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

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No.: EB-09-MD-010
	)	
All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 2013 **Released: March 25, 2013**

By the Commission:

I. INTRODUCTION

1. On April 30, 2010, AT&T Corp. (AT&T) filed a formal complaint against All American Telephone Co. (All American), e-Pinnacle Communications, Inc. (e-Pinnacle), and ChaseCom (ChaseCom) (collectively, Defendants) under Section 208 of the Communications Act of 1934, as amended (Act).[1] Count I of the Complaint alleges that Defendants violated Sections 203 and 201(b) of the Act by billing AT&T for access services that were not properly provided pursuant to valid or applicable tariffs.[2] Count II of the Complaint alleges that Defendants violated Section 201(b) of the Act by undertaking sham arrangements to inflate billed access charges to AT&T and other long distance carriers.[3] Because the evidence shows that Defendants participated in an access stimulation scheme designed to collect in excess of eleven million dollars of improper terminating access charges from AT&T, we grant Counts I and II of the Complaint.[4]

[1] *See* Amended Formal Complaint of AT&T Corp., File No. EB-09-MD-010 (filed Apr. 30, 2010) (Complaint); 47 U.S.C. § 208. The litigation arises from a primary jurisdiction referral from the United States District Court for the Southern District of New York (the Court). The Commission directed the parties to effectuate the Court's referral by filing two formal complaints. *See* Letter Ruling from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, to James F. Bendernagel, Jr., Counsel for AT&T, and Jonathan Canis, Counsel for Defendants, File No. EB-09-MD-010 (filed Apr. 2, 2010) (April 2 Letter Ruling). The parties did so, and the Commission previously resolved Defendants' complaint. *See All American v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723 (2011).

[2] Complaint at 66–69, paras. 123–30; 47 U.S.C. §§ 201(b), 203.

[3] Complaint at 69–71, paras. 131–37; 47 U.S.C. § 201(b).

[4] AT&T also alleged in Count III of its Complaint that Defendants are unable to collect any compensation for access services under a *quantum meruit*, quasi-contract, constructive contract, or any other state law theory. Complaint at 71, paras. 138–42. Under Section 1.722(d) of the Commission's rules, AT&T elected to bifurcate its liability and damages claims. Complaint at 4, para. 8 (citing 47 C.F.R. § 1.722(d) (setting forth the requirements a complainant

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II. BACKGROUND

A. Parties

2. AT&T is an interexchange carrier (IXC) providing interstate telecommunications service (also known as long-distance service) throughout the United States.[5] In order to originate and terminate long distance calls, IXCs such as AT&T must use the facilities of local exchange carriers (LECs).[6]

3. As discussed in more detail below, Defendants were formed and certificated by state commissions to be competitive local exchange carriers (CLECs). Rather than serving and competing to serve a broad range of customers in its local area, however, All American provided services in Nevada and Utah only to a single chat line/conferencing service provider (CSP), Joy Enterprises, Inc.[7] Similarly, ChaseCom and e-Pinnacle provided services in Utah exclusively to a few CSPs.[8]

B. Important Non-Parties

4. In addition to the parties, several other entities figure prominently in this litigation. First, Beehive Telephone Company, Inc., Nevada, and Beehive Telephone Company, Inc., Utah (collectively, Beehive) are incumbent local exchange carriers (ILECs) that serve approximately 800 to 1,000 access lines in rural territories in Nevada and Utah.[9]

5. Second, Joy Enterprises, Inc. (Joy) is a Nevada corporation with its principal place of business in Nevada.[10] Joy is a CSP that shares the same business address with All American.[11] Joy and All American also have common directors, officers, and ownership.[12]

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must satisfy if it "wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made")). Commission staff subsequently ruled that the issues raised in Count III of the Complaint will be addressed in AT&T's damages proceeding, if any. Letter Ruling from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, to James F. Bendernagel, Jr., Counsel for AT&T, and Jonathan Canis, Counsel for CLECs, File No. EB-09-MD-010 (filed July 28, 2010) (Status Conference Order). Because this Order finds in AT&T's favor on liability, AT&T may file with the Commission a supplemental complaint for damages in accordance with 47 C.F.R. § 1.722(e) ("If a complainant proceeds pursuant to paragraph (d) of this section . . . the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint . . . . ").

[5] Complaint at 6, para. 10.

[6] *See generally United States Tel. Ass'n v. FCC*, 188 F.3d 521, 523–24 (D.C. Cir. 1999).

[7] Complaint at 6, para. 11; All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom's Answer to AT&T Corp.'s Amended Formal Complaint, File No. EB-09-MD-010 (filed June 14, 2010) (Answer) at 6–7, para. 11; Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File Nos. EB-09-MD-010 and EB-10-MD-003 (July 16, 2010) (Joint Statement) at 2, Stipulation 2. CSPs generate very high volumes of incoming calls for which local exchange carriers (LECs) charge terminating access. *See Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17874, para. 656 (2011) (*USF/ICC Transformation Order*), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011).

[8] Complaint at 7–8, paras. 12–13; Answer at 7–8, paras. 12–13; Joint Statement at 2–3, Stipulations 3–4.

[9] Joint Statement at 3, Stipulation 6.

[10] *Id.*, Stipulation 7.

[11] Answer at 8, para. 16; Joint Statement at 4, Stipulation 8; *see* AT&T Ex. 79, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah*, Public Service Commission of Utah, Pre-Filed Direct Testimony of David W. Goodale on Behalf of All American Telephone Company, Inc., at 11–12 (Feb. 26, 2010) (All American Utah PSC Hearing Direct Testimony); *see also AT&T Corporation v. Beehive Telephone Company, Inc. and*
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6. Finally, CHR Solutions, Inc. (CHR) is a Texas telecommunications consulting company that drafts and effectuates regulatory filings on behalf of its clients.[13] CHR provided regulatory services to Beehive and Defendants and drafted and filed the tariffs at issue.[14]

C. The Commission's Tariff Regime

7. The Commission regulates access charges that LECs apply to interstate calls.[15] As a general matter, ILECs must file and maintain tariffs with the Commission for interstate switched access services.[16] Commission rules provide rate-of-return LECs (such as Beehive) with alternate means for filing individual interstate access tariffs.[17] One option is to participate in the traffic-sensitive pool managed by the National Exchange Carrier Association (NECA) and in the traffic-sensitive tariff filed annually by NECA.[18] The rates in the traffic-sensitive tariff are set based on the projected aggregate costs (or average schedule settlements) and demand of all pool members and are targeted to achieve an 11.25 percent return.[19] Each participating carrier historically received a settlement from the pool based on its costs plus a pro rata share of the profits, or based on its settlement pursuant to the average schedule formulas.[20] Stated differently, all NECA pool members share revenues in excess of costs.

8. Alternatively, a rate-of-return carrier that has 50,000 or fewer access lines in a study area may elect to file its access tariffs in accordance with Section 61.39 of the Commission's rules,[21] which the Commission adopted in the *Small Carrier Tariff Order*.[22] A carrier choosing to proceed under this rule (Section 61.39 Carrier) must file access tariffs in odd numbered years to be effective for a two-year period.[23] Section 61.39 Carriers base their initial rates on historical costs (or average schedule settlements) and associated demand for the preceding year.[24] They base their subsequent rates on their costs and traffic volumes for the prior two year period.[25] Section 61.39 Carriers do not pool their costs

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Beehive Telephone, Inc. Nevada, Memorandum Opinion and Order, 17 FCC Rcd 11641, 11644, para. 6 (2002) (*AT&T v. Beehive*).

[12] Joint Statement at 4, Stipulation 8.

[13] Joint Statement at 4, Stipulation 10.

[14] *Id*.

[15] *See* 47 C.F.R. §§ 69.1–69.2.

[16] *See* 47 U.S.C. § 203.

[17] *See Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 19992–93, paras. 6–8 (2007) (*2007 Access Charge NPRM*); *Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 22 FCC Rcd 16109, 16111–12, paras. 4–6 (Wireline Comp. Bur. 2007). Rate-of-return carriers may earn no more than a Commission-prescribed return on the investments they make in providing exchange access services. *General Communication, Inc. v. Alaska Communications Systems*, Memorandum Opinion & Order, 16 FCC Rcd 2834, 2836, para. 5 (2001), *review granted in part and denied in part and case remanded, ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002).

[18] *2007 Access Charge NPRM*, 22 FCC Rcd at 17992, para. 6.

[19] *Id*.

[20] *Id*.; 47 C.F.R. §§ 69.601–69.612.

[21] 47 C.F.R. § 61.39.

[22] *Regulation of Small Telephone Companies*, Report and Order, 2 FCC Rcd 3811 (1987) (*Small Carrier Tariff Order*); *2007 Access Charge NPRM*, 22 FCC Rcd at 17992–93, paras. 7–8.

[23] 47 C.F.R. § 69.3(f)(2).

[24] 47 C.F.R. § 61.39(b).

[25] 47 C.F.R. § 61.39(a).

and revenues with any other carrier. Thus, if demand increases, Section 61.39 Carriers retain the revenues to the extent they exceed any cost increases.

