. *See* Letter from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, FCC, to David H. Solomon, Counsel for Qwest, and James U. Troup, Counsel for Farmers, File No. EB-07-MD-001 (dated June 14, 2007). Farmers chose option 1. *See* Farmers' Discovery Response at 3-4, Exhibit B.

[72] Qwest's Opening Brief at 14.

[73] Farmers' Reply Brief at 7-9.

[74] *See National Exchange Carrier Association, Inc. (NECA) Proposed Modifications to the 1997 Interstate Average Schedule Formulas and Proposed Further Modifications to the 1997-98 Interstate Average Schedule Formulas*, Order on Reconsideration and Order, 13 FCC Rcd 10116, 10118, ¶ 4 (Com. Car. Bur. 1997) ("'Cost companies' settle with NECA on the basis of their actual interstate costs of service. 'Average schedule companies' use formulas to estimate the average costs of service and settle with NECA on the basis of those estimated costs. The average schedule formulas are designed to simulate the disbursements that would be received by cost companies that are representative of average schedule companies."). *See also* 47 C.F.R. § 69.606 ("Payments [to average schedule companies] shall be made in accordance with a formula approved or modified by the Commission. Such formula shall be designed to produce disbursements to an average schedule company that simulate the disbursements that would be received pursuant to § 69.607 by a [cost] company that is representative of average schedule companies.").

[75] Farmers' Reply Brief at 7-8.

[76] *See* paragraph 21 *supra*.

[77] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3814, ¶ 25 (directing cost companies to base rates on a cost study but permitting average schedule companies to rely on previous years' NECA settlements as a surrogate for cost studies).

[78] We also note that the average schedule formulas never contemplated the extraordinary increases in demand brought about by arrangements such as those Farmers entered into with conference calling companies. *See In the Matter of Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 2007 WL 3416323 at 6, ¶ 9, 11, ¶¶ 24-25 (Wireline Comp. Bur. 2007) ("*2007 Access Tariff Designation Order*"). When a carrier such as Farmers experiences significant increases in its MOUs, the NECA average schedule formula likely overstates such carrier's revenue requirement and therefore understates its rate of return. *Cf. In the Matter of*

(continued ...)

such a comparison is appropriate for the limited purpose of determining whether Farmers overearned during the Complaint Period. Thus, we do not use the average schedule formula to establish a specific rate of return for Farmers.

23. Farmers does not deny that its demand during the Complaint Period far exceeded its historical demand used to calculate its individual tariff rates at the time it left the NECA pool.[79] According to Farmers, however, its revenues predictably rose as a result of increases in traffic volume. In addition, Farmers maintains that its costs also increased, to some unspecified extent.[80] Further, Farmers contends that: (1) Qwest has not properly calculated Farmers' revenue requirement (because Qwest excluded settlement amounts for common line and SS7 services);[81] (2) Qwest improperly commingled information for two different monitoring periods (*i.e.*, that any analysis of the 2005-2006 and 2007-2008 monitoring periods would have to take into account any under-earnings in 2005 and 2008, respectively);[82] and (3) Farmers' access rates are reasonable "when compared to the rates that the large price cap carriers charge for conferencing services."[83]

24. We reject Farmers' assertions. First, Qwest presented persuasive expert testimony demonstrating that Farmers' costs did not rise by nearly the same proportion as its access revenues.[84] Although Farmers submitted with its Reply Brief a declaration of its General Manager attesting that Farmers incurred greater costs as its traffic volume expanded, the declaration is not sufficiently detailed or probative to counter the specific testimony and supporting analysis presented by Qwest's expert.[85] Second, contrary to Farmers' contention, Qwest properly excluded common line and SS7-related costs from the revenue requirement, because such costs are recovered via a rate element not at issue here. In any event, excluding the costs works in Farmers' favor, because they are excluded from the total revenue figure as well. Third, Farmers gets little mileage from its contention that Qwest's calculations ought to include potential under-earnings that Farmers allegedly experienced while in the NECA pool. Farmers' earnings during the Complaint Period are subject to company-specific review. Because section 61.39

(Continued from previous page)
Establishing Just and Reasonable Rates for Local Exchange Carriers, Notice of Proposed Rulemaking, FCC 07-176 at 12, ¶ 25 (rel. Oct. 2, 2007) ("*Access Stimulation NPRM*") ("We tentatively conclude that the average schedule formulas can only yield reasonable estimates of an average schedule carrier's costs when the demand is within the range used to develop the formulas. When an average schedule carrier experiences a significant growth in demand that takes it outside the observed range of demand used to establish the average schedule formulas, the process of running the increased demand data through the formulas produces what appear to be extreme increases in costs for the carrier. This increase appears to be inconsistent with the efficiencies carriers would be expected to realize as access demand increases.")

[79] Farmers' Discovery Response, Exhibit A. When Farmers left the NECA pool, its individual tariff rates were calculated based upon its historical demand as calculated by the NECA settlement formula. Joint Statement at 3, ¶¶ 7-8.

[80] Farmers' Reply Brief at 8. Farmers argues, for instance, that it made "substantial investments in additional facilities," and incurred the cost of marketing fees. Farmers' Reply Brief, Exhibit A, Declaration of Rex McGuire ("McGuire Reply Brief Declaration") at 2, ¶ 4.

[81] Farmers' Reply Brief at 8 n.25.

[82] Farmers' Reply Brief at 8-9.

[83] Farmers' Opening Brief at 6-7.

[84] *See* Complaint, Exhibit C, Declaration of Peter Copeland ("Copeland Declaration"). Mr. Copeland's testimony shows that the tremendous expansion in Farmers' traffic was not accompanied by a similar increase in access lines. Copeland Declaration at 4, ¶ 7. According to Mr. Copeland, under the NECA settlement formulas, when a carrier such as Farmers experiences a substantial increase in access traffic volumes, but that increase is not accompanied by a similar rise in access line counts, its costs rise at a much slower pace than its receipts. Copeland Declaration at 13, ¶ 24.

[85] *Compare* Copeland Declaration *with* McGuire Reply Brief Declaration.

carriers are exempt from the monitoring period requirements of section 65.701 of the Commission's rules,[86] we find that the two year period that Farmers was out of the NECA traffic-sensitive pool is a reasonable time frame over which to measure and evaluate Farmers' earnings. Finally, the rates that Qwest charges for its conference calling services simply are not relevant to determinations of whether rates for Farmers' access service -- an entirely different service – are just and reasonable and whether Farmers exceeded the permissible rate of return.

25. In sum, given Farmers' failure to produce actual data regarding its costs, we agree with Qwest that it is appropriate to use the results of applying the NECA average schedule formula for the purpose of determining whether Farmers overearned. Moreover, we find that Qwest persuasively has demonstrated that Farmers' revenues increased many fold during the period at issue, without a concomitant increase in costs. As a result, the conclusion that Farmers vastly exceeded the prescribed rate of return is inescapable.

C. Although Farmers Earned an Unlawful Rate of Return During the Complaint Period, Qwest Is Not Entitled to Damages.

26. Qwest asks the Commission to depart from the prohibition against awarding retrospective relief in conjunction with "deemed lawful" tariffs, because Farmers engaged in a "deliberate, bad-faith plan" to vastly increase its access revenues and earn an unlawfully high rate of return.[87] Specifically, Qwest maintains that, at the time Farmers filed new rates to be effective July 1, 2005, Farmers already had entered into a contract with a conference calling company [Redacted confidential information regarding the terms of Farmers' contract with a conference calling company]. Qwest argues that Farmers nonetheless based its new rates on much lower historical volume figures.[88] Qwest contends that section 204(a)(3)'s "deemed lawful" provision does not apply in such circumstances, and it seeks a declaration that Farmers' tariffed rates are "void *ab initio*," thereby entitling Qwest to a damages award.[89]

27. We decline to rule as Qwest requests. As an initial matter, Qwest contends that factual statements Farmers made to the Commission in support of its tariff filing were "incorrect" and/or "misleading," in violation of Commission rule 1.17(a)(1) and (2),[90] because Farmers failed to disclose its purported plan to increase interstate access volumes.[91] Under the Commission's rules, Farmers was required to report its *historical* cost and demand figures, which the Commission determined are "likely to be a close and unbiased substitute for prospective data."[92] In fact, the Commission specifically declined to include a requirement that carriers provide *any* projected demand data or combine such future projections with historical data.[93] In this case, Farmers reported its historical data accurately. Farmers was not required to opine on whether its historical volume figures were an accurate proxy for future

[86] 47 C.F.R. § 61.39(c).

[87] Complaint at 18, ¶ 33. *See also* Complaint at 2, 18-20, ¶¶ 33-36; Qwest's Legal Analysis at ii, 4, 17-21; Qwest's Opening Brief at 16 ("Farmers achieved these grossly excessive revenues through implementation of a pre-planned, intentional scheme to abuse a perceived loophole in the Commission's rules.").

[88] Qwest's Opening Brief at 16.

[89] Complaint at 2, 22, ¶ 41, 27, ¶ 60; Qwest's Legal Analysis at ii, 4, 17-21; Qwest's Opening Brief at 16-18; Qwest's Reply Brief at 2-3.

[90] 47 C.F.R. § 1.17(a)(1), (2).

[91] Qwest's Opening Brief at 17.

[92] *Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 12 n.22. *See* Farmers' Reply Brief at 7 ("Section 61.39(b) of the Commission's rules does not require supporting data to be filed with the tariff, and Section 61.39(b)(2) prohibits the use of projected demand in lieu of historical demand. Farmers therefore believed that the Commission would not have been interested in the contracts that Farmers had with conferencing companies.").

[93] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶¶ 15-16.

volume figures. As it turns out, the historical data was not a good substitute for prospective data, and Farmers overearned. Under the existing rules, however, Farmers' statements are not unlawful.[94] Nor do we consider Farmers' failure to disclose its future plans to be a "case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations."[95] Although Qwest characterizes Farmers' actions as "underhanded,"[96] and we agree that Farmers manipulated the Commission's rules to achieve a result unintended by the rules, Qwest does not identify any "improper accounting techniques" employed by Farmers.[97] Finally, Qwest has not alleged that revenue-sharing arrangements between Farmers and the conference calling companies violate section 201(b) *per se*. Consequently, the prior Commission decision relied on by Qwest (finding that certain conduct by an IXC toward a competitive access provider ("CAP") was permissible when the CAP was established as a sham entity) is not dispositive.[98]

D. We Deny Farmers' Request for a Ruling Regarding Qwest's Alleged Self-Help.

28. Farmers asserts that Qwest has only made partial payments for the terminating access services Farmers provided.[99] According to Farmers, "[e]ach time that Qwest has withheld payment of Farmers's tariffed charges, it has violated Farmers's tariff and engaged in unlawful self-help."[100] Farmers asks the Commission to find that "Qwest's self-help is unlawful and a continuing violation of Sections 201(b) and 203(c) of the Act and Farmers's federal tariff."[101]

29. We decline to rule as Farmers requests. To begin, Farmers' request is tantamount to a "cross-complaint," which the Commission's formal complaint rules expressly prohibit.[102] Moreover, any complaint instituted by Farmers to recover fees allegedly owed by Qwest would constitute a "collection

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[94] We similarly see no grounds to rely on general equitable principles such as "unclean hands" to award Qwest damages. *See* Qwest's Legal Analysis at 21 ("A decision to declare Farmers's access rates void *ab initio* would also be consistent with other legal principles designed to prevent wrongdoers from relying on deception to retain ill-gotten gains."); Qwest's Opening Brief at 18 n.66 (same).

[95] Complaint at 22, ¶ 41 (citing *ACS of Anchorage*, 290 F.3d at 413); Qwest's Legal Analysis at 20 (same); Qwest's Opening Brief at 17-18 (same).

[96] Qwest's Opening Brief at 18.

