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October 6, 2016

By Hand Delivery And ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***AT&T Corp. v. Great Lakes Communications Corp.*, Docket No. 16-170, File No. EB-16-MD-001**

Dear Ms. Dortch:

AT&T Corp. ("AT&T") submits for filing the **Public Version** of its Reply to Great Lakes Communication Corp.'s ("GLCC") Answer. Consistent with the Commission's rules and the June 2, 2016 Protective Order entered by the Commission Staff, AT&T has redacted all confidential and highly confidential information from the **Public Version**, which it is filing by hand and ECFS.

AT&T is also filing by hand with the Secretary's office hard copies of both the **Highly Confidential** and **Confidential Versions** of the submission. AT&T is also separately filing by hand both the **Confidential** and **Highly Confidential Versions** of this submission. In addition, copies of all versions of the submission are being served electronically on GLCC's counsel. Electronic courtesy copies are also being provided to the Commission's Enforcement Bureau.

Please contact me if you have any questions regarding this matter.

Sincerely,

James F. Bendernagel, Jr.

Enclosures

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

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cc: Joseph P. Bowser, Counsel for Defendant
G. David Carter, Counsel for Defendant
Lisa Griffin, FCC
Anthony DeLaurentis, FCC
Sandra Gray-Fields, FCC
Christopher Killion, FCC

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

In the Matter of **AT&T CORP.** **One AT&T Way** **Bedminster, NJ 07921** **(202) 457-3090** ***Complainant,*** ***v.*** **GREAT LAKES COMMUNICATION CORP.** **1713 McNaughton Way** **Spencer, IA 51301** **(712) 580-4700** ***Defendant.***	**File No. EB-16-MD-001**

REPLY TO THE ANSWER

Pursuant to 47 C.F.R. § 1.726, and the Commission's Letter Order, dated August 19, 2016, which waived in part certain aspects of Section 1.726, Complainant AT&T Corp. ("AT&T") submits this reply (the "Reply") in support of its Formal Complaint (the "Complaint") and in response to the numbered paragraphs set forth in the answering submission (the "Answer") filed by Defendant Great Lakes Communication Corp. ("GLCC") with the Federal Communications Commission (the "Commission") on September 15, 2016. AT&T also is submitting herewith its Reply Legal Analysis in Support of its Formal Complaint (the "AT&T Reply Legal Analysis"). Pursuant to 47 C.F.R. § 1.726(b), AT&T states that GLCC's Answer contains no affirmative defenses to AT&T's Complaint, but to the extent that any of its Answer could be deemed to be an affirmative defense, AT&T denies any such affirmative defenses, for the reasons set forth herein. AT&T further states that, with respect to 47 C.F.R. § 1.726(d), to the extent that it has not been waived, AT&T has no additional individuals to add to its initial

Information Designation.

1. Paragraph 1 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

2. AT&T denies that the United States District Court for the Northern District of Iowa (the "District Court") did not refer the two counterclaims addressed in its March 3, 2015 order (the "First Referral Order") to the Commission for the reasons given in AT&T's letters dated January 8, 2016 and January 28, 2016, and submitted in connection with this proceeding.[1] Otherwise, Paragraph 2 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

3. AT&T denies that the District Court did not refer the two counterclaims addressed in the First Referral Order to the Commission, for the reasons provided above in Paragraph 2 of this Reply and in AT&T's January Letters. Otherwise, Paragraph 3 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does,

[1] AT&T Ex. 2, Letter from J. Bendernagel (Counsel for AT&T) to C. Killion (FCC), dated Jan. 8, 2016; AT&T Ex. 92, Letter from J. Bendernagel (Counsel for AT&T) to C. Killion (FCC), dated Jan. 28, 2016 ("AT&T's January Letters"). *See also* Order on Report & Rec., *Great Lakes Commc'n Corp.* v. *AT&T Corp*. ("*GLCC-AT&T*"), No. 13-04117, 2015 WL 897876, *7 (N.D. Iowa Mar. 3, 2015) (dismissing Counts II and III "without prejudice *pursuant to the primary jurisdiction doctrine*"), *aff'g*, Report & Rec., 2014 WL 2866474, **16, 18 (N.D. Iowa June 24, 2014) ("Count III . . . *should be referred* to the FCC pursuant to the primary jurisdiction doctrine" because the "*FCC has primary jurisdiction* over AT&T's claim that GLCC's alleged refusal to establish a direct connection is unjust or unreasonable") (emphases added). A court that refers a claim may either stay the case or dismiss the claim, but if a court decides to dismiss, the claim is still referred to the agency. *See Reiter* v. *Cooper*, 507 U.S. 258, 268-69 & n.3 (1993).

however, those allegations or arguments are denied for the reasons in the Complaint, this Reply, and their accompanying legal analyses.

4. Except for the first sentence, AT&T denies all of the legal and factual claims in Paragraph 4 of the Answer for the reasons set forth in Count I of its Complaint and Part I of the Argument section of its legal analyses.

AT&T denies that GLCC does not have a duty to provide GLCC with a direct connection, and that GLCC has at all times complied with the Commission's benchmarking rules. First, under the Commission's CLEC access rules, which implement Sections 201 and 203 of the Communications Act (the "Act"), GLCC's revised tariff must be functionally equivalent to that of CenturyLink. [2] CenturyLink's tariff contains a flat-rated, direct-trunked transport service (as did GLCC's prior tariff). *See* AT&T Reply Legal Analysis at Part I. At the volumes of traffic GLCC stimulated, a flat-rated, direct-trunked transport service, priced using the rates in CenturyLink's tariff, is more cost-effective than a tandem-switched transport service. *Id.* As such, GLCC was obliged by the Commission's functional equivalence rules to provide a direct connection, at or below CenturyLink's rates. *Id*. Second, at a minimum, GLCC was obliged to "permit [AT&T] to install direct trunking from [AT&T's] point of presence to [GLCC's] end office, thereby bypassing any tandem function." *Access Charge Reform, PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c), or in the Alternative, Section 61.26(a)(6) of the Commission's Rules*, 23 FCC Rcd. 2556, ¶ 27 (2008) ("*PrairieWave*"). GLCC failed to permit such a connection, except on unreasonable conditions. *See* AT&T Reply Legal Analysis at Part I.

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[2] *See* AT&T Reply Legal Analysis at Part I; 47 C.F.R. § 61.26; *Qwest Commc'ns* v. *N. Valley Commc'ns*, 26 FCC Rcd. 8332, ¶ 8 (2011) ("*Northern Valley I*"), *recon denied*, 26 FCC Rcd. 14520 (2011) ("*Northern Valley II*"), *aff'd*, *N. Valley Commc'ns* v. *FCC*, 717 F.3d 1017 (D.C. Cir. 2013) ("*Northern Valley III*").

AT&T also denies that enforcing the Commission's rules against GLCC to require it to provide or permit a direct connection is inconsistent with either 47 C.F.R. § 61.26(a)(3) or 47 U.S.C. § 251(a). AT&T Legal Analysis in Support of its Formal Complaint ("AT&T Legal Analysis") at Part I; AT&T Reply Legal Analysis at Part I. The fact that direct-trunked transport is not expressly listed in Section 61.26(a)(3) does not mean that it is not a switched access service subject to the Commission's rules. It is, and in the circumstances presented here, GLCC was obligated to offer it in order to meet its obligation to provide services functionally equivalent to CenturyLink. *Id.* Further, Section 251(a), which was added as part of reforms for local competition, is a general provision that specifies the duty of all telecommunications carriers. The Commission traditionally regulates interconnection between local exchange carriers ("LECs") and interexchange carriers ("IXCs") pursuant to Section 201. *Id.* In that regard, the Commission's rules and orders impose specific duties on competitive local exchange carriers ("CLECs") engaged in access stimulation. It is the obligations under these rules that AT&T seeks to enforce in this case. AT&T thus denies that it is asking the Commission to create new law, and instead, AT&T is asking the Commission to enforce its existing CLEC access rules and orders, including *Northern Valley I* and *PrairieWave*. *Id.*

AT&T denies that John Habiak's testimony in a separate proceeding can be read to allow GLCC to refuse to provide or permit a direct connection. The facts of the case in which Mr. Habiak testified are different than those in this case. AT&T's position in that case was that, under the Commission's benchmarking rules, the LEC providing transport could charge no more than 7 miles of transport charges, at the rates of a competing incumbent local exchange carrier ("ILEC") with low per-minute, per-mile rates. *E.g.*, AT&T Ex. 93, AT&T Reply Legal Analysis in Support of Formal Compl., *AT&T Servs., Inc.* v. *Great Lakes Comnet, Inc.*, File No. EB-14-

MD-013, at **29-32 (Nov. 19, 2014). As such, the per-mile transport charges that could have been lawfully assessed under the Commission's rules were only $0.00014 per minute times 7 miles, or $0.00098 per minute. *Id.* at *30. In this case, by contrast, Iowa Network Services, Inc.'s ("INS") tariffed transport rate is $0.009 per minute, and even GLCC's witness admits that, at the traffic volumes handled by GLCC, the expense of establishing a direct connection is outweighed by the savings associated with bypassing the tandem charges. As such, nothing in Mr. Habiak's testimony nor AT&T's filings in *Great Lakes Comnet* undercuts AT&T's claims in this case that GLCC should be providing, or at the very least, permitting a direct connection.

AT&T admits that it did not use the direct connection service GLCC offered to provide in its prior tariff, but avers that, when that prior tariff was in effect, GLCC was providing service pursuant to a negotiated agreement, not its tariff. Declaration John W. Habiak ("Habiak Decl."), ¶¶ 7-8, dated Aug. 15, 2016; Reply Declaration of John W. Habiak ("Habiak Reply Decl."), ¶¶ 3-4, dated Oct. 6, 2016. Further, AT&T denies GLCC's claim that it has offered to provide a direct connection to AT&T, because those offers contained price premiums and other unreasonable conditions. Habiak Reply Decl. ¶¶ 6-8; AT&T Reply Legal Analysis at Part I. AT&T further denies GLCC's claim that it can refuse to permit AT&T to install direct trunks, as required by the Commission's rules and *PrairieWave*, based on GLCC's speculation that AT&T might not be able to obtain or install such trunks. *See* Habiak Reply Decl. ¶¶ 14-15; AT&T Reply Legal Analysis at Part I. AT&T also denies GLCC's claim that the reduction in its costs if GLCC complied with its obligations to provide or permit a direct connection is "unsubstantiated conjecture," Habiak Reply Decl. ¶¶ 21-24; AT&T Legal Analysis at Part I.

5. Except for the first sentence, AT&T denies all of the legal and factual claims in Paragraph 5 of the Answer for the reasons set forth in Count II of its Complaint and Part II of the

Argument section of its legal analyses.

GLCC does not deny that, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** None of these services are telecommunications services. Because the FCPs did not pay GLCC a fee for "telecommunications service" as required by GLCC's tariff and the Commission's rules, GLCC violated its access tariff by billing AT&T for access services on the calls that GLCC stimulated over AT&T's network, in connection with its access stimulation schemes. *See generally* Compl. at Count II; AT&T Legal Analysis at Part II; AT&T Reply Legal Analyses at Part II.

AT&T denies that it has mischaracterized GLCC's relationships with its FCPs. AT&T further denies that GLCC's Telecommunications Service Agreements ("TSAs") provide that the FCPs will pay GLCC for any interstate telecommunications service, Compl. ¶¶ 43-46; AT&T Legal Analysis at 25-32; AT&T Reply Legal Analysis at Part II, which is the relevant question under the tariff and that the District Court referred. AT&T also denies that the FCPs are "end users" under GLCC's tariff or the Commission's rules, because they do not pay GLCC a fee for telecommunications service, and therefore denies that GLCC properly billed access charges to AT&T on the traffic that GLCC and its FCPs stimulated. *See generally* Compl. at Count II; AT&T Legal Analysis at Part II; AT&T Reply Legal Analyses at Part II. AT&T further denies that GLCC's regulatory reporting on Form 499-A supports GLCC's defenses, because **[[BEGIN CONFIDENTIAL]]** [redacted]

[redacted] **[[END CONFIDENTIAL]]** and **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[[END HIGHLY CONFIDENTIAL]]

6. Except for the first sentence, AT&T denies all of the legal and factual claims in Paragraph 6 of the Answer for the reasons set forth in Count III of its Complaint and Part III of the Argument section of its legal analyses.

In brief, the grounds for AT&T's denials are that the Commission has exclusive authority over interstate access services – as GLCC itself has conceded, AT&T Legal Analysis at 35 & AT&T Ex. 70, Pet. For Decl. Ruling to the IUB & Conting. Pet. for Preempt., File No. 09-152 (Aug. 14, 2009) ("GLCC Petition"), and as the FCC has stated in prior order and appellate filings, AT&T Legal Analysis at 38-39 & nn.158-59. As to access services offered by CLECs, as well as any services provided by CLECs in connection with access stimulation, the Commission has exercised its authority to ensure that a CLEC's rates and terms for service are just and reasonable by creating a regulatory regime applicable to such services. AT&T Legal Analysis at 7-12. As part of that regime, the Commission has made clear that CLECs can recover for switched access services (or any call termination service provided in connection with access stimulation) only via lawfully filed tariffs or negotiated contracts. *See id.* at Part III; *id.* at 36-37 & n.152. The Commission has further stated that there is no "regulatory gap" in its regime that allows CLECs to "pursue alternative damages theories." *AT&T Corp.* v. *All American Tel. Co.*, 30 FCC Rcd. 8958, ¶ 13 n.50 (2015).

In light of the Commission's regime, to the extent state law permits a carrier to recover for access services via additional methods, such as through common law claims like *quantum*

meruit and unjust enrichment, state law would conflict with the Commission's regime and would be pre-empted – as many courts have concluded. AT&T Legal Analysis at 41-45. In this case, the claim for pre-emption is especially strong, because GLCC's unjust enrichment claim asserts that GLCC is entitled to recover more than **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** its tariffed rate, and such a result would plainly conflict with the Commission's determinations that CLEC tariffed access rates above the Commission-specified benchmark are unjust and unreasonable. *See id.* at Part III; *id.* at 41-47.

GLCC's claim is that, because the Commission has allowed CLECs to recover for access services pursuant to negotiated contracts, the Commission necessarily has "de-regulat[ed]" GLCC's services, and "has authorized," GLCC Legal Analysis in Support of Answer ("GLCC Legal Analysis") at 47, any and all state law theories of recovery – even when (as here) a CLEC files a tariff for those services, and then violates the terms of its tariff. This argument is a *non sequitur*, and it misses the point. *See* AT&T Reply Legal Analysis at Part III. The extent to which a CLEC, once it negotiates a contract with an IXC, can rely on state law theories to enforce or interpret that contract is simply not at issue in this case, and that hypothetical issue was not referred by the District Court. It is undisputed that the parties do not have a negotiated contract for GLCC access services. Rather, GLCC filed a tariff for access services, and it thus purported to provide its services pursuant to the federal law regime that Congress has established and that the Commission has since administered. Having elected to pursue compensation under this regime, the question here is whether, when GLCC violates federal law by charging AT&T in violation of its tariff, may it nonetheless rely on a third (*quantum meruit*) or fourth (unjust enrichment) state law method to recover moneys that it could not lawfully recover under its filed tariff? As AT&T has explained in Part III of the Argument section of its legal analyses, and as

many courts have held, the answer is clearly "no."

7. AT&T denies that the District Court did not refer the two counterclaims addressed in the First Referral Order to the Commission for the reasons provided above in Paragraph 2 of this Reply and in AT&T's January Letters. Further, in light of GLCC's admission in Paragraph 7 of the Answer that, for purposes of the services at issue, it is a "common carrier" under the Act, then the Commission has jurisdiction over all of AT&T's claims in the Complaint, which arise under the common carrier provisions of the Act.[3] AT&T also denies that "the Commission lacks jurisdiction to pick and choose which state law contract-based theories of recovery are available," Ans. ¶ 7, and the basis for AT&T's denial is found in Count III of its Complaint and in Part III of the Argument section of its legal analyses. As GLCC has itself advocated, the Commission has exclusive authority over interstate access services, and thus it has "jurisdiction" to pre-empt state regulation of interstate access services. *See* AT&T Legal Analysis at 34-40 & AT&T Ex. 70, GLCC Petition. By contrast, states cannot regulate such services. *See, e.g.*, AT&T Ex. 69, Br. of FCC & Dep't of Justice, *MCIMetro Access Transmission Servs. of Va., Inc.* v. *Christie*, No. 07-1401, at **12, 14 (4th Cir. Feb. 19, 2008). By providing in its regulatory regime that GLCC may recover for access services (or services provided in connection with access stimulation) only via lawful tariffs or negotiated contracts, the Commission has "picked" and "chosen" the lawful methods of recovery, and has pre-empted state law theories, such as GLCC's *quantum meruit* and unjust enrichment claims, that conflict with its regime and the two authorized means of recovery.

[3] Although GLCC's Answer admits that the Commission has jurisdiction over "portions" of AT&T's Complaint, GLCC fails to specify any portions of the Complaint over which the Commission supposedly lacks jurisdiction – which is, in effect, an admission that the Commission has jurisdiction to address the entirety of AT&T's Complaint. *See* 47 C.F.R.§§ 1.720(c), (d), 1.724(b), (d).

Otherwise, Paragraph 7 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons in the Complaint, this Reply, and their accompanying legal analyses.

8. AT&T denies that the District Court did not refer the two counterclaims addressed in the First Referral Order to the Commission for the reasons provided above in Paragraph 2 of this Reply and in AT&T's January Letters. Otherwise, Paragraph 8 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

9. Paragraph 9 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

10. Paragraph 10 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in this Reply, the Reply Legal Analysis, and its supporting papers.

11. GLCC admits the allegations in Paragraph 11 of the Complaint and therefore no response is required.

12 AT&T denies the allegations in Paragraph 12 of the Answer, and reiterates that it has attempted to discuss, in good faith, the possibility of settlement. The parties had settlement discussions before the District Court, but, as the District Court found, AT&T's letter dated June

26, 2015 "did not offer a complete settlement agreement," and, therefore, "GLCC's purported acceptance … did not create a binding settlement agreement."[4] AT&T also denies that it "has not meaningfully responded to" GLCC's recent settlement proposals. AT&T diligently, thoroughly, and in good faith considered each of GLCC's settlement proposals before ultimately rejecting them for business reasons. *See, e.g.* AT&T Ex. 94, E-mail from M. Hunseder (Counsel for AT&T) to D. Carter (Counsel for GLCC), dated Aug. 12, 2016. AT&T further notes that the settlement materials that GLCC attached to its Answer demonstrate that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

Otherwise, Paragraph 12 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

13. AT&T denies that the District Court did not refer the two counterclaims addressed in the First Referral Order to the Commission, for the reasons provided above in Paragraph 2 of this Reply and in AT&T's January Letters. Otherwise, Paragraph 13 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

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[4] *See GLCC-AT&T*, 124 F. Supp. 3d 824, 848 (N.D. Iowa 2015). The District Court noted, however, that "the lawyers approached the issue of whether there had been a binding settlement agreement with the utmost good faith, civility, and superb preparation." *Id.* at 852. As such, there is no basis to allege that AT&T's efforts to resolve the matter were not made in good faith.

14. Paragraph 14 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

15. Except for the first sentence, AT&T denies the legal and factual allegations in Paragraph 15 of the Answer, and, moreover, GLCC's assertions are irrelevant to the allegations in Paragraph 15 of the Complaint. Paragraph 15 of the Complaint merely states that AT&T was not acting as a common carrier for purposes of this case, which pertains to referrals from a suit in which GLCC sued AT&T (and vice-versa) as a putative customer. The Commission has expressly determined that, when long distance carriers purchase access services, any alleged failure to pay for those services by the long distance carrier does not implicate any duty under the common carrier provisions of the Act. *All American Tel. Co.* v. *AT&T*, 26 FCC Rcd. 723, ¶ 10 (2011). As such, GLCC should simply have admitted the allegation in the second sentence of Paragraph 15 of the Complaint.

While it is true that AT&T has not paid for the services that GLCC has improperly billed, AT&T never alleged that it has paid GLCC for those services, and thus GLCC's statement in the third sentence of Paragraph 15 of the Answer is irrelevant to the allegations in Paragraph 15 of the Complaint. The last sentence of Paragraph 15 of the Answer is not only (also) irrelevant to the allegations in Paragraph 15 of the Complaint, but also inaccurate. AT&T flatly denies that the access stimulation schemes in which GLCC is engaged "indisputably benefit" AT&T and its customers. To the contrary, the Commission has determined that such schemes *harm* long distance carriers and most of their customers, who "ultimately support businesses [like GLCC] designed to take advantage" of flaws in the Commission's access charge rules. *In re Connect*

America Fund, 26 FCC Rcd. 17663, ¶ 663 (2011) ("*Connect America Order*").

Otherwise, Paragraph 15 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

16. GLCC admits the allegations in Paragraph 16 of the Complaint and therefore no response is required.

17. AT&T denies that GLCC has complied with the Commission's benchmark rule, as set forth in the *Connect America Order* and its implementing rules, because it has refused to offer AT&T a direct connection service at the rates that CenturyLink charges for a similar connection service, or to accept AT&T's traffic if tendered at GLCC's facility in Spencer, Iowa. *See* AT&T Legal Analysis at Part I; AT&T Reply Legal Analysis at Part I. AT&T also denies that CenturyLink and INS are not otherwise relevant to the issues in dispute in this proceeding for the reasons given in the Complaint, this Reply, and their accompanying legal analyses. *See, e.g.*, *id.*; Habiak Decl. ¶¶ 14-29. AT&T further denies that GLCC's FCPs are "end users," as defined in GLCC's tariff and the Commission's rules, because they do not pay a fee to GLCC for telecommunications service. *See* AT&T Legal Analysis at Part II; AT&T Reply Legal Analysis at Part II. Otherwise, Paragraph 17 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

18. GLCC admits the allegations in Paragraph 18 of the Complaint and therefore no response is required.

19. AT&T admits that, in connection with an ongoing litigation in which AT&T claims that INS's tariff is unlawful, it has withheld certain payment to INS, but AT&T denies GLCC's characterization of such withholding as a "self-help" negotiating tactic. Declining to pay for services that are not authorized by a valid tariff is not improper "self-help," and, in any event, INS's tariff allows customers to withhold disputed charges pending resolution of the dispute, and thus AT&T's decision not pay INS's improperly billed charges is a remedy that is permitted by the INS tariff. *See* AT&T Ex. 95, INS FCC Tariff No. 1, 1st Rev. Page 42, 3rd Rev. Page 43, filed Aug. 10, 1988. Otherwise, Paragraph 19 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

20. AT&T admits that it has not offered evidence establishing that each of GLCC's FCPs provide their conferencing and chat services for free, however, the Commission has long recognized that CLECs engaged in access stimulation "enter[] into [] arrangement[s] with [] provider[s] of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls," in order to inflate traffic volumes and maximize access charge revenues. *Connect America Order* ¶ 656. GLCC offers no evidentiary support for its allegation that, contrary to the typical access stimulation arrangement, the FCPs that GLCC serves do not provide their services for free. In fact, GLCC's expert testified that GLCC "provide[s] the telephony to free conference call providers." AT&T Ex. 96, Deposition of Michael Starkey ("Starkey Dep."), at 42:4-7, taken Nov. 5, 2014. Further, even if one or more of GLCC's FCPs did offer a service that required payment by users, GLCC is sharing revenues with the FCPs that are used to subsidize the FCPs' services, to the detriment of competition, *see Connect America*

Order ¶ 665, and, further, GLCC would still (i) have improperly billed AT&T, *see* AT&T Legal Analysis at Part II; and (ii) have violated Section 201(b) and the Commission's rules, *see* AT&T Legal Analysis at Part I. Otherwise, Paragraph 20 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

21. Paragraph 21 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

22. Paragraph 22 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

23. AT&T asserts that its Legal Analysis describes facts that are properly and fully supported by the factual record, and that the regulatory background in AT&T's Legal Analysis is based on the actual facts and holdings in the Commission's rules and orders – unlike the regulatory background in GLCC's Legal Analysis, which (consistent with GLCC's history) misreads the relevant regulatory requirements. As such, AT&T denies that its Legal Analysis contains no facts. Otherwise, Paragraph 23 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

24. AT&T admits that GLCC is a CLEC, but notes that prior to August 2012, GLCC did not serve any traditional customers, AT&T Ex. 14, August 2012 Monthly Report, *In re Great Lakes Commc'ns Corp.*, No. SPU-2011-004 (IUB Aug. 30, 2012), and that GLCC's primary activity since 2005 has not been to compete in local markets but to engage in access stimulation. *See* AT&T Ex. 16, *In re Great Lakes Commc'n Corp.*, No. SPU-2011-004, at **12-14 (IUB Mr. 30, 2012) ("*IUB GLCC Order*"). For the reasons stated in Counts I and II of its Complaint and Parts I and II of the Argument section of its legal analyses, AT&T denies that GLCC has operated legally, *i.e.*, consistently with the Act and the Commission's rules. Otherwise, Paragraph 24 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

25. Regardless of whether GLCC's relationships with its FCPs are "partnerships" in a legal sense, regulators have found it appropriate to use that term as an accurate way to describe LECs' relationships with conference and chat providers in access stimulation arrangements. *See* AT&T Ex. 90. Final Order, *In re Qwest Commc'ns Corp.*, No. RCU-2007-002, at **32-33 (IUB Sept. 21, 2009) ("*IUB Final Order*"). AT&T denies GLCC's assertion that those relationships are instead "carrier-customer relationship[s]." Certainly, GLCC does not treat its FCPs like its ordinary customers that do not stimulate large volumes of calls – for example, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**, and it cannot be disputed that GLCC has not made any similar payments to other entities that GLCC claims as customers. Further, as AT&T has explained, the FCPs served by GLCC are neither "end users" nor "customer(s)," as defined in GLCC's tariff and the Commission's rules,

because they do not pay a fee to GLCC for telecommunications service. AT&T Legal Analysis at Part II; AT&T Reply Legal Analysis at Part II. AT&T also notes that GLCC has not denied that access stimulation was GLCC's entire operation for many years, and that should be deemed admitted.

AT&T also denies that Josh Nelson's testimony does not support AT&T's allegation that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** Otherwise, Paragraph 25 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

26. Paragraph 26 of the Answer does not provide a reason for denying any aspect of Paragraph 26 of the Complaint, and thus the allegations in Paragraph 26 of the Complaint are deemed to be admitted. Otherwise, Paragraph 26 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

27. AT&T denies that the September 2009 Iowa Utilities Board ("IUB") order is not

relevant to the issues in dispute in this proceeding, for the reasons given in the Complaint, this Reply, and their accompanying legal analyses. *See, e.g.*, Compl. ¶¶ 27-28; AT&T Legal Analysis at 2. AT&T also denies that any "evidentiary support" is required to support its "characterization" of the September 2009 IUB order, because the order is obviously critical of GLCC – that order determined, among other things, that the IUB should open a separate investigation to determine whether to revoke GLCC's operating certificate. *See* AT&T Ex. 90, *IUB Final Order*, at *67; *id.* at **2, 24-25, 57-59.

AT&T further denies that the relevant holdings in the September 2009 IUB order and in the Commission's *Farmers* proceedings are dissimilar to this case. In both cases, the commissions found that the FCPs served by the CLECs were not "end users," as defined in their respective tariffs, because, among other facts, the FCPs did not pay a fee for telecommunications service.[5] Accordingly, the commissions held that the tariffed access charges assessed by the CLECs on calls to the FCPs were unlawful. *Id.*

In addition, AT&T denies that it has not substantiated its allegation that the IUB has been highly critical of GLCC. In September 2009, the IUB found that GLCC had "failed to comply with the terms and conditions of [its] own intrastate access tariffs" because, among other things, it had failed to collect fees for telecommunications service from its FCPs. AT&T Ex. 90, *IUB Final Order*, at **2, 24-25. Later, in March 2012, the IUB found that GLCC "ha[d] never provided any services that are considered components of local exchange service." AT&T Ex. 16, *IUB GLCC Order*, at *13. In discussing GLCC's repeated failure to operate legally as a local exchange carrier, the IUB faulted GLCC's management, finding that, "[i]n the end, Great Lake's

[5] *See* AT&T Ex. 90, *IUB Final Order*, at **24-24, 53-54; *Qwest Commc'ns* v. *Farmers & Merchs. Mut. Tel. Co.*, 24 FCC Rcd. 14801, ¶¶ 10-27 (2009) ("*Farmers I*"), *recon. denied*, 25 FCC Rcd. 3422, ¶¶ 9-12 (2010) ("*Farmers II*"), *aff'd*, 668 F.3d 714 (D.C. Cir. 2011) ("*Farmers III*").

2006 claim that it was providing local exchange service in [a specified Iowa local exchange] was either a knowing falsehood or evidence that Great Lakes lacks the managerial ability to understand and provide any of the services it claimed to offer …. [C]ompany management that makes false or incompetent statements to the [IUB] is not providing adequate service." *Id.* at **14-15. Although the IUB declined to revoke GLCC's certificate of public convenience and necessity, that is hardly an endorsement of GLCC's past practices. AT&T admits that the IUB terminated GLCC's obligation to file monthly status reports in July 2016 – more than four years after the IUB ordered GLCC to file its initial report. *Id.* at **25-27.

Otherwise, Paragraph 27 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

28. Paragraph 28 of the Complaint consists largely of quotations from the September 2009 IUB order, and GLCC admits that the order is quoted accurately. Although GLCC claims that AT&T "mischaracteriz[ed]" the order, GLCC does not explain how AT&T did so, and, in fact, there are no such mischaracterizations.

GLCC nonetheless makes a remarkable claim as to the IUB rules that apply to intrastate access stimulation schemes: GLCC claims that the Commission "has **preempted state control** over the rates for intrastate access, such that" the IUB rules have been "**nullified**." This claim is flatly inconsistent with GLCC's assertions that it may recover for *inter*state access services – over which the Commission has exclusive jurisdiction – under state law unjust enrichment and quasi-contract claims. If state regulation of *intra*state access stimulation rates have been entirely "nullified," then, *a fortiori*, state law unjust enrichment and quasi-contract claims that seek to

exert "state control" over *inter*state access charges have been as well.[6]

As to GLCC's other (non-responsive) assertions, AT&T denies the claim that the Commission "has expressly concluded that sharing access revenues does not make a CLEC's interstate [access] rates unjust or unreasonable." The Commission, like the IUB, declined to find revenue sharing arrangements to be unlawful in all circumstances. *Connect America Order* ¶ 672; AT&T Ex. 90, *IUB Final Order*, at **54-59. The Commission (like the IUB), however, did find revenue sharing to be problematic in the context of access stimulation schemes, concluding that the increased access revenues often lead to "inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable under section 201(b) of the Act." *Connect America Order* ¶ 657. Further, AT&T denies that GLCC's rates have been "established pursuant to FCC policy." To the contrary, as AT&T explained in Counts I and II of its Complaint and Parts I and II of the Argument section of its legal analyses, GLCC's rates, its tariff, and its billed access charges violate the Commission's rules. Otherwise, Paragraph 28 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

29. Paragraph 29 of the Complaint consists largely of quotations from the March 2012 IUB order, and GLCC admits that the order is quoted accurately. Although GLCC claims that AT&T "mischaracteriz[ed]" the order, GLCC does not explain how AT&T did so, and, in fact, there are no such mischaracterizations. Otherwise, Paragraph 29 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does,

[6] Whether the Commission's revised regime invalidates the IUB rules has not been decided, and the Commission need not opine on it in this case. The point here is that GLCC's own advocacy is flatly inconsistent, and their arguments that they may recover based on *quantum meruit* or unjust enrichment are not credible.

however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

30. Paragraph 30 of the Complaint consists largely of quotations from the March 2012 IUB order, and GLCC admits that the order is quoted accurately. Although GLCC claims that AT&T "mischaracteriz[ed]" the order, GLCC does not explain how AT&T did so, and, in fact, there are no such mischaracterizations. Otherwise, Paragraph 30 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

31. AT&T denies that GLCC FCC Tariff No. 1 and CenturyLink FCC Tariff No. 11 are not relevant to the issues in dispute in this proceeding for the reasons given in Count I of the Complaint and Part I of the Argument section of the legal analyses. AT&T also denies that it has not offered "evidentiary support" for its allegation that the terms and descriptions of switched access service in GLCC FCC Tariff No. 1 and CenturyLink FCC Tariff No. 11 were "generally consistent." In Paragraphs 32 to 34 of the Complaint, AT&T explains that the terms and descriptions relevant to the issues in dispute in this proceeding, including "Switched Access Service," "End User," "Customer(s)," and "Direct-Trunked Transport," were "generally consistent" in both GLCC FCC tariff No. 1 and CenturyLink FCC Tariff No. 11. Otherwise, Paragraph 31 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

32. Paragraph 32 of the Answer does not provide a reason for denying any aspect of Paragraph 32 of the Complaint, and thus the allegations in Paragraph 32 of the Complaint are

deemed to be admitted. AT&T denies that GLCC FCC Tariff No. 1 and CenturyLink FCC Tariff No. 11 are "irrelevant" to the issues in dispute in this proceeding for the reasons given in Count I of the Complaint and Part I of the Argument section of the legal analyses. Otherwise, Paragraph 32 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

33. Paragraph 33 of the Answer does not provide a reason for denying any aspect of Paragraph 33 of the Complaint, and thus the allegations in Paragraph 33 of the Complaint are deemed to be admitted. AT&T denies that GLCC FCC Tariff No. 1 and CenturyLink FCC Tariff No. 11 are "irrelevant" to the issues in dispute in this proceeding for the reasons given in Count I of the Complaint and Part I of the Argument section of the legal analyses. Otherwise, Paragraph 33 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

34. Paragraph 34 of the Answer does not provide a reason for denying any aspect of Paragraph 34 of the Complaint, and thus the allegations in Paragraph 34 of the Complaint are deemed to be admitted. AT&T denies that GLCC FCC Tariff No. 1 and CenturyLink FCC Tariff No. 11 are not relevant to the issues in dispute in this proceeding for the reasons given in Count I of the Complaint and Part I of the Argument section of the legal analyses. Otherwise, Paragraph 34 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

35. AT&T denies that GLCC's tariff complies with the Commission's benchmark

rule because it does not offer a direct connection service at the rates that CenturyLink charges for a similar connection service. AT&T Legal Analysis at Part I; AT&T Reply Legal Analysis at Part I. AT&T also denies that, with respect to the rates and services at issue in this proceeding, GLCC's tariff is "deemed lawful," or, even if it were, that this status would insulate GLCC from liability and damages for the violations of the Act and the Commission's rules set forth in the Complaint. *See* AT&T Reply Legal Analysis at Part I. Otherwise, Paragraph 35 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

36. Paragraph 36 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

37. Paragraph 37 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

38. Paragraph 38 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

39. AT&T denies that Mr. Nelson testified that he "merely agreed that [GLCC's] Tariff speaks for itself, including the clause that provides that 'an end user must pay a fee to the

Company for telecommunications service.'" Rather, Mr. Nelson testified that GLCC's tariff required that "for a Free Calling Party to be an End User under the Tariff, it must be paying a fee … to Great Lakes for interstate or foreign telecommunications service." AT&T Ex. 6, Nelson Dep. at 28:22-29:4. Otherwise, Paragraph 39 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

40. GLCC admits the allegations in Paragraph 40 of the Complaint and therefore no response is required.

41. AT&T denies that GLCC provides telecommunications service to the FCPs pursuant to the so-called "Telecommunications Service Agreements." **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** None of these services is a telecommunications service for the reasons given in Count II of the Complaint and Part II of the Argument section of the legal analyses.

AT&T also denies that it has not provided evidentiary support for its allegation that the TSAs and the Marketing Agreements **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[7] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[redacted] **[[END HIGHLY CONFIDENTIAL]]** Indeed, GLCC admits that "both agreements are necessary to fully understand" GLCC's access stimulation arrangements with its FCPs. Further, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** AT&T further denies that it has not substantiated its allegation that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Otherwise, Paragraph 41 at Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

42. As demonstrated by the first two sentences of Paragraph 42 of the Answer, GLCC admits all of the facts in the text of Paragraph 41 of the Complaint – including the fact that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

The remainder of Paragraph 42 of the Answer (except for the last sentence) addresses the second sentence of footnote 91 of the Complaint, which states "the Commission has held that the excess revenues shared in access stimulation schemes such as these are ultimately passed on to unwitting customers." Contrary to GLCC's claim, this statement accurately characterizes the *Connect America Order*, in which the Commission stated that "all customers of these long-

distance providers bear [the] costs [of access stimulation], even though many of them do not use the access stimulator's services, and, in essence, ultimately support businesses designed to take advantage of today's above-cost intercarrier compensation rates." *Connect America Order* ¶ 663.

Even though footnote 91 of the Complaint does not mention AT&T, GLCC then makes a series of non-responsive and irrelevant claims about AT&T, all of which AT&T denies. These claims miss the point of the Commission's findings, which is that consumers bear the costs of access stimulation schemes. In this regard, GLCC admits that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Finally, AT&T denies that it has not substantiated its allegation that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]** GLCC's willingness to share such a large portion of its revenues with the FCPs is evidence of the inflated profits generated by GLCC through its access stimulation arrangement.

Otherwise, Paragraph 42 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

43. AT&T denies that GLCC provides the FCPs **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted]

[[END HIGHLY CONFIDENTIAL]] Regardless, none of the services that GLCC provides to any of the FCPs under the TSAs is a telecommunications service for the reasons given in Count II of the Complaint and Part II of the Argument section of the legal analyses.

Finally, GLCC's claim that it "*had* to provide its customers with telecommunications services in order to complete the several billion minutes of telephone calls" at issue in this proceeding is wholly irrelevant. In order for the FCPs to qualify as "end users" under GLCC's tariff and the Commission's rules, they must *pay a fee* to GLCC for telecommunications service.[8] Under the TSAs, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Otherwise, Paragraph 43 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

44. Paragraph 44 of the Answer is largely incoherent and non-responsive. In Paragraph 44 of the Complaint, AT&T explained that **[[BEGIN HIGHLY CONFIDENTIAL]]**,

[8] AT&T Ex. 8, GLCC FCC Tariff No. 2, Orig. Pages 7-9 (definitions of "Customer of an Interstate or Foreign Telecommunications Service," "End User," and "Telecommunications"); AT&T Ex. 6, Nelson Dep. at 26:10-29:22; *Northern Valley I* ¶¶ 8-9.

[redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

GLCC has access to its own billing and payment records, and in the Answer, it should have either admitted the facts in the second sentence of Paragraph 44 of the Complaint, or, if GLCC claimed that AT&T's analysis of GLCC's billing records was not accurate, GLCC should have provided a substantiated denial. GLCC failed to do so. Instead, GLCC states that it "admits only that it consistently billed and collected the fees that its customers agreed to pay for the telecommunications and ancillary services that Great Lakes provided them under their respective [TSAs], the monthly fees for which are reflected in Exhibit A to the customers' Agreements." This response dodges the facts of AT&T's allegation, and the second sentence of Paragraph 44 of the Complaint should be deemed as admitted. The allegation in the second sentence of Paragraph 44 of the Complaint concerned **[[BEGIN HIGHLY CONFIDENTIAL]]**

[redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

In any event, for the reasons just given above, Count II of the Complaint, and Part II of

the Argument section of the legal analyses, AT&T denies that the FCPs pay a fee to GLCC for telecommunications service pursuant to the TSAs. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** None of these services is a telecommunications service for the reasons given in Count II of the Complaint and Part II of the Argument section of the legal analyses. In the same vein, AT&T denies that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[9] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

As to GLCC's denial that its FCP offer their services for free, AT&T incorporates its statement in Paragraph 20 of this Reply in response.

Otherwise, Paragraph 44 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

45. Paragraph 45 of the Complaint contains two sentences. The second sentence is a quote from certain of GLCC's TSAs. The first sentence alleges that GLCC billed, and the FCPs paid GLCC a fee, for **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** GLCC has the billing records to confirm or deny the percentage

[10] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[11] GLCC alleges that it "assigns" the numbers to its customers. However, as noted by AT&T and admitted by GLCC, the numbers can be ported, and thus it is not clear whether GLCC in fact assigned all of the numbers used by its FCPs.

of invoices on which it billed and was paid for this service. However, it failed to respond meaningfully to AT&T's assertion, and it should be deemed as admitted.

Rather than respond to the basic facts alleged in the two sentences in Paragraph 45 of the Complaint, Paragraph 45 of the Answer consists of a lengthy legal claim that it provides a "comprehensive high-capacity telecommunications service" to "all" of its customers. AT&T denies that GLCC provides telecommunications service to the FCPs that have contracted for **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

Otherwise, Paragraph 45 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

46. The second sentence of Paragraph 46 of the Complaint is an allegation that GLCC has not billed for any other services, other than the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** specified in Paragraphs 44 and 45 of the Complaint. GLCC has the billing records to confirm or deny whether it billed for any other services than those AT&T specified. However, it failed to respond meaningfully to AT&T's assertion in the second sentence of Paragraph 46 of the Complaint, and it should be deemed as admitted.

As to the first sentence of Paragraph 46 of the Complaint, AT&T denies GLCC's assertion that AT&T has misrepresented the cited deposition testimony. Both Mr. Nelson and

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[12] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Ms. Beneke testified that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

GLCC's Answer also contains a legal claim about the Commission's regulation of CLECs' charges to end users, but whether or not the Commission regulates the "manner" in which a CLEC provides services to its customers misses the point. What is relevant here is that the Commission prohibits the tariffing of access charges by CLECs where its customers are not required to pay a fee for telecommunications service. *See Northern Valley II* ¶ 12 ("Northern Valley may offer its services to individuals and business for any fee (or no fee)," however, "if Northern Valley chooses to assess access charges upon IXCs by *tariff*, the individuals or entities to whom Northern Valley provides access must be 'end users' (*i.e.*, paying customers)"); *Northern Valley III*, 717 F.3d at 1019 ("the FCC is not here regulating the relationship between the CLEC and the end user; rather, the FCC is regulating the relationship between the CLEC and

the long-distance carrier").

AT&T denies that the FCPs pay a fee to GLCC for telecommunications service pursuant to the TSAs. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** None of these services is a telecommunications service for the reasons given in Count II of the Complaint and Part II of the Argument section of the legal analyses.

Otherwise, Paragraph 46 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

47. Paragraph 47 of the Answer does not address the second or third sentences of Paragraph 47 of the Complaint, and therefore AT&T's allegations are deemed to be admitted.

GLCC admits that **[[BEGIN CONFIDENTIAL]]** it has not paid the Iowa state sales tax on telecommunications service for the moneys that it collected from the FCPs. **[[END CONFIDENTIAL]]** AT&T denies that the cited provision of the Iowa tax code is not relevant to the issues in dispute in this proceeding for the reasons given in Part II of the Argument section of the legal analyses. AT&T Legal Analysis at 26-27; AT&T Reply Legal Analysis at Part II. AT&T also denies that, with respect to the rates and services at issue in this proceeding, GLCC's

tariff is "deemed lawful," or, even if it were, that this status would insulate GLCC from liability and damages for the violations of the Act and the Commission's rules set forth in the Complaint. *See* AT&T Reply Legal Analysis at Part I, Otherwise, Paragraph 47 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

48. Paragraph 48 of the Complaint alleges certain facts about GLCC's reporting of revenues on Form 499. Specifically, AT&T alleges that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** GLCC does not deny the allegations about its Form 499-A reporting, and therefore AT&T's allegations are deemed admitted.

Even though Paragraph 48 of the Complaint made no "legal conclusions," GLCC purports to deny the "legal conclusions" in Paragraph 48 of the Complaint, and proceeds to aver that it "properly reports its applicable revenues to the FCC" on Form 499. This misses the point. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Further, while the Commission need not resolve the merits of GLCC's claim that it has properly reported the moneys that it has collected from the FCPs on Form 499, AT&T notes that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]] [[BEGIN**

CONFIDENTIAL]] [redacted] **[[END CONFIDENTIAL]]** In addition, it is difficult to conclude that it is "proper" for GLCC to engage in interstate access stimulation activities on massive scale, such that it generates **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** of interstate revenues and results in the payment of **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** to FCPs for promoting interstate calling – and then **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Otherwise, Paragraph 48 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

49. AT&T denies that facts concerning its relationship with GLCC, including when GLCC began billing AT&T, the volumes of GLCC traffic handled by AT&T, and past disputes between the parties, are not relevant to the issues in dispute in this proceeding for the reasons given in the Complaint, this Reply, and the accompanying legal analyses. *See, e.g.*, AT&T Legal Analysis at 1-4, 12-13. Otherwise, Paragraph 49 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

50. Paragraph 50 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal

analyses.

51. In Paragraph 51, GLCC asserts that AT&T has not complied with "Great Lakes' deemed lawful tariff-dispute provision." However, in the District Court, GLCC moved for summary judgment on this ground, and the Magistrate Judge and the District Court rejected GLCC's arguments that AT&T failed to comply with the tariff provision, or that it was deemed lawful. Rep. and Recomm., *GLCC-AT&T*, 2014 WL 2866474, at *22; Order on Mtns. for Summ. J., *GLCC-AT&T*, 2015 WL 12551192, **10-11. The District Court did not refer any issues about its holding, that issue is not before the Commission, and AT&T denies the allegation, for all the reasons stated in its briefing before the District Court and in the District Court's opinions on this issue.

AT&T also denies that its May 2, 2012 communication to GLCC was somehow deficient, or failed to advise GLCC of the nature of AT&T's dispute or to provide GLCC an opportunity to investigate and resolve the dispute (which is the legitimate purpose of a bill dispute provision in a tariff, *see* Rep. and Recomm., *GLCC-AT&T*, 2014 WL 2866474, at *22). Further, the parties after that communication had extensive discussions about the provision of a direct connection, and thus GLCC was provided appropriate notice of AT&T's dispute with GLCC's bills and practices.

AT&T also denies that it has assented to GLCC's continued provision of access services for the reasons given in Count III of the Complaint and Part III of the Argument section of the legal analyses. In this regard, under the Commission's regulatory regime, AT&T cannot under federal law block traffic to GLCC, *In re Establishing Just & Reasonable Rate*, 22 FCC Rcd. 11629, ¶¶ 1, 5 (2007), and thus the fact that calls flow from AT&T's network to INS, and then to GLCC, does not mean that AT&T has assented to GLCC's access services or its unreasonable

practices. For the same reasons, any "network signals" that are exchanged provide no indication of assent by AT&T.

Otherwise, Paragraph 51 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

52. In Paragraph 52, AT&T alleged, as a general proposition, that IXCs will often direct connect to a LEC's end office, because such arrangements are often more cost-effective. AT&T provided ample support for this fundamental proposition, including GLCC's own witness, and GLCC's claims to the contrary lack merit and are denied.

AT&T also denies GLCC's claims regarding Mr. Habiak's testimony, which are addressed in Mr. Habiak's Reply Declaration. First, prior to 2012, AT&T and GLCC operated pursuant to a series of settlement agreements – not GLCC FCC Tariff No. 1. *See* Compl. ¶¶ 49-51; Habiak Reply Decl. ¶ 3. Furthermore, as GLCC admits, there was uncertainty leading up to the *Connect America Order* as to whether access stimulation would be allowed to continue at all. Nelson Decl. ¶ 9; Habiak Reply Decl. ¶ 4. Following the issuance of the *Connect America Order*, GLCC revised its tariff to remove the direct connection service offered under its previous tariff and began billing AT&T for 133 miles of transport services. Compl. ¶ 40; Habiak Decl. ¶¶ 12-13; Habiak Reply Decl. ¶ 4; *GLCC-NVC*, 2015 WL 12551192, at **16-17 & n.15. It was at this juncture that AT&T requested a direct connection arrangement from GLCC. Habiak Decl. ¶ 14; Habiak Reply Decl. ¶¶ 3-4; AT&T Ex. 67, Deposition of John W. Habiak ("Habiak Dep."), at 164:12-165:2, taken Nov. 13, 2014; AT&T Ex. 6, Nelson Dep. at 120:2-11. Second, AT&T denies that Mr. Habiak's testimony concerning when AT&T "considers" a direct connection

service does not support the paragraph's allegation concerning when AT&T "implements" a direct connection. GLCC provides no explanation as to the significance of this distinction. Third, AT&T denies that the cited testimony of Mr. Habiak supports GLCC's allegation that it has no legal obligation to offer AT&T a direct connection service, for the reasons stated above in Paragraph 4 of this Reply.

In addition, AT&T denies that Dr. Toof's expert report, including the portions cited in this paragraph, "offer[s] no evidence or analysis and [is] devoid of any expertise" for the reason given in AT&T's response to GLCC's Motion to Exclude the Expert Report of Dr. Toof. Finally, AT&T denies that it has mischaracterized the testimony of Mr. Starkey; he clearly testified that "[w]hen traffic volumes are high enough, the flat rate associated with a dedicated or direct transport link can be cheaper to the IXC than paying per minute rate elements, e.g., tandem switching, tandem switch transports, and tandem switch transport facilities." AT&T Ex. 18, Starkey Dep. at 120:7-21. And, contrary to GLCC's contention, Mr. Starkey testified that, if AT&T were able to obtain a direct connection from GLCC at CenturyLink's tariffed rates, AT&T would "likely" pay less than it currently pay today. AT&T Ex. 96, Starkey Dep. at 121:23-122:11. Otherwise, Paragraph 52 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

53. Regardless of the precise ratio, GLCC does not and cannot dispute that it terminates to its single switch far more access minutes in Iowa than CenturyLink does in Iowa. This is relevant both because GLCC has not "curtail[ed]" its access stimulation activities, *see Connect America Order* ¶¶ 33, 690, and because the GLCC stimulated traffic volumes are so

substantial that GLCC's tariffed access service (which fails to offer a flat-rated direct connection) is not functionally equivalent to CenturyLink's tariff (which does offer such a service).

Although GLCC alleges that CenturyLink handled approximately 42 billion minutes of access traffic per year in 2012 and 2013, these volumes are irrelevant, and they represent all of the access traffic (including both originating and terminating traffic) that CenturyLink transmitted to or from the millions of end users that it serves throughout the country. *See generally* AT&T Ex. 61, Rebuttal Expert Report of Michael Starkey, Ex. F, submitted Nov. 5, 2014. By contrast, in 2013, GLCC terminated **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** minutes of calls to handful of FCPs in Northwest Iowa. *See* Compl. ¶¶ 53-54.

AT&T denies that Dr. Toof "has no expertise in this respect" for the reasons given in AT&T's Opposition to GLCC's Motion to Exclude the Expert Report of Dr. Toof. Otherwise, Paragraph 53 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

54. In Paragraph 54, AT&T alleged that, even though GLCC handles more terminating traffic in Iowa than CenturyLink does, GLCC has far less switching and related facilities than CenturyLink. Regardless of the precise level of facilities, this fact is undeniable, and it is relevant for the reasons described above.

Further, contrary to GLCC's claim, AT&T is not assessing the "reasonableness" of GLCC's rates, Ans. ¶ 53 n.54, but is stating facts that support AT&T's claim that GLCC's tariffed access services, given GLCC's traffic volumes that it has stimulated, are not functionally

equivalent to CenturyLink's services. Otherwise, Paragraph 53 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

55. AT&T denies that it has not supported its allegation that CenturyLink typically delivers traffic at the volumes at issue in this proceeding via a direct connection arrangement.[13] AT&T also denies that GLCC carries less traffic than CenturyLink, for the reasons stated above in Paragraph 53. AT&T further denies that Dr. Toof is not competent to testify to these facts because he has no experience in the telecommunications industry for the reasons given in AT&T's Opposition to GLCC's Motion to Exclude the Expert Report of Dr. Toof. AT&T denies GLCC's assertions about CenturyLink's network capacity, for the reasons stated by Mr. Habiak in Paragraph 14 of his Reply Declaration. AT&T denies GLCC's assertion that GLCC did not refuse to provide AT&T with a direct connection, *see* AT&T Reply Legal Analysis at Part I.

AT&T admits that GLCC's initial tariff contained rates benchmarked to NECA's rates, which the FCC found was "harmful" and led to "inflated profits" and unreasonable rates. *Connect America Order* ¶ 657. AT&T denies GLCC's claim that its end office "provide[s] equal access" via INS's facilities (or that AT&T admitted this claim). GLCC offers no support that its switch does not offer equal access/dialing parity to GLCC's few customers that originate long distance calls; in any event, in this case, virtually all the traffic is terminating traffic generated by

[13] Mr. Habiak, AT&T's expert, and GLCC's expert all testified that in many cases carriers handing high traffic volumes implement direct connection arrangements because they are generally the most efficient, cost-effective way to transmit large volumes of traffic. *See* Habiak Decl. ¶ 5; AT&T Ex. 13, Expert Report of David I. Toof, ¶¶ 87-89, submitted Oct. 3, 2014; AT&T Ex. 18, Starkey Dep. at 120:7-21.

GLCC's access stimulation activities. *See* Stip. ¶ 12. AT&T denies the last sentence of Paragraph 55 of GLCC's reply, for the reasons stated above and in Mr. Habiak's declarations.

Otherwise, Paragraph 55 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

56. For the reasons stated in Part I of the Argument section of its legal analyses and in the declarations of Mr. Habiak, AT&T denies all of the assertions in the second, third and fourth sentences of Paragraph 56 of the Answer. First, GLCC admits in this very paragraph that "at some point in the first several months of 2012, Mr. Giedinghagen of AT&T called Mr. [Nelson] of Great Lakes to ask whether AT&T could direct connect to Great Lakes' network. … Mr. Nelson declined." Second, both Mr. Habiak and Mr. Nelson testified that AT&T requested a direct connection arrangement from GLCC in 2012 and that that request was denied. Habiak Decl. ¶ 15; AT&T Ex. 67, Habiak Dep. at 164:12-165:2; AT&T Ex. 6, Nelson Dep. at 120:2-13. AT&T also denies that GLCC rejected AT&T's initial request for a direct connection arrangement because AT&T did not provide sufficient details concerning the technical and financial elements of such an arrangement. Rather, Mr. Nelson testified that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** In any event, GLCC and AT&T had additional correspondence on the direct connection, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** AT&T admits that it has withheld certain payment to GLCC since April 2012, but AT&T denies

GLCC's characterization of the withholding as "unlawful" "self-help" for the reasons given in the Complaint, the Reply, and their accompanying legal analyses.

AT&T further denies claims about the details of GLCC's alleged commercial arrangements with other carriers. With one exception, GLCC has refused to produce documentation about those arrangements. Otherwise, Paragraph 56 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

57. For the reasons stated in Part I of the Argument section of AT&T's legal analyses, GLCC has refused to provide AT&T with a direct connect, at rates offered by CenturyLink for functionally equivalent services, and GLCC has also refused to permit, without unreasonable conditions, AT&T to install direct trunking to GLCC's end office. As to GLCC's tariff, Mr. Nelson testified (and the parties stipulated) that GLCC does not offer a direct connection arrangement under its tariff. AT&T Ex. 6, Nelson Dep. at 126:9-15; Stip. ¶ 13. AT&T further denies that GLCC accepted AT&T's request for a direct connection arrangement, and as AT&T has explained, the District Court rejected GLCC's claim in this regard. *See GLCC-AT&T*, 124 F. Supp. 3d 824, 848 (N.D. Iowa 2015).

AT&T further denies that the FCPs served by GLCC are "end users" or "customer(s)," as those terms are defined in GLCC's tariff and the Commission's rules, because they do not pay a fee for telecommunications service. *See* AT&T Legal Analysis at Part II; AT&T Reply Legal Analysis at Part II.

Otherwise, Paragraph 57 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or

arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

58. AT&T denies that GLCC's traffic is like the traditional traffic handled by INS. INS was created "to lower the cost" of transporting traffic within Iowa, by aggregating small volumes of calls from a number of independent LECs, which, at the time of INS's formation, could not offer equal access to callers to originate long distance services. *AT&T Corp.* v. *Alpine Commc'ns*, 27 FCC Rcd. 11511, ¶ 29 (2012); *In re Application of Iowa Network Access Division*, 3 FCC Rcd 1468, ¶ 3 (C.C.B. 1989). INS's service was never designed for, nor is it appropriately charged on, access stimulation traffic. GLCC's traffic, of course, consists entirely of access stimulation traffic, and all of it is terminating. AT&T further denies that the FCPs served by GLCC are "end users" or "customer(s)," as those terms are defined in GLCC's tariff and the Commission's rules, because they do not pay a fee for telecommunications service. *See* AT&T Legal Analysis at Part II; AT&T Reply Legal Analysis at Part II. Otherwise, Paragraph 58 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

59. Contrary to GLCC's claims in Paragraph 59, GLCC's refusal to provide or permit a direct connect, in violation of the Commission's rules, has caused AT&T to pay for INS's more costly transport. AT&T paid all of INS's charges, including for GLCC traffic, until late in 2013, when INS raised its rates above the cap the Commission put in place, *Connect America Order* ¶ 801. AT&T denies that its withholding of INS's improperly billed charges is self-help, for the reasons described above in Paragraph 19. For all of the reasons in Part I of the Argument section of AT&T's legal analyses and Mr. Habiak's declaration, AT&T maintains that GLCC refused to

provide or permit a direct connect, which caused AT&T to be billed for a more costly transport service by INS. For the reasons in Mr. Habiak's declarations, AT&T denies that GLCC did not understand how AT&T would seek to install direct trunking. AT&T also denies that the analysis in Mr. Starkey's declaration is accurate, and, in any event, even if it were, there would still be substantial savings if AT&T could bypass tandem services.

Otherwise, Paragraph 59 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

60. AT&T repeats and re-alleges each and every reply contained in Paragraphs 1 to 59 of this Reply as if set forth fully herein. Otherwise, Paragraph 60 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

61. AT&T denies that it has not offered any factual support for is allegation that, at the traffic volumes at issue, INS's service is significantly less efficient and more costly than a direct connection arrangement. Indeed, GLCC's witness, Mr. Starkey, conceded this point. AT&T Ex. 18, Starkey Dep. at 120:7-21; *see also* Habiak Decl. ¶¶ 5, 15-24. Further, as explained above in Paragraph 58, the Commission's approval for INS to operate in 1988 does not mean that INS's service is the appropriate and efficient way to carry large volumes of access stimulation traffic to CLECs.