9. The Commission considers CLECs (such as Defendants) to be nondominant carriers subject to minimal rate regulation.[26] During the relevant period, CLECs had two means by which to provide and charge IXCs for functionally equivalent interstate access services. A CLEC generally may tariff interstate access charges if the charges are no higher than the rate charged for such services by the competing ILEC (the benchmarking rule).[27] Alternatively, a CLEC must negotiate and enter into agreements with IXCs to charge rates higher than those permitted under the benchmarking rule.[28]

D. The Access Stimulation Scheme

1. Beehive Becomes a Section 61.39 Carrier and Enters Into a Revenue-Sharing Agreement with Joy.

10. Prior to March 31, 1994, Beehive participated in the NECA traffic-sensitive tariff.[29] In 1994, Beehive withdrew from the NECA pool and became a Section 61.39 Carrier.[30] Because Beehive operates in sparsely-populated areas, its historic traffic volumes at that time were low, thereby allowing it to charge relatively high access rates in its individual tariff.[31]

11. Around the same time that Beehive became a Section 61.39 Carrier, Beehive and Joy entered into an access revenue-sharing arrangement in which Beehive paid Joy a portion of Beehive's tariffed access charges for every minute of long distance traffic routed to Joy's assigned telephone numbers.[32] The agreement with Joy resulted in Beehive's interstate local switching minutes of use growing exponentially. For example, between 1994 and 2005, Beehive's traffic increased approximately one hundredfold, from 3.6 million minutes of use in 1994 to 313.5 million minutes of use in 2005.[33]

2. Beehive Reenters the NECA Pool.

12. As a result of the significant increase in traffic, Beehive was required to reduce its end office switching element rate between 2001 and 2005 from 4.59 cents per minute to 1.02 cents per minute.[34] AT&T estimates that Beehive's local switching rate would have declined even further (to 0.25

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[26] *See Tariff Filing Requirements for Non-Dominant Common Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754, para. 9 (1993) (CLECs are non-dominant carriers because they have not been previously declared dominant), *vacated and remanded in part on other grounds*, *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995).

[27] *See* 47 C.F.R. § 61.26; *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9925, para. 3 (2001) (*CLEC Access Reform Order*). In 2011, the Commission adopted rules requiring a CLEC engaged in "access stimulation" (discussed below) to reduce its tariffed interstate switched access rates to the rates of the price cap LEC in the state with the lowest rates, rather than the presumably higher rates of the competing ILEC. *See* 47 C.F.R. § 61.26(g); *USF/ICC Transformation Order*, 26 FCC Rcd at 17874–90.

[28] *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

[29] Joint Statement at 6–7, Stipulation 23.

[30] *Id*.

[31] *See Beehive Telephone Company, Inc. Beehive Telephone Company, Inc. Nevada*, Order on Reconsideration, 13 FCC Rcd 11795, 11806, para. 24 (1998) (*Beehive Reconsideration Order*).

[32] Joint Statement at 7, Stipulation 24. This payment arrangement changed over time to a fixed monthly fee. *Id.*

[33] *See* Joint Statement at 7–8, Stipulation 25, 29.

[34] Joint Statement at 8, Stipulation 30. During this same period, the Commission was investigating Beehive's revenue-sharing arrangements, its relationship with Joy, and its high access rates. *See* AT&T Ex. 130, Deposition of Charles McCown at 38–39, 157–59 (McCown First Deposition). *See generally Beehive Telephone Company, Inc.,*

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cents per minute by 2007), if Beehive continued to be the entity that charged terminating access.[35] In order to avoid these additional rate reductions, however, Beehive reentered the NECA pool in mid-2007.[36] As explained above, participation in the NECA pool tariff meant that Beehive no longer was able to retain for itself—and would have to share with all pool members—revenues in excess of its costs.[37]

3. Beehive Creates Defendants.

13. Rather than dismantling the access stimulation scheme, Beehive set about creating the Defendants to assume its role as terminating access carrier for certain end-users. As noted above, CLECs may tariff switched access services at rates that are "benchmarked" against the competing ILEC's rates.[38] Unlike ILECs, however, during the period relevant to this complaint, CLEC rates were not subject to reduction as a result of large increases in traffic volume.[39] Although Defendants provided the termination services, Beehive continued to charge the IXCs for tandem switching and transport of the stimulated traffic.[40]

14. Beehive directed its consultant—CHR—to assist Defendants in preparing and filing tariffs,[41] and Beehive paid CHR for its work.[42] Similarly, at no cost to All American, Beehive's attorney

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Beehive Telephone, Inc. Nevada, Suspension Order, 12 FCC Rcd 11695 (Com. Car. Bur. 1997) (*Beehive Suspension Order*); *Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) (*Beehive First 1997 Rate Investigation Order*); *Beehive 1997 Rate Reconsideration Order*; *Beehive Telephone Company, Inc., Beehive Telephone, Inc. Nevada*, Memorandum Opinion and Order, 13 FCC Rcd 12275 (1998) (*Beehive Second 1997 Rate Investigation Order*).

[35] Joint Statement at 22, para. 46 (AT&T Disputed Fact); Complaint Ex. A, Expert Report of David I. Toof, PhD (Toof Report), at 6, para. 16.

[36] *See* AT&T Ex. 130, McCown First Deposition at 56, 158; Defendants' Ex. 4, Deposition of Charles McCown at 106–07 (McCown Second Deposition); Joint Statement at 9, Stipulation 34.

[37] Moreover, the enormous quantity of terminating minutes that Beehive was receiving by virtue of its arrangement with Joy would have reduced Beehive's per-minute costs, risking the possibility that Beehive would have been forced into a lower NECA rate band. *See, e.g.*, AT&T Legal Analysis at 37–38; AT&T Reply to Formal Complaint, File No. EB-09-MD-010 (filed Jan. 29, 2010) at 15 and n.31 (AT&T Reply); AT&T Ex. A, Toof Report at 4–6, paras. 12–16.

[38] *See* paragraph 9 above.

[39] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17885–86, para. 689; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 18003, para. 34 (2007); *see also* note 27 above.

[40] AT&T Ex. 130, McCown First Deposition at 159; Defendants' Ex. 4, McCown Second Deposition at 120; AT&T Ex. 23, Email from Chuck McCown at Beehive to CHR (explaining that Beehive will bill the IXCs for tandem switched termination, tandem switching, and tandem switched transport along with a portion of the local switching to make it whole).

[41] ChaseCom's Answers to AT&T's Amended First and Second Requests for Interrogatories, File No. EB-09-MD-010, at 4 (filed Aug. 27, 2010) (ChaseCom's Interrogatory Responses); e-Pinnacle Communications, Inc.'s Answers to AT&T's Amended First and Second Requests for Interrogatories, File No. EB-09-MD-010 (filed Aug. 27, 2010) (e-Pinnacle's Interrogatory Responses) at 4; All American's Answers to AT&T's Amended First and Second Requests for Interrogatories, File No. EB-09-MD-010 (filed Aug. 27, 2010) (All American Interrogatory Responses) at 3. *See* AT&T Ex. 138, Deposition of Brian Kofford (Kofford Deposition) at 53; AT&T Ex. 139, Deposition of Herb Levitin, at 64 (Levitin Deposition). *See also* AT&T Ex. 54, Email exchange between CHR and Beehive; AT&T Ex. 55, CHR email; AT&T Ex. 56, CHR Email; AT&T Ex. 57, Email from Beehive to CHR; AT&T Ex. 58, Email from e-Pinnacle to CHR; AT&T Ex. 59, CHR Email; AT&T Ex. 60, Email from e-Pinnacle to CHR; AT&T Ex. 61, Email from e-Pinnacle to CHR.

[42] Joint Statement at 9, Stipulation 31; *see also* AT&T Ex. 52, Email from CHR to Beehive; AT&T Ex. 53, Email from Beehive to All American, e-Pinnacle and ChaseCom; AT&T Ex. 135, Deposition of Kelly Atkinson (Atkinson (continued . . .)

(who also was an employee and director of Beehive) worked on All American's behalf to obtain regulatory approval for All American to become a CLEC in Utah.[43]

15. Defendants then applied for Certificates of Public Convenience and Necessity (CPCN) to operate as CLECs in Utah, representing to the Utah PSC that they did not intend to operate or provide services in Beehive's territory.[44] Beehive publicly supported and assisted Defendants' efforts in filings it made with the Utah PSC.[45] When the Utah PSC issued Defendants' CPCNs, it expressly precluded them from providing public telecommunications services in "local exchanges of less than 5,000 access lines of incumbent telephone corporations with fewer than 30,000 access lines."[46] In other words, Defendants were not permitted to compete against Beehive or provide service in its service territory.[47] Nonetheless, after obtaining CPCNs from the Utah PSC, Defendants filed interstate switched access tariffs with this Commission that benchmarked their tariffed rates for access services in Utah against Beehive's Utah tariffed rates.[48] All American's Nevada CPCN did not have similar territorial restrictions to its Utah CPCN, and its Nevada interstate tariff benchmarked its rates against Beehive's Nevada tariffed rates.[49]

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Deposition) at 24; AT&T Ex. 128, Deposition of David Goodale (Goodale First Deposition) at 210-12; AT&T Ex. 139, Levitin Deposition at 63; e-Pinnacle's Interrogatory Responses at 4.

[43] AT&T Ex. 128, Goodale First Deposition at 212-16; AT&T Ex. 136, Deposition of David Goodale at 160–61 (Goodale Second Deposition); AT&T Ex. 130, McCown First Deposition at 177-79; Joint Statement at 15, Stipulation 73.

[44] AT&T Ex. 5, *Application of All American Telephone Company, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services Within the State of Utah*, Report and Order, para. 3 (March 7, 2007) (All American Utah CPCN); AT&T Ex. 9, *Application of e-Pinnacle Communications, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services Within the State of Utah*, Report and Order, para. 2 (Oct. 20, 2004) (e-Pinnacle CPCN); AT&T Ex. 12, *Application of ChaseCom for a Certificate of Public Convenience and Necessity to Provide Local Exchange Services Within the State of Utah*, Report and Order, para. 2 (July 13, 2005) (ChaseCom CPCN).

[45] *See* Joint Statement at 9, Stipulation 37; AT&T Ex. 124, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Order on Application for Review and Rehearing and Request for Reconsideration at 21–23 (July 6, 2010) (Utah PSC Revocation Reconsideration Order); AT&T Ex. 79, All American Utah PSC Hearing Direct Testimony at 5; ChaseCom Interrogatory Responses at 4; e-Pinnacle Interrogatory Responses at 4.