[97] Although we do not grant the retrospective relief Qwest requests in his complaint proceeding, the Commission in the future will examine closely conduct that manipulates the historical volume and pricing rules and may well find that such conduct violates section 201(b) of the Act. Indeed, we currently are considering the lawfulness of such arrangements in other proceedings. *Access Stimulation NPRM*. In addition, we are considering whether payments made to the provider of a stimulating activity under such agreements may be included in a carrier's revenue requirement for purposes of setting rates. *2007 Access Tariff Designation Order* at 7, ¶¶ 13-14.

[98] Qwest's Legal Analysis at 20 (citing *Total Telecommunications Serv., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001) ("*Total v. AT&T*")). We express no view on whether a different record could have demonstrated that the deemed lawful provision does not apply or that the conduct at issue ran afoul of any other statutory provisions.

[99] Joint Statement at 9, ¶ 35; McGuire Opening Brief Declaration at 3, ¶ 7.

[100] Farmers' Opening Brief at 13. *See also* Answer at 10; Farmers' Legal Analysis at 1, 11-12.

[101] Farmers' Opening Brief at 2, 14.

[102] 47 C.F.R. § 1.725 ("Cross-complaints seeking any relief within the jurisdiction of the Commission against any carrier that is a party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 1.720 through 1.736. For purposes of this subpart, the term 'cross-complaint' shall include counterclaims.").

action," which the Commission repeatedly has declined to entertain.[103]

E. Farmers Did Not Violate Sections 203 or 201(b) of the Act by Imposing Terminating Access Charges on Traffic Bound for Conference Calling Companies.

30. Qwest alleges that Farmers violated sections 203 and 201(b) of the Act by imposing terminating access charges on traffic that Farmers does not, in fact, terminate.[104] Qwest argues that traffic delivered to the conference calling companies does not terminate in Farmers' exchange, but merely passes through it to terminate elsewhere.[105] We find, however, that Farmers does terminate the traffic at issue, and therefore we deny Counts II and III of the Complaint.

31. Qwest correctly notes that only a carrier whose facilities are used to originate or terminate a call may impose access charges.[106] The Commission has generally used an "end-to-end" analysis in determining where a call terminates.[107] As Qwest points out, the Commission has focused on the end points of the communications, "and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."[108]

32. Qwest argues that calls to the conference calling companies are ultimately connected to – and terminate with – users in disparate locations.[109] According to Qwest, when a caller dials one of the conference calling companies' telephone numbers, the communication that he or she initiates is not with the conference calling company, but with other people who have also dialed in to the conference calling company's number.[110] Qwest argues that such calls terminate at the locations of those other callers, and that Farmers is providing a transiting service, not termination. Farmers' view of the calls, however, is that users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point.[111] We find Farmers' characterization of the conference calling services

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[103] *See U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, ¶ 8 (2004) (citing "long-standing Commission precedent" holding that the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges, and that such claims should be filed in the appropriate state or federal courts).

[104] *See* Complaint at 22-26, Counts II and III.

[105] *See* Complaint at 22-23 (arguing that imposition of terminating access charges violates sections 201(b) and 203 of the Act); Qwest's Legal Analysis at 21-30 (same); Reply at 14-19 (same). *See also* Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7.

[106] Qwest's Legal Analysis at 21 (noting that section 3(16) of the Act defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of *origination or termination* of telephone toll services") (emphasis added).

[107] *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic v. FCC*").

[108] *Bell Atlantic v. FCC*, 206 F.3d at 4.

[109] Complaint at 23; Qwest's Legal Analysis at 24; Reply at 14-15; Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7. Qwest initially asserted that calls bound for the conference calling companies do not terminate at Farmers' exchange because at least some of the traffic "appears to be" transported to equipment owned by the conference calling companies and located outside the exchange. Qwest's Legal Analysis at 24; Reply at 14. Farmers, however, stated that the traffic at issue is all routed to conference bridges located in Farmers' exchange. McGuire Opening Brief Declaration at 3. In its Opening Brief, Qwest indicated that it was no longer relying on this point. Qwest's Opening Brief at 23 n.90.

[110] Qwest's Legal Analysis at 22; Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7.

[111] Answer at 26. Farmers' Opening Brief at 9-10.

to be more persuasive than Qwest's.[112]

33. Qwest's view of how to treat a conference call leads to anomalous results. For instance, suppose parties A, B, C, and D dial in to a conference bridge. According to Qwest, A has made three calls, one terminating with B, one with C, and one with D. But in fact, B, C, and D have actually initiated calls of their own in order to communicate with A. What Qwest calls the *termination* points are actually *call initiation* points. Moreover, under Qwest's theory, the exchange carriers serving B, C, and D would all be entitled to charge terminating access. In fact, each of those carriers would be entitled to charge terminating access three times – B's carrier could charge for terminating calls from A, C, and D, and so forth. This conference call with four participants would incur terminating access charges twelve times. Qwest has not addressed this logical consequence of its theory, nor has it offered any evidence that conference calls are treated as terminating with the individual callers for any purpose beyond the circumstances of this case.[113]

34. Qwest tries to analogize this case to calling card platform cases in which the Commission applied an end-to-end analysis and found that calls dialed in to a calling card platform and then routed on to another party terminated with the ultimate called party, not at the platform.[114] In other words, the Commission found that there was one call (from A to B via the calling card platform), not two (A to the platform plus platform to B). This argument is circular, however. It assumes that the calls at issue are routed on to another party, when the very issue to be decided here is whether that is the case. The calling card cases merely address the issue of whether the call terminates at the platform if, in fact, it is routed on to another party beyond the platform.[115]

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[112] The parties argue about whether Qwest would assess terminating access charges in this situation, but the record does not answer the question. According to Farmers, Qwest has admitted that it also bills terminating access for calls to a conference bridge. Farmers' Opening Brief at 2 (citing Response of Qwest Communications Corporation to Interrogatories, File No. EB-07-MD-001 (filed July 10, 2007)). Qwest, however, indicates that conference call providers generally use a different service configuration, relying on special access and 800 service, and states that Qwest has no knowledge of any end user providing a conference bridge service in the same manner as the conference calling companies that entered agreements with Farmers. Qwest Response to Interrogatory No. 1. Qwest does state that in the rare case that a conference call provider did interconnect in the same manner as the conference calling companies in this case, Qwest would assess terminating access charges. In its Reply Brief, however, Qwest says that it would do so only to the extent that it had no reason to know that its customer was a conference calling company. Qwest's Reply Brief at 7. Qwest gives no indication of what it would do if it knew that the customer was a conference calling company. Because the parties have not identified any specific instance in which Qwest actually did charge – or chose not to charge – terminating access for calls to a conference bridge, we find the record inconclusive on this point. In any event, what Qwest would hypothetically charge under similar circumstances is not dispositive here.

[113] Newton's Telecom Dictionary's definition of a "conference bridge" also seems consistent with Farmers' view, speaking of the callers being connected by the bridge, rather than describing the bridge as routing the calls on from one caller to another. Newton's describes a conference bridge as "[a] telecommunications facility or service which permits callers from several diverse locations to be connected together for a conference call." H. Newton, Newton's Telecom Dictionary, at 260 (2006).

[114] Qwest's Legal Analysis at 25-26 (citing *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005), and *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006)).

[115] We also find inapposite a number of cases cited by Farmers to suggest that the Commission has already found that it is lawful to impose access charges for the type of service at issue here. *See* Farmers' Legal Analysis at 10 (citing *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001); *AT&T v. Frontier Communications of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2001); *Beehive II*, 17 FCC Rcd at 11641). In those cases, the issue of whether access charges were appropriate was never addressed. The parties and the Commission simply assumed that the LECs involved were providing access service, and the dispute was about the lawfulness of their rates.

35. In addition to its argument about where the calls at issue terminate, Qwest also argues that Farmers' tariff does not allow Farmers to assess terminating access charges on calls to the conference calling companies. Farmers' tariff provides that terminating access service allows the customer "to terminate calls from a customer designated premises to an end user's premises."[116] Qwest asserts that the conference calling companies are not end users, and that therefore delivering calls to them does not constitute terminating access service. The record indicates, however, that the conference calling companies *are* end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with its tariff.

36. Farmers' tariff defines "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier," and in turn defines "customer" as any entity "which subscribes to the services offered under this tariff."[117] Qwest asserts that the conference calling companies do not subscribe to services offered under Farmers' tariff, and are therefore neither customers nor end users. Thus, Qwest concludes, delivery of traffic to the conference calling companies cannot constitute terminating access under the tariff.

37. Farmers asserts that the conference calling companies are customers because they purchase interstate End User Access Service and pay the federal subscriber line charge.[118] Qwest, however, argues that the conference calling companies nevertheless do not "subscribe" to Farmers' services "under any meaningful definition of that term."[119] Qwest asserts that "subscription" requires the payment of money,[120] but that the conference calling companies effectively pay nothing for Farmers' service because all of their payments are refunded to them in another form – the marketing fees.

38. We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff.[121] Qwest offers scant support for its assertion that one cannot subscribe to a service without making a net payment to the service provider.[122] For this pivotal proposition, Qwest cites nothing in the tariff itself, but only Black's Law Dictionary's definition of "subscription" as a "written contract by which one engages to . . . contribute a sum of money for a designated purpose . . . in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like."[123] Another dictionary, however, defines "subscribe" as merely "to enter one's name for a publication or service,"[124] and we note that offers of "free subscriptions" are quite common. We reject Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to

[116] Farmers' tariff incorporates the NECA tariff's terms with respect to switched access services. *See* Complaint, Exhibit 9 (Kiesling Tariff) at § 6. The quoted language appears in the NECA Tariff. *See* Complaint, Exhibit 8 (NECA Tariff) at § 6.1.

[117] Complaint Exhibit 8 (NECA Tariff) at § 2.6.

[118] Complaint at vii, 27.

[119] Qwest's Legal Analysis at 27.

[120] Qwest cites only to the Black's Law Dictionary definition of "subscription" for this proposition. Qwest's Legal Analysis at 27.

[121] We express no view on whether the conduct at issue ran afoul of any other statutory provisions not raised by Qwest.

[122] Qwest complains that Farmers has not offered authority to support the alternative view, Qwest's Reply Brief at 5, but Qwest bears the burden of proof here.

[123] Qwest's Legal Analysis at 27.

[124] Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1981, p. 1152.

Farmers.[125] The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users. The record shows that the conference calling companies did subscribe, *i.e.*, enter their names for, Farmers' tariffed services.[126] Thus, the conference calling companies are both customers and end users, and Farmers' tariff therefore allows Farmers to charge terminating access charges for calls terminated to the conference calling companies.

39. Qwest has failed to prove that the conference calling company-bound calls do not terminate in Farmers' exchange, and has failed to prove that Farmers' imposition of terminating access charges is inconsistent with its tariff. We therefore deny Counts II and III of the Complaint.

IV. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 201, 203, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, and 209, that Count I of the Complaint IS GRANTED IN PART and IS OTHERWISE DENIED, as discussed above.

41. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 201, 203, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, and 209, that Counts II and III of the Complaint ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[125] We also note that Qwest has failed to prove that the conference calling companies do not pay Farmers for service because the marketing fees cancel out the tariff payments. Qwest cites a District Court decision concerning the filed rate doctrine to argue that the Commission must consider related transactions in analyzing the amount paid for tariffed services. *Qwest Corp. v. Public Service Comm'n of Utah*, 2006 WL 842891 (D. Utah Mar. 28, 2006) (in determining whether AT&T was paying Qwest the full tariffed rate for a private line, court considered payments from Qwest to AT&T for Qwest's occasional use of the line). As the judge in that case recognized, however, another district court reached the opposite result on the same issue. *See Qwest Corp. v. Minnesota Public Service Comm'n*, 2005 WL 1431652 (D. Minn. Mar. 31, 2005) (once AT&T leased the private line, the transaction was complete, and the tariff was no longer relevant to what price was paid for the tariffed service). Qwest offers no argument as to why we should find the Utah decision more persuasive than the Minnesota ruling.