As AT&T has explained in Part I of the Argument section of its legal analyses, GLCC is obligated by the Commission's rules to provide a functionally equivalent service to CenturyLink,

and thus should have provided a direct connection, and thus AT&T denies the third sentence of Paragraph 61 of the Answer. Alternatively, AT&T has sought—at its own expense—to transport the relevant traffic to GLCC's switch through a third-party, such as CenturyLink. Compl. ¶¶ 55-56. GLCC's claims as to Century Link's capacity are denied, for the reasons stated above and in Mr. Habiak's reply declarations.

AT&T denies that there is no factual support for its allegation that direct connection arrangements avoid the need to incur tandem-switching or per-minute transport costs. *See, e.g.*, *PrairieWave* ¶ 27; AT&T Ex. 18, Starkey Dep. at 120:7-21. AT&T also denies that Mr. Habiak's estimate of AT&T's cost savings includes improper assumptions, for the reasons given Mr. Habiak's declarations. *See, e.g.*, Habiak Reply Decl. ¶ 16-27. Otherwise, Paragraph 61 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses

62. AT&T denies this response for the reasons given in Paragraphs 56 to 61 of this Reply. Otherwise, Paragraph 62 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

63. AT&T denies this response for the reasons given in Paragraph 59 of this Reply. Otherwise, Paragraph 63 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

64. For the reasons stated in Part I of the Argument section of its legal analyses, AT&T denies that it is requesting that the Commission establish "new law." Rather, it is asking that the Commission enforce its existing CLEC access rules against GLCC. *See* AT&T Legal Analysis at Part I; AT&T Reply Legal Analysis at Part I. Otherwise, Paragraph 64 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

65. AT&T denies that it has mischaracterized the *Connect America Order*. Otherwise, Paragraph 65 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

66. GLCC admits the allegations in Paragraph 66 of the Complaint and therefore no response is required.

67. AT&T denies the first phrase in Paragraph 67 of the Answer, for the reasons stated in Part I of the Argument section of its legal analyses. AT&T admits that, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**, but it denies any claims about CenturyLink's capacity, for the reasons given in its Reply Legal Analysis and the Reply Habiak Declaration. For the reasons stated above, in its legal analyses, and in Mr. Habiak's declarations, AT&T denies all the remaining claims and allegations in Paragraph 67. In any event, even if GLCC's claims were true, GLCC has nevertheless violated its obligations under the Commission's CLEC access rules.

Otherwise, Paragraph 67 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

68. AT&T denies that Mr. Habiak's estimate of AT&T's costs savings includes improper assumptions, for the reasons given Mr. Habiak's declarations. *See, e.g.*, Habiak Reply Decl. ¶¶ 16-27. AT&T denies GLCC's assertions about CenturyLink's network capacity, for the reasons stated by Mr. Habiak in Paragraph 14 of his Reply Declaration. Otherwise, Paragraph 68 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

69. As to the second sentence in Paragraph 69, AT&T incorporates its response to Paragraph 68. Otherwise, Paragraph 69 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

70. AT&T denies the allegations in paragraph 70, for the reasons given in its legal analyses, and it denies the claim that it has a "habitual practice" of not paying for access, which GLCC does not support and which is totally inaccurate. Otherwise, Paragraph 70 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

71. Paragraph 71 of the Answer does not contain specific factual allegations or legal

arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

72. Paragraph 72 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

73. AT&T repeats and re-alleges each and every reply contained in Paragraphs 1 to 72 of this Reply as if set forth fully herein. Otherwise, Paragraph 66 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

74. Paragraph 74 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

75. Paragraph 75 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

76. AT&T denies this response for the reasons given in Paragraph 39 of this Reply. Otherwise, Paragraph 76 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments

are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

77. AT&T denies this response for the reasons given in Paragraphs 41 to 46 of this Reply. Otherwise, Paragraph 77 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

78. AT&T denies this response for the reasons given in Paragraphs 47 and 48 of this Reply. Otherwise, Paragraph 78 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

79. AT&T denies that the FCPs served by GLCC are "end users," as that term is defined in GLCC's tariff and the Commission's rules, because they do not pay a fee for telecommunications service. *See* AT&T Legal Analysis at Part II; AT&T Reply Legal Analysis at Part II. Otherwise, Paragraph 79 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

80. AT&T denies the allegations in Paragraph 80. As AT&T explained above in Paragraph 51, GLCC's claims about its bill dispute provisions are wrong and have been rejected. Otherwise, Paragraph 80 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments

are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

81. Paragraph 81 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

82. AT&T repeats and re-alleges each and every reply contained in Paragraphs 1 to 81 of this Reply as if set forth fully herein. Otherwise, Paragraph 82 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

83. Paragraph 83 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

84. Paragraph 84 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

85. Paragraph 85 of the Answer does not contain specific factual allegations or legal arguments to which a response is required. If it does, however, those allegations or arguments are denied for the reasons given in the Complaint, this Reply, and their accompanying legal analyses.

86. For the reasons in its Complaint, this Reply, the legal analyses, and their supporting material, AT&T denies the allegations in Paragraph 86. In no event should the Commission find "in the alternative" that "AT&T violated" GLCC's "dispute resolution provision" in its tariff, because the District Court denied that claim, and that issue is not pending before the Commission.

Respectfully submitted,

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Dated: October 6, 2016

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

In the Matter of **AT&T CORP.** **One AT&T Way** **Bedminster, NJ 07921** **(202) 457-3090** ***Complainant,*** ***v.*** **GREAT LAKES COMMUNICATION CORP.** **1713 McNaughton Way** **Spencer, IA 51301** **(712) 580-4700** ***Defendant.***	**File No. EB-16-MD-001**

REPLY LEGAL ANALYSIS IN SUPPORT OF FORMAL COMPLAINT OF AT&T CORP.

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INTRODUCTION

Great Lakes Communication Corp. ("GLCC") is a company that has demonstrated its inability to understand or comply with fundamental regulatory requirements.[1] Its Answer confirms that it either does not understand the Federal Communications Commission's (the "Commission") rules, or has elected to ignore them. Indeed, GLCC consistently turns regulatory requirements on their head:

- When the Commission said in its 2011 *Connect America Order* that it wanted to "curtail" access stimulation,[2] GLCC took that as a directive to expand its business, pumping **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** of traffic per year.

- In that same order, the Commission told GLCC that, if it wanted to continue to engage in access stimulation, it must reduce its rates to those of CenturyLink. *Id.* ¶ 689. Instead of simply adjusting its rates, GLCC re-wrote the fundamental terms of its access tariff so that its service would be different from CenturyLink's access service – including removing an offer to transport calls via a flat-rated, direct-trunked transport service, which is a lower cost method of hauling the enormous volumes of traffic GLCC stimulates.

- In 2008, the Commission instructed competitive local exchange carriers ("CLECs") to "permit an IXC [interexchange carrier] to install direct trunking from the IXC's point of presence to the competitive LEC's end office, thereby bypassing any tandem function."[3] However, when AT&T asked GLCC to allow such a connection, GLCC said **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]] [[BEGIN CONFIDENTIAL]]** [redacted]

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[1] Compl. ¶¶ 27-30; Ex. 16, *In re Great Lakes Commc'ns Corp.*, No. SPU-2011-004, at **12-15 (IUB Mar. 30, 2012) ("*IUB GLCC Order*") ("Great Lakes' confusion about Board orders, its own tariffs, where it is providing service, and its own business operations demonstrates that Great Lakes may not possess the managerial ability to comply with Board orders, provide accurate and complete information to the Board, and provide reasonably adequate local exchange service").

[2] *In re Connect America Fund*, 26 FCC Rcd. 17663, ¶¶ 33, 649 (2011) ("*Connect America Order*").

[3] *Access Charge Reform, PrairieWave Telecomms., Inc. Petition for Waiver of Sections 61.26(b) and (c), or in the Alternative, Section 61.26(a)(6) of the Commission's Rules*, 23 FCC Rcd. 2556, ¶ 27 (2008) ("*PrairieWave*").

[4] AT&T Ex. 6, Deposition of Joshua D. Nelson ("Nelson Dep.") at 120:2-13, taken Nov. 6, 2014.

[redacted] **[[END CONFIDENTIAL]]**

- In *Northern Valley I*, the Commission explained that CLECs electing to file tariffs for switched access must charge end users, as incumbent local exchange carriers ("ILECs") do, a fee for telecommunications services.[5] Rather than comply with that order, GLCC billed most of its conferencing and chat customers ("FCPs") for **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

- Under the Commission's rules for CLEC access services, which were first issued in 2001, the Commission "adopted a new regulatory regime,"[6] because "action was necessary" in order to "prevent CLECs from exploiting the market power in the rates that they tariff for switched access services."[7] The Commission's regulatory regime thus provides that (i) CLECs may only recover for access in two ways (a lawful tariff or a negotiated contract), and (ii) there is "no regulatory gap" that allows alternative state law claims. Yet, in GLCC's view, this means the Commission has "de-regulated" GLCC's access services, thereby permitting it to pursue alternative state law claims, seeking a recovery that exceeds its tariff rate by **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

Making matters worse, GLCC's response to AT&T's Complaint is to accuse AT&T of "absurdist nitpicking," GLCC Legal Analysis at 46, of "linguistic sorcery," *id.* at 22, and of "trying to put Great Lakes out of business, by any means necessary," *id.* at 8 n.22. The Commission should ignore GLCC's unfounded rhetoric. AT&T is one of the largest access payors, and it recognizes that it is obligated to pay access charges on traffic associated with access stimulation. But that obligation exists *only* pursuant to a negotiated contract or a lawful tariff that complies with the Commission's rules, including the requirements set forth above, which GLCC does not follow or even seem to understand.

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[5] *Qwest Commc'ns* v. *N. Valley Commc'ns*, 26 FCC Rcd. 8332, ¶¶ 8-9 (2011) ("*Northern Valley I*"), *recon denied*, 26 FCC Rcd. 14520 (2011) ("*Northern Valley II*"), *aff'd*, *N. Valley Commc'ns* v. *FCC*, 717 F.3d 1017 (D.C. Cir. 2013) ("*Northern Valley III*").

[6] Eighth Report and Order and Fifth Order on Reconsideration, *In re Access Charge Reform*, 19 FCC Rcd. 9108, ¶ 1 (2004) ("*Eighth Report and Order*").

[7] Seventh Report and Order, *In re Access Charge Reform*, 16 FCC Rcd. 9923, ¶¶ 2, 30-34 (2001) ("*CLEC Access Order*").

As a general matter, the Commission's CLEC access rules are intended to "mimic the operation of the marketplace," by allowing CLECs to file tariffs only when they offer services at rates no higher than the rates the benchmark ILEC charges for functionally equivalent services. *CLEC Access Order* ¶ 3; *see id.* ¶¶ 37, 55; *Northern Valley I* ¶¶ 5-11; 47 C.F.R. § 61.26. When CLECs follow the Commission's rules, IXCs will often be indifferent as to whether a CLEC or ILEC is providing access because the two services must be functionally equivalent, and priced at the same levels. GLCC, however, has no real interest in competing with CenturyLink or any other local carrier. Its primary business model is, and has been, to manipulate the flaws in the Commission's intercarrier compensation regime, abuse its bottleneck monopoly, "exploit[] the market power in the rates that [it] tariff[s]" by aiding in the stimulation of traffic that would not otherwise exist, and force AT&T to take GLCC's services on terms that GLCC dictates. GLCC's conduct is contrary to the public interest and the Commission's rules. GLCC's defenses of its conduct lack merit, and should be rejected.

The remainder of AT&T's Reply is organized as follows. Part I explains that GLCC has no valid defense to AT&T's claim that GLCC committed an unreasonable practice under Section 201(b), in violation of the Commission's CLEC access rules, by failing to provide or permit a direct connection. Part II addresses GLCC's defenses to AT&T's claim that GLCC violated its tariff and the Commission's rules by billing AT&T for access services on traffic for which GLCC did not bill or collect a fee for telecommunications service. Part III demonstrates that the District Court was correct in dismissing GLCC's alternative state law claims, and that GLCC's claim that the Commission's rules authorize such claims has no merit.

I. GLCC'S REFUSAL TO PROVIDE OR ALLOW A DIRECT CONNECTION IS AN ABUSE OF ITS BOTTLENECK MONOPOLY, AND VIOLATES SECTION 201(b) OF THE ACT AND THE COMMISSION'S RULES FOR CLECs THAT ENGAGE IN ACCESS STIMULATION.

Contrary to GLCC's claims, Count I of AT&T's Complaint does not seek a "new" legislative rule, or any amendment to the Commission's rules or interpretation of Section 251 of the Act. Rather, AT&T is simply asking the Commission to enforce its existing rules, specifically its longstanding CLEC access rules and its 2011 rules regarding access stimulating LECs.[8] GLCC violated those rules in two ways, and enforcing them against GLCC on a retroactive basis is fully consistent with the norms of agency adjudication.

First, CLEC access rules "require that tariffed CLEC charges for 'interstate switched exchange access services' be for services that are 'the functional equivalent' of ILEC interstate switched exchange access services." *Northern Valley I* ¶ 8. GLCC has violated these rules, because its access services are not "the functional equivalent" of the access services of CenturyLink, the ILEC against which it must benchmark its rates.

Prior to the Commission's *Connect America Order*, GLCC filed a tariff with terms of service that were roughly equivalent to those offered by CenturyLink, but with rates that were much higher than CenturyLink's rates. In response to the *Connect America Order*, GLCC did not simply lower the rates in its tariff, as the Commission required. Rather, GLCC re-wrote its tariff in several fundamental respects, including by eliminating the option to purchase "flat-rated" "direct-trunked transport" that would bypass tandem switching and per-minute, per-mile

[8] As such, GLCC's lengthy discussion of the distinctions between rulemaking and adjudication is beside the point. *See* GLCC Legal Analysis at 25-35; *see also infra* pp. 19-20 (discussing GLCC's argument).

tandem-switched transport.[9] At the traffic volumes stimulated by GLCC's FCPs, a flat-rated transport service is far less expensive than the per-minute rates that INS charges to transport calls between Des Moines and Spencer, the location of GLCC's switch.[10] Unlike in GLCC's prior tariff and in CenturyLink's tariff, which offer at least two options for transporting traffic (both flat-rated and per-mile), GLCC's current tariff no longer offers any flat-rated transport service. *See* Compl. ¶¶ 34, 40.

As such, GLCC's revised tariff violates the *Connect America Order* and the Commission's benchmarking rule: given the large traffic volumes that GLCC has stimulated, GLCC's tariffed access service is *not* functionally equivalent to CenturyLink's service. *See Northern Valley I* ¶ 8.[11] Rather, it forces IXCs to use and pay for the highest-cost transport service. To comply with the Commission's rules, GLCC, as a CLEC engaged in access stimulation, should either have retained the flat-rated transport offering in its tariff, or reduced its rates to reflect the fact that its tariffed access service is inferior, and results in higher costs to its IXC customers.

Second, even if the Commission's rules did not require GLCC, when engaged in access stimulation, to *provide* a direct connection by tariff, its rules and its decision in *PrairieWave* require GLCC to "*permit* an IXC to install direct trunking from the IXC's point of presence to

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[9] *See* AT&T Ex. 17, GLCC FCC Tariff No. 1, Orig. Page 6-3, filed Sept. 1, 2005 (diagram of GLCC's "components of Switched Access Service," which includes "Direct-Trunked Transport (flat-rated)" and provides direct transport between GLCC's end office switch and an IXC serving wire center and point of presence).

[10] Declaration of John W. Habiak ("Habiak Decl.), ¶¶ 13-29, dated Aug. 15, 2016.

[11] Indeed, GLCC concedes that tandem-switched transport service is "very different" from flat-rated direct trunked transport service, *see, e.g.*, GLCC Legal Analysis at 14, 16, 22, 23, 24, 33, and thus, when a carrier engages in access stimulation on a scale like that of GLCC, a tariff offering both a flat-rated direct transport option and a tandem-switched transport option is not functionally equivalent to tariff offering only a tandem-switched transport service.

[[BEGIN HIGHLY CONFIDENTIAL]] [[END HIGHLY CONFIDENTIAL]] [[BEGIN CONFIDENTIAL]] [[END CONFIDENTIAL]] By refusing to allow a direct connection, GLCC violated the Commission's existing precedents and Section 201(b) of the Act.

A. GLCC's Arguments In Support Of Its Refusal To Direct Connect Lack Merit.

1. GLCC's Obligation To Provide Or Allow A Direct Connection Arises Not Under Section 251, But Under Section 201 And Commission Rules That Govern CLECs Engaged In Access Stimulation.

GLCC's primary argument is that CLECs generally are not obligated under Section 251 of the Act to interconnect directly, and it points to testimony from AT&T that acknowledges this statement of law. GLCC Legal Analysis at 1-2, 8-11. AT&T has not, however, alleged a claim under Section 251. Rather, AT&T claims that (1) GLCC, as a CLEC engaged in access stimulation, violated the Commission's "functional equivalence" rules, which implement Section 201(b) of the Act, by filing a tariff that, unlike CenturyLink's tariff, omits the transport option that is demonstrably less expensive for GLCC's traffic volumes; and (2) GLCC improperly

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[12] *PrairieWave* ¶ 27 (emphasis added).

[13] [[BEGIN CONFIDENTIAL]] T [[END CONFIDENTIAL]]

refused to permit AT&T to install direct trunking to GLCC's end office, in violation of the Commission's *PrairieWave* decision, which also implements Section 201(b) of the Act.

Even though CLECs generally do not have an obligation under Section 251(a) to interconnect directly with other carriers, the interconnection obligations of a LEC as to an IXC have long been subject to Section 201.[14] As to CLECs, beginning in 2001, the Commission has relied on Sections 201(b) and 203 to regulate the rates, terms and conditions CLECs may impose upon IXCs through tariffs for switched access services. *CLEC Access Order* ¶¶ 2-44, 145. Specifically, the Commission found that because of their bottleneck monopolies, CLECs have the incentive and ability to overcharge IXCs and IXC customers. *Id.* ¶¶ 2, 30, 34.

To constrain abuses of those bottleneck monopolies, the Commission adopted benchmarking rules, implemented under Sections 201 and 203, for CLECs tariffing their switched access services. *CLEC Access Order* ¶¶ 3, 145; AT&T Legal Analysis at 7-10. Because the Commission recognized that rates have "meaning only when one knows the services to which they are attached," *Eighth Report and Order* ¶ 14, the CLEC's tariffed offering of access service has to include "the functional equivalent of ILEC interstate exchange access services." *Northern Valley I* ¶ 8. In addition, in 2008, the Commission explained that *all* CLECs should "permit an IXC to install direct trunking from the IXC's point of presence to the competitive LEC's end office, thereby bypassing any tandem function." *PrairieWave* ¶ 27. And, in 2011, because of additional abuses by CLECs engaged in access stimulation, the Commission required access-stimulating CLECs to benchmark against, and offer service

[14] *E.g.*, *In re Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971); *Connect America Order* ¶ 1338 n.2435; *cf.* AT&T Legal Analysis at 20 n.92 (explaining that Section 251(a) obligations for telecommunications carriers like CLECs were premised on the view that they did not have bottleneck monopolies, such as those that CLECs have over access).

functionally equivalent to, the lowest-priced, price cap LEC in the state. *Connect America Order* ¶¶ 688-89.

As such, under the Commission's CLEC access rules, GLCC (like all CLECs) is obligated to permit IXCs to install direct trunking to its switch, *PrairieWave* ¶ 27, and, since 2011, as an access stimulating LEC, GLCC has been obligated to benchmark its tariffed access service against CenturyLink's switched access service, which offers IXCs the ability to obtain flat-rated, direct-trunked transport. *See, e.g.*, AT&T Ex. 10, CenturyLink FCC Tariff No. 11, Orig. Pages 6-9, 6-12, 6-225. Both of those obligations arise from the Commission's rules implementing Sections 201 and 203 – not from Section 251.

Further, nothing in Section 251(a) is at odds with the Commission's rules issued under Sections 201 and 203. Section 251 was added to the Act in 1996, as part of Congress's effort to address *local* competition. Section 251(a) provides the minimum duty of indirect connection on *any* telecommunications carrier, in order to ensure that callers can complete calls to and from the customers of all other carriers.[15] Section 251(a) does not, as GLCC claims, establish both a floor *and* a ceiling for the interconnection obligations of CLECs when they provide switched access services to IXCs, especially when they are engaged in access stimulation schemes. *Cf. Local Competition Order* ¶ 997; AT&T Legal Analysis at 20 n.92. Rather, because of concerns about CLEC abuse of their bottleneck monopolies, the Commission has invoked Section 201(b) to

[15] *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 997 (1996) ("*Local Competition Order*") (subsequent history omitted).

impose on CLECs additional interconnection obligations with respect to switched access services that CLECs elect to offer via tariff.[16]

Finally, GLCC's reliance on Mr. Habiak's testimony in another proceeding regarding his understanding of Section 251 is entirely misplaced. The facts of the case in which Mr. Habiak testified are far different than those in this case. *See* Reply to Ans. ¶ 4. That case involved an entirely different routing scheme, and the tandem-switched transport charges at issue in that case should have been only about $0.001 per minute under the Commission's benchmark. *Id.* At that rate, and because much lower traffic volumes were at issue, there was no need to use a direct connection. *Id.* By contrast, the tandem charges that INS imposes on GLCC's traffic are about 0.9 cents per minute.

2. The Commission's Benchmarking Rules For Access-Stimulating LECs Require GLCC To Offer A Direct Connection Like CenturyLink Does.

GLCC claims that AT&T's request for a direct connection "violates" the Commission's CLEC access rules, and specifically the list of illustrative rate elements in 47 C.F.R. § 61.26(a)(3). GLCC Legal Analysis at 1-2, 14-15, 22-24. This argument ignores the text of that regulation, as well as the Commission's interpretation of the functional equivalence requirement.

According to GLCC, the Commission "clearly defined the ILEC bundle of access services against which CLECs must benchmark their rates, and 'direct-trunk transport' is conspicuously absent from that list." GLCC Legal Analysis at 14-15. However, the list that the

[16] Although CLECs generally do not have the obligation under Section 251(a) to provide direct connections like ILECs do, all CLECs must permit IXCs to install direct trunks to CLECs' end offices. *PrairieWave* ¶ 27. Further, in circumstances like those presented here, where a CLEC (i) has engaged in access stimulation and (ii) has filed a tariff with rates that match the lowest-priced price cap LEC in the state, that CLEC must provide a direct connection in its tariff in order to fulfill its obligation, under the Commission's CLEC access rules and Section 201(b), to offer service that is functionally equivalent to that price cap LEC. *Northern Valley I* ¶ 8; 47 C.F.R. § 61.26.

Commission included in Section 61.26(a)(3) is what a CLEC "typically" would offer, and GLCC, as one the nation's largest access-stimulating CLECs, is not typical. *See* 47 C.F.R. § 61.26(a)(3); AT&T Legal Analysis at 22. Further, GLCC's view that the "functional equivalence" requirement is limited to matters expressly listed in section 61.26(a)(3) cannot be squared with Commission precedent. In *Northern Valley I*, for example, the Commission construed the functional equivalence standard to impose obligations on CLECs that are not specified in the text of Section 61.26, but which nonetheless follow from tethering CLEC rates and services to those of a benchmark ILEC. *Northern Valley I* ¶¶ 5-11. If GLCC's interpretation of Section 61.26(a)(3) were correct, then *Northern Valley I* would be invalid. What is critical here is that GLCC's tariffed access service, which eliminates cost-effective transport in favor of a far more costly transport service, is not functionally equivalent to CenturyLink (or even to GLCC's prior tariff).

Further, GLCC's artificially narrow interpretation of Section 61.23(a)(3) is simply inconsistent with the text of the regulation. The text of § 61.26(a)(3) defines a CLEC's switched access service to "include" the functional equivalent of ILEC services "typically" associated with the listed rate elements. 47 C.F.R. § 61.26(a)(3). It remains a canon of construction that, where "[a] definition is introduced with the verb 'includes,' . . . the examples enumerated in the text are illustrative, not exhaustive."[17] Indeed, the Commission itself has stated that the list of rate elements is not exclusive, but instead "illustrate[s] what might be considered the 'functional equivalent' of [ILEC] access services." *Eighth Report and Order* ¶ 13 n.48; *see also CLEC Access Order* ¶ 55 n.126.

[17] *Christopher* v. *SmithKline Beecham Corp.*, --- U.S. ---, 132 S. Ct. 2156, 2160 (2012).

GLCC states that tandem-switched transport is "very different" from direct-trunked transport, GLCC Legal Analysis at 14, implying that the Commission, having expressly included the former in the text of Section 61.26(a)(3), cannot lawfully require GLCC to provide the latter. However, the differences between tandem-switched transport and direct-trunked transport support AT&T's position, not GLCC's.[18] The fact that the services are "very different" means that, at the traffic volumes stimulated by GLCC, GLCC's tariff (which lacks a flat-rated direct-trunked transport option) is "very different" from, and not functionally equivalent to, CenturyLink's tariff (which does include such an option).

GLCC seems to think that because Section 61.26(a)(3) expressly mentions tandem-switched transport but not direct-trunked transport, then direct-trunked transport is outside the scope of the rule. Not true.[19] The Commission's benchmark rules encompass more than tandem-switched transport and the other listed rate elements. The rules apply to "switched exchange access services," 47 C.F.R. § 61.26, "however described in tariffs." *CLEC Access Order* ¶ 55. As the Commission explained, switched access service typically entails "a

[18] The differences are that tandem-switched transport goes through a tandem switch, and is typically priced (albeit not by INS) on a per-minute, per-mile basis, whereas direct-trunked transport bypasses the tandem, and is generally flat-rated (as in GLCC's initial tariff, AT&T Ex. 17, GLCC FCC Tariff No. 1, Orig. Page 6-3). As such, direct-trunked transport is plainly less costly where, as here, an IXC is required to transport large volumes of traffic to a single end office. By contrast, when an IXC wants to transport to multiple end offices, but only small volumes of traffic to each end office, then it is generally less expensive to establish a connection only to the tandem, and pay for the tandem-switched transport to each office.

[19] GLCC claims that the omission of "direct-trunked transport" from the list of elements in section 61.26(a)(3) must have been intentional, because that service is described elsewhere in the Commission's rules. *See* GLCC Legal Analysis at 22-23 & n.71 (citing 47 C.F.R. §§ 69.112, 69.2(oo)). The rules that GLCC contrasts with section 61.26 plainly do not support such an inference, as they were promulgated at a different time, pursuant to a different section of the Act, and for a different regulatory purpose. *See In re Review of Commission's Rules & Policies Affecting Conversion to Digital Television*, 17 FCC Rcd. 15978, ¶ 30 (2002) (refusing to infer deliberate exclusion of language at issue where the disparate provisions "were enacted as part of entirely different Acts, separated by a significant time period.").

connection between the LEC switch and the serving wire center (often referred to as 'interoffice transport')." *Id.* Both tandem-switched transport and direct-trunked transport provide a connection between the LEC switch and the serving wire center, and both are types of interoffice transport. As such, both of these forms of transport are encompassed by the Commission's CLEC access rules. The fact that direct-trunked transport is not expressly listed in Section 61.26(a)(3) does not mean it is not a switched access service that, in the circumstances presented here, GLCC must offer in order to meet its obligation to provide services functionally equivalent to CenturyLink. It is not listed because, as noted above, CLECs "typically" (*id.*) do not need to offer it, because most CLECs are not engaged in access stimulation.

3. GLCC's "Rate Structure" Argument Is A Red Herring.

GLCC relies on a snippet from the *CLEC Access Order* that the Commission's rules do not require "'any particular rate elements or rate structure.'"[20] This statement has no effect in this case. As the Commission has emphasized, regardless of whether a CLEC files a composite rate or tariffs rates for individual rate elements, the "aggregate charge" cannot exceed what the ILEC would charge for a functionally equivalent service. *CLEC Access Order* ¶ 55. As the Commission explained in a relevant appellate brief, "the rate *structure* a CLEC chooses for its tariff has no bearing on the maximum rate *level* established by Rule 61.26(c)."[21]

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[20] GLCC Legal Analysis at 15, 24 (quoting *CLEC Access Order* ¶ 55). Paragraph 55 of the *CLEC Access Order*, read as a whole, flatly contradicts GLCC's claim that only tandem-switched transport is addressed by the Commission's CLEC access rules. Indeed, it makes clear that the "switched access services" covered by the Commission's rules include all types of "interoffice transport." *Id.* Further, the footnote to this paragraph makes clear that, while the benchmark rules apply to certain specific rate elements, the Commission's rule is not necessarily limited to those specified elements *Id.*; *cf.* 47 C.F.R. § 61.26(a)(3).

[21] AT&T Ex. 98, Brief for Amicus Curiae FCC, *PaeTec Commc'ns, Inc.* v. *MCI Commc'ns Servs. Inc.* ("*PaeTec-MCI*"), Nos. 11-2268, et al., at 20, 25-28 (3d Cir., filed Mar. 14, 2012) ("FCC Amicus Br.").

Here, GLCC elected to tariff rates for individual elements, and it set the rates for those rate elements at the same level as CenturyLink's rates.[22] GLCC's service, however, is *not* functionally equivalent to CenturyLink's service and consequently its rates fail to meet the benchmark. Given its choice to tariff individual rate elements at rates equal to CenturyLink, GLCC could not simply omit the rate element (direct-trunked transport) in CenturyLink's tariff that offered the lowest rate to transport the high traffic volumes that GLCC has stimulated. Having elected to do so, GLCC effectively raised the "aggregate charge" to AT&T to a rate that far exceeds the applicable CenturyLink rate. While nothing in the Commission's rules would preclude GLCC from using a composite rate, GLCC did not elect to do so.[23]

4. GLCC Also Violated The Commission's Rules And Its *PrairieWave* Decision By Refusing AT&T's Request To Install A Direct Connection.

GLCC's refusal to permit AT&T to obtain its own transport to connect to GLCC's switch violates the Commission's decision in *PrairieWave* and provides an independent basis for finding that GLCC violated Section 201(b) of the Act. *See* AT&T Legal Analysis at 13-24. GLCC offers three arguments to justify its position, but none have merit.

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[22] *See* AT&T Ex. 8, GLCC FCC Tariff No. 2, Orig. Page Nos. 54-55. The District Court found that GLCC's tariff did not actually permit GLCC to charge for any transport itself. Order on Mots. For Summ. J., *Great Lakes Commc'n Corp.* v. *AT&T Corp.* ("*GLCC-AT&T*"), No. 13-4117, 2015 WL 12551192, at **17-21 (N.D. Iowa Jun. 8, 2015).

[23] Contrary to GLCC's argument, AT&T is not asking the Commission to "reverse" its holdings in the *Eighth Report and Order*. GLCC Legal Analysis at 3-4 (citing *Eighth Report and Order* ¶¶ 9, 13). According to GLCC, that *Order* holds that, if a CLEC serves the end user, it is entitled to the "full benchmark" rate of the ILEC. *Id.* GLCC misreads the *Order*. As the Commission has explained, a CLECs can charge the "full benchmark" only when it serves the end user and provides all of the same functionality as the ILEC, *i.e.*, all tandem *and* end office functions. *See* AT&T Ex. 98, FCC Amicus Br. at 12-21. A CLEC cannot charge for any services that it does not provide, and thus even when it serves the end user, it cannot charge, for example, for tandem services that only the ILEC provides. *Id.*

First, GLCC claims that AT&T never "meaningfully requested" a direct connection.[24] As GLCC has conceded elsewhere in its submission, this is flatly wrong.[25] Although GLCC's CEO now claims to have lacked an understanding of certain unspecified aspects of AT&T's requests, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

Second, GLCC argues that "*PrairieWave* is irrelevant because this is not about whether AT&T can bypass *Great Lakes*' tandem switch; AT&T wants to bypass *INS*'s tandem switch." GLCC Legal Analysis at 21. However, when the Commission stated that a CLEC should "permit an IXC to install direct trunking . . . , thereby bypassing any tandem function," it meant what it said: that an IXC should be permitted to "bypass[] *any* tandem function." *PrairieWave* ¶ 27 (emphasis added). The Commission's holding is not limited, as GLCC seems to believe, to permitting IXCs to bypass only those tandem functions provided by a LEC that also owns the end-office switch.[26]

Third, GLCC claims that AT&T does not have a right to bypass INS's switch because **[[BEGIN CONFIDENTIAL]]** [redacted]

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[24] GLCC Legal Analysis at 20; Ans. ¶ 56 (claiming AT&T has not offered competent proof of its request).

[25] Ans. ¶ 56 (GLCC's CEO testifying "concerning the reasons for *declining AT&T's initial direct connection request*.") (emphasis added). GLCC's claim that AT&T did not previously request a direct connection under GLCC's prior tariff , *id.* ¶ 55, misses the point. Prior to filing its revised tariff in 2012, GLCC provided service to AT&T under negotiated contracts, not the tariff. *See* Habiak Reply Decl. ¶ 3.

[26] As further noted by the Commission, one of the concerns raised regarding whether CLECs could charge for tandem and end-office switching was that "it . . . could lead to IXCs being billed by multiple competitive LECs and incumbent LECs." *PrairieWave* ¶ 23. The Commission found that there was limited risk that this would occur, "[s]o long as an IXC may elect to direct trunk to the competitive LEC end offices, and thereby avoid the tandem switching function and associated charges." *Id.* ¶ 27.

[redacted]

[[END CONFIDENTIAL]]

Further, and more significantly, AT&T's ability to actually procure the transport necessary for a direct connection in no way excuses GLCC's failure to live up to its common carrier obligations. As explained above, GLCC was required to permit such connections. Thus, the Commission should disregard GLCC's claim that its violation should be excused because of its alleged belief that AT&T could not procure the transport.

B. By Refusing To Provide Or Permit A Direct Connection To Its Network, GLCC Forces AT&T To Use INS's Far More Costly Transport Service.

GLCC asserts that it should not be held responsible for the consequences of its failure to provide or permit a direct connect because "[GLCC] does not require AT&T to use INS" and AT&T had other options to route calls to GLCC. GLCC Legal Analysis at 21 (citing Declaration of Josh Nelson ("Nelson Decl."), ¶ 20, Sept. 14, 2016). This is simply not accurate. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[[END HIGHLY CONFIDENTIAL]]

Second, within the LERG, GLCC lists INS as the tandem carrier IXCs should route through to terminate traffic to GLCC. *See* Habiak Reply Decl. ¶ 13. While the LERG is an industry database, and the designations therein have no binding legal effect, GLCC's designation of INS in the LERG undercuts any claim that AT&T somehow freely elected to use INS's services.

Third, GLCC's criticism of the potential savings calculated by Mr. Habiak are misplaced because, among other things, the savings that AT&T would realize would still be substantial. Further, as discussed in Mr. Habiak's reply declaration, there are a number of flaws in GLCC's analysis. *See* Habiak Reply Decl. ¶¶ 16-24. **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

[27] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

C. GLCC's Procedural Challenges Are Baseless.

GLCC raises a number of procedural challenges to AT&T's Count I, but all lack merit. *First*, GLCC argues that the claim in Count I was "not referred to the Commission." Ans. ¶ 3; GLCC Legal Analysis at 9-11. However, GLCC's argument is flatly inconsistent with the plain language of the District Court's orders.[28] And because AT&T's direct connection claim was referred and dismissed without prejudice, GLCC's argument that the merits of AT&T's direct connect claim have been addressed "*three* times by *three* different judges," GLCC Legal Analysis at 10, is inaccurate.

Second, neither the "deemed lawful" doctrine nor the filed rate doctrine insulate GLCC's unreasonable practices from the Commission's review. The Supreme Court has held that the filed rate doctrine "assuredly does *not* preclude avoidance of the tariff rate . . . through claims and defenses that are specifically accorded by the [Act] itself." *Reiter* v. *Cooper*, 507 U.S. 258, 266 (1993). AT&T's claims against GLCC under Sections 201(b) and 203 are claims "accorded" by the Act, and the Commission has repeatedly held that "the Filed Rate Doctrine does not insulate tariffs from legal challenges under section 201(b)." *Bell Atlantic-Delaware* v. *Global NAPs*, 17 FCC Rcd. 7902, ¶ 25 (2002) (citing cases). GLCC's filed rate defense should thus be rejected.

GLCC's "deemed lawful" claim is also inapplicable to this case. As a general matter, tariffs cannot be used to circumvent the specific duties that the Act and the Commission's rules place on carriers. *Global NAPS, Inc.* v. *FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) ("tariffs

[28] *See* Reply to Ans. ¶ 3. After the Court's referral orders, GLCC raised this same argument to the Commission Staff, which rejected it. What is more, at the District Court, GLCC itself said that AT&T's direct connection claim was "dismissed without prejudice *so that AT&T may pursue that claim at the FCC*." Mem. in Support of Mot. in Limine to Exclude Testimony of Expert Witness, David I. Toof, Ph.D., at 22, filed Dec. 17, 2014 (emphasis added).

still must comply with the applicable statutory and regulatory requirements").[29] Under the Commission's rules, GLCC's tariff must be functionally equivalent to that of CenturyLink. GLCC cannot effectively amend that requirement by filing a tariff that is not functionally equivalent, then waiting for the tariff to go into effect, and claiming that it is not liable because its tariff became "deemed lawful." Likewise, GLCC is obliged by the Commission's rules and *PrairieWave* to permit AT&T to install direct trunks. GLCC cannot avoid that requirement by filing a tariff that omits or purports to deny AT&T that right, and claiming that its unreasonable practice of denying such connections is immune from review because its tariff is deemed lawful.[30]

In any event, because GLCC's tariff violated the Commission's CLEC access benchmark rule when the tariff was filed, the Commission's rules provide that GLCC was prohibited from filing such a tariff. 47 C.F.R. § 61.26; *CLEC Access Order* ¶¶ 82-87 (mandatory detariffing). The Commission addressed this issue in its amicus brief in *PaeTec-MCI*. In that case, the Third

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[29] *See also PaeTec Commc'ns, Inc.* v. *CommPartners, LLC*, No. 08–0397, 2010 WL 1767193, at **4-5 (D.D.C. Feb. 18, 2010) (a "filed tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated"); *AT&T Servs. Inc.* v. *Great Lakes Comnet, Inc.*, 30 FCC Rcd. 2586, ¶ 28 (2015) ("*Comnet*"); *In re GS Texas Ventures, LLC*, 29 FCC Rcd. 10541, ¶¶ 5-6 & n.19 (2014). In fact, counsel to GLCC has so contended in *Commpartners*. In that case, representing the access customer, GLCC's counsel argued that "tariff provisions are void ab initio to the extent such terms are applied to ends that the statutory framework does not allow those terms to reach." AT&T Ex. 99, Mem. of Points and Authorities in Opp. to Mot. to Amend, et al., filed in *Paetec Commc'ns* v. *Commpartners*, Civ. No. 1:08-cv-00397-JR, at 22 (Apr. 30, 2010); *see id.* at 21 (stating the court properly "recognized the mischief that can attend streamlined tariffing procedures" and citing the portion of the Order quoted in the text above); *id.* at 24 (arguing that there is no authority for the "sweeping proposition" that a carrier can use a tariff under Section 204(a)(3) to "supplant Congress, the FCC, and now this Court simply by revising its tariff with a one sentence fragment on 14 days' 'notice'").

[30] To take another example, under *Northern Valley I*, a CLEC that files an access tariff is obligated to charge fees for telecommunications service to end users. A CLEC filing a tariff that lacks any such requirements is patently unlawful. *See Northern Valley Commc'ns, Revisions to FCC Tariff No. 3*, 26 FCC Rcd. 9280 (2011). If such a tariff were allowed to go into effect, the CLEC is not free to disobey the Commission's holding in the *Northern Valley* proceedings, by claiming that its access tariff has been "deemed lawful."

Circuit requested that the Commission file an amicus brief addressing the question: "Whether a CLEC's switched access tariff, filed on a 'streamlined' basis pursuant to 47 U.S.C. § 204(a)(3), but subsequently found to violate the FCC's benchmark rule, can enjoy 'deemed lawful' status?"[31] The Commission answered "no," explaining that, under its regulatory regime for CLEC access services, "a carrier is *prohibited* from filing a tariff" in violation of the benchmark rule; "any attempt to do so would violate the FCC's rules," and such an unlawful tariff "cannot benefit from 'deemed lawful' status pursuant to section 204(a)(3) of the Act."[32]

Third, nothing in AT&T's Complaint requires the Commission to amend its rules or issue a new legislative rule, and thus there is no merit at all to GLCC's lengthy claim that AT&T is not entitled to damages or other retroactive relief. *See* GLCC Legal Analysis at 25-35. As described above, GLCC became obligated to offer a direct connect service in 2011, when the Commission amended its rules to require GLCC, as a carrier engaged in access stimulation, to benchmark its rates against CenturyLink's tariff, which provides a direct connect service. There is nothing unfairly retroactive about applying the Commission's longstanding functional equivalence rules to GLCC's misconduct.[33] Further, in 2008, the Commission made clear that CLECs should permit IXCs to install direct trunks to the CLEC's end office switch, and that precedent also can be applied to GLCC. As GLCC concedes, this is an adjudication, which "deals with what the

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[31] AT&T Ex. 98, FCC Amicus Br. at 2.

[32] *Id.* at 2, 25; *see* 47 C.F.R. § 61.26(b) (a CLEC "*shall not file* a tariff" for its access service that violates the benchmark rule) (emphasis added).

[33] *Northern Valley I* ¶¶ 7-8 (interpreting the functional equivalence standard's requirement that a CLEC serve end users to mean that it serve customers that pay a fee for a telecommunications service); *Northern Valley III*, 717 F.3d at 1019 ("[W]e conclude that the FCC reasonably interpreted and applied the relevant regulations. Moreover, nothing in the Communications Act precludes the FCC's approach in this case . . . .").

law *was*."[34] Having violated the Commission's existing rules, GLCC is liable for all damages, including consequential damages, that it caused as a result of its violations. *See* 47 U.S.C. § 206.

II. GLCC'S FCPs PAID ONLY FOR SERVICES THAT ARE NOT "TELECOMMUNICATIONS SERVICE," AND THUS THEY ARE NOT "END USERS."

The first question in the District Court's *Second Referral Order* is whether GLCC is "properly charging 'end user' fees to their FCP customers for 'telecommunications services,' as required under the FCC's rules and GLCC's revised tariff."[35] In its answering submission, GLCC fails to address directly the fundamental question of whether **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** GLCC dodges this issue because those **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** services are plainly not telecommunications services under either the Act or GLCC's tariff, which means that GLCC's FCPs have not paid fees to GLCC for telecommunications services. Consequently, the answer to the District Court's question is "no."

Rather than directly address the question referred by the District Court, and attempt to show that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** *are* "telecommunications services" under the Act and its tariff, GLCC raises a host of arguments that have no merit, in an attempt to distract

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[34] GLCC Legal Analysis at 28 n.86 (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988)) (emphasis altered) (internal quotations omitted).

[35] *GLCC-AT&T*, 2015 WL 3948764, at *9 (N.D. Iowa Jun. 29, 2015) ("*Second Referral Order*"). The Court referred this issue precisely because the Commission has expertise on questions about "[w]hat constitutes 'telecommunications services' within the Act." *Id.* at *6.; *see also id.* ("this question of how to classify particular services under the definition of 'telecommunications' in the Communications Act and GLCC's tariff is better suited for the FCC than a jury").

the Commission from the question that the District Court actually asked. Similarly deficient is GLCC's characterization of the requirement that the FCPs pay a fee for telecommunications service as "absurdist nitpicking." GLCC Legal Analysis at 46. That position, which traffic pumpers have raised as a defense since day one, was firmly rejected by the Commission in *Farmers*, *Northern Valley*, and a long line of other cases.

As Judge O'Brien explained in dismissing certain of GLCC's tariff claims in the underlying litigation, "the precise language of the tariff matters" because the filed tariff doctrine "binds carriers and customers to the terms stated." *GLCC-AT&T*, 2015 WL 12551192, at *21. Likewise, in the *Farmers* appeal,[36] Judge Tatel in oral argument explained why it was appropriate to require Farmers to comply strictly with end user tariff provisions when it engaged in access stimulation:

> "Well, it's just like the tax law. Right? ... . There's lots of loopholes and if you're going to exploit them, you better do them honestly, right?"[37]

In this case, the question is whether GLCC complied with a basic regulatory requirement to charge a fee for telecommunications services. The evidence clearly shows that it did not.

A. [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] [[END HIGHLY CONFIDENTIAL]] Are Not "Telecommunications Services."

GLCC's tariff provides that an "End User must pay a fee to [GLCC] for telecommunications service." AT&T Ex. 8, GLCC FCC Tariff No. 2, Orig. Page 8. The record shows that, for nearly all of the traffic at issue, GLCC sent the FCPs invoices setting forth **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[36] *Qwest Commc'ns Corp.* v. *Farmers & Merchs. Mut. Tel. Co.*, 24 FCC Rcd. 14801 (2009) ("*Farmers I*"), *recon. denied*, 25 FCC Rcd. 3422 (2010) ("*Farmers II*"), *aff'd*, 668 F.3d 714 (D.C. Cir. 2011) ("*Farmers III*").

[37] AT&T Ex. 100, Tr. of Oral Arg., *Farmers v. FCC*, 668 F.3d 714, (D.C. Cir. 2011), at 45-46 (Dec. 7, 2011).

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

None of these services entail the transmission of information between points of a customer's choosing. Indeed, GLCC has conceded as much.[39] Consequently, they are not telecommunications services as defined by the Act and by GLCC's tariff, which necessarily means that, in paying GLCC's invoices, the FCPs did not pay a fee for "telecommunications service."[40]

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[38] Compl. ¶ 44. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[39] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** In its answering submission, GLCC filed a declaration of its CEO, Joshua Nelson, in which Mr. Nelson attempts to explain away his admission by asserting that he "simply did not understand" the questions asked at his deposition. Nelson Decl. ¶ 21. The Commission should give no weight to this after-the-fact change in position. In all events, and regardless of Mr. Nelson's testimony, as noted above, GLCC's Answer admits (or at least fails to deny) that each of the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** services, in and of itself, is not a telecommunications service.

[40] Compl. ¶¶ 74-81; AT&T Legal Analysis at 25-27; *see also Sprint Commc'ns. Co.* v. *Crow Creek Sioux Tribal Court*, No. 10-04110, 2016 WL 4150931, at *8 (D.S.D. Aug. 4, 2016) ("NAT's method of determining the number of ports/lines that it bills to Free Conferencing is in derogation of NAT's tariffs and the service agreements. The fact that NAT billed Free Conferencing *something* and gave that *something* an 'End User Fees' façade for billing purposes does not demonstrate that Free Conferencing actually subscribed to the End User Access Service").

B. The FCPs Unambiguously Were Billed And Paid Fees For [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] [[END HIGHLY CONFIDENTIAL]], Not For GLCC's Completion Of Calls.

GLCC argues that, because the calls were completed by GLCC and reached the FCPs' equipment, the payments GLCC received from the FCPs were necessarily payments for completing the calls to the FCPs and thus for a telecommunications service. *E.g.*, GLCC Legal Analysis at 42, 44. This argument fails, first as a matter of common sense, and also because the record evidence does not support GLCC's claim that the fees paid by the FCPs were for completing calls. Rather, the payments were unambiguously for the services **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]** Accordingly, GLCC failed to comply with the explicit requirement that its FCPs must "pay a fee to [GLCC] for telecommunications service."

GLCC's other arguments fare no better. The Commission has rejected the suggestion that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Finally, GLCC's assertion that "the Commission does not regulate the relationship between a CLEC and its customers," GLCC Legal Analysis at 40, is a red herring. Whether GLCC elects to charge the FCPs a fee or not is within its discretion. What is not within its discretion is its ability to collect tariffed access charges from AT&T if the FCPs do not pay fees for telecommunications service. Both the Act and GLCC's tariff require that such fees be charged and collected, and GLCC's argument that such a requirement impermissibly invades the

[41] AT&T Legal Analysis at 31 (citing *Qwest Commc'ns Corp.* v. *Sancom, Inc.*, 28 FCC Rcd. 1982, ¶¶ 24-25 (2013).

relationship between CLEC and end user has been expressly rejected by the D.C. Circuit.[42]

C. GLCC's Claims Are Inconsistent With *Metrocall.*

In its *Metrocall* decision, the Commission concluded, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** Under *Metrocall*, if a particular service is provided and a payment is made, the payment cannot be deemed to relate to that service unless the terms of the invoices and agreements support that conclusion.

[[BEGIN HIGHLY CONFIDENTIAL]] [redacted]

[42] In upholding the Commission's decision in *Northern Valley II*, the D.C. Circuit held as follows: "Northern Valley points out that the FCC has previously refrained from directly regulating the relationship between the CLEC and the end user. But the flaw in that argument is that the FCC is not here regulating the relationship between the CLEC and the end user; rather, the FCC is regulating the relationship between the CLEC and the long-distance carrier." *Northern Valley III*, 717 F.3d at 1019.

[redacted]

[[END HIGHLY CONFIDENTIAL]], the logic of *Metrocall* compels rejection of GLCC's position.[43]

In seeking to distinguish *Metrocall*, GLCC focuses on "the [Commission's] prohibition against recurring charges solely for numbers assessed *from one carrier to another*," which GLCC asserts "has no bearing here." GLCC Legal Analysis at 43 n.135. But GLCC ignores the other holding in *Metrocall*, which is the one relevant here, wherein the Commission established that a carrier's invoices and the governing legal instrument (in *Metrocall*, a tariff; here, the TSAs) are the relevant evidence to examine in determining what services are being billed and paid.[44] In so holding, the Commission rejected the very position that GLCC is taking in this

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[43] *See also Crow Creek*, 2016 WL 4150931, at *10 (rejecting argument that $6.45 rate was "all-inclusive" and encompassed specified services given "the absence of any agreement" to that effect); *id.* at *15 (concluding free calling party did not receive service under LEC's tariff "because NAT did not calculate or bill Free Conferencing for the local exchange service described in § 5.2 of NAT's Tribal tariff. NAT's theory ignores the explicit requirements of its tariffs and contracts and relies, instead, on unwritten and unverifiable amendments to those documents"). In other words, because the record shows only billing and payment for the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** non-telecommunications services, there is no evidence that can support the conclusion that the FCPs were also billed and paid for an additional service.

[44] GLCC tries to counter this conclusion with an analogy to postal service, claiming that "by AT&T's absurd logic, buying a 'stamp' gets you only paper and glue, not the transmission of your letter." GLCC Legal Analysis at 44. The analogy is inapt. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**, by contrast, are analogous to a street address, which serves as the destination for the transmission of a letter, not the transmission itself.

case.[45] Under *Metrocall*, if a carrier sends bills that refer only to specified services, then there is no basis to conclude (as GLCC argues here) that the carrier was in fact billing for other services not identified in the bills.[46]

D. [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] **[[END HIGHLY CONFIDENTIAL]]**

GLCC relies on **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[45] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[46] GLCC also claims that *Metrocall* demands a "complete record," GLCC Legal Analysis at 43-44, n.135, but the Commission has a complete record here, including the invoices, underlying agreements and testimony, which goes well beyond merely "the names of the various fee categories on the TSA Exhibit[s]" GLCC Legal Analysis at 43-44, n.135.

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

E. GLCC's Assertion That Its Invoices And Agreements For [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] [[END HIGHLY CONFIDENTIAL]] Were A Means To "Size" Fees For A Telecommunications Service Has No Valid Support Or Credibility.

GLCC contends that it "calculate[d] the fee for its telecommunications service based on certain key metrics that reflect the quantity of those services it provides to its various customers." GLCC Legal Analysis at 44. That position is neither supported nor credible.

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[47] As GLCC's corporate representative expressly acknowledged, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Nothing in the text of the invoices or the TSAs, or any other contemporaneous documents, suggests that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** AT&T highlighted that point in its Legal Analysis, and GLCC failed to identify any contemporaneous evidence rebutting AT&T's position. To the contrary, GLCC relies upon Mr. Nelson's declaration, prepared for this proceeding, which is nothing more than a blatant attempt to manufacture support for its position after the fact. Indeed, Mr. Nelson made no mention of the "sizing" concept at his deposition. Consequently GLCC's sizing argument should be rejected as an after-the-fact, purely litigation construct.[48]

What is more, the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[48] *See Crow Creek*, 2016 WL 4150931, at *10 (rejecting party's position as a "post hoc rationalization").

[49] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

F. GLCC's Argument That The FCPs Need Not Pay A Fee For Interstate Services Lacks Merit.

GLCC effectively admits that it did not receive fees for any interstate telecommunications services, Reply to Ans. ¶ 48, but argues that payment of interstate fees is not required by its tariff. Under GLCC's view, its tariff should be interpreted so that an End User/Customer need only send or receive an interstate telecommunications service, and the interstate service can be free, so long as the Customer pays GLCC a fee for intrastate telecommunications service outside of the tariff, pursuant to some separate agreement. GLCC Legal Analysis at 35-43. That position is not only illogical, it is not consistent with the definitions in GLCC's tariff.[50]

GLCC's tariff defines "End User" as "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier." Compl. ¶ 37. The tariff also defines the phrase "Customer of an Interstate or Foreign Telecommunications Service" in relevant part as any entity that "sends or receives an interstate or foreign Telecommunications service" so long as the entity pays "a fee to [GLCC] for telecommunications service." *Id.* In other words, the "fee ... for telecommunications service" that must be paid is assessed on the "interstate ... Telecommunications service" that the End User/Customer must send or receive.

Because these two phrases appear in the same sentence and in the same tariff, it is thus reasonable to read this language to require that the Customer pay a fee for the interstate

[50] As to the Commission's rules, in the *Northern Valley* decision, the Commission held that CLECs, like ILECs, had to charge a fee, and the ILEC fees to which the Commission pointed were the ILECs' *interstate* end user common line charges. *Northern Valley I* ¶ 5, n.16 (referencing 47 C.F.R. §§ 69.4(a), 69.104, 69.152). Further, it would be unusual for the Commission to hold that, in order for a LEC to file a valid tariff for *inter*state access services, a CLEC needs to charge a fee for *intra*state telecommunications service. As such, it is reasonable to read *Northern Valley I* as requiring the payment of fee for an interstate telecommunications service. The Commission need not address the scope of its rules, because GLCC's tariff is properly read to require payment of a fee for interstate telecommunications service.

telecommunications service that it sends or receives. Moreover, even if GLCC's interpretation of its tariff were as reasonable as AT&T's reading (which it is not), AT&T should prevail, because ambiguities in GLCC's tariff are construed in AT&T's favor and against GLCC. *See AT&T Corp.* v. *Alpine Commc'ns*, 27 FCC Rcd. 11511, ¶ 27 (2012).

III. GLCC IS BARRED FROM PURSUING ALTERNATIVE STATE-LAW REMEDIES BECAUSE IT FILED A TARIFF PURSUANT TO THE COMMISSION'S REGULATORY REGIME.

The Commission's regulations governing interstate access services exclude state-law theories of recovery, particularly where, as here, the CLEC has chosen to file a tariff for such services. *See* AT&T Legal Analysis at 33-50. GLCC asserts that the Commission explicitly "has authorized" state law recovery for CLEC access services. GLCC Legal Analysis at 47. Not only is GLCC's argument unsupported by any valid precedent, but it is premised on an entirely upside-down and incoherent view of the Commission's regulatory regime.

A. The Commission Regulates CLEC Access Charges According To A Federal Regime; It Has Not De-Regulated Access Charges In Favor Of State Regulation.

GLCC reads the Commission's use of the word "deregulatory" in the Commission's 2001 and 2004 orders, GLCC Legal Analysis at 47, to eliminate the Commission's clear descriptions in those orders of the problems that it sought to address, and the "new regulatory regime" that it adopted to address those problems, *Eighth Report and Order* ¶ 1. Based on this faulty premise, GLCC claims that the Commission's reforms do not constrain CLECs, but rather permit them to pursue recovery for interstate access services on whatever state-law theories a CLEC can imagine. GLCC has it entirely backward.

From 1996 to 2001, "CLECs [were] largely unregulated in the manner that they set their access rates." *CLEC Access Order* ¶ 21; *accord id.* ¶¶ 8, 13, 25. A CLEC could be subject to a

complaint that its rates were unjust and unreasonable under Section 201(b),[51] but prior to 2001, "the Commission refrained from involving itself in a general examination of the reasonableness of CLEC access rates." *CLEC Access Order* ¶ 25. In 2001, after finding that CLEC access rates were generally priced "well above" the access rates of the incumbent, *id.* ¶ 22, the Commission concluded that its prior "regime ha[d] often failed to keep CLEC rates within a zone of reasonableness." *Id.* ¶ 25.

To address this problem, the Commission did not, as GLCC contends, "de-regulate" CLEC access rates. To the contrary, it imposed additional regulation on CLECs' rates noting, that such "*action* is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services."[52] Specifically, the Commission provided two methods for a CLEC to recover switched access charges: either "negotiate" an agreement with an IXC, or file a lawful tariff that complies with the Commission's benchmark rule. *CLEC Access Order* ¶¶ 3, 82-87. The Commission thus constrained the CLEC's bottleneck monopoly power, by "*eliminat[ing] regulatory arbitrage opportunities* that previously existed" under the pre-2001 regime, in which CLECs could "*use[] the tariff system* to set access rates that were [not] subject . . . to negotiation." *Id.* ¶¶ 2-3 (emphases added).

That the Commission allowed CLECs the option of negotiating contracts with IXCs does not mean, as GLCC argues, that the Commission permitted CLECs to pursue equitable theories of recovery, under state law, in the absence of a negotiated contract. Nothing in the Commission's decisions supports such an interpretation, nor can such an interpretation be

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[51] *See, e.g.*, *AT&T Corp.* v. *Bus. Telecom, Inc.*, 16 FCC Rcd. 12312, ¶ 1 (2001) (granting claim that access rates were unjust and unreasonable under Section 201(b)).