[46] Joint Statement at 2–3, Stipulations 2, 3, 4, 6; *see also* Utah Code Section 54-8b-2.1 (specifying the process for excluding competition within a local exchange with fewer than 5,000 access lines and the obligations that may be imposed on carriers obtaining authorization to provide public telecommunications services to any customer or class of customers who requests service within such exchanges).

[47] Joint Statement at 3, Stipulation 6 ("Each of Beehive's local exchanges in Utah have less than 5,000 access lines, and Beehive serves fewer than 30,000 access lines in Utah."). *See* AT&T Ex. 5, All American Utah CPCN, Exhibit A; AT&T Ex. 9, e-Pinnacle CPCN, Exhibit A; AT&T Ex. 12, ChaseCom CPCN, Exhibit A. Indeed, in response to opposition to its initial CPCN application, which included Beehive's territory, All American revised its application to remove the areas served by Beehive. AT&T Ex. 96, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah, Public Service Commission of Utah*, Docket No. 08-2469-01, Report and Order at 4–5 (Apr. 26, 2010) (Utah PSC Revocation Order).

[48] As noted above, a CLEC may benchmark its rates to those of a *competing* LEC, but Defendants were not authorized to compete with Beehive in Utah. Joint Statement at 10, Stipulation 45; AT&T Legal Analysis at 13–14; *see also* AT&T Ex. 75, All American F.C.C. Tariff No. 2, Original Pages 89–92 (stating that All American's rates shall be "no higher than the Incumbent Local Exchange Carrier's equivalent rates in whose serving area [All American] is providing service"); AT&T Ex. 29, ChaseCom Tariff No. 1 at Pages 91–94 (stating that ChaseCom's
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4. Beehive Coordinates Defendants' Operations.

16. In order to position Defendants to step in as LECs, Beehive assisted them with setting up their initial operations.[50] It chose a location for Defendants' equipment that enabled Beehive to maximize the amount of transport mileage that it could charge for the stimulated traffic (which it continued to carry, even though Defendants ostensibly terminated the traffic).[51] At no cost to Defendants, Beehive installed and maintained their equipment (which was collocated in Beehive's facilities),[52] coordinated and managed their billing and collection services,[53] and provided power and other services as needed by Defendants.[54] Moreover, Beehive assigned to Defendants, and allowed them to continue to use at no cost, the telephone numbers that previously had been used for Defendants' conferencing and chat line services.[55] Further, Beehive advised CHR regarding when to file revised tariffs for Defendants after Beehive increased its own rates,[56] advanced money to and acted as a co-lessee of Defendants' equipment,[57] and decided whether Defendants could relocate their equipment.[58]

17. Despite becoming CLECs, none of the Defendants marketed local exchange services to residents or businesses generally in Utah or Nevada.[59] Rather, Defendants designed and engineered their

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rates "are in accordance with" Beehive's Tariff); AT&T Ex. 30, e-Pinnacle Tariff No. 1 at Pages 92–95 (stating that e-Pinnacle's rates "are in accordance with" Beehive's Tariff).

[49] AT&T Ex. 5, *Application of All American Telephone Company for Authority to Operate as a Competitive Provider of Telecommunications Services, Providing Resold and Facilities-Based Interexchange and Basic Services within the State of Nevada*, Order (Mar. 5, 2001) (All American Nevada CPCN). AT&T Ex. 28, All American F.C.C. Tariff No. 1, at 89–92. ChaseCom and e-Pinnacle were not authorized to operate as CLECs in Nevada.

[50] Joint Statement at 9, Stipulation 31. *See* ChaseCom's Interrogatory Responses at 4; e-Pinnacle's Interrogatory Responses at 4; All American's Interrogatory Responses at 3; *see also* AT&T Ex. 139, Levitin Deposition at 64.

[51] *See* AT&T Ex. 130, McCown First Deposition at 223–24; AT&T Ex. 138, Kofford Deposition at 77–78.

[52] *See* ChaseCom's Interrogatory Responses at 3–4; e-Pinnacle Interrogatory Responses at 3–4; All American Interrogatory Responses at 3; Defendants' Ex. 4, McCown Second Deposition at 120–21; Joint Statement at 10, 14, Stipulations 47 and 70.

[53] Joint Statement at 9, Stipulation 36. Prior to April 2006, Beehive billed AT&T under Beehive's name for calls that terminated on Defendants' equipment. Beginning April 1, 2006, the bills AT&T received were in Defendants' names. Joint Statement at 12, Stipulations 53 and 55; All American's Interrogatory Responses at 5; ChaseCom's Interrogatory Responses at 3–4; e-Pinnacle's Interrogatory Responses at 4, 6; AT&T Ex. 139, Levitin Deposition at 93–95; AT&T Ex. 138, Kofford Deposition at 68–69. Beehive, however, continued to generate the invoices and collect charges until Defendants ceased operating. *But see* All American Interrogatory Responses at 5 (between June 1, 2006 and August 1, 2007, Beehive resumed billing AT&T under Beehive's name for traffic that terminated to Joy's conference bridge equipment in Utah); *see also* AT&T Ex. 136, Goodale Second Deposition at 52.

[54] *See* Joint Statement at 14, Stipulation 70; ChaseCom's Interrogatory Responses at 4; e-Pinnacle's Interrogatory Responses at 3–4; All American's Interrogatory Responses at 3, 6; AT&T Ex. 130, McCown First Deposition at 162–64; Defendants' Ex. 4, McCown Second Deposition at 120–21; AT&T Ex. 138, Kofford Deposition at 55–58; AT&T Ex. 136, Goodale Second Deposition at 65; AT&T Ex. 139, Levitin Deposition at 54.

[55] Joint Statement at 9, Stipulation 36; All American's Interrogatory Responses at 3, 6; ChaseCom's Interrogatory Responses at 4; e-Pinnacle's Interrogatory Responses at 4; AT&T Ex. 138, Kofford Deposition at 59–60; AT&T Ex. 139, Levitin Deposition at 67–68; AT&T Ex. 136, Goodale Second Deposition at 54–57.

[56] *See, e.g.*, AT&T Ex. 56, CHR Email (noting that Beehive directed CHR to contact Defendants to ask if they wanted their tariffs changed to reflect Beehive's increased rate changes).

[57] e-Pinnacle's Interrogatory Responses at 4–6.

[58] *See, e.g.*, AT&T Ex. 138, Kofford Deposition at 47.

[59] Joint Statement at 13, Stipulations 62, 65. *See also* AT&T Ex. 96, Utah PSC Revocation Order at 14–16, 18, 26–28; AT&T Ex. 139, Levitin Deposition at 84, 123; AT&T Ex. 138, Kofford Deposition at 71, 110.

operations to provide services to CSPs exclusively.[60] Specifically, All American's operations in Nevada and Utah solely supported its affiliate Joy's chat line and conferencing services.[61] All American never had its own operating switch in Nevada,[62] and traffic to telephone numbers associated with its Nevada operations terminated to Joy's equipment located at Beehive's facilities in Utah not in Nevada.[63] Nor did All American have a switch in Utah until one was installed sometime in 2008.[64] That switch, however, was connected to the Internet and was not physically connected to Joy's equipment in Utah.[65] ChaseCom and e-Pinnacle provided conferencing services on their conference bridge equipment.[66] ChaseCom served five CSPs, which included its own conferencing services under its own brand,[67] and e-Pinnacle served four CSPs.[68] The only equipment that ChaseCom and e-Pinnacle owned was conference bridge equipment.[69] They did not own or lease any switches that are typically used to provide competitive LEC services to the public.[70]

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[60] Defendants were established as UNE-P CLECs. *See* AT&T Exs. 25, 48, 49; *see also* AT&T Ex. 135, Allison Deposition at 33. They did not, however, obtain any unbundled network elements that would have enabled them independently to provide local telecommunications services to the public. *See, e.g.*, AT&T Ex. 140, Beehive's Response to Sprint's Third Set of Interrogatories and Document Requests at 10; AT&T Ex. 138, Kofford Deposition at 59; AT&T Ex. 139, Levitin Deposition at 66–67.

[61] AT&T Ex. 97, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah*, Public Service Commission of Utah, Transcript of Hearing, Docket No. 08-2469-01, at 123 (Mar. 3, 2010) (Utah PSC Transcript); AT&T Ex. 100, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier Within the State of Utah*, Public Service Commission of Utah, Pre-Filed Rebuttal Testimony of David W. Goodale on Behalf of All American Telephone Company, Inc., at 7 (Feb. 26, 2010).

[62] All American maintains that it purchased a switch for use in Nevada. As of October 27, 2010, however, it had not been installed. AT&T Ex. 132, Deposition of Doug Wingrove at 8, 18-20, 39-40; *see* AT&T Initial Brief at 8–9. The testimony All American cites to the contrary is from individuals who lacked direct knowledge regarding the switch. *See* Defendants' Reply Brief at 6–7; AT&T Ex. 128, Goodale First Deposition at 54; AT&T Ex. 136, Goodale Second Deposition at 49–50, 105; AT&T Ex. 130, McCown First Deposition at 69–70; AT&T Ex. 131, Deposition of John Brewer at 103–04. Consequently, calls in Nevada continued to be routed and terminated in the same manner over Beehive's equipment. AT&T Ex. 132, Deposition of Doug Wingrove at 40–41.

[63] AT&T Ex. 132, Deposition of Doug Wingrove at 11-12, 14-17, 22-26, 33-34 (testifying that Joy's conference bridge equipment was located in Utah and that all calls to telephone numbers associated with Joy's operation were routed to its equipment located in Utah).

[64] All American's assertion that it leased switches from Beehive prior to purchasing and installing its own switches in Nevada or Utah is unsupported. *See* AT&T Ex. 130, McCown First Deposition at 105; AT&T Ex. 97, Utah PSC Transcript at 69; AT&T Ex. 128, Goodale Deposition at 122-24. *See, e.g.*, AT&T Ex. 140, Beehive's Response to Sprint's Third Set of Interrogatories and Document Requests at 10**.**

[65] AT&T Ex. 132, Deposition of Doug Wingrove at 37-38 (testifying that All American's Utah switch was connected to a router, which was then connected to the Internet, and that the switch was not physically connected to any conferencing equipment).