[126] *See* Answer at vii.

EXHIBIT 5

Comments of AT&T

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	

COMMENTS OF AT&T INC.

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December 17, 2007

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Washington, D.C. 20554

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	)	

COMMENTS OF AT&T INC.

Pursuant to Section 1.1415 of the Commission's Rules (47 C.F.R. §1.415), AT&T Inc. ("AT&T") respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding.[1]

INTRODUCTION AND SUMMARY

The Commission should promptly adopt modest rule changes to put a stop, once and for all, to the concerted and ever-expanding campaign being waged by a small minority of rapacious LECs to abuse the existing rules to bilk hundreds of millions of dollars from their customers. The many variants of these "traffic pumping" schemes include offers on Internet websites of "free" or very low cost chat lines (often with pornographic content), conferencing services, voicemail, and international calling. The schemes depend on using the promise of service at little or no charge to entice callers across the country (and the world) to place millions of long-distance calls to telephone numbers assigned to rural LECs with extraordinarily high access charges (falsely premised on assumptions of the low traffic volumes typical in such rural areas), with the LECs and their calling service partners sharing the access charges paid by AT&T and

[1] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, FCC 07-176, released Oct. 2, 2007 ("*NPRM*"), *published at* 72 Fed. Reg. 64179 (Nov. 15, 2007) ("*NPRM*").

other IXCs for supposed "termination" of those calls. The enormous public interest harms associated with these patently unreasonable practices are well known and indisputable.

Initially, traffic pumping was confined to a relative handful of unscrupulous small ILECs, but in the past two years both the number and the magnitude of schemes has mushroomed.[2] Encouraged by the success of these scams, dozens of small ILECs with visions of traffic pumping riches sought to exit the NECA traffic sensitive access pool in the most recent annual tariff filing. It took a Commission order suspending those tariffs to stop them: faced with the need to disclose their plans for vastly increasing the traffic to which their proposed rates would be applied, those ILECs either returned to the NECA pool or agreed to tariff language that would trigger automatic mid-course rate corrections in response to any substantial traffic increases.[3] But even in the face of the Commission's subsequent decision in a formal complaint proceeding finding that traffic pumping schemes lead to unjust and unreasonable rates,[4] traffic pumping activities continue to grow, and more fundamental rule changes plainly remain urgently necessary.

The industry and the Commission should not and cannot continue to rely exclusively on case-by-case suspensions, investigations and litigation to combat this problem. History teaches that small ILECs inclined to such misbehavior and the coterie of brokers, consultants and fly-by-

[2] *See AT&T Corp.* v. *Beehive Tel. Co., Inc*, 17 FCC Rcd 11641 (2002); *AT&T Corp.* v. *Frontier Communications of Mt. Pulaski, Inc.*,17 FCC Rcd 4041 (2002); *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001); *Total Telecoms. Services, Inc. v. AT&T Corp.*, 16 FCC Rcd 5726 (2001) *aff'd in part, rev'd in part and remanded sub nom. AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003).

[3] *See July 1, 2007 Annual Access Charge Tariff Filings*, WCB/Pricing No. 07-10, Order, DA 07-2862 (rel. June 28, 2007).

[4] *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, FCC 07-175 (rel. October 2, 2007), *petition for reconsideration pending*.

night Internet-based communications service providers that seek to share in the spoils are remarkably creative, and it is inevitable that, absent rule changes, they will continue to develop and deploy new schemes that make a mockery of the Commission and its core Communications Act mandates. The Commission should attack the problem at its source, and enact modest rule changes that will eliminate those aspects of the current rules that have inadvertently encouraged these schemes.

Equally important, however, even as recent Commission attention has caused some ILECs to scale back their traffic stimulation activities, "rural" CLECs – most of which are operated solely to exploit the Commission's rules and do not serve any actual rural customers – are rapidly *expanding* their traffic pumping activities. CLECs now account for more than *three quarters* of the traffic pumping minutes being billed to AT&T. The access charge rules governing CLECs, however, make it far more difficult for the Commission to prevent CLEC traffic pumping through individual tariff suspensions and investigations. Nor will exclusive reliance on after-the-fact enforcement stop these CLEC schemes, because (in contrast to ILECs) it is very easy for these tricksters to start new CLECs to replace those whose traffic pumping operations have been exposed and halted.

A few relatively modest rule changes would largely end these schemes. For both ILECs and CLECs, two types of rule changes are necessary. First, the Commission's current rules do not provide sufficient mechanisms for early detection and deterrence of schemes to stimulate traffic to levels inconsistent with the LEC's tariffed rates. To address these deficiencies, the Commission should adopt targeted reporting and certification rules that will improve transparency and clarify the consequences of misbehavior, including loss of the ability to shield unreasonable rates and returns behind "deemed lawful" status when the LEC's conduct is inconsistent with the promises upon which the Commission relies in accepting its streamlined tariff filing without suspension. Second, to reduce LECs' underlying incentives and ability to engage in traffic stimulation schemes, given the inevitable long lag between inception of a traffic pumping scheme and any judicial or Commission action shutting down the scheme, the Commission should implement rule changes that will require prompt, automatic tariff filings and rate reductions once the existence of a traffic pumping scheme becomes apparent.

Accordingly, the Commission should adopt the following specific rule changes for ILECs and CLECs. First, the Commission should require ILECs filing under Rules 61.38 and 61.39 and CLECs that seek to benchmark to a rural ILEC rate or to take advantage of the rural exemption: (1) to report their access traffic quarterly (and rural CLECs should also report their access lines); (2) to certify upon the filing of a tariff that they will not enter into any traffic pumping arrangement (as defined below); and (3) to include in all tariffs a commitment to revise the tariff and reduce rates in the event traffic exceeds specified thresholds (and to make appropriate refunds to access customers injured before the reduced rates become effective). If an ILEC's traffic exceeds those specified thresholds (measured in percentage growth in terminating switched access minutes) in any given quarter, the Commission's rules should require the ILEC to file new tariffed rates within 45 days under Rule 61.38. If a CLEC's traffic patterns (measured by access minutes of use per access line) exceed the specified thresholds, the Commission's rules should require a new tariff filing within 45 days subject to special ILEC benchmarks (*i.e.*, CLECs operating in non-rural ILEC's rural areas would lose the rural exemption, and CLECs operating in a rural ILEC's area would benchmark to the lowest NECA rate (Band 1)). And, as explained below, the Commission should also (i) declare access revenue sharing arrangements, in which the LEC is a net payor of money to its purported "customer," to be an unreasonable practice under Section 201(b); (ii) declare unjust and unreasonable the increasingly common small LEC practice of inflating access charges by designating an interconnection point with a centralized equal access provider that is scores or hundreds of miles away from the LEC's actual physical interconnection with the centralized provider; and (iii) prevent small LECs from attempting to evade rule changes designed to discourage traffic pumping by electing price cap treatment, declare that no small LEC may elect price cap treatment without prior Commission approval.

The vast majority of responsible, law-abiding ILECs and CLECs that have nothing to do with these schemes would be almost entirely unaffected by these rule changes. For example, the rule changes proposed here would not change any of the procedural options available to small ILECs opting into the NECA tariff or Rules 61.38 and 61.39; they would merely add modest reporting, certification and mid-course tariff-filing requirements that would not have any impact on an ILEC unless it experienced truly extraordinary traffic growth. AT&T has carefully analyzed historical data on ILEC traffic fluctuations, and it has proposed traffic thresholds here that would far exceed historically observed traffic growth from seasonal variations or even from rapid population growth. Similarly, AT&T's proposed rule changes would not eliminate any procedural tariffing option available today to CLECs; again, they would merely add certification and mid-course tariff-filing requirements that would never have any impact unless a CLEC's actual traffic patterns demonstrated that the assumptions underlying the generally applicable benchmark "safe harbors" are inappropriate for that CLEC and that special benchmarks should instead apply. In short, these rule changes would, with negligible burdens, deter the most egregious instances of traffic pumping, and the Commission should promptly adopt these rules in advance of 2008 annual access tariff filings.

ARGUMENT

I. THE LECs' WIDE VARIETY OF ACCESS STIMULATION SCHEMES IS WELL DOCUMENTED.

The traffic pumping schemes AT&T has identified vary in their specific details, but they generally share certain characteristics: An unscrupulous ILEC or CLEC (1) establishes high terminating access charges (typically based on false pretenses), (2) enters into traffic pumping kickback arrangements with pornographic chat-lines or other calling services that agree to advertise the service on Internet websites and other media and to route the millions of calls associated with their nominally "free" services through the LEC's exchange, and (3) bills terminating access charges to interexchange carriers for these calls between non-residents of the rural communities they serve and shares those spoils with the calling service partners that directed the traffic to or through the LEC's exchange. AT&T has uncovered an endless variety of such schemes, in which ILECs or CLECs combine these three basic elements to generate enormous volumes of traffic and exorbitant terminating access charges to interexchange customers. And while ILECs have historically been the worst offenders, CLEC traffic pumping schemes are now growing faster than ILEC schemes and represent the most pressing problem going forward.

These traffic stimulation schemes, and some of the most common variations, are described in detail in the declaration of Adam Panagia, Associate Director – Network Fraud Investigations for AT&T (attached hereto). For example, one of the most prolific methods of artificial traffic stimulation are "chat lines" – many of which offer "adult" or sexual subject matter[5] – that allow as many as 270 callers simultaneously to conduct conversations over a single line, generally with the capability for callers to access a "back room" to conduct one-on-one

[5] *See* Panagia Decl. ¶ 12.

conversations.[6] In the month of November, 2007 alone, 2,160 such chat lines generated over 47.4 *million* minutes of calling over AT&T's network, with an average call duration of 20 minutes.[7]

A variant of chat lines are "free" teleconferencing services, which like "chat lines" make use of conference bridges but are primarily geared to on-demand conferencing use by small businesses and individuals. Hundreds of simultaneous conversations may be conducted on a single access line.[8] In November, 2007, AT&T transported and terminated over 22.6 *million* minutes to just 99 particular conference lines that are associated with traffic pumping schemes.[9]

Another scheme that has been heavily used by traffic pumpers is "free" international calling service. In this arrangement, callers who reach a platform by dialing a telephone number at a LEC with high access charges may then input a telephone number for a set of foreign destinations, and that traffic is then carried to the international calling points via wholesale

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[6] *Id.* ¶ 11.

[7] *Id.*

[8] *Id.* ¶ 13.

[9] *Id.* By contrast, AT&T's conference bridges are associated with 4ESS and 5ESS switching systems within its own network; the specific locations that are selected for the switching systems and the associated bridges are determined solely by considerations of efficient network management, such as trunking capacity, and not by the terminating access rates applicable to calls to those locations. *See id.* ¶ 13, n.2. Moreover, AT&T charges its end user customers for such services, and to the extent AT&T charges an access rate, the access rates merely reflect the low "target rate" for such charges established by the Commission's *CALLS Order* (because all of AT&T's conference bridges are situated in locations where the *CALLS Order* governs access rates). *See Access Charge Reform, et al.*, Sixth Report and Order, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"). *See id.* AT&T does not pay calling service providers to stimulate traffic on AT&T's network. *See id.*

arrangements the calling service has made with other carriers at no additional charge to the calling party.[10]

There is really no limit to the ingenuity of some LECs in concocting these schemes. One of the most egregious schemes that AT&T recently uncovered was one where a LEC appeared to be using autodialing equipment to place tens of thousands of calls to wireless and wireline customers that entice customers in various ways (*e.g.*, offering free commercial credit cards) to call a telephone number in the LEC's local exchange, and when such customers place those calls, the LEC charges terminating access to the IXC that carried the call.[11] There are undoubtedly myriad other traffic pumping techniques that AT&T has yet to uncover.