[52] *Id.* ¶ 34 (emphasis added); *see* 47 C.F.R. § 61.26 (new rule issued in 2001 to regulate CLECs); *see also* AT&T Ex. 98, FCC Amicus Br. at 5-6 (explaining that CLECs "were largely unregulated in the manner in which they set their access rates *until 2001*, when the FCC adopted the [*CLEC Access Order*].") (quotation omitted) (emphasis added).

reconciled with the regime that the Commission established. The extent to which a CLEC that has negotiated a contract with an IXC can rely on state-law theories to construe or interpret that contract is simply not at issue here, and that issue was not referred by the District Court. It is indisputable that GLCC elected to file a tariff for its access services; it did not negotiate a contract with AT&T. Thus, under the Commission's regime, GLCC's only method for recovery is by its tariff.[53] If it fails to recover under its tariff, it cannot enter some alternative reality, and seek to pursue additional state-law recovery methods that are not authorized by, and indeed would eviscerate, the Commission's regime.

The Commission's decision in the *All American Damages Order* further confirms this point. In that decision, the Commission explained that, when a carrier violates its tariff or the Commission's rules in providing access services, there is no "regulatory gap" that allows it to pursue "alternate damage theories," because carriers "cannot avoid the Commission's regulation

[53] GLCC's reliance on *Ting* v. *AT&T*, 319 F.3d 1126 (9th Cir. 2003) is misplaced, because that case involved long distance services. Unlike CLEC access services, the Commission has chosen to institute mandatory detariffing for long distance, although such services remain subject to Sections 201 and 202 of the Act. Under that regime, the courts of appeal have split on the effect of mandatory detariffing on certain state law claims. Although the Ninth Circuit in *Ting* declined to find pre-emption of certain state laws allegedly limiting the use of arbitration clauses, it is the only circuit to reach that result. GLCC fails to cite decisions from the Seventh and Tenth Circuits, which found that similar state laws (as well as state-law unjust enrichment claims) were pre-empted because they were inconsistent with Sections 201 and 202. *See Boomer* v. *AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002) ("[I]t is clear from Section 201(b) that Congress intended federal law to govern the validity of the rates, terms and conditions of long-distance service contracts."); *In re Universal Service Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1197-99 (10th Cir. 2010) (same); *Dreamscape Design, Inc.* v. *Affinity Network, Inc.*, 414 F.3d 665, 674 (7th Cir. 2005) (same). Because the Commission's regime for CLEC access charges is different, and requires CLECs either to file tariffs or to negotiate contracts, nothing in this case requires the Commission to address the cases on the long distance regime.

of competitive interstate switched access services by violating the very rules the Commission created to govern those services."[54]

The Commission's adoption, in 2011, of a "uniform, national" framework for all intercarrier compensation, including inter- and intra-state access, further undercuts GLCC's position on its alternative state law claims. *See* AT&T Legal Analysis at 34 n.137. Remarkably, in its Answer, GLCC concedes that, under the Commission's 2011 regime, "*the FCC has preempted state control* over the rates for intrastate access," and it asserts that state regulation of intrastate access stimulation (such as rules issued by the IUB) has been "nullified." Ans. ¶ 28 (emphasis added). GLCC's position in this proceeding is thus incoherent: under its view of the Commission's regulatory regime, state control of *intra*state access has been nullified, but states can control rates for *inter*state access through alternative state-law claims like those pled by GLCC. This is wrong, and what has been clearly "nullified" are GLCC's *quantum meruit* and unjust enrichment claims.

Finally, GLCC's argument that "it would make little sense for the FCC to countenance state-law-governed negotiated contracts, but then (silently) amend all 50 states' statutes of fraud to include a new category of contract that must be in writing and signed by the party against whom it is sought to be enforced, and to preclude equitable modes of recovery designed to ensure just results when parties fail to reach a signed, written agreement," GLCC Legal Analysis at 51, is wholly devoid of merit. The Commission's regime is entirely sensible, and GLCC's

[54] *AT&T Corp.* v. *All Am. Tel. Co.*, 30 FCC Rcd. 8958, ¶ 13 & n.50 (2015) ("*All American Damages Order*"), *review pending*, No. 15-1354 (D.C. Cir.).

explanation turns logic on its head.[55] A negotiated contract for access, *i.e.*, one that is "mutually agreed upon" between an IXC and a CLEC, is consistent with Section 201(b) and the Commission's regime, because it limits the CLEC's ability to abuse its bottleneck monopoly by allowing the IXC to decline to agree to unreasonable terms. *CLEC Access Order* ¶¶ 4, 108. GLCC's proposed construct provides no such assurances. In fact, it would allow the laws of each of the 50 states (and juries in individual cases) to effectively set rates and terms for interstate access services, with no assurance that those determinations comply with the Commission's view of what is just and reasonable under Section 201(b).

B. GLCC Ignores Or Mischaracterizes Substantial Caselaw Finding That CLECs Cannot Pursue *Quantum Meruit* or Unjust Enrichment Claims.

GLCC dismisses out-of-hand the vast majority of courts that have considered and rejected the argument that it advances here. *See* GLCC Legal Analysis at 53. GLCC claims without elaboration that those decisions – which it tellingly refuses to discuss individually – "mechanically" applied the law or were incorrect in light of GLCC's unsupported view that the Commission "clearly established . . . a regime that contemplates state-law-based modes of recovery." *Id.* As the District Court held in granting AT&T's motion for summary judgment:

> "It defies credulity that the LECs continue to maintain, despite consideration of these very traffic pumping cases by various tribunals, that the resounding theme at the very core of the matter – **if the tariff access charges do not apply, are the LECs nonetheless entitled to some compensation** – has somehow been missed by all those tribunals. It has not; **the answer is no**."[56]

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[55] Contrary to GLCC's claim, the Commission did not implicitly "amend" state statutes of frauds, but rather explained, pursuant to its exclusive jurisdiction, which kinds of contracts for interstate access services comply with the regime that it promulgated to ensure that CLEC rates are just and reasonable.

[56] *GLCC-AT&T*, 2015 WL 12551192, at *23 (quoting *Qwest Commc'ns Co.* v. *Aventure Commc'ns Tech., LLC*, No. 07-00078, 2015 WL 711154, at *81 (S.D. Iowa 2015)).

Moreover, Judge O'Brien's holding in this regard is hardly unique.[57] Indeed, the court in *AT&T* v. *Aventure* recently reached a similar conclusion in granting AT&T judgment on the pleadings with respect to a LEC's alternative claims of *quantum meruit* and unjust enrichment. The court reasoned that the alternative claims "*allege the very same access services* for which Aventure billed AT&T *under its tariff*. Since Aventure alleges that it has filed interstate access services tariffs, the only way Aventure can recover from AT&T is via tariff." *AT&T* v. *Aventure*, 2016 WL 5340680, at *59 (first emphasis added). In so ruling, the court rejected Aventure's attempt to distinguish the Commission's *Northern Valley* orders, in which the Commission "held that . . . CLECs can only recover for access services through tariffs or negotiated contracts," *id.* at *58, because "[a]ny doubt regarding the LECs ability to recovery for services provided to IXCs in the access stimulation cases . . . has been removed by the FCC's [*All American Damages Order*]," *id.* at *59.

There is also no merit to GLCC's claim that "courts that have foreclosed a LEC's ability to recover under state law have done so only *after* it was established that the carrier had a viable, alternative basis for compensation under the federal regulatory regime." GLCC Legal Analysis at 52. Not only does GLCC ignore at least 17 decisions that are explicitly or implicitly to the contrary – including those that AT&T cited in its Legal Analysis, and the decision in *AT&T* v. *Aventure* that issued after GLCC's Answer – GLCC mischaracterizes the only authority that

[57] GLCC incorrectly claims that Judge Bennett has "strongly suggested" that he does not agree with Judge O'Brien's summary judgment decision. GLCC Legal Analysis at 47 n.149. Rather, Judge Bennett referred GLCC's issues because other courts had referred similar issues. Since Judge Bennett's referral order, the Commission issued its *All American Damages Order*, which has removed any doubt regarding whether CLECs can pursue alternative recoveries for access services they purported to provide by filed tariff. *See AT&T Corp.* v. *Aventure Commc'ns Tech., LLC*, No. 07-00043, 2016 WL 5340680, at **58-59 (S.D. Iowa Sept. 19, 2016) ("*AT&T* v. *Aventure*").

GLCC presents for this position. In *INS* v. *Qwest IV*,[58] the Eighth Circuit affirmed an order dismissing claims of implied contract and unjust enrichment – but not because the court had first determined that the claimant would be compensated. Rather, the court determined that because the reciprocal compensation agreement contemplated by the IUB order at issue in the case was a form of "express contract," which precluded alternative equitable claims for the same traffic as a matter of Iowa law.[59] GLCC's characterization of *INS* v. *Qwest IV* is particularly untenable in light of the decision in *AT&T* v. *Aventure*, in which Judge Gritzner cited his decision in *INS* v. *Qwest III*, as well as his decision in *INS* v. *Qwest IV*, yet reached the exact opposite conclusion that GLCC claims is compelled by those cases.

GLCC also incorrectly characterizes the two decisions it cites in support of its claim that "numerous decisions . . . discredit AT&T's arguments." GLCC Legal Analysis at 51. In the first decision, Judge Kornmann initially declined to dismiss a CLEC's unjust enrichment claim, but then stayed the case and referred to the Commission, among other issues, whether the CLEC could be compensated at all for access services that were not provided consistent with the terms of its tariff.[60] The second decision was based on the incorrect premise, which the Court drew at the pleadings stage, that a CLEC's services fall entirely outside of the Commission's regulatory

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[58] *Iowa Network Servs., Inc.* v. *Qwest Commc'ns Corp.*, 466 F.3d 1091 (8th Cir. 2006) ("*INS* v. *Qwest IV*"), *aff'g* 385 F. Supp. 2d 850 (S.D. Iowa 2005) ("*INS* v. *Qwest III*").

[59] *INS* v. *Qwest IV*, 466 F.3d at 1098 ("[T]he regulatory process [as determined by the IUB order] contemplates that an express contract will ultimately result, and for this reason the district court did not err in dismissing INS's state law claims of unjust enrichment and implied contract.").

[60] *See N. Valley Commc'ns* v. *Qwest Commc'ns Corp.*, 659 F. Supp. 2d 1062, 1070 (D.S.D. 2009) (reasoning that filed rate doctrine did not apply), *staying case and referring issues*, 2010 WL 3909932, at *5 (Sept. 29, 2010), *denying mot. to vacate stay*, 2012 WL 2366236, at *6 (Jun. 20, 2012) ("It is within the unique competence of the FCC to determine what compensation, if any, plaintiff may receive for these access stimulation-related fees . . . .").

regime if the CLEC provides them in violation of that regime.[61] The Commission has since conclusively rejected that premise (to the extent that it was ever valid) in the *All American Damages Order*, ¶ 13 & n.50.

Finally, GLCC tries to diminish its own prior advocacy to the Commission, in which it took a position directly contrary to the one that it advances here. In a petition for declaratory ruling, GLCC urged the Commission to pre-empt the IUB, when GLCC feared that the IUB would regulate GLCC's interstate access services. Specifically, GLCC urged the Commission to declare that "all matters relating to interstate access charges, including the rates therefor and revenue derived therefrom, are within its exclusive federal jurisdiction and thus any attempts by state authorities to regulate interstate access charges are beyond their authority."[62] In GLCC's view, as espoused in 2009, state utility commissions had no authority even to "touch[] . . . the interstate access rates and revenues of LECs." *Id.* at 2. That position stands in stark contrast to GLCC's current position that "juries . . . [should] decide the 'reasonable value' for services provided'" pursuant to alternative state-law claims. GLCC Legal Analysis at 56-57. GLCC does not and cannot offer any valid justification for this complete reversal of position.[63]

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[61] *See* AT&T Ex. 85, Order Denying Mot. for J. on Pleadings, *N. Valley Commc'ns, LLC* v. *AT&T Corp.*, No. 14-01018, at **11-12 (D.S.D. Aug. 20, 2015) (reasoning that "if [the] services are not access services, then they not only fall outside the tariff . . . but also fall outside the scope of the FCC rule limiting the methods by which a CLEC may charge.").

[62] AT&T Ex. 70, Pet. for Decl. Ruling to the Iowa Utils. Bd. & Contingent Pet. for Preemption, WC Docket No. 09-152, at *1 (filed Aug. 14, 2009); *accord id.* at 14.

[63] In a footnote, GLCC tries to claim that its petition "dealt with an entirely different factual and legal landscape." GLCC Legal Analysis at 50 n.160. However, GLCC points to no actual changes in the law or in the material facts. Indeed, three pages earlier in its Legal Analysis, GLCC describes the current regime as dating to 2001—several years before it filed its petition seeking preemption of state regulation of interstate access services. *See id.* at 47 (citing *CLEC Access Order*).

C. *New Valley* Is Inapposite.

GLCC argues that the Commission's decision in *New Valley* requires that the Commission permit state common-law recoveries for access services.[64] *New Valley* is inapposite for several reasons. *First*, in that decision, the Commission exercised its discretion to decline to award a refund to a party that, despite being warned that it bore the burden of proof, "provide[d] no evidence or persuasive arguments in support of its claim." *New Valley* ¶ 9. *Second*, the Commission did not affirmatively award any compensation to any party, nor did it identify any theory that would justify such an award – the Commission certainly did not discuss or, as GLCC claims, "authorize"[65] alternative state common law claims. *Third*, the services at issue in that case were special access services, and the Commission has explained in the context of CLEC access services that *New Valley* and its progeny "do[] not hold that a carrier is *always* entitled to some compensation for a service rendered, even if the service is not specified in its tariff," but rather that "a carrier *may be* entitled to some compensation for providing a non-tariffed service, depending on the totality of the circumstances."[66] *Finally*, even if the Commission were to develop a theory that would permit a CLEC to recover for access services that it provided in violation of the Commission's rules and the CLEC's filed tariff, the Commission has never remotely implied that the varied common-law doctrines of 50 states provide appropriate vehicle for such a recovery.

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[64] *See* GLCC Legal Analysis at 55 (citing *New Valley Corp.* v. *Pacific Bell*, 8 FCC Rcd. 8126, ¶ 8 (1993) ("*New Valley*")).

[65] *Id.* at 47.

[66] *In re All American*, 26 FCC Rcd. 723, ¶ 19 (2011) (citing *Farmers I* ¶ 24 n.96).

D. The Commission Need Not Address Any "Reasonable Rate" In This Proceeding, But If It Does, It Could Never Exceed $0.0007 For End Office Switching.

AT&T agrees with GLCC that the issue that the Commission Staff labeled as issue 5 concerns damages, and thus only needs to be considered if GLCC is entitled to compensation for end-office switching services that it provided in violation of its tariff and the Commission's rules. AT&T's position is that, if there is no tariff, then there is no right to compensation.[67]

In the event, however, the Commission were to reach this issue, there would be no circumstances in which GLCC could collect more than $0.0007 per MOU for "service" that it allegedly provided. *First*, $0.0007 is the rate that GLCC offered to terminate substantively identical intrastate access traffic.[68]

Second, some parties (including AT&T) suggested using $0.0007 in the *Connect America* proceeding, because it was a "negotiated rate," albeit for reciprocal compensation. *Connect America Order* ¶ 692. While the Commission declined to adopt $0.0007 as the benchmark rate for all access-stimulating LECs, it did so in part because, at that time in 2011, it "expect[ed] that the approach we adopt will reduce the effects of access stimulation significantly." *Id.* GLCC, of course, did not curtail its access stimulation. *See also id.* ¶ 690.

Third, $0.0007 is the current rate, and one used by the Commission in its transition (thus undercutting the argument that $0.0007 has no utility in the access context). *See id.* ¶ 801, Fig. 9. *Finally*, $0.0007 reflects a generous rate for GLCC's service, in light of the fact that GLCC terminates many times the traffic of CenturyLink, with far fewer facilities.[69]

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[67] *See, e.g.*, *AT&T Corp.* v. *YMAX Commc'ns Corp.*, 26 FCC Rcd. 5742, ¶¶ 12-14 (2011) (carrier violated Section 203(c) of the Act by billing access charges that were not authorized by tariff that it had filed).

[68] *See* AT&T Ex. 13, Toof Report, Ex. DIT-5, at 1.

[69] Compl. ¶¶ 53-54.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the relief requested in AT&T's Formal Complaint.

Respectfully submitted,

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Dated: October 6, 2016

Counsel for AT&T Corp.

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

In the Matter of

AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
202-457-3090

Complainant,

File No. EB-16-MD-001

v.

GREAT LAKES COMMUNICATION CORP.
1713 McNaughton Way
Spencer, IA 51301
712-580-4700

Defendant.

REPLY DECLARATION OF JOHN W. HABIAK

I, John W. Habiak, hereby declare and certify as follows:

1. I am providing this Reply Declaration in support of AT&T Corp.'s ("AT&T") Reply Legal Analysis in Support of its Formal Complaint. The information provided in this Reply Declaration is based on my personal knowledge and my review of documents and records kept by AT&T in the normal course of its business. My job responsibilities are stated in my initial Declaration.

2. The purpose of this Reply Declaration is to respond to certain assertions made in the Declaration of Joshua Nelson, the Chief Executive Officer of Great Lakes Communication Corp. ("GLCC"), and the Declaration of Michael Starkey, an expert witness who is employed by QSI Consulting, Inc. I was provided by counsel a copy of GLCC's Answer, and I have reviewed the declarations of Mr. Nelson and Mr. Starkey. I also have reviewed and signed Appendix A to the Protective Order in this matter, and thus I reviewed the versions of the Answer and

declarations that contain Confidential Material, but not the versions that contain the Highly Confidential Material of GLCC.

Responses to the Nelson Declaration

3. In paragraph 3 of his declaration, Mr. Nelson states that AT&T did not request the direct-trunked transport service offered in GLCC's initial tariff, which was in effect from about 2005 to 2012. However, what Mr. Nelson omits from his declaration is that for most of this period, GLCC was not providing AT&T services pursuant to that tariff (which contained rates that AT&T considered excessive), and instead was providing service pursuant to negotiated agreements between AT&T and GLCC. In those agreements, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

4. Additionally, as GLCC admits, there was uncertainty prior to the Federal Communications Commission's (the "Commission") *Connect America Order*[1] as to whether access stimulation would be allowed at all. As it turned out, the Commission placed conditions on carriers engaging in access stimulation, and not long after these new rules went into effect, the negotiated agreement between AT&T and GLCC expired. GLCC re-filed its access tariff in early 2012. As discussed in AT&T's Complaint, GLCC's revised tariff eliminated the option in its prior tariff pursuant to which GLCC would provide flat-rated, direct-trunked transport. Further, in an apparent effort to make up for the access revenues that were reduced (in part) by the Commission's new rules, GLCC began billing AT&T tandem switched transport, on a per-mile, per-minute basis, for 133 miles of transport (all the while, AT&T was also being billed by

[1] Report and Order, *In re Connect America Fund*, 26 FCC Rcd. 17663 (2011) ("*Connect America Order*").

Iowa Network Services, Inc. ("INS") for that same transport).[2] It was at this juncture – when, despite the *Connect America Order*, AT&T began being double-billed, and at rates exceeding a penny a minute, for transporting large volumes of traffic that GLCC continued to stimulate – that AT&T requested a direct connect.

5. Mr. Nelson asserts in paragraph 14 that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

6. In paragraph 16, Mr. Nelson mentions "numerous offers" to provide a direct-connect service to AT&T. To begin with, these were settlement offers, and it was my understanding that they were intended to resolve the parties' billing dispute, and were not intended as a defense to a legal claim. Regardless, Mr. Nelson's declaration omits two important facts.

7. *First*, in each proposal that GLCC made, **[[BEGIN CONFIDENTIAL]]** [redacted]

[2] GLCC continued to bill AT&T for 133 miles tandem-switched transport until September 2013. AT&T's position was that GLCC's double-billing of transport on a per-mile, per-minute basis was inconsistent with the Commission's decision in *AT&T Corp.* v. *Alpine Commc'ns*, 27 FCC Rcd. 11511 (2012). As I understand it, the District Court in this matter ruled that GLCC was not permitted to bill for that transport, or any transport, under the terms of its tariff.

[redacted] **[[END CONFIDENTIAL]]**

8. *Second,* although Mr. Nelson notes in paragraph 16 that AT&T "rejected each and every one of our direct connect offers," he omits the fact that AT&T made numerous counterproposals, and in those proposals, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** GLCC did not accept those offers.

9. Mr. Nelson's discussion in paragraph 17 of the negotiations between the parties in late June of 2015 is incomplete. AT&T made a written offer on June 26, 2015, but later that day the parties were notified by the District Court that it would vacate the upcoming trial, stay the case, and refer additional issues to the Commission. It was only after that notice that GLCC's counsel sent a message to AT&T that attempted to accept AT&T's offer. **[[BEGIN CONFIDENTIAL]]** [redacted]

[redacted] **[[END CONFIDENTIAL]]**

10. As to Mr. Nelson's statement in paragraph 18 that he has "reached mutually acceptable business arrangements with other carriers in which Great Lakes terminates long distance traffic pursuant to a contract," I have never seen the terms of those agreements, nor has Mr. Nelson discussed those terms with me (or, to my knowledge, with anyone else at AT&T). What I have seen is both CenturyLink's tariff for switched access service, and GLCC's prior tariff, both of which offered a flat-rated direct connection service.

11. In paragraph 20, Mr. Nelson states that he is "confident that AT&T has numerous options to get its traffic to Great Lakes that do not require it to use INS's CEA service." As to this statement, I have the following observations. *First*, while Mr. Nelson asserts that he is confident that there are numerous options, he does not identify any of those options. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

12. *Second*, it is not clear that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

13. *Third*, it is not clear what Mr. Nelson means by the phrase "require it to use INS

CEA service." To the extent that it is GLCC's position that INS's tariffed service, and particularly its very high tariffed rate of about $0.009 per minute, is not an appropriate way to route traffic to GLCC, AT&T agrees with that position. What is less clear is GLCC's position as to whether AT&T is required to take INS CEA service. What is also unclear is whether GLCC has taken steps to force AT&T to route its traffic through INS's network. While GLCC would undoubtedly deny that it has done so, its designation in the LERG of the INS tandem switch in Des Moines, Iowa is certainly consistent with such routing. Further, in one of its early settlement proposal **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

14. In paragraph 21, Mr. Nelson claims that he "would be surprised to learn that CenturyLink has had enough idle, spare capacity" to transport to Spencer, Iowa, all of the traffic that GLCC has stimulated. I have two reactions to that claim. *First*, AT&T has never taken the position that CenturyLink currently has sufficient spare capacity in Northwest Iowa to handle the huge volumes of traffic being stimulated by GLCC, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Given the rural nature of Northwest Iowa, it would not make sense for CenturyLink to deploy that type of capacity. *Second*, the fact that such capacity is not currently in place does not mean that it could not be deployed. It may be that CenturyLink would have to augment its existing facilities, and while that might add one-time costs what AT&T would have to pay, those costs would not come close to offsetting the massive savings that AT&T would realize by avoiding the INS charges.

15. In paragraph 21, Mr. Nelson also suggests that he lacks "concrete details" as to

how AT&T proposes to connect to GLCC. I find this claim to be somewhat disingenuous for two reasons. *First*, as Mr. Nelson notes in paragraph 14, the parties have exchanged numerous settlement proposals. **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

Responses to Starkey Declaration

16. As noted, I have reviewed Mr. Starkey's declaration, which critiques the analysis I presented in my initial declaration. I have the following observations.

17. *First*, Mr. Starkey does not seem to appreciate the purpose of the analysis that I presented. My purpose was to illustrate the enormous savings available from a direct connection arrangement. I was not attempting to engineer, or cost out, a specific direct connection arrangement. Further, even with Mr. Starkey's adjustments (many of which are not soundly based), there would still be significant savings. Consequently, Mr. Starkey's comments in paragraphs 5-6 are misplaced.

18. *Second*, Mr. Starkey does not seem to understand what services are currently being provided by GLCC. As I understand it, because of a ruling by the District Court, GLCC is not currently authorized to charge AT&T for any transport services under its tariff. Furthermore, even it had such authority, the most that GLCC could charge for would be a mile of transport between the Spencer Point of Interconnection ("POI") on INS network and GLCC's Spencer switch. As a result, Mr. Starkey's discussion in paragraphs 8-9 is totally off base. GLCC has no such operational or financial responsibility.

19. *Third*, Mr. Starkey's criticism in paragraph 5 is similarly perplexing. Because GLCC is not authorized to charge for transport under its tariff, there would be no reduction in GLCC's current charges as a result of AT&T obtaining a direct connection. The only charges that GLCC is able to bill under its tariff are end office charges, which for purposes of the comparison in my initial Declaration would remain the same.

20. *Fourth*, Mr. Starkey's claims **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

21. *Fifth*, Mr. Starkey's comments regarding the exclusion of the entrance facility costs in paragraph 16 further demonstrates his lack of understanding of my analysis. Those costs were excluded because the INS rate to which the direct connect rate was being compared does not include that cost. Accordingly, under both scenarios that cost would be incurred. Consequently, the cost of the entrance facility is a wash when doing a savings analysis, which is why it was left out of the analysis.

22. *Sixth*, Mr. Starkey's discussion of construction costs paragraphs 14-15 is also misplaced. It is possible that such costs might need to be incurred and that they might reduce the magnitude of the savings somewhat. But it is important to recognize that those costs would not be recurring and the monthly savings would still be significant. Moreover, Mr. Starkey exaggerates the magnitude of such costs.

23. *Seventh*, Mr. Starkey's assertion in paragraph 10 that the greatest savings would require a longer commitment is also misplaced. While as a general proposition that comment is accurate, my analysis was constructed on a conservative basis and therefore used CenturyLink's highest rates for the shortest period. If longer terms rates had been used, the savings would have been greater.

24. Finally, even if one were to make the types of adjustments that Mr. Starkey suggests, but correct for the deficiencies in his analysis, the results would still show that the savings associated with a direct connection over the period from 2012 to 2015 would be significant; indeed, Mr. Starkey's own chart shows **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** in savings.

GLCC Traffic Volumes

25. I was asked to provide information regarding the range of traffic volumes that are bound for the individual telephone numbers assigned by GLCC to one of its Free Calling Parties. That range is quite large.

26. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY**

CONFIDENTIAL]]

27. I was also asked if I could offer a comparison between the volume of AT&T long distance traffic bound for GLCC, and the volume of AT&T long distance traffic bound for CenturyLink throughout all of Iowa. **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

I certify under penalty of perjury that the foregoing is true and correct. Executed on October 5, 2016.

John W. Habiak

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

In the Matter of

AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
202-457-3090

Complainant,

v. **File No. EB-16-MD-001**

GREAT LAKES COMMUNICATION CORP.
1713 McNaughton Way
Spencer, IA 51301
712-580-4700

Defendant.

AT&T CORP.'S OBJECTIONS TO FIRST SET OF INTERROGATORIES

Pursuant to Section 1.729(c) of the Commission's rules, 47 C.F.R. § 1.729(c), AT&T Corp. ("AT&T") hereby submits to the Federal Communications Commission (the "Commission"), and concurrently serves on Defendant Great Lakes Communication Corp. ("GLCC") its Objections to GLCC's First Set of Interrogatories ("Interrogatories").

GENERAL OBJECTIONS

In addition to any specific objections set forth below, AT&T objects generally as follows:

1. AT&T objects to the Interrogatories, and the instructions and definitions thereto, to the extent that they seek information or documents that are protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege. Any inadvertent disclosure of material protected by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege or exemption is not intended, and should not be construed, to constitute a waiver.

2. AT&T objects generally to any interrogatory that calls for proprietary and confidential information and/or trade secrets. Notwithstanding this objection, to the extent the Commission determines that discovery of such information is necessary, AT&T is willing to provide such information pursuant the to the terms of the Protective Order that has been entered in this proceeding.

3. AT&T objects to the Interrogatories, and the instructions and definitions thereto, to the extent that they seek information or documents that are publicly available to, or already in the possession of, Defendant or its Counsel.

4. AT&T objects to the Interrogatories, and the instructions and definitions thereto, to the extent that they purport to impose upon AT&T any obligation not imposed by the rules of the Commission.

5. AT&T objects generally to any interrogatory to the extent it seeks information that is not both relevant to the material facts in dispute in this proceeding and necessary to the resolution of the dispute, or is otherwise inconsistent with Section 1.729 of the Commission's rules.

6. AT&T objects generally to any interrogatory to the extent that it is vague, ambiguous, and/or unintelligible in the context of this matter.

7. AT&T objects to the Interrogatories, and the instructions and definitions thereto, to the extent they purport to require AT&T to provide information that is not presently within its possession, custody, or control.

8. AT&T objects to GLCC's definitions of the terms "you," "your," and "AT&T" to the extent those terms are intended to include any person other than AT&T Corp. The responses provided herein are provided on behalf of AT&T Corp. and not on behalf of any of its affiliates.

9. AT&T objects to the Interrogatories, and the instructions and definitions thereto, to the extent that they imply the existence of facts or circumstances that do not or did not exist, and to the extent that they state or assume legal conclusions. In providing these responses and objections, AT&T does not admit the factual or legal premise of any of the Interrogatories.

10. AT&T objects to the Interrogatories in combination because they violate Section 29(a) of the Commission's rules by having more than ten written interrogatories, including subparts. The following interrogatories have multiple subparts: Interrogatory 1 – two subparts; Interrogatory 2 – four subparts; Interrogatory 3 – three subparts; and Interrogatory 4 – three subparts.

OBJECTIONS TO SPECIFIC INTERROGATORIES

GLCC-ATT 1:

Identify all engineering, network-planning, technical and financial aspects of any "direct connect" service relating to Great Lakes that you investigated, studied, analyzed or discussed from September 1, 2011 through June 26, 2015, and produce all documents evidencing such investigations, studies, analyses, or communications, including, without limitation, all internal communications and communications with third parties relating to the carriage of AT&T's Great Lakes-related traffic, including the feasibility of any such proposal and the technical (including the format in which the traffic would be carried, whether in IP or TDM and how such interconnection would be provisioned), and financial details of any such service. Such information and documents includes, but is not limited to, the CenturyLink "service" modeled in AT&T Compl. Ex. 91.

OBJECTION:

In addition to its General Objections, AT&T objects to this two-part interrogatory as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. It is overbroad and unduly burdensome in that it seeks "all" such documents; it is not reasonably calculated to lead to the discovery of admissible evidence because it is based on a false premise, *i.e.*, that GLCC's obligation to make available to AT&T a direct connection was somehow premised on AT&T's first articulating to GLCC "the financial or technical terms under which AT&T would implement such an arrangement." Interrogatories at 8. No such requirement exists, and indeed, such a requirement would be inconsistent with the nature of services that GLCC should have provided or allowed on a common carrier basis. Nor would such a requirement be reasonable, to the extent that it would require AT&T to expend significant resources before GLCC made clear whether it would even be willing to agree to provide or permit a direct connection. AT&T further notes that in the course of the underlying litigation it produced documents regarding the matter addressed in this interrogatory – documents that are available to GLCC in this proceeding and that in certain instances were identified as exhibits in the underlying litigation. Finally, it is difficult to reconcile the requests set forth in this interrogatory with the positions that GLCC has taken in responding to AT&T's

interrogatories to GLCC, particularly GLCC's objection to the production of additional documents. *See* GLCC's Opposition and Objections to AT&T's First Request for Interrogatories, General Objection 5.

Notwithstanding the foregoing, and subject to resolution of AT&T's overbreadth objection, AT&T would be willing to conduct a reasonable search of its files for additional, non-privileged documents responsive to this request provided that GLCC is also willing to produce documents responsive to AT&T's requests.

GLCC-ATT 2:

Identify all carriers that AT&T has asked to carry, and all carriers that have offered to carry, Great Lakes-bound traffic for AT&T from January 1, 2012 to present, and for each such instance state the date and material terms under which AT&T requested, or the carrier offered, to carry such traffic, and produce all communications relating to each such instance.

OBJECTION:

In addition to its General Objections, AT&T objects to this four-part interrogatory as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. It is overbroad and unduly burdensome in that it seeks information regarding "all" such contacts as well "all communications;" it is not reasonably calculated to lead to the discovery of admissible evidence because it is based on a false premise, i.e., that GLCC's obligation to make available to AT&T a direct connection was somehow premised on whether other carriers would be willing to deliver AT&T's traffic to GLCC for termination. GLCC's obligation to provide a direct connection to AT&T is not so conditioned, and indeed, such conditions would be inconsistent with the nature of the services that GLCC should have provided or allowed on a common carrier basis. AT&T further notes that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** Finally, it is difficult to reconcile the requests set forth in this interrogatory with the positions that GLCC has taken in responding to AT&T's interrogatories to GLCC. *See* GLCC's Opposition and Objections to AT&T's First Request for Interrogatories, Objections to ATT-GLCC 1 and 2. GLCC appears to be of the view that it can rely on such agreements in support of its position in this proceeding and at the same

time shield them from disclosure.

Notwithstanding the foregoing, and subject to resolution of AT&T's overbreadth objection, AT&T would be willing to respond to this interrogatory provided that GLCC is also willing to produce documents responsive to AT&T's requests for information pertaining to GLCC's agreements with other carriers regarding termination services.

GLCC-ATT 3:

With respect to your allegations that "excess revenues shared in access stimulation schemes such as these are ultimately passed on to unwitting customers," Compl. ¶ 42 n.91, and that Great Lakes has "forced" AT&T's "customers" to pay for INS's "expensive services," Compl. ¶ 59, identify all business records, including, without limitation, customer invoices and payments, and communications relating thereto, showing that AT&T has in fact "ultimately passed on to unwitting consumers" the costs associated with Great Lakes' traffic, including your payments to INS. Specifically identify all instances in which you raised the price or otherwise adjusted the terms of any of your services to any customer because of such costs and whether you reduced the charges to your customers as a direct result of the FCC's price reductions for access stimulation in the *Connect America Fund Order*.

OBJECTION:

In addition to its General Objections, AT&T objects to this three-part interrogatory as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. It is overbroad and unduly burdensome in that it requests AT&T to identify "all business records, including without limitation customer service invoices and payments, and communications relating thereto," as well as "all instances" in which AT&T purportedly adjusted its prices or the terms of its services. It is not reasonably calculated to lead to the discovery of admissible evidence because the information that this interrogatory seeks has nothing to do with the matters at issue in this proceeding. Indeed, GLCC (in its explanation) does not make any effort to show how this information relates to any of the matters referred by the district court, and for good reason – there is no connection. The statements referenced by GLCC in this interrogatory were derived from findings made by the Commission in its *Connect America Order*. *See, e.g.*, 26 FCC Rcd. 17663 ¶¶ 649, 657, 663-64, 666 (2011). GLCC cannot attack those findings in this proceeding. One of the issues being considered in that proceeding was the economic impact of access stimulation on long distance carriers and their customers as well as the public in general. Neither that issue, nor the question of whether access stimulation

should be banned, is present in this case. Accordingly, this interrogatory is wholly inappropriate.

GLCC-ATT 4:

With respect to the [BEGIN CONFIDENTIAL] [redacted] **[END CONFIDENTIAL] identify the people or person responsible for preparing and overseeing this policy, and identify all reasons why AT&T Corp., an independent long distance carrier, chooses not to pursue opportunities that would avoid the per-minute pricing in the [BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

OBJECTION:

In addition to its General Objections, AT&T objects to this three-part interrogatory because it is not reasonably calculated to lead to the discovery of admissible evidence. As an initial mater, it should be noted that this entire interrogatory is premised on **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Further, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** somehow undercuts AT&T's position that in situations with high traffic volumes a direct connection is more economical is absurd. The whole purpose of **[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Finally, whether or not **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** is wholly irrelevant in the context of this dispute. **[BEGIN CONFIDENTIAL]]** [redacted] **[[END**

CONFIDENTIAL]] It operates in Iowa where CenturyLink is the price cap ILEC. As such, the considerations associated with obtaining a direct connection facility are necessarily different than they would be if [**[BEGIN CONFIDENTIAL]]** [redacted] [**[END CONFIDENTIAL]]** In any event, GLCC has not provided a sufficient basis for requiring AT&T to incur the obvious expense and burden of responding to this interrogatory. GLCC also provides no explanation as to why it did not pursue discovery about this document in discovery before the District Court.

Respectfully submitted,

James F. Bendernagel, Jr.

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Dated: October 6, 2016

Counsel for AT&T Corp.

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

In the Matter of

AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
202-457-3090

Complainant,

v. **File No. EB-16-MD-001**

GREAT LAKES COMMUNICATION CORP.
1713 McNaughton Way
Spencer, IA 51301
712-580-4700

Defendant.

AT&T CORP.'S SECOND REQUEST FOR INTERROGATORIES TO GREAT LAKES COMMUNICATION CORP.

Pursuant to 47 C.F.R. § 1.729(a), Complainant AT&T Corp. ("AT&T") hereby submits to the Federal Communications Commission (the "Commission"), and concurrently serves on Defendant Great Lakes Communication Corp. ("GLCC"), this Second Request for Interrogatories ("Interrogatories"). GLCC shall respond to these Interrogatories in the time provided by 47 C.F.R. § 1.729, in writing, under oath, and in accordance with the Commission's rules and the Instructions and Definitions set forth herein.

DEFINITIONS

1. All terms used herein shall be construed in an ordinary, common sense manner, and not in a hypertechnical, strained, overly-literal, or otherwise restrictive manner; however, acronyms and other terms of art in the telecommunications industry shall have the meaning typically ascribed to them by the industry.

2. "Any" means each, every, and all persons, places, or things to which the term refers.

3. "Communication" means any transfer of information, whether written, printed, electronic, oral, pictorial, or otherwise transmitted by any means or manner whatsoever.

4. "Concerning" means relating to, involving, reflecting, identifying, stating, referring to, evidencing, constituting, analyzing, underlying, commenting upon, mentioning, or connected with, in any way, the subject matter of the request.

5. "Copy" means any reproduction, in whole or in part, of an original document and includes, but is not limited to, non-identical copies made from copies.

6. "Describe" and "description" means to set forth fully, in detail, and unambiguously each and every fact of which you have knowledge related to answering the interrogatory.

7. "Document" means any written, drawn, recorded, transcribed, filed, or graphic matter, including scientific or researchers' notebooks, raw data, calculations, information stored in computers, computer programs, surveys, tests and their results, however produced or reproduced. With respect to any document that is not exactly identical to another document for any reason, including but not limited to marginal notations, deletions, or redrafts, or rewrites, separate documents should be provided.

8. "Free Calling Party" means any person (as defined herein) with which GLCC has agreed to share revenue, or has shared revenue, derived from the delivery of long-distance telephone calls, including but not limited to the Free Calling Parties identified in the underlying litigation: **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]** It also includes, but is not limited to, any ordinary customers, that are not conference companies or chat line companies, to which GLCC has agreed to share revenue, or has shared revenue, derived from the delivery of long-distance telephone calls.

9. "Identify," "identity," or "identification," when used in relation to "person" or "persons," means to state the full name and present or last known address of such person or persons and, if a natural person, his or her present or last known job title, the name and address of his or her present or last known employer, and the nature of the relationship or association of such person to you.

10. "Identify," "identity," or "identification," when used in relation to "document" or "documents," means to state the date, subject matter, name(s) of person(s) that wrote, signed, initialed, dictated, or otherwise participated in the creation of the same, the name(s) of the addressee(s) (if any), and the name(s) and address(es) (if any) of each person or persons who have possession, custody, or control of said document or documents.

11. "Identify" when used in relation to a "communication" means to identify the participants in each communication and, if such communication is not contained in a document, the date, place, and content of such communication.

12. "Including" means including but not limited to.

13. "Interexchange carrier" or "IXC" means a long-distance carrier who provides intrastate or interstate long-distance communications services between local exchange areas. It

also includes a wireless carrier, when the wireless carrier is routing intrastate or interstate long-distance communications services for termination to GLCC.

14. "Marketing Agreement" means any contract or agreement by which GLCC remits any revenue derived from Termination Services to Free Calling Parties, including but not limited to the Marketing Agreements produced in the underlying litigation.

15. "Original" means the first archetypal document produced, that is, the document itself, not a copy.

16. "Person" or "persons" means any natural person or persons, group of natural persons acting as individuals, group of natural persons acting as a group (*e.g.*, as a board of directors, a committee, *etc*.), or any firm, corporate entity, partnership, association, joint venture, business, enterprise, cooperative, municipality, commission, or governmental body or agency.

17. "Previously provided" means those documents that were (i) provided in the Underlying Litigation (ii) without restriction as to their use in this Formal Complaint proceeding.

18. "Relevant Period" means December 29, 2011 to the present, unless otherwise specified.

19. "Termination Services" means any service provided by any entity to deliver in any form, including but not limited to either a TDM or IP connection, a long-distance telephone call from an interexchange carrier to GLCC for termination to any of its Free Calling Parties. Such services also include but are not limited to any direct connection service similar to the "Direct-Trunked Transport" service provided by CenturyLink pursuant to CenturyLink FCC Tariff No. 11.

20. "Telecommunications Service Agreement" means any contract or agreement that governs the services that GLCC provides to Free Calling Parties, including but not limited to the Telecommunications Service Agreements produced in the underlying litigation.

21. "Underlying litigation" means any and all proceedings in *Great Lakes Commc'ns Corp. v. AT&T Corp.*, No. 13-4117 (N.D. Iowa).

22. "You," "your," or "GLCC" means Great Lakes Communication Corp.; any of its parent, affiliated, or subsidiary companies; and employees, officers, directors, agents, representatives, and all other persons or entities acting or purporting to act on their behalf, including without limitation any outside consultant or witness retained by them. In that regard, each and every interrogatory contained herein is directed at you.

INSTRUCTIONS

When responding to the following interrogatories, please comply with the instructions below:

1. Each interrogatory is continuing in nature and requires supplemental responses as soon as new, different, or further information is obtained that is related to answering the interrogatory.

2. Provide all information, including all documents, related to answering the interrogatory that are in your possession, custody, or control, regardless of whether such documents are possessed directly by you or by your employees, officers, directors, agents, representatives, or any other person or entity acting or purporting to act on their behalf.

3. In lieu of producing any requested information or documents that were previously provided to AT&T in the underlying litigation, identify when and how such information or documents were previously provided to AT&T.

4. In any interrogatory, the present tense shall be read to include the past tense, and the past tense shall be read to include the present tense.

5. In any interrogatory, the singular shall be read to include the plural, and the plural shall be read to include the singular.

6. In any interrogatory, the use of the conjunctive shall be read to include the disjunctive, and the use of the disjunctive shall be read to include the conjunctive.

7. Any document withheld from production on the grounds of a privilege is to be specifically identified by author(s), addressee(s), length, and date, with a brief description of the subject matter or nature of the document, and a statement of the privilege asserted.

8. If you contend that any part of your response to a particular Interrogatory contains trade secrets or other proprietary or confidential business or personal information, such contention shall not provide a basis for refusing to respond within the time required by the applicable rules. You shall respond according to and under the terms of Section 1.731 of the Commission's Rules, 47 C.F.R. § 1.731.

9. Please begin the response to each request on a separate page.

10. Please restate each interrogatory before providing the response or objection.

11. Please specify the interrogatory in response to which any document, narrative response, or objection is provided. If a document, narrative response, or objection relates to more than one request, please cross reference.

12. For each separate interrogatory, identify the person(s) under whose supervision the response was prepared.

13. For any interrogatory consisting of separate subparts or portions, a complete response is required to each subpart as if the subpart or portion were propounded separately.

14. Produce any documents in the form of legible, complete, and true copies of the original documents as "original" is defined herein.

15. Please provide all documents in their native format, together with all metadata.

16. If you assert that documents or information related to answering an interrogatory are unavailable or have been discarded or destroyed, state when and explain in detail why any

such document or information was unavailable, discarded, or destroyed, and identify the person directing the discarding or destruction. If a claim is made that the discarding or destruction occurred pursuant to a discarding or destruction program, identify and produce the criteria, policy, or procedures under which such program was undertaken.

17. If any interrogatory cannot be answered in full after reasonable inquiry, provide the response to the extent available, state why the interrogatory cannot be answered in full, and provide any information within your knowledge concerning the description, existence, availability, and custody of any unanswered portions.

INTERROGATORIES

ATT-GLCC 11:

Identify and produce all documents reflecting Joshua D. Nelson's conversations with AT&T representatives regarding GLCC's provision of a direct connection service, including, but not limited to, the conversation discussed in paragraph 14 of Mr. Nelson's Declaration dated September 14, 2016.

Explanation:

The information sought in this interrogatory is necessary to the resolution of AT&T's allegation that GLCC's refusal to provide a direct-trunked transport service, *i.e.*, to permit a direct connection to its network, was unjust and unreasonable in violation of Section 201(b) of the Communications Act. Specifically, the information sought relates to AT&T's request for a direct connection, and to GLCC's denial of that request.

This information is not readily available to AT&T through a source other than GLCC and is not the type of information that is typically made available publicly. In his September 14, 2016 Declaration, GLCC's CEO, Joshua D. Nelson, provided detail regarding the parties' communications on these issues that he did not provide during his deposition in the underlying litigation, indicating that he may have reviewed notes or other documents that he has kept on those issues, but which has not been made available to AT&T previously. *See* Declaration of Joshua D. Nelson ("Nelson Decl.") ¶¶ 1, 14, dated Sept. 14, 2016.

ATT-GLCC 12:

In paragraph 18 of his Declaration, Mr. Nelson asserts that he has "reached numerous mutually acceptable business arrangement with other carriers under which Great Lakes terminates long distance traffic pursuant to contract." Identify each such agreement and either produce it or describe the material "technical and financial terms of those commercial agreements."

Explanation:

The information sought in this interrogatory is necessary to the resolution of AT&T's allegation that GLCC's refusal to provide direct-trunked transport service, *i.e.*, to permit a direct connection to its network, was unjust and unreasonable in violation of Section 201(b) of the Communications Act. Specifically, the information sought relates to AT&T's request for a direct connection, and to GLCC's denial of that request. In his September 14, 2016 Declaration, GLCC's CEO, Joshua D. Nelson, indicated that he has negotiated "numerous" contracts with carriers – other than AT&T – regarding the termination of long-distance traffic, and claims that he did so because of the distinct manner in which those other carriers discussed the "technical and financial terms" of the agreements that they entered into with GLCC. Nelson Decl. ¶ 18. Mr. Nelson's discussion of these contracts in his "declaration in support of Great Lakes' Answer," Nelson Decl. ¶ 1, gives lie to GLCC's assertion that such contracts "are not relevant to the material facts in dispute in this proceeding." GLCC Opposition and Objections to AT&T Corp.'s First Request for Interrogatories at 5.

This information is not readily available to AT&T through a source other than GLCC and is not the type of information that is typically made available publicly.

ATT-GLCC 13:

In paragraph 20 of his Declaration, Mr. Nelson states that he is "confident that AT&T has numerous options to get its traffic to Great Lakes that do not require INS's CEA service." Identify and describe each such option (including but not limited to the material terms, such as price) and state the basis for Mr. Nelson's confidence that such options are available to AT&T.

Explanation:

The information sought in this interrogatory is necessary to the resolution of AT&T's allegation that GLCC's refusal to provide direct-trunked transport service, *i.e.*, to permit a direct connection to its network, was unjust and unreasonable in violation of Section 201(b) of the Communications Act. Specifically, it is relevant to rebutting GLCC's asserted defense that it need not have permitted AT&T to direct trunk to its end office because "AT&T has not offered any competent evidence establishing that it was either willing or able to actually install 'direct trunking' to Great Lakes' end office switch." GLCC Legal Analysis at 22.

This information is not readily available to AT&T through a source other than GLCC and is not the type of information that is typically made available publicly.

ATT-GLCC 14:

In paragraph 22 of his Declaration, Mr. Nelson states that in "our efforts to have each high-volume customer contribute their appropriate share to Great Lakes' cost of providing them service on our local network, including terminating them all of their interstate calls, when we price out the total monthly cost for each high-volume customer we look at those three variables and do our best to charge comparable prices for comparable quantities of service." Identify and produce all documents reflecting GLCC's efforts to "price out the monthly cost for each high volume customer" and explain how GLCC determines for each high-volume customer "their appropriate share [of] Great Lakes' cost of providing them service on [GLCC's] local network."

Explanation:

The information sought in this interrogatory is necessary to the resolution of AT&T's allegation that the calls for which GLCC billed AT&T were not terminated to end users, *i.e.*, to customers that paid a fee for an interstate or foreign telecommunications service. Specifically, the information sought concerns whether any services for which the Free Calling Parties paid GLCC were telecommunications services, as GLCC's CEO put GLCC's "efforts to price out the total monthly cost for each high-volume customer" into issue with regard to whether "we only bill our high-volume customers for non-telecommunications services." Nelson Decl. ¶ 22.

This information is not readily available to AT&T through a source other than GLCC and is not the type of information that is typically made available publicly.

ATT-GLCC 15:

With respect to the "three major variables" identified by Mr. Nelson in paragraph 22 of his Declaration state for 2015 the total costs that GLCC incurred in connection with the provision to its high-volume customers of (i) DID lines and DID number, (ii) space for co-location and (iii) power.

Explanation:

The information sought in this interrogatory is necessary to the resolution of AT&T's allegation that the calls for which GLCC billed AT&T were not terminated to end users, *i.e.*, to customers that paid a fee for an interstate or foreign telecommunications service. Specifically, the information sought concerns whether any services for which the Free Calling Parties paid GLCC were telecommunications services.

This information is not readily available to AT&T through a source other than GLCC and is not the type of information that is typically made available publicly.

Respectfully submitted,

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Dated: October 6, 2016

Counsel for AT&T Corp.

Supplemental Table of Exhibits in Support of
AT&T's Reply to GLCC's Answer to the Formal Complaint

Ex.	Description
92	Letter from J. Bendernagel (Counsel for AT&T) to C. Killion (FCC), dated Jan. 28, 2016
93	Excerpted Pages from AT&T Reply Legal Analysis in Support of Formal Compl., *AT&T Servs., Inc. v. Great Lakes Comnet, Inc.*, File No. EB-14-MD-013 (Nov. 19, 2014)
94	E-mail from M. Hunseder (Counsel for AT&T) to D. Carter (Counsel for GLCC), dated Aug. 12, 2016 (HIGHLY CONFIDENTIAL MATERIALS OMITTED)
95	Supplemental Excerpted Pages from INS FCC Tariff No. 1, filed Aug. 10, 1988
96	Supplemental Excerpted Pages from the Deposition of Michael Starkey, taken Nov. 5, 2014 (CONFIDENTIAL MATERIALS OMITTED)
97	GLCC Invoice to Free Calling Party, GLCC_ATT_000272, dated Jan. 7, 2012 (HIGHLY CONFIDENTIAL MATERIALS OMITTED)
98	Brief for Amicus Curiae FCC, *PaeTec Commc'ns, Inc. v. MCI Commc'ns Servs. Inc.*, Nos. 11-2268, et al. (3d Cir., filed Mar. 14, 2012)
99	Mem. of Points and Authorities in Opp. to Mot. to Amend, et al., filed in *Paetec Commc'ns v. Commpartners*, Civ. No. 1:08-cv-00397-JR 22 (Apr. 30, 2010)
100	Tr. of Oral Arg., *Farmers v. FCC*, 668 F.3d 714 (D.C. Cir. 2011) (Dec. 7, 2011)
101	Mem. in Support of Mot. for Temp. Restraining Order and Prelim. Injunction, *Great Lakes Commc'n Corp. v. Berntsen*, No. 09-4085 (N.D. Iowa Nov. 3, 2009)

Exhibit 92

Letter from J. Bendernagel (Counsel for AT&T) to C. Killion (FCC), dated Jan. 28, 2016

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FOUNDED 1866

January 28, 2016

Via E-mail

A.J. DeLaurentis
MDRD, Enforcement Bureau
Federal Communication Commission
445 12th Street, SW
Washington, DC 20554

Re: *Great Lakes Commc'ns Corp. v. AT&T Corp.*, No. 5:13-cv-04117 (N.D. Iowa)

Dear Mr. DeLaurentis:

In its letter dated January 11, 2016, Great Lakes Communications Corp., ("GLCC") asserts that the Commission should open two proceedings, one to consider the second referral order issued by Judge Bennett on June 26, 2015,[1] and a second proceeding to consider the issues referred by Judge O'Brien on March 3, 2015.[2] While the parties can address this issue in more detail at the upcoming status conference, GLCC's proposal is inefficient and inconsistent with the Commission's past practice.

As a result of the Court's orders, five issues have been referred to the Commission. Those five issues arise out of the same transactions and between the same parties. The notion that, in these circumstances, the Commission should divide the Court's two referral orders into two distinct proceedings, with two separate records and two separate procedural schedules, makes no sense, and GLCC cites no authority that would mandate such an inefficient process. *Cf.* 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").

Notably, like the District Court here, the district court in the *All American* case issued two separate referral orders, the first referring AT&T's "sham entity" counterclaim (which AT&T implemented by filing a formal complaint), and the second referring a discrete list of issues. After the district court's second referral order, the Commission did not create a separate proceeding dedicated solely to the issues in that order, but instead required AT&T to amend its

[1] *Great Lakes Commc'ns Corp. v. AT&T Corp.*, 2015 WL 3948764 (N.D. Iowa, June 29, 2015).

[2] *Great Lakes Commc'ns Corp. v. AT&T Corp.*, 2015 WL 897876 (N.D. Iowa, March 3, 2015). GLCC's assertion that Counts II and III of AT&T's counterclaims were "not referred" (Ltr. at 4) is flatly inconsistent with the plain terms of the Court's orders. *Id.* at 18 (dismissing Counts II and III "without prejudice *pursuant to the primary jurisdiction doctrine*") (emphasis added); Report and Recommendation of Magistrate Judge, *Great Lakes Commc'ns Corp. v. AT&T Corp.*, No. 5:13-cv-04117 (N.D. Iowa, June 24, 2014) (same). The fact that the Court did not stay the remaining claims when it issued the first referral does not mean that those counts were "not referred."

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

existing complaint. The Commission then addressed both referral orders in a single proceeding.[3] Here, it also makes sense to have a single proceeding to address the referred issues.[4]

In its January 11 Letter, GLCC also claims that separate proceedings are warranted because of AT&T's supposed "inaction" in implementing the first referral order. Ltr. at 4. This claim is meritless. When the Court issued the first referral order in March, 2015, it was also considering the parties' cross-motions for summary judgment, and in its motion, AT&T requested the Court to refer issues that it did not resolve on summary judgment. AT&T SJ Br. at 38-40 (Dec. 17, 2014). Rather than immediately proceed with the first referral order at the Commission, it made sense to avoid piecemeal litigation and await the District Court's rulings on summary judgment and the additional primary jurisdiction request. Further, because the results from the July, 2015 trial could have affected the need for AT&T to move forward with Counts II and III at the Commission, AT&T chose to proceed with the federal court litigation first.[5]

In late June, however, the Court issued its order referring additional issues to the Commission, cancelling the trial and staying the proceeding. At that point, AT&T immediately reached out to GLCC to discuss how to approach the Commission Staff about the referred issues. In response, GLCC indicated that it did "not believe it is appropriate to reach out to the FCC at this time" and later told AT&T that it would seek relief from the Court if AT&T attempted to do so. Thereafter, GLCC elected to pursue an improper appeal and a meritless petition for mandamus with the court of appeals, rather than proceed at the Commission. Accordingly, any undue delay in the Commission's consideration of the referred issues is primarily the result of GLCC's litigation strategy, not that of AT&T.

AT&T looks forward to meeting with Staff to resolve the referred issues.

---

[3] In All American, the Commission created a second proceeding to address the purported Communications Act claims brought by the district court plaintiffs against AT&T, but no such claims are present or were referred in GLCC's dispute with AT&T.

[4] There is also no merit to GLCC's claim that the District Court has "no interest" in the issues in the first referral order being "co-mingled" with those in the second referral order. Ltr. at 4. GLCC fails to cite any portion of the Court's Orders to support that claim. The fact that, after the initial referral order, the Court decided that it could litigate the remaining claims rather than stay them has no bearing on whether the Commission – faced with the referral of all five issues – must divide those issues in the manner GLCC claims is necessary.

[5] GLCC characterizes both Counts II and III as exclusively prospective, *e.g.*, Ltr. at 3, 4, but that is not accurate as to Count III, which also seeks damages, *e.g.*, Counterclaims, ¶ 100. Further, the fact that AT&T is billed inflated and unnecessary charges to transport large volumes of traffic to GLCC is at the heart of the parties' disputes.

SIDLEY AUSTIN LLP
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Very truly yours,

/s/ James F. Bendernagel, Jr.

James F. Bendernagel Jr.

Exhibit 93

Excerpted Pages from AT&T Reply Legal Analysis in Support of Formal Complaint, *AT&T Servs., Inc.* v. *Great Lakes Comnet, Inc.*, filed Nov. 19, 2014

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

In the Matter of **AT&T SERVICES, INC.** **1120 20th Street, N.W.** **Washington, DC 20036** **202-457-3090** **AT&T CORP.** **One AT&T Way** **Bedminster, NJ 07921** **202-457-3090** ***Complainants,*** ***v.*** **GREAT LAKES COMNET, INC.** **1515 Turf Lane, Suite 100** **East Lansing, MI 48823** **517-664-1600** **WESTPHALIA TELEPHONE COMPANY** **109 E. Main Street; P.O. Box. 368** **Westphalia, MI 48894-0368** **989-587-5008** ***Defendants.***	**File No. EB-14-MD-013**

REPLY LEGAL ANALYSIS IN SUPPORT OF AT&T FORMAL COMPLAINT

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Dated: November 19, 2014

Counsel for AT&T Services, Inc. and AT&T Corp.

AT&T for transport services that it did not provide. To the extent that GLC is instead contending in their brief that LEC-MI did not, in fact, transport the 8YY traffic from Southfield to Flint, Michigan, they offer no affirmative evidence to support their claim, which is refuted by the testimony of Mr. Irvin.