[66] AT&T Ex. 139, Levitin Deposition at 73, 88, 123; AT&T Ex. 138, Kofford Deposition at 71-72.

[67] AT&T Ex. 139, Levitin Deposition at 41-49.

[68] AT&T Ex. 138, Kofford Deposition at 83.

[69] Joint Statement at 9, Stipulation 38; AT&T Ex. 139, Levitin Deposition at 66-67; AT&T Ex. 138, Kofford Deposition at 78-80.

[70] AT&T Ex.139, Levitin Deposition at 66-67; ChaseCom Interrogatory Responses at 6-7. Although e-Pinnacle described its conference bridges as "switches" (AT&T Ex. 138, Kofford Deposition at 58), other evidence in the record contradicts this unsubstantiated claim (such as e-Pinnacle's admission that it did not provide dialtone or telecommunications services). *See* Joint Statement at 13, Stipulation 65; *see also* AT&T Ex. 138, Kofford

(continued . . .)

18. Defendants no longer operate as CLECs in Nevada or Utah. All American ceased operating in Utah and Nevada during the summer of 2010.[71] ChaseCom and e-Pinnacle ceased operating in Utah during the summer of 2007.[72] Although Defendants had Section 214 authorizations from this Commission, they did not comply with the Commission's discontinuation of service rules, which require obtaining approval for and notifying customers of the discontinuation of service.[73]

E. The Utah PSC Revocation Proceeding

19. On April 26, 2010, the Utah PSC revoked All American's CPCN and ordered All American to withdraw from the state.[74] Characterizing All American as a "mere shell company," the Utah PSC found that All American lacked the technical, financial, and managerial resources to serve the customers it represented it would and could serve when applying for its CPCN.[75] All American, the Utah PSC determined, misrepresented its intent to provide all forms of resold local exchange service,[76] when, in fact, it never planned to serve any customers other than Joy.[77] The Utah PSC concluded that All American's maintenance of a CPCN was not in the public interest.[78] Refusing to condone All American's "blatant legal violations,"[79] the Utah PSC explained that All American operated illegally in Utah "for about three years prior to even obtaining its CPCN," that "[i]t operated illegally in Beehive territory while it was applying for a CPCN," and that "[f]rom the date it was granted its CPCN explicitly prohibiting it from entering Beehive territory, it was already operating there illegally" and continued to do so.[80] In other words, All American never intended to—nor did it ever—comply with its Utah authorization.[81]

(. . . continued from previous page)
Deposition at 110. Thus, although Defendants provided some CLEC services, they did not do so to the public at large (nor, as discussed below, did they do so in accordance with the terms of their tariffs).

[71] *See* discussion regarding the Utah PSC revocation proceeding below in paragraphs 19-21. *See also* AT&T Ex. 128, Goodale First Deposition at 48.

[72] *See* AT&T Ex. 138, Deposition of Brian Kofford, at 24-25; AT&T Ex. 139, Deposition of Herb Levitin at 64-65.

[73] *See* 47 C.F.R. § 63.71.

[74] *See* AT&T Ex. 96, *Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Report and Order (Apr. 26, 2010) (Utah PSC Revocation Order). All American filed with the Utah PSC a petition to amend its CPCN retroactively to March 7, 2007 (the date the CPCN was issued), which would have authorized All American to operate as a CLEC in the area certificated to Beehive. *See* AT&T Ex. 71, *Petition of All American Telephone Co., Inc. for a Nunc Pro Tunc Amendment of its Certificate of Authority to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Report and Order (June 16, 2009) at 2–3, 14, 18–19. The Utah PSC, *sua sponte*, expanded the proceeding to consider whether to rescind All American's CPCN.

[75] AT&T Ex. 96, Utah PSC Revocation Order at 18, 23, 24.

[76] *Id*. at 14, 28.

[77] *Id*. at 14, 27–29.

[78] *Id*. at 25.

[79] *Id*. at 29.

[80] AT&T Ex. 96, Utah PSC Revocation Order at 34 (emphasis omitted); *see also id.* at 28 (despite All American's verified representations in its application for a CPCN, Mr. Goodale admitted that "'from the time [All American] first considered operating in Utah, the company's intent was to operate in Beehive's territory in the manner in which it is currently operating'").

[81] AT&T Ex. 96, Utah PSC Revocation Order at 33.

20. The Revocation Order emphasized the "collusion" between All American and Beehive,[82] which profited from All American's operations,[83] determining that "Beehive was a party to [All American's] scheme and materially aided it in operating illegally."[84] The Utah PSC highlighted the following evidence:

> The record shows Beehive helped [All American] obtain its CPCN improperly and helped it operate illegally. [All American] operated illegally at least two years prior to applying for its CPCN. . . . [All American's] petition in the Original Certificate Proceeding, and subsequent amended petitions, were all prepared and filed by Beehive's former counsel. In those petitions . . . [All American] represented to us that they would not serve in Beehive's territory. We granted the CPCN based on this representation. Despite that affirmation that it would not serve in Beehive territory, Beehive's counsel then drafted the interconnection agreement which it claimed would purportedly allow it to compete in Beehive territory. Beehive knew that [All American] was not authorized to serve in its territory. . . . All the while, Beehive . . . provided management services, consulting services, and serviced equipment belonging to [All American].[85]

"Promot[ing] competition . . . and prevent[ing] anti-competitive behavior," the PSC observed, is what "Beehive and [All American] do *not* want."[86]

21. The Utah PSC concluded that All American's CPCN should be rescinded because it "does not merit" the "concomitant privileges" obtained from a CPCN, including "the right to levy access charges" and "order number blocks."[87] It further ordered All American to cease operating in Utah within 30 days.[88] Although All American sought review and rehearing of the Revocation Order (and Beehive filed a request for reconsideration and vacatur of the Revocation Order), the Utah PSC declined to reverse its findings.[89] It further ordered that All American would be assessed a $2,000 per day penalty for each day it continued operating.[90]

F. The Primary Jurisdiction Referral

22. On February 5, 2007, Defendants sued AT&T in the United States District Court for the Southern District of New York.[91] The federal court complaint, as amended on March 6, 2007, asserted four claims: (i) a collection action for amounts AT&T allegedly owed Defendants for access services

[82] AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 17.

[83] AT&T Ex. 96, Utah PSC Revocation Order at 26 (All American represented in a post-hearing brief that its operations "provide revenue to Beehive"). As it did when All American was applying for its CPCN, Beehive supported All American in its efforts to dissuade the Utah PSC from revoking All American's CPCN. *See* AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 1.

[84] AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 23.

[85] *Id*. at 21-22 (citations omitted).

[86] *Id*. at 19 (emphasis added).

[87] *Id*. at 11.

[88] *Id*. at 35.

[89] AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 23.

[90] *Id*. at 23.

[91] Joint Statement at 4, Stipulation 11.

provided pursuant to interstate tariffs; (ii) a claim that AT&T violated Section 201(b) of the Act by invoking "self-help" and failing to pay for the tariffed access services; (iii) a claim that AT&T violated Section 203(c) of the Act by failing to pay for the tariffed services; and (iv) a claim for compensation under quantum meruit for the telecommunications services allegedly provided.[92] AT&T filed an answer and counterclaims, asserting federal law claims that Defendants violated Sections 201(b) and 203 of the Act, as well as state law fraud, civil conspiracy, and unjust enrichment claims.[93] Specifically, AT&T alleged that Defendants did not provide "switched access services consistent with the terms of their tariffs."[94] AT&T also claimed that, regardless of whether Defendants provided access services pursuant to tariff, they committed unreasonable practices through "sham" arrangements designed for the purpose of inflating access charges.[95]

23. The First Court Referral Order, issued on March 16, 2009, referred AT&T's "sham entity" counterclaim to the Commission.[96] AT&T effectuated this referral by filing an informal complaint with the Commission on April 15, 2009,[97] which it converted into a formal complaint on November 16, 2009.[98] Thereafter, Defendants requested that the Court refer additional issues to the Commission, which the Court did on February 5, 2010.[99] At Commission staff's direction, AT&T filed an Amended Complaint to effectuate certain issues in the Second Court Referral Order.[100] At the same time, Defendants filed their own formal complaint to effectuate the remaining issues in the Second Court Referral Order,[101] which the Commission has already resolved.[102]

III. DISCUSSION

A. Defendants Violated Section 201(b) of the Act by Operating as Sham CLECs With the Apparent Purpose and Effect of Inflating Their Billed Access Charges to Levels That Could Not Otherwise Be Obtained by Lawful Tariffs.

24. We find, based on the totality of the record, that Defendants were "sham" CLECs created to "capture access revenues that could not otherwise be obtained by lawful tariffs,"[103] and that

[92] *Id*.

[93] Joint Statement at 4–5, Stipulation 12.

[94] *Id*.

[95] *Id*.

[96] AT&T Ex. 1, *All American Telephone Company, Inc. v. AT&T, Inc.*, Memorandum & Order, 07-Civ 861, at *3–4 (WHP) (Mar. 16, 2009) (First Court Referral Order).

[97] AT&T Ex. 34, Informal Complaint, File No. EB-09-MDIC-003 (Apr. 15, 2009).

[98] Complaint at 2, para. 2, n.4. *See* Formal Complaint of AT&T, File No. EB 09-MD-010 (filed Nov. 16, 2009). Count II of AT&T's Complaint implements the First Court Referral Order.

[99] AT&T Ex. 94, *All American Telephone Company, Inc., et al. v. AT&T, Inc.*, Memorandum & Order, 07-Civ 861, at 2–4 (WHP) (Feb. 5, 2010) (Second Court Referral Order). Count I of AT&T's Complaint implements Issues 1a to 1e and Count III effectuates issues 2, 3, 5a, 5c, 5d, and 5e of the Second Court Referral Order.