These schemes are increasing in popularity because participating LECs believe their rates will be "deemed lawful" under 47 U.S.C. § 204(a)(3), freeing them to bill millions of additional dollars to IXCs for access services with no fear of ever having to pay damages if the scheme is later challenged and the patently unjust and unreasonable rates associated with these huge calling volumes are declared unjust and unreasonable. Because the perpetrators operate in very rural areas with only a few hundred or at most a few thousand access lines, they historically generated only a few thousand minutes per month of terminating access. Based on these historical demand figures, small ILECs file tariffs with the Commission with terminating access rates that are very high, usually several cents per minute, and sometimes as high as 10 or more cents per minute.[12]

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[10] Panagia Decl. ¶ 14.

[11] *See* Panagia Decl. ¶¶ 15-20.

[12] As discussed below, some traffic pumping LECs also have begun to implement schemes to further artificially increase terminating access rates even beyond setting such rates based on demand that does not reflect enormous demand generated by traffic pumping. For example, certain LECs, through arrangements with an intermediary centralized equal access carrier arrangements approved by the Commission to *reduce* access charges (typically centralized providers owned, in part, by these same LECs) are shifting the locations where the LECs claim

Because the Commission's rules permit these ILECs to set rates based on historical demand figures, the Commission typically does not suspend or investigate these tariffs. While the tariffs assume very low traffic volumes, however, the ILECs secretly enter into traffic pumping agreements which are not disclosed to the Commission. These schemes typically result in millions of additional calls to the ILEC's exchange, and consequently these ILECs' access bills to AT&T and other IXCs typically increase from thousands of dollars per month to millions of dollars per month virtually overnight. The ILEC and its traffic pumping partner then share the millions of dollars of profits from the scheme. Indeed, as discussed further below, once the ILEC has reached the number of access minutes on which its rates are based, that LEC has fully recovered its revenue requirement, and every additional access minute charged to its IXC customers is almost entirely windfall profit. The additional minutes associated with the traffic pumping schemes thus allow the ILEC to earn returns that vastly exceed those on which its tariffs are based. These ILECs then argue that their tariffs' "deemed lawful" status shields them from having to pay retroactive damages even though their rates and practices are patently unlawful.

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to "interconnect" with the intermediary carrier in order to grossly inflate the "transport" component of their access charges. For example, one LEC has established a new "interconnection" point with an intermediary carrier that is more than two hundred miles from the local exchange served by the LEC (and the LEC's actual physical interconnection with centralized facilities, thereby inflating the transport component of the access charges from tenths of a cent to several additional cents per minute. These LECs do not appear to have constructed any new facilities, and the actual physical routing of calls from AT&T to the LECs remains unchanged; yet on the basis of its paper change in "interconnection" points, the LECs claim entitlement to several cents more for each minute of traffic they supposedly terminate in connection with the traffic pumping schemes in which they are engaged. *See, e.g., Application of Indiana Switch Access Division*, 1 FCC Rcd. 643, ¶ 5 (1986) (granting operational authority to centralized facilities provider, but warning "our decision permitting [Indiana Switch] to proceed should not be interpreted as unbounded authority on the part of [independent LECs], or their affiliates, to determine points of interconnection with IXCs").

The CLECs' schemes are even easier to implement. CLECs typically exploit one of two soft spots in the Commission's current CLEC access charge rules: they either (1) "enter" the rural areas of non-rural ILECs (*i.e.*, the RBOCs), which allows them to establish a token presence using below-cost UNE arrangements while simultaneously using the rural exemption to charge high access charges benchmarked to the highest NECA rate, or (2) gravitate to (and may be affiliated with) rural ILECs in extremely high-cost rural areas that have left the NECA pool, thus allowing the CLEC to "benchmark" to the ILEC's extremely high access charges. The CLEC then engages in a traffic pumping scheme, resulting in traffic volumes that far exceed those on which the benchmark ILEC's rates are based (or the traffic on which the highest NECA rate is based), and thus earns extraordinary returns. Because these CLEC rates are in tariffs filed on a streamlined basis, the CLEC argues that even if its conduct, rates, and returns are later determined to be unlawful, it is shielded from paying refunds by the "deemed lawful" status of its tariffs.[13]

These ILEC and CLEC traffic pumping schemes are being implemented in multiple rural areas of multiple states. AT&T alone has identified schemes by such LECs in Iowa, Minnesota, and South Dakota, among other states. AT&T has filed lawsuits against many of these ILECs and CLECs, which remain pending in federal courts. But these lawsuits will not adequately address the problem because LECs are becoming more and more creative in the methods they are

[13] Nor are CLEC going to be willing voluntarily to commit to the safeguard mechanisms the Commission has imposed on ILECs. Recently, AT&T began receiving invoices from a new CLEC in South Dakota that appeared to reflect a pattern of traffic pumping. AT&T contacted the CLEC and requested that the CLEC confirm that it had not entered into any agreements to pay compensation, or provided anything of value, to any entity improperly to stimulate traffic, defining "improper stimulation of traffic" as including, but not limited to, "any arrangement by the CLEC to pay a communications service provider or other entity to direct calls to or through the CLEC's exchange that can be expected over the life of the arrangement to produce net payments from the CLEC to such entity." The CLEC summarily rejected AT&T's request.

using to maximize their returns from such schemes and to avoid detection. Many holding companies own several ILECs, and they simply rotate traffic pumping among the subsidiary or affiliate ILECs, closing down the traffic pumping scheme for a particular ILEC upon the expiration of its tariff (or being caught) and shifting the activities to another subsidiary or affiliate ILEC. In other instances, ILECs have sought to carve out their most rural areas, set up a "new" ILECs serving only those very rural areas, file tariffs for those ILECs with very high rates based on very low demand, and then implement a traffic pumping scheme that increases volumes from thousands of minutes a month to millions of minutes per month. ILECs are also apparently creating CLEC subsidiaries through which they implement their traffic pumping schemes.[14] When these CLEC subsidiaries are caught engaging in traffic pumping, the ILEC can merely shift the traffic to other, sometimes newly created, CLECs. Similarly, CLEC holding companies create CLECs to engage in traffic pumping activities, and when they are caught, they simply re-direct the stimulated traffic to a new CLEC.

Although these schemes have their antecedents in abuses by only a few carriers, more and more LECs have been entering into such schemes, and the annualized harm to customers and the public has already mushroomed to hundreds of millions of dollars per year. Moreover, although the Commission has recently taken action against some ILECs – *e.g.*, by suspending the tariffs of the ILECs that exited NECA and sought to file their own tariffs in July 2007 – much of

[14] An early example of this phenomenon is Beehive Telephone Company, a rural ILEC that serves sparsely populated areas of Utah and Nevada. Within the past two years, however, no less than three CLECs have commenced operations within Beehive's service territories, apparently providing service through the purchase of unbundled service from the incumbent. These CLECs are operating "free" chat and conference lines and charging interexchange carriers at Beehive's high access rates under the guise of compliance with the Commission's "benchmark" rates for such rural CLECs. Given the paucity of legitimate subscribers in Beehive's operating area, it comes as little surprise that evidence suggests these "competitive" carriers have ties to the ILEC; for example, the attorney who incorporated one of the CLECs is a director of Beehive.

the problem has simply shifted to the CLECs, which can evade Commission oversight more easily than ILECs. Indeed, CLECs today account for about *three quarters* of all traffic pumping minutes being billed to AT&T.

As the Commission points out, the extraordinary returns derived from these traffic pumping schemes are not remotely offset by the little, if any, incremental costs of carrying that additional traffic. *NPRM* ¶ 14 (when "demand increases significantly, a [traffic pumping] carrier's increased revenues generally will exceed any cost increases"). Indeed, in *Qwest v. Farmers*, the Commission expressly agreed with the analysis in the declaration of Peter B. Copeland (submitted in support of Qwest's formal complaint against Farmers and Merchants Mutual Telephone Co. ("Farmers")), which shows that the enormous increases in access minutes associated with Farmers' traffic pumping activities were not accompanied by a proportional increase in office switching costs and tandem transport costs. AT&T's own extensive analysis has confirmed that Mr. Copeland's analysis applies generally to all of the traffic pumping ILECs and CLECs that experience similarly enormous increases in access minutes – it is an indisputable fact that a LEC's costs do not increase materially with the enormous traffic volume increases associated with traffic pumping.[15]

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[15] AT&T also has confirmed that Mr. Copeland's Farmer's-specific evidence using the average schedule formula approved by the Commission extends generally to all traffic pumping LECs. AT&T has identified several LECs whose traffic during the past three years has increased by at least 100% during any year. The average level of monthly traffic for these LECs in 2004 was 1.3 million minutes per month. AT&T then computed the average schedule settlement associated with a 30%, 100%, and 1000% increase in minutes (*see NPRM* ¶ 16), and the results show that the traffic-sensitive settlement per minute associated with these increases declined on average by only 18.6%, 43.3%, and 88.9%, respectively, notwithstanding that the formula was never designed to address volume increases of this magnitude and greatly overestimates associated cost increases.

Finally, the *NPRM* asks for details regarding any agreements between the traffic pumping LECs and the web-based (and other) partners that help implement these schemes. Although AT&T generally is not privy to the details of these agreements, it has attempted to obtain such information and has developed data that provides some limited insight into the compensation arrangements between traffic pumpers and their partners.[16] Clearly, the best sources of any information on the terms, conditions and payments that support these schemes are the traffic pumping LECs themselves, but those LECs and their partners have been working hard to conceal such information.[17] There can be no genuine dispute, however, that those schemes are funded through sharing of the LECs' access revenues with the entities that offer "free" chat lines, conferencing and other services. This practice has become so blatant that the owner of one notorious traffic pumping ILEC in Iowa and the provider of the "free" conferencing service with

[16] For example, one of the Iowa LECs engaged in traffic pumping prepared form agreements with other entities that were expected to generate traffic for the "free" conferencing and other traffic pumping schemes that the LEC offered in conjunction with other service providers. The form agreements offered those parties a "marketing fee" of $0.007 per minute for generating up to 2 million minutes of monthly inbound usage, and $0.013 per minute for generating such traffic above 2 million minutes monthly. Panagia Decl., ¶¶ 7-8. In another case, a traffic pumping provider offered other entities a tiered fee arrangement, ranging from $ .005 per minute for up to one million minutes to as high as $ .01 per minute for four million or more minutes, to generate traffic for its services. *See id.*

[17] For example, in a recent complaint filed by Qwest with the Commission against one of these traffic pumping LECs, Qwest argued that the traffic pumping calls were not actually being "terminated" by the traffic pumping LEC to its traffic pumping partners, because those websites were not "customers" within the meaning of the LECs' tariff. The defendant LEC submitted bills to the Commission purporting to show that the traffic pumping partners were in fact purchasing services from the LEC, and thus were customers, and the Commission relied on those documents in rejecting Qwest's arguments. But the LEC subsequently admitted that those bills were created during the litigation and backdated to make it appear as though the LEC's traffic pumping partners were actually LEC customers. Moreover, the LEC has since resisted efforts to submit more complete documentation of these backdated contracts to the Commission. In an Iowa Utilities Board's investigation of traffic pumping, the defendant LEC appears to have submitted more detailed information subject to protective order about the true relationship with their traffic pumping partners. When Qwest sought permission from the IUB to submit those same documents to the Commission notwithstanding the IUB's protective order, the defendant LEC opposed disclosing these documents to the Commission.

which the LEC was allied actually boasted about the success of their scheme in a recent interview published in *The Wall Street Journal*.[18] The fact that these LECs and their partners have no compunction about admitting their activities underscores the need for Commission action to bring an end to these abuses.