Defendants argue that in addition to the route through Flint, there also existed a direct route from Southfield to Westphalia. GLC/WTC Br. 42. That such a route existed makes no difference, because the undisputed evidence shows that 8YY traffic went by way of Flint. The only difference between Mr. Irvin's and Mr. Summersett's testimony in this regard is that Mr. Irvin was clear that LECMI transported 99.9% of the 8YY traffic to Flint (3 Tr. 533:1-7), while Mr. Summersett had no idea how much of the 8YY traffic LECMI transported to Flint (Summersett MPSC Dep. at 86:10-87:20), and so had to admit that it is possible *none* of the 8YY traffic was actually carried by GLC all the way from Southfield to Westphalia (*id*. at 99:1-12) – in which case it was all transported by LECMI to Flint.

In sum, the evidence establishes that LEC-MI transported 8YY traffic from Southfield to Flint, where it handed off the traffic to GLC. Nonetheless, the Defendants billed AT&T at their much higher access rates as if GLC were providing that transport service. Defendants' conduct violates the Communications Act, which prohibits carriers from charging for access services that they did not provide. *Eighth Report and Order* ¶ 21.

IV. DEFENDANTS IMPROPERLY INFLATED THE TRANSPORT CHARGES TO AT&T ON THE 8YY AGGREGATED TRAFFIC.

In Part VI and Count IV of its Complaint, AT&T demonstrated that, on the aggregated 8YY wireless traffic, the Defendants were improperly inflating their transport mileage charges to AT&T, billing 83 miles of transport, for a total charge of about 3.46 cents for tandem

transport alone.[23] Although these are supposedly "competitive" tandem services, the prevailing market-based charge that would exist, if the aggregated 8YY wireless traffic were handed off from LEC-MI's switch in Southfield, Michigan to the closest tandem (operated by AT&T Michigan, seven miles away from LECMI), is only 0.0098 cents per minute (7 miles times AT&T Michigan's rate of 0.0014 cents per minute). The Commission has held that, in a truly competitive market, it is "highly unusual for a competitor to enter a market at a price dramatically above the price charged by the incumbent, absent a differentiated service offering." *Seventh Report and Order* ¶ 37. Further, the Commission has held that it is an unreasonable practice for a carrier to inflate transport charges without providing IXCs or their customers benefits that offset the increased routing costs. *Alpine*, ¶¶ 44-45. Based on these precedents, in this case, as to the aggregated 8YY wireless traffic, the Defendants should not able to charge (as they have) more than the prevailing incumbent rate for transport, because it is clear that neither AT&T nor its 8YY subscribers obtain any benefits due to the traffic being hauled the additional 76 miles. Certainly, there are no benefits that justify a rate 350 times higher than the prevailing ILEC rate.

In response, the Defendants engage in misdirection. Legal Analysis at 2-4, 46-53. Contrary to the Defendants' claims, AT&T is not mounting a broad attack as to the Defendants' overall efficiency or network design (*see id*. at 2-4). Nor is AT&T contending that LECs must always route traffic through the nearest tandem, or are precluded from using "competitive"

[23] Compl. ¶¶ 154-64 & Ex. 12 (3.4347 cents per minute for GLC and 0.0347 cents per minute for WTC, after May 2013). Prior to May, 2013, WTC misbilled the entire mileage.

tandem services. Rather, as to a specific type of traffic (aggregated 8YY wireless traffic),[24] AT&T's claim is that it was unreasonable for the Defendants to charge their excessive per mile, per minute rates for traffic that was transported over a circuitous route, approximately 12 times as long as the distance to the nearest tandem. As the Defendants do not dispute, there are existing, technically feasible ways to route the traffic – including but not limited to the AT&T Michigan tandem – in which the charges for transport would be dramatically reduced. In these circumstances, there is simply no basis for the Defendants – as nominally "competitive" providers of tandem services – to charge over 80 miles of transport, for a charge of 3.4 cents per minute.

In short, AT&T has no objection to the aggregation of wireless traffic, or even to the transport of that traffic to distant, purportedly "competitive" tandems – it simply does not want to pay "competitive" providers *increased* transport mileage when (as here) that transport provides no added benefits to AT&T or its customers. *Seventh Report and Order* ¶ 4 (the Commission's CLEC access rules are designed to "mimic the operation of the marketplace as competitive LECs will no longer be operating in the access market with tariffed rates well above the prevailing market price.").[25]

---

[24] In this regard, AT&T's claims in Count IV have nothing to do with to traffic originated by or terminated to end users residing in Westphalia, Michigan, and it has never disputed that GLC may assess tandem-related charges, including tandem transport, (at the appropriate "competing ILEC" rate, *see* Part I, *supra*) on such traffic.

[25] *Id.* ¶ 59 ("Our benchmark system will drive CLEC rates down toward the level charged by the ILECs, thereby bringing them toward the model of a competitive market, in which new entrants can successfully enter only at or below the prevailing market price"); *see AT&T Corp*. v. *BTI*, 16 FCC Rcd 12312, ¶ 33 (2001) ("Although [ILECs'] access rates are subject to price cap regulation, those rates were, nevertheless, the prevailing market rates that [a CLEC] would have needed to consider in pricing its access services, had the access market been truly competitive.").

As AT&T explained, while the Defendants, as "competitive" providers, charged AT&T 3.4 cents per minute for transport, a reasonable and "prevailing market price" was around 0.0098 cents per minute. Ex. 12; Habiak Decl. ¶¶ 46-49. For purposes of calculating the "prevailing market price," some reasonable mileage figure had to be used as a benchmark, and AT&T used the 7-mile distance from the LEC-MI switch to the AT&T Michigan tandem because that had been a traditional interconnection point between AT&T Corp. and LEC-MI.[26] The Defendants were free to suggest and justify an alternative benchmark, but have offered none.

The Defendants only other argument as to this Count is to fall back on their mantras that "AT&T itself chose to use GLC's competitive tandem," "could have cancelled that arrangement at any time," and had "several other alternatives" to GLC's tandem services. Legal Analysis at 46, 48. As AT&T explains below in Part V, these claims are not accurate, and the Commission has already concluded as such in the *Seventh and Eighth Reports and Orders*. Contrary to the Defendants' claims, the Commission has found that competitive tandem providers *do* have "bottleneck monopolies" over IXCs, and that IXCs may have "no choice" but to accept traffic from an intermediate competitive LEC. *Seventh Report and Order* ¶ 30; *Eighth Report and Order* ¶ 17. In response to these conditions, the Commission issued rules designed to "drive CLEC rates down toward the level of the ILECs, thereby bringing them toward the model of a competitive market," in which competitors' prices cannot exceed "the prevailing market price." *Seventh Report and Order* ¶ 59. Here, as AT&T explained, the prevailing market price for

[26] *See* Habiak MPSC Rebuttal Testimony, at 15, 3 Vol. Hearing Tr. at 476. *See also BTI*, 16 FCC Rcd 12312, ¶ 31 (holding that "ILEC switched access services are functionally equivalent to CLEC switched access services" and that "according to fundamental economic principles, in a properly functioning competitive market, the access rates of [a CLEC's] primary access competitors would have been a substantial factor in [the CLEC's] setting of its own access rates").

transport on the aggregated wireless 8YY traffic at issue would be no more than about 0.0098 cents per minute, yet the Defendants charged about 350 times that rate. As such, Defendants should be liable for refunds of their excessive rates, which are far above any reasonable measure of the prevailing market price.

V. ALL OF DEFENDANTS' AFFIRMATIVE DEFENSES, AND THEIR ARGUMENTS THAT AT&T VOLUNTARILY CHOSE TO USE THEIR SERVICES, LACK MERIT.

The Defendants raise an overarching argument (which includes many of their affirmative defenses) that, even if the Defendants' tariffed rates exceed the Commission benchmarks, AT&T "voluntarily chose" to use the Defendants' services and is thus entitled to no relief. *See, e.g.*, Legal Analysis at 1. The Defendants present this argument, in various forms, over and over again, throughout their Answer, Affirmative Defenses, and Legal Analysis.[27] But no matter how many times they repeat it, and regardless of the precise form the argument takes, it is simply wrong – as the Commission has already concluded when it capped the rates for all competitive access services. 47 C.F.R. § 61.26. In any event, it is also flatly irrelevant, because even assuming, *arguendo*, it could be said that AT&T "voluntarily" ordered and used the Defendants' services, AT&T was entitled to be charged no more than the rates set forth in and Commission's rules.

A. Defendants' Claims And Related Defenses That AT&T "Voluntarily" Ordered Their Access Services Are Wrong But, In Any Event, Are Irrelevant To Their Excessive and Unreasonable Rates.

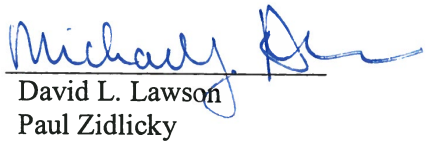
As to the Defendants' assertions that they should not be liable because AT&T "voluntarily" ordered their services, Defendants generally make four closely related arguments: (1) that AT&T voluntarily submitted Access Service Requests (ASRs) and thereby "effectively

[27] *See, e.g.*, Legal Analysis at 1-4, 8, 13, 17, 23, 30, 31-32, 46, 48, 49, 51, 53, 53 & nn.87 & 90; Second, Fourth, Ninth and Tenth Affirmative Defenses; Answer ¶¶ 42, 49, 62, 68, n.137.

CONCLUSION

For the reasons stated herein, the Commission should grant AT&T's Formal Complaint and allow AT&T to file a supplement complaint for damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2014, I caused a copy of the foregoing Reply Legal Analysis In Support Of AT&T Formal Complaint to be served as indicated below:

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Exhibit 94

E-mail from M. Hunseder (Counsel for AT&T) to D. Carter (Counsel for GLCC), dated Aug. 12, 2016

CONFIDENTIAL MATERIALS OMITTED

Exhibit 95

Supplemental Excerpted Pages from INS FCC Tariff No. 1, filed Aug. 10, 1988

CENTRALIZED EQUAL ACCESS SERVICE

Regulations, Rates and Charges applying to the provision of interstate Centralized Equal Access Service within the certificated operating territory of:

Iowa Network Access Division
in the State of
Iowa
as provided herein
Rate Center: Des Moines, Iowa

Service is provided by means of wire, radio, satellite, fiber optics or other suitable technology or combination thereof.
All material in this tariff is new.

IOWA NETWORK ACCESS DIVISION

TARIFF F.C.C. NO. 1
26th Revised Page 1
Cancels 25th Revised Page 1

CENTRALIZED EQUAL ACCESS SERVICE

CHECK SHEET

Title Page 1 and Page 1 to 188 and Supplement No. 7, inclusive, of this tariff are effective as of the date shown. Original and revised pages as named below contain all changes from the original tariff that are in effect on the date hereof.

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* New or Revised page

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CHECK SHEET

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(B) (Cont'd)

(2)(c) In the event that a billing dispute concerning any rates or charges billed to the customer by Iowa Network is resolved in favor of Iowa Network, any payments withheld pending settlement of the dispute shall be subject to the late payment penalty set forth in (b) preceding. If the customer disputes the bill on or before the payment date, and pays the undisputed amount on or before the payment date, any late payment charge for the disputed amount will not start until ten (10) days after the payment date.

(3) Billing Disputes Resolved in Favor of the Customer

If the customer pays the total billed amount and disputes all or part of the amount, Iowa Network will refund any overpayment. In addition, Iowa Network will pay to the customer penalty interest on the overpayment. When a claim is filed within 90 days of the due date, the penalty interest period shall begin on the payment date. When a claim is filed more than 90 days after the due date, the penalty interest period shall begin from the date of the claim or the date of overpayment, whichever is later. (C) (X)

(X) Issued under authority of Special Permission Number 89-150 of the Federal Communications Commission.

CENTRALIZED EQUAL ACCESS SERVICE

2. General Regulations (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.1 Payment of Rates, Charges and Deposits (Cont'd)

(B) (Cont'd)

(3) Billing Disputes Resolved in Favor of the Customer (Continued)

(Z)

(Z)

The penalty interest period shall end on the date that Iowa Network actually refunds the overpayment to the customer. The penalty interest rate shall be at the same rate of interest for the interest expense billed to the account and paid by the customer.

(C)

(C)

(C) Reserved for Future Use

Exhibit 96

Supplemental Excerpted Pages from the Deposition of Michael Starkey, taken Nov. 5 2014

CONFIDENTIAL MATERIALS OMITTED

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

GREAT LAKES COMMUNICATIONS CORP., Plaintiff,	Civil Action No. 5:13-cv-4117
vs.	
AT&T CORP., Defendant.	

VIDEOTAPED DEPOSITION OF MICHAEL STARKEY
Washington, D.C.
Tuesday, November 11, 2014

Reported by: John L. Harmonson, RPR
Job No. 87078

November 11, 2014

8:58 a.m.

Videotaped Deposition of MICHAEL STARKEY, held at the offices of Sidley Austin, LLP, 1501 K Street, N.W., Washington, D.C., pursuant to the Federal Rules of Civil Procedure, by notice, before John L. Harmonson, a Registered Professional Reporter and Notary Public of the District of Columbia who officiated in administering the oath to the witness.

A P P E A R A N C E S

On Behalf of the Plaintiff:
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On Behalf of Defendant:
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Washington, D.C. 20005
BY: JAMES BENDERNAGEL JR., ESQ.
MICHAEL HUNSEDER, ESQ.

ALSO PRESENT:
JASMIN RICE, Legal Video Specialist

M. STARKEY

Q. Well, you just indicated a second ago that AT&T in conjunction with the conference bridge company was providing that service. And you said the analog to that was the business model that Great Lakes has.

MR. BOWSER: Objection.

BY MR. BENDERNAGEL:

Q. That would mean that Great Lakes is in that business, correct?

MR. BOWSER: Misstates testimony.

THE WITNESS: Yeah, I'm not sure I would answer your question in that regard because I don't think that's what I said. I can say it again.

BY MR. BENDERNAGEL:

Q. Are they in the business or not? Do they provide the service or not?

MR. BOWSER: Objection; asked and answered.

THE WITNESS: What is the service in your question?

BY MR. BENDERNAGEL:

Q. Free conference call service.

A. I think I've answered that Great Lakes

M. STARKEY

does not provide free conference call service that I'm aware of.

Q. Do they have a roll in providing that service?

A. They provide the telephony to free conference call providers, as I understand it.

Q. And the telephony being switched access?

A. No. In this case, it is the connection between those conference call providers and the public switch network.

Q. And that's not switched access?

A. Some portion of it is.

Q. I mean, which portion is?

A. The portion that IXCs use to get to those conference call providers.

Q. I see. You indicated that they compete with LECs. Which LECs do they compete with?

A. Any LEC who might also serve those conference call providers.

Q. And who are their specific competitors in that regard?

A. Well, certainly Techstar, one of my

M. STARKEY

former clients, was in that model. Qwest, as an example. CenturyLink. AT&T's affiliates that are local exchange carriers. Certainly any of those carriers could serve these particular clients.

Q. Do they?

A. Yes.

Q. Is it your testimony CenturyLink provides this service?

A. What is "this service" in your question?

Q. Is it your testimony that CenturyLink competes with Techstar and Great Lakes in the provision of free conference call services?

A. I've already said that Great Lakes doesn't provide free conference call services.

Q. I didn't say that. I said the provision of. You indicated that there is competition between Techstar and Great Lakes, correct?

A. Correct, in the provision of telephony, some of whose clients are free conference call providers.

Q. How many clients does Great Lakes have

M. STARKEY

MR. BOWSER: Objection; misstates testimony.

THE WITNESS: Yeah. The only way I can answer that question is to give you the same answer I just did.

BY MR. BENDERNAGEL:

Q. Well, you never answered my question, which was: Is the lowest rate offered by Qwest for switched access a direct connect rate?

MR. BOWSER: Objection; lacks foundation.

THE WITNESS: I don't know.

BY MR. BENDERNAGEL:

Q. Well, do you have any doubt that that's the case?

A. If your question to me is does Qwest offer a lower rate than a direct connect, I guess if you want more precision, I need more precision in the question, which is to who and in what context and for what service.

[redacted]

1 M. STARKEY

[redacted]

1 M. STARKEY

[redacted]

1 M. STARKEY

[redacted]

M. STARKEY

[redacted]

Q. Well, you haven't done a study in that regard, correct?

A. In what regard?

Q. In regard to what you just said about building out this and building out that. You don't know what it would cost, right?

A. In this particular case, I have not. I have done a good number of studies which have evaluated that very issue.

Q. Well, let's deal with what we do know.

A. Okay.

Q. If you were just to price this out on a tariff, putting aside those kind of questions, the rate would be lower than the rate that Great Lakes is currently charging to AT&T, correct?

MR. BOWSER: Objection; lacks

ACKNOWLEDGMENT OF DEPONENT

I, MICHAEL STARKEY, have read or have had the foregoing testimony read to me and hereby certify that it is a true and correct transcription of my testimony with the exception of any attached corrections or changes.

_____

MICHAEL STARKEY

[ ] No corrections

[ ] Correction sheet(s) enclosed

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, by the witness, MICHAEL STARKEY, on this the _____ day of _____, _____.

C E R T I F I C A T E

DISTRICT OF COLUMBIA

I, JOHN L. HARMONSON, a Notary Public within and for the District of Columbia, do hereby certify:

That MICHAEL STARKEY, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of November, 2014.

_____

JOHN L. HARMONSON, RPR

My commission expires: 11/14/15

NAME OF CASE: **Great Lakes Communications Corp. vs. AT&T Corp., Civil Action No. 5:13-cv-4117**

DATE: **November 11, 2014**

WITNESS: **Michael Starkey**

Reason Codes:

1. **To clarify the record**
2. **To conform to the facts**
3. **To correct transcription errors**

Pg.	Ln.	Now Reads	Should Read	Reason
10	21	Techstar	Tekstar	3
15	23	host space	host switch	3
23	6	switch access	switched access	3
27	14	He joined us	She joined us	3
38	18	against one across	against one another	3
42	25	Techstar	Tekstar	3
47	11	The Cloud USA	McLeodUSA	3
49	25	level three	Level 3	3
50	1	communications	Communications	3
50	10	initially then	initially independent then	1
51	4	Techstar	Tekstar	3
51	8	Techstar	Tekstar	3
52	22	Techstar	Tekstar	3
56	13	Techstar	Tekstar	3
56	16	Techstar	Tekstar	3
56	16	traffic bumping	traffic pumping	3
87	8	Voip, the PSTN	VoIP-to-PSTN	3
89	5	Voip, the PSTN	VoIP-to-PSTN	3
103	7	old structures	new structures	1
104	12	questioning	question	3
122	17	switchboards	switch ports	3
124	16	by passing	bypassing	3
127	10	direct America	Connect America	3
130	23	a tariff direct	a carrier direct	3
139	16	That's what the FCC has said.	That's what the FCC has said, rates higher than the benchmark must be charged pursuant to contract, although I don't know what you mean by "express."	2
190	18	definition of	definition of end	3
215	15-	bold discretion	"as they please"	2

	16			
216	9	per use	per unit	3
262	6	I have said that.	delete "I have said that"	1
298	15	R box	RBOCS	3
365	11	I could	I do	3
368	8	Farmers won	Farmers One	3
370	9	R box	RBOCS	3
370	11	Calls	CALLS	3
372	6	Calls order	CALLS Order	3

Signature of Deponent

SUSCRIBED AND SWORN BEFORE ME

THIS 16th DAY OF December, 2014.

Ashley Nicole Droege
(Notary Public)

MY COMMISSION EXPIRES: 4.27.18

ASHLEY NICOLE DROEGE
Notary Public Notary Seal
State of Missouri
Commissioned for St. Charles County
My Commission Expires: April 27, 2018
14608545

Exhibit 97

GLCC Invoice to Free Calling Party, GLCC_ATT_000272, dated Jan. 7, 2013

HIGHLY CONFIDENTIAL MATERIALS OMITTED

Exhibit 98

Brief for Amicus Curiae FCC, *PaeTec Commc'n, Inc. v. MCI Commc'ns Servs. Inc.*, Nos. 11-2268, et al. (3d Cir., filed Mar. 14, 2012)

BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 11-2268 (consolidated with 11-2568) & 11-1204 (consolidated with 11-2569)

PAETEC COMMUNICATIONS, INC. ET AL.,

PLAINTIFFS – COUNTERCLAIM DEFENDANTS - APPELLEES – CROSS-APPELLANTS,

V.

MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES;
VERIZON GLOBAL NETWORKS INC.,

DEFENDANTS – COUNTERCLAIM PLAINTIFFS – APPELLANTS – CROSS-APPELLEES.

On Appeal and Interlocutory Review Under 28 U.S.C. § 1292(b) from the United States District Court for the Eastern District of Pennsylvania, No. 09-cv-1639 (SD)

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At this Court's invitation, the Federal Communications Commission ("FCC" or "Commission") respectfully files this brief as amicus curiae.

STATEMENT OF INTEREST

The FCC has primary responsibility for implementing and enforcing the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* ("the Act"). The FCC has an interest in ensuring that the Act, its implementing rules, and its precedents are correctly interpreted.

QUESTIONS PRESENTED

This Court, pursuant to its Order dated January 25, 2012, invited the FCC to set forth its position on four questions:

1. Is a [CLEC] authorized under the regulations codified at 47 C.F.R. § 61.26 *et seq.*, and the FCC's rulings in the *Eighth Report and Order*, 19 FCC Rcd. 9108 (2004), to include a tandem-switch fee in the composite switched access rate it charges to long-distance carriers for calls to and from the CLEC's end-users in either of the following situations: (a) when the CLEC provides an indirect connection to its end-office switch, and subtends a third party tandem switch?; or [(b)] when the CLEC provides a direct connection to its end-office switch? In neither situation does the CLEC directly operate a tandem switch.

   Answer: As explained in Argument Section I below, the FCC believes the answer to both parts of the question is no.

2. Whether a tariff intended to be filed on a "streamlined basis" pursuant to 47 U.S.C. § 204(a)(3), but received by the FCC 14 days before the "effective date" printed on the tariff, can be "deemed lawful" (*e.g.*, by tolling the "effective date" one day forward to provide a 15 day notice period)?

   Answer: As explained in Argument Section II below, the FCC believes

the answer is no.

3. Whether a CLEC's switched access tariff, filed on a "streamlined" basis pursuant to 47 U.S.C. § 204(a)(3) but subsequently found to violate the FCC's benchmark, can enjoy "deemed lawful" status? Or, is that tariff subject to the mandatory detariffing rule announced in the *Seventh Report and Order*, 16 FCC Rcd. 9923 (2001)?

   Answer: As explained in Argument Section III below, the FCC believes the answer is no to the first question, and yes to the second question.

4. Whether a CLEC is subject to overcharge liability despite charging the rates specified in its "deemed lawful" tariff schedule, when those rates are subsequently found to violate the FCC's benchmark and the tariff contains a provision stating that "notwithstanding any other provision … the rate for Switched Access Service shall equal the maximum rate permitted under 47 C.F.R. § 61.26"?

   Answer: As explained in Argument Section IV below, the FCC believes a CLEC could be subject to overcharge liability under 47 U.S.C. § 203(c) of the Act if the CLEC violates the terms of its tariff.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

1. The Act directs the FCC to ensure that rates for telecommunications services are "just and reasonable," 47 U.S.C. § 201(b), and not unjustly or unreasonably discriminatory. 47 U.S.C. § 202(a). In certain circumstances, a carrier is required to file "schedules of charges" (*i.e.*, "tariffs") with the FCC setting forth the rates (as well as other terms and conditions) upon which it will provide service to customers. 47 U.S.C. § 203(a). When a carrier files a tariff, it may charge only the rate specified in that tariff. *Id.* § 203(c). The

Act, moreover, provides the FCC various tools to ensure that tariffed rates are just and reasonable, as required by section 201(b) of the Act.[1]

Courts have drawn a distinction between "legal" and "lawful" tariffs. "A *legal* tariff is procedurally valid – it has been filed with the Commission, the Commission has allowed it to take effect, and it contains the published rates the carrier is permitted to charge." *Virgin Islands Tel. Corp. v. FCC,* 444 F.3d 666, 669 (D.C. Cir. 2006) ("*Vitelco*") (internal quotations and citations omitted). "A *lawful* tariff," by contrast, "is a tariff that is not only legal, but also contains rates that are 'just and reasonable' within the meaning of § 201(b)." *Id.* (emphasis added).

A legal tariff can become substantively lawful if it is so adjudged in a hearing before the FCC, *see* 47 U.S.C. § 204(a)(1), or it can be "deemed lawful" if it is filed pursuant to a "streamlined" procedure specified in 47 U.S.C. § 204(a)(3). Under that provision, a tariff filed on a streamlined basis "shall be deemed lawful and shall be effective 7 days [for a rate decrease] and

[1] *See, e.g.*, 47 U.S.C. § 205 (the FCC may prescribe a just and reasonable rate "to be thereafter observed" if it determines after a hearing that a carrier's tariffed rate is unlawful); 47 U.S.C. § 208 (the FCC must investigate claims about the lawfulness of rates set forth in effective tariffs); 47 U.S.C. § 206 (the FCC may award damages to a complainant if it finds that a carrier's tariffed rates are unlawful); 47 U.S.C. § 204(a)(1) (the FCC may suspend a new or revised tariff before it becomes effective).

15 days [for a rate increase] after the date on which it is filed with the Commission unless the Commission takes action … before the end of that 7-day or 15-day period."

"A carrier charging a merely *legal* rate may be subject to refund liability if customers can later show that the rate was unreasonable." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002); *see also Vitelco*, 444 F.3d at 669. "A carrier charging rates under a lawful tariff, however, is immunized from refund liability, even if that tariff is found unlawful in a later complaint [under 47 U.S.C. § 208] or rate prescription proceeding [under 47 U.S.C. § 205]." *Vitelco*, 444 F.3d at 669.

In certain circumstances, the Commission has exercised its authority under 47 U.S.C. § 160 to forbear from applying the tariff provisions in the Act (including, but not limited to, § 204) and the FCC's implementing regulations. *See, e.g., Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923, 9956-58 (¶¶ 82-87) (2001) ("*Seventh Report and Order*"); *Petitions of AT&T, Inc. and BellSouth Corp. for Forbearance*, 22 FCC Rcd 18705, 18729 (¶ 42) (2007) ("*AT&T Forbearance Order*"). One exercise of the Commission's forbearance authority has involved a procedure known as "mandatory detariffing." Under that procedure, carriers are *prohibited* from filing tariffs

with the FCC. Instead, they must negotiate rates with their customers without resort to section 203 of the Act and the FCC's rules governing tariffs.[2]

2. This case involves interstate switched "access service" – the service that local telephone companies ("local exchange carriers" or "LECs") provide to connect their end-user subscribers with interexchange carriers ("IXCs") when such subscribers make or receive long-distance calls. The FCC's rules generally require LECs to file tariffs with the Commission that establish the rates, terms, and conditions for their interstate access services, subject to certain exceptions. *See, e.g.*, 47 C.F.R. § 69.1(b).

a. "Historically," the "access charges" levied by incumbent local exchange carriers ("ILECs") "have been the product of an extensive regulatory process." *Seventh Report and Order*, 16 FCC Rcd at 9939 (¶ 41). "This process," the FCC has found, "yield[s] presumptively just and reasonable rates." *Id.* Competing LECS ("CLECs"), by contrast, were "largely unregulated in the manner in which they set their access rates" until 2001, when the FCC adopted the *Seventh Report and Order*. *Id.* at 9931

[2] *See, e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730 (1996), *recon.*, Order on Reconsideration, 12 FCC Rcd 15014 (1997), *further recon.*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999), *aff'd*, *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

(¶ 21). In that *Order*, the FCC "limit[ed] the application of [its] tariff rules to CLEC access services" after finding that some CLECs were "us[ing] the regulatory process to impose excessive access charges on IXCs and their customers." *Id.* at 9924-25 (¶ 2); *see also id.* at 9934 (¶ 27). This anticompetitive practice was possible because the market for these services did not allow competition to discipline rates and CLECs thus enjoyed a monopoly over access charges: in order to originate and terminate long distance traffic, the IXC has no choice but to use the local network of the LEC serving the end-user customer. *See id.* at 9934-36 (¶¶ 28-32).

Responding to the record evidence, the FCC expressed "concern[] that … permitting CLECs to tariff any rate they choose may allow some CLECs inappropriately to shift onto the long distance market … a substantial portion of the CLECs' start-up and network build-out costs." *Id.* at 9936 (¶ 33). That, in turn, "may promote economically inefficient entry into the local markets and may distort the long distance market." *Id.*

"[T]o eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services," the FCC used its forbearance authority under 47 U.S.C. § 160 to impose a "detariffing regime". *Id.* at 9925 (¶ 3). "CLEC access rates that are at or below [a] benchmark … will be presumed to be just and reasonable" and "CLECs may

impose them by tariff." *Id.* But "[a]bove the benchmark," the FCC held that "CLEC access services will be mandatorily detariffed." *Id.; see also id*. at 9938-40, 9956 (¶¶ 40-44, 82). Thus, under this mandatory detariffing regime, a CLEC "must negotiate higher rates with IXCs" outside the tariff process set forth in the Act and the FCC's implementing regulations. *Id.* at 9925 (¶ 3).

The FCC explained that the "benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area." *Id.* at 9941 (¶ 45); *see also* 47 C.F.R. § 61.26(c). The FCC capped CLEC switched access charge rates at those of the competing ILECs because ILEC rates are "presumptively just and reasonable." *Id.* at 9939 (¶ 41). In "moving CLEC tariffs to the 'rate of the competing ILEC,'" the FCC clarified that it "d[id] not intend to restrict CLECs to tariffing solely the per-minute rate that a particular ILEC charges for its switched, interstate access service." *Id.* at 9945 (¶ 54). "The only requirement," the FCC explained, "is that the aggregate charge for these services, however described in [CLEC] tariffs, cannot exceed our benchmark." *Id.* at 9946 (¶ 55).

In the *Seventh Report and Order*, the FCC did not immediately require CLECs to reduce their interstate access rates to the switched access rate of the competing ILEC. Instead, it imposed transitional benchmark rates that

dropped from 2.5 cents per minute to 1.2 cents per minute over the course of three years. *Id.* at 9944-45 (¶ 52); *see also* 47 C.F.R. § 61.26(c). It was only at the end of the transition period, which ended on June 21, 2004, that a CLEC's tariffed interstate access rates were capped at the benchmark rate (*i.e.*, the switched access rate of the competing ILEC). *Id.*

The FCC codified these requirements at 47 C.F.R. § 61.26.

b. Three years after the *Seventh Report and Order*, in 2004, the FCC rejected a request by Qwest Communications Corporation, an IXC, to clarify that "the benchmark rate should be … reduced" when "a carrier other than the [C]LEC" provides part of the switched access services necessary to deliver a long-distance call. *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd 9108, 9113 (¶ 10) (2004) ("*Eighth Report and Order*"). The FCC held that, so long as the CLEC was providing local telephone service to the person who received that call (the "end user"), the CLEC could tariff a rate equal to the full benchmark rate. *Id.* at 9114 (¶ 13). At the same time, the FCC rejected a request by NewSouth Communications, Inc., a CLEC, to declare "that a [C]LEC should be permitted to charge for all of the competing [I]LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing [I]LEC's tandem." *Id.*

at 9118 (¶ 20).[3] The FCC instead "clarif[ied] that the competing [I]LEC switching rate" used as the benchmark "is the end office switching rate when a [C]LEC originates or terminates calls to end-users and the [ILEC] tandem switching rate when a [C]LEC passes calls between two other carriers." *Id.* at 9119 (¶ 21).

c. A subsequent FCC order reiterated that a CLEC may only charge an IXC for tandem switching when it actually provides tandem switching. *See Access Charge Reform*, 23 FCC Rcd 2556, 2564 (¶ 26) (2008) ("*Clarification Order*"). In that order, the FCC clarified that the earlier *Eighth Report and Order* "does not prevent [C]LECs from charging for both tandem and end office switching when these functions are provided by separate switches." *Id.* Acknowledging its earlier holding that a CLEC may only charge an IXC a single switching rate (*i.e.*, either tandem or end office switching, whichever is applicable) when it uses one switch to provide interstate access service, the FCC found that "[w]hen a [C]LEC performs both functions, … using two separate switches, it may charge for both functions, as would an [I]LEC." *Id.*

[3] A switch is a device used to route telephone calls to their destinations. An end-office switch is a type of switch located in a LEC central office; it serves as the network entry point for the loops, or transmission facilities, that connect a residence or business to the Public Switched Telephone Network. A tandem switch is an intermediate switch located between the end-office switch and the final destination of the call.

II. THE PROCEEDINGS BELOW

1. PAETEC Communications, Inc. ("PAETEC") is a CLEC. Its provision of interstate switched access services to IXCs, including Verizon Business Services ("Verizon"), is governed by PAETEC Tariff No. 3 on file with the FCC. Pls. Br. 18; Defs. Br. 15. Two of those services are in dispute: (1) Switched Access Service ("SWAS"), which applies to long-distance calls that an IXC routes to PAETEC indirectly through an ILEC's tandem switch, and (2) Switched Access Service (Direct Connection) ("SWAS-DC"), which applies to long-distance calls that an IXC routes directly to PAETEC's switch. Pls. Br. 18; Defs. Br. 16-17. Since August 2, 2006, PAETEC has charged a single "composite" rate for SWAS and SWAS-DC, and as relevant to this case, those rates include a charge for tandem switching that is equivalent to the competing ILEC's rate for tandem switching. Pls. Br. 18-19; Defs. Br. 18.

2. On April 17, 2009, PAETEC filed a complaint in which it sought to collect SWAS and SWAS-DC charges that IXC Verizon had disputed and failed to pay. In ruling on cross-motions for summary judgment, the court below interpreted the FCC's rules to permit a CLEC to charge an IXC for tandem switching where the CLEC routes its calls to its own end-user customers through an ILEC tandem switch. (App. 92). Accordingly, the

district court found that PAETEC's SWAS rates complied with the benchmark rate in Rule 61.26. (App. 92). By contrast, where an IXC connects directly to a CLEC switch, the court held that a CLEC may not charge for tandem switching and, as a consequence, that PAETEC's SWAS-DC rate exceeded the benchmark rate in Rule 61.26(c). (App. 92-96).

The district court then addressed two further issues concerning PAETEC's SWAS-DC rates. First, the court found that PAETEC's SWAS-DC rates were not deemed lawful for the period beginning December 24, 2008, because PAETEC's tariff for that period provided the FCC with only 14 days' notice, not the 15 days required by 47 U.S.C. § 204(a)(3). (App. 102-105). Second, it held that PAETEC's SWAS-DC rates for the period August 2, 2006 through December 24, 2008 (App. 24) were "deemed lawful," despite the fact that the FCC's regulations "forbid[] CLECs from filing tariffs in excess of the Benchmark" in Rule 61.26(c). (App. 59-63).

ARGUMENT

An "agency's reading of its own rule is entitled to substantial deference." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 328 (2008). Indeed, an agency's construction of its own rule is "controlling" when, as in this case, the interpretation reflects a "fair and considered judgment" and is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S.

452, 461-62 (1997). This rule of deference applies to the FCC's interpretation of its own regulations, as set forth in an amicus brief that (like this brief) reflects the agency's fair and considered view on the question. *Talk Am., Inc. v. Michigan Bell Tel. Co.,* 131 S.Ct. 2254, 2261 (2011) (deferring to FCC rule interpretation contained in amicus brief).

I. IF A CLEC DOES NOT PROVIDE TANDEM SWITCHING, IT MAY NOT CHARGE FOR TANDEM SWITCHING.

Under the rules at issue in this case, if a CLEC does not provide tandem switching functionality, the CLEC may not include a tandem-switching charge in the interstate switched access rates it levies on IXCs for calls to and from the CLEC's end-user customers. This common-sense interpretation – that a carrier may charge only for services that it actually provides – applies irrespective of how the CLEC interconnects with the IXC (*i.e.,* "directly" or "indirectly," as described in Question 1) or how it elects to bill the IXC (*i.e.,* through a composite rate or individual rate elements).

The FCC decided this issue in the *Eighth Report and Order*, where it rejected NewSouth's proposal "that a [C]LEC should be permitted to charge for all of the competing [I]LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing [I]LEC's tandem." *Id.* at 9118 (¶ 20). In that *Order*, the FCC explained that its "long-standing policy with respect to [I]LECs is that they

should charge only for those services that they provide." *Id.* at 9118-19 (¶ 21). The FCC noted that "[u]nder this policy, if an [I]LEC switch is capable of performing both tandem and end office functions, the applicable switching rate should reflect only the function(s) actually provided to the IXC." *Id.* It then reasoned that "a similar policy should apply to [C]LECs." *Id.*

The FCC's *Clarification Order* supports this conclusion. There, the FCC considered the applicable benchmark rate where a CLEC uses both a tandem switch and an end-office switch to connect calls from IXCs to its end-user customers. Citing paragraph 21 of the *Eighth Report and Order*, the FCC reiterated that "where a single switch is capable of providing tandem and end office functions, … [C]LECs can charge the end office switching rate when they originate or terminate calls to end users, and the tandem switching rate when they pass calls between two other carriers." *Id.*, 23 FCC Rcd at 2565 (¶ 26). Yet it also emphasized that "[w]hen a [C]LEC performs both functions, … using two separate switches, it may charge for both functions, as would an [I]LEC." *Id.*[4]

[4] Verizon thus reaches the right result under the wrong theory in this case. Relying on paragraph 19 of the *Eighth Report and Order*, Verizon claims that paragraph 13 applies only to the transitional benchmark rates, whereas

Footnote continued on the next page.

The first question this Court has posed to the FCC appears to perceive some tension between paragraphs 13 and 21 of the *Eighth Report and Order*, 19 FCC Rcd at 9114, 9118-19 (¶¶ 13, 21). *See* Jan. 25, 2012 Order at 1, n.1. Properly construed, however, the two paragraphs are harmonious. In paragraph 13 of that *Order*, the FCC "den[ied] Qwest's request for clarification that the full benchmark rate is not available in situations when a [C]LEC does not provide the entire connection between the end user and the IXC." *Id.* at 9114 (¶ 13). The FCC so held in order to enable a CLEC to charge the "full benchmark rate" in Rule 61.26(c), 47 C.F.R.§ 61.26(c), in the circumstance where a CLEC and an ILEC provide the same access element (*e.g.*, tandem switching) in the call path between an IXC and the CLEC's end-user customer. Paragraph 21 is thus entirely consistent with paragraph 13 in that it also holds that a CLEC may charge an IXC for the services it actually provides – or, more specifically, a CLEC may charge for tandem switching when it provides tandem switching in addition to end-office switching to terminate an IXC's long-distance traffic with the CLEC's end-

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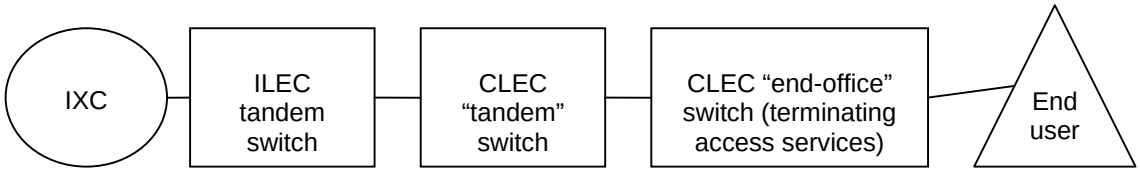
paragraph 21 of that *Order* and the subsequent *Clarification Order* apply to the final benchmark rate. Defs. Br. 41-44. The *Eighth Report and Order* does not establish such a dichotomy. Paragraph 19 explains that "the arguments presented by Qwest to support its request are equally applicable to the transitional benchmark rates" and the final benchmark rates. 19 FCC Rcd at 9117-18.

user customers. *Id.* at 9118-19 (¶ 21); *see also Clarification Order*, 23 FCC Rcd at 2564 (¶ 26).

By way of example, an IXC could send its traffic through two tandem switches to reach an end user customer served by a CLEC. As shown in the diagram below, the IXC would interconnect with an ILEC tandem switch, which would be interconnected with a CLEC's switch. A call from the IXC to the CLEC end user customer would thus pass through the ILEC's tandem switch, to the CLEC's switch, and then to a different CLEC switch before being terminated with the end user customer. In that circumstance, the CLEC is performing all of the functions encompassed by the full benchmark rate (from tandem switching to termination with the end user customer), even though there also is an ILEC performing some functions between the IXC and the CLEC.



Qwest's request for clarification effectively asked the FCC to determine that an IXC is *never* required to pay a CLEC for tandem switching where that service is provided by a different carrier, including in the scenario described above. Specifically, Qwest argued that "when one or more of the

services necessary to originate or terminate an interexchange call is provided by a carrier other than a [C]LEC, … the benchmark rate should be correspondingly reduced." *Eighth Report and Order*, 19 FCC Rcd at 9113 (¶ 10). So, for example, "where the [I]LEC still provides tandem switching," Qwest asserted that "the IXC should have to pay that charge to the [I]LEC only, and not to both the [I]LEC and the [C]LEC" – even where the CLEC also provides tandem switching service with its own switch.[5] *Id.* The FCC, in paragraph 13, disagreed. "When a [C]LEC originates or terminates traffic to its own end users," the FCC explained, "it is providing the functional equivalent of those services, even if the call is routed from the [C]LEC to the IXC through an [I]LEC tandem." *Eighth Report and Order*, 19 FCC Rcd at 9114 (¶ 13). Paragraph 13 thus confirms the common-sense principle that where a CLEC provides a functionality such as tandem switching, it can charge for it, even if an ILEC also provides the same functionality in the call path between an IXC and a CLEC end-user customer.

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[5] Qwest specifically argued that "if an ILEC provides (and directly bills an IXC for) tandem switching used to originate and terminate long distance calls to a CLEC's end user [customers], the ILEC's rate for tandem switching should be subtracted from the 'competing ILEC rate' used in the applicable benchmark," irrespective of whether the CLEC also provides tandem switching to complete the long-distance call. *See* Qwest Communications Corporation Petition for Clarification Or, In the Alternative, Reconsideration, CC Docket No. 96-262 at 3 (filed June 20, 2001).

Contrary to PAETEC's position, Paragraph 13 of the *Eighth Report and Order* does not support the counter-intuitive proposition that a CLEC may charge an IXC for tandem switching when it does not provide that service. *See* Pls. Br. 30. PAETEC misconstrues that paragraph when it broadly asserts that "the FCC confirmed that a CLEC can charge a composite rate based on the aggregate total of what an ILEC charges, *specifically including the ILEC's charge for the ILEC tandem switch*, even if the CLEC does not itself use a tandem switch to deliver its access service." Pls. Br. 18.[6] In so arguing, PAETEC overlooks that the FCC's holding in paragraph 13 of the *Eighth Report and Order* is qualified: "because there *may* be situations" (such as the relatively rare double-tandem scenario described above) "when a [C]LEC does not provide the entire connection between the end user and the IXC, but is nevertheless providing the functional equivalent of the [I]LEC interstate exchange access services, we deny Qwest's petition." *Id.* (emphasis

[6] Relying on rule 61.26(a)(3), as quoted in paragraph 13 of the *Eighth Report and Order*, PAETEC contends that "when CLECs deliver switched access service, the CLECs are providing the functional equivalent of all the elements – including tandem switching – that ILECs may use to provide switched access service." Pls. Br. 28. That statement is correct only insofar as the CLEC actually provides the IXC with the access service elements listed in the rule. To the extent that the CLEC does not provide those service elements, PAETEC's interpretation would violate the FCC's "long-standing policy" that LECs "should charge only for those services that they provide." *Eighth Report and Order*, 19 FCC Rcd 9118 (¶ 21).

added). Instead, PAETEC effectively replaces the qualified "may" in paragraph 13 with an unqualified "will," so that in PAETEC's view a CLEC "will" be permitted to charge an IXC the full benchmark rate in *any* "situation[] when a [C]LEC does not provide the entire connection between the end user and the IXC." *Id.* This reading is contrary to the text of the *Eighth Report and Order* and it is impossible to square with the FCC's holding in paragraph 21 that CLECs "should charge only for those services that they provide." *Id.* at 9118 (¶ 21).[7]

The district court thus erred when it found that a CLEC may charge IXCs for tandem switching if it provides an indirect connection to its end-

[7] PAETEC claims that this interpretation would "nullify" the distinction between "the amount a CLEC can charge when it is acting as an intermediate carrier from the amount a CLEC can charge when it is serving its own end-user customers." Pls. Reply 9, citing 47 C.F.R. § 61.26(b), (c), and (f). Not so. The FCC added new subsection (f) to Rule 61.26 in the *Eighth Report and Order*, 19 FCC Rcd at 9117 (¶ 18), to address confusion surrounding application of the benchmark rate when a CLEC is *not* serving the end-user customer. Some carriers, including PAETEC's predecessor in interest, argued that CLECs "should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end user to an IXC." *Id.* at 9115 (¶ 14). The FCC disagreed, explaining "that the rate that a [C]LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing [I]LEC for the same functions." *Id*. at 9116 (¶ 17). Subsection (f), which codified that holding, was therefore necessary to clarify that CLECs that do not serve end-user customers (like those that do) "should charge only for those services that they provide." *Id.* at 9118 (¶ 21).

office switch (*i.e.*, when the CLEC's end office switch subtends a third-party's tandem switch). As both PAETEC and Verizon point out (Defs. Br. 39-45; Pls. Br. 45-46; Pls. Reply 17), the FCC's rules and orders do not establish different benchmark rates based on the manner in which the CLEC and the IXC interconnect. Rather, the FCC's orders have established a single benchmark rate, and that rate is computed based on the ILEC's rates for the services that a CLEC actually provides an IXC. *Eighth Report and Order*, 19 FCC Rcd at 9118 (¶ 21); *Clarification Order*, 23 FCC Rcd 2565 (¶ 26). The district court's holding undermines that policy because it would allow a CLEC to charge an IXC the ILEC rate for tandem switching provided by the ILEC, and not the CLEC itself.

For similar reasons, there is no merit to PAETEC's contention that a CLEC may charge an IXC for tandem switching, so long as it charges the IXC a "composite rate" (*i.e.*, a single, combined rate) for exchange access rather than an individual tandem switching rate element. Pls. Br. 23-24, 37-41; Pls. Reply 18-23. This novel distinction finds no support in the FCC's rules and orders. For example, FCC Rule 61.26 defines a single rate benchmark – and that benchmark does not vary based on how the CLEC elects to bill an IXC. *See* 47 C.F.R. § 61.26(a)(5) ("The *rate* for interstate switched exchange access services shall mean the composite, per-minute rate

for these services, including all applicable fixed and traffic-sensitive charges.") (emphasis added). Similarly, in the *Seventh Report and Order*, 16 FCC Rcd at 9946 (¶ 55), the FCC explained that "[t]he only requirement is that the aggregate charge for these services, however described in [CLEC] tariffs, cannot exceed our benchmark." In other words, the rate *structure* a CLEC chooses for its tariff has no bearing on the maximum rate *level* established by Rule 61.26(c).

PAETEC's position is also inconsistent with the FCC's holdings in the *Eighth Report and Order* (19 FCC Rcd at 9118-19 (¶ 21)) and the *Clarification Order* (23 FCC Rcd 2565 (¶ 26)). The FCC in those decisions held that where a CLEC uses a single switch for access service, it may only charge an IXC a single switching rate (*i.e.*, either tandem or end office switching, but not both). *Clarification Order*, 23 FCC Rcd 2565 (¶ 26); *see also Eighth Report and Order*, 19 FCC Rcd at 9118-19 (¶ 21). It would be contrary to those orders to find that a CLEC may include in its composite rate a tandem switching fee that it would be prohibited from billing separately.

Indeed, PAETEC's element-specific pricing versus composite rate distinction is inconsistent with its own theory of the case. Throughout its briefs, PAETEC claims that the FCC permits CLECs to charge IXCs for tandem switching that they concededly do not provide in order to "foster the

equality of access charge revenue" between ILECs and CLECs. Pls. Br. 24; *see also id.* at 17, 46-47; Pls. Reply at 15.[8] That claim is incorrect: the FCC enacted the CLEC access charge regime at issue to address the CLECs' misuse of market power by "eliminat[ing] from [its] rules opportunities for arbitrage and incentives for inefficient market entry." *Seventh Report and Order*, 16 FCC Rcd at 9936 (¶ 33); *see also id.* at 9924 (¶¶ 2-3). But even assuming *arguendo* that the FCC intended to maximize CLEC access charge revenue, it would make little sense for the Commission to enact regulations that force CLECs to charge less simply because they elect "a la carte" or element-specific pricing over a single, composite price.

II. A TARIFF FILED ON FEWER THAN 15 DAYS' NOTICE IS NOT ENTITLED TO "DEEMED LAWFUL" STATUS UNDER 47 U.S.C. § 204(a)(3).

A tariff filed in a streamlined manner pursuant to 47 U.S.C. § 204(a)(3) "shall be deemed lawful and shall be effective 7 days [for a rate decrease] or 15 days [for a rate increase] after the date on which it is filed with the

[8] In practice, PAETEC's theory actually promotes revenue inequality. Under PAETEC's theory, the CLEC could collect more than an ILEC for a given call because the ILEC can only charge an IXC for the services it provides, while a CLEC charging the composite rate would be permitted to bill an IXC for every access element listed in Rule 61.26(a)(3), even including elements it does not provide itself. Rather than equalize revenue opportunities between ILECs and CLECs, this would give the CLEC a competitive advantage over the ILEC.

Commission unless the Commission takes action … before the end of that 7-day or 15-day period." Therefore, a tariff proposing a rate increase will not be "deemed lawful" for purposes of section 204(a)(3) of the Act unless it is filed with 15 days' notice from its effective date.

Under the FCC rules then in effect,[9] a carrier must specify an effective date on the face of a new or revised tariff. *See* 47 C.F.R. § 61.23(a). The notice period required by section 204(a)(3) "begins on and includes the date the tariff is received by the Commission, but does not include the effective date." 47 C.F.R. § 61.23(b). Thus, in response to the Court's second question, Jan. 25, 2002 Order at 2, a tariff filed only 14 days before the carrier-designated "effective date" could not be "deemed lawful" under section 204(a)(3).

With respect to the Court's question about potential tolling of the "effective date," nothing in section 204(a)(3) of the Act or the FCC rules then in effect provides for such tolling. Contrary to PAETEC's claims, section 204(a)(3) does not set the effective date of the tariff filing "without regard to the 'Effective Date' written on the tariff pages being filed" so that a tariff

[9] 47 C.F.R. § 61.23, which was the operative rule at the time of this dispute, was removed from the Code of Federal Regulations effective November 17, 2011.

filed on a streamlined basis "'shall be deemed lawful' and 'shall be effective' 15 days after filing." Pls. Br. 64-65. Rather, the FCC's rules expressly provided that "[e]very proposed tariff filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least the number of days notice specified in this section." In other words, the tariff's effective date marked the end of the notice period, 47 C.F.R. § 61.23(a), and the carrier determined that "effective date" under the FCC's former rules by filing within the periods specified by section 204(a)(3).

Indeed, the FCC has unequivocally stated that "all LEC tariff transmittals, other than those that solely reduce rates, shall be filed on 15 days notice" to receive "deemed lawful" treatment. *Implementation of Section 402(b)(1) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2203 (1997) (¶ 68). Moreover, the agency repeatedly has held that tariffs filed outside the statutory notice period, while permitted by the FCC's rules and

precedent, do not qualify for "deemed lawful" treatment.[10] And this rule is widely understood by LECs.[11]

PAETEC's remaining arguments are no more persuasive. *See* Pls. Br. 65-66. As Verizon points out, PAETEC cannot rely on the FCC's treatment of tariffs filed during the 1995 federal government shutdown because "the government was not closed when PAETEC filed its December 2008 tariff"; rather, "PAETEC simply sent the tariff to the wrong address." Defs. Reply at 41. Likewise, PAETEC's reliance on cases involving contract interpretation and the FCC's rules requiring notice of discontinuance of service are inapposite because they do not involve the statutory notice requirements in section 204(a)(3) of the Act. Pls. Br. 65-66.

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[10] *See, e.g.*, *Administration of the North American Numbering Plan*, 20 FCC Rcd 2957, 2960 (¶ 7 n.31) (2005) (tariff filed on one day's notice was "not 'deemed lawful' under section 204(a)(3)"); *Protested Tariff Transmittal Action Taken*, 25 FCC Rcd 13327 (n.1) (Wir. Comp. Bur. 2010) (same for tariff filed on 16 days' notice); *Long-Term Telephone Number Portability Tariff Filings*, 14 FCC Rcd 3306, 3306-07 (¶ 2) (Com. Car. Bur. 1999) (same for tariff filed on 17 days' notice); *1997 Annual Access Tariff Filings*, 13 FCC Rcd. 5677, 5706 (¶ 78) (Com. Car. Bur. 1997) ("LEC tariffs not filed on either 7-days' or 15-days' notice will not be 'deemed lawful.'").

[11] *See, e.g.*, Letter from Consolidated Communications to FCC (Dec. 19, 2011) (conceding that a tariff filed on 16 days' notice is not subject to 47 U.S.C. § 204(a)(3)); Letter from Frontier Communications Solutions to FCC (Feb. 17, 2010) (explaining that "because the original tariff was not filed on 15 days' notice, Frontier foregoes … deemed lawful status.") (attached as Appendix A).

III. CLEC SWITCHED ACCESS RATES ABOVE THE BENCHMARK ARE SUBJECT TO MANDATORY DETARIFFING AND CANNOT BE "DEEMED LAWFUL" PURSUANT TO 47 U.S.C. § 204(a)(3).

A CLEC tariff for interstate switched access services that includes rates in excess of the benchmark in Rule 61.26 is subject to mandatory detariffing. Under that regime, a carrier is *prohibited* from filing a tariff; any attempt to do so would violate the FCC's rules and render the prohibited tariff *void ab initio* if filed with the Commission. *Cf. Global NAPS, Inc. v. FCC*, 247 F.3d 252, 259-60 (D.C. Cir. 2001) ("Merely because a tariff is presumed lawful upon filing does not mean that it is lawful"; rather, "[s]uch tariffs still must comply with the applicable statutory and regulatory requirements" and "[t]hose that do not may be declared invalid."). Thus, such a tariff cannot benefit from "deemed lawful" status pursuant to section 204(a)(3) of the Act.

In the *Seventh Report and Order*, 16 FCC Rcd at 9956 (¶ 82), the FCC explained:

> [A] CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark. During the pendency of these negotiations, or to the extent the parties cannot agree, the CLEC may charge the IXC only the benchmark rate. In order to implement this approach, we adopt mandatory detariffing for access rates in excess of the benchmark. That is, we exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark.

The FCC's implementing rule, 47 C.F.R. § 61.26(b)(1), specifies that "a CLEC *shall not* file a tariff for its interstate switched exchange access services that prices those services … higher [than t]he rate charged for such services by the competing ILEC" (emphasis added).

Section 204(a)(3) is one of "the Act's tariff requirements" subject to the FCC's forbearance action, so "deemed lawful" status under that statutory provision is not available for CLEC switched access charges above the benchmark in Rule 61.26(c). Indeed, in an analogous context, the FCC has explained that it utilizes mandatory detariffing to "restrict" a LEC's "ability to assert 'deemed lawful' status." *AT&T Forbearance Order*, 22 FCC Rcd at 18729 (¶ 42) (conditioning forbearance relief granted to AT&T on its not filing or maintaining any interstate tariffs for certain broadband services); *cf. Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, (47 U.S.C. § 160(c)), for Forbearance*, 22 FCC Rcd 16304, 16331-32 (¶¶ 59-61) (2007) (explaining that "the Commission imposed a permissive detariffing regime through [Rule] 61.26 that permits the filing of tariffs … where the rates are *at or below* a benchmark that is 'the rate of the competing ILEC,'" and holding that the relevant ILEC could "obtain deemed lawful treatment of its tariffed rates," if it "compli[ed] with the … condition … that the rates for [its]

switched access services not increase" above the benchmark rate) (emphasis added).

Relying on its forbearance authority under 47 U.S.C. § 160, the FCC found that the mandatory detariffing of above-benchmark rates would serve the public interest because "CLECs are positioned to wield market power with respect to access service." 16 FCC Rcd at 9957 (¶ 84). Mandatory detariffing, the FCC explained, "will provide greater assurance that [CLEC switched access charge] rates are just and reasonable and will likely prevent CLECs from using long distance ratepayers to subsidize their operational and build-out expenses." *Id.* at 9958 (¶ 86).

As noted above (*see* n.1), the FCC has authority to suspend and investigate streamlined tariffs filed pursuant to section 204(a)(3). *See* 47 U.S.C. § 204(a)(1). But it is not possible, as a practical matter, for the FCC to examine each of the hundreds of CLEC access tariffs filed with the agency within the 15 days before those tariffs go into effect. Once those tariffs become effective, moreover, the "deemed lawful" provision in the statute insulates the CLEC from refund liability should the FCC later find that its access rates exceed the benchmark in Rule 61.26. *Vitelco*, 444 F.3d at 669. That is why the FCC mandatorily detariffed CLEC access charge rates in excess of the benchmark: prohibiting those presumptively unreasonable

rates from being tariffed in the first instance better serves the public interest by according IXCs (and, ultimately, consumers) more protection from unreasonably high interstate access rates than attempting to identify such unreasonable rates on an *ad hoc* basis after the tariffs are filed. *See Seventh Report and Order*, 16 FCC Rcd at 9958 (¶¶ 86-87).