[100] *See* April 2 Letter Ruling.

[101] Formal Complaint and Motion for Declaratory Ruling of All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom, File No. EB-10-MD-003 (filed May 7, 2010).

[102] *See All American v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723 (2011).

[103] Complaint Legal Analysis at 29–53; AT&T Reply at 14–17; AT&T Reply to Amended Formal Complaint, File No. EB-09-MD-010 (filed July 6, 2010) at 24-28 (AT&T Amended Reply); AT&T Initial Brief at 18–24.

billing AT&T for access charges in furtherance of this scheme constitutes an unjust and unreasonable practice in violation of Section 201(b) of the Act. The extensive record in this case overwhelmingly supports our determination.[104]

25. Defendants had no intention at any point in time to operate as *bona fide* CLECs or provide local exchange service to the public at large.[105] Although they obtained CPCNs, Defendants neither owned nor leased facilities, nor did they purchase unbundled network elements typically used by CLECs to provide any telecommunications services to the public.[106] Defendants' entire business plan was to generate access traffic exclusively to a handful of CSPs,[107] and to bill for that traffic at tariffed rates that were benchmarked to Beehive's NECA rates.[108] Defendants did this even though they represented to the Utah PSC that they would *not* operate as CLECs in Beehive's territory,[109] and their Utah CPCNs specifically prohibited them from doing so.[110] Indeed, All American admits that it knew of the limitation in its Utah CPCN and nonetheless operated in contravention of it.[111] ChaseCom and e-Pinnacle similarly admit that they intended all along to provide service in prohibited Beehive service areas; nonetheless, they turned a blind eye to the limitations of their CPCNs.[112]

26. Beehive masterminded the sham. Although ostensibly "competing" with each other, Beehive and Defendants were in no sense vying for customers.[113] On the contrary, Beehive engaged—at its own expense—consultants and attorneys to assist Defendants in obtaining CPCNs.[114] Beehive then supported Defendants' operations in numerous ways, from directing the installation and maintenance of Defendants' collocated equipment and acting as a co-lessee/guarantor of equipment, to operating

[104] The record exceeds 7,000 pages, including pleadings, discovery responses, deposition transcripts, court exhibits, Utah PSC exhibits, and other miscellaneous documents.

[105] *See* paragraphs 17, 19–21 above.

[106] *See, e.g.*, AT&T Ex. 140, Beehive's Response to Sprint's Third Set of Interrogatories and Document Requests at 10; AT&T Ex. 138, Kofford Deposition at 56, 59; AT&T Ex. 139, Levitin Deposition at 66–67.

[107] All American served Joy, its parent-affiliate CSP. Joint Statement at 8, Stipulation 28; AT&T Ex. 96, Utah Revocation Order at 6. In addition to its own conferencing service, ChaseCom served three CSPs. AT&T Ex. 139, Levitin Deposition at 44–45, 48. e-Pinnacle also served three CSPs. AT&T Ex. 138, Kofford Deposition at 83.

[108] 47 C.F.R. § 61.26.

[109] AT&T Ex. 5, All American Utah CPCN, at 2–3; AT&T Ex. 9, e-Pinnacle CPCN, at para. 3; AT&T Ex. 12, ChaseCom CPCN, at para. 3.

[110] AT&T Ex.6, All American CPCN at Exhibit A; AT&T Ex. 96, Utah PSC Revocation Order, at 29, 33–34; AT&T Ex. 9, e-Pinnacle CPCN at para. 2; AT&T Ex. 12, ChaseCom CPCN at para. 2. We disagree with the CLECs' contention that the status of their CPCNs is irrelevant to whether they operated as sham entities and to their ability to lawfully provide interstate switched access service under the terms of their respective tariffs. *See* Complaint at 16, para. 29; Answer at 15, para. 29; paragraph 39 below.

[111] AT&T Ex.128, Goodale Deposition at 216; AT&T Ex. 96, Utah PSC Revocation Order at 34.

[112] The owners of ChaseCom and e-Pinnacle expressed a complete lack of familiarity with a telecommunications company's operations and were unaware of the limitations in the Utah CPCNs. AT&T Ex. 138, Kofford Deposition at 68; AT&T Ex. 139, Levitin Deposition at 56–58. Beehive similarly disregarded the CPCN limitations, encouraging All American to enter into an interconnection agreement with Beehive. *See* AT&T Ex. 130, McCown First Deposition at 177–82; AT&T Ex. 124, Utah PSC Revocation Reconsideration Order at 21-22.

[113] AT&T Ex. 96, Utah PSC Revocation Order at 6, 27–28; *see, e.g.*, AT&T Ex. 138, Kofford Deposition at 71; AT&T Ex. 139, Levitin Deposition at 88.

[114] *See* paragraphs 13–15, 20 above.

Defendants' billing and collection services, allowing Defendants to use Beehive's telephone numbers for their conferencing and chat line services, and advancing Defendants money.[115]

27. Creation of Defendants allowed the access stimulation arrangements to continue at rates that would have been unsustainable had Beehive remained a Section 61.39 Carrier. Under the Commission's *Small Carrier Tariff Rules*, Beehive's rates declined over time (as its volume of calls to CSPs increased) and would have continued to decline every two years.[116] Beehive, accordingly, re-entered the NECA pool, where its rates increased to between 2.44 cents per minute and 3.30 cents per minute for the local switching rate elements.[117] Beehive, however, was then subject to NECA's requirement that revenues from the stimulated traffic in excess of Beehive's costs be distributed among the pool members. In contrast, Defendants—which are CLECs not subject to NECA's requirements or any other rate-of-return regulation—could "benchmark" their rates to the "competing" ILEC and continue to bill IXCs for interstate switched access pursuant to tariffs. Other than the rates, however, nothing in substance changed when Defendants began "providing" these access services.[118] Callers dialed the same telephone numbers to reach chat or conference lines, and their calls were routed over the same Beehive facilities and equipment.[119] Beehive even continued to generate the access bills—at no cost to Defendants.[120]

28. Beehive still made money. It charged the IXCs for tandem switching and transport of the stimulated traffic, which benefited Beehive "roughly within an order of magnitude" of what had been Beehive's take of the terminating access profits.[121] When asked in deposition what Beehive gained from remaining part of the access stimulation relationship, Beehive's Chief Executive Officer explained:

> All American had a miraculous ability to generate enormous volumes of telephone calls inbound to Beehive. Beehive charged by the minute and by the mile in some cases -- well, almost all cases. Our access billables were huge. *That's what we were getting out of it . . . a lot of money.*[122]

Moreover, it appears that Beehive held for itself a share of the terminating access charges, limiting the CLECs to "a set number of cents per minute" that did not change after Defendants became CLECs.[123]

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[115] *See* paragraph 16 and notes 53 and 55 above; e-Pinnacle's Interrogatory Responses at 4–6; ChaseCom's Interrogatory Responses at 3–4; All American's Interrogatory Responses at 3; AT&T Ex. 130, McCown First Deposition at 126, 174.

[116] Between 2001 and 2005, Beehive's rates for the end office switching rate element of switched access services declined from 4.59 cents per minute to 1.02 cents per minute. Joint Statement at 8, Stipulation 30. AT&T estimates that Beehive's rate would have dropped to as low as 0.25 cents per minute if it had continued filing its own 61.39 tariff. Joint Statement at 22, AT&T Disputed Fact 46; Complaint Ex. A at 6, para. 16.

[117] Joint Statement at 21–22, AT&T's Disputed Fact 45.

[118] *See* Complaint at 30, para. 56, 37–38, para. 66; Complaint Legal Analysis at 5; AT&T Ex. 130, McCown First Deposition at 105; AT&T. Ex.138, Kofford Deposition at 34–37; AT&T Ex. 139, Levitin Deposition at 94–95.

[119] *See* Complaint at 34–35, para. 61; Complaint Legal Analysis at 5; AT&T Ex. 136, Goodale Second Deposition at 40, 54-55; AT&T Ex. 138, Kofford Deposition at 33–36.

[120] *See* Defendants' Ex. 4, McCown Second Deposition at 116-18, 120-21; AT&T Ex. 139, Levitin Deposition at 36, 94; AT&T Ex. 138, Kofford Deposition at 34–35.

[121] AT&T Ex. 130, McCown First Deposition at 159.

[122] AT&T Ex. 130, McCown First Deposition at 87 (emphasis added).

[123] AT&T Ex. 138, Kofford Deposition at 36–37 (testifying that, although e-Pinnacle was nominally the CLEC billing AT&T, it continued sharing revenue with Beehive in exactly the same way it had when Beehive was billing (continued . . .)

29. Defendants contend that AT&T's sham entity claim lacks both legal and factual support. First, according to Defendants, conduct is unreasonable under Section 201(b) of the Act only if it was taken to further a goal that is prohibited by the Act or the Commission's rules or policies.[124] AT&T, Defendants say, has failed to meet its burden of proving that their conduct violated any Commission rule or any provision of the Act.[125] The Commission's authority to determine whether a carrier's conduct violates Section 201(b), however, is not limited in the manner Defendants suggest. For example, in lieu of directly regulating CLEC access rates, the Commission has stated repeatedly that it will ensure just and reasonable rates through the Section 208 complaint process.[126] Moreover, the Commission has awarded damages (or permitted the complainant to seek damages) under Section 208 for violations of Section 201(b), even where no independent violation of a particular rule was found.[127]

30. Defendants further maintain that AT&T's "sham entity" claim is premised upon a single Commission order—*Total Telecom*[128]—that cannot be squared with the facts in this case and does not

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AT&T); *see also* AT&T Ex. 139, Levitin Deposition at 30 (testifying that, after becoming a CLEC, ChaseCom and Beehive would share revenue).