II. THE COMMISSION HAS AMPLE AUTHORITY TO MODIFY ITS RULES TO END THE UNLAWFUL TRAFFIC PUMPING SCHEMES.

The Commission not only has ample authority to modify its rules to prevent ILECs and CLECs from effectively implementing traffic pumping schemes – it has a duty to do so. The Communications Act gives the Commission broad authority to regulate interstate communications services and to adopt tariff filing rules that ensure that rates for such services are just and reasonable.[19] This broad authority includes the power to establish a system of rate-of-return regulation, and to specify under such a system tariff filing and other requirements.[20] The Commission thus has used this authority to adopt rules governing mandatory tariff-filing periods,[21] submission of data for monitoring purposes,[22] mandatory certifications,[23] authorized

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[18] *See* Dionne Searcey, "How 2 Guys' Iowa Connection Took Big Telecoms for a Ride," *The Wall Street Journal*, Oct. 4, 2007; *see also* Panagia Decl. ¶ 6 (discussing the article).

[19] *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) ("legislative discretion implied in the rate making power necessarily extends to the entire legislative process embracing the method used in reaching the legislative determination as well as that determination itself").

[20] *See, e.g., Nader v. FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975); *Regulatory Reform For Local Exchange Carriers Subject To Rate Of Return Regulation*, 8 FCC Rcd. 4545, ¶ 25 (1993); *Regulation of Small Telephone Companies*, 2 FCC Rcd. 3811, ¶¶ 20-21 (1987) ("*Small Carrier Order*"); 47 U.S.C. § 154(i).

[21] *See, e.g., Regulatory Reform For Local Exchange Carriers Subject To Rate Of Return Regulation*, 8 FCC Rcd. 4545, ¶ 25 (1993) (selecting two-year rather than one-year mandatory tariff filing interval is "a lawful exercise of our statutory discretion to tailor our regulatory systems").

[22] *See, e.g., Small Carrier Order*, 2 FCC Rcd 3811, ¶ 18 ("we have modified the proposed rules to clarify that the Commission may request . . . carrier[s] to submit the data specified by the data filing provisions in the Commission's rules").

returns,[24] and procedures for "streamlined" tariff filings under § 204(a)(3) of the Act.[25] The Commission also has ample authority to declare practices to be "unreasonable" under Section 201(b).[26]

The Commission has already acknowledged its authority to modify its tariffing rules at issue here. The tariffing rules being exploited to implement traffic pumping schemes were adopted by the Commission to ease the administrative burdens on rural LECs by allowing small ILECs to rely on historical demand data in setting rates and to avoid submitting various types of data supporting its rates, and by allowing CLECs to benchmark their rates to rural ILEC rates. The Commission also recognized, however, that there could be unexpected consequences that could require modifications of these rules, and, accordingly, the Commission emphasized that it "stand[s] ready to undertake necessary corrective measures" in such circumstances.[27] As the Commission has elsewhere acknowledged, it has "an *affirmative duty* to re-evaluate our policies

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[23] *See, e.g., Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290, ¶ 31 (2006) ("We find that certain certification and reporting requirements are necessary to ensure compliance with our existing access charge rules. . . . As with any other service subject to the Commission's rules, if . . . providers do not comply with these rules they will be subject to the Commission's enforcement authority, including complaints and forfeitures").

[24] *See, e.g., Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, Order*, 5 FCC Rcd. 7507, ¶¶ 1, 216, 231 (1990) (prescribing an 11.25% return for rate-of-return carriers).

[25] *See, e.g., Implementation of Section 402(b)(1) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, (1997).

[26] Order on Reconsideration, *Business Discount Plan, Inc. Apparent Liability for Forfeiture*, 15 FCC Rcd. 24396, ¶ 8 (2000) ("Congress gave the Commission broad authority over unjust and unreasonable practices 'for and in connection with communication services.' In enacting section 201(b), Congress did not enumerate or otherwise limit the specific practices to which this provision applies. Instead, it granted us [the Commission] a more general authority to address such practices as they might arise in a changing telecommunications marketplace").

[27] *Small Carrier Order* ¶ 14.

in light of changed circumstances, to be alert to the consequences of our policies and stand ready to alter our rule if necessary to serve the public interest more fully."[28]

These traffic pumping schemes present an especially clear-cut case warranting prompt corrective action. These schemes are being implemented by more and more ILECs and CLECs, and they are patently unlawful, for they are designed for only one purpose: to allow ILECs and CLECs to charge excessive rates and to earn returns that far exceed just and reasonable levels in violation of Section 201(b) of the Act. The Commission has already reached precisely this conclusion. *Qwest v. Farmers,* ¶¶ 1-2 (agreeing with Qwest's allegations that "Farmers violated section 201(b) of the Act by earning an excessive rate of return" from its traffic pumping activities); *see also NPRM* ¶¶ 14-15 (access stimulation often results in "unjust and unreasonable" rates in violation of Section 201(b) of the Act for ILECs operating under Sections 61.38 or 61.39 of the Commission's rules and for CLECs operating under Section 61.26).

These Commission findings are manifestly correct. For an ILEC, the per-minute access rate it may charge under Sections 61.38 and 61.39 of the existing rules is the ILEC's revenue requirement for access services – *i.e.*, the total amount required to recover the ILEC's access cost plus a reasonable return – divided by the number of access minutes. Once the ILEC has reached the number of access minutes on which its rates are based, that ILEC has fully recovered its revenue requirement. The massive additional traffic volumes generated by access stimulation

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[28] *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 3 FCC Rcd 2050, ¶ 7 n.11 (1988) (emphasis added); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981); *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe R. Co.*, 387 U.S. 397, 416, *reh'g. denied*, 389 U.S. 889 (1967); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, 22 FCC Rcd. 6927, ¶ 37 (2007) ("While we realize that this is a change in Commission policy, we find that new circumstances force us to reassess our existing regulations").

schemes are nearly all profit,[29] and therefore such additional minutes increase the actual return earned by the ILEC far above the prescribed return. In the schemes at issue here, ILECs typically are selling *tens of millions* of access minutes in excess of the volumes on which their rates are based, rendering those rates grossly unjust and unreasonable.

Likewise, the CLEC traffic pumping schemes are designed solely to exploit Section 61.26 of the Commission's rules to allow CLECs to charge unjust and unreasonable rates and to earn unjust and unreasonable returns. The Commission adopted that rule in response to a showing that CLECs were abusing their terminating access monopolies, and the Commission's intent was to permit CLECs to tariff their rates only when they were no greater than the rates charged by the competing incumbent LEC in the same service area. The Commission assumed that the ILEC's rate would be "presumptively just and reasonable,"[30] and the Commission's benchmark rule is based on the assumption that a CLEC offering service in any particular ILEC's service area would have a network and customer base similar to that of the ILEC's. Thus, a CLEC entering an extremely rural area is assumed to have operations similar to the "competing" rural ILEC – an assumption that was critical to the Commission's conclusion that "if operation in these [rural] areas justifies higher access rates for the regulated incumbents, we conclude that it justifies equivalent rates for any competitor in the area."[31] That assumption plainly does not hold true, however, for the traffic pumpers: if the new entrant CLEC's traffic volumes are much higher than the historical demand on which the incumbent LEC's rates are based, that fact is a clear indication that the CLEC's operations are fundamentally different than

[29] As noted, any additional costs associated with the increased traffic volumes do not remotely rise in proportion to the increases in traffic associated with traffic pumping schemes.

[30] *Access Charge Reform, et al.*, Seventh Report and Order, 16 FCC Rcd 9923, ¶ 41 (2001) ("*CLEC Access Charge Order*").

[31] *Id.* ¶ 51.

the rural ILEC's, and that the Commission can no longer simply assume that the benchmark rate is an appropriate proxy for a reasonable CLEC rate. Thus, as the Commission notes in the *NPRM* (¶ 34), where a CLEC's demand substantially exceeds that of the benchmark LEC, then the CLEC's return will necessarily exceed just and reasonable levels.

In addition to imposing millions of dollars in access overcharges on IXCs, all of these schemes cause significant harm to the public interest, competition, and consumers. In many cases, they involve the marketing and provision of pornographic materials that can be accessed by children – indeed, they directly advertise the phone numbers on the Internet and provide no safeguards to prevent children from dialing them or to allow parents to block them – thus circumventing myriad Commission policies aimed at preventing such conduct. Moreover, the perceived loopholes in the Commission's rules are also distorting proper investment incentives. Rather than upgrading their facilities and making other investments to provide the best possible service to their customers, the traffic pumping ILECs and CLECs are investing their resources in kickback arrangements and other inefficient activities, and IXCs are investing millions of dollars to detect and address these practices on a case-by-case basis. In addition, these traffic pumping and other activities, if left unchecked, will inevitably result in increased long-distance prices throughout the country because the Commission's geographic averaging rules will require IXCs to recover the increased costs associated with these activities from all of their customers, not only those located in the areas where this unlawful conduct takes place. If these schemes are allowed to continue, both IXCs and their customers will end up subsidizing these renegade LECs and their partners in otherwise unsupportable business plans. On this record, there is no question that the Commission promptly should adopt the modest rule changes described immediately below to end traffic pumping.

III. THE COMMISSION SHOULD ADOPT MODEST CHANGES TO ITS RULES TO PREVENT THE SIGNIFICANT PUBLIC HARMS CAUSED BY ILEC AND CLEC ACCESS STIMULATION SCHEMES.

The Commission can deter and prevent small ILECs and "rural" CLECs from engaging in illegal traffic stimulation schemes with targeted modifications to its rules to eliminate the incentives and abilities LECs have to engage in such conduct. *Accord* NPRM ¶ 11 ("we must revise our tariff rules so that we can be confident that tariffed rates remain just and reasonable even if a carrier experiences or induces significant increases in access demand"). Two general types of changes are necessary.

First, under the Commission's existing rules, the Commission cannot adequately detect these unlawful schemes at the time the LEC files its tariff because, as the Commission points out, "[t]he type of increased demand" at issue "occurs after the tariffs become effective." *NPRM* ¶ 11. Therefore, the Commission should adopt mechanisms at the tariff-filing stage that will deter LECs from trying these traffic pumping schemes.

Second, even if it later becomes obvious that a LEC is engaging in traffic stimulation that renders its rates unlawful, under the current rules it can take months or even years to obtain a Commission or court ruling in that regard, and even then, such a ruling may have only prospective effect due the possible applicability of "deemed lawful" status for such tariffs. Thus, the Commission should also adopt rule changes that will trigger immediate rate reductions once the existence of a traffic pumping scheme becomes apparent and that will deny deemed lawful status to tariffs that are filed under false pretenses.

To accomplish these twin goals and address shortcomings in the rules, the Commission should promptly modify its access charge rules for both ILECs and CLECs by adopting the following interrelated requirements:

(1) requirements that certain ILECs and CLECs report their quarterly access traffic, to provide transparency that will both deter traffic pumping schemes and enable quick discovery of schemes that do develop;

(2) requirements that certain ILECs and CLECs submit certifications with their tariffs that they will not enter into improper access revenue sharing arrangements and that their traffic will not experience increases of specified percentages, with loss of "deemed lawful" status if the promises made in the certifications are not kept; and

(3) requirements that will trigger prompt reductions in tariffed rates in the event any of these ILECs or CLECs do experience extraordinary increases in traffic above specified benchmarks.