If the Court were to find that a CLEC access tariff that includes rates exceeding the benchmark can enjoy "deemed lawful" status, it would undermine the mandatory detariffing regime imposed by the FCC. *Cf. Global NAPS*, 247 F.3d at 259-60 (affirming FCC's determination that a CLEC's federal tariff was *void ab initio* because the FCC had not authorized the tariff filing and instead directed the carrier to negotiate intercarrier compensation rates with other LECs).[12]

[12] Relying on *Sprint Communications Co. L.P. v. Northern Valley Communications, LLC*, 26 FCC Rcd 10780, 10788 (¶ 17) (2011) ("*Northern Valley Order*"), PAETEC claims that "[a]bsent wrongdoing, deemed lawfulness applies." Br. 62. That is not the case with respect to CLEC switched access charge rates that exceed the benchmark rate in Rule 61.26(c). The *Northern Valley Order* did not address that issue, *see* 26 FCC Rcd at 10783-10788 (¶¶ 7-16), and Sprint (the complainant IXC) "admi[tted] [that] the Tariff rates [at issue] are no higher than the ILEC rates against which they are benchmarked pursuant to rule 61.26." *Id.* at 10788 (¶ 18).

IV. A CARRIER THAT VIOLATES ITS TARIFF CAN BE SUBJECT TO OVERCHARGE LIABILITY.

If a carrier fails to comply with the terms of its own tariff, it is subject to liability under 47 U.S.C. § 203(c). That statutory provision holds that "no carrier shall … charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect." *Id.*

In the FCC's view, a CLEC could be subject to liability under section 203(c) if its tariff prohibited it from charging interstate switched access rates that are higher than the maximum rate permitted by Rule 61.26(c), and the CLEC nevertheless charged rates exceeding that benchmark. *See, e.g., Chesapeake and Potomac Tel. Co. of Maryland; Am. Tel. & Tel. Co.; Petition for Declaratory Ruling Regarding Intrastate Private Lines Used in Interstate Communications*, 2 F.C.C.R. 3528, 3532 (1987) (tariff filer "would apparently violate its statutory duties under Section 203(c) … if it refrained from billing and collecting the applicable rate for these lines.").

CONCLUSION

As set forth above, the Court should affirm the district court's conclusion that a CLEC may not charge an IXC for tandem switching when the IXC directly connects with the CLEC. The Court should, however,

reverse the district court's conclusion that a CLEC may charge an IXC for tandem switching functionality that the CLEC does not actually provide when an IXC indirectly connects to the CLEC through an ILEC tandem switch. This Court should reach both dispositions applying the reasoning set forth in Argument Section I, above.

The Court should also affirm the district court's holding that a tariff filed on 14-days' notice does not enjoy "deemed lawful" status pursuant to 47 U.S.C. § 204(a)(3).

Finally, the Court should reverse the district court's holding that a CLEC tariff that contains interstate switched access rates above the benchmark rate in Rule 61.26(c) enjoys "deemed lawful" status pursuant to section 204(a)(3) of the Act. Instead, the Court should find that such a tariff is *void ab initio* when filed.

Respectfully submitted,

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March 14, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PAETEC COMMUNICATIONS, INC. ET AL., Plaintiffs – Counterclaim Defendants - Appellees – Cross-Appellants, v. MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES; VERIZON GLOBAL NETWORKS INC., Defendants – Counterclaim Plaintiffs – Appellants – Cross-Appellees.	Nos. 11-2268 (consolidated with 11-2568) & 11-1204 (consolidated with 11-2569)

CERTIFICATE OF COMPLIANCE

I hereby certify that (1) this brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the brief contains 7,256 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Pursuant to Third Circuit Rule 31.1(c), I further certify that the text of the electronic brief is identical to the text in the paper copies and that a virus detection program, Symantec Endpoint Protection version 11.0.4014.26, has been run on the file and that no virus was detected.

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APPENDIX A

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Amended Transmittal No. 34

December 19, 2011

FRN #0010-1553-98

Marlene H. Dortch, Secretary
Federal Communications Commission
Washington, DC

Attention: Wireline Competition Bureau

This letter is an amended Transmittal Letter #34 to say we did not file Transmittal #34 pursuant to Section 204(a)(3). Transmittal #34 was filed on a 16 days notice and asked to become effective Jan 1, 2012.

All petitions, correspondence and inquiries in connection with this filing should be addressed to me at wendy.williams@consolidated.com or 936-633-6657.

Sincerely,

Wendy Williams
Regulatory Relations Specialist

Frontier Telephone Companies
180 South Clinton Avenue
Rochester, NY 14646

February 17, 2010

Second Amended Transmittal No. 2

Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

ATTENTION: WIRELINE COMPETITION BUREAU

Dear Secretary:

On February 12, 2010, Frontier filed its Transmittal No. 2, deferring the effective date of material filed under Transmittal No. 1 from February 23, 2010 to February 27, 2010. In Transmittal No. 2, Frontier stated that Transmittal No. 1 was being deferred in order to achieve the required 15-day statutory notice. Frontier acknowledges that, because the original tariff was not filed on 15 days' notice, Frontier foregoes the deemed lawful status that would otherwise be available under §203(a)(3) of the Communications Act.

Frontier Telephone Companies
180 South Clinton Avenue
Rochester, NY 14646

In accordance with the requirements of Section 61.21(a)(3) of the Commission's Rules, the FCC Registration Number (FRN) for Frontier is 0003-5763-52. Frontier is making this filing on behalf of issuing carriers with the following FRNs:

FRNs for participants in Tariff FCC No. 1

0003-5726-17	0003-5839-37	0003-5743-16
0003-5745-89	0003-5745-63	0001-5968-81
0003-5745-48	0003-5745-22	0003-5733-91
0004-2605-68	0003-5745-06	0004-0549-38
0004-0367-03	0001-6713-20	0004-3410-95
0003-9342-05	0002-7227-42	0003-4132-42

FRNs for participants in Tariff FCC No. 2

0003-4074-91	0003-4558-96	0003-2732-40
0003-2233-85	0004-9663-54	0003-2712-36
0005-0613-38	0004-1323-38	0005-0603-71
0004-1561-62	0005-0604-13	0005-0402-66
0004-9663-62	0004-2439-52	0005-0604-96
0005-0605-12	0003-2222-21	0005-0604-08
0005-0603-14	0003-3996-80	0005-0610-64
0005-0605-87	0005-0611-14	0002-7189-71

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0002-6246-41	0002-5749-60

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Questions regarding this filing may be directed to me at:

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Personal or facsimile service of any petitions which may be filed against this transmittal should use the above name, address, and fax number.

Respectfully Submitted,

Kevin Clinefelter
Manager, Pricing & Tariffs

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Paetec Communications, Inc., et al., Plaintiffs

v.

MCI Communications Services, Inc. d/b/a Verizon Business Services, et al., Defendants

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on March 14, 2012, I electronically filed the foregoing Brief for Amicus Curiae Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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Exhibit 99

Mem. of Points and Authorities in Opp. to Mot. to Amend, et al., filed in *Paetec Commc'ns v. Commpartners*, Civ. No. 1:08-cv-00397-JR (Apr. 30, 2010)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAETEC COMMUNICATIONS INC., Plaintiff, v. COMMPARTNERS, LLC, Defendant.	Civ. Action No. 1:08-cv-00397-JR

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF PAETEC'S MOTION TO AMEND THE COURT'S FEBRUARY 18, 2010 MEMORANDUM OPINION AND ORDER TO INCLUDE A CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Dated: April 30, 2010

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAETEC COMMUNICATIONS, INC., Plaintiff, v. COMMPARTNERS, LLC, Defendant.	Civ. Action No. 1:08-cv-00397-JR

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Defendant CommPartners, LLC ("CommPartners") respectfully submits this Memorandum of Points and Authorities in Opposition to Plaintiff PAETEC Communications, Inc.'s ("PAETEC") Motion requesting that the Court amend its February 18, 2010 Order ("Order") to certify certain questions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) ("PAETEC Mem."). The Court should deny PAETEC's Motion because PAETEC fails to establish the exceptional circumstances that would render this case appropriate for interlocutory appeal under 28 U.S.C. § 1292(b).

I. INTRODUCTION

This case has required this Court to wade into an area of telecommunications law and policy broadly referred to as "intercarrier compensation." This term is used generally to refer to the regime by which telephone companies compensate each other when they interact to complete a call between their respective customers – *i.e.*, when the two companies exchange traffic. By statute, and as the Court found, there are two mutually exclusive sets of rules that govern how companies compensate each other for calls between their customers: the "access charge" regime

and the "reciprocal compensation" regime. This case centers on PAETEC's attempt to use the former regime for its alleged termination of traffic that is governed by the latter statutory regime.

The access charge regime was established in the early 1980s, when wireline telephone companies most commonly interacted to complete long-distance calls (as opposed to local calls). The calling party's local phone company (or "LEC" – local exchange carrier) carried the call to its customer's chosen long distance carrier, which then carried the call over the long-distance portion of the journey to the called party's LEC, which then completed the connection by delivering the call to its local phone service customer. In this traditional scenario (which still regularly occurs today), three carriers are involved in the completion of a long-distance call: the originating LEC, the long-distance carrier, and the terminating LEC. To compensate the LECs (both originating and terminating) for the costs incurred in handling these long-distance calls for the long-distance carriers, the FCC permitted LECs to establish "access charges" pursuant to a tariff that must be paid by the long-distance carriers. Thus, the long-distance company collects its fees from its long-distance customer, and then pays the originating and terminating LEC their tariffed access charges.

Congress preserved the "access charge" rules and obligations that existed before February 8, 1996 in 47 U.S.C. § 251(g). For the new types of traffic exchanged following the implementation of the Telecommunications Act of 1996 and for which no pre-1996 Act compensation mechanism existed, such as the VoIP traffic at issue here, Congress established a forward looking intercarrier compensation regime, known as "reciprocal compensation." *See* 47 U.S.C. §§ 251(b)(5). Under this "reciprocal compensation" regime, carriers like PAETEC and CommPartners that exchange traffic must enter into an agreement governing each other's rates for transiting or terminating telecommunications traffic received from the other. If they cannot

agree on rates, the parties must accept the rate established by the state public service Commission. *See* 47 U.S.C. § 252(d)(2).

Here, PAETEC seeks a judgment that it is entitled to collect access charges for traffic delivered to it by CommPartners. This traffic falls into two types: TDM-originated traffic and VoIP-originated traffic. TDM traffic is traditional telephone traffic (*i.e.*, traffic that began on the Public Switched Telephone Network and ended on that network, and that does not require either end user to make use of any special equipment). VoIP traffic, in contrast, begins in an Internet Protocol ("IP") format, and must be converted by CommPartners from VoIP to TDM format for the call to be terminated on the Public Switched Telephone Network. Here, CommPartners provides that carriage and protocol conversion.

In April 2009, PAETEC filed a Motion for Summary Judgment On the Issue of Liability, in which PAETEC argued that CommPartners was liable for access charges on both the TDM-originated traffic and VoIP-originated traffic. CommPartners opposed and cross-moved, arguing chiefly that VoIP-originated traffic falls outside of the access charge regime, both because its VoIP-originated traffic is an "information service" exempted from the access charge regime, and because PAETEC is seeking compensation for the termination (assuming *arguendo* PAETEC actually is terminating this traffic) of "telecommunications" traffic under 47 U.S.C. § 251(b)(5), which is subject to the reciprocal compensation pricing regime that is laid out in 47 U.S.C. § 252. At the same time, CommPartners acknowledged, as it always has, its duty to pay PAETEC access charges for TDM-originated calls.[1]

[1] Although CommPartners concedes its liability for TDM-originated traffic terminated on PAETEC's network, the amount of this traffic (and thus the amount owed to PAETEC by CommPartners) remains an issue of factual dispute between the parties.

In its February 18, 2010 Order, this Court granted PAETEC's Motion with respect to TDM-originated traffic delivered to PAETEC by CommPartners, which was not legitimately in dispute. Most relevant here, the Court's Order joined the growing, uniform body of federal case law holding that VoIP-originated traffic is outside of the scope of access tariffs, and thus granted CommPartners' Opposition and Cross-Motion with respect to the VoIP-originated calls. The Court correctly concurred with the other federal courts that have considered this issue and held that the VoIP-originated traffic delivered by CommPartners to PAETEC constitutes an "information service" not subject to PAETEC's tariffed access charges, and was not subject to the tariff in any event because such traffic is compensable under the reciprocal compensation regime of sections 251 and 252 of the Communications Act. Order at 5-11.

PAETEC now petitions this Court to allow the unusual step of certifying an interlocutory appeal of that non-final Order. Dissatisfied with its loss on the issue of liability for VoIP-originated calls, and not wanting to invest any effort in confirming that CommPartners' liability for TDM traffic is *de minimis*, PAETEC unpersuasively argues that the Court's interlocutory Order should be reviewed by the Court of Appeals before the case is concluded. *See* 28 U.S.C. §1292(b). PAETEC is wrong. It strains to make a variety of conflicting arguments, some included in its original Motion for Summary Judgment and others raised here for the first time, that it erroneously claims meet the high standard established in § 1292(b) to circumvent the traditional prohibition on piecemeal appeals.

As explained below, PAETEC fails to meet its heavy burden. PAETEC's argument is that it would rather obtain premature appellate review of the liability determination rather than complete this proceeding. If PAETEC's Motion were granted, essentially all cases that are bifurcated between liability and damages would be equally entitled to piecemeal review. That is

not the standard for interlocutory certification. PAETEC fails to establish that its requested interlocutory appeal presents a controlling issue of law that would materially affect the course of the litigation. Furthermore, its claims that there is "substantial ground for difference of opinion" ignore the unwavering trend of federal case law that supports the Court's Order. In a futile effort to avoid that controlling body of law, PAETEC's Motion relies on antiquated, non-binding, or inapposite regulatory findings and decisions that succeed only in confusing the otherwise straightforward issue before the Court. PAETEC fails to provide a single decision of either a court or the FCC that contradicts the Court's well reasoned and well supported Order. As such, the Court should deny PAETEC's Motion and order the parties to continue the litigation through to final judgment.

II. PAETEC MISSTATES THE COURT'S HOLDING IN CRAFTING ITS QUESTIONS FOR APPEAL

As a threshold matter, the questions that PAETEC asks this Court to certify for interlocutory appeal impermissibly mischaracterize the Court's February 18, 2010 Order. Indeed, PAETEC's Motion for certification reads like a second motion for summary judgment. The arguments PAETEC raises now either (1) misstate the Court's holding, (2) were not raised on summary judgment, (3) are tangential to the dispute between the parties, or (4) were not even part of the Court's ruling. As such, the Court should decline to certify to the Court of Appeals the questions PAETEC presents.

PAETEC first misstates the Court's Order by requesting certification for appellate review of whether 47 U.S.C. § 204(a)(3) and the filed tariff doctrine "can be overridden, in the absence of unambiguous language under the Act or an FCC ruling that such traffic is not subject to access charges." PAETEC Mem. 2. The Court's Order does not "override" the filed tariff doctrine or § 204(a)(3). Rather, the Court correctly found that interpreting PAETEC's tariff in the manner

urged by PAETEC would impermissibly abridge other provisions of the Communications Act. *See* Order at 9 (explaining that the "decision did not alter the terms of the tariff; the disputed terms were simply *ultra vires* and lacked legal force."). Thus, the Court simply engaged in what courts engage in on a regular basis: interpreting language in one legal document in a way that produces the result required by the controlling statutory scheme. As such, the Court should reject PAETEC's questions for appeal because they misstate the Court's holding by referring to the Order as having "overridden" an "expressed Congressional directive" and as being contrary to the "filed-rate doctrine."

PAETEC also seeks review of the Court's "conclusion" that "VoIP-originated traffic *carried by an intermediate carrier* is not subject to access charges." PAETEC Mem. 2 (emphasis added). PAETEC never even raised CommPartners' role as an alleged "intermediate" or "wholesale" service provider at all in its initial summary judgment brief, and only raised the issue elliptically in its Reply Brief. PAETEC Partial Summ. J. Reply Br. 10. The Reply Brief simply noted that the "ESP exemption [from access charges] only exempts the actual provider of the enhanced (or information) service, and not an intermediary that merely transmits a long distance call at one end of which is an ESP." *Id*. However, PAETEC acknowledges that this only matters "[t]o the extent that CommPartners, LLC, is not performing any 'net protocol conversion' itself or otherwise acting as an 'information service provider' with respect to the subject traffic." *Id*. Here, the Court's Order explicitly found that CommPartners <u>does</u> provide a "net protocol conversion" and thus is providing an "information service." *See* Order at 7. The Court never considered, nor did it have reason to consider, CommPartners' role as an "intermediate carrier" (a designation nowhere to be found in the Communications Act) because (1) PAETEC failed to properly raise it in the briefing on its Motion for Summary Judgment and

(2) that issue played no role in the outcome of the case because CommPartners' status as an "information service provider" is determinative. Review of this issue is therefore inappropriate because CommPartners' role as an "intermediate carrier" played no part at all in the Court's Order. As such, this question is inappropriate for certification.

PAETEC also misconstrues the Court's Order when it seeks review of the "Court's conclusion that § 251(g) does not permit the imposition of access charges on VoIP-originated traffic, purportedly because VoIP technology did not exist prior to the enactment of § 251(g)." PAETEC Mem. 2. PAETEC again resorts to mischaracterizing the Court's Order to improve its hopes of securing piecemeal review. The Court's Order does not turn on whether "VoIP technology" existed prior to 1996. Rather, the Court correctly determined that no "pre-Act *obligation* relating to intercarrier compensation for VoIP" existed prior to 1996. Order at 7 (emphasis added). The Court therefore correctly applied 47 U.S.C. § 251(g) (and *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), in turn), which merely grandfathered the FCC's access charge regime and accompanying obligations that existed as of February 7, 1996. PAETEC's objection to this conclusion is at odds with the significant portion of its brief that acknowledges that the FCC has *never* adopted *any* intercarrier-compensation rules for VoIP-originated traffic. *See* PAETEC Mem. 10-12. Thus, since the FCC has *never* issued such rules, it logically follows that this traffic has never been subject to the antiquated access charge regime in place prior to February 8, 1996. Indeed, as PAETEC points out, "The FCC was first presented with an opportunity to address the access charges owed on IP telephony in the March 1996 petition filed by the America's Carriers Telecommunications Association." PATEC Mem. 10; see also Ex. A to PAETEC Mem. ("1996 ACTA Petition"). PAETEC then goes on to list eight different instances in which the FCC has *declined* to take the very action PAETEC asked this

Court to take. PAETEC Mem. 10-12. Thus, PAETEC's Motion should be denied at the outset as an improper effort to seek summary judgment anew or seek certification of an order that this Court did not issue.

III. PAETEC FAILS TO SHOW THE EXCEPTIONAL CIRCUMSTANCES NECESSARY TO SECURE CERTIFICATION OF AN INTERLOCUTORY APPEAL

A litigant requesting certification for interlocutory appeal "must meet a high standard to overcome the 'strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals.'" *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 597 F. Supp. 2d 120, 121 (D.D.C. 2009) (internal citations omitted). To satisfy its heavy burden, PAETEC must establish that the Court's February 18, 2010 Order involves "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Nat'l Cmty. Reinvestment Coal.*, 597 F. Supp. 2d at 121. Indeed, as the movant, PAETEC "'bears the burden of showing that *exceptional circumstances* justify a departure from the basic policy of postponing appellate review until after the entry of final judgment.'"[2] *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002) (emphasis added) (internal citations omitted). PAETEC cannot, and does not, make that showing.

[2] PAETEC cites to several secondary sources that suggest a lower standard for interlocutory appeal is appropriate. *See, e.g.*, PAETEC Mem. 3 (citing 16 Fed. Prac. & Proc. Juris. § 3930 (2d ed.) (2010)). Regardless of the academic merit of any of those positions, this view has not been adopted within this circuit. *See In re DC Water & Sewer Authority*, 561 F.3d 494, 497 (D. C. Cir. 2009) ("Courts generally disfavor interlocutory appeals because they disrupt ongoing trial court proceedings and squander resources.").

A. PAETEC Fails To Show That Interlocutory Review Would Reverse The Course Of The Litigation Or Result In Substantial Savings Of The Parties' Time Or Effort

PAETEC fails to establish that resolution of the issues it seeks to have certified will result in "savings of the court's or the parties' resources." *Judicial Watch*, 233 F. Supp. 2d at 19; PAETEC Mem. 3. Both parties acknowledge that, regardless of the ultimate ruling on the VoIP issue, significant discovery will be required if the parties intend to take this matter through trial. Nevertheless, in its effort to justify its request for a piecemeal, premature appeal, PAETEC attempts to minimize the amount of discovery that will be required in the (unlikely) event of interlocutory reversal, and inaccurately portrays the discovery burden required by the Court's Order as Herculean.

On the one hand, PAETEC exaggerates the burden associated with segregating the VoIP-originated calls from the TDM-originated calls (which the law required PAETEC to do all along, in any event). PAETEC Mem. 3 ("the process of separating the TDM and VoIP calls to determine how many minutes are VoIP-originated and how many minutes are TDM-originated is very complex. It will involve protracted discovery, expert testimony and trial."). On the other hand, to incent the Court to agree to this piecemeal appeal, PAETEC suggests that, if the Court's Order is reversed, the "only factual question to be resolved will be the total number of minutes terminated, a number that does not appear to be in dispute." PAETEC Mem. 3.

PAETEC's portrayal of the relative burdens is simply not accurate. Foremost, carriers in billing disputes routinely undertake these types of inquiries on a regular basis when resolving co-carrier billing disputes that involve segmenting different types of traffic. Moreover, as PAETEC only stands to recover a couple hundred thousand dollars at most in this case (*i.e.*, even if the traffic is rated at its subsidy-laden access charge rates), the suggestion that the parties will engage in "protracted discovery, expert testimony and trial" is simply not credible. That is

lawyers' rhetoric; the business people will focus on resolving this controversy with appropriate efficiency.

PAETEC then suggests that interlocutory reversal would yield a case with essentially no discovery burdens, a premise it reaches by simply assuming that CommPartners will accede to whatever factual claims that PAETEC makes in this case. To be clear, CommPartners has no intention of waiving its right to have PAETEC meet its burden of proof that it actually terminated the traffic in question. As PAETEC knows, PAETEC wears many hats in the telecommunications industry, and often serves as a carrier's carrier (*e.g.*, an "intermediate carrier"). CommPartners does not share PAETEC's view of the case and will not simply assume that PAETEC terminated all of the traffic for which it has billed CommPartners.

Regardless of the outcome of any appeal on the Court's Order, "determining how many of the minutes of traffic that CommPartners sent to PAETEC for termination were VoIP-originated and how may were TDM-originated" will be part of the parties' discovery burden. PAETEC Mem. 3. Indeed, even if the Court's Order is reversed, the parties will still be required to examine whether and to what extent traffic delivered by CommPartners to PAETEC was actually *terminated* to an end user on PAETEC's network in TDM format, or whether the traffic was handed off to another carrier for that carrier's termination, converted into another format, or otherwise modified in a manner inconsistent with the collection of terminating access charges on TDM-originated traffic under PAETEC's access tariff.[3] Such discovery is necessary regardless of what compensation standard applies, because the compensation rates vary under both intercarrier compensation regimes based on whether PAETEC is actually terminating this traffic

[3] The Court's February 18, 2010 Order was limited to the subject of whether payment was owed for VoIP- and TDM-originated traffic, but did not determine how much traffic actually was terminated and therefore how much payment was actually owed.

or merely transiting it, and whether CommPartners converted IP traffic into TDM format for PAETEC only for PAETEC to turn around and convert it back into IP format. Thus, the outstanding discovery issues will necessarily involve a review of both parties' records, and the records will undergo similar scrutiny irrespective of the legal ruling that attaches vis-à-vis the VoIP issue.

Given these factual matters that the parties need to explore regardless of the legal ruling vis-à-vis VoIP-originated traffic, reversal on interlocutory appeal would not conserve either the Court's or the parties' resources. To the contrary, it would just delay that undertaking, and thus run the risk of two appeals on the same action once discovery and any necessary trial is completed. Interlocutory reversal therefore does not provide the promise of quick-and-easy resolution that PAETEC has advertised. The Court should deny PAETEC's request for an interlocutory-appeal certification because doing so will not "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

B. PAETEC Fails To Establish The Existence Of A Controlling Issue Of Law

PAETEC fails to identify any controlling issue of law warranting piecemeal attention by the Court of Appeals. Instead, PAETEC seeks review of mixed questions of law and fact that the D.C. Circuit will not entertain and that are irrelevant in any case. A controlling question of law "is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *Elkins v. District of Columbia*, No. 04-480, 2010 WL 517410, at *5 (D.D.C. Feb. 12, 2010) (citing *Judicial Watch*, 233 F. Supp. 2d at 19). An issue presents a controlling question of law under § 1292(b) when the issue "determines the outcome 'or even the future course of the litigation.'" *APCC Servs., Inc. v. Sprint Commc'ns Co., L.P.*, 297 F. Supp. 2d 90, 96 (D.D.C. 2003) (citing *Judicial Watch*, 233 F.Supp.2d at 19). Most commonly, courts find an issue to be controlling

when it would terminate an action if the district court's order were reversed. *Id.* As explained above, PAETEC cannot make that showing here. To obtain certification when resolution of the issue would not terminate the action, the movant must demonstrate that the issue "determine[s] the outcome or even the future course of litigation." *Judicial Watch*, 233 F. Supp. 2d at 19. PAETEC cannot make that showing either.

PAETEC's Motion fails to demonstrate that the issues for which it requests certification rise to the level necessary to establish a "controlling issue of law." As noted above, PAETEC identifies two specific conclusions that it seeks to review: (1) the conclusion that VoIP-originated traffic carried by an intermediate carrier is not subject to tariffed access charges; and (2) the conclusion that § 251(g) does not permit the imposition of tariffed access charges on VoIP-originated traffic by virtue of the fact that VoIP technology did not exist in 1996. PAETEC Mem. 2. However, neither of these issues is dispositive of the case, nor will resolution of these issues reduce the discovery burden going forward.

As a legal matter, resolution of either (or both) of the issues listed by PAETEC would not significantly advance the course of litigation. PAETEC first seeks review of the "Court's conclusion that VoIP-originated traffic carried by an intermediate carrier is not subject to access charges." PAETEC Mem. 2. PAETEC's request for interlocutory appeal of this "conclusion" would not meaningfully advance the litigation because the Court did not even make this finding in reaching its holding. Rather, the Court found, based on undisputed facts, that since CommPartners caused the VoIP-originated calls at issue to undergo a "net-protocol conversion," that was the "determinative indicator of whether a service is an enhanced or information service." Order at 6 (quoting *Sw. Bell Tel., L.P.v. Mo. Pub. Serv. Comm.*, 461 F.Supp.2d 1055, 1081-82 (E.D. Mo. 2006)). PAETEC never denies that CommPartners performs the protocol

conversion for the VoIP traffic at issue. Thus CommPartners qualifies for the ESP exemption, the existence of which PAETEC also does not dispute. CommPartners' alleged role as an "intermediate carrier" played no part in the Court's determination, nor should it have done so.

That the traffic delivered by CommPartners to PAETEC underwent a "net-protocol conversion" is a question of *fact* that the Court explicitly found in its Order (Order at 7), and such findings are not subject to interlocutory appeal. *Foster Wheeler Energy Corp. v. Metro. Knox Solid Waste Auth., Inc.*, 970 F.2d 199, 202 (6th Cir. 1992) ("On interlocutory appeal the appellate court has no authority to review disputed questions of fact.") (footnotes and citations omitted); *Shroff v. Spellman*, No. 09-1084, 2010 WL 1039799, at *11 n.4 (10th Cir. Mar. 23, 2010) ("We have jurisdiction over this interlocutory appeal because the record before us is sufficient to permit us to decide the pure question of law presented by the undisputed facts."); *see also Yalkut v. Gemignani*, 873 F.2d 31, 34 (2d Cir. 1989); *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860, 863 (3d Cir. 1977). Instead, PAETEC confuses the issue by inappropriately conflating the information service provided by CommPartners (*i.e.*, the VoIP-TDM protocol conversion, which is an information service) with simple transport service (*i.e.*, moving traffic from one location to another without a format change). Under the undisputed facts presented by both parties, granting PAETEC's interlocutory appeal would not materially change the standing of the case, because the D.C. Circuit would also recognize the undisputed fact that CommPartners provides the net-protocol conversion for this traffic.

Second, PAETEC seeks review of "the Court's conclusion that § 251(g) does not permit the imposition of tariffed access charges on VoIP-originated traffic, purportedly because VoIP technology did not exist prior to the enactment of § 251(g) of the Act." PAETEC Mem. 2. PAETEC again sets up a strawman that neither this Court nor the Court of Appeals should

address. As noted above, the issue is not whether "VoIP technology" existed as a factual matter in 1996.[4] The issue, rather, is whether PAETEC can point the Court to some pre-1996 Act obligation compelling the payment of tariffed access charges for terminating VoIP traffic. PAETEC's latest re-briefing highlights that there are none. As PAETEC concedes, "The FCC was first presented with an opportunity to address the access charges owed on IP telephony in the March 1996 petition filed by the America's Carriers Telecommunications Association." PAETEC Mem. 10; see also Ex. A to PAETEC Mem. ("1996 ACTA Petition").

Thus, the Court's ruling did not turn on the existence of "VoIP technology," as PAETEC incorrectly suggests. The Court specifically – and correctly – declined PAETEC's "invitation to speculate" about whether "pre-Act law *would have* supported [access] charges" for VoIP traffic, as opposed to "whether companies actually paid access charges for VoIP prior to the Act." Order at 8 (emphasis in original). Accordingly, PAETEC has improperly sought certification for appeal of an irrelevant factual issue.

C. No "Substantial Ground For Difference Of Opinion" Exists

PAETEC also fails to provide the Court with case law demonstrating "substantial ground for difference of opinion" for any of the issues it identifies for appeal. "A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits." *APCC Servs., Inc.*, 297 F. Supp. 2d at 97 (internal citations omitted). "The threshold for establishing the 'substantial ground for difference of opinion' with respect to a 'controlling question of law' required for certification pursuant to § 1292(b) is a high one." *Judicial Watch*, 233 F. Supp. 2d at 19 (noting that the

[4] This issue is not an appropriate issue for interlocutory appeal in any event *because it is factual*, not legal. *Foster Wheeler Energy Corp.*, 970 F.2d at 202.

Court was only able to find a few instances within the D.C. Circuit in which a court had found that the standard was satisfied). Indeed, the Court has stated unequivocally that:

> Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a "substantial ground for difference of opinion" sufficient to satisfy the statutory requirements for an interlocutory appeal.

First Am. Corp. v. Al-Nahyan, 948 F.Supp. 1107, 1116 (D.D.C. 1996) (internal citations omitted). As such, the "law is clear that certification under § 1292(b) is reserved for truly exceptional cases." *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 673936, at *2 (D.D.C. Jan. 27, 2000) (citing *Tolson v. United States*, 732 F.2d 998, 1002 (D.C. Cir. 1984)). PAETEC does not meet this standard.

1. PAETEC fails to show a substantial ground for a difference of opinion over whether VoIP is an information service.

It is undisputed that "information services" are not subject to the access charge regime. *See In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, 19 FCC Rcd. 7457, 7459-60 ¶¶ 4-7 (2004) ("*IP-in-the-Middle Order*"); *see also Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005). In revising its tariff, PAETEC claims to have defined its "Access Service" in a manner designed to cover VoIP traffic and purporting to moot unilaterally an allegedly "raging controversy" itself without explaining that intention until it began billing others for terminating VoIP traffic. PAETEC's FCC Tariff No. 3 (defining access service as "all services and facilities provided … for the origination or termination of any interstate or foreign telecommunications using the Company network … regardless of the technology used in transmission. This includes, but is not limited to, Internet Protocol or similar services."). In this lawsuit, PAETEC seeks to collect access charges under that tariff for the

information services CommPartners provided based on the deemed lawful provisions of 47 U.S.C. § 204(a)(3) and the filed tariff doctrine.

PAETEC does not cite a single instance where a court has upheld such an argument. Indeed, PAETEC is compelled to concede (1) that the FCC has never explicitly ruled on whether VoIP-originated traffic qualifies as an "information service," and (2) that the federal courts that previously have considered the question have found that VoIP calls are information services under the Communications Act. PAETEC Mem. 10-12, 18 (citing *Sw. Bell Tel., L.P.v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006) *aff'd* 394 F.3d 568, 569 (8th Cir. 2004); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm.*, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003)); *see also Manhattan Telecomms. Corp. v. Global NAPs, Inc.*, No. 08 Civ. 3829, 2010 WL 1326095, at *2 (S.D.N.Y. Mar. 31, 2010) (same holding). These cases support the Court's Order and defeat the request for interlocutory appeal as there is not a substantial ground for a difference of opinion**.**

In *Southwestern Bell*, for example, the U.S. District Court for the Eastern District of Missouri ruled that "IP-PSTN traffic is an information service within the meaning of the Act because it offers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'" 461 F. Supp. 2d at 1082 (quoting 47 U.S.C. § 153(20)) (footnotes omitted). The court recognized that the key factor in determining whether VoIP-originated traffic constituted an information service was that the protocol conversion from VoIP to TDM happened during the carrier's transmission path:

> The communication originates at the caller's location in IP protocol, undergoes a net change in form and content when it is transformed at the CLEC's switch into the TDM format recognized by conventional PSTN telephones, and ends at the recipient's location in TDM.

Id. (internal citations omitted). This led the court to the conclusion that "IP-PSTN is an information service." *Id.* Here, the facts are indistinguishable, and the Court's February 18, 2010 Order is entirely consistent with this reasoning.

PAETEC is also compelled to acknowledge that the U.S. District Court for the District of Minnesota also explicitly concluded that VoIP service is an "information service." *Vonage*, 290 F. Supp. 2d at 999-1001. The court there held "that the VoIP services provided by Vonage constitutes an information service because it offers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.'" *Id.* (quoting 47 U.S.C. § 153(20). To support this conclusion, the court observed that, for "calls originating with one of Vonage's customers, calls in the VoIP format must be transformed into the format of the PSTN [*i.e.*, TDM] before a POTS [Plain Old Telephone System] user can receive the call." *Id.* Thus, the court in *Vonage* also held that when a call undergoes a net protocol conversion, it is an "information service." This is identical to the conclusion reached by this Court. Order at 6-7.

In an attempt to create the illusion of a "substantial difference of opinion," PAETEC first points to a series of fifteen year-old decisions that it claims demonstrate that "transitions to new technologies, such as the conversion from analog to digital, while involving net protocol conversions, do not result in an information services classification. PAETEC Mem. 18 (citing *In re Implementation of the Non-Accounting Safeguards in Sections 271 and 272 of the Communications Act of 1934, as amended*, Order on Reconsideration, CC Docket No. 96-149, 12 FCC Rcd. 2297, 2298-99 ¶ 2 (1997) (revising paragraph 106 of the *In re Non-Accounting Safeguards Order*, CC Docket No. 96-149, 11 FCC Rcd. 21905, 21957-58 ¶ 106 (1996))). PAETEC misconstrues these cases, however, as these decisions do not stand for this proposition

at all. Rather, these decisions simply hold that a conversion from and to the same format (*e.g.*, analog-to-digital-to-analog) as the traffic transits the network does not turn the call into an information service. *Id.*

For example, footnote 241 of the *Non-Accounting Safeguards Order*, which is cited specifically in PAETEC's Motion, *see* PAETEC Mem. 18, provides an example where "a carrier converts from X.25 to X.75 formatted data at the originating end within the network, transports the data in X.75 format, and then converts the data back to X.25 format at the terminating end." *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21958 ¶ 106 n.241. This is the classic example of conversion from and to the same format, and is unrelated to the case here where the call originates in VoIP format and is converted *by CommPartners* into TDM format. Indeed, this order and the others cited by PAETEC are essentially precursors to the *IP-in-the-Middle Order*, which held, as the Court noted, that "if a company converts a TDM signal to VoIP and then back to TDM before handing it off, no information service is provided." Order at 6 n.3 (citing *IP-in-the-Middle Order*, 19 FCC Rcd. 7457, 7465-66, ¶¶ 12-13 (2004). Thus, PAETEC relies on inapposite cases, for it is undisputed here that *CommPartners* provides a *net* protocol conversion for the calls at issue.

PAETEC next tries to demonstrate "substantial ground for difference of opinion" by citing to a number of state PUC decisions, but PAETEC also fails here. PAETEC Mem. 19. Here again, the cases cited by PAETEC are not even on point. For example, PAETEC first cites to a California Public Utilities Commission decision that it alleges supports its conclusion that "tariffed access charges are owed on VoIP-originated calls." PAETEC Mem. 19 (citing *Global NAPs v. Cal. Pub. Utils. Comm'n*, No. 07-cv-04801, Order Granting Defendant's Motion for Summary Judgment (C.D. Cal. Dec. 23, 2008) ("*Global NAPs Order*")). However, that decision

was predicated explicitly on the fact that the CPUC was enforcing a *private agreement* between the two companies (*i.e.*, an interconnection agreement) and *not a tariff*. *Global NAPs Order* at 18 (noting that "Global NAPs has not shown that the CPUC's action in enforcing the *interconnection agreement* between it and Cox is analogous to the direct regulation of VoIP traffic preempted in Vonage.") (emphasis added).

The other PUC cases cited by PAETEC were all also very fact specific to the defendant in the cases cited, Global NAPs, Inc., the type of traffic it was carrying, and Global NAPs' role in the call flow. For instance, the Illinois decision turned on the fact that "the traffic Global [NAPs] Illinois delivers to AT&T is not ESP / ISP traffic" and as such "Global [NAPs] is a carrier, not an ESP." *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, No. 08-0105, Order, at 39, 44 (Ill. Comm. Comm'n Feb. 11, 2009). Similarly, the Georgia PSC denied Global NAPs' claim of an ESP exemption because Global NAPs did not provide any support for its claims "that the customers sending the subject traffic are ESPs." *Blue Ridge v. Global NAPs*, Docket No. 21905, Order Adopting In Part And Modifying in Part The Hearing Officer's Initial Decision, at 7 (Ga. PSC, Jul. 31, 2009). Unlike those two cases, PAETEC admits that CommPartners' customers for VoIP-originated traffic are ESPs. *See* PAETEC Mem. 16-17.

The Pennsylvania PUC decision also turned on a finding that Global NAPs was not providing an information service because it was acting as a common carrier (*i.e.*, simply providing transport without providing a protocol conversion). *Palmerton Tel. Co. v. Global NAPs*, C-2009-2093336, at 8-9 (Pa. PUC, Feb. 11, 2010) (petition for reconsideration pending, Global NAPs Petition for Reconsideration, *Palmerton Tel. Co. v. Global NAPs*, C-2009-2093336

(Pa. PUC, filed Feb. 11, 2010)).[5] Here, in contrast, the Court has found that CommPartners engages in "transmission and net conversion of the calls" and therefore "is properly labeled an information service provider." Order at 7. Because of these *factual* differences, the legal reasoning in the PUC cases involving Global NAPs cited by PAETEC is inapplicable here, and cannot provide grounds for a showing of "substantial ground for difference of opinion."[6]

Ultimately, PAETEC's contention that it can apply access charges to VoIP-originated traffic is without support, and no "substantial ground for a difference of opinion" exists. PAETEC acknowledges that every federal court to consider the issue has decided against it, and the regulatory decisions it cites are inapposite, and in many cases, antiquated. As such, the Court should deny certification of these issues for interlocutory appeal.

2. There is no substantial ground for difference of opinion over the scope of § 204(a)(3) and the filed tariff doctrine.

Contrary to PAETEC's assertions, § 204(a)(3) and the filed tariff doctrine do not allow PAETEC to "defeat the ongoing regulatory process [or] thwart the authority of the" relevant regulatory authority, here the FCC. *Iowa Network Servs. v. Qwest Corp.*, 385 F. Supp. 2d 850, 899 (S.D. Iowa 2005) (*"INS"*), *aff'd* 466 F.3d 1091 (8th Cir. 2006); *see also Manhattan Telecomms. Corp. v. Global NAPs, Inc.*, No. 08 Civ. 3829, 2010 WL 1326095, at *2 (S.D.N.Y.

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[5] On March 5, 2010, Global NAPs, Inc. filed a petition for declaratory ruling with the FCC seeking the Commission's preemption of, *inter alia*, the Pennsylvania PUC's decision in *Palmerton*; the FCC has sought public comment on that petition. *In re Petition for Declaratory Ruling and Alternative Petition for Preemption of the Pennsylvania, New Hampshire, and Maryland State Commission*, WC Docket No. 10-60, Public Notice, DA 10-461 (rel. Mar. 18, 2010).

[6] Again, to the extent that PAETEC is seeking review of the Court's conclusions of fact that CommPartners provides protocol conversion for its customers, such a review is inappropriate in an interlocutory appeal. *Foster Wheeler Energy Corp. v. Metro. Knox Solid Waste Auth., Inc.*, 970 F.2d 199, 202 (6th Cir. 1992) ("On interlocutory appeal the appellate court has no authority to review disputed questions of fact."); *Gregory v. City of Louisville*, 444 F.3d 725, 742-43 (6th Cir. 2006) ("To the extent that an appellant on an interlocutory appeal argues issues of fact and law on appeal, this Court will only entertain pure issues of law.").

Mar. 31, 2010) (declining "to enter the melee and attempt to apply the filed rate doctrine" when "a significant percentage of the (undifferentiated calls) for which it [the carrier] was billed are VoIP" because of the regulatory uncertainty). Section 204(a)(3) functions to provide any tariffs filed pursuant to its "streamlined provisions" with "deemed lawful" status unless suspended by the FCC within the applicable statutory period. *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, 12 FCC Rcd. 2170, 2183-83 (1997) ("*Streamlined Tariff Order*"). The Court never determined whether PAETEC's tariff is entitled to "deemed lawful" protection, and, as noted below, rightly so. Thus, there is no basis to certify an issue for appeal that this Court never decided vis-à-vis 47 U.S.C. § 204(a)(3).

The Court only cited 47 U.S.C. § 204(a)(3) once in its Order. Order at 10. There the Court recognized the mischief that can attend streamlined tariffing procedures. *Id*. ("The FCC sometimes has as few as fifteen days to consider whether to object to a tariff that contains a rate increase before it goes into effect. *See* 47 U.S.C. § 204(a)(3). To treat tariffs as inviolable would create incentives to bury within tariffs provisions that expand their rates beyond statutory allowance in the hope that the FCC will not notice.") (citation omitted). This is, of course, precisely what happened here.

Here, PAETEC simply revised a term's definition and never revealed its true intentions until many weeks or months later when the carrier-customers begin receiving bills that seeks to enforce that new tariff-term interpretation. The 15-day objection period upon which PAETEC mistakenly relies provided no meaningful ability for others to object or protect themselves from PAETEC's overreaching. And that is presumably why the overwhelming focus of the streamlined tariffing provisions relates to changes in *rates*, not tariff interpretations. PAETEC's entire discussion in its memorandum about the "difference between a 'legal' rate, and a 'lawful'

rate" is therefore beside the point, for this is not a case about the reasonableness of PAETEC's *rates*, but about the permissible *interpretation* of one of its *terms*. PAETEC Mem. 6; 8 ("As the D.C. Circuit has observed, once a *rate* is 'lawful' it cannot be deviated from….") (emphasis added). Even if PAETEC's tariffed *rate* is deemed lawful (it is not,[7] but that does not matter for present purposes), that does not foreclose this Court's right and obligation to *interpret* PAETEC's tariff in a manner that is consistent with the very legislation that entitled PAETEC to author its own law, as it were, *viz*., the Communications Act.

As the Court properly found, the filed tariff doctrine does not allow PAETEC's tariff to be *interpreted* in a fashion that overwrites "the statutory framework pursuant to which it is promulgated." Order at 9. Rather, tariff provisions are void *ab initio* to the extent such terms are applied to ends that the statutory framework does not allow those terms to reach. *Id*. PAETEC again cites no case law to stand for the remarkable proposition that, in the name of the filed tariff doctrine, a federal court must blindly submit to a tariffing carrier's preferred interpretation of a tariff provision when that interpretation would overwrite the statutory scheme that enabled the tariff's existence in the first place.

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[7] PAETEC's claim that its tariff has been "deemed lawful" pursuant to section 204(a)(3) also suffers from factual problems. Indeed, it is unclear whether PAETEC can claim that its tariff is "deemed lawful" pursuant to § 204(a)(3). According to the issue date on the face of its tariff in effect during the time relevant to this dispute, the Fifth Revised Leaf (which contains the revised definition of "Access Service" on which PAETEC relies) was issued on September 13, 2007, and effective September 27, 2007. *See* Ex. A. To be "deemed lawful" under 47 U.S.C. § 204(a)(3), a tariff must be "filed on 15-days' notice." *Streamlined Tariff Order*, 12 FCC Rcd. at 2203 ¶ 68. As the FCC has explained, "LEC tariffs filed outside the scope of section 204(a)(3) shall not be 'deemed lawful' because, by definition, they are not filed pursuant to that section and are not, therefore, accorded the treatment provided for in that section." *Id*. at 2189 ¶ 34. Under the FCC's rules, the notice period begins on and includes the date the tariff is received by the FCC, but excludes the effective date of the tariff filing. 47 C.F.R. § 61.58(a)(1). As such, PAETEC's September 2007 Amendment purportedly broadening the scope of its access tariff was filed on only *14 days*' notice, and thus was not deemed lawful because the FCC was not given the statutorily required 15 days' notice. Accordingly, PAETEC's claim to deemed lawful status for its tariff is belied by the tariff itself.

PAETEC's inability to establish a substantial ground for a difference of opinion on this uncontroversial proposition is unsurprising. A "tariff filed with a federal agency is the equivalent of a federal regulation." Order at 9 (citing *Cahnmann v. Spring Corp.*, 133 F.3d 484, 488 (7th Cir. 1998)). PAETEC's argument ignores the elementary tenet of statutory construction that, even if the plain language of a general regulation would appear to compel a certain result, that result cannot be embraced if it would do violence to another, more specific part, of the statutory regime. As the Court of Appeals has long held that:

> For purposes of interpretation, legislative enactments have long been classed as either general or special, and given different effect on other enactments dependent as they are found to fall into one class or the other. Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute….

United States v. Brown, 483 F.2d 1314, 1322 (D.C. Cir. 1973); s*ee also Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature….'") (quoting *Brown v. Duchesne*, 60 U.S. 183, 194 (1856)); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, *as well as the language and design of the statute as a whole.*") (emphasis added) (internal citations omitted); *Walsh v. Ford Motor Co.*, 627 F. Supp. 1519, 1526 (D.D.C. 1986) (accord).

Here, PAETEC would turn this rule of construction on its head, and would subordinate the Court to PAETEC's tariff even where, as here, the proffered tariff interpretation violates the statutory and regulatory regime enacted by Congress and the FCC. PAETEC did not and cannot cite any authority for the sweeping proposition that it can supplant Congress, the FCC, and now this Court simply by revising its tariff with one sentence fragment on 14 days' "notice."

Thus, the Court properly cited *INS v. Qwest* for the proposition that tariffs cannot be used to "sidestep" the applicable legal framework as part of "a strategic attempt to thwart the impact of the 1996 Act." Order at 10 (citing *INS*, 385 F. Supp. 2d at 899). PAETEC has not produced a single opinion suggesting that *INS* was incorrectly decided or inappropriately applied here. Instead of providing conflicting rulings that would actually support a *substantial* ground for a difference of opinion (as opposed to PAETEC being dissatisfied with not succeeding on its unfounded legal argument), PAETEC argues that the holding of *INS* should not apply because "the FCC has made no definitive statement regarding VoIP-originated traffic." PAETEC Mem. 10. While true, that alone does not amount to a "substantial difference of opinion." The FCC's silence is just that – silence. The Court properly relied upon the consistent body of case law holding in CommPartners' favor.

PAETEC cannot transform the FCC's silence into a voice that counsels in favor of the D.C. Circuit reviewing the Court's Order, which is consistent with the entire body of case law on the issue. Again, this Court correctly noted the *Southwestern Bell* and *Vonage* cases that directly oppose PAETEC's claims here. And indeed, since this Court issued its Order, another federal district court has held that the filed tariff doctrine does not compel the finding that access charges are owed for VoIP traffic. *Manhattan Telecomms. Corp.*, 2010 WL 1326095, at *2 ("Finding that Global has successfully shown that a significant percentage of the (undifferentiated) calls for

which it was billed are VoIP, and given the FCC's authority in this area and its limited pronouncements, the Court declines to enter the melee and attempt to apply the filed rate doctrine to the facts of this case.").[8] This lack of controversy dooms PAETEC's motion. *See Nat'l Cmty. Reinvestment Coal.*, 597 F.Supp.2d at 122 (denying interlocutory appeal because of a failure to show a split within the district on this issue); *Graham v. Mukasey*, 608 F. Supp. 2d 56, 57-58 (D.D.C. 2009) (denying interlocutory appeal because Plaintiff "has not shown the presence of a controlling issue of law in this case for which there is a substantial ground for difference of opinion … [and] does not show the existence of any split in this district or this circuit regarding any controlling issue of law in this case, nor does he demonstrate that the … opinion is contrary to law.").

Indeed, all PAETEC has demonstrated in its Motion is its disagreement with the Court's Order. But mere disagreement "does not establish the substantial ground for difference of opinion sufficient to satisfy the statutory requirements for interlocutory appeal." *Id.* (citing *Judicial Watch*, 233 F. Supp. 2d at 19-20). Absent conflicting authority for the Court of Appeals to consider, interlocutory appeal simply is not appropriate.

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[8] The court in *Manhattan Telecommunications* was evidently not briefed on the distinction between access charges and reciprocal compensation. The court there ruled that Manhattan was entitled to compensation under an equitable theory. For the reasons given in its summary judgment briefs, CommPartners maintains that such a result – in which the various federal district courts set the rates for the termination of § 251(b)(5) telecommunications instead of the state commissions that Congress chose to set those prices in § 252(d)(2) – is contrary to the Act. Congress gave federal courts a role in that legislative scheme: reviewing those state court determinations for compliance with federal law, not setting the rates in the first instance. 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section."). In any event, PAETEC has not sought interlocutory review of this Court's determination that equitable relief is unavailable.

3. PAETEC mischaracterizes the Order's reliance upon the applicability of the ESP exemption[9] to wholesale services in an attempt to manufacture a "substantial difference of opinion."

PAETEC distorts the content of the Court's Order by arguing that the Order rests "on the applicability of the ESP exemption to carriers providing wholesale service." PAETEC Mem. 14. This assertion suffers from several flaws. First, as a factual matter, the Order simply never touches upon CommPartners' role as a wholesale (or intermediate) service provider. This is because the Court correctly makes a finding of (undisputed) fact that CommPartners' service includes the "transmission and net conversion of the calls" and as such is "properly labeled an information service." Order at 7. These findings of fact and law qualify CommPartners for the ESP exemption; the fact that CommPartners provides services on a "wholesale" rather than "retail" basis simply does not and should not enter into the analysis. *See* Order at 6 ("[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service" and therefore is eligible for the ESP exception) (quoting *Sw. Bell*, 461 F. Supp. 2d at 1081-82).

PAETEC attempts to confuse the issue by now alleging that "CommPartners is not the enhanced service provider here but is in fact a carrier transmitting calls for its customers." PAETEC Mem. 14-15. PAETEC further claims that CommPartners "[only] provides the transmission services underlying a VoIP provider's retail offering." PAETEC Mem. 16. As indicated above, however, the Court found differently in its Order.[10] *See* Order at 7 (finding that

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[9] Under law prior to the 1996 Telecommunications Act, the "information services" exception to access charges was known as the "enhanced services" exception or "ESP" exception. Order at 5.

[10] That CommPartners' services include a net protocol conversion is an established issue of fact. The Court's determination that CommPartners' service is an "information service" rather than a "telecommunications service" is a combined issue of fact and law. *See* Order at 7. Only issues of pure law can be raised on interlocutory appeal. *See Gregory v. City of Louisville*, 444 F.3d 725, 742-43 (6th Cir. 2006) ("To the extent that an appellant on an interlocutory appeal

CommPartners provides "transmission and net conversion of the calls") (emphasis added). CommPartners provides more than mere "transmission." Indeed, PAETEC has previously acknowledged that CommPartners provides the enhanced services at issue – Exhibit A to PAETEC's own motion for summary judgment explains CommPartners' service by noting that where "the called party uses traditional voice service, the call is converted to voice protocol and routed to that party through the nearest [carrier's] telephone switch that serves the called party." Clark Decl. ¶ 12. CommPartners' alleged role as a "wholesale" rather than "retail" provider of VoIP services is immaterial to the determination of whether CommPartners provides "information services" or "telecommunications services." Indeed, the wholesale/retail distinction appears nowhere in the Communications Act.

PAETEC's claim that "a carrier serving the information or enhanced services provider is providing a telecommunications service" is also misleading and inaccurate. PAETEC Mem. 15. Even if this is true in some circumstances, the Court made no such finding. In any event, the determination of whether a provider is offering a "telecommunications service" or an "information service" is determined based on the nature of the actions under taken by the carrier. Here, the record is undisputed that CommPartners provides a net protocol conversion that falls squarely within the "information service" category. Order at 7. PAETEC attempts to supports its theory by citing to several inapposite decisions by the FCC, which PAETEC never cited in its summary judgment briefs. *See* PAETEC Mem. 15.

PAETEC first cites to a 2008 FCC decision on *customer privacy* protections, where Verizon argued that the service providers affiliated with Bright House Networks and Comcast

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argues issues of fact and law on appeal, this Court will only entertain pure issues of law."). As such, PAETEC's new arguments as to CommPartners' status as an "information service provider" cannot be reviewed except for error of pure law.

were not "carriers" *within the meaning of section 222(b)* because they did not hold themselves out to the public as offering such services for sale. *In re Bright House Networks, LLC v. Verizon California, Inc.*, 23 FCC Rcd. 10704, 10717 ¶ 38 (2008) ("*Brighthouse*") *aff'd sub nom Verizon California, Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009). Neither the fact that they were offering VoIP services nor that they offered services on a wholesale basis ultimately affected the Commission's analysis. *Id.*

Brighthouse involved an entirely different part of the Act than that at issue here, and the Commission explicitly limited its holdings to finding that the two carriers "are telecommunications carriers f*or purposes of section 222(b) of the Act*," which, as noted above, governs consumer privacy. *Id.* ¶ 41 (emphasis added). Indeed, the Commission noted that:

> the D.C. Circuit has made clear that an agency may interpret an ambiguous term 'differently in two separate sections of a statute which have different purposes.' Here, section 222(b) has a different purpose – privacy protection – than many other provisions of the Communications Act, and we believe that this purpose argues for a broad reading of the provision. As a result, our decision holding the Competitive Carriers to be 'telecommunications carriers' for purposes of section 222(b) *does not mean that they are necessarily 'telecommunications carriers' for purposes of all other provisions of the Act*.

Id. at 10719-20 ¶ 41 (emphasis added) (footnotes omitted). *Bright House Networks* is simply inapplicable to the dispute between PAETEC and CommPartners. PAETEC is comparing apples and oranges again.

PAETEC's reliance on the FCC's order declaring Time Warner Cable, a VoIP provider, to be a wholesale telecommunications carrier entitled to interconnect and exchange traffic with incumbent LECs is also inapplicable. *In re Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, 22 FCC Rcd. 3513, 3518-19, ¶ 12 (2007).

The *Time Warner* order established the right of wholesale telecommunications providers to interconnect pursuant to § 251 of the Act. *Id.* at 3513 ¶ 1. It did not, however, establish the regulatory status of all services provided by wholesale (as opposed to retail) carriers to VoIP providers. Indeed, the FCC limited its decision to "carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis." *Id.* at 3520 ¶ 14 (declining to "express any opinion on any state commission's evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service."). Here, the Court has determined that CommPartners provides an "information service" and not a "telecommunications service" because it performs a net protocol conversion on the VoIP traffic it carries. Order at 7. As such, *Time Warner* is inapposite.

The decisions of the D.C. Circuit, Eighth Circuit, and the District of Nebraska cited by PAETEC are also far off the mark. PAETEC Mem. 15-16 (citing *Verizon California, Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009) ("*Verizon California*"), *Iowa Tel. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 747 (8th Cir. 2009) ("*Iowa Telecom*"), and *Sprint v. Neb. PSC*, No. 4:05-cv-3260, 2007 WL 2682181, at *1 (D. Neb. Sep. 7, 2007) ("*Sprint*")). In *Verizon California*, the D.C. Circuit simply upheld the reasoning of the FCC in *Brighthouse*, discussed above, and is therefore equally inapposite (had it actually been relevant, PAETEC presumably would have cited it in its summary judgment briefs). In *Iowa Telecom*, the factual situation closely mirrored that of *Time Warner*, with Sprint seeking interconnection with an incumbent LEC to facilitate the provision of wholesale services to a cable company offering VoIP services over their cable network. *Iowa Telecom*, 563 F.3d at 747. In accepting Sprint's statement that it provided services on a "common carrier" basis and therefore was entitled to interconnection, the

court was never required (nor, does it appear, ever requested) to reach the issue of whether Sprint was an "information service provider" and therefore not a "telecommunications service provider." As such, the decision is irrelevant to the Court's Order here.. Similarly, the Nebraska District Court decision cited by PAETEC resolved an interconnection dispute on factual and legal grounds closely mirroring those of *Iowa Telecom*, and as such is also irrelevant to determining whether CommPartners is an "information service" or "telecommunications service" provider. PAETEC Mem. 15 (citing *Sprint*, 2007 WL 2682181, at *1.[11]

As the Court correctly found, CommPartners does provide an "information service." Order at 7 (finding that "CommPartners' transmission and net conversion of the calls is properly labeled an information service."). PAETEC's efforts to conflate "telecommunications traffic" with "telecommunications carrier" are pure sophistry. PAETEC Mem. 15. As the Court rightly acknowledged, information service traffic can still be "telecommunications" under 47 U.S.C.