[124] Defendants' Reply Brief at 8 (citing *Global Crossing Telecommunications Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 53 (2007) (*Global Crossing v. Metrophones*); *see* 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful . . . .")).

[125] Defendants' Reply Brief at 8.

[126] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982, 16141, para. 363 (1997) ("[I]f an access provider's service offerings violate section 201 or section 202 of the Act, we can address any issue of unlawful rates through the exercise of our authority to investigate and adjudicate complaints under section 208."); *Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8597, para. 2, 8609, para. 25 (1997) (same).

[127] *See, e.g.*, *AT&T Corp. v. YMax Communications Corp*., Memorandum Opinion & Order, 26 FCC Rcd 5742, 5761, paras. 52–53 & n.147 (2011) (concluding that Commission's finding that carrier charges were unlawful under Sections 203(c) and 201(b) obviated the need to reach claims stated in remaining counts of complaint alleging violations of particular Commission rules and orders); *AT&T v. Business Telecom Inc.*, Order on Reconsideration, 16 FCC Rcd 21750, 21755, para. 9 (2001) (noting that "the Commission has on several occasions awarded damages for violations of section 201(b), even in the absence of specific rules applicable to the conduct at issue"); *Total Telecomms. Servs., Inc. v. AT&T Corp.*, Memorandum Opinion & Order, 16 FCC Rcd 5726, 5733, para. 16 (2001) (holding that creation of sham entity designed to extract inflated access charges from interexchange carriers violated Section 201(b) despite absence of Commission rule directly on point); *Ascom v. Sprint*, Memorandum Opinion and Order, 15 FCC Rcd 3223 (2000) (holding that a carrier's failure to properly provide service to its customer and for bills issued to a non-customer were unjust and unreasonable practices); *ASC Telecom, Inc. d/b/a AlternaTel*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 18654, 18656 n.18 (2002) (noting that even though a Commission rule did not apply to non-operator service calls, the practice of charging a called party for a rejected collect call nevertheless constitutes a 201(b) violation); *People's Network Inc. v. AT&T*, Memorandum Opinion & Order, 12 FCC Rcd 21081, 21089, para. 17 (Com. Car. Bur. 2007) (holding that carrier's billing delays constituted an unreasonable practice under section 201(b) notwithstanding absence of Commission rule addressing the issue); *Rainbow v. Bell Atlantic*, Memorandum Opinion and Order, 15 FCC Rcd 11754 (CCB 2000) (holding that a carrier's failure to make necessary software available to a customer to access the carrier's platform was an unjust and unreasonable practice); *Hi-Rim Communications, Inc. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 6551 (Com. Car. Bur. 1998) (holding that a carrier's change of customer's designated primary interexchange carrier without authorization, and subsequent failure to transfer the customer back to the original carrier's network was an unjust and unreasonable practice).

[128] *Total Telecommunications Services, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001) (*Total Telecom*) *aff'd in part and remanded in part*, 317 F.3d 227 (D.C. Cir. 2003).

support AT&T's claim.[129] In *Total Telecom*, the Commission found that an entity formed by a LEC solely to enable the LEC to charge, indirectly, rates that it could not continue to charge via its existing tariff "deserved to be treated as a sham."[130] AT&T filed a complaint challenging the lawfulness of the sham entity's charges, which the Commission granted, holding that "if accepted . . . [Total's position] would enable every ILEC to avoid dominant carrier regulation by mere artifice."[131] Defendants in this case argue that *Total Telecom* involved a different regulatory scheme that the Commission since has eliminated, rendering the decision irrelevant.[132] They assert that CLECs now must charge the same rate as the competing ILEC,[133] and that AT&T's claim fails because there is no dispute that Defendants' access charges accurately reflect Beehive's tariffed rates.[134] We disagree. *Total Telecom* was not dependent upon the regulatory scheme then in place, but rather upon an analysis of Total Telecom's actions to avoid the regulations necessary to ensure just and reasonable rates.[135] The decision thus not only remains relevant precedent; it supports our conclusion here. But for the creation of Defendants, Beehive's scheme would have ended because, under the Commission's rules, Beehive itself no longer could charge high rates and retain the resultant revenue.[136]

31. Defendants' assertion that their billings to AT&T were lawful because they benchmarked their rates in compliance with Section 61.26(b)(1)[137] of the Commission's rules is irrelevant.[138] Even assuming that Defendants were authorized to compete against Beehive and that Beehive is the "competing" ILEC under the Commission's rules,[139] Defendants were not competing with Beehive in any real sense. On the contrary, Beehive and Defendants collaborated with each other at every turn. As discussed above, we find that Defendants' conduct violates Section 201(b) because they operated as sham entities in an effort to circumvent the Commission's CLEC access charge and tariff rules, which would have brought the access stimulation scheme to an end.

32. Next, Defendants contend that the Commission categorically rejected AT&T's similar challenges to revenue-sharing arrangements between LECs and CSPs, including a complaint AT&T filed against Beehive that "feature[ed] Joy extensively."[140] We disagree. In *Jefferson Telephone*, the Commission "emphasize[d] the narrowness of [its] holding" and found "simply that, based on the specific

[129] Answer Legal Analysis at 16–19.

[130] *Total Telecom*, 16 FCC Rcd at 5734, para. 18.

[131] *AT&T Corporation v. FCC*, 317 F.3d 227, 233 (D.C. Cir. 2003).

[132] Answer Legal Analysis at 17.

[133] Answer Legal Analysis at 18.

[134] Answer Legal Analysis at 16–18; Defendants' Initial Brief at 19–20; Surrebuttal of All American, e-Pinnacle, and ChaseCom, File No. EB-09-MD-010, at 5–6 (filed Aug. 4, 2010) (Surrebuttal).

[135] *See Total Telecom*, 16 FCC Rcd at 5733, para. 16 ("Atlas created Total as a sham entity designed solely to extract inflated access charges from IXCs, [and] this artifice constitutes an unreasonable practice in connection with the provision of access services.").

[136] Nor do we find persuasive Defendants' reliance on a settlement agreement between AT&T and Beehive, which involved a claim pre-dating the period at issue here. *See* Defendants' Initial Brief at 21–22.

[137] 47 C.F.R. § 61.26(b)(1).

[138] Answer Legal Analysis at 19-20, 41-44, Defendants' Initial Brief at 20–21.

[139] A "competing ILEC" is the "incumbent local exchange carrier . . . that would provide interstate exchange access service . . . to the extent that those services would not be provided by the [Defendants]." 47 C.F.R. § 61.26(a)(2).

[140] Answer Legal Analysis at 15 (citing *AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd 16130 (2001) (*Jefferson Telephone*); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002) (relying upon *Jefferson Telephone* and deciding issues identical to those in that case and reaching the same conclusion); *AT&T Corporation v. Beehive Telephone Company, Inc.*, 17 FCC Rcd 11641 (2002) (same)).

facts and arguments presented," AT&T failed to demonstrate that Jefferson's revenue-sharing agreement violated the Act.[141] The Commission "expresse[d] 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."[142] Because the facts and claims in *Jefferson Telephone* are different from those of this case, it is not determinative of AT&T's sham entity claim.

33. Finally, Defendants argue that AT&T actually is attacking Beehive's rates.[143] Although, unquestionably, Beehive is integral to this regulatory arbitrage, Defendants miss the point. The gravamen of the Complaint is that Defendants violated Section 201(b) of the Act by operating as sham entities for the purpose of inflating access charges that AT&T and other IXCs had to pay.[144] And so it is *Defendants' conduct*, not Beehive's rates, that is at issue.[145] Upon reviewing the extensive record (developed here, in the Court, and at the Utah PSC), we have little difficulty concluding—as AT&T alleges—that Defendants engaged in an unjust and unreasonable practice. We therefore grant Count II of AT&T's Complaint.

B. Defendants Violated Sections 201(b) and 203 of the Act by Billing for Services that They Did Not Provide Pursuant to Valid and Applicable Tariffs.

34. In addition to operating as sham CLECs in violation of Section 201(b) of the Act, we find that Defendants violated Sections 203 and 201(b) of the Act by billing AT&T for access services that they did not provide pursuant to valid and applicable interstate tariffs.[146] Accordingly, we grant Count I of AT&T's Complaint as well.

1. None of the Defendants Had Valid and Applicable Interstate Tariffs for the Traffic Billed to AT&T.

35. All American's F.C.C. Tariff No. 1 (the Nevada Tariff)[147] specifically applied to interstate exchange access services used to send traffic to or from an end user in *Nevada*.[148] All American's Nevada traffic, however, terminated at its affiliate Joy's equipment located in Beehive's

[141] Unlike here, in *Jefferson Telephone* AT&T argued that Jefferson's revenue sharing agreement was inconsistent with a common carrier's duty to carry traffic indifferently in violation of section 201(b) and that the agreement violated Section 202(a)'s restriction on "undue or unreasonable preferences." *Jefferson Telephone*, 16 FCC Rcd at 16137, para. 16.

[142] *Id.*

[143] Answer Legal Analysis at 13–16, 62–63; Defendants' Reply Brief at 8–9.

[144] AT&T Amended Reply at 25–26.

[145] Joint Statement at 9, Stipulation 35.

[146] *See* Complaint at 42–63, paras. 73-113; Complaint Legal Analysis at 9-29; AT&T Initial Brief at 5–8.

[147] All American filed F.C.C. Tariff No. 1 on June 29, 2005, and revised the tariff on June 16, 2008. Joint Statement at 10, Stipulations 40, 42.