These modest changes to the Commission's rules, described in greater detail below, should go a long way toward eliminating the significant incentive and ability unscrupulous LECs have today to game the system, while at the same time keeping to a minimum the burdens on honest LECs.[32]

A. **Quarterly Reporting Requirements.**

The first step towards deterring and preventing unscrupulous LECs from engaging in unlawful traffic stimulation schemes is to implement measures that enable the Commission and customers to detect and expose such schemes. Accordingly, it is critically important the Commission adopt requirements to file publicly quarterly reports with the Commission of the number of access minutes and, for certain CLECs, the number of access lines served.[33]

Specifically, any small ILEC that files its own tariff should be required to file a quarterly report with the Commission stating the number of access minutes served in the past quarter. In addition, during the first year that these new rules are effective, all small ILECs that file tariffs

[32] As to CLECs, traffic-pumping is largely attractive because the Commission's benchmarking rules – the rural exemption in Rule 61.26(e) that allows a CLEC operating in rural areas of an RBOC's service area to tariff the highest NECA rate and the opportunity for CLECs that operate in rural ILEC areas to benchmark to the rural ILEC rate – allow a traffic-pumping CLEC to charge a very high access rate. The most simple solution to CLEC traffic pumping, therefore, would be to revisit the *CLEC Access Charge Order* and eliminate CLECs' ability to freely rely on these ILEC and NECA benchmarks.

[33] *See NPRM* ¶ 21 (asking whether "any additional or revised reporting is necessary").

under Rules 61.38 or 61.39 also should be required to submit their prior year's quarterly volumes so that the Commission can assess the degree to which such ILECs' current volumes have increased relative to the year-ago period.

Similarly, all CLECs that take advantage of the rural exemption to the Commission's benchmarking rules, or that benchmark to a rural ILEC's rate, *see* 47 C.F.R. § 61.26, should be required to file quarterly reports with the Commission of the number of access lines they serve, as well as the quarterly access minute totals in the same manner as AT&T has proposed for small ILECs.

The Commission and access customers could then use these reports to quickly identify significant increases in LEC demand, and such traffic reporting will facilitate the additional remedial measures set forth below. These reporting requirements would place only a very small additional burden on the LECs, which already compile this same data for their own purposes, including to issue bills to their IXC customers.[34]

B. Mandatory Certifications.

The Commission should also adopt a certification requirement, which should help to deter most LECs from attempting to game the Commission's rules with traffic stimulation schemes. As with the reporting requirements, this certification requirement would apply to small ILECs that file their own tariffs pursuant to section 61.38 or 61.39 and also to CLECs that take advantage of the rural exemption or that benchmark to a rural ILEC's rate.

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[34] Further, NECA already reports monthly traffic volumes to the Commission for Tier 1 and Tier 2 (Tier 2, subset 2) LECs but currently reports only aggregated data for Tier 3 LECs. Quarterly reporting will not only obviate claims of undue burden on the part of these small carriers, but will better control for variations in monthly data that AT&T has observed in its own access billings from LECs.

Specifically, the Commission should require that these carriers submit in connection with any switched access tariff filing a statement by an executive officer of the LEC certifying that the LEC is not currently stimulating traffic and it will not do so during the tariff period. The ILEC certification should state:

> I hereby certify that [name of LEC] has not entered into, and will not enter into during the term of this tariff, any agreement or arrangement that: (i) directly or indirectly compensates a third party or third parties, including any entity affiliated with [name of LEC], for stimulating calls to or through [name of LEC]'s exchange(s), and results in compensation to such third parties that exceeds the revenues [name of LEC] receives from the customers to which it terminates the calls stimulated by the arrangement, or (ii) has the effect of increasing the amount of access traffic terminated by the [name of LEC] by more than [X][35] percent in any quarter compared to the amount of access traffic terminated by [name of LEC] during the same quarter in the prior year.

The CLEC certification should state:

> I hereby certify that (i) [name of LEC] has not entered into, and will not enter into during the term of this tariff, any agreement or arrangement that directly or indirectly compensates a third party or third parties, including any entity affiliated with [name of LEC], for stimulating calls to or through [name of LEC]'s exchange(s) and results in compensation to such third parties that exceeds the revenues [name of LEC] receives from the customers to which it terminates the calls stimulated by the arrangement, and (ii) [name of LEC]'s monthly average terminating minutes per active access line shall not exceed 2,000 minutes during the term of this tariff.

The Commission should state in its order adopting this proposal and in its implementing rules that if a LEC subject to the certification requirement fails to submit such a certification with a streamlined tariff application, the Commission will either reject the tariff or suspend the tariff and set it for investigation, thus eliminating the "deemed lawful" status of the tariff.

[35] As described below, the applicable benchmark would vary depending on the size of the carrier: for carriers reporting up to ten million MOUs annually, the specified percentage would be 100 percent; for carriers with between ten million and 50 million MOUs annually, the specified percentage would be 75 percent; and for carriers reporting more than 50 million MOUs annually, the specified percentage would be 50 percent.

Further, to address the problem of CLECs that are not subject to periodic tariff filing requirements and that may already be engaged in traffic stimulation activities that render their rates under existing tariffs patently unjust and unreasonable, the Commission should require such a certification from all CLECs with existing tariffs that take advantage of the rural exemption or that benchmark to a rural ILEC's rate. Any such CLEC that is unable or unwilling to submit such certifications should be prohibited from continuing to rely on those benchmarks (*i.e.*, under the Commission's rules, there would be mandatory detariffing for these CLECs' access services unless they filed new tariffs at the lower benchmarks that should be established for CLECs engaged in traffic stimulation as detailed below).

These certification requirements are necessary because unscrupulous LECs are tempted by the possibility that their tariffed rates will be "deemed lawful" and shielded from any damages liability, even when a more complete analysis of the LECs' business practices would show that there is nothing lawful about the rates, because the carriers expect that their traffic volumes will increase substantially and the rates bear no relationship whatsoever to legitimate costs. The certification requirements can act as a partial substitute for more searching review of these LECs' tariffs. Where an officer of the LEC has certified that the LEC will not engage in traffic stimulation activities, the Commission and access customers can more comfortably believe that the tariffs filed on a "streamlined basis" in fact contain rates that are likely to be reasonable and thus truly deserving of "deemed lawful" status. And where the conditions in the certification upon which deemed lawful status is premised are violated during the tariff period, the Commission will be on solid legal ground in refusing to accord the rates deemed lawful status.

Indeed, the Commission has ample authority under Section 204(a)(3) to deny by rule "deemed lawful" status for tariffs supported by false certifications. The language, structure, and purposes of § 204(a)(3) and the Communications Act all confirm that intentional concealment of material information can preclude a rate from obtaining "deemed lawful" status. First, § 204(a)(3) permits a LEC to file tariffs "on a streamlined basis," but the Act does not define these terms and thus Congress has left the precise meaning and implementation of this phrase to the Commission. It has always been understood that the Commission, in interpreting and implementing § 204, may prescribe the precise forms of support that a carrier must file so that the Commission can perform its own functions under § 204 – *i.e.*, to review and, if necessary, to suspend the carrier's rates. The statute certainly cannot be read as protecting a *carrier's* right to choose unilaterally what supporting information it will provide and what it will withhold. And since the initial filing is even more important under the streamlined procedures of § 204(a)(3), the Commission could reasonably interpret the statute as imposing a heightened standard of candor regarding expected costs and traffic volumes for tariffs filed "on a streamlined basis." Accordingly, the Commission has the statutory latitude to conclude that a carrier has not made a tariff filing that satisfies this requirement of § 204(a)(3) if it has intentionally concealed information that establishes the unlawfulness of the proposed rates.[36]

As the Commission notes (¶ 28), the D.C. Circuit has already recognized that such withholding of material information can result in a forfeit of "deemed lawful" status: in *ACS*, it

[36] Indeed, the statute already imposes a duty of candor on those seeking regulatory benefits from the Commission. *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (statute gives the Commission "an affirmative obligation" to perform certain tasks in "the public interest," and "[a]s a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an *affirmative duty* to inform the Commission of the facts it needs in order to fulfill its statutory mandate" (emphasis added)); *see also FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

upheld the Commission's position that when rates are filed under the streamlined procedures, they are "deemed lawful" and are not subject to damage awards, but it made clear that it was not "addres[sing] the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations."[37]

This interpretation is also fully consistent with the Commission's recent holding in *Qwest v. Farmers,* as the Commission recognizes both in that order and in the *NPRM*. The Commission's decision in that case to recognize the "deemed lawful" status of Farmers' tariff turned entirely on the Commission's interpretation of the existing access charge rules – specifically, the Commission's conclusion that the Rule 61.39 procedures do not currently contain an explicit or implicit duty to make representations about future traffic growth.[38] The Commission acknowledged in the *Qwest* order that a LEC might be liable under different facts,[39] and with a *change* in the tariff-filing rules, a false certification would clearly involve the sort of "improper accounting techniques" that the D.C. Circuit has said would lead to negation of a carrier's "deemed lawful" status. And in the *NPRM* itself, the Commission states that "[w]e contemplate that a finding that a carrier had failed to disclose any required information could be the basis for denying deemed lawful status to the carrier's rates."[40]

A certification requirement would thus close a gap in the Commission's rules and should deter most LECs from even trying access stimulation schemes. This fact was dramatically proven earlier this year when thirty-eight ILECs left NECA, most of which with the obvious intention of entering into traffic pumping schemes. The Commission suspended their tariffs –

[37] *ACS*, 290 F.3d 403, 413 (D.C. Cir. 2002).

[38] *Qwest v. Farmers* ¶ 27.

[39] *See id*

[40] *NPRM* ¶ 28.

thus denying them deemed lawful status – and *all* of the ILECs jumped at the chance the Commission gave them either to re-enter NECA or to amend their tariffs to require new rates if their traffic increased. Moreover, to the extent that a LEC executive executes a false certification, the executive may be subject to addition civil or criminal penalties, which will further deter unscrupulous LECs from engaging in illegal traffic stimulation schemes. The Commission has taken this approach in other areas where there is a significant potential for unlawful behavior, such as universal service and prepaid cards.[41]

While this certification requirement would significantly reduce the incentives of LECs to engage in traffic pumping schemes, such a requirement would impose only very minimal burdens on honest LECs. For them, it requires only the preparation of one additional document. Honest LECs rarely, if ever, will experience such extraordinary increases in total traffic volume (in the case of ILECs) or terminating minutes per line (in the case of CLECs). And to the extent that that an honest LEC does for reasons beyond its control experience such unusual increases, then its existing rates would be rendered unjust and unreasonable and it would be entirely appropriate to allow customers to obtain refunds for excessive charges and to require the LEC to submit a new tariff that reflected the increased demand.[42]

[41] *See, e.g., Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290, ¶ 31 (2006). A certification requirement would be superior to a rule that simply treated existing tariff filings as an implicit representation to the same effect. There is significant value in forcing the executives of these carriers to focus on and sign a statement – potentially on pain of even criminal punishment – that the carrier will not engage in a traffic pumping scheme during the term of the tariff.

[42] Further, the Commission retains its ability to grant waivers of these certification rules when the LECs subject to the requirements demonstrate good cause why the certification is unnecessary due to particularized circumstances.

C. **Benchmarks That Trigger Reduced Rates.**

As discussed above, even after it is clear to a customer that a LEC is engaged in an unlawful traffic stimulation scheme, it often can take months or even years to litigate such issues and to obtain a prospective finding from the Commission or a Court that the LECs' rates are unjust and unreasonable. As a result, access customers continue to be subject to millions of dollars in excessive charges every month for months or even years after it is clear that a LEC's rates are unlawful. To eliminate this lag, and thereby protect customers from the unlawful effects of any schemes that are in fact implemented, the Commission should adopt rules that require LECs subject to the reporting and certification requirements to reduce rates immediately when specified traffic stimulation benchmarks are met. The benchmarks would be easily calculated from the data that, as described above, these LECs will be required to report.