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[11] PAETEC incorrectly claims that "numerous state commissions" have agreed with PAETEC's position that "wholesale carriers" to information service providers by default offer "telecommunications service." PAETEC Mem. 16. As with the other orders cited above, these decisions are simply inapposite. For example, the first PUC case cited by PAETEC is a North Carolina Utility Commission decision involving a request for interconnection by Sprint with an incumbent LEC (just as in *Sprint* and *Iowa Telecom* discussed above). PAETEC Mem. 16 n.19 (citing *In re Petition of Sprint Communications Company, L.P. for Arbitration of Interconnection Agreement with Randolph Telephone Company*, 2008 WL 5456090, at *12 (N.C.U.C. Dec. 31, 2008) ("*Randolph*")). There, the North Carolina Utility Commission (*"NCUC"*) determined that "Sprint is entitled to interconnect and exchange traffic with [the incumbent LEC] pursuant to Sections 251(a) and (b) of the Act as a wholesale telecommunications provider of services to other carriers, including Voice over Internet Protocol (VoIP) telephony service." *Randolph*, 2008 WL 5456090 at 7. As in the other decisions discussed above, the NCUC did not predicate its determination that Sprint was entitled to interconnection because as a wholesale service provider, Sprint was offering telecommunications services, as PAETEC would have the Court believe. Rather, although Sprint's right to interconnect was predicated on its status as a "telecommunications carrier," the NCUC specifically noted that Sprint "may then also offer information services, without limitation as to the relative amounts of the two types of services." *Id.* at 13. As such, Sprint's role as a wholesale carrier and ability to interconnect with LECs played no role in determining whether the services actually provided where "telecommunications" or "information" services. *Id.* The other PUC cases cited by PAETEC contain similar flaws.

§ 251(b)(5) and thus subject to the *reciprocal compensation* regime. Order at 7 n.5 ("Unlike access charges, reciprocal compensation can apply to information services.") (citing *Sw. Bell*, 461 F. Supp. 2d at 1081 n.19).

PAETEC's new assertion, PAETEC Mem. 15-17, that CommPartners only provides "transmission services" (*i.e.*, telecommunications services) was not argued in its Motion for Summary Judgment. PAETEC cannot raise new factual issues or seek review of factual findings in an interlocutory appeal of the Court's Order. *See Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) ("Even an issue raised in the complaint but ignored at summary judgment may be deemed waived."); *Head Start Family Educ. Program, Inc. v. Coop. Educ. Serv. Agency 11*, 46 F.3d 629, 635 (7th Cir. 1995) (holding that an argument not raised by a party in its motion for summary judgment is waived); *Foster Wheeler Energy Corp. v. Metro. Knox Solid Waste Auth., Inc.*, 970 F.2d 199, 202 (6th Cir. 1992) ("On interlocutory appeal the appellate court has no authority to review disputed questions of fact.") (footnotes omitted). Further, they are contradicted by the Court's Order, and by undisputed fact. Order at 7. Again, PAETEC is wrong in any event; the "wholesale"/"retail" distinction is a red herring, as CommPartners indisputably provides the net protocol conversion that qualifies its services for information-service status.

In addition to lacking legal support, PAETEC's assertion that "a carrier serving the information or enhanced services provider is providing a telecommunications service" also conflicts with the FCC's reasons for adopting the ESP exemption. PAETEC Mem. 16. The FCC adopted the ESP exemption to avoid the stifling effects that the imposition of access charges could have on enhanced/information service providers and their nascent technologies. *See In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service*

Providers, CC Docket No. 87-215, 3 FCC Rcd. 2631, 2631 ¶ 2 (1988) (characterizing the ESP exemption as a temporary measure to avoid "unduly" burdening the Internet Service Provider industry); *IP-in-the-Middle Order*, 19 FCC Rcd at n. 60 (confirming vitality of ESP exemption). PAETEC's claim that the ESP exemption applies only to VoIP *retail* providers and not intermediate/wholesale carriers is nonsensical. The ESP exemption only serves its purpose if the wholesale/intermediate carrier, which the enhanced/information service provider must pay to carry its traffic, is also exempt from access charges for that traffic and does not have to pass through those access charges to the VoIP retailer in the form of higher rates. If the wholesale/intermediate carrier were required to pay the terminating access charges as PAETEC contends, then the FCC's intention to shelter enhanced/information service providers from these charges would be thwarted as the intermediate carriers would pass through the access charges to the VoIP retailers in the form of higher rates for the services provided. Thus, in addition to its legal flaws discussed above, the Court should reject PAETEC's claims that wholesale/intermediate carriers carrying information services are not eligible for the ESP exemption because it contradicts the underlying purpose of the exemption – the FCC's desire to protect new technologies from access charges.

4. PAETEC fails to demonstrate a "substantial difference of opinion" on the reach of 47 U.S.C. § 251(g).

PAETEC's final claim that there is a "substantial difference of opinion" as to whether VoIP traffic falls outside the scope of § 251(g) also lacks any support. Rather, PAETEC's argument is a classic example of vehement disagreement without case law support for the movant's preferred outcome. *See First Am. Corp.*, 948 F. Supp. at 1116 ("Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a 'substantial ground for difference of opinion.'") (internal citations omitted). Indeed, although PAETEC

clearly disagrees with Congress's plain language in § 251(g), the D.C. Circuit's holding in *WorldCom, Inc. v. FCC*, and this Court's Order correctly applying those authorities, PAETEC fails to provide a citation to a single federal or state case holding to the contrary. Nothing PAETEC argues can change the fact that § 251(g) is a clearly worded grandfathering provision, as the D.C. Circuit has aptly noted. In contrast, *Sw. Bell* stands for the clear proposition that "[b]ecause IP-PSTN [*i.e.*, VoIP-originated traffic converted to TDM] is a new service developed after the Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable." *Sw. Bell*, 461 F. Supp. 2d at 1080. Similarly, the Tenth Circuit has also accepted this interpretation of § 251(g), noting that "§ 251(g) is a transitional provision designed to keep in place certain restrictions and obligations, including the existing access charge regime, until such provisions are superseded by FCC regulations." *Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1263 (10th Cir. 2005) (internal citations omitted).

PAETEC argues that this Court's (and presumably the Tenth Circuit's and Eastern District of Missouri's) reading of *WorldCom* is inconsistent with "numerous" decisions. However, none of the decisions cited by PAETEC are on point. PAETEC first cites to the FCC's *IP-in-the-Middle Order*, arguing that "[t]his Court's reasoning that the presence of VoIP technology disqualifies a call from being subject to access charges would apply equally to that case; yet the FCC ruled that access charges were owed." PAETEC Mem. 22-23. The FCC's *IP-in-the-Middle-Order* is immediately distinguishable.

In the *IP-in-the-Middle Order*, the FCC explicitly limited its ruling to the type of service described in AT&T's Petition – services that "undergo[] no net protocol conversion." *IP-in-the-Middle Order*, 19 FCC Rcd. at 7458, ¶ 2. Before February 8, 1996, carriers were entitled to collect access charges for calls that began and ended in TDM format, so the FCC merely held

that a carrier cannot override § 251(g) through a technological conversion that it performs for its own convenience. Here, by contrast, the Court has correctly determined that CommPartners engages in "transmission *and net conversion* of the calls." Order at 7 (emphasis added).

The same is also true in the FCC's prepaid calling card services decisions cited by PAETEC. *See, e.g., In re AT&T Corp. Petition for a Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 05-68, Order & NPRM, 20 FCC Rcd. 4826, ¶ 14 (2005) ("We are not persuaded by AT&T's claim that inserting advertisements in a calling card service transforms that service into an information service under the Act and our rules.") (footnotes omitted); *see also In re Regulation of Prepaid Calling Card* Services, WC Docket No. 05-68, Declaratory Ruling & Report & Order, 21 FCC Rcd. 7290 (2006) (applying same logic when prepaid calling card used menu to allow long distance calls).

Finally, PAETEC takes issues with the Court's *factual* determination that "VoIP did not exist prior to 1996." PAETEC Mem. 23. As noted above, the argument about when VoIP existed is a red herring, for *WorldCom* correctly held that § 251(g) preserved certain pre-Act *payment obligations*, not the underlying technology used in transmitting certain types of calls. *See* Order at 8 (observing, correctly, that the "analysis should turn … on whether companies actually paid access charges for VoIP prior to the Act."). Thus, whether VoIP existed in some laboratory or dorm room in 1996 is not relevant here; what matters is that there *never was any pre-Act payment obligation regarding VoIP traffic* that could have been *preserved* in § 251(g). Indeed, not only was there no FCC-imposed payment obligation in 1996 for VoIP traffic, this whole case arose because, as of 2010, the FCC still has not established any intercarrier compensation rules regarding payment obligations for VoIP traffic. Once again, PAETEC finds false comfort in the FCC's silence.

In any event, review of a Court's conclusions of fact is inappropriate in an interlocutory appeal. *Foster Wheeler Energy Corp.*, 970 F.2d at 202 ("On interlocutory appeal the appellate court has no authority to review disputed questions of fact."). However, as a factual matter, PAETEC's requested finding would contradict the Eastern District of Missouri's determination, correctly followed by this Court, that "IP-PSTN is a new service developed after the Act." *Sw. Bell Tel., L.P.*, 461 F. Supp. 2d at 1080. Furthermore, the article cited as support for PAETEC's proposition fails to provide any evidence of VoIP-originated, TDM-terminated traffic in existence at that time in the United States. *See* Ex. A to PAETEC Mem. Rather, the article mainly discusses computer-to-computer telephony. Finally, the mere fact that such a technology may have been in existence does not call into question the essential meaning of the Court's statement – *i.e.*, that "VoIP was not developed until the 1996 Act was passed." Order at 8. Ultimately, none of the orders or facts provided by PAETEC support its position that § 251(g) governs the applicability of access charges for VoIP traffic. It most certainly does not, and PAETEC's resort to newspaper articles shows that there can be no substantial ground for difference of opinion on this controlling issue of law.

IV. CONCLUSION

As demonstrated above, PAETEC has failed to meet the high standard for interlocutory appeal required by 28 U.S.C. § 1292(b). Therefore, CommPartners respectfully requests that the Court deny PAETEC's Motion and deny certification of the issues PAETEC identifies in its Motion and accompanying Memorandum.

Dated: April 30, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2010, a true and correct copy of Defendant CommPartners, LLC's Memorandum of Points and Authorities in Opposition to Plaintiff PAETEC's Motion To Amend The Court's February 18, 2010 Memorandum Opinion And Order To Include A Certification For Interlocutory Appeal Pursuant To 28 U.S.C. § 1292(b) and the Proposed Order attached thereto was served via ECF upon the counsel of record listed below.

/s/ Michael B. Hazzard
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Exhibit 100

Tr. of Oral Arg., *Farmers v. FCC*, 688 F.3d 714 (D.C. Cir. 2011) (Dec. 7, 2011)

Do Not Release - Not for Inclusion in the Public Record
PUBLIC VERSION

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 FARMERS AND MERCHANTS MUTUAL
4 TELEPHONE COMPANY OF WAYLAND,
IOWA,
5
6 Petitioner, No. 10-1093
7 v.
8 FEDERAL COMMUNICATIONS
COMMISSION, ET AL.,
9
10 Respondent.

11 Wednesday, December 7, 2011
Washington, D.C.

12 The above-entitled matter came on for oral
13 argument pursuant to notice.

14 BEFORE:

15 CIRCUIT JUDGES ROGERS, TATEL, AND KAVANAUGH

16 APPEARANCES:

17 ON BEHALF OF THE PETITIONER:

18 JOHN F. COONEY, ESQ.

19 ON BEHALF OF NORTHERN VALLEY COMMUNICATIONS:

20 ROSS A. BUNTROCK, ESQ.

21 ON BEHALF OF THE RESPONDENT:

22 JOEL MARCUS, ESQ.

23 ON BEHALF OF QUEST COMMUNICATIONS COMPANY, LLC:

24 DAVID H. SOLOMON, ESQ.

25

ORIGINAL

C O N T E N T S

ORAL ARGUMENT OF: PAGE

John F. Cooney, Esq.
On Behalf of the Petitioner 3; 54

Ross A. Buntrock, Esq. 17
On Behalf of Northern Valley Communications

Joel Marcus, Esq. 24
On Behalf of the Respondent

David H. Solomon, Esq. 47
On Behalf of Qwest Communications Company, LLC

1 P R O C E E D I N G S

2 THE CLERK: Case number 10-1093, Farmers and
3 Merchants Mutual Telephone Company of Wayland, Iowa,
4 Petitioner v. Federal Communications Commission, et al. Mr.
5 Cooney for the Petitioner; Mr. Buntrock, Intervener for
6 Northern Valley Communications, LLC; Mr. Marcus for the
7 Respondent; Mr. Solomon, Intervener for Qwest Communications
8 Company, LLC.

9 JUDGE ROGERS: Good morning.

10 ORAL ARGUMENT OF JOHN F. COONEY, ESQ.

11 ON BEHALF OF THE PETITIONER

12 MR. COONEY: Good morning. And may it please the
13 Court. Despite the complexity of the briefing, this is
14 actually a simple case. Farmers provided Qwest with service
15 that, as a matter of physics, constituted switch access
16 service and that was provided pursuant to a lawful tariff that
17 was consistent with the Communications Act and the FCC's
18 rules.

19 Farmers switched calls from Qwest customers and, as
20 the Commission found, terminated those calls to the conference
21 calling companies at their conference bridges. Under these
22 circumstances under the filed rate doctrine, Farmers is
23 entitled to collect its charges for a switch access service
24 that it provided Qwest. Moreover Qwest should not be afforded
25 a windfall by being allowed to avoid paying for the services

1 that it actually received.

2 Now, to assist the Court in considering the case, I

3 want to describe the context in which this case arises. In

4 their briefs, the FCC and the large carrier suggest that these

5 kinds of revenue sharing agreements between local carriers

6 like Farmers and the conference calling companies are a scam,

7 that there's something improper about them. They are not.

8 These arrangements have long been permissible under the

9 Commission's rules which, until recently, allowed small rural

10 carriers like Farmers to establish their tariffs based on

11 their historical costs rather than on anticipated future

12 costs, and the reason the Commission did that is to provide

13 the rural carriers with a mechanism by which they can try to

14 raise funds in order to build out their systems and convert

15 them to the new broadband environment.

16 JUDGE ROGERS: Yes. Yes.

17 MR. COONEY: That's what Farmers did here. It used

18 its revenue to convert its system to broadband.

19 JUDGE ROGERS: Well, you know what our standard of

20 review is, and the Commission has examined contracts and

21 determined that they are so far from being tariff-like

22 documents that they cannot be considered part of a tariff to

23 service.

24 MR. COONEY: Your Honor, the Commission has confused

25 two silos, if you will, that are involved here. Silo one

1 involves the switched access service where the parties to the
2 contracts are Farmers and, or not the contracts. It operates
3 by tariff by operation of law. Farmers and Qwest. Then the
4 Commission has -- there is no doubt a bit that Qwest received
5 switched access service in a physical sense. The calls were
6 delivered to Farmers. They were switched to Farmers'
7 customers through its local loop, and the Qwest customers were
8 connecting to the conference calling bridges as they intended.
9 That should be the end of the inquiry in our view because
10 there's no doubt that they received switched access.
11 JUDGE ROGERS: I understand that's your view.
12 MR. COONEY: Right.
13 JUDGE ROGERS: And that's why I started off by
14 pointing out our standard of review. Now, you know, it's very
15 deferential to the Commission. It's interpreting a tariff.
16 It's interpreting contracts that you argue come within the
17 tariff, and you say this is simply a matter of physics. Well,
18 you know, that's the first time I heard that word in this
19 case. But, in any event, that's not the way the Commission
20 looked at it, and we would have to find that the Commission
21 either, you know, acted beyond its authority or was arbitrary
22 and capricious.
23 MR. COONEY: Yes, Your Honor. I --
24 JUDGE ROGERS: It's a very high standard.
25 MR. COONEY: Well, we first submit that the

1 Commission errored as a matter of law.
2 JUDGE ROGERS: Yes.
3 MR. COONEY: That there's no deference paid in these
4 situations because the Commission violated several provisions
5 at once. When I tried to reach out to the second silo which
6 is to work to the second set of grievance between Farmers and
7 the conference calling companies. We have three arguments
8 there.
9 The first is --
10 JUDGE TATEL: Wait. Wait. Before you go on to all
11 three, you said the case was simple. I thought that way, too.
12 Tell me why this is wrong. The Commission concluded that the
13 conference calling companies were not end users under the
14 tariff, and that's why they reached the conclusion that they
15 did. They read the tariff that way, and that is why the
16 Commission -- that's the basis in which the Commission based
17 its decision. They weren't end users under the tariff.
18 Period.
19 MR. COONEY: Yes. And --
20 JUDGE TATEL: Right?
21 MR. COONEY: Our answer to that question is multi-
22 part, Your Honor, but it begins this way.
23 JUDGE TATEL: You mean my simple question has a
24 complicated answer?
25 MR. COONEY: No. No. It has a multi-part answer

1 but its simple, and it all involves the application of a file
2 breakdown. The answer here is that in providing access
3 service, Farmers was required to issue a tariff, and it did
4 issue a tariff.
5 JUDGE TATEL: It says the Commission said these were
6 not tariffs. These didn't fall in a tariff.
7 MR. COONEY: Well, that's inconsistent with their
8 prior decisions, Your Honor.
9 JUDGE TATEL: Yes.
10 MR. COONEY: The service that was provided was local
11 access service, or access service as its called in the case.
12 JUDGE TATEL: Yes.
13 MR. COONEY: The calls came in from Qwest customers.
14 They were switched to the local loop by Farmers.
15 JUDGE TATEL: Yes.
16 MR. COONEY: Farmers then delivered them to the
17 conference calling company's bridges where those calls were
18 terminated.
19 JUDGE TATEL: Right.
20 MR. COONEY: And, so as a matter of physics, we had
21 access service that was provided and --
22 JUDGE TATEL: But I'm talking about the Commission's
23 interpretation of the tariff. I got the physics part of it.
24 But there's a legal question in addition to the question of
25 physics.

1 MR. COONEY: The legal question --
2 JUDGE TATEL: And the legal question is that the
3 Commission's decision was based on this conclusion that the
4 tariff required them to be end users, and they weren't.
5 Period.
6 MR. COONEY: Well, our position, Your Honor, is that
7 the application of the tariff and, therefore, the application
8 of the filed rate doctrine turns on the physics because the
9 service that was provided here, physically, was access
10 service. Now, the Commission has tried to go to the contracts
11 and say well, despite the physics, the contracts meaning that
12 the service was not access service, and the Commission points
13 to two things, really. First, is the terms of the resulting
14 contracts contained provisions that were not -- you would
15 expect to have in a tariff relationship, and the second point
16 they make is well, in carrying on its billing practices under
17 the arrangement, Farmers did not follow the requirements of
18 the tariff to bill and collect the rate. Well, we believe
19 that those are irrelevant as a matter of law. The application
20 of the -- the decision should turn on the physical nature of
21 the service received. As this is access service, then it is
22 access service under a valid tariff and Farmers is entitled to
23 collect a fee for that.
24 JUDGE TATEL: I'll just try once more. Under the
25 tariff, switch access service requires an end user. That's

1 what the Commission said.
2 MR. COONEY: That's right, Your Honor, and under the
3 switch --
4 JUDGE TATEL: Okay. And they said that conference
5 companies were not end users
6 MR. COONEY: Well, there are several problems with
7 their argument, Your Honor.
8 JUDGE TATEL: Yes.
9 MR. COONEY: First, Section 6.5(d) of the
10 Commission's rules requires Farmers to bill in situations
11 where its provided access service to an area or to an IXC like
12 Qwest, and that happened here. Also, we argue that the tariff
13 does not include an end user requirement. If you look at what
14 the Commission did, they interpreted Section 6.1 of the tariff
15 to say that there has to be an end user, and they based that
16 on the straight top line of 6.1. But, what they ignored is
17 that 6.1 incorporates within it other provisions of the tariff
18 in Section 6.1.3. It incorporates those --
19 JUDGE TATEL: What about this -- you know, these
20 tariff's are normally pretty hard to understand but this one
21 comes with a picture. Right? And it shows all three kinds of
22 service ending. This is this picture. You know what I'm
23 talking about?
24 MR. COONEY: Yes. The one that has the TED and the
25 access service.

1 JUDGE TATEL: Okay. Yes. And it ends at a picture
2 of a telephone which says end user.
3 MR. COONEY: Yes. And it depends upon the
4 definition of end user, Your Honor. If you'll look at Section
5 6.1.3, you'll see that the, which are incorporated in 6.1, you
6 will see that they talk about delivering these services but
7 these provisions do not include an end user requirement in the
8 sense of a person who's picking up the telephone. Those
9 provisions are satisfied by delivery of the call to physical
10 devices. Computers, time and weather services, answering
11 machines, which is probably the closest one to a conferencing
12 bridge. So, there is an end user here but not in the sense of
13 a human who's picking up the phone. It's delivered to a piece
14 of equipment and that's exclusively permitted by the absence
15 of the end user requirement in Section 6.1.3 which are
16 incorporated into Section 6.1. That's why, to come back to
17 Judge Rogers question. We think that there is not deference
18 to the Commission's interpretation here because it was flat
19 wrong. You simply cannot ignore a part of the tariff as they
20 did here because it's not convenient for them to recognize
21 that this was incorporated, and as it was shown in the briefs,
22 it was incorporated by virtue of a Commission order in 1984
23 which specifically directed NECA to bring these provisions
24 back to clarify things, and that's when the tariff provision,
25 before it went into effect for all these rural telephone

1 companies, was amended to bring in these provisions that
2 expressly do not include an end user requirement. So, we
3 think that's why their core interpretation is wrong.
4 JUDGE ROGERS: Yes.
5 MR. COONEY: But, to come back to the fact, Your
6 Honor, our position is that the application of the filed rate
7 doctrine here is absolute, and that the filed rate doctrine
8 does not permit the parties to contract around a valid tariff,
9 and that's why the physical nature of the service is so
10 important.
11 JUDGE ROGERS: Yes.
12 MR. COONEY: Because if this is, in fact, access
13 service then the parties can't contract around it, and the
14 principle rational evaporates.
15 JUDGE ROGERS: The Commission's response to that is
16 well, the tariff may have been narrower than the statute and
17 regulations, and you're bound by that tariff.
18 MR. COONEY: And our answer to that question, Your
19 Honor, is it's something like the answer in a preemption case
20 which is the law says one thing, the regulations say another
21 thing, and the Commission's answer is well, if you chose to
22 draft more narrowly than that, you're bound by what you
23 drafted with. But, that's obviously wrong because the tariff,
24 the provisions of the tariff cannot change the governing law
25 and the government statute. It cannot provide a mechanism for

1 getting around the filed rate doctrine. Otherwise, there
2 would be no meaning to the filed rate doctrine if the parties
3 could simply contract around it or the carrier could offer a
4 much narrower service, and then say a much more favorable one
5 to the receiver and say, you know, I'm sorry. When you
6 drafted less narrowly then or we drafted a very narrow tariff
7 that didn't go as far as we could have under the statute and
8 the rules.
9 JUDGE ROGERS: Now, the Commission, as I understand
10 it took a slightly different view of the billing aspect of
11 this case in terms of were these conference calling companies'
12 subscribers and in Farmers 1 that was significant. In Farmers
13 2, again, it was significant to the Commission as indicating
14 that these were not within the tariff, and you're saying
15 that's all irrelevant because of the physics here.
16 MR. COONEY: We're saying that the physics governs.
17 That's correct, Your Honor. And, but we also say that the
18 Commission's interpretation is inconsistent with its prior
19 precedence that it didn't recognize which got this right, and
20 these are the two Jefferson cases. I will work my way back to
21 the billing question. I want to address that.
22 JUDGE ROGERS: Well, what's your response to the
23 Commission's comment about its precedent, the two Jefferson
24 cases?
25 MR. COONEY: Well, they simply say that those cases

1 are irrelevant but they're at the heart of this case.
2 JUDGE ROGERS: Well, they say the issue wasn't
3 raised in those cases, in Jefferson 1, and then in Jefferson
4 2, it was confined to the very specific facts of that case.
5 MR. COONEY: Right. Well, the holding in Jefferson
6 1 is that when the conference calling company received access
7 service under a provision, it provided for a net flow of
8 funds. That was a tariff service. And, in fact, the holding
9 was that Farmers, excuse me, Jefferson had violated the filed
10 rate doctrine by not going ahead and billing and collecting
11 that information correctly.
12 JUDGE ROGERS: Yes.
13 MR. COONEY: So, that is the answer to Your Honor's
14 question about the billing aspects. The answer is it's
15 irrelevant. The remedy for this -- there was a violation.
16 Farmers did not bill and collect as it should have. When
17 Counsel stepped into the case, Counsel spotted that error and
18 immediately corrected it, and it's like no good deed is going
19 unpunished. That's now part of the old particulars. But
20 Jefferson 1 tells us that that is covered by the filed rate
21 doctrine, and the carrier is obliged to pay, and the local
22 access provider is required to bill it.
23 JUDGE ROGERS: All right.
24 MR. COONEY: Jefferson 2. It also is extremely
25 relevant to the case, and I think it answers some of Judge

1 Tatel's questions because in Jefferson 2, when the Court
2 looked at the arrange over the net flow of funds and said
3 well, in defining the standard, it narrowed the test, it said
4 this is a tariff that the company was obliged to issue by law.
5 That is it was lawfully required to do that, and the service
6 it provided was a tariff service. It was identical to
7 everybody here, to all the rural recipients.
8 JUDGE TATEL: Was there a question in the case as
9 to whether the company was an end user? No.
10 MR. COONEY: They did not raise the end user
11 doctrine there, Your Honor. That is --
12 JUDGE TATEL: All right. Right. That's why the
13 Commission says the case is not relevant to any issue here.
14 The issue here is this case turns on the fact that the
15 Commission found the conference companies not to be end users,
16 and that issue, as you just admitted, was not addressed in
17 Jefferson 2.
18 MR. COONEY: The situations are exactly the same,
19 Your Honor. In all cases, the CCCs had subscribed to the
20 service. They were receiving the access service, and what the
21 Commission said in Jefferson 2 is this is perfectly
22 permissible and lawful and the IXC is required to pay because
23 all IXCs are paying the same amount and all customers of the
24 local carrier receive exactly the same service like here. The
25 calls come in. They are transferred to the local loops. They

1 use the same processes and the same network to get to the end.
2 What you are providing here is access service and, according
3 to the Commission in Jefferson, and everybody is receiving it
4 under the same terms and conditions. So, that's the service
5 and that's why the filed rate doctrine applies.
6 JUDGE ROGERS: But they're not. I mean, that's one
7 of the points the Commission made. They're not. These are
8 individual contracts, different terms, et cetera. So --
9 MR. COONEY: There were individual contracts in both
10 Jefferson 1 and Jefferson 2, Your Honor.
11 JUDGE ROGERS: There's an exclusivity provision.
12 MR. COONEY: There was an exclusivity provision as
13 set forth in the decision in Jefferson 1.
14 JUDGE ROGERS: Yes.
15 MR. COONEY: We have four pages in our brief that
16 spell out that these contracts are virtually identical or at
17 least they have many of the common terms.
18 JUDGE ROGERS: Yes.
19 MR. COONEY: But what is set out in Jefferson 2, why
20 that's the controlling decision, is that under the
21 circumstances where the entity has subscribed and receive the
22 service and where the local carrier makes this available under
23 the same terms and conditions, that's determinative, and
24 that's why the filed rate doctrine applies. The fact that
25 there is a separate agreement on the side that deals with the

1 marketing arrangements, does not change that analysis, and
2 that's where the Commission goes wrong here.
3 JUDGE ROGERS: Yes.
4 MR. COONEY: It looks at the contracts and says
5 we're shocked to find that there are these sidebar agreements
6 and that changes everything. Well, the result was contrary in
7 Jefferson 2, and their logic that the Commission's own rule
8 that it issued in November comes out the other way. It
9 expressly says there, our law has been and is today, that in a
10 situation where there is a contract providing for a net flow
11 of funds that does not mean that this is not a switched access
12 service for which the IXC has to pay.
13 JUDGE ROGERS: All right. Do you want to save some
14 time for rebuttal?
15 MR. COONEY: I've saved some time. Four minutes for
16 rebuttal, Your Honor.
17 JUDGE ROGERS: Okay.
18 MR. COONEY: I would just like to come back to
19 finish with a point you raised, Judge Rogers. Our position is
20 that in a situation like this, the filed rate doctrine does
21 apply. We admit that Farmers was required to bill and collect
22 separately for the payments. They were wide on the flow of
23 funds here, and so they netted it out. That was not correct.
24 But the remedy for that kind of violation of the
25 administrative provisions of the tariff are not that the

1 carrier gets off scot-free. It's that the Commission should
2 begin, if it deems it appropriate, an independent proceeding
3 as it did in Jefferson 1 to address the problem under its
4 existing rules.
5 JUDGE ROGERS: All right. Thank you.
6 MR. COONEY: Thank you.
7 JUDGE ROGERS: All right. Mr. Buntrock?
8 ORAL ARGUMENT OF ROSS A. BUNTROCK, ESQ.
9 ON BEHALF OF THE NORTHERN VALLEY COMMUNICATIONS, LLC
10 MR. BUNTROCK: May it please the Court. Ross
11 Buntrock on behalf of Intervenor Northern Valley
12 Communications. Your Honors, this case goes beyond a discreet
13 analysis of Farmers' tariff provisions. In the last four
14 years, the FCC has reached four different conclusions on the
15 question of whether LACs may assess access charges on calls
16 terminated by two conference calling companies by IXCs like
17 Qwest, AT&T, and the other intervenors. In Farmers 1 on
18 October 2, 2007, the FCC held the question of whether the
19 conference calling companies paid Farmers more than Farmers
20 paid them is thus irrelevant to their status as end users.
21 The FCC specifically rejected Qwest's argument that conference
22 calling companies can be end users under Farmers tariff only
23 if they make payments to Farmers. But, Your Honors, 784 days
24 later on November 24, 2009, years after ignoring the 90 day
25 deadline established in 405(b)(1), the FCC flip-flopped and

1 held that conference calling companies could not be end users
2 under Farmers' tariff unless they made payments to Farmers
3 because that's what Farmers' tariff required.
4 JUDGE KAVANAUGH: What's wrong with that?
5 MR. BUNTROCK: Well, Your Honor, under Section
6 405(b)(1), the Farmers 1 decision was final. There had to be
7 a final appealable order under 405(b)(1) and (b)(2), and
8 therefore, the Commission no longer had jurisdiction or the
9 ability to reverse that conclusion in this adjudication
10 without a reasoned analysis as this Court has held in WLS and
11 Greater Boston. But, fast forward to the Northern Valley, a
12 separate case involving my client, Northern Valley. When the
13 FCC decided the Northern Valley cases, the Commission says
14 support its case here. The Commission concluded that a
15 payment from an end user to a LAC is required, but not because
16 of the language of the tariff but because it sought to
17 interpret through its rules to require such payment. So, what
18 the FCC is effectively doing is trying to augment the
19 statutory definitions set forth in 47(153)(20) which defines
20 access services, and so fast forward again to the fourth
21 version of this in the last four years. On November 18, 2011,
22 in its inter-carrier compensation order, some 124 days after
23 releasing Farmers 2, the FCC comes full circle and abandons
24 its Farmers 2 flip-flop without even acknowledging that it had
25 existed and holds that tariff access charges can be assessed

1 by LACs on calls terminated to conference calling companies,
2 by long distance carriers even if there's a net payment from
3 the LAC to the conference calling company. So, we've got four
4 different answers to the same question in four years, and the
5 FCC has never provided a reasoned analysis for this announced
6 change that we only became aware of in the context of the
7 Farmers adjudication. Therefore, the Farmers 2 decision is
8 arbitrary and capricious. It should be vacated until such
9 time as the Commission provides a reasoned analysis for its
10 flip-flop. And, again, going back to the issues that were
11 raised by the FCC in justifying its decision and suggesting
12 that it has jurisdiction to make this change, they look to
13 *Gottlieb v. Pena* but that essentially reads out of existence
14 405(b)(2). So, they don't have any ability -- when Congress
15 has provided a deadline and a remedy, the Commission can't
16 just go back and clawback jurisdiction and change its mind.
17 And, in fact, carriers like Northern Valley have been relying
18 upon the Farmers 1 decision for three years without even
19 understanding that there was any possibility that the FCC
20 might possibly change its mind about whether it's going to
21 impound on that precedent or not. And with that --
22 JUDGE ROGERS: Well, I mean, reliance but it did say
23 there about subscribing and billing. So, I mean, you were on
24 notice in that sense.
25 MR. BUNTROCK: Well, you're right, Your Honor. They

1 did say but even in the order and reconsideration, they
2 started setting up this flip-flop, and so, instead of focusing
3 on payment, they started talking about end user and
4 subscription.
5 JUDGE ROGERS: Yes.
6 MR. BUNTROCK: But they focused on payment in
7 Farmers 1 and that's where the --
8 JUDGE ROGERS: I mean, what I understood the
9 Commission to be saying is look. There are three provisions
10 in this tariff that we looked at. When you read them
11 together, you know, you can provide services under the tariff
12 but you have to do it in a certain way, and if you don't do it
13 in a certain way, it's not a tariff service, and here, end
14 users were required, and there were no end users.
15 MR. BUNTROCK: Well, first they said the tariff
16 matters. Right? In Farmers 1 they said, you know, the tariff
17 says what it says. Farmers wasn't taking service. There can
18 be such a thing as screened subscribership rights. So, they
19 weren't looking to --
20 JUDGE ROGERS: Yes.
21 MR. BUNTROCK: -- subscriber. They weren't looking
22 for the definition of end user. They're looking at payment.
23 But then in Farmers 2 they said, you know what? Forget what
24 we said a few months ago, reduction of two years ago, the
25 focus is now on the flow of payments. Did you pay?

1 JUDGE TATEL: No. They didn't say forget. They
2 didn't say forget in Farmers 1.
3 MR. BUNTROCK: Well, they didn't acknowledge it.
4 JUDGE TATEL: In Farmers 1, the first Farmers case
5 relied, the Commission relied on Farmers' assurance that these
6 companies were paying customers, and they subsequently
7 discovered that they weren't.
8 MR. BUNTROCK: Your Honor, with all respect, that's
9 incorrect.
10 JUDGE TATEL: It is?
11 MR. BUNTROCK: The FCC knew definitively that there
12 was no money changing hands, that the conference-calling
13 companies were not paying Farmers, that, in fact, Farmers was
14 paying a net payment to the conference calling companies, and
15 so, essentially, if you focus on paragraph 38 of the first
16 Farmers order, they said --
17 JUDGE ROGERS: No. But the whole point was that
18 they were part of the regular billing system. They were
19 subscribers. I mean that was Farmers 1. That was the whole
20 assumption.
21 MR. BUNTROCK: Well, that was the assumption. But,
22 that wasn't what the conclusion turned upon. If you look at
23 paragraph 38 of the FCC's decision --
24 JUDGE ROGERS: Yes.
25 MR. BUNTROCK: -- they specifically suggest and

1 emphatically say that subscribership doesn't matter. Payments
2 don't matter.
3 JUDGE ROGERS: Yes.
4 MR. BUNTROCK: You could have -- there is such a
5 thing called a free subscription. There's something called
6 the free magazine subscription. If you look at page 38, the
7 FCC specifically rejects class characterization that well,
8 Farmers didn't treat them like a real customers. They didn't
9 put them in the billing system. They didn't send them a bill.
10 That was all after the fact. Re-analysis in Farmers 2. That
11 wasn't the focus of Farmers 1. Farmers 1 turned on --
12 JUDGE TATEL: Why would there be free customer
13 service? I'm just curious. I didn't know that that --
14 MR. BUNTROCK: Well, Qwest does it all the time
15 for --
16 JUDGE TATEL: I've been trying to get it for years
17 and can't. In fact, the price keeps going up.
18 MR. BUNTROCK: Have you seen the thing where Qwest
19 will offer you a free FiOS subscription for three months and
20 if you don't like it, you don't have to pay for it.
21 JUDGE TATEL: I see.
22 MR. BUNTROCK: In the meantime, they're probably
23 charging access charges on the calls that are terminating to
24 your Verizon line at your house. Does that mean that,
25 therefore, they have to refund those monies if you don't

1 subscribe to Verizon's FiOS service? And that's what they're
2 suggesting here.
3 JUDGE ROGERS: I agree with your point that the
4 Commission said, I mean, in paragraph 38, that the net payment
5 doesn't matter. But, it also said that the record shows that
6 the conference calling companies did subscribe, i.e. enter
7 their names for Farmers tariff services, and they cite the
8 answer that was filed in the case. Thus, the conference
9 calling companies are both customers and end users. That's
10 the Commission finding in paragraph 38.
11 MR. BUNTROCK: But, Your Honor, the subscription
12 under the new analysis in Farmers 2 was the changing of
13 money, the exchange of money.
14 JUDGE ROGERS: Yes.
15 MR. BUNTROCK: And so, the FCC eventually said in
16 Farmers 2 that the minuscule act of not sending an invoice and
17 not receiving a payment for that invoice changes the question
18 of whether or not this is access service. That's ridiculous,
19 number one. But number two, the FCC didn't have jurisdiction
20 two and a half years later to change its mind in the context
21 of this adjudication.
22 JUDGE ROGERS: Well, they have a different
23 interpretation of that section. But --
24 MR. BUNTROCK: Well, they say that 405(b)(1) where
25 Congress says, you know, you've got to deal with

1 reconsiderations within 90 days doesn't provide a remedy but
2 they're wrong.
3 JUDGE ROGERS: And make a decision as to whether or
4 not you're going to grant reconsideration.
5 MR. BUNTROCK: Well, they ignore (b)(2). 405(b)(2)
6 says that it's got to be a final appeal to order because if
7 you look up the legislative history of 1988, they were
8 concerned about just this fact. If the FCC could just say,
9 oh, you know, we met. We got the order out and they could
10 effectively --
11 JUDGE ROGERS: Right. I understand.
12 MR. BUNTROCK: -- eliminate completely and just
13 review.
14 JUDGE ROGERS: All right.
15 MR. BUNTROCK: And so, that's why this result is so
16 egregious here, and that why this is --
17 JUDGE ROGERS: All right.
18 MR. BUNTROCK: -- a decision that must be vacated as
19 arbitrary and capricious.
20 JUDGE ROGERS: Thank you. Why don't we hear from
21 the Commission.
22 ORAL ARGUMENT OF JOEL MARCUS, ESQ.
23 ON BEHALF OF THE RESPONDENT
24 MR. MARCUS: Good morning, Your Honors.
25 JUDGE ROGERS: Good morning.

1 MR. MARCUS: May it please the Court. I'm Joel
2 Marcus for the FCC.
3 JUDGE ROGERS: It's a matter of physics.
4 MR. MARCUS: This is a tariff case, Judge Rogers,
5 and rules of physics don't govern here. The language of the
6 tariff governs here.
7 JUDGE ROGERS: I understood that to be a way of
8 saying Qwest received the service.
9 MR. MARCUS: Qwest received some kind of service.
10 Yes. But, because this is a tariff case, and we are existing
11 here under a tariff regime that's set forth in Section 203 of
12 the Communications Act, and because the nature of the tariff
13 is the very thing that defines the relationship between the
14 provider and the customer that, and that's 203 says that you
15 may not even provide a service that's not specified in your
16 tariff. So, if there was a service provided --
17 JUDGE ROGERS: Well, this service was specified and
18 why were the conference calling companies not end users?
19 MR. MARCUS: Well, the service was specified as
20 switchbacks, as a service that is a service to an end user.
21 JUDGE ROGERS: Yes.
22 MR. MARCUS: And an end user ultimately comes down
23 to a subscriber.
24 JUDGE ROGERS: Yes.
25 MR. MARCUS: And a subscriber has to be a

1 subscriber, under the terms of the end user access tariff, and
2 the conference companies were not subscribers under the end
3 user access tariff because the end user access tariff requires
4 there to be regular billing, late penalties, payment for
5 service, no special deals, service on terms open to everybody,
6 common carriage. The whole gamut of the things that are the
7 quiescence of a tariff service, and there is absolutely
8 nothing about the --
9 JUDGE KAVANAUGH: That's different from Farmers 1.
10 Right? What you just said?
11 MR. MARCUS: I don't believe so, Judge Kavanaugh,
12 and the reason why is that in Farmers 1 none of the evidence
13 of the non-tariff nature of the relationship between the
14 conference companies and Farmers was before the Commission.
15 In Farmers 1, the only thing that the Commission was looking
16 at was the net flow of funds, and in paragraphs 37 and 38 of
17 the first order, the Commission was assessing Qwest's argument
18 that because there was a net flow of funds, the conference
19 companies were not end users, and the Commission says no. We
20 rejected the net flow of funds argument because there doesn't
21 have to be any net flow of funds but the Commission, as you
22 pointed out, Judge Rogers, in for example in footnote 139 in
23 paragraph 38 --
24 JUDGE ROGERS: Yes.
25 MR. MARCUS: -- this is at page 545 of the joint

1 appendix, it says the record shows that they did subscribe.
2 See their answer at 7; and the answer at 7 is the critical
3 thing in this whole thing. The answer at 7 basically says we
4 bill them. They paid. They were customers. And that was the
5 representation, the critical representation, that turned out
6 to be entirely phony, and if you look at paragraph 138, I'm
7 sorry, footnote 138 of that same order, this is on page 544 of
8 the joint appendix, the Commission says we know that Qwest has
9 failed to prove that the conference calling companies do not
10 pay Farmers for service because the marketing fees cancel out
11 the tariff payments. There, the Commission is specifically
12 saying, yes. There may be a flow of cash from one side to the
13 other, but there's still a netting here. But, in fact, there
14 was no netting. The Commission specifically found that there
15 was no netting. In the third reconsideration order, and this
16 is at -- it's in a different volume of the appendix. It's at
17 page 5 of the appendix. This is footnote 35 in paragraph 11
18 of the third order and the Commission says it became clear
19 that the conference calling companies never paid subscriber
20 line charges or made any other payments to Farmers and that
21 Farmers never expected to be paid. In fact, to this day,
22 Farmers has sent some bills after the fact. But, it has never
23 taken any action to enforce those bills. It's never actually
24 sought payment and it specifically advised the conference
25 calling companies that they didn't have to pay, and so if you

1 look at this and then if you go to another part. I'm sorry.
2 Go ahead.
3 JUDGE ROGERS: Just so I'm clear. If the record had
4 showed that the conference calling companies were billed
5 monthly and let's assume also that they paid but there was
6 still a net payment, would there be any problem?
7 MR. MARCUS: No. There wouldn't. We would be in
8 Farmers 1 in the first order in this case.
9 JUDGE ROGERS: Yes.
10 MR. MARCUS: There would be a problem in that they
11 violated the Act but, you know --
12 JUDGE ROGERS: Yes.
13 MR. MARCUS: -- by earning an excess amount of money
14 but there was no remedy for that. It was the subsequently-
15 developed evidence showing that the relationship was entirely
16 fundamentally different in reality than it was in the
17 Commission's initial understanding that led the Commission to
18 conclude that under the tariff and under the tariff's
19 definition of switch access which is the governing provision
20 here, it's the law, that the tariff required there to be an
21 end user and that for the host of reasons showing that there
22 was no genuine tariff relationship between the conference
23 companies and Farmers. Those conference companies were not
24 end users under any conceivable understanding of that tariff.
25 JUDGE KAVANAUGH: If you're a free subscriber, can

1 you be an end user?

2 MR. MARCUS: Well, you know, that's an interesting

3 question. That's what the Commission answered in the Northern

4 Valley Case saying that if the tariff calls for zero charge.

5 That's not allowed. But, that doesn't have to do with the set

6 of laws that we have here. That has to do with the nature of

7 what a telecommunication service is. But I think that you

8 wouldn't really find Farmers disputing that. They sent the

9 Court a 28(j) letter on November 16th, and they said in their

10 own letter, a document which provides that the carrier will

11 receive no compensation for providing a telecommunication

12 service, is not a tariff. And, so the idea -- the Commission

13 in that paragraph 38 did, there was a kind of dueling

14 dictionary situation between Qwest and Farmers and the

15 Commission did say that the idea of subscribed, as a generic

16 matter, is capable of encompassing the idea of a free

17 subscription. By the way, even if you sign up, Judge Tatel,

18 for the three free months of FiOS, the idea is that you will

19 become a paying customer. I don't think that they're in it

20 just for charitable function.

21 JUDGE TATEL: Well, that's too bad. Now, let me ask

22 you this. Now, Farmers has been providing the service to

23 Qwest.

24 MR. MARCUS: They have been providing some kind

25 of --

1 JUDGE TATEL: But Qwest hasn't paid for any of it.
2 Right?
3 MR. MARCUS: Well, they've been providing some kind
4 of service for Qwest.
5 JUDGE TATEL: Right.
6 MR. MARCUS: It is not switch access service.
7 JUDGE TATEL: Well, then it's a service. Whatever
8 it is, it's a service. Is there a way in which Farmers,
9 notwithstanding what's happened, can at least be compensated
10 for or to put it the other way --
11 JUDGE ROGERS: Restitution?
12 JUDGE TATEL: -- has Qwest gotten a free service
13 here all this time?
14 MR. MARCUS: Well, we don't know yet. Farmers is
15 currently litigating against Qwest in district courts.
16 JUDGE TATEL: Yes.
17 MR. MARCUS: The damages phase of this proceeding is
18 pending before the Commission where the Commission may have
19 the opportunity to assess that. I would point out that --
20 JUDGE TATEL: No. Wait a minute. Finish your
21 sentence. Assess what?
22 MR. MARCUS: Oh. Assess whether there should be
23 some sort of offsetting --
24 JUDGE TATEL: Oh.
25 MR. MARCUS: -- nature to the --

1 JUDGE TATEL: So that could be done in those
2 proceedings. In other words, Qwest could be required to
3 pay --
4 MR. MARCUS: It could possibly. I can --
5 JUDGE TATEL: -- or whatever it was it bought
6 from --
7 JUDGE ROGERS: In other words, is it a bar? That's
8 what we're just trying to make clear.
9 JUDGE TATEL: Right.
10 MR. MARCUS: At this point, it's not an absolute
11 bar. Although, I would point out that Section 203 of the Act
12 says that you may not assess charges for anything that's not
13 specified in your tariff. You know, again, this is a tariff
14 case and is governed ultimately by Section 4, I'm sorry, by
15 Section 203, and I think it's ironic here that Farmers is
16 standing before you saying you must strictly enforce the filed
17 rate doctrine. The filed rate doctrine this. The filed rate
18 doctrine that. The filed rate doctrine is a tariff doctrine,
19 and if you want to take advantage of doctrines that are rather
20 draconian tariff doctrines, you have to comply with the terms
21 of your tariff. It just doesn't work that if you want to
22 exploit loopholes in Commission laws and regulations that you
23 can do it without actually conforming to all of the legal
24 requirements for doing that.
25 JUDGE ROGERS: So, as a matter of physics, let me

1 just understand one thing. The conference call company is the
2 end user of, no. This is my question. In other words, I want
3 to have a conference call with my colleagues. All right. So,
4 I dial into conference call company 1 and then they dial my
5 colleagues and then we all talk. But --
6 MR. MARCUS: Actually, everybody dials in at the
7 same time.
8 JUDGE ROGERS: Well, the way it works on our Court,
9 they don't do that, you know.
10 MR. MARCUS: These were more along the lines of chat
11 lines, Judge Rogers.
12 JUDGE ROGERS: Oh. Okay.
13 MR. MARCUS: Like adult-oriented kind of chat lines
14 than, like, you know --
15 JUDGE ROGERS: Okay. Regular conference calling.
16 MR. MARCUS: -- the sort of thing you might do in
17 the Court, I hope.
18 JUDGE ROGERS: All right.
19 MR. MARCUS: We don't have to go there. Right?
20 JUDGE TATEL: Don't be so sure.
21 JUDGE ROGERS: No. No. We call it having a
22 conference call when everyone's on the line. All right.
23 Okay. So, my point is, everyone calls in simultaneously to
24 the conference calling company.
25 MR. MARCUS: Right.

1 JUDGE ROGERS: So, everyone who calls in is deemed
2 the end user not --
3 MR. MARCUS: Well, the people who are calling in are
4 end users of their own local telephone company.
5 JUDGE ROGERS: Yes.
6 MR. MARCUS: But they're not the end user of, let's
7 say, Farmers, if that's who's providing the conference call
8 service. When you call in to Iowa to have your chat, let's
9 say. Your call is connected to a piece of equipment. It's
10 basically a computer that has the capability of handling
11 multiple telephone calls simultaneously so that everybody can
12 speak with one another. So, there is something on the end of
13 the line. The term end user, though, here is a specific term
14 that's defined in a tariff. It's a specifically-defined legal
15 term. As Judge Tatel was pointing out earlier, with legal
16 definitions, with legal meanings and legal consequences, and
17 in order to be an end user under this tariff, and therefore,
18 in order for a long distance company to be on the hook for the
19 access charges that it would have to pay for a call placed to
20 end user, there must, in fact, be an end user as defined under
21 the tariff.
22 JUDGE ROGERS: Okay. But look at Section 2.6
23 defining end user.
24 MR. MARCUS: Section 2.6 of the tariff?
25 JUDGE ROGERS: Yes.

1 MR. MARCUS: Yes. Okay.
2 JUDGE ROGERS: It says end user means any customer
3 not a carrier.
4 MR. MARCUS: Right. They mean customer.
5 JUDGE ROGERS: Other than a telephone company.
6 MR. MARCUS: Customer.
7 JUDGE ROGERS: Right.
8 MR. MARCUS: But then you have to go look at
9 customer, the definition of customer.
10 JUDGE ROGERS: And then customer takes you to
11 subscription?
12 MR. MARCUS: Yes. It does, Judge Rogers. Customer
13 is defined at JA201.
14 JUDGE ROGERS: Right.
15 MR. MARCUS: This is also in Section 2 of the
16 tariff. It says the term customer --
17 JUDGE ROGERS: Right.
18 MR. MARCUS: Customer denotes any individual, blah,
19 blah, blah, which subscribes to the services offered under
20 this tariff.
21 JUDGE ROGERS: Okay. So if --
22 MR. MARCUS: That's the critical thing here.
23 JUDGE ROGERS: So, in Farmers 1 where the Commission
24 referred to enter their names for Farmers tariff services --
25 MR. MARCUS: Yes.

1 JUDGE ROGERS: -- entering your name isn't enough or
2 that's a term of art that has all of these other aspects to
3 it?
4 MR. MARCUS: I don't know if it's a term of art in
5 the sense that I can cite you cases where the Commission has
6 defined that specifically but I think that it's a term of art
7 in the sense that, and this is proven by that footnote 139,
8 that when the Commission was talking about entering names,
9 when the Commission was talking about subscribing, it was
10 talking about its reliance on the representation that there
11 was a, you know, a legitimate relationship under the tariff
12 here, that there was a taking of service under the tariff,
13 that there was an expectation of service under the tariff,
14 that came with the expectation of payment, the expectation of
15 billing, the expectation of conforming the parties conduct to
16 the sort of conduct that one engages in when one is operating
17 under a tariff, and none of that is present here.
18 JUDGE KAVANAUGH: But they had a commercial
19 relationship.
20 MR. MARCUS: They did indeed.
21 JUDGE KAVANAUGH: And they used service.
22 MR. MARCUS: They used some kind of service.
23 JUDGE KAVANAUGH: Right.
24 JUDGE KAVANAUGH: But, again, under a tariff regime,
25 under Section 203 of the Communications Act, Judge Kavanaugh,

1 it contemplates the very idea of providing service that is not
2 a tariff service.
3 JUDGE KAVANAUGH: Right.
4 MR. MARCUS: It makes it illegal. So, you may not
5 provide a service that's not a tariff service.
6 JUDGE KAVANAUGH: Yes.
7 MR. MARCUS: And it sets up this tariff regime. You
8 must describe exactly what your services are or else you're
9 going to be doing something illegal.
10 JUDGE KAVANAUGH: Right.
11 MR. MARCUS: And so they provided a service.
12 JUDGE KAVANAUGH: But I'm trying to fair it out as
13 what is the line between a permissible and impermissible
14 subscription.
15 MR. MARCUS: I think that the Commission didn't need
16 to address this because here --
17 JUDGE KAVANAUGH: Right.
18 MR. MARCUS: -- we're so far over the line that we
19 didn't need to determine --
20 JUDGE KAVANAUGH: Well, the know that we're so far
21 over the line, we have to have some idea of what the line
22 might be.
23 MR. MARCUS: Well, speaking hypothetically and the
24 Commission didn't address this --
25 JUDGE KAVANAUGH: I understand.

1 MR. MARCUS: -- if there had been, you know, a
2 discount on the price for example. We'll charge you only $10
3 a month rather than $50 a month, maybe that would have been
4 something that, you know, would have shown that they were
5 actually providing service under the tariff but they had
6 gotten a special deal for example. But, here, there's --
7 JUDGE KAVANAUGH: There has to be payment from the
8 conference call company to Farmers?
9 MR. MARCUS: The tariff requires payment. The
10 Commission has long held that payment is required under a
11 tariff. The Communications Act defines a telecommunications
12 service --
13 JUDGE KAVANAUGH: Is that net payment or --
14 MR. MARCUS: No. Again, the Commission --
15 JUDGE KAVANAUGH: Just a payment.
16 MR. MARCUS: That's right. There has to be --
17 JUDGE KAVANAUGH: And it could be repaid back.
18 MR. MARCUS: Essentially, if you put in the netting,
19 you can say, Judge Kavanaugh, that there has to be a
20 responsibility for payment. So, if you and I --
21 JUDGE KAVANAUGH: But, it all seems like kind of a
22 shell game if they're saying yes. There has to be a payment.
23 Of course, you can pay them back.
24 MR. MARCUS: I don't know. If you and I make two
25 bets on, you know, the football games on Sunday. And one is

1 bigger than the other, and I win one of them, and you win one
2 of them, you owe me some money, and I owe you some money.
3 There will be a net flow of cash from one of us to the other
4 one of us.
5 JUDGE KAVANAUGH: Right.
6 MR. MARCUS: But, that didn't mean that you didn't
7 have a payment responsibility to me. It was just overwhelmed,
8 essentially, by my payment responsibilities to you.
9 JUDGE TATEL: Well, suppose in this case that the
10 conference companies paid under the tariff enrue (phonetic
11 sp.) $5 to $25 a month. Okay? And the understanding was is
12 that Farmers would reimburse them our of the access charge
13 from that $5, reimburse them out of the access charges that
14 they get from Qwest. It's still zero.
15 MR. MARCUS: If there was netting, in other words,
16 if the deal had been you owe us X dollars, and by the way, you
17 know, all this whole discussion assumes that all the other
18 terms of the tariff are being complied applied.
19 JUDGE TATEL: You're point is it has to be a
20 legitimate payment. Right?
21 MR. MARCUS: Right. Exactly. So, there are many
22 indicia of illegitimacy here in terms of tariff --
23 JUDGE TATEL: Yes.
24 MR. MARCUS: -- you know, in terms of whether this
25 was even a service under this tariff. Right.

1 JUDGE TATEL: And your point is, I guess the
2 Commission's point is, you don't have to figure out what that
3 line is.
4 MR. MARCUS: Right.
5 JUDGE TATEL: Because here, there was no payment at
6 all. Is that the point?
7 MR. MARCUS: Well, there was no payment at all.
8 There was also no other behavior that indicated --
9 JUDGE TATEL: Yes. Yes.
10 MR. MARCUS: -- parties regarded themselves as being
11 governed by the tariff.
12 JUDGE KAVANAUGH: Well, but when you say legitimacy,
13 why is it more legitimate to say oh, give me $5 and I'll give
14 you back $25.
15 MR. MARCUS: Oh. That's not what -- oh. Well, in
16 terms of the net payment --
17 JUDGE KAVANAUGH: Yes. Why is that more legitimate
18 than just the payment of $20.00 in one direction, the net
19 payment?
20 MR. MARCUS: I think that the nature of the
21 responsibility is an important one, and --
22 JUDGE KAVANAUGH: Why?
23 MR. MARCUS: Because, you know, because a free
24 service is not a tariff.
25 JUDGE KAVANAUGH: Basically, what you're saying is

1 you give me the money and I'll give you the money back makes
2 it okay. But, if you just give me the money, even though it's
3 the same result. Right? Same amounts?
4 MR. MARCUS: That's something that the Commission --
5 JUDGE KAVANAUGH: So, two situations with the exact
6 same amounts. One's legitimate. One's illegitimate just
7 because of how you booked it?
8 MR. MARCUS: Well, you know, in our football
9 example --
10 JUDGE KAVANAUGH: Yes.
11 MR. MARCUS: -- Judge Kavanaugh, if I refuse to
12 pay --
13 JUDGE KAVANAUGH: Right.
14 MR. MARCUS: -- and you sued me.
15 JUDGE KAVANAUGH: Yes. I'm still following. I'm
16 with you.
17 MR. MARCUS: You could sue me, and you could say he,
18 you know, he has to pay me. You know, we made a bet. He
19 lost. He has to pay me. In the damages phase --
20 JUDGE ROGERS: But, get it back then --
21 MR. MARCUS: -- there might some, you know, re-
22 jiggering of exactly who owes what to who.
23 JUDGE KAVANAUGH: Yes.
24 MR. MARCUS: But, there's still an actual
25 obligation, and that's important.

1 JUDGE TATEL: Or fortunate.

2 MR. MARCUS: -- for the technical issue here.

3 JUDGE TATEL: I thought your answer to my question

4 was that if there was -- if the subscriber charged us $25 and

5 the deal was you pay us that and we'll reimburse you $25 out

6 of what we charge Qwest that that would not be a legitimate

7 subscriber reach. Isn't that what you said to me?

8 MR. MARCUS: Well, if it were a direct we will just

9 simply reimburse you.

10 JUDGE TATEL: Yes.

11 MR. MARCUS: That I don't think -- but here it's --

12 the nature of the quick pro quo is you'll pay us, or the way

13 it should be is, you'll pay us $25 for service. In exchange,

14 you will have an obligation under our deal to deliver to me X

15 number of minutes of traffic every month. So, it's not just a

16 free provision of service. The local carrier is also

17 receiving some service from somebody else, and so it's that

18 service that's provided by the conference company that becomes

19 the other side of my bet with Judge Kavanaugh. There are

20 potentially enforceable obligations on both sides, and I think

21 that the existence of an actual obligation is important here.