[148] *See* AT&T Ex. 28, Tariff No. 1, Original Title Page ("Regulations Rates and Charges Applying . . . Within the Operating Territory of [All American] in the State of Nevada"); Application of Tariff, section 1.1 ("This tariff sets forth the regulations, rates, and charges . . . within . . . Nevada"); Scope, section 2.11 ("Service(s) and the furnishing of interstate transmission of information originating and terminating in . . . Nevada"). Prior to filing Tariff No. 1, All American made modifications *specifying* that the tariff was limited to services provided within Nevada. *See* AT&T Ex. 73 (email from All American to Beehive changing reference from Texas to Nevada); *see also* AT&T Ex. 134, Deposition of Dorothy Young at 29–30 (Young Deposition); AT&T Ex. 97, Utah PSC Hearing Transcript at 85-86. In addition, when All American filed its Tariff No. 2 to cover services provided in states other than Nevada, it made it clear that it did not want its Tariff No. 2 to affect its Nevada operations and tariff. *See* AT&T Ex. 134, Young Deposition at 71–79; AT&T Ex. 74 (email from CHR noting that All American's first tariff was for its Nevada operations).

facilities in Utah and not in Nevada.[149] By billing under that tariff for interstate traffic terminated in Utah, Defendants violated Sections 201(b) and 203 of the Act.

36. All American's F.C.C. Tariff No. 2, ChaseCom's F.C.C. Tariff No. 1, and e-Pinnacle's F.C.C. Tariff No. 1 (collectively, Utah Tariffs)[150] also do not support billing for the Utah traffic because the Utah PSC did not authorize Defendants to provide local telecommunications services in the areas of Utah where they operated. ChaseCom's and e-Pinnacle's tariffs apply to services provided within their "Operating Territory" "in the State of Utah,"[151] and All American's Tariff No. 2 applies to services provided "[w]ithin the Operating Territory of All American."[152] Under the terms of the Tariffs, "Operating Territory" plainly refers to the geographic area where the Utah PSC authorized Defendants to provide local telecommunications services.[153] All of the bills to AT&T for Utah traffic related to services Defendants provided in geographic areas of Utah where they *were not authorized* by the Utah PSC to provide services (i.e., in Beehive's territory).[154] Thus, billing under the Utah Tariffs also violates Sections 201(b) and 203 of the Act.

37. None of Defendants' arguments persuade us otherwise. Defendants incorrectly assert that their authorization under Section 214 of the Act conveys the unfettered ability to provide interstate services nationwide, regardless of limitations in any applicable tariffs.[155] CLECs have blanket Section 214 authority under Section 63.01 of our rules to provide domestic, interstate communications services,[156] but the blanket authority extends only to entry certification requirements for initial operating authority; it does not impact CLECs' obligations under any other section of the Act[157] or Commission rules.[158]

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[149] *See* paragraph 17 and note 63 above.

[150] ChaseCom and e-Pinnacle filed their tariffs—both captioned F.C.C. Tariff No. 1—on October 12, 2005. Joint Statement at 10, Stipulations 43-44. All American filed its F.C.C. Tariff No. 2 on April 18, 2008. Joint Statement at 10, Stipulation 41.

[151] AT&T Ex. 29, e-Pinnacle Tariff No. 1, Original Title Page; AT&T Ex. 30, ChaseCom Tariff No. 1, Original Title Page.

[152] AT&T Ex. 75, All American Tariff No. 2, Original Title Page.

[153] *See* AT&T Ex. 75, All American Tariff No. 2, Original Page 11, Access; Original Page 12, Exchange; AT&T Ex. 29, e-Pinnacle Tariff No. 1, Original Page 11, Access; Original Page 12, Exchange; AT&T Ex. 30, ChaseCom Tariff No. 1, Original Page 10, Access; Original Page 11, Exchange. Even if we found the term "Operating Territory" ambiguous, we would construe it against the drafter and conclude that it refers to the geographic area in which Defendants were authorized by the Utah PSC to provide services. *See AT&T Corp. v. Ymax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742, 5755, para. 33 (2011) (citing *Associated Press v. FCC*, 452 F.2d 1290, 1299 (D.C. Cir. 1971); *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 24 FCC Rcd 14801, 14810, n.83 (2009), *recon. denied*, 25 FCC Rcd 3422 (2010), *pet. for review denied, Farmers & Merchants Mut. Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011); *American Satellite Corp. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 57 FCC2d 1165, 1167, para. 6 (1976)).

[154] *See* Joint Statement at 12, Stipulation 57 and paragraph 15 and footnotes 44 and 46 above. The Utah PSC concluded that "[a]t no time while it operated in Utah has [All American] operated legally." AT&T Ex. 96, *Utah PSC Revocation Order* at 34.

[155] Answer at 32; Answer Legal Analysis at 22-23; Defendants' Reply Brief at 2.

[156] 47 C.F.R. § 63.01.

[157] *See* 47 U.S.C. § 203 (no carrier shall provide service unless it files and publishes schedules in accordance with the Act and the Commission's regulations).

[158] *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*; CC Docket No. 97-11, *Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, AAD File No. 98-43, Report and Order in CC Docket No. 97-11 and Second Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11372-75, paras. 12-18 (1999). Defendants' reliance upon *Vonage Holdings Corporation*, *Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and

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Accordingly, until a CLEC files valid interstate tariffs under Section 203 of the Act or enters into contracts with IXCs for the access services it intends to provide,[159] it lacks authority to bill for those services. In addition, Defendants' assertion that the geographic scope of their tariffs is merely "illustrative" and "not binding if the carrier actually provides the service in territory not identified in its interstate tariff"[160] is inconsistent with Section 203 and the "filed tariff" doctrine.[161] Finally, contrary to Defendants' characterization, the geographic limitations in their tariffs were not mere "technical defects" or "ministerial errors."[162] Rather, they are terms fundamental to whether the access tariffs apply at all. Defendants have offered no justification for deviating from Section 203 and the filed tariff doctrine, and they may not simply pick and choose the provisions of their Tariffs with which they will comply.[163]

2. Defendants Did Not Terminate Calls to "End Users" Within the Meaning of Their Interstate Switched Access Tariffs.

38. Similarly, we conclude that Defendants also did not terminate calls to "end users" within the meaning of their tariffs. The definition of Switched Access Service in all of the relevant tariffs requires calls to originate from or terminate to "end users" on Defendants' networks.[164] The tariffs define "end users" as "[u]sers of local telecommunications carriers services who are not carriers."[165] As demonstrated above, however, Defendants were sham entities that did not provide local telecommunications services or terminate calls to any "user" of local telecommunications services.[166] In addition, Defendants concede that (1) they have no written agreements for local services with any customers, and did not provide local services to any customers pursuant to tariffs;[167] (2) the CSPs to which they provided service never ordered local telecommunications service from Defendants and

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Order, 19 FCC Rcd 22404 (2004) (*Vonage Declaratory Ruling*) is misplaced. Answer Legal Analysis at 23; Defendants' Reply Brief at 2. The *Vonage Declaratory Ruling* addressed a state commission's attempt to regulate VoIP interstate services. In this case, it is the Utah Tariffs—not any determination by the Utah PSC—which limit Defendants' ability to provide the services in question.

[159] *See CLEC Access Reform Order*, 16 FCC Rcd at 9923, 9925, para. 3; 47 C.F.R. § 61.26.

[160] Answer Legal Analysis at 22–23.

[161] *See MCI WorldCom Network Servs. v. PaeTec Commc'ns, Inc*, 204 Fed Appx 272, n.2 (4th Cir. 2006) ("under the filed rate doctrine, a carrier is expressly prohibited from collecting charges for services that are not described in its tariff").

[162] Answer Legal Analysis at 22-23; Defendants' Reply Brief at 2–4 (citing *Norwest Transportation. Inc. v. Horn's Poultry, Inc.*, 23 F.3d 1151 (7th Cir. 1994) (holding that shipper's tariffed charges were not invalid because shipper failed to change its name on tariff after the ICC approved the name change)).

[163] *See* Complaint Legal Analysis at 10–12, 16.

[164] AT&T Ex. 75, All American Tariff No. 2, Section 6.1 at Original Page 67; AT&T Ex. 30, ChaseCom Tariff No. 1, Section 6.1 at Original Page 70; AT&T Ex. 29, e-Pinnacle Tariff No. 1, Section 6.1 at Original Page 71 (stating that Switched Access Services provides for "the use of common switching, terminating, and trunking facilities between a Customer Designated Premises and an end-users premises for originating and terminating traffic").

[165] AT&T Ex. 75, All American Tariff No. 2 at Original Page 11; AT&T Ex. 30, ChaseCom Tariff No. 1 at Original Page 11; AT&T Ex. 29, e-Pinnacle Tariff No. 1 at Original Page 12.

[166] *See* paragraphs 24–33 above; AT&T Ex. 96, *Utah PSC Revocation Order* at 13–16.

[167] Joint Statement at 13, Stipulations 59-61, 71; AT&T Ex. 141, Letter dated March 8, 2010, from Jonathan E. Canis, Counsel for All American, to The Honorable Henry A. Waxman, Chairman, Committee on Energy and Commerce, House of Representatives at 5 (stating that All American's sole customer "does not take services pursuant to tariff," but rather "per a unique, oral agreement") (All American Congressional Responses). There also is no evidence that Defendants filed tariffs with the appropriate state regulatory authority to provide local telecommunications services. *See, e.g.*, Ex. 96, *Utah PSC Revocation Order* at 23–25 (All American operated "without a local exchange tariff filed in Utah – in violation of Utah [law]").

Defendants never entered the CSPs into their accounting, billing or ordering systems;[168] (3) Defendants never billed the CSPs any amounts for local telecommunications services or any charges for any subscriber line charge, universal service fee, or carrier common line charge; and (4) the CSPs never paid any such amounts.[169] Consequently, Defendants did not have any "end users" as defined in their tariffs, and therefore could not properly bill for access services under the terms of their tariffs.[170]

39. We disagree with Defendants' contention that the Utah PSC's findings are irrelevant to our analysis.[171] The Utah PSC conducted extensive proceedings into All American's operations, and its findings are credible and independently supported by the record. Nor do we find any factual basis for concluding that All American's Nevada operations or ChaseCom's and e-Pinnacle's Utah operations differed in any material respect from All American's Utah operations.