Specifically, for small ILECs that file tariffs pursuant to section 61.38 or 61.39, the Commission should promulgate a rule requiring such LECs to file updated tariffs, with revised rates based on updated data and traffic volumes, within 45 days after the end of any quarter in which the LEC's traffic in fact increased by more than a specified percentage compared to the same quarter a year ago. AT&T has conducted an extensive, multi-year analysis of annual traffic volume changes for small ILECs of various sizes to determine appropriate percentage triggers for three "tiers" of these LECs. In particular, for all 61.38 and 61.39 ILECs, AT&T has examined year-over-year quarterly growth rates in access minutes for the past ten years. These data show that year-over-year growth rates in access minutes for these ILECs are often negative and, in any event, are generally well below 20 percent.[43] However, the data show that the

[43] These findings are illustrated in the attached Appendices A-1 (61.38 ILECs) and A-2 (61.39 ILECs), depicting the January 2005 through June 2006 data. The significant growth rates in

variation in year-over-year quarterly access minutes is greatest for ILECs with fewer than 10 million access minutes per quarter, and smaller for ILECs with between 10 million and 50 million access minutes per quarter, and the smallest for ILECs with more than 50 million access minutes per quarter.[44] Accordingly, to account for the larger variations in year-over-year annual growth rates for smaller ILECs, and lower variations for larger ILECs, AT&T suggests that the Commission adopt the following percentage triggers for three categories of small ILECs (defined by the LEC's number of access minutes per year):

Category of LEC by Annual Minutes	**Year-Over Year Quarterly Growth Rate Trigger**
10 million MOUs or less	100 percent
10 million MOUs to 50 million MOUs	75 percent
50 million or more MOUs	50 percent

As shown in Exhibits A-1 and A-2, these suggested triggers are set far above the natural variations in traffic that have historically been observed for ordinary, non-traffic-pumping LECs, and they are set at levels that make it very unlikely that natural variations in traffic will trigger a tariff filing. These triggers also recognize the mathematical proposition that a LEC with relatively larger demand may engage in significant traffic pumping without necessarily achieving a 100 percent growth level, and mitigate the potential that affiliated LECs may engage in "traffic management" to allocate their additional demand from traffic pumping among those carriers to avoid triggering the need for refiling the tariff of any one of those entities.

Concomitantly, AT&T supports a slightly revised version of the Commission's proposal to require all LECs that file their own tariffs under Section 61.38 or 61.39 to include the following language in their tariffs:

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year-over-year access minutes for the known traffic pumping LECs are highlighted in red, and they all far exceed the tariff filing triggers proposed in the table below.

[44] *See id.*

> If quarterly local switching minutes of the issuing carrier exceed [insert applicable percentage from the above table] of the local switching demand of the same quarter of the preceding year, the issuing carrier will file revised local switching and transport tariff rates pursuant to Commission Rule 61.38 to reflect this increased demand within 45 days of the end of that quarter. The issuing carrier will issue refunds to Customers equal to the difference between the local switching and transport charges paid by the customers under the existing tariffs and those contained in the revised tariffs for each day from the first day of the quarter in which increased traffic volumes triggered the new tariff filing requirement to the day on which the revised local switching and transport tariff rates become effective.

The requirement that any new tariffs be filed pursuant to Rule 61.38 is entirely appropriate. If a LEC's demand has increased by the enormously high percentages in the proposed triggers, that LEC's traffic has strayed extremely far above the zone in which it would be reasonable to assume that the LEC's historical demand for switched access minutes is a reasonable proxy for future demand or that the average schedule formula will accurately predict costs.[45] Accordingly, Section 61.39 is not a legitimate method for computing new rates triggered by such massive increases in demand, and such LECs therefore should be required comply with the Section 61.38 requirements with respect to its mid-course tariff filing.[46]

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[45] As the Commission recognizes, the average schedule formulas "can only yield reasonable estimates of an average schedule carrier's cost when the demand is within the range used to develop the formulas" and "when an average carrier experiences a significant growth in demand that takes it outside the observed range of demand used to establish the average schedule formulas, the process of running the increased demand data through the formulas produces what appear to be extreme increases in costs for the carriers." *NPRM* ¶ 25.

[46] In subsequent voluntary filings (or when the next two year filing is made), such LECs, however, should be permitted to again file tariffs pursuant to the Section 61.39 requirements. In such circumstances, however, the Commission should modify its rules to require LECs to submit information with their tariff filings demonstrating that compliance with Section 61.39 is likely to produce just and reasonable rates. Cost schedule companies should, therefore, be required to submit data showing that their 12-month historical demand is a reasonable proxy for future demand. Further, average schedule companies should be required to submit data showing that their demand falls within the rage of demand used to develop the average schedule formula und which they seek to compute rates.

For CLECs, the Commission would modify its existing rules so that CLECs could not rely on the rural exemption or benchmark to a rural ILEC's rate where their traffic patterns exhibit clear indicia of traffic pumping. Unlike ILECs, however, a CLEC's traffic levels, particularly in the first couple of years that it operates in an area, may vary considerably year over year, and CLECs frequently enter and leave particular service areas. Consequently, year over year monthly traffic comparisons could be a poor proxy for separating traffic pumping CLECs from the herd. Instead, the Commission should adopt a trigger based on the number of access minutes per line. Where a "rural" CLEC's per line traffic is multiples of the minutes per line experienced by rural ILECs (other than those that are themselves engaged in traffic pumping) whose rates serve as the CLEC's rate benchmark – there can be no question that the CLEC is engaged in traffic pumping, and not the true competition for rural customers that the benchmarking rules were intended to foster.

The Chart in Appendix B, attached hereto, shows the total number of access lines and minutes that rate of return ILECs reported to the Commission in 2006. These data show that the monthly average per line access minutes for all such ILECs is 215, and that out of 1400 small ILECs there are only 21 (less than 2%) with per line access minutes that exceed 1,000, virtually all of which are documented traffic pumpers. Based on these ILEC data, AT&T proposes a rural CLEC trigger of 2,000 access minutes per line. This trigger is very conservative and provides substantial latitude for CLEC growth through legitimate business practices, but would trigger the obligation for refiling by entities that clearly seek to inflate their access demand through traffic pumping. Under this proposal, therefore, a rural CLEC that exceeds the specified benchmark of 2,000 minutes per access line, by Commission rule, would no longer be able to file a tariff that relies on the rural exemption or benchmarks to a rural ILEC's rate.[47] Such CLECs would have the following options: offer services on a mandatorily detariffed basis (as is true now of CLECs that want to offer services above the Commission-specified benchmark rates) or file new tariffs with a benchmark that would become either (1) the competing ILEC's rate, if the CLEC is using the rural exemption, or (2) the NECA band 1 rate, if the CLEC is benchmarked to a rural ILEC's rate.

Requiring new CLEC tariff filings in these circumstances is fully consistent with, if not compelled by, the rationale behind the *CLEC Access Charge Order*. One of the premises of the benchmarking rule was the assumption that a CLEC could match the higher rates of the "competing ILEC." *See CLEC Access Charge Order*, 16 FCC Rcd. 9923, ¶ 51 ("*If* operation in these [rural] areas justifies higher access rates for the regulated incumbents, we conclude that it justifies equivalent rates for any competitor operating in the area") (emphasis added). If a CLEC is engaged in traffic pumping instead – generating enormous traffic through relatively few lines – the CLEC clearly has very different operating structure than the ILEC that is actually serving these rural communities. If the trigger has been met, permitting the CLEC to continue to benchmark to the NECA band 8 rate in the case of CLECs operating in RBOC territory or the rural ILEC rate in the case of CLECs operating in rural ILEC territory would be inappropriate because it would necessarily lead to unjust and unreasonable rates.

These modest rule changes strike an appropriate balance between the interests in stopping unlawful traffic stimulation schemes and minimizing any potential additional burdens placed on

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[47] To ensure that CLECs do not circumvent this triggering mechanism by artificially reducing their per line access minutes by giving away access lines or otherwise expanding the number of access lines used in the denominator of this per line trigger, the Commission also should prohibit rural CLECs from providing access lines at prices lower than the subscriber line charge associated with such access lines.

honest LECs. The threshold triggers are set high enough to catch only traffic stimulation schemes. Most honest ILECs, which already serve most of the customers in their service areas, will rarely, if ever, experience such large annual percentage increases in demand (or minutes per access line), and thus will not be caught up in these rules. In the unlikely event that an honest LEC does experience such extraordinary increases in demand, it would be entirely appropriate to require that LEC to submit new tariffs that account for those demand increases.

IV. THE COMMISSION SHOULD ISSUE DECLARATORY RULINGS THAT CERTAIN TRAFFIC PUMPING LEC PRACTICES ARE UNJUST AND UNREASONABLE.

Finally, the Commission should issue declaratory rulings that (1) any LEC revenue sharing arrangement in which the LEC becomes the net payor of the customer is an unreasonable practice under Section 201(b); (2) the practice of manipulating interconnection points to artificially inflate access charges is an unreasonable practice under Section 201(b); and (3) no small LEC may opt into the Commission's current price cap rules absent express permission from the Commission.

Revenue Sharing Agreements. The Commission should adopt its tentative conclusion (*NPRM* ¶¶ 18-20) that it is an unreasonable practice in violation of Section 201(b) for a LEC to enter into an access revenue sharing agreement in which it becomes a net payor to an end user customer. AT&T has previously defined the kickback schemes that should come within this declaratory ruling as "any LEC arrangement to pay a communications service provider to direct calls to or through a LEC's exchange that can be expected over the life of the arrangement to produce net payments from the LEC to its communications service 'customer.'"[48] It is well-

[48] *See NPRM* ¶ 20 n.49.

settled that the Commission may declare a practice to be unreasonable,[49] and any LEC agreement that meets this definition would be unreasonable because there are no circumstances in which such schemes can serve a lawful purpose.

As the Commission's experience has abundantly confirmed, any arrangement in which the LEC is paying more to the end-user from access revenues than the end-user is paying to the LEC for local service makes economic sense *only* if the LEC is earning exorbitant returns on access services – *i.e.*, such arrangements' only function is to facilitate traffic pumping schemes.[50] There are no circumstances in which a LEC could "reasonably" use its access revenues to pay an end-user for the privilege of serving that end-user, nor has any party to these proceedings identified any legitimate basis for such revenue sharing agreements that is consistent with the LEC's obligations to charge just and reasonable access rates. The Commission should therefore declare the practice to be *per se* unreasonable.[51]

In the *NPRM* (¶ 19), the Commission also asks whether such arrangements would be unreasonable if the ILEC included the revenue sharing or other compensation amounts in its revenue requirement. Explicitly including such amounts in the revenue requirement would

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[49] Order on Reconsideration, *Business Discount Plan, Inc.; Apparent Liability for Forfeiture*, 15 FCC Rcd. 24396, ¶ 8 (2000) ("Congress gave the Commission broad authority over unjust and unreasonable practices 'for and in connection with communication services.' In enacting section 201(b), Congress did not enumerate or otherwise limit the specific practices to which this provision applies. Instead, it granted us [the Commission] a more general authority to address such practices as they might arise in a changing telecommunications marketplace.").

[50] This is just simple arithmetic: such agreements necessarily assume that the LEC will generate returns on its access services that will be enough to cover the costs of both the LEC's access business and its website partner's separate calling business.