22 But I think --

23 JUDGE ROGERS: Well, I think that --

24 JUDGE KAVANAUGH: I'm not sure what the substance of

25 that is getting at though.

1 JUDGE ROGERS: Yes.

2 JUDGE KAVANAUGH: What's the point? If the two
3 amounts of the two different scenarios are exactly the same,
4 then what is the big picture point that the Commission's
5 trying to get at other than potentially it doesn't like these
6 deals at all.

7 MR. MARCUS: Again, it's interesting to figure out
8 where the exact line might be and why the line might be there.
9 But here, I just want to remind --

10 JUDGE KAVANAUGH: Right.

11 MR. MARCUS: -- you and the other members of the
12 Court --

13 JUDGE KAVANAUGH: Yes.

14 MR. MARCUS: -- that we're talking about a
15 relationship that bears no resemblance to a tariff
16 relationship at all. Special terms and deals, you know, et
17 cetera, et cetera, all of the factors that I've talked about
18 and that we've set forth in our brief. But, I think
19 ultimately, at the end of the day, it matters because when
20 you're talking about Section 203 of the Act and you're talking
21 about a tariff regime, the legal bells and whistles matter --

22 JUDGE KAVANAUGH: Yes.

23 MR. MARCUS: -- you know, because that's the way the
24 regime works, and even though the Commission as a matter of
25 policy has allowed a little bit of slippage in the joints

1 because of these net payment arrangements which it deems
2 permissible, I don't think that that undermines the idea that
3 there is something important about compliance with the actual
4 obligations that are imposed under the Communications Act.
5 Did you have a question, Judge Rogers?
6 JUDGE ROGERS: So, remind me here. In this case, I
7 thought it was Farmers wanted to increase the number of
8 minutes. So, it made this contract saying you have an
9 obligation to provide us with a minimum of X number of minutes
10 per month.
11 MR. MARCUS: That's correct.
12 JUDGE ROGERS: And because that's so valuable to
13 us --
14 MR. MARCUS: That's right. It's valuable because
15 they thought they would be able to charge the long distance
16 companies.
17 JUDGE ROGERS: No. No. But, just let me play it
18 out here.
19 MR. MARCUS: Sure.
20 JUDGE ROGERS: It's so valuable to us that we're not
21 going to charge you anything. All right. But you have this
22 obligation to provide this minimum number of minutes per
23 month, and if you don't provide it, you know, then we'll start
24 charging you or something like that. And I understand your
25 point about special deals and terms and all that but to the
26 extent we're focusing on the money end of it, that's really

1 not the Commission's concern, and I want to be clear because
2 the Commission in its notice of proposed rule making is saying
3 well, our rules allow this. Our rules have allowed this, and
4 they allow it.
5 MR. MARCUS: The rules have allowed it. I had sent
6 a 28(j) letter to the Court --
7 JUDGE ROGERS: Yes.
8 MR. MARCUS: -- about a week ago where the
9 Commission actually adopted new rules, and the Commission did
10 not outlaw this practice entirely.
11 JUDGE ROGERS: Yes.
12 MR. MARCUS: But, it did change its tariff regime.
13 So, that if you wind up with large increases in your traffic,
14 you have to file new tariffs.
15 JUDGE ROGERS: Right. But that's in the future.
16 All right?
17 MR. MARCUS: Yes. That's in the future.
18 JUDGE ROGERS: So if the argument --
19 MR. MARCUS: That's not this case.
20 JUDGE ROGERS: That's right. They argue --
21 JUDGE ROGERS: I think -- does your question reduce
22 down to the same question that Judge Kavanaugh was asking,
23 Judge Rogers, which is, you know, why go through this if
24 there's just going to be a net flow of money the other way?
25 JUDGE ROGERS: Well, I think all the questions are,

1 yes. Why go through the steps, and it just seems unfair if
2 Qwest gets a free ride and it got, as a matter of physics, you
3 know, the access.
4 MR. MARCUS: It's very difficult to say that Qwest
5 got a free ride here when it basically gets no marginal
6 revenue from a long-distance phone call these days and all
7 that was happening was that Farmers was sitting there running
8 the meter as fast as it could and imposing millions of dollars
9 of liability on Qwest, and I think what the Commission points
10 out both in the --
11 JUDGE KAVANAUGH: All of which would have been
12 permissible if they'd just done the legal niceties.
13 JUDGE ROGERS: Right.
14 MR. MARCUS: All of which would have been
15 permissible. But the --
16 JUDGE KAVANAUGH: So, but the running the meter
17 thing, I know that's rhetorically strong, but that doesn't
18 really do much for you.
19 MR. MARCUS: I think what it does for me, Judge
20 Kavanaugh, is that if you're going to exploit loopholes in the
21 Commission's rules, you better do it right, and we don't have
22 to be the hand maidens to this, and keep in mind that, you
23 know, every time Qwest has to spend another million dollars on
24 access charges, it, at some point or another, comes out of my
25 pocket and yours. So, it's not that these things are entirely

1 cost free to society. If you will, the net flow of funds just
2 gets hidden someplace else.
3 JUDGE ROGERS: Okay.
4 MR. MARCUS: So, if the Court has anymore questions,
5 I'd be happy to answer them but, otherwise --
6 JUDGE ROGERS: All right.
7 MR. MARCUS: We would urge that the Court affirm the
8 Commission's orders.
9 JUDGE TATEL: Well, it's just like tax law. Right?
10 JUDGE ROGERS: Yes.
11 JUDGE TATEL: There's lots of loopholes and if
12 you're going to exploit them, you better do them honestly.
13 Right?
14 MR. MARCUS: I think that's right.
15 JUDGE TATEL: You got to follow the tax laws. You
16 got to follow the tariffs. That's what this is. Right?
17 MR. MARCUS: I think that's exactly right, Judge
18 Tatel.
19 JUDGE TATEL: Yes. Okay.
20 MR. MARCUS: And, you know, these doctrines like the
21 filed rate doctrine --
22 JUDGE TATEL: Right.
23 MR. MARCUS: -- can have some harsh consequences but
24 you only become the beneficiary of the harsh consequences if
25 you have crossed your i's and dotted your t's and actually

1 conformed. Did I say that wrong? Yes. I heard the laughter.
2 But you know what I meant.
3 JUDGE TATEL: You also need to follow the tariff
4 carefully.
5 MR. MARCUS: And that, I think, proves my point.
6 JUDGE TATEL: Right.
7 JUDGE ROGERS: All right. Thank you.
8 MR. MARCUS: Thank you, Your Honors.
9 JUDGE TATEL: All right. We'll hear from Qwest, and
10 I will begin by saying no free ride here.
11 ORAL ARGUMENT OF DAVID H. SOLOMON, ESQ.
12 ON BEHALF OF QWEST COMMUNICATIONS COMPANY, LLC
13 MR. SOLOMON: Well, let me -- may it please the
14 Court. Let me start right there with the free ride point in
15 that it's our big picture point that Judge Kavanaugh was
16 talking about. We don't view this at all as a free ride.
17 This is an arbitraged scene that the Commissions been
18 struggling with for several years to try to figure out a way
19 to control it, and the Commission said in the rule making
20 order that recently came out where it cited estimates that
21 this is costing interexchange carriers billions of dollars --
22 JUDGE ROGERS: Yes.
23 MR. SOLOMON: -- because the conference companies
24 and LACs like Farmers are exploiting these loopholes in the
25 rules. It's not a service we want. It's a service because

1 the Commission has no blocking rules that we're prohibited
2 from stopping the calls from going through to the conference
3 companies but it's a situation where if the conference
4 companies said tomorrow we don't want you to deliver this
5 traffic that would be fine with us. So, it's not a windfall
6 in a sense that we're making money from it. It's not a
7 service that we want.
8 JUDGE TATEL: What, excuse me. I'm not sure. Why
9 wouldn't Qwest -- if the system operated the way it's supposed
10 to, wouldn't Qwest be just fine with this? It would charge
11 the incoming caller for the long distance call and pay Farmers
12 an access charge. Wouldn't it?
13 MR. SOLOMON: The way pricing works in the long
14 distance industry, it's generally sort of all-you-can-eat
15 plans. So, there aren't permanent charges for long distance
16 calls, and what happens here is because of the way it's set
17 up, the conference companies choose a rural LAC. Rural LACs
18 have very, very high access rates because they have such low
19 usage.
20 JUDGE TATEL: I see.
21 MR. SOLOMON: So, the rates, for example, Farmers
22 switched access rate is about 10 times what the switched
23 access rate is for Qwest a local exchange carrier.
24 JUDGE TATEL: I see.
25 MR. SOLOMON: So, they pick the rural local exchange

1 carriers so that the charges are then extremely high on the
2 interchange carriers, and that's the way they fund their free
3 conference service.
4 JUDGE TATEL: So, are people who are using this
5 conference service, these adult conference services, they're
6 making far more calls, long distance calls, on whatever plan
7 they have than other subscribers?
8 MR. SOLOMON: Right. Because it encourages them.
9 JUDGE TATEL: I see.
10 MR. SOLOMON: There are no incentives for them to
11 have a reasonable length of a call.
12 JUDGE TATEL: I see.
13 MR. SOLOMON: The rest of us, when we do a
14 conference call --
15 JUDGE TATEL: I see. I see.
16 MR. SOLOMON: -- you get a bill based on the amount
17 of time.
18 JUDGE TATEL: I get it. I get it. I get it.
19 MR. SOLOMON: Going back to the big picture point, I
20 think it was ironic that Farmers is talking about the rule
21 making in the Connect America Fund because again, thinking
22 about how the Commission has been approaching this problem of
23 arbitragers. Had arbitragers in other areas of access
24 charges, this is another one it's dealing with. Ultimately,
25 what it did in the rule-making was it, over a period of time,

1 it's eliminating access charges so that there aren't these
2 opportunities for arbitrage. It's been trying to deal with
3 arbitrage in a series of ways, in this context, which I think
4 are reasonable. First, it gets the Farmers case and in the
5 first go round, it didn't realize that there were no payments
6 for communication services. So, it said well, they did
7 subscribe to service and did enter their names because there
8 was payment involved. Then they get new facts after they get
9 passed the concealment of evidence and manufactured evidence
10 and they say okay. We realize that there wasn't payment here.
11 As a technical matter, that means they're not end users under
12 the tariff, and so we don't like the arbitrage schemes but we
13 can't just say sort of out of the blue they're all illegal per
14 se. So, first in the Farmers case they say okay. You didn't
15 comply with your tariff. So, we do view this as a scam. So,
16 you did your scam in a way -- you structured your scam as
17 business partners in a way that's not consistent with your
18 tariff. So, that's illegal. Then the Northern Valley case
19 comes along, and Northern Valley responded to the Qwest case
20 and said okay. We're going to change our tariffs. Our tariff
21 provides for free service, and the Commission said no. The
22 scam doesn't work that way either because our access rules
23 require that there be paying end user customers. Then, in the
24 rule making which is going on during this period and the
25 Commission in its notice makes all sorts of noises about how

1 bad traffic pumping is and how bad these situations are, the
2 Commission comes along and it wrote these rules and says okay.
3 To the extent traffic pumping is continuing in situations that
4 we haven't addressed, we're going to adopt rules that we hope
5 will eliminate traffic pumping or seriously deter it. It
6 didn't go so far as to say we're going to prohibit revenue
7 sharing because it was concerned that that might get rid of
8 certain legitimate arrangements between companies but it was
9 basically saying -- all it addressed was situations under its
10 rules where people are acting consistent with its access
11 charge rules. It never said in the rule making proceeding
12 okay. Now, we've reconsidered things and think that it's
13 always switched access even if you don't tariff it correctly.
14 I mean, it does matter going to the point Mr. Marcus made. It
15 does matter in a tariff system that you tariff things
16 correctly. Tariff's like the core of traditional common
17 carrier regulation, and it is the flip side of the filed rate
18 doctrine if there are going to be all these harsh consequences
19 if you don't follow your tariff. You have to be clear about
20 what's in your tariff, and if you don't include something in
21 your tariff, it's perfectly appropriate for you to suffer. In
22 that regard, the Commission precedent in the Western Union
23 case that's cited in the briefs makes clear that even in a
24 situation where it was the functional equivalent, even in a
25 situation where the parties assumed and intended it to be in

1 the tariff. The fact of the matter is the Commission held
2 that that is unlawful if you try to charge someone under the
3 tariff for something that could and maybe should have been in
4 the tariff but you didn't include in the tariff. Now, it's a
5 separate question whether, at some point, Farmers might get
6 some money back.
7 JUDGE ROGERS: Yes.
8 MR. SOLOMON: That's pending in the damages
9 proceeding and also in district court litigation. But, the
10 issue here is not the question of whether Farmers at some
11 point should get some money which we, not surprisingly, don't
12 think they should. We think they should not get money. But,
13 the issue here is whether they acted outside their tariff, and
14 if you act outside your tariff whether that's illegal.
15 JUDGE KAVANAUGH: And outside the tariff for you
16 means?
17 MR. SOLOMON: Outside the tariff means we were being
18 charged for switch access service under the interstate tariff.
19 The interstate tariff says in order to charge someone switch
20 access service, the service has to go to or from an end user.
21 JUDGE KAVANAUGH: Right.
22 MR. SOLOMON: And the Commission found they weren't
23 end users. Just in the same way that --
24 JUDGE KAVANAUGH: Right. So, it all goes back to
25 just whether subscriber -- there has to be this exchange of

1 documentation.
2 MR. SOLOMON: Well, I think it's --
3 JUDGE KAVANAUGH: Because to pay the payment amount
4 could have been exactly the same. You'd be in the same
5 financial position but you wouldn't have a legal argument.
6 MR. SOLOMON: Well, right. And we argued in the
7 first round that the net payments, it should be illegal
8 because it was ultimately the same thing as no payment at all
9 because the net payments flowed in the wrong direction. But,
10 I think it's perfectly appropriate for the Commission to say
11 we're going to approach this narrowly and look at the tariffs
12 now and look at the broader question in the rule making which
13 is also consistent with how the Iowa Utility's Board did it
14 for intrastate traffic pumping in a case also involving
15 Farmers where they found that the conference companies weren't
16 end users under the local tariff or the intrastate access
17 tariff, and therefore Farmers and other carriers couldn't
18 charge the interchange carriers for intrastate access and then
19 the Iowa Utility's Board also went forward and adopted rules
20 so that they could try to prevent it more broadly in the
21 future.
22 JUDGE TATEL: And your answer to my earlier question
23 to the Commission about whether Qwest gets a windfall here is
24 you didn't make any money on these calls anyway. Right?
25 MR. SOLOMON: Right. And in fact, we're --

1 JUDGE TATEL: In fact, what this does, it avoids a
2 loss. Is that right?
3 MR. SOLOMON: I don't know if it's in the record
4 that it avoids a loss, per se.
5 JUDGE TATEL: Yes.
6 MR. SOLOMON: But, we're having to, I mean, yes.
7 We're having to spend all this money and other interexchange
8 carriers are having to spend billions of dollars on calls that
9 we don't want, and so we have to spend --
10 JUDGE TATEL: Millions of dollars in, I mean, in
11 access charges.
12 MR. SOLOMON: In access charges. That's right.
13 JUDGE TATEL: Yes. I see.
14 MR. SOLOMON: So, yes. We are losing in that sense.
15 JUDGE TATEL: I see. I see. Yes.
16 MR. SOLOMON: If there are no further questions, we
17 encourage the Court to affirm yes.
18 JUDGE ROGERS: Thank you. All right. Counsel for
19 petitioner?
20 ORAL ARGUMENT OF JOHN F. COONEY, ESQ.
21 ON BEHALF OF THE PETITIONER
22 MR. COONEY: Your Honor, I would like to make four
23 points quickly. First, as I hear the Commission's argument,
24 this case is controlled by Jefferson. The Commission said we
25 wouldn't be here if the tariffs had been billed and collected,

1 to take up Judge Kavanaugh's line of cases. It was the
2 failure to bill and collect in a net out situation that makes
3 this something that they find there's not an end user
4 relationship here. Well, that's Jefferson 1; and in Jefferson
5 1, the Commission says where there's a net flow of funds
6 agreement and the carrier doesn't bill, the remedy for that is
7 that we institute a proceeding against the carrier. The filed
8 rate doctrine is applicable here, and the filed rate doctrine
9 imposes a duty on you to do that billing and collecting
10 because it's important to us, the Commission, to be able to
11 track what you're doing. Using bill and collect warrants the
12 duty of proceeding against you for, under our administrative
13 powers, for failure to comply. That's the answer here. It's
14 not to give Qwest a windfall. Second, I want to clarify my
15 answer to Judge Rogers question about whether Jefferson 2
16 involved the end user question.
17 JUDGE TATEL: Qwest says they didn't get a windfall.
18 MR. COONEY: I'm sorry, Your Honor?
19 JUDGE TATEL: Qwest said they had no windfall. That
20 all this traffic, that they don't make any money on it.
21 MR. COONEY: Well, the argument here turns on what
22 Counsel identified that the long distance companies prefer to
23 bill their clients on a limited long distance basis. The
24 problem comes because as a business model, that's what they
25 choose to adopt. They could go back and bill their customers

1 by the minute. They prefer not to do that because they think
2 they can market better and marketing ends the competition by
3 having an unlimited flat flee basis. That's all that's
4 involved here. That's a complete red herring because they've
5 made this decision consciously. What they're trying to do
6 here is to have their cake and eat it too. They want to have
7 the current flat fee billing arrangement but they don't want
8 to pay for the calls.
9 JUDGE TATEL: Yes.
10 MR. COONEY: But, their customers are getting
11 everything that the customers wanted. The customers wanted to
12 call these lines. They wanted to use Qwest. It was delivered
13 to the conference bridge, and the consumers participated in
14 the call. They got everything that they wanted.
15 JUDGE TATEL: Yes.
16 MR. COONEY: And that's why we regard this as --
17 it's a business model which they took an opportunistic attempt
18 with the FCC and managed to persuade the FCC.
19 JUDGE TATEL: Yes.
20 MR. COONEY: Now, I wanted to make certain that
21 Judge Rogers understood my question. That in Farmers, I'm
22 sorry. In Jefferson 2, the Commission did not address the
23 question under the end user rubric. But, it did address
24 squarely the question as to whether access service was being
25 provided. AT&T raised it in the complaint. The Commission

1 considered it under whether we have access service under these
2 situations and the answer was yes, we do because the physical
3 product is being delivered to somebody who signed up for the
4 service. Under those situations, the filed rate doctrine
5 applies. The terms of the contract don't matter because we
6 have -- the service is being offered indiscriminately to all
7 users of the local carrier, those who are part of the
8 conference calling company and those that are not. And,
9 finally, I'd just like to make the point in deciding Farmers
10 1, the Commission and Qwest have the contracts before them.
11 The full contracts were there, and they showed that there was
12 no net flow of funds. So, the Commission's discussion
13 discovers after the fact that there wasn't billing and
14 collecting going on and that justifies them in ignoring
15 Jefferson 1 and ignoring Jefferson 2, which they basically
16 punt on in their position. It's simply not right. They had
17 the full facts before them when they decided that the
18 conference calling companies were subscribers because they had
19 entered their name and they'd actually received the service.
20 JUDGE ROGERS: All right. Thank you.
21 MR. COONEY: Thank you.
22 JUDGE ROGERS: We'll take the case under advisement.
23 (Recess.)
24
25

1 DIGITALLY SIGNED CERTIFICATE

2 I certify that the foregoing is a correct
3 transcription of the electronic sound recording of the
4 proceedings in the above-entitled matter.
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10 Dawn M. Bahnmiller December 12, 2011
11 DEPOSITION SERVICES, INC.
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Exhibit 101

Mem. in Support of Mot. for Temp. Restraining Order and Prelim. Injunction, *Great Lakes Commc'n Corp. v. Berntsen*, No. 09-4085 (N.D. Iowa Nov. 3, 2009)

Do Not Release - Not for Inclusion in the Public Record
PUBLIC VERSION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

GREAT LAKES COMMUNICATION CORPORATION and SUPERIOR TELEPHONE COOPERATIVE,	)	CIVIL ACTION
Plaintiffs,	)	No. _____
vs.	)	
ROBERT B. BERNTSEN, KRISTA K. TANNER, AND DARRELL HANSON, in their Official Capacities as Members of the Iowa Utilities Board and not as Individuals; IOWA UTILITIES BOARD, Utilities Division, Department of Commerce; NEUSTAR, INC., the North American Numbering Plan Administrator and Pooling Administrator,	)	PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
	)	EXPEDITED RELIEF REQUESTED PURSUANT TO LR 7.j
Defendants.	)	

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* Motions for admission *pro hac vice* pending
Dated: November 3, 2009

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Plaintiff Great Lakes Communication Corp. ("Great Lakes"), by its undersigned counsel, submits the following Memorandum in Support of its Motion for Temporary Restraining Order and Preliminary Injunction.

I. BACKGROUND

The world of telecommunications regulation is divided into two hemispheres: interstate and international telecommunications are regulated by the Federal Communications Commission ("FCC") pursuant to authority delegated by Congress. 47 U.S.C. § 151. Intrastate telecommunications are regulated at the state level by agencies, like the Iowa Utilities Board ("IUB"), pursuant to authority delegated to them. Iowa Code § 476.1; 47 U.S.C. § 152(b). At the heart of this dispute is an *ultra-vires* decision by the IUB that, while purporting to prohibit certain conduct solely with respect to *intrastate* communications, impinges on federal authority by also preventing Great Lakes from providing *interstate* services. In addition, the IUB's decision to prohibit certain conduct with respect to *intrastate* communications relies entirely on misreading, misapplying, and creating conflicts with *federal* law. This motion for temporary restraining order and preliminary injunction seeks relief from two discrete directives by the IUB: one directing a federal non-governmental entity to use its delegated authority to seize the telephone numbers of Great Lakes; and the other commencing a proceeding to "show cause" why the Certificate of Public Convenience and Necessity ("CPCN") of Great Lakes should not be revoked on the basis of an erroneous interpretation of law that is directly at odds with federal precedent.

Great Lakes is a "local exchange carrier" ("LEC") providing telephone service to customers in Spencer, Iowa under the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 153(26). Affidavit of Joshua D. Nelson ¶ 2. Great Lakes serves customers that provide conference-calling services. Nelson Aff. ¶ 4; Affidavit of David Erickson Aff. ¶ 4. Subscribers to

the conference-calling services reach the conference-calling "bridges" by dialing a long-distance telephone number and entering an access code. Once connected to the conference bridge, customers can talk to anyone else also connected to the bridge and using the same access code. The conference-calling services are free to the persons calling them, other than the long-distance charges owed to their IXCs. Erickson Aff. ¶5.

To provide service to its conference-calling service provider customers, Great Lakes needs telephone numbers that it can assign. Nelson Aff. ¶ 11. Great Lakes obtains these numbers from the North American Numbering Plan Administrator ("NANPA"), a non-governmental entity to whom the FCC has delegated authority to administer the numbering system for the public switched telephone network.[1] Neustar, Inc. was selected by the FCC to function as both NANPA and the Pooling Administrator.

Plaintiff provides access to its local exchange facilities and customers so that long-distance companies ("interexchange carriers," or "IXCs") such as Qwest Communications Corporation ("Qwest"), AT&T Corporation ("AT&T"), or Sprint Communications Company, L.P ("Sprint"), can complete telephone calls from their customers to Great Lakes' conference-calling service providers. Nelson Aff. ¶ 3. To compensate Great Lakes for the use of its local exchange facilities, Great Lakes collects "terminating access charges" from the IXCs. Nelson Aff. ¶ 5. The access charges owed by the IXCs to LECs are included in the service fees the long-distance companies charge their customers.

Great Lakes' access charges are specified in tariffs on file with the FCC and the IUB. Nelson Aff. ¶ 7. Most of the terms in the Great Lakes interstate access tariff mirror those in the

[1] Similarly, the FCC has delegated authority to a Pooling Administrator to administer subsets of telephone numbering resources known as "thousand-number blocks" for the purpose of conserving numbers through "pooling." The "pooling" process allows more than one carrier to share the local exchange prefix ("NXX") that follows the area code ("NPA").

National Exchange Carrier Association ("NECA") Access Tariff No. 5. *Id.* The NECA Access Tariff defines the terms and conditions for interstate access charges for more than 1,000 local exchange carriers,[2] and, as explained more fully below, has been interpreted by the FCC to apply to the traffic destined for conference calling service providers that are the subscribers of LECs, like Great Lakes.

The terms of the Great Lakes intrastate access tariff adhere closely to the Iowa Telecommunications Association ("ITA") Access Tariff No. 1, except for minor exceptions. Nelson Aff. ¶ 7. The ITA intrastate access tariff defines the terms and conditions for intrastate access charges for over 140 Iowa LECs.[3] Importantly, the ITA Access Tariff incorporates the terms and conditions of the NECA Access Tariff No. 5, but provides rates and charges specific to traffic originated and terminated within Iowa. Therefore, the General Terms and Conditions, including definitions of terms, are identical between the NECA interstate access tariff (which the FCC has already interpreted to apply to conference calling traffic) and the ITA intrastate access tariff (which the IUB erroneously concludes does not apply to conference calling traffic).

For more than two years now, Qwest and Sprint have withheld payment of access charges lawfully owed to Great Lakes. Nelson Aff. ¶ 8. The IXCs have defended their self-help actions by asserting that Great Lakes' access tariffs do not apply to traffic destined for conference calling providers. The IXCs have taken their complaints to state regulators, like the IUB. In this case, Qwest filed a Complaint at the IUB against Plaintiff and seven other Iowa local telephone companies, seeking relief from its obligation to pay intrastate access charges. Complaint, Request for Declaratory Relief and Request for Emergency Injunctive Relief, *Qwest Commcn's Corp. v. Superior Tel. Coop. et al.*, Docket FCU-07-02 (filed Feb. 20, 2007).

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[2] https://www.neca.org/cms400min/NECA_Templates/AboutUsInterior.aspx?id=31
[3] http://www.i-t-a.net/about-us.cfm

The IUB recently released its Final Order. *Qwest Comms. Corp. v. Superior Telephone Coop., et al.*, Docket No. FCU-07-2 (Iowa Utils. Bd. Sep 21, 2009) ("Final Order"). In the Final Order, the IUB reached several erroneous factual and legal conclusions that, if allowed to stand, will have an immediate and direct impact on interstate communications and inflict irreparable harm on Great Lakes. The IUB held, among other things, that: (1) Conference-calling service providers did not subscribe to services provided by Plaintiff under the terms of the NECA interstate access tariff and Plaintiff's local exchange service tariffs. *Id.* at 77. (2) Conference-calling service providers are not end users under the terms of the NECA interstate access tariff and the Plaintiff's local exchange service tariffs. *Id.* at 78. (3) The sharing of revenues between Plaintiff and its conference-calling service provider customers is not unlawful per se, but it is unreasonable under the facts in this case. *Id.* at 58-59, 78. (4) Great Lakes has improperly assigned all of its telephone numbers to conference-calling service providers. *Id.* at 78. (5) Great Lakes violated the terms of its tariffs when it charged Qwest, Sprint, and AT&T for terminating switched access fees for the traffic at issue. *Id.* at 79. (6) NANPA and the Pooling Administrator are directed to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes. *Id.* at 80. And (7) The IUB will initiate a proceeding asking Great Lakes to show cause why its CPCN should not be revoked. *Id.* at 67.

As a direct result of the IUB's Final Order, Great Lakes is in imminent danger of being shut down. On October 27, 2009, NANPA informed Great Lakes that it will begin the process of reclaiming Great Lakes' numbers in the first week of November. Nelson Aff. ¶ 14. The Final Order irreparably harms Great Lakes by directing NANPA to reclaim the telephone numbers Great Lakes uses in order to serve end user customers and to provide interstate access service. Nelson Aff. ¶ 12; Erickson Aff. ¶ 12. In addition, revocation of Great Lakes CPCN would

prohibit Great Lakes from providing any services whatsoever, including intrastate and *interstate* telecommunications services. A Temporary Restraining Order and Preliminary injunctive relief pending judicial review of the Final Order is warranted under the circumstances.

II. STANDARD FOR ISSUING A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The standard for granting a temporary restraining order and preliminary injunction for courts in this Circuit "involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (*en banc*); *see also Interbake Foods, L.L.C. v. Tomasiello***,** 461 F.Supp.2d 943, 954-55 (N.D. Iowa 2006) ("it is well-settled in this circuit that applications for preliminary injunctions and temporary restraining orders are generally measured against the standards set forth in the seminal *Dataphase Systems*"). Although courts will generally consider "the balance of equities" and whether they "so favor[] the movant that justice requires the court to intervene to preserve the status quo until the merits are determined," *Dataphase Sys.*, 540 F.2d at 113, particular attention is given to "prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated." *Id.* at n.5. In addition, where, as here, "the intrusion of a state would result in a conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right." *Chaulk Servs., Inc. v. Mass. Comm'n Against Discrimination*, 70 F.3d 1361, 1369 (1st Cir. 1995) (quoting *American Fed'n of Labor v. Watson*, 327 U.S. 582, 593-95 (1946).

III. ARGUMENT

A. Great Lakes Will Suffer Irreparable Harm Absent Injunctive Relief.

It is well established that "the basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999). In order to demonstrate irreparable harm, movant must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996).

Great Lakes will suffer irreparable harm absent a temporary restraining order and preliminary injunction, and the harm is certain and great. On October 27, 2009, NANPA informed Great Lakes that it is beginning the process of reclaiming Great Lakes' numbers. Nelson Aff. ¶ 14. One block of telephone numbers is due to be fully disconnected no later than December 21, 2009, and two other blocks of telephone numbers are due to be fully disconnected no later than December 26, 2009. Nelson Aff. ¶ 14. Without telephone numbers, Great Lakes will have no ability to provide *any* telecommunications services to its customers. Nelson Aff. ¶ 12. The IUB's directive will simply drive Great Lakes out of business. *Id.*

The Supreme Court has stated that "a substantial loss of business and perhaps even bankruptcy" are "certainly" "the type of injury [that] sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (finding irreparable harm when ordinance prohibiting topless dancing would put bar owner out of business). *See also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (finding irreparable harm when absence of injunction would result in company's destruction); *Menominee Rubber Co. v. Gould, Inc.*, 657 F.2d 164, 167 (7th Cir. 1981) (finding irreparable harm in potential termination of distribution agreement that would result in destruction of plaintiff's business); *McLeodUSA*

Telecomms. Servs., Inc. v. Qwest Corp., 361 F. Supp. 2d 912, 921 (N.D. Iowa 2005) (finding irreparable harm in disconnection of telecommunications service of competitive carrier).

In addition, the Final Order states that the IUB will initiate a proceeding asking Great Lakes to show cause why its CPCN should not be revoked. Final Order at 67. This show cause proceeding is the fruit of a poisonous tree planted from the seeds of the IUB's erroneous decisions in Docket FCU 07-2. As such, implementation of the IUB's Final Order should be barred until the Final Order is reviewed. Great Lakes will be irreparably harmed if its CPCN is revoked by the IUB, and it thus put out of business, before the IUB's legal conclusions can be fully challenged through an appeal.

There are no legal remedies that will be adequate to compensate Great Lakes if its telephone numbers are reclaimed and/or its CPCN revoked, before the IUB's Final Order is found to be unlawful. Great Lakes would be in the position of having to win back the customers it will have lost, customers that no doubt will have moved to other carriers. Great Lakes will have suffered untold economic losses from not being able to provide local exchange services and receiving compensation for doing so for the time from the loss of its telephone numbers to the time the IUB Final Order will have been declared unlawful. There would be no one to collect damages from since the parties responsible for the harms to Great Lakes are the IUB and the individual IUB Members acting in their official capacities. When a plaintiff sues a state official alleging a violation of federal law, the federal court may not award retroactive monetary damages. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984); *Baker Electric Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding that even if plaintiff prevails on the merits, it will lack an adequate remedy against the state regulatory commission it is suing).

B. The Irreparable Harm to Great Lakes Significantly Outweighs Any Conceivable Harms to Other Interested Parties.

The second element in the test for injunctive relief is "the state of balance between [Plaintiff's irreparable] harm and the injury that granting the injunction will inflict on other parties litigant." *Dataphase*, 640 F.2d at 114. What must be weighed for this second element is the threat to each of the parties' rights and economic interests that would result from either granting or denying the preliminary injunction. *McLeodUSA*, 361 F. Supp. 2d at 922.

The certain harms to Great Lakes significantly outweigh any conceivable harm to other parties. First, entry of an injunction cannot "harm" the IUB as a matter of law. *Baker Electric Coop.*, 28 F.3d at 1473. Second, IXCs have not paid terminating access to Great Lakes for more than two years and continue to withhold payment. Yet they continue to collect revenues from their long-distance customers who place the calls to Plaintiff's customers. The issuance of injunctive relief pending judicial review would maintain the *status quo* that is already favorable to them until this appeal is resolved.

C. Great Lakes Is Likely to Prevail on the Merits.

The third element in the test for injunctive relief is "the probability that movant will succeed on the merits." *Dataphase*, 640 F.2d at 114. At this stage, the Court is not deciding whether Great Lakes will ultimately win in its appeal of the Final Order. *O'Connor v. Peru State College*, 728 F.2d 1001, 1002-03 (8th Cir. 1984); *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991). Great Lakes need only present a "sufficiently strong case" in order to satisfy the third element of the *Dataphase* test. *Glenwood Bridge*, 940 F.2d at 371.

1. Reclamation of Great Lakes' Telephone Numbers Would Place Great Lakes in Violation of Federal Law.

The reclamation of Great Lakes' telephone numbers ordered by the IUB would have the effect of forcing Great Lakes to violate federal law: "No carrier shall discontinue, reduce or

impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby[.]" 47 U.S.C. § 214(a).

The regulations implementing section 214 require carriers to seek authorization from the FCC for any discontinuance of service to a community. 47 C.F.R. §§ 63.60-63.702. The standard for the FCC to grant discontinuance, however, can never be satisfied under the circumstances of this case. FCC rules state that approval is not granted when "it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected." 47 C.F.R. § 63.71(a)(5)(i). In its application for discontinuance, a carrier must provide a "[s]tatement of the factors showing that neither present nor future public convenience and necessity would be adversely affected by the granting of the application[.]" 47 C.F.R. § 63.505(i).

It is not possible for Great Lakes to provide this statement to the FCC. Great Lakes' largest customer is Free Conferencing Corporation ("Free Conferencing"). Nelson Aff. ¶ 15; Erickson Aff. ¶ 12. Great Lakes has assigned telephone numbers to Free Conferencing, those numbers have been activated in the public switched telephone network, and Great Lakes terminates millions of minutes of traffic to Free Conferencing each month. Nelson Aff. ¶ 15; Erickson Aff. ¶ 6. Reclamation of those telephone numbers would require Great Lakes to discontinue service to Free Conferencing. Free Conferencing would be unable to receive service or a reasonable substitute from another carrier, primarily because Free Conferencing would no longer be able to use the telephone numbers that Great Lakes had assigned to it and on which Free Conferencing's business depends. Moreover, there is no way to migrate millions of minutes of traffic per month to another carrier in the time before Neustar's intended reclamation date.

Injunctive relief is the proper remedy when service to a customer is to be discontinued without approval from the FCC under Section 214. *ITT World Commc'ns, Inc. v. New York Tel. Co.*, 381 F. Supp. 113, 123 (S.D.N.Y. 1974). In *ITT*, the court enjoined the telephone company from discontinuing a unique service to customers using teletypewriter equipment not only because the carrier did not have Section 214 approval, but also because the companies were in the midst of litigation before the FCC on the issue. The court was concerned that absent an injunction, the telephone company would render the dispute moot by discontinuing the service before the customers were able to adapt to the loss of service. *Id.* at 122.

Similarly, the FCC can force carriers to continue to provide service when discontinuance of service would result in "the immediate and catastrophic loss of business" for customers, even though that carrier had filed for bankruptcy. *Complaint Against Internet Commerce & Communications, Inc. f/k/a/ RMI.NET, Inc. and ICC Speed Call, LLC for Failure to Comply with Statutory and Regulatory Discontinuance Requirements*, 16 FCC Rcd. 19393 ¶ 3 (2001). "The purpose of these requirements is to reduce the harm to consumers caused by discontinuances of service, which is an important aspect of the Commission's general obligation under the Communications Act to protect and promote the public interest." *Id.* at ¶ 6. Thus, a carrier must assure the FCC "that no customer would be discontinued from its network until they successfully migrated their service to another carrier" and "that no risk of customer disruption would occur from the discontinuance." *Id.* at n.15. Reclaiming Great Lakes' telephone numbers would force it to discontinue service abruptly and with no time to obtain the requisite FCC approval—under *ICC*, such approval likely is not even possible. The Final Order thus would place Great Lakes in violation of Section 214 and the FCC regulations if number reclamation were to be completed. Injunctive relief is the appropriate remedy.

2. The IUB Final Order Is Preempted by Federal Law.

Under the Supremacy Clause, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666 (1962); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986). "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." 369 U.S. at 666. With respect to state agency action, state regulations that contravene the federal regulatory scheme are invalid under the supremacy clause. *Townsend v. Swank*, 404 U.S. 282, 285 (1971); *see also Louisiana PSC*, 476 U.S. at 368-69.

a. The IUB's Purported Directive to NANPA For Reclamation Of Great Lakes' Numbers Exceeds Its Authority.

Plaintiff is likely to prevail on the merits of its claim that the Final Order should be preempted because the IUB exceeded its delegated authority regarding the reclamation of telephone numbers. In purported reliance on 47 C.F.R. § 52.15, the Final Order directs "the North American Numbering Plan Administrator and the Pooling Administrator … to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes Communications Corp." Final Order at 81. This directive grossly exceeds the authority that the FCC has delegated to state commissions and directly contradicts applicable federal law.

The Act vests the FCC with exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. 47 U.S.C. § 251(e). The FCC's chief imperative with regard to numbers is ensuring their fair distribution and to prevent unused numbers from being retained by any carrier for an unreasonable length of time.[4] Although the

[4] For example, the FCC established numbering rules in 2000 for the reclamation of numbers in order "to ensure the return of unused numbers to the NANP inventory for assignment to other carriers." *Numbering Resource*

FCC may delegate its authority to states, 47 U.S.C. § 251(e)(1), a state commission has only limited authority to order number reclamation. 47 C.F.R. § 52.15(i). State authority to reclaim numbers shall *only* be exercised when there is a clear showing that numbers have not been activated. 47 C.F.R. § 52.15(i)(2). As such, a reclamation directive is only appropriate if "the state commission is satisfied that the service provider *has not activated* and commenced assignment to end users of their numbering resources within six months of receipt." 47 C.F.R. § 52.15(i)(5) (emphasis added). NANPA may comply with a state directive to reclaim an NXX code only "if the state commission is satisfied that the code holder has not activated the code within the time specified" in the regulations. 15 FCC Rcd. at 7680-81 ¶ 237.

A number is "activated" when it is distributed throughout the databases and switches in the Public Switched Telephone Network that dictate how calls reach their intended destinations. A number has been activated if it has the ability to send or receive telephone calls. The telephone numbers that Great Lakes has assigned to conference-calling service providers have clearly been activated and Great Lakes has informed NANPA of such; otherwise Great Lakes would not be able to transmit calls to its subscribers or bill the IXCs for access charges.

Here, the IUB did not follow the procedure that could possibly make its reclamation directive an appropriate exercise of state authority. It based its decision to order reclamation on its conclusion that Great Lakes was using its numbers only for service to conference-calling service providers, and that such customers were not "end users" under the terms of the NECA interstate access tariff. Final Order at 66-67. It failed to provide Great Lakes with notice and hearing of the reclamation as required by FCC regulations. 47 C.F.R. § 52.15(i)(4). Its attempt to strip Great Lakes' numbers is thus well outside the bounds of its limited delegated authority.

Optimization, 15 FCC Rcd. 7574, ¶ 5 (2000); *see also* 47 C.F.R. §§ 52.105, 52.107 ("warehousing" and "hoarding" toll-free telephone numbers are unreasonable practices under the Act).

The FCC numbering rules plainly were not intended to be applied by states in the manner applied by the IUB.

b. The Final Order Unlawfully Regulates Interstate Services.

The Final Order clearly attempts to regulate the provision of interstate services in violation of federal law. Although the IUB asserted that it "is aware of its jurisdictional limitations with respect to interstate and international traffic and as such has limited its findings in this final order to the intrastate issues raised in [Qwest's] complaint," this assertion is not credible. Final Order at 77. The IUB did not limit its findings to only the *intrastate* issues raised in the complaint, nor did it limit its relief to apply only to *intrastate* communications.

Three sentences into the Overview of the Final Order the IUB fully demonstrates its failure to limit its actions to the exchange of intrastate traffic: "The scheme *originates* with local exchange carrier (LEC) members of the National Exchange Carrier Association (NECA) traffic sensitive pool *for interstate access charges*." Final Order at 6 (emphasis added). The "NECA pool" was a creation of the FCC in 1983, is governed pursuant to Part 69 of the FCC's regulations, and is clearly outside the IUB's jurisdiction. It pertains *only* to interstate access charges, yet the functioning of the NECA pool is the predominant focus of the entire decision.[5] The IUB barely attempts to hide that it is trying to regulate the operations of members of the NECA pool. Indeed, there is ample evidence that the IUB does not recognize a distinction between tariffs it can enforce and tariffs it cannot: it repeatedly fails to distinguish between the intrastate ITA access tariff and the interstate NECA access tariff.[6] It would have been easy for

[5] For example, "LECs bill the IXCs for… traffic using relatively high interstate switched access rates ($0.05 to $0.13 per minute) that were filed in individual tariffs after opting out of the NECA pool[.]" Final Order at 7.

[6] For example, "The Respondents argue that *their tariffs* were properly applied to the FCSCs[.]" Final Order at 12 (emphasis added). "The Respondents contend that these relationships are permitted under *their tariffs* and existing law." *Id.* at 19 (emphasis added).

the IUB to make those distinctions, and its failure to do so is telling as to the intended reach of its decision.

In addition, the Final Order renders several findings and conclusions that plainly affect interstate communications. The IUB interpreted the terms "end users," "customers," and "terminates" under the terms of the NECA interstate Tariff No. 5, extending its reach into interstate communications. Final Order at 37-42, 53. It decided that revenue sharing between a LEC and its customer is not unlawful *per se*, but it is unreasonable under the facts in this case. *Id.* at 57-59. It decided the IXCs were justified in engaging in self-help by withholding tariffed access charges from the LECs. *Id.* at 70. And it determined that *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, 22 FCC Rcd. 17973 (2007) ("*Farmers and Merchants*") was not final and thus not applicable. *Id.* at 29. These conclusions directly impact interstate traffic and the manner in which the Iowa LECs assess terminating access for such traffic.

Based on these conclusions, the IUB has already instituted relief that likewise reaches both intrastate and interstate matters: IXCs must calculate how much they are owed by the LECs. *Id.* at 80.[7] The IUB directed NANPA and the Pooling Administrator to commence reclamation of Great Lakes' numbering resources. *Id.* at 67. And LECs must report all telephone numbers they have assigned to conference-calling service providers for possible reclamation. *Id.*

In order to be lawful and to avoid preemption, the action by the IUB should not have negated the FCC's authority over interstate communications. *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *Illinois Bell v. FCC*, 883 F.2d 104 (D.C. Cir. 1989). Indeed, the D.C. Circuit has already affirmed at least two FCC decisions that preempted state commission decisions that

[7] The IUB simply refers to "the traffic at issue in this case" but does not make clear that the order applies only to intrastate traffic. And because the IUB denied Plaintiff's request to exclude evidence regarding interstate traffic, the "traffic at issue in this case" may be deemed to include interstate calls.

failed to limit their reach to intrastate traffic. *Public Util. Comm'n of Tex. v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (FCC preempted a state commission decision regarding interconnection of a private network with the public switched network because there was no practical way to separate the intrastate component of the interconnection facilities from the interstate component); *Pub. Serv. Comm'n of Md. v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (FCC preempted a state commission decision regarding disconnection of local service for failure to pay for local or interstate services because customer was prevented from using its phone for interstate services).

It is impossible to apply the IUB's rulings, purportedly limited to intrastate traffic, without also affecting interstate components of Great Lakes' service. The IUB seeks reclamation of telephone numbers, with the specific intent of putting Great Lakes out of business, and thereby prohibiting Great Lakes from providing interstate services as well. Accordingly, it is not possible for the IUB to regulate the intrastate component of the service without impermissibly regulating the interstate component, and state law must yield to federal law. *Vonage Holdings Corp. Pet. for Decl. Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd. 22404 (2004), *aff'd*, *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 483 F.3d 570 (8th Cir. 2007). The Final Order must be preempted because it would effectively prevent Great Lakes from providing any *interstate* telecommunications services.

c. The Final Order Conflicts with Federal Law.

Great Lakes is also likely to prevail on the merits because the IUB ignored relevant FCC precedent, and in so doing, has created conflicts between state law and federal law. An "outright or actual conflict between federal and state law" is grounds for preempting state actions. *Louisiana PSC*, 476 U.S. at 368. Great Lakes has identified several examples of the Final Order creating a conflict with FCC precedent: (1) The IUB concluded that *Farmers and Merchants* is not final. Final Order at 29. Yet the FCC has never stated that *Farmers and Merchants* has been

reversed, vacated, or reconsidered, and expressly stated that the grant of Qwest's petition for additional discovery in the case did not indicate that the ruling in that case will change. Order on Recons., *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, 23 FCC Rcd. 1615, 1617 ¶ 7 (2009). (2) The IUB decided that conference-call service providers do not subscribe to the LECs' switched access or local exchange tariffs, and therefore are not end users under the terms of the NECA tariff. Final Order at 77-78. These conclusions directly contravene *Farmers and Merchants*, interpreting identical tariff language. 22 FCC Rcd. at 17987, ¶ 38. (3) The IUB decided that LECs did not net, or offset, fees to their customers. Final Order at 78. Yet *Farmers and Merchants* finds the manner in which money is exchanged between a carrier and its customer is not relevant. 22 FCC Rcd. at 17987, ¶ 38. (4) The IUB decided that LECs did not provide local exchange service through special contract arrangements. Final Order at 78. Again, *Farmers and Merchants* finds that conference call providers are end users despite receiving service under special contracts. 22 FCC Rcd. at 17987, ¶ 38. (5) The IUB ruled that conference-call service providers acted as "business partners" of LECs. Final Order at 78. *Farmers and Merchants*, however, finds that conference call providers are "end users" under identical tariff language. 22 FCC Rcd. at 17987, ¶ 38. (6) The IUB decided that revenue sharing is an indication that a particular service arrangement may be unreasonable. Final Order at 78. Yet the FCC has repeatedly and expressly rejected identical claims. *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001); *AT&T Corp. v. Frontier Commc'ns of Mt. Pulaski, Inc.*, 17 FCC Rcd. 4041 (2002); *AT&T Corp. v. Beehive Tel. Co.*, 17 FCC Rcd. 11641 (2002); *Farmers and Merchants*, 22 FCC Rcd. 17973. (7) The IUB ruled that assigning numbers to conference-call providers is improper. Final Order at 78. This ruling contradicts *Farmers and Merchants*, which never finds that assigning numbers to conference call providers is improper. 22 FCC Rcd. at 17987, ¶¶ 30-

38. (8) The IUB decided that calls to conference-call service providers neither terminated at the end user's premises, nor terminated within the LECs local exchange areas. Final Order at 78. However, *Farmers and Merchants* found that calls to conference call providers "terminate" and are compensable. 22 FCC Rcd. at 17986, ¶¶ 35-36. (9) And finally, the IUB ruled that use of Foreign Exchange arrangements constitutes unlawful "traffic laundering." Final Order at 78. Under federal law, however, Foreign Exchange arrangements, in which a subscriber receives service for a local exchange where it has no physical presence, are not unlawful. *Starpower Commc'ns, LLC v. Verizon South Inc.*, Memorandum Op. & Order, 18 FCC Rcd. 23625 (2003). These conflicts with federal law created by the IUB require preemption of the Final Order under *Louisiana PSC*. 476 U.S. at 368.

d. The Final Order Warrants Preemption On Other Grounds.

Plaintiff is also likely to prevail on the merits on several other grounds. First, the FCC has occupied the field, leaving the IUB no room to rule on the issue of compensation for calls to conference-call service providers. *Louisiana PSC*, 476 U.S. at 368. On October 2, 2007, the FCC issued a Notice of Proposed Rulemaking specifically to resolve all of the issues addressed in the Final Order. *Establishing Just and Reasonable Rates for LECs*, 22 FCC Rcd. 17989 (2007). Second, the Final Order flouts the FCC's prohibition on self-help refusals to pay access charges, thereby standing as an obstacle to the accomplishment and execution of the full objectives of Congress. *Louisiana PSC*, 476 U.S. at 368-9. The IUB completely exonerates the IXCs' use of self-help by simply refusing to pay tariffed access charges. Final Order at 70. This holding is consistent with decades of FCC precedent prohibiting self help. "[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties." *Tel-Central of Jefferson City, Mo., Inc. v. United Tel. Co. of Mo., Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1989), *aff'd Tel-Central of Jefferson City, Mo., Inc. v. FCC*, 920 F.2d 1039

(D.C. Cir. 1990). Third, the Final Order encroaches on FCC jurisdiction by regulating traffic that uses Internet protocol to route calls to overseas numbers. Final Order at 42-43. The FCC is vested with exclusive jurisdiction over international traffic. 47 U.S.C. § 152(a). Moreover, the FCC has on multiple occasions asserted exclusive jurisdiction over Internet-based communications, *e.g.*, *Vonage Order*, 19 FCC Rcd. at 22414 ¶ 18, including IP-based calling card calls. *AT&T Corp. Pet. for Decl. Ruling Re Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, 4839 ¶ 38 (2005), *aff'd AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006). Finally, the IUB's purported directive for reclamation of Great Lakes' numbers defies the clear intent of Congress that state law shall not create barriers to entry for competitors. *Louisiana PSC*, 476 U.S. at 368. The IUB directive prohibits the ability of an entity to provide an interstate telecommunications service in violation of Section 253.

3. The Final Order Impedes Interstate Commerce.

The Commerce Clause of the Constitution, Art. I, § 8, cl. 3, empowers Congress to regulate commerce among the states and confines the states' power to burden interstate commerce. *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1984). The commerce clause operates by denying the states "the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Id.* If a state regulation has "extraterritorial reach," the critical inquiry is whether the effect of the state regulation is to control conduct beyond the boundaries of the State. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793-795 (8th Cir. 1995). Where the state regulation is even-handed to effectuate a legitimate local public interest, the burden imposed on interstate commerce must not be "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *R&M Oil & Supply Inc. v. Saunders*, 307 F.3d 731, 735 (8th Cir. 2002).

The Final Order has extraterritorial reach because it would have the effect of compelling

Great Lakes to discontinue providing interstate services. As a result, consumers all over the country would be unable to access the services provided by Great Lakes' customers. Approximately 98% of the traffic at issue and terminated by Great Lakes is interstate. Nelson Aff. ¶ 9. By reclaiming the telephone numbers of Great Lakes, the IUB's action has the effect of controlling a considerable amount of conduct beyond Iowa in violation of the Commerce Clause.

The Final Order imposes a burden upon interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. The IUB's unexpressed policy goals in the Final Order are heavily outweighed by the harm the IUB imposes by putting LECs out of business and generally impeding competition. The alleged harm from the "scheme" attributed to Great Lakes and other LECs "*originates* with local exchange carrier (LEC) members of the National Exchange Carrier Association (NECA) traffic sensitive pool *for interstate access charges*." Final Order at 6 (emphasis added). Moreover, the alleged harms at issue in this case have been found to be lawful by the FCC under federal law. The only benefits in the Final Order accrue to the national IXCs that stand to benefit from using Great Lakes' services without providing any compensation, but have been unable to obtain relief from the FCC under identical circumstances. Yet the Final Order places an enormous burden on interstate commerce by driving at least one provider of interstate telecommunications services, Great Lakes, out of business, with more likely to follow. The IUB has failed to identify a legitimate local public interest that warrants the radical disruption to interstate commerce that would result from enforcement of the Final Order against conduct that is lawful under federal law.

D. The Public Interest Favors Granting Injunctive Relief.

The fourth element to be considered for issuing a temporary restraining order or preliminary injunction is the public interest. *Dataphase*, 640 F.2d at 114. There are no benefits to complying with an order that the IUB had no authority to issue in the first instance, even

temporarily. *Bank One v. Guttau*, 190 F.3d 844, 847-848 (8th Cir. 1999), *cert. den. sub nom. Foster v. Bank One*, 529 U.S. 1087 (2000). Plaintiff would be forced to temporarily suspend its relationships with important end-user customers pending judicial review of the Final Order, with no guarantee the relationships will resume after the Final Order is declared unlawful. Nelson Aff. ¶ 15; Erickson Aff. ¶ 12. The public interest is served by enjoining enforcement of the invalid provisions of state law. *Bank One*, 190 F.3d at 848.

IV. RULE 65 BOND REQUIREMENT

Plaintiff should not be required to post any bond under Rule 65(c) of the Federal Rules of Civil Procedure. No party will be harmed by enjoining the IUB from directing Neustar, as NANPA, from reclaiming the telephone numbers of Great Lakes, or from enjoining the IUB from initiating a show cause proceeding to consider revocation of Great Lakes' CPCN. The IUB will incur no damages as a result of the injunction, and the IXCs will likely continue to withhold lawful access charges under the *status quo*. To the extent the bond requirement under Rule 65(c) is mandatory, a bond in the nominal amount of $1.00 would be appropriate. *Interbake Foods*, 461 F. Supp. at 979-980.

V. CONCLUSION

For all these reasons, Plaintiff Great Lakes asks this Court to grant the injunctive relief requested in the Motion for Temporary Restraining Order and Preliminary Injunction.

November 3, 2009

Respectfully submitted,

By: __/s/ Jeana L. Goosmann_____

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

In the Matter of **AT&T CORP.** **One AT&T Way** **Bedminster, NJ 07921** **(202) 457-3090** ***Complainant,*** ***v.*** **GREAT LAKES COMMUNICATION CORP.** **1713 McNaughton Way** **Spencer, IA 51301** **(712) 580-4700** ***Defendant.***	**File No. EB-16-MD-001**

OPPOSITION TO GREAT LAKES COMMUNICATION CORP.'S MOTION TO EXCLUDE EXPERT REPORT OF AT&T'S EXPERT WITNESS, DAVID I. TOOF, PH.D.

AT&T Corp. ("AT&T") submits this Opposition to the motion of Great Lakes Communication Corp. ("GLCC") seeking to exclude the expert report of AT&T's expert witness, David I. Toof, Ph.D.[1]

I. INTRODUCTION

As the Federal Communications Commission (the "Commission") is aware, prior to the district court's referral, the parties were actively preparing to try this case to a lay jury in Sioux City, Iowa. In that connection, both parties filed a number of motions in limine, including motions both challenging the expertise of the other parties' expert witnesses and seeking to exclude or limit portions of the proposed testimony of each expert. A principal reason that these

[1] Great Lakes Communication Corp.'s Motion to Exclude Report of AT&T's Expert Witness, David I. Toof, Ph.D. ("Motion" or "Mot.").

motions were filed was to prevent the presentation of evidence that could be misconstrued or that might confuse the jury.

No such concerns exist here. The issues raised in AT&T's Formal Complaint are not being tried before a jury, but rather are being submitted to an expert agency that is fully familiar with the regulatory and technical matters at issue and well versed in the use and consideration of expert testimony. Indeed, the Commission handles numerous cases each year that involve expert testimony without having to rely on motion practice directed to the admissibility of such evidence. Rather, the Commission generally addresses such matters by assessing, in the normal course of issuing its decision, the weight and credibility of the expert's presentation.

Notwithstanding this well-established practice, GLCC has filed as part of its answering submission a motion to exclude the expert report of AT&T's expert witness, Dr. David I. Toof. As is apparent from the face of GLCC's motion, it has not been tailored to address the matters specifically identified by AT&T in its Formal Complaint as relating to Dr. Toof's expert report.[2] Instead, GLCC has recycled the motion that it filed in district court – a motion that was fully briefed well in advance of trial but that was never resolved by the district court.

As explained in greater detail below, GLCC's motion should be denied. In its lengthy submission, GLCC does not identify a single precedent that supports granting this type of motion in the context of an Commission complaint proceeding and for good reason – the Commission does not generally resolve issues relating to the weight to be accorded to expert testimony in this manner. In fact, the Commission generally discourages the filing of motions to dismiss or other

[2] AT&T Ex. 13, Expert Report of David I. Toof ("Toof Report"), submitted Oct. 3, 2014.

interim motions because they needlessly tax the Commission's resources and do nothing to expedite resolution of the principal matters at issue.[3]

GLCC's Motion also should be denied because it is wholly lacking in merit. Dr. Toof clearly possesses the expertise necessary to opine on the matters addressed in his expert report. In fact, the Commission relied on the analysis that Dr. Toof presented in the *All American* case in concluding that All American and the other defendants had acted unlawfully in connection with the traffic-pumping scheme at issue in that case.[4] There is also no merit to GLCC's specific criticisms of Dr. Toof's report. Putting to one side that many of the issues raised in GLCC's motion have little if anything to do with the matters presently before the Commission, AT&T responded fully and completely to each of those issues in the opposition that it filed before the district court. Rather than burden the Commission with another lengthy pleading reiterating each of those points, AT&T summarizes below the major points made in that opposition and then attaches it, as Exhibit A, for the Commission's consideration.[5]

II. LEGAL STANDARD

GLCC concedes that the Federal Rules of Evidence do not govern this formal complaint proceeding, and GLCC does not and cannot identify any complaint proceeding in which the Commission has relied upon Federal Rule of Evidence 702 and/or *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[6]

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[3] *See, e.g.*, Notice of Formal Complaint, *AT&T Corp.* v. *Great Lakes Commc'n Corp.*, EB-16-MD-001, at 3 n.2 (Aug. 19, 2016) (citing *In re Implementation of the Telecomm. Act of 1996*, 16 FCC Rcd. 5681, 5696 (2001)).