40. Further, there is no merit to Defendants' assertion that *Farmers*[172] has no bearing on this case because the tariff in that case defined "end users" in terms of "subscribers" of services, while Defendants' tariffs define "end users" as "users of local telecommunications services."[173] Even if, as Defendants contend, "user" is a broader term than "subscriber,"[174] the CSPs were not "users of local telecommunications services" provided by Defendants, as would be required under the tariffs.[175]

41. Finally, we disagree that All American's revisions to its Tariff No. 1 somehow obviate the "end user" requirement.[176] All American's Tariff No. 1 applied to interstate traffic terminated in Nevada, not Utah, and the revisions did nothing to alter that fact.[177] And even if revised Tariff No. 1 applied to both Nevada and Utah, it defines "end user" as "[a]ny . . . entity . . . which uses the service of [All American] under the terms and conditions of *this tariff*."[178] Because, as All American admits, its only customer did not use its services under the terms and conditions of any Tariff,[179] All American had no "end users" of its services, as defined in its Revised Tariff No. 1.[180]

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[168] Joint Statement at 13, Stipulations 63–64.

[169] Joint Statement at 13–14, Stipulations 67–68.

[170] *See, e.g.*, *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, Second Order on Reconsideration, 24 FCC Rcd 14801, 14805–08, paras. 10–16 (2009).

[171] Answer Legal Analysis at 23–24.

[172] *See Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Company*, Third Order on Reconsideration, 25 FCC Rcd 3422 (2010) (*Farmers*), *review denied*, *Farmers and Merchants Mutual Telephone Company v. FCC*, 668 F.3d 714 (D.C. Cir. 2011) (*Farmers v. FCC*); *see also* Answer Legal Analysis at 25–28.

[173] Answer Legal Analysis at 26–28.

[174] Answer Legal Analysis at 26.

[175] Moreover, contrary to Defendants' characterization, Answer Legal Analysis at 27, *Farmers* was not "premised entirely on the Commission's finding that Farmers acted improperly by back-billing its conference operators." *See Farmers v. FCC*, 668 F.3d at 719–21 (describing the multiple factors the Commission considered in its analysis).

[176] Answer Legal Analysis at 26, n.46.

[177] *See* paragraph 35 above. *See also* AT&T Ex. 77, Letter from Katherine Marshall, Counsel for All American, to Marlene Dortch, FCC Secretary (filing All American Revised F.C.C. Tariff No. 1); AT&T Exhibit 77, Tariff Check Sheet and First Revised Page No. 1 (noting that the Original Title Page and sections 1 and 2 were not revised).

[178] AT&T Ex. 77, Revised Tariff No. 1, First Revised Page No. 12 (emphasis added). *See* AT&T Legal Analysis at 24–25.

[179] AT&T Ex. 141, All American Congressional Responses at 5 (stating that All American's sole customer "does not take services pursuant to tariff," but rather "per a unique, oral agreement"); AT&T Ex. 36, All American's Second Interrogatory Responses at 3 (stating that services provided to its sole customer "were provided on an untariffed basis"); AT&T Ex. 98, All American Answers to Data Requests at 5.3 ("Charges to [All American's only

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C. Defendants' Procedural Arguments Are Baseless.

42. Defendants complain that they were "irreparably prejudiced" by "flawed" decisions relating to the effectuation of the Court Referrals and management of the complaint proceeding.[181] Defendants previously requested reconsideration of rulings relating to the manner in which the Commission chose to hear the issues referred by the Court,[182] which staff denied.[183] Thereafter, Defendants sought permission to file a surrebuttal to AT&T's Reply, arguing that such a filing would "cure" any prejudice.[184] Staff granted their request.[185] Later, Defendants sought reconsideration of several rulings made by staff during a discovery/status conference,[186] which staff denied.[187]

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customer] are not governed by a price list or tariff; but rather pursuant to an oral agreement between the parties"); AT&T Ex. 99, All American Answers to Data Requests at 2 ("All American's business relationship with [its only customer] is governed by an oral agreement").

[180] Because we find that Defendants did not terminate calls to "end users" within the meaning of their tariffs, we need not address AT&T's arguments that the calls were not terminated to "end user premises" or over the Defendants' common facilities. *See* Complaint at 59–61, paras. 106–09; Complaint Legal Analysis at 25–27; AT&T Initial Brief at 15–17. Moreover, having found that Defendants did not bill pursuant to applicable tariffs and that they did not, in any event, provide access services within the meaning of their tariffs, we do not need to address whether Defendants' tariffs also violate the Commission's rules requiring tariffs to clearly establish a rate. *See* Complaint at 45–47, paras. 79–80, nn.162, 165; Complaint Legal Analysis at 13-15; AT&T Initial Brief at 6–8; AT&T Reply Brief at 6–7. For the same reasons, we also need not address whether All American's multiple tariff filings violate the Commission rules. *See* Complaint at 44–47, paras. 78–80; AT&T Legal Analysis at 40.

[181] *See* Answer Legal Analysis at 2–9, 64–66; Defendants' Initial Brief at 1–18.

[182] *See* Letter from Jonathan Canis, Counsel for All American, to Lisa B. Griffin, Deputy Division Chief, EB/MDRD and Anthony J. DeLaurentis, Special Counsel, EB/MDRD, File No. EB-09-MD-010 (filed Apr. 13, 2010).

[183] Letter from Lisa B. Griffin, Deputy Division Chief, EB/MDRD to Jonathan Canis, Counsel for All American, and James F. Bendernagel, Jr., Counsel for AT&T, File No. EB-09-MD-010 (filed Apr. 27, 2010) (April 27th Letter Ruling) (concluding that "relevant factors of law, policy, and practicality" supported the procedural rulings). Defendants subsequently requested that the Commission issue a declaratory ruling, at the same time that it issues its liability ruling in this case, to address several issues referred by the Court (*see* footnote 4 above) that have been bifurcated into any supplemental damages proceeding that may be filed after the liability ruling. Letter from Jonathan E. Canis, Counsel for Defendants, to Lisa B. Griffin, FCC, EB, Deputy Chief of MDRD, Rosemary McEnery, FCC, EB, Deputy Chief of MDRD, Anthony J. DeLaurentis, FCC, EB, Special Counsel, File No. EB-09-MD-010 (filed Mar. 15, 2012). We deny Defendants' request for the reasons explained below in paragraph 43. *See also* 5 U.S.C. § 554(e) (An agency "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

[184] *See* Answer Legal Analysis at 2-9, 64; All American, e-Pinnacle, and ChaseCom's Motion Requesting Permission to File Surrebuttal, File No. EB-09-MD-010 (filed July 14, 2010) at 2–4; *see also* Surrebuttal at 1.

[185] Letter from Lisa B. Griffin, Deputy Division Chief, EB/MDRD to Jonathan Canis, Counsel for All American, and James F. Bendernagel, Jr., Counsel for AT&T, File No. EB-09-MD-010 (filed July 28, 2010) (July 28th Status Conference Order).

[186] Letter from Jonathan Canis, Counsel for All American, to Lisa B. Griffin, Deputy Division Chief, EB/MDRD and Anthony J. DeLaurentis, Special Counsel, EB/MDRD, File No. EB-09-MD-010 (filed Aug. 19, 2010).

[187] Letter from Lisa B. Griffin, Deputy Division Chief, EB/MDRD to Jonathan Canis, Counsel for All American, and James F. Bendernagel, Jr., Counsel for AT&T, File No. EB-09-MD-010 (filed Sept. 2, 2010) (September 2nd Letter Ruling); *see* Opposition of AT&T Corp. to Request for Reconsideration, File No. EB-09-MD-010 (filed Aug. 27, 2010).

43. The Commission has broad discretion to structure its proceedings to maximize fairness, promote efficiency, and conserve the resources of the parties and the Commission.[188] Defendants offer no new arguments as to why the Commission should revisit any of these matters. In any event, we find that the procedural rulings in the case were well-reasoned and appropriate,[189] and that Defendants have suffered no prejudice as a result.[190]

IV. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Counts I and II of the Complaint are GRANTED.

45. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Count III will be addressed in connection with any damages complaint filed by AT&T.

46. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, and the Commission's rules 1.720–1.736, 47 C.F.R. §§ 1.720–1.736, that Defendants' Request for Declaratory Ruling is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[188] *See* 47 U.S.C. §§ 4(i), 4(j), 208 ("[I]t shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."); *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22501, para. 5 (1997) (*Formal Complaints Order*) ("Commission staff retains considerable discretion under the new rules to, and is indeed encouraged to, explore and use alternative approaches to complaint adjudication designed to ensure the prompt discovery of relevant information and the full and fair resolution of disputes in the most expeditious manner possible."); *id.* at 22510, n.68 ("We emphasize again that the staff retains considerable discretion to use alternative approaches and techniques designed to promote fair and expeditious resolution of complaints."); *Public Notice: Primary Jurisdiction Referrals Involving Common Carriers*, 15 FCC Rcd 22449 (Com. Car. Bur., Enf. Bur., Int'l Bur., Wir. Tele. Bur. 2000) ("The procedures by which the Commission handles a common carrier matter referred by a court pursuant to the primary jurisdiction doctrine may vary according to the nature of the matter referred.").

[189] *See* April 27th Letter Ruling (concluding among other things that "relevant factors or law, policy, and practicality" supported the procedural rulings).

[190] *See* April 27th Letter Ruling; July 28th Status Conference Order; September 2nd Letter Ruling. This applies as well to Defendants' mistaken assertion that they have been prejudiced by any purported failure of the Commission to resolve this case within five months. Answer Legal Analysis at 64–66, Defendants' Initial Brief at 10–13; *see Farmers v. FCC*, 668 F.3d at 718 ("But even if the Commission had missed the 90-day deadline, it would not have lost jurisdiction to issue *Farmers II* because Congress established no consequence for failing to meet that deadline.").