[51] In addition, the Commission should declare that LECs must exclude from the definition of their tariffed access services, traffic associated with revenue-sharing arrangements, and that LECs are therefore subject to damages for revenues derived from such traffic because those revenues would not be protected by the "deemed lawful" provisions of the Act.

unquestionably violate Section 201(b), because as the Commission notes, such payments are unrelated to the provision of exchange access.[52] Indeed, it is well-settled that access charges may not recover costs that are unrelated to – *i.e.*, not "used and useful" for the provision of exchange access.[53] In light of the ever-growing pattern of abuse facilitated by these agreements, however, the time has now come to declare such all agreements to be an unreasonable practice.[54]

Manipulating Points of Interconnection To Artificially Inflate Access Charges. The Commission should also declare as unreasonable practices under section 201(b) certain schemes

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[52] *See id.*

[53] *See, e.g., American Telephone and Telegraph Co.*, 38 FCC 2d 213 (1972), *aff'd sub nom., Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975); *American Tel. & Tel. Co. (Phase II)*, 64 FCC 2d 1 (1977), *recon. in part*, 67 FCC 2d 1429 (1978); *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, 2 FCC Rcd. 269 (1987), *recon.* 4 FCC Rcd. 1697 (1989). In the past, certain ILECs and CLECs engaged in traffic pumping schemes erroneously have argued that that Commission has held revenue sharing schemes to be lawful under § 201(b). As the Commission recognized in its recent *Qwest* v. *Farmers and Merchants* decision, that is not true. Rather, the Commission has held only that access sharing arrangements do not necessarily violate a LEC's duty as a common carrier to hold one's services out indifferently. *Beehive*, 17 FCC Rcd. 11641, ¶ 29; *Frontier*,17 FCC Rcd 4041; *Jefferson Tel. Co.*, 16 FCC Rcd. 16130, ¶¶ 7-15 ("based on the record in this case, in which AT&T argues that Jefferson's access revenue-sharing arrangement with IAN violated section 201(b) solely because it allegedly breaches common carriage duties, we conclude that AT&T has not met its burden of demonstrating that Jefferson's practice here is unjust and unreasonable"). The Commission merely found "based on the record" developed in those cases that the LEC had not acted contrary to a common carrier – *i.e.*, the LECs there had delivered calls indifferently to all customers and had not attempted to steer traffic to any particular customer. The Commission "emphasize[d] the narrowness of [its] holding" in those cases, *see Jefferson Tel. Co.*, 16 FCC Rcd. 16130, ¶ 16, and acknowledged that such arrangements might be violate § 201(b) or be otherwise unlawful for other reasons.

[54] In addition to being clear violations of Section 201(b) of the Act, there are serious questions as to whether some or all of these revenue sharing schemes -- which use traditional POTS telephone numbers and sometimes 8YY numbers – violate the very important policies underlying 47 U.S.C. § 223 and the Telephone Disclosure and Dispute Resolution Act (TDDRA) (47 U.S.C. § 228). Many of the revenue sharing schemes involve the transmission of "adult" pornographic content to the caller, but have no safeguards to protect against children making such calls and receiving the content. These schemes thus significantly subvert the important policies underlying these provisions of the Act, and as such the Commission can and should use its Section 201 authority to declare these schemes unlawful.

whereby LECs seek to manipulate the points at which they interconnect with an intermediate centralized access provider in order to substantially inflate the mileage-based charges that apply to these transport access services.

In many states, access traffic is initially terminated by an IXC to an intermediate centralized access provider, which has built a transport ring around a state to aggregate traffic from numerous end offices, and then handed off to the terminating LEC at an interconnection point on the centralized equal access ring designated by the terminating LEC. The terminating LEC then charges the IXC a transport charge to carry the traffic from the designated interconnection point to the LEC's end office. As the Commission found when it initially authorized these centralized facilities, the "aggregation of traffic should reduce the access charges [the LEC] assesses IXCs."[55] In an increasing number of cases, however, certain LECs are turning the purposes of these centralized facilities upside-down, and using them to *increase* access charges for transport services. These LECs manipulate the interconnection point to designate a very distant location far removed from their actual physical interconnection with the centralized provider's ring, and then assess IXCs an exorbitant mileage-based charge for transport from that point.

In one variant of these schemes, the terminating LEC changes its interconnection point so that calls from an IXC are handed off to a centralized intermediate access provider that is located in an entirely different state, many hundreds of miles away from the terminating LEC. For example, AT&T has learned that Aventure, a CLEC in Iowa, has specified that calls destined for Iowa customers be handed off to a centralized access provider in Minnesota, even though AT&T directly connects with another such centralized provider, Iowa Network Services (INS), that has

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[55] *E.g.*, *Application of Iowa Network Access Division*, 3 FCC Rcd. 1468, ¶ 14 (C.C.B. 1988).

an interconnection point in the very town in which Aventure's switch is located. To make matters worse, the traffic is then routed from Minnesota through South Dakota, and then from South Dakota to Iowa, and only then to Aventure's facilities in Iowa. As a result of this highly circuitous and entirely unnecessary path from Minnesota to South Dakota and then to Iowa, Aventure bills AT&T for more than 230 miles of transport charges, notwithstanding that Aventure could charge only a few miles of transport if it designated its interconnection point efficiently at the nearby INS interconnection point. Further, although as a CLEC, Aventure may choose to deliver long distance traffic to AT&T outside the LATA in which it originates, it should not be able to charge AT&T the cost of moving traffic to its chosen inefficient point of delivery in order to inflate its revenues. Similarly, AT&T should not be compelled to deliver traffic destined for a carrier's customers through an inefficient, and overly expensive route solely to support a carrier's desire to impose excessive charges on AT&T.

In another variant of the scheme, the LEC utilizes the centralized access provider in its own state, but rather than designate the closest interconnection point on the centralized provider's ring, the LEC designates the most distant interconnection point on the ring as its "official" interconnection point with the centralized provider, often the exact location where IXCs deliver their traffic to the centralized provider. The LEC's actual physical interconnection remains, of course, at the closest interconnection point, and the actual routing of the call remains over the centralized provider's ring to that actual physical interconnection point. But through the paper change of designating the distant "official" interconnection point, the LEC then claims the right to charge the IXC up to hundreds of miles of transport (in addition to the transport charges the IXC pays the centralized provider for transport anywhere on the ring).[56]

By way of example, Readlyn Telephone Company of Iowa is located in Readlyn, Iowa, only 1 miles from the INS ring. Yet, Readlyn designates Des Moines – nearly 50 miles further away and the very point where AT&T interconnects with INS – as Readlyn's official interconnection point with INS, thereby nearly doubling the per-minute terminating access charges it claims are due. Of course, Readlyn's facilities, in fact, connect to the INS ring at the nearby interconnection point, not in Des Moines. Many LECs in Iowa and elsewhere are now engaging in this patently unreasonable practice which is designed solely to inflate access charges.

In each case, these LECs' manipulations of interconnection points are patently unlawful, and result in manifestly unreasonable charges for access services. These LECs have asserted that, when the Commission and state regulatory agencies approved these centralized access arrangements, the LECs were allowed complete discretion in selecting an interconnection point with the centralized providers, but this is flatly wrong. In one of the very first decisions approving these centralized access arrangements, the Commission allowed the LECs some control over the location of interconnection points, but it expressly declined to "authoriz[e] a blanket policy" and cautioned that its approval of these facilities "should not be interpreted as

[56] AT&T believes that these modifications are the result of LECs leasing facilities from centralized equal access providers that originally provided, and billed, AT&T for the same transport services. Further, while some LECs modified the point at which they take traffic from the intermediate carrier simultaneously with beginning traffic pumping, the onslaught of traffic pumping also revealed that some LECs apparently instituted the modifications much earlier, and that AT&T only identified the change when traffic levels increased substantially.

unbounded authority on the part of [LECs] to determine points of interconnection with IXCs."[57] In particular, the Commission determined that a LEC should not propose "significant[] increases [in] IXCs' operating costs" with no corresponding improvements in service or otherwise "unreasonably designate[] points of interconnection with IXCs."[58] That is precisely what is occurring here with the current schemes of these LECs. They have not offered any legitimate basis for why the transport services are being routed and billed in the manner described above. The reality is that these interconnection points and call routing mechanisms have been devised solely to increase the mileage-based charges that these LECs impose on IXCs. The Commission should use its broad authority under Section 201(b) and promptly declare such practices to be unjust and unreasonable.

Participation In Price Cap Regulation. Finally, because the current price cap rules would be patently inappropriate if applied to small and mid-sized ILECs, the Commission should issue a declaratory ruling making clear that no ILEC is permitted to opt into the Commission's current price cap rules absent express permission from the Commission. Allowing mid-sized and small LECs to opt in to the current price cap regime would be inappropriate because the Commission has made many changes to the price cap rules over the years – such as the elimination of the sharing requirement – on the assumption that those rules apply only to large LECs. The most significant of these changes was the CALLS Plan, which was an industry agreement in which most of the then-existing price cap carriers agreed to specific and very low rate levels for

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[57] *Application of Indiana Switch Access Division*, 1 FCC Rcd. 634, ¶ 5 (1986).

[58] *Id.*

switched access services, and a 6.5% X-Factor as a mechanism for transitioning to those agreed upon rates.[59]

Although a small ILEC with legitimate customers would have no reason to opt in to the current price cap rules, that regime as written could tempt traffic-pumping LECs to opt in. Those LECs could leave NECA, establish very high switched access charges, and then opt into price caps, which would result in application of the price cap formula set out in the rules – *i.e.*, a 6.5% X-Factor applied to switched access each year until the switched access target rates are reached, which in the case of the traffic pumping LECs could take many years. In the intervening years, however, the rules would permit these ILECs to earn astronomical returns from traffic pumping, because the price cap regime does not regulate returns.

The Commission has already tentatively concluded that the CALLS plan rules are not available to any LEC that was not already a price cap carrier at the time of CALLS:

> The debate over incentive regulation is often clouded by uncertainty as to whether the CALLS plan contemplated that additional study areas would enter that plan during its five-year term. Three years have passed and no rate-of-return carrier has sought entry. To eliminate the uncertainty, *we tentatively conclude that the CALLS plan was not designed to be open to new carriers or study areas*. The CALLS plan began as a voluntarily negotiated agreement among price cap carriers and certain IXCs that addressed pricing and universal service concerns as a package, without consideration of possible participation by carriers that were then under rate-of-return regulation. That CALLS was not intended to accommodate additional entry is most clearly indicated by the fact that in adopting the plan, the Commission made no provision for how the universal service component of the CALLS plan would address future expansion to new carriers. We therefore believe the rules should be amended to clarify that new carriers or carrier study areas may not elect this plan. We invite parties to comment on this tentative conclusion.[60]

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[59] *CALLS Order*, 12 FCC Rcd 12962, ¶¶ 150-82.

[60] *Multi-Association Group Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 19 FCC Rcd. 4122, ¶ 93 (2004); *see also Valor Communications Group, Inc*, 21 FCC Rcd. 859, ¶¶ 3, 7 (2006).

The Commission should now formally adopt this tentative conclusion and make crystal clear that rural ILECs are not allowed to opt into the current price cap system without prior Commission approval.[61] The Commission is considering a range of proposals for small and mid-sized LEC incentive regulation in another proceeding, and no current rate-of-return LEC should be permitted to opt into any form of incentive regulation until the Commission has completed that rulemaking.[62]

[61] An example of an ILEC that has expressly sought Commission approval to opt into the price cap mechanism is Windstream Corporation. *See Windstream Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief*, WC Docket No. 07-171 (dated Aug. 6, 2007). AT&T has submitted comments in support of Windstream's request. *See* Comments of AT&T Inc., *Windstream Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief*, WC Docket No. 07-171 (dated Sep. 24, 2007).

[62] There is no need to modify the price cap rules as they apply to price cap carriers. With respect to *those* carriers, the CALLS price caps are extremely low, are presumed to be just and reasonable, and would not yield the sort of profits the traffic-pumpers have extorted from IXCs and that encourage traffic-pumping. And in all events, it is well-settled that, for price cap carriers, the Commission regulates only prices, not profits.

CONCLUSION

For the reasons stated above, the Commission should adopt the foregoing changes to its tariffing regime for ILECs and CLECs to preclude traffic pumping abuses, and should issue declaratory rulings that practices described above are unjust and unreasonable practices in violation of Section 201(b) of the Communications Act.

Respectfully submitted,

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