[4] *AT&T Corp.* v. *All Am. Tel. Co.*, 28 FCC Rcd. 3477, ¶¶ 24-33 (2013) ("*All American*").

[5] *See* Ex. A, AT&T's Opp. to GLCC's Mot. in Limine, *Great Lakes Commc'n Corp.* v. *AT&T Corp.*, No. 5:13-cv-4117 (N.D. Iowa) (Jan. 12, 2015) ("AT&T Trial Opp.").

[6] None of the specific authorities cited by GLCC supports *Daubert*'s application in this proceeding. Indeed, GLCC does not cite a single case discussing the application of *Daubert* in the context of a Complaint proceeding. Instead, it cites a series of district court cases assessing the role of the Federal Rules of Evidence in proceedings involving either state agencies or

Rather, as part of the Commission's overall consideration of the evidence, the Commission generally assesses the credibility and determines the weight that it will give to the expert testimony presented.[7] By proceeding in this fashion, the Commission insures that a complete record has been developed both to support its decision and to avoid issues on appeal. A good example is the Commission's evaluation of expert testimony in *AT&T Corp.* v. *Business Telecom, Inc.*, 16 FCC Rcd. 12312 (2001). In that proceeding, the Commission explained that the cost study prepared by Warren R. Fischer – the expert designated to justify the competitive local exchange carrier's ("CLEC") rates – was "so riddled with conceptual flaws and factual errors as to be of minimal evidentiary value."[8] But despite the "egregious nature" of flaws "too numerous to discuss in detail,"[9] the Commission did not exclude *any* portion of Mr. Fischer's testimony.[10]

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evidentiary hearing before an administrative law judge. *See WorldNet Telecomms., Inc.* v. *Telecomms. Regulatory Bd. of Puerto Rico*, 707 F. Supp. 2d 163, 214 (D.P.R. 2009) ("assum[ing]" that the Federal Rules of Evidence would apply and determining that state agency did not abuse its discretion in admitting expert testimony under those rules); *McElmurray* v. *U.S. Dep't of Agriculture*, 535 F. Supp. 2d 1318, 1325 (S.D. Ga. 2008) (explaining that the deference afforded in admitting evidence under Administrative Procedure Act "has its limits"), *and Lobsters, Inc.* v. *Evans*, 346 F. Supp. 2d 340, 344-45 (D. Mass. 2004) (holding that administrative law judge's conclusion that expert testimony was reliable was supported by substantial evidence).

[7] *See* Report and Order, *In re Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, 8 FCC Rcd. 2614, ¶ 65 (1993) (contrasting complaint proceedings under Section 208 of the Communications Act, which "specifically confers upon the Commission authority to handle complaints 'in any manner and by such means as it shall deem proper'" with formal hearings under Administrative Procedure Act, which have stricter standards for the admission of evidence).

[8] *Id.* ¶ 48.

[9] *Id.*

[10] *See generally id*.

III. ARGUMENT

A. Dr. Toof Has The Requisite Expertise.

Dr. Toof has the requisite expertise to opine on the matters addressed in his expert report. Dr. Toof's *curriculum vitae* details his extensive experience opining on the types of regulatory matters at issue in this case, including before courts, the Commission, and other bodies. Most notably, in the *All American* case, Dr. Toof presented extensive expert testimony before the Commission regarding a traffic-pumping scheme pursuant to which interstate switched access charges had been unlawfully manipulated by three CLECs, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** Based in significant part on Dr. Toof's analysis, the FCC concluded that the three CLECs were "sham" entities that had engaged in a scheme that violated Section 201(b) of the Act.[11] The FCC also found – again relying on Dr. Toof's analysis – that the CLECs had failed to provide switched access service consistent with the terms of their respective tariffs.[12]

Given that the Commission was satisfied with Dr. Toof's qualifications in that formal complaint proceeding, there is no basis for GLCC to claim that Dr. Toof is not qualified in this proceeding.[13] Indeed, GLCC itself favorably cites Dr. Toof's report in its answering submission.[14] Consequently, the Commission reject this aspect of GLCC's motion.[15]

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[11] Attached hereto as Exhibit B is a copy of the public version of Dr. Toof's Supplemental Expert Report in the *All American* case. His analysis of the economic incentives behind the sham entities' traffic-pumping scheme, which the Commission determined was unlawful, is set forth at paragraphs 2 through 17. A comparison of that portion of Dr. Toof's report to the Commission's decision clearly shows that the Commission relied on Dr. Toof's analysis in determining that the defendants entered sham arrangements in order to "inflate billed access charges to AT&T." *All American* ¶ 1, *see also id.* at ¶¶ 10-13, 24-33 (describing how the sham-entity scheme enabled defendants to inflate charges billed to AT&T).

[12] *See id.* ¶¶ 34-41.

[13] The Commission again credited Dr. Toof's analysis in the damages phase of the *All-American* case, citing his report in support of the Commission's conclusion that "AT&T has substantiated

B. No Basis Exists For Striking Dr. Toof's Statements Regarding the Commission's Regulatory Process.

GLCC mischaracterizes Dr. Toof's report as a "legal brief" and on that basis argues that portions of his report addressing the Commission's regulatory process and GLCC's failure to provide service consistent with the Commission's rules and its tariff should be excluded. Mot. at 7-15. GLCC also takes issue with Dr. Toof's understanding of the Commission's regulatory regime, characterizes certain of his opinions as "biased," and points out that certain portions of his report have no application to the matters currently at issue is this proceeding. Mot. at 8. None of these claims provides a basis for striking Dr. Toof's expert report.

As even a cursory review of Dr. Toof's expert report shows, the clear purpose of his testimony was to analyze the facts elicited in discovery to determine whether they supported GLCC's claims that it has provided switched access service consistent with the Act, the Commission's rules, and GLCC's tariff.[16] Courts routinely have allowed experts to testify in a similar fashion in similar cases, including in cases relied upon by GLCC.[17] Further, as explained in greater detail in Exhibit A, even under the *Daubert* standard that GLCC concedes does not apply here, the challenged opinions would not be excluded.[18]

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the amount of its direct damages." *AT&T Corp.* v. *All Am. Tel. Co.*, 30 FCC Rcd. 8958, ¶ 11 & n.45 (2015).

[14] *See* Ans. ¶¶ 43 n.35, 47 n.41.

[15] The other points raised by GLCC regarding Dr. Toof's expertise are fully addressed in the Opposition that AT&T filed before the district court. *See* Ex. A, AT&T Trial Opp. at 6-8.

[16] *See e.g.*, AT&T Ex. 13, Toof Report, ¶¶ 86-91 (discussing GLCC's failure to comply with the *Connect America Order*); *see also* Ex. A, AT&T Trial Opp. at 10-11.

[17] *See* Mot. at 17 (citing *Sancom, Inc.* v. *Qwest Commc'ns Corp.*, 683 F. Supp. 2d 1043, 1060 (D.S.D. 2010) and *TC Systems, Inc.* v. *Town of Colonie*, 213 F. Supp. 2d 171, 181-82 (N.D.N.Y. 2002)).

[18] *See* Ex. A, AT&T Trial Opp. at 8-15.

There is also no merit to GLCC's assertion that portions of Dr. Toof's expert report should be excluded because certain of his views are not consistent with GLCC's understanding of the applicable legal standards. Such claims do not go to admissibility but rather to the weight that should be accorded to Dr. Toof's testimony. Moreover, that analysis should not be made in a vacuum at the start of the proceeding but after all of the evidence has been presented and the parties have been able to fully explain their respective positions. At that juncture the Commission is best positioned to evaluate the expert testimony presented by both sides and to assess its credibility.[19]

Finally, GLCC's assertion that certain of the points addressed in Dr. Toof's report are not currently at issue in this proceeding does not constitute a basis for excluding those portions of Dr. Toof's report from the record.[20] To the extent that the information is not relevant, it can be ignored. It makes no sense for either the parties or the Commission to waste valuable time and resources analyzing evidentiary issues that ultimately will not impact resolution of the matters referred by the district court. Yet that is what GLCC, by simply recycling a motion that it filed in the underlying litigation, is asking the Commission to do.

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[19] In this regard it is important to note that GLCC cites its own expert's interpretation of the Commission's rules throughout its submission in an attempt to show that GLCC's characterization of those rules is correct. *See, e.g.*, GLCC Legal Analysis in Support of Answer at 43 n.132 (citing Michael Starkey's conclusion that FCPs are end users); Ans. ¶ 79 & n.92 (same); GLCC Ex. 10, Expert Report of Michael Starkey, at 11, submitted Aug. 18, 2014 (opining that "the FCC directly contemplated situations wherein a CLEC would be allowed to charge tariffed access rates, even when it did not serve an end user."); *id.* at 13-19 (opining that GLCC satisfied each of the elements of its state-law claims).

[20] Contrary to GLCC's claims, the portions of Dr. Toof's expert report addressing **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** are not irrelevant but go directly to the issue of **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

C. No Basis Exists For Striking Dr. Toof's Testimony Regarding The Parties' Claims For Damages.

In its motion, GLCC acknowledges that Dr. Toof has the requisite expertise to testify regarding the damages sought by GLCC with respect to its state law claims and to present damages calculations is support of AT&T's claims. Mot. at 2. Instead, it seeks to strike the damages portions of Dr. Toof's expert report on principally two grounds. First, GLCC asserts that consideration of the damages issues during this phase of the proceeding is premature. *Id*. at 15-16. Second, it claims that Dr. Toof's analysis is seriously flawed. *Id.* at 16-33. Neither claim provides a basis for excluding Dr. Toof's damages related testimony.

As to the issue of whether the presentation of evidence regarding damages is premature, AT&T fully understands that the proceeding has been bifurcated and that issues regarding the specific damages that the parties may have suffered will be addressed, if need be, in a second proceeding – in fact, AT&T proposed that this case be bifurcated. The fact of bifurcation, however, does not support the conclusion that the portions of Dr. Toof's expert report addressing damages should be excluded. To the contrary, there are a number of points discussed by Dr. Toof that clearly have a bearing on matters that are currently at issue. For example, with respect to GLCC's state-law claims and AT&T's Second Counterclaim at the district court, Dr. Toof discusses the $0.0007 per-minute rate, AT&T Ex. 13, Toof Report, ¶¶ 21, 24, 128-29, 137, which is a matter addressed by both parties in their current submissions.[21] Dr. Toof also discusses, in connection with AT&T's Third Counterclaim, the potential savings associated with a direct connection, AT&T Ex. 13, Toof Report, ¶¶ 25, 133-41, which again is a matter currently at issue.[22]

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[21] *See* AT&T Legal Analysis at 51-54; GLCC Legal Analysis at 56-58.

[22] *See* Compl. ¶ 59; AT&T Legal Analysis at 13-23; Ans. ¶ 59; GLCC Legal Analysis at 20. AT&T further notes that this aspect of GLCC's attack on the relevance of Dr. Toof's testimony is somewhat hypocritical given that GLCC relies on its damages analyses in its legal analysis.

There is also no merit to GLCC's claim that the damages portion of Dr. Toof's expert report should be excluded as "seriously flawed." Mot. at 16-33. As demonstrated in Exhibit A, none of the "flaw[s]" that GLCC alleges to exist in Dr. Toof's analysis would warrant exclusion of that analysis even in a jury trial, and thus are woefully inadequate where, as here (and as GLCC admits), the *Daubert* standard does not apply.[23] Further, GLCC's claim that Dr. Toof's analysis is unreliable because it fails to take into account GLCC's legal defense is nonsense.[24] Even in a jury trial, experts are permitted to assume underlying liability when calculating estimates relating to damages.[25]

IV. CONCLUSION

For the foregoing reasons, GLCC's Motion should be denied.

See GLCC Legal Analysis at 55 & n.178 (citing GLCC Ex. 29, Expert Report of Warren R. Fischer, submitted Aug. 18, 2014 (GLCC's designated expert on damages)); 57 & n.183 (same), 58 & n.189 (citing the opinions of Michael Starkey and Warren Fischer on the rates that it alleges AT&T should pay under GLCC's state-law claims).

[23] *See* Ex. A, AT&T Trial Opp. at 15-35.

[24] *See* Mot. at 24 (criticizing Dr. Toof's analysis for "fail[ing] to take into consideration the legal effect of GLCC's deemed lawful tariff status" – and for failing to prove what AT&T has paid to Iowa Network Services, Inc.).

[25] *See Sancom*, 683 F. Supp. 2d at 1068.

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Dated: October 6, 2016

Counsel for AT&T Corp.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

GREAT LAKES COMMUNICATION CORP., **Plaintiff,** **v.** **AT&T CORP.,** **Defendant.**	**Case No.: 5:13-cv-4117** **(FILED UNDER SEAL)**

AT&T'S OPPOSITION TO GLCC'S MOTION IN LIMINE

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AT&T Corp. ("AT&T") respectfully submits this Opposition to the Motion in Limine filed by Plaintiff Great Lakes Communication Corp. ("GLCC") on December 17, 2014 (the "Motion").

I. INTRODUCTION

Having submitted expert reports prepared by two professional experts—one of whom, Michael Starkey, principally provides support for GLCC's legal theories—GLCC now moves to exclude the expert report and testimony of AT&T's expert, Dr. David I. Toof, on the ground that he is a "professional expert" whose principal purpose is to bolster AT&T's legal theories. GLCC also raises questions regarding Dr. Toof's expertise and claims that his damages analyses are flawed in a number of respects. None of GLCC's criticisms provide a basis for excluding Dr. Toof's expert report or testimony under the Federal Rules of Evidence or *Daubert*,[1] and in any event, the criticisms have no merit.

First, Dr. Toof has the requisite expertise to opine on the matters addressed in his expert report. Dr. Toof's *curriculum vitae* details his extensive experience opining on the types of regulatory matters at issue in this case, including before courts, the Federal Communications Commission ("FCC"), and other bodies. Most notably, Dr. Toof presented extensive expert testimony before the FCC regarding a traffic-pumping scheme pursuant to which interstate switched access charges had been unlawfully manipulated by three competitive local exchange carriers ("CLECs"), one of which was an affiliate of one of GLCC's current Free Calling Party ("FCP") partners, Joy Enterprises. Based in significant part on Dr. Toof's analysis, the FCC concluded that the three CLECs were "sham" entities and had engaged in a scheme which violated Section 201(b) of the Communications Act (the "Act").[2] The FCC also found—again

[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).
[2] *See AT&T Corp. v. All Am. Tel. Co., et al.*, 28 FCC Rcd. 3477, 3492 (2013).

relying on Dr. Toof's analysis—that the CLECs had failed to provide switched access services consistent with the terms of their respective tariffs.[3] Given that the FCC was satisfied with Dr. Toof's qualifications, there is no basis to GLCC's assertions that Dr. Toof lacks the requisite expertise to assist the finder of fact in this case.[4]

Second, GLCC is simply incorrect in characterizing Dr. Toof's proposed testimony as a "legal brief."[5] As even a cursory review of Dr. Toof's expert report shows, the clear purpose of his testimony was to analyze the facts elicited in discovery to determine whether they supported GLCC's claim that it provided switched access services consistent with the Act, the FCC's rules, and GLCC's tariff. Courts have allowed experts to testify in a similar fashion in similar cases, including cases relied upon by GLCC.[6]

Third, the mere fact that GLCC disagrees with the various legal theories that Dr. Toof considered—at counsel's direction—in performing his analyses is not a basis for excluding his expert report or testimony. As noted below and explained in AT&T's Motion for Summary Judgment, each of the legal theories of which Dr. Toof relied is soundly based. But more fundamentally, the applicable law is an issue for the court to decide, and the mere fact that the parties disagree on the applicable law—hardly an unusual occurrence in litigation—is not a basis for excluding an expert witness. Rather, consistent with *Daubert*, GLCC's criticisms are more appropriately addressed on cross-examination.[7]

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[3] *See id*. at 3492-95.

[4] By contrast, the FCC has severely criticized GLCC's witness, Warren Fischer. *AT&T Corp.* v. *BTI*, 16 FCC Rcd. 12312, ¶¶ 48-49 & nn.140-41 (2001) (noting that a "cost showing" sponsored in part by Mr. Fischer was "so riddled with conceptual flaws and factual errors as to be of minimal evidentiary value;" although Mr. Fischer was a "purported switching expert," he "admitted under oath that he was not an expert on switching" and "failed to consider a number of relevant factors" in his report).

[5] Mot. at 6.

[6] *See* Mot. at 15 (citing *Sancom, Inc. v. Qwest Commn'cns Corp.*, 683 F. Supp. 2d 1043, 1060 (D.S.D. 2010) and *TC Systems, Inc. v. Town of Colonie*, 213 F. Supp. 2d 171, 181-82 (N.D.N.Y. 2002)).

[7] *See Daubert*, 509 U.S. at 595 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking" admissible expert

Finally, GLCC presents a number of other criticisms of Dr. Toof's analyses of the facts relevant to (i) GLCC's state-law claims and (ii) AT&T's counterclaims. As explained below, none of these criticisms justifies the exclusion of Dr. Toof's expert report or testimony, particularly at this stage of the litigation.[8] GLCC's Motion thus should be denied.

II. BACKGROUND

Evaluating GLCC's Motion requires an understanding of the context in which Dr. Toof's expert report arose. Under the Court's Scheduling Order, GLCC submitted reports for its two purported expert witnesses—Michael Starkey and Warren Fischer—on August 18, 2014.[9] As both reports were filed well before the Court's discovery deadline,[10] each witness reserved the right to amend his respective report based on further developments in this case.[11] Mr. Starkey purports to be a telecommunications expert.[12] He is also an established professional expert who claims to have testified in "greater than 150 proceedings before approximately 40 state commissions, the FCC[,] and courts of varying jurisdiction" since 1991.[13] Mr. Starkey's report consists largely of his opinions as to the legal requirements underlying each of GLCC's claims,[14] and contains speculation that the FCC would permit GLCC to recover charges for switched access services even if GLCC did not provide such services under a valid tariff or

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testimony.) (citation omitted).

[8] Unlike the baseless criticisms contained in GLCC's Motion, AT&T has identified various deficiencies in the reports and testimony of GLCC's own witnesses which may bear on their admissibility. *See generally* Dkt. 81. Accordingly, AT&T reserves its right to move for the exclusion of those reports and/or testimony at the appropriate stage in this litigation.

[9] *See* Dkt. 39 (GLCC's initial expert disclosures due on August 18, 2014).

[10] *See* Dkt. 25, at 1 (establishing discovery deadline of November 17, 2014).

[11] *See* Expert Report of Michael Starkey (Aug. 18, 2014) ("Starkey Report") at 1 (reserving right to amend) (Excepted pages attached hereto as Exhibit 2); Expert Report of Warren R. Fischer (Aug. 18, 2014) ("Fischer Report) at 1 (same) (Excepted pages attached hereto as Exhibit 4).

[12] Starkey Report at 1.

[13] *Id*., Ex. A (biography).

[14] *See, e.g.*, *id*. at 6-8 (describing the FCC's *Connect America* Order), 9-11 (summarizing FCC rules and regulations relating to switched access services and "end users"), 13-18 (discussing GLCC's *quantum meruit* and unjust enrichment claims).

contractual agreement.[15]

Mr. Fischer—GLCC's purported damages expert—claims to be an expert on "telecommunications cost and pricing issues."[16] Like Mr. Starkey, Mr. Fischer is a professional expert who has offered testimony on "more than 50 occasions in proceedings before 27 different state utility commissions and other agencies," including "numerous litigation efforts."[17] Mr. Fischer's report is largely a mathematical calculation of damages[18] containing no independent analysis of key issues such as (i) the reasons for the billing error underlying Count I of the Complaint,[19] (ii) the market value of the services which GLCC allegedly provided to AT&T,[20] or (iii) the actual benefit (if any) conferred on AT&T from such services.[21]

On October 3, 2014, Dr. Toof submitted his expert report on behalf of AT&T to both respond to Mr. Starkey's and Mr. Fischer's reports and to present analysis in support of AT&T's counterclaims.[22] Because the discovery deadline was still more than a month away,[23] Dr. Toof (like GLCC's two witnesses[24]) reserved the right to amend his expert report based on further developments in this case.[25] Further, Dr. Toof's expert report discussed all of AT&T's counterclaims[26]—including AT&T's Second and Third Counterclaims, which Magistrate Judge Strand has recommended be referred to the FCC.[27]

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[15] *See id*. at 13 (contending that even if the "the tariffs at issue in this case do not apply . . . AT&T should nevertheless be required to compensate GLCC").
[16] Fischer Report at 2.
[17] *See id*.
[18] *See, e.g., id*. at 3-4 (setting forth mathematical calculations for damages).
[19] *See id*. at 6-10.
[20] *See id*. at 10-11. Nor did Mr. Fischer examine GLCC's costs of providing service.
[21] *See id*. at 11-16.
[22] *See* Expert Report of David I. Toof, Ph.D. (Oct. 3, 2014) ("Toof Report") ¶¶ 5-7 (attached hereto as Exhibit 1).
[23] *Supra* note 10.
[24] *Supra* note 11.
[25] *See* Toof Report ¶ 7 n.6 (reserving right to amend expert report because "discovery process is still in progress").
[26] Toof Report ¶¶ 135-46.
[27] Dkt. 32, at 42 (Second Counterclaim), 45 (Third Counterclaim).

Dr. Toof's expert report addressed three principal issues. *First*, Dr. Toof analyzed the services GLCC allegedly provided to AT&T and concluded that GLCC did not, in fact, provide switched access service.[28] *Second*, Dr. Toof identified a number of flaws in GLCC's damages claims.[29] *Third*, Dr. Toof calculated the value associated with AT&T's four counterclaims.[30] In addition, Dr. Toof provided background information relating to the telecommunications industry and the role of access[31] as well as GLCC's operations, business response to key regulatory filings, and dealings with AT&T.[32] Dr. Toof considered various materials in drafting his expert report, including GLCC's expert reports, pleadings in this case, contemporaneous documents and emails, tariffs, orders of courts, the FCC, and the Iowa Utilities Board (the "IUB"), and FCC regulations.[33]

GLCC deposed Dr. Toof on October 30, 2014. On November 5, 2014, GLCC's two witnesses submitted rebuttal reports,[34] and AT&T deposed those witnesses on November 11, 2014 (Mr. Starkey), and November 17, 2014 (Mr. Fischer), respectively. Dr. Toof has not yet had the opportunity to respond to the witnesses' rebuttal reports or the points elicited at their depositions.

III. LEGAL STANDARD

Under Federal Rule of Evidence 702, the trial court acts as a "gatekeeper" screening expert testimony for relevance and reliability.[35] The Eighth Circuit has established a three-part

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[28] Toof Report ¶¶ 84 – 118.
[29] *Id*. ¶¶ 120-34.
[30] *Id*. ¶¶ 135-46.
[31] *Id*. ¶¶ 27-54.
[32] *Id*. ¶¶ 55-83.
[33] *Id*. ¶ 7.
[34] *See* Rebuttal Expert Report of Michael Starkey (Nov. 5, 2014) ("Starkey Rebuttal Report") (Excepted pages attached hereto as Exhibit 3); Rebuttal Expert Report of Warren R. Fischer (Nov. 5, 2014) ("Fischer Rebuttal Report") (Excepted pages attached hereto as Exhibit 5).
[35] *Daubert*, 509 U.S. at 589.

test for screening expert testimony under Rule 702:

> First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact . . . . Second, the proposed witness must be qualified to assist the finder of fact. Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires.[36]

As the Eighth Circuit has explained, "Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony. The rule is clearly one of admissibility rather than exclusion."[37]

The Eighth Circuit has also made clear that "[t]he exclusion of an expert's opinion is proper only if it is so fundamentally unsupported that it can offer no assistance to the jury."[38] Further, Rule 704 provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue [to be decided by the fact finder]."[39] Indeed, courts refuse to exclude expert testimony "[w]here [the expert] has established a nexus between the applicable statement of the law and the facts of this case."[40] Thus, while an expert may not explain the legal meaning of a term, an expert may define a term of art as it is used within a given field, and may testify as to whether "*a specific item or event fits within the meaning of a statutory term* . . . even if it embraces an 'ultimate issue.'"[41]

IV. ARGUMENT

A. Dr. Toof Has the Requisite Legal Experience.

GLCC argues that Dr. Toof's expert report and testimony should be excluded because he

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[36] *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001) (internal quotations and citations omitted).
[37] *Id.* at 686 (internal quotations and citations omitted).
[38] *Wood v. Minn. Mining & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997) (internal quotations and citations omitted).
[39] Fed. R. Evid. 704(a).
[40] *Sancom*, 683 F. Supp. 2d at 1053 n.1.
[41] *Id.* at 1052 (additional quotations omitted) (emphasis in original).

lacks the "qualifications as an expert in telecommunications."[42] GLCC points out that Dr. Toof (i) gained most of his telecommunications experience since he left Ernst & Young in 1996,[43] (ii) has only testified on telecommunications issues on behalf of AT&T,[44] (iii) has not worked for a telecommunications regulator,[45] and (iv) is not an expert on all aspects of "telecommunications policy."[46] In addition, GLCC suggests that Dr. Toof is merely a "professional expert" but admits that that fact—even if true—would not be a "per se disqualification,"[47] and actually has proffered two "professional experts" of its own in this case.[48]

GLCC's criticisms have no merit. As an initial matter, Dr. Toof is not being offered as a technical expert on the operation of telecommunications networks but rather as an expert on the regulatory process through which regulated entities (like GLCC) bill and collect for their services.[49] In that regard, Dr. Toof has extensive experience both in the telecommunications industry as well as other regulated industries, which are governed by comparable standards.[50]

Dr. Toof has worked on projects and presented testimony relating to a number of

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[42] Mot. at 3-6.
[43] *See id*. at 4.
[44] *Id*.
[45] *Id*.
[46] *See id*. at 5.
[47] *See id*. at 6.
[48] *Supra* Section II.
[49] *See* Toof Report ¶¶ 5-7 (describing purposes of expert report).
[50] For example, Dr. Toof's *curriculum vitae* describes his experience in the oil, natural gas, and electric utility industries. *See id*., Ex. DIT-1 (*curriculum vitae*). That experience is highly relevant to this case because the Act—like the Natural Gas Act (which governs natural gas pipelines) and Federal Power Act (which governs electric utilities)—is modeled on the Interstate Commerce Act (which governs oil pipelines) and contains comparable regulatory requirements. *See The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 248 n.12 (Mar. 1995) ("The similarities among the . . . Act, the FPA, and the NGA are attributable not only to the fact that they were adopted in the same era, but that they were all modeled on the Interstate Commerce Act[.]"); A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed., 1989) at 3 ("The *fons et origo* of the telephone-telegraph common carrier provisions of the [A]ct is the Interstate Commerce Act[.]").

different regulated industries and issues.[51] GLCC emphasizes that telecommunications was not the focus of Dr. Toof's work with Ernst & Young. However, in the over 18 years since he left that firm, Dr. Toof has worked on numerous telecommunications-related projects, and has developed extensive experience related to access stimulation (*i.e.*, traffic pumping), in particular.[52] Indeed, Dr. Toof has submitted expert reports in other traffic-pumping cases, including the *All American* case in which the FCC relied on his expert testimony in finding that the plaintiffs were "sham" entities.[53]

Finally, the fact that most of Dr. Toof's telecommunications work has been for AT&T[54] is not a valid basis for exclusion. The relevance, if any, of that fact goes to the weight—not the admissibility—of Dr. Toof's testimony.[55] Indeed, GLCC does not cite any authority to the contrary,[56] nor is AT&T aware of any such authority. Further, in arguing this point, GLCC acknowledges that Dr. Toof has been consulting on "telecommunications-related project[s]" for nearly two decades (*i.e.*, since leaving Ernst & Young).[57] Dr. Toof's extensive experience in telecommunications and other relevant industries easily satisfies the "liberalize[d] . . . rules governing the admission of expert testimony" under Rule 702.[58]

B. Dr. Toof's Discussion of Legal Principles is Not a Basis for Excluding His Expert Report or Testimony.

GLCC attacks Dr. Toof's testimony by baselessly asserting that it is offered to bolster

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[51] *See* Toof Report, Ex. DIT-1 (*curriculum vitae*).
[52] *See id*.; *see also id*. ¶¶ 2-4 (describing experience).
[53] *See All Am. Tel. Co.*, 28 FCC Rcd. at 3492.
[54] *See* Mot. at 4.
[55] *See Daubert*, 509 U.S. at 595.
[56] *See* Mot. at 4.
[57] *See id*.
[58] *Supra* Section III & note 37. The claim that Dr. Toof is not an expert on telecommunications "policy," Mot. at 5, is misleading but irrelevant, because if this dispute requires the application of policy, then under the primary jurisdiction doctrine, it must be referred to the FCC. *See, e.g.*, *Iowa Beef Processors* v. *Ill. Central Gulf R. Co.*, 685 F.2d 255, 259 (8th Cir. 1982) (agency has "primary jurisdiction" over "any matter that raises issues of . . . policy").

AT&T's legal theories, and then ignores that Dr. Toof has detailed, at length, the nexus between those theories and the facts that he evaluated. Dr. Toof was asked to assess whether the facts support GLCC's claim that it provided switched access services consistent with the Act, the FCC's rules, and GLCC's tariffs. This task obviously required Dr. Toof to summarize the applicable legal standards in explaining how he determined whether those standards had been met. While a ruling that Dr. Toof applied the wrong standard would impact the credibility—and possibly the relevance—of his testimony, it would not serve as a basis for excluding his testimony.[59] Further, there is no merit to GLCC's specific criticisms of Dr. Toof's expert report and testimony.

1. No Grounds Exist for Excluding Dr. Toof's Summary of the Applicable Regulatory History.

GLCC argues that Dr. Toof's summary of the regulatory regime to which he applied his opinion[60] should be excluded on the grounds that the summary was "biased" and "usurps" the Court's role in determining the relevant law.[61] Both arguments are baseless.

First, GLCC provides no specific support for its assertion that Dr. Toof has provided a "biased" summary of the applicable regulatory regime.[62] GLCC does not identify any aspect of his summary that GLCC claims is inaccurate, nor does it explain in any detail the basis for its allegation.[63] Moreover, the fact that GLCC and its witnesses may have a different perspective on the applicable regulatory regime is not a basis for excluding Dr. Toof's expert report or testimony.

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[59] *See, e.g.*, *Sancom*, 683 F. Supp. 2d at 1055, 1057 (noting that court would resolve issues of tariff interpretation and application when ruling on summary judgment motions, and declining, in the meantime, to exclude expert testimony on meaning of terms in the telecommunications field).
[60] Toof Report at ¶¶ 28-77.
[61] Mot. at 7.
[62] *See id*.
[63] *See id*.

Second, Dr. Toof's regulatory summary does not "usurp" the role of the Court because there is a clear nexus between that summary and Dr. Toof's ultimate opinion regarding GLCC's provision of service. GLCC does not argue otherwise, but instead attempts to distort the reasoning of the *TC Systems* decision[64] by selective quotation. In *TC Systems*, the court excluded, for purposes of anticipated summary judgment motions, portions of an expert's discussion of the FCC's regulatory criteria. The court did so because the expert "fail[ed] to establish any nexus between these criteria and her ultimate opinion."[65] The court, however, did not preclude the expert from testifying on these same criteria at trial so long as she established a nexus between her opinion and the criteria.[66] In this case, Dr. Toof's opinion that GLCC has not provided service consistent with the FCC's rules and GLCC's tariff clearly is related to—and, in part, derived from—his understanding of the applicable regulatory regime. Thus, there is a clear nexus between Dr. Toof's ultimate opinion and his regulatory summary, as required by both *TC Systems* and *Sancom*.[67]

2. No Grounds Exist for Excluding Dr. Toof's Discussion of GLCC's Failure to Comply with the FCC's *Connect America* Order.

In seeking to exclude paragraphs 86-91 of Dr. Toof's report, GLCC wholly misconstrues Dr. Toof's testimony. Contrary to GLCC's claim, these paragraphs are not an attempt to circumvent Magistrate Judge Strand's recommendation regarding AT&T's Third Counterclaim, nor simply a repetition of that Counterclaim. Rather, these paragraphs relate to GLCC's failure to comply with the FCC's *Connect America* Order as well as the requirement that CLECs seeking to charge the rates assessed by a competing Incumbent Local Exchange Carrier

[64] *TC Systems, Inc. v. Town of Colonie*, 213 F. Supp. 2d 171 (N.D.N.Y. 2002).
[65] *Id.* at 182.
[66] *Id.*
[67] *See id.*; *Sancom*, 683 F. Supp. 2d at 1053 (distinguishing *TC Systems* and denying a motion to strike portions of an expert's report in which the expert described statutory definitions in his own terms, because the expert applied his discussion to the facts of the case).

("ILEC") provide service that is "functionally equivalent" to that of the competing ILEC.[68]

As Dr. Toof explained, GLCC responded to the *Connect America* Order not only by reducing its rates for switched access services, but also eliminating from its tariff "a direct connect option that would have enabled AT&T to more efficiently deliver its traffic to Great Lakes' network and thereby avoid the transport charges associated with routing calls through Des Moines Iowa over the [Iowa Network Services ('INS')] network."[69] Dr. Toof further observed that this option was available in the CenturyLink tariff to which GLCC's rates were benchmarked.[70] Consequently, by eliminating this less-costly option, GLCC was not—as required by the *Connect America* Order—offering the lowest rate for switched access service available from CenturyLink, nor was it providing "functionally equivalent" service.[71]

GLCC does not take issue with the facts supporting Dr. Toof's analysis, nor does it claim that Dr. Toof erroneously applied those facts to the FCC's rules (as Dr. Toof understands them). Instead, GLCC claims that it is somehow insulated the Court's application of these rules due to the "deemed lawful" status of its tariff.[72] But that is not the law,[73] and in no event is it a basis for excluding Dr. Toof's analysis.[74]

3. No Grounds Exist for Excluding Dr. Toof's Discussion of [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]]

Similarly misplaced is GLCC's attack on Dr. Toof's discussion of **[[BEGIN CONFIDENTIAL]]** [redacted]

[68] *See, e.g.*, 47 C.F.R. § 61.26(a)(3).
[69] Toof Report ¶ 86.
[70] *Id*. ¶ 90.
[71] *Id*. ¶¶ 86, 91.
[72] Mot. at 8.
[73] *See* AT&T Opp. to GLCC Mtn. for Summ. J., Section III.A.
[74] *See Sancom*, 683 F. Supp. 2d at 1058-59 (refusing to exclude expert opinion that provision of local exchange service constituted "unjust or unreasonable discrimination" under the Communications Act and state law).

[redacted] **[[END CONFIDENTIAL]]** Preliminarily, it is GLCC, not Dr. Toof, that misreads the FCC's rules on this matter. The FCC explained on reconsideration in *Northern Valley* that competitive LECs "may offer its services" to the public "for any fee (or no fee)."[75] The FCC further explained, however, that if competitive LECs—like GLCC—want to "assess access charges upon IXCs by *tariff*," then they **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

Accordingly, Dr. Toof's expert report is fully consistent with the law. Moreover, Dr. Toof never opined that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Rather, Dr. Toof observed that (i) CenturyLink's tariff included such a charge,[78] **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** From these facts—which GLCC does not dispute—Dr. Toof concluded that GLCC's switched access tariff was not consistent with the FCC's *Northern Valley* decision, which requires that CLECs provide service on a functionally-equivalent basis.[81] GLCC may disagree with AT&T's interpretation of the *Northern Valley* decision, but that is not a legitimate

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[75] 26 FCC Rcd. 14520, ¶ 12 (2011).

[76] *Id*. Consequently, the fact that Dr. Toof did not address the FCC's Order in the *Universal Service Contribution Methodology* case, *In re Universal Service Contribution Methodology*, 28 FCC Rcd. 16037, ¶¶ 11-12 (2013), is irrelevant. That case only recognizes the principle that a competitive LEC may offer its services to the public for any fee (or no fee). It in no way undermines Dr. Toof's analysis or the FCC's other requirement that CLECs must assess tariffed end user fees for telecommunications services if they want to file a tariff for switched access services.

[77] *See* Toof Report ¶¶ 93-95. **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

[78] *Toof Report* ¶ 93.

[79] *Id*. ¶ 94.

[80] *Id*. ¶ 95.

[81] *See* Dkt. 80, at 8-10. Notably, GLCC wholly ignores another basis which Dr. Toof presents for his conclusion that GLCC was not providing functionally-equivalent service—*i.e.*, GLCC's FCP partners "are not end users as that term has been defined by CenturyLink and the FCC." *See* Toof Report ¶¶ 13-14.

basis for excluding Dr. Toof's application of that interpretation to the facts of this case. As the *Sancom* court held, that is an appropriate subject for expert testimony.[82]

4. No Grounds Exist for Excluding Dr. Toof's Discussion of the End-User Premises Requirement.

Dr. Toof's discussion of the "End User's Premises" requirement provides yet another example where GLCC misapprehends the testimony that it seeks to exclude. The purpose of Dr. Toof's testimony was not to determine whether GLCC had complied with the terms of its tariff by delivering the calls at issue to an "End User Designated Premises," as GLCC has defined that term in its amended tariff. Such an analysis would be pointless because the term "End User Designated Premises" as GLCC defines it in its amended tariff is so malleable that it is meaningless—the location could be anywhere as long as it was "designated" by the end user.[83]

Rather, the purpose of Dr. Toof's analysis was to determine whether the locations to which the calls were actually delivered were "End User's Premises" as that term—which appears in both the CenturyLink tariff and GLCC's original tariff—traditionally has been understood in the industry. Dr. Toof's analysis would thus help the finder of fact understand the underlying basis of AT&T's claim that, by eliminating the traditional requirement of termination to an actual "end user's premises," GLCC's tariff is not functionally equivalent to that of Century Link, which is what is required by the FCC's rules.[84]

In conducting that analysis, Dr. Toof (i) looked to the definition of "End User's Premises" that the IUB applied in interpreting identical language in GLCC's intrastate tariff,

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[82] *See Sancom*, 683 F. Supp. 2d at 1053 n.1 ("Where [the expert] has established a nexus between the applicable statement of the law and the facts of this case, . . . the court has denied Sancom's motion to strike [the expert's report].").

[83] *See, e.g.*, Dep. of M. Starkey ("Starkey Dep.") at 281 (Q: "Well, [the definition of "End User Designated Premises" in GLCC's amended tariff] would suggest the end-user-designated premises could be anywhere in the world, doesn't it?" A: "As long as they could connect to the company's services there, potentially.") (Exerpted pages attached hereto as Exhibit 6).

[84] *See Northern Valley I*, ¶ 8.

[[BEGIN CONFIDENTIAL]] [redacted] **[[END CONFIDENTIAL]]** Each of these bases supports Dr. Toof's opinion that GLCC failed to deliver the calls to an "End User's Premises" regardless of whether he also applied his own "common sense."

Interestingly, GLCC in its Motion does not dispute that the calls at issue are not being terminated at an "End User's Premises," as the IUB has defined that term. GLCC instead falls back on its "deemed lawful" argument and asserts that because its tariff became effective, the tariff's terms cannot be challenged even if (as here) they violate the FCC's functional-equivalency requirements. But that is not the law.[86] Further, the fact that GLCC has a different view of the law than that applied in Dr. Toof's expert report is not a basis for excluding his analysis, particularly where there has been no showing that Dr. Toof's definition of the phrase "End User Premises" is in any way defective or at odds with the accepted definition of that term.[87]

5. No Grounds Exist for Excluding Dr. Toof's Discussion of [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]]

In moving to exclude paragraphs 115-18 of Dr. Toof's expert report, GLCC does not

[85] *See* Toof Report ¶¶ 105-06, 110-13.
[86] *See* AT&T Opp. to GLCC Mot. for Summ. J., Section III.A.
[87] *See Sancom*, 683 F. Supp. 2d at 1056-67 (refusing to exclude expert's testimony that parties were not "end users" and were more akin to defendant's partners, and that defendant's service to parties was not provided to "customer premise equipment").

deny that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Instead, GLCC asserts that that fact is "not material . . . to the question of whether GLCC is entitled to collect *tariffed interstate access charges.*"[88]

As explained above, however, the fact that GLCC disagrees with Dr. Toof's legal framework is not a basis for excluding his analysis. Moreover, GLCC's assertion the "FCC and AT&T have previously agreed that a LEC can provide service throughout a LATA (at a minimum)"[89] is a total distortion of AT&T's position in this case as well as the FCC's ruling in the *Alpine* case. The specific service element at issue in *Alpine* was tandem-transport service, not end-office service. **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

Finally, GLCC does not, and cannot, cite any authority supporting the proposition that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** thus are beside the point. In any event, these are not valid bases for

[88] Mot. at 11 (emphasis in original).
[89] *Id.* at 12.
[90] *See* Dkt. 80, at 17-20.
[91] Mot. at 12.

excluding Dr. Toof's expert report or testimony.[92]

C. Dr. Toof's Criticisms of GLCC's State-Law Claims are Soundly Based and Should Not Be Excluded.

GLCC does not challenge Dr. Toof's expertise as it relates to the evaluation or calculation of damages.[93] Instead, GLCC criticizes Dr. Toof's analysis of GLCC's two state-law claims and, on that basis, argues that his expert report and testimony should be excluded. There is no merit to GLCC's criticisms, nor do grounds exist for excluding Dr. Toof's expert report or testimony.

1. GLCC's *Quantum Meruit* Claims.

Messrs. Starkey and Fischer both provided analysis in support of GLCC's *quantum meruit* claim. In his report, Mr. Starkey set forth his understanding of the elements necessary under Iowa law to establish such a claim, and opined—based on his review of the record—that GLCC had stated a valid claim.[94] For his part, Mr. Fischer calculated what he contended were the damages associated with this claim.[95]

Dr. Toof reviewed the evidence relating to GLCC's *quantum meruit* claim and, in his expert report, took issue with both Mr. Starkey's assertion that GLCC had established such a claim, as well as Mr. Fischer's damages calculation. As to Mr. Starkey's report, Dr. Toof noted that (i) under Iowa law, it was his understanding that it is necessary to demonstrate a "meeting of

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[92] *See also Sancom*, 683 F. Supp. 2d at 1054 ("[Expert's] analysis of whether the terminating access charges . . . terminated within Sancom's exchange area and were properly charged to Qwest is permissible expert testimony.").

[93] *See* Mot. at 1 ("[GLCC] does not dispute Dr. Toof is generally qualified through education and training to testify on damages-related issues . . . ."); Toof Report, Ex. DIT-1 (detailing Dr. Toof's experience in damage-calculation matters). In contrast, GLCC's own damages "expert"—Mr. Fischer—has far less experience in this area than does Dr. Toof. For example, Mr. Fischer admitted at his deposition that (i) he had never been qualified as a damages expert, Dep. of Warren Fischer ("Fischer Dep.") at 51 (Excerpted pages attached hereto as exhibit 9), (ii) only six of his prior cases involved damages calculations at all, *id*. at 23, (iii) outside of the context of the GLCC cases, he had never been asked to address *quantum meruit* or unjust enrichment claims, *id*. at 18, (iv) his full knowledge as to those damages theories was limited to his reading of the *Iowa Waste* decision and the sources cited therein, *id*. at 14-16, and (v) he was not familiar with the *INS* decision. *Id*. at 16-17.

[94] *See* Starkey Report at 13-15.

[95] *See* Fischer Report at 10-11.

the minds" to establish an implied-in-fact contract, and (ii) no such showing had been—or could be—made in this case because AT&T had not assented to GLCC's provision of service.[96] As to Mr. Fischer's report, Dr. Toof (i) criticized Mr. Fischer's adoption, without any analysis, of GLCC's "tariffed rate" as the market rate for valuing GLCC's alleged services, (ii) presented analysis showing that the market rate would not exceed the rate that GLCC had voluntarily filed for identical service in its intrastate tariff, (iii) further opined—given the volume of traffic at issue and the low level of cost associated with moving that traffic—that the market rate would likely be even lower, and (iv) pointed out that Mr. Fischer wholly ignored the additional cost that GLCC had imposed by its unlawful provision of service under their tariff.[97]

In its Motion, GLCC raises four objections to Dr. Toof's analysis of GLCC's *quantum meruit* claim. None justifies the exclusion of Dr. Toof's expert report or testimony.

a. Dr. Toof Expressed No Opinion regarding Preemption.

GLCC spends three pages of its brief discussing a non-issue. Dr. Toof never opined in his report that GLCC's *quantum meruit* claim would be preempted, but rather stated that GLCC's *quantum meruit* claim "likely [would] be preempted by the Filed Tariff Doctrine." He further explained the basis of his understanding in that regard as follows:

> *I have been advised that* this doctrine requires that a CLEC provide service either pursuant to the terms of its tariff or, where de-tariffing has been permitted, by express contract. In the absence of either a tariff or an express contract, the CLEC is prohibited from seeking to recover using state law contract remedies.[98]

Dr. Toof thus is not testifying as to the law, but only setting forth his understanding of the law in order to establish a nexus between the law and his opinion. That is entirely permissible.

Further, there is no merit to GLCC's contention that Dr. Toof somehow contradicted his

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[96] *See* Toof Report ¶¶ 21, 124.
[97] *See id*. ¶¶ 21, 125-30.
[98] *Id*. ¶ 123 (emphasis added).

expert report in discussing GLCC's *quantum meruit* claim during his deposition. At his deposition, Dr. Toof stated that such a claim might be "conceivable" in certain circumstances. That statement is not inconsistent with the observation in his expert report that GLCC's *quantum meruit* claim "likely" would be preempted.[99] Hence, there is no contradiction.[100]

Finally, AT&T agrees with GLCC's assertion that in this case—where there has been a finding that service was not provided pursuant to tariff and there is no express contract—the question of whether a *quantum meruit* claim is preempted is a question of law for the Court to decide.[101] Indeed, AT&T makes this very point in its Motion for Summary Judgment.[102]

b. No Grounds Exist for Excluding Dr. Toof's Conclusion that GLCC Will be Unable to Show "Assent."

In attacking Dr. Toof's opinion that GLCC cannot show that AT&T assented to receiving GLCC's services, GLCC identifies no evidence demonstrating such assent. Instead, GLCC mischaracterizes Dr. Toof's expert report,[103] fails to address (or even acknowledge) the assent requirement, and erroneously suggests that AT&T could have blocked wholesale traffic.

None of GLCC's arguments justifies the exclusion of Dr. Toof's expert report or testimony on this point. As explained in AT&T's Motion for Summary Judgment, the phrase "*quantum meruit*" under Iowa law "denotes . . . an implied-in-fact contract to pay for services

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[99] *Id.* ¶¶ 22, 123.

[100] There is also no merit to GLCC's claim that Dr. Toof lacked sufficient experience to understand the operation of the Filed Tariff Doctrine. That doctrine is not—as GLCC seems to suggest—limited to the telecommunications industry, but rather is applied in most regulated industries. *Supra* note 50. Further, Dr. Toof's explanation of the Filed Tariff Doctrine set forth in his expert report is fully consistent with how that doctrine has been applied to CLECs in numerous decisions, many of which AT&T discusses in its Motion for Summary Judgment. *See* Dkt. 80, at 33-35.

[101] *See* Mot. at 14.

[102] *See* Dkt. 80, at 22-26.

[103] Contrary to GLCC's claim, Dr. Toof did not state in his expert report that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** As explained below as well as in AT&T's Motion for Summary Judgment, no such evidence exists and GLCC, in its Motion, has identified none. *See* Dkt. 80, at 27-28.

rendered."[104] Iowa law further makes clear that "'[a]n implied in fact contract . . . arises from the conduct of the parties, not merely from their relationship, *and requires an expression of assent*.'"[105]

GLCC (like Mr. Starkey) does not address the assent requirement or identify any evidence showing that AT&T ever assented to GLCC's provision of service.[106] That is because—as Dr. Toof observed[107]—no such evidence exists. To the contrary, the evidence clearly shows that, despite the fact that AT&T expressly objected to GLCC's provision of service in the Spring of 2012 and thereafter steadfastly refused to pay for any such services, GLCC continued to foist its services upon AT&T. These facts alone defeat GLCC's *quantum meruit* claim because a "direct declaration of dissent flies squarely in the face of an implied-in-fact contract."[108]

Moreover, AT&T had no ability to block any of the traffic at issue. GLCC criticizes Dr. Toof for not identifying the specific FCC decision banning Interexchange Carriers ("IXCs"), like AT&T, from blocking such traffic,[109] but there is no question that such a bar exists. Indeed, the FCC specifically ruled in 2007 that "carriers cannot engage in self help by blocking traffic to LECs allegedly engaged in [traffic pumping]."[110] Further, there is absolutely no merit to GLCC's suggestion that AT&T may be able to lawfully block traffic depending on the nature of the traffic at issue—*i.e.*, whether such traffic is wholesale or retail in origin. The FCC made no such distinction in its *Call Blocking* decision and GLCC identifies no subsequent FCC decision

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[104] *Iowa Waste Sys., Inc. v. Buchanan Cnty.*, 617 N.W.2d 23, 29 (Iowa Ct. App. 2000).
[105] *Union Pacific R. Co. v. Cedar Rapids & Iowa City R. Co.*, 477 F. Supp 2d 980 (N.D. Iowa 2007) (emphasis added) (quoting *Irons v. Community State Bank*, 461 N.W.2d 849, 855 (Iowa Ct. App. 1990)).
[106] At his deposition, Mr. Starkey testified he was not familiar with that requirement. *See* Starkey Dep. at 326.
[107] Toof Report ¶ 124.
[108] *Iowa Waste Sys.*, 617 N.W.2d at 30; *see also* Dkt. 80, at 27-28.
[109] Mot. at 17.
[110] *See 2007 Call Blocking Declaratory Ruling*, 22 FCC Rcd. 11629, ¶¶ 1, 5 (2007).

supporting its suggestion that AT&T could have lawfully blocked wholesale traffic.

Finally, the fact that Mr. Starkey has asserted that AT&T may have derived a benefit from GLCC's completion of AT&T's wholesale traffic is totally irrelevant. *First*, whether or not AT&T benefitted from GLCC's provision of service is a question distinct from whether AT&T assented to the service. Indeed, the Iowa Court of Appeals expressly has held that a lack of assent means there is no implied-in-fact contract, even if the recipient of services may have received a benefit.[111] *Second*, and more significantly, an assertion by GLCC's expert hardly justifies excluding Dr. Toof's expert report and testimony. Rather, all that assertion accomplishes is to identify a potential disputed issue at this stage of the litigation.

c. No Grounds Exist for Excluding Dr. Toof's Conclusions regarding the Market Value of GLCC's Alleged Services.

GLCC argues that Dr. Toof unreliably determined the market value of GLCC's alleged services to AT&T,[112] but largely ignores Dr. Toof's methodology. In reaching his conclusions, Dr. Toof relied on a number of factors. *First*, Dr. Toof observed that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Based on these facts, Dr. Toof concluded that reliance on "the price cap ILEC rate is not a proper benchmark for the value of the service that Great Lakes asserts that it has provided to AT&T."[115] That rationale is fully consistent with the FCC's analysis

[111] *See Iowa Waste Sys.*, 617 N.W.2d at 30-31; *see also* Dkt. 80, at 27-28.
[112] Mot. at 18-21.
[113] *Id.* ¶ 126.
[114] *Id.* ¶ 127.
[115] *Id.*

in evaluating the rates of traffic-pumping entities.[116]

Second, Dr. Toof explained that the CenturyLink rate on which GLCC's tariffed rate is based, in part, is not a good proxy both because (i) CenturyLink and GLCC do not compete for the same customers—CenturyLink is not a traffic pumper and provision of traditional access services is, at most, a *de minimis* part of GLCC's business—and (ii) the traffic and cost profiles of CenturyLink and GLCC differ markedly.[117] Although the FCC in its *Connect America* Order generally adopted as a benchmark the rate of the lowest price-cap ILEC in the state, the FCC noted that it would revisit that issue if—as is the case here—the traffic volumes of the traffic-pumping CLEC greatly exceeded the traffic volumes of the price-cap ILEC.[118] In fact, GLCC admits that its traffic volumes exceed by approximately seven times the switched access traffic that CenturyLink handles in the entire state of Iowa—*i.e.*, 7 billion minutes of use ("mou") per year for GLCC versus 1 billion mou per year for CenturyLink.[119] This huge disparity further supports Dr. Toof's position that the tariffed rate is not a good proxy for the market value of the services allegedly provided.

Third, Dr. Toof concludes—**[[BEGIN CONFIDENTIAL]]** [redacted]

[116] *See Farmers I*, 22 FCC Rcd. 17973, ¶¶ 21-25 (2007) (traffic-pumping ILEC earned unlawful rate of return where its costs "did not rise by nearly the same proportion as its access revenues" rose); *In re Connect America Fund*, 26 FCC Rcd. 17663, 17874-76, ¶¶ 657, 662, 666 (FCC 2011) (explaining that rates of access-stimulating LECs are "almost uniformly . . . unjust and unreasonable" due to the "inflated profits" that such LECs derive from "significant increases in switched access traffic" combined with "unchanged access rates," and noting that the "excess revenues" shared in access-stimulation schemes "provide additional proof that the LEC's rates are above cost"); *id.* ¶ 666 ("excess revenues that are shared in access stimulation schemes provide additional proof that the LEC's rates are above cost").

[117] Toof Report ¶¶ 125, 127.

[118] *See* 26 FCC Rcd. 17663, ¶ 690 (2011) ("[S]hould the traffic volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, we may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted.").

[119] *See* Starkey Rebuttal Report, Ex. F at 2 (comparing GLCC's total access minutes of use in Iowa to Qwest's access minutes of use nationwide); *See* Starkey Dep. at 109-110 (estimating that Qwest's access minutes of use in Iowa are 1 billion).

[redacted] **[[END CONFIDENTIAL]]** As Dr. Toof explained, the market value can be no greater than that rate.[120]

GLCC ignores the first two aspects of Dr. Toof's analysis, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** GLCC's arguments do not justify the exclusion of Dr. Toof's conclusions regarding the market value of GLCC's alleged services.

First, the fact that the intrastate rate which GLCC filed with the IUB never became effective in no way detracts from the fact that GLCC voluntarily agreed to that rate. Indeed, the failure of that rate to become effective means that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

Second, there is no merit to GLCC's claim that Dr. Toof must have mistakenly assumed that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** was the product of a cost study. Dr. Toof made no such assumption, and specifically noted that he was not in a position to perform such a cost study. Further, the fact that GLCC's traffic volumes are seven times higher than the CenturyLink rate, but **[[BEGIN CONFIDENTIAL]]** [redacted]

[120] *See* Toof Report ¶¶ 125-29.
[121] *See* Mot. at 20.

[redacted] **[[END CONFIDENTIAL]]** Interestingly, Mr. Fischer—who admittedly had the expertise to conduct a cost study and easily could have gained access to the necessary information[122]—made no effort whatsoever to perform such a cost study,[123] and instead simply assumed that the tariffed rate would equal the market rate.[124]

Third, the fact that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** generally is used in connection with intrastate traffic does not disqualify its use here. GLCC does not point to any evidence suggesting that the costs of exchanging intrastate and interstate traffic are significantly different. Additionally, that GLCC proposed this rate for its intrastate switched access service in Iowa and that a number of IXCs proposed its use in the *Connect America* proceeding clearly suggest that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Likewise, the fact that the FCC did not adopt that rate in that proceeding does not mean the rate is not applicable. As noted above, in adopting the price-cap ILEC rate as a benchmark, the FCC assumed that the traffic volumes would be roughly comparable.[126] But that is not the case here,

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[122] *See* Fischer Dep. at 61, 65-68, 175.

[123] *See id*. at 37-39, 173-174 (acknowledging that he did not examine GLCC's costs of service). Further, as Mr. Fischer admitted at his deposition, he had made no inquiry regarding GLCC's having filed the $.0007-per-mou rate as its intrastate rate for switched access, *id*. at 171, nor did he know whether the CenturyLink benchmark rate was reasonable. *See id*. at 76-77.

[124] In his report, Mr. Fischer declared that in capping an access-stimulating CLEC's rates, "the FCC determined . . . *the market rate* for a CLEC engaging in access stimulation." *See* Fischer Report at 3-4 (emphasis added). Mr. Fischer cited as support the FCC regulation which codified this aspect of its *Connect America* order, and which plainly does not speak to any "market" concepts at all. *See id.* at 4 & n.2 (citing 47 C.F.R. 61.26(g)(1)). However, as Mr. Fischer admitted during his deposition: "When the FCC capped the rates, it was creating a benchmark. *It didn't call it a market rate* at the time. . . . That was a *prescribed* rate in the CLEC access order." Fischer Dep. at 165 (emphasis added).

[125] *See AT&T Corp. v. Business Tel., Inc.*, No. EB-01-MD-001, ¶¶ 23, 37, 40 (F.C.C. May 30, 2001) (finding it "relevant," in determining the reasonableness of access rates, to "compare them to . . . reciprocal compensation rates."); Starkey Dep. at 22-23 (suggesting that costs associated with switched access and reciprocal compensation are largely the same).

[126] *See* 26 FCC Rcd. 17663, ¶ 690 (2011) ("[S]hould the traffic volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, we may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted.").

which strongly supports the adoption of a rate significantly lower than CenturyLink's benchmark rate.

Finally, neither case cited by GLCC supports the exclusion of Dr. Toof's expert report or testimony.[127] *Craftsman Limousine*'s requirement that an expert's analysis "incorporate all aspects of the economic reality" was rooted in the "rule of reason" analysis that the finder of fact must apply in determining the effect of a restraint on trade under the Sherman Antitrust Act.[128] That requirement has no application here. *Cole*'s rationale for excluding expert testimony also does not apply, because Dr. Toof's opinion plainly is "supported by the record."[129]

d. No Grounds Exist for Excluding Dr. Toof's Conclusions regarding Potential Set-off Claims.

There is also no merit to GLCC's claim that Dr. Toof should be prevented from testifying to the losses that AT&T has suffered as a result of GLCC's unlawful conduct. Clearly, any losses AT&T suffered as a result of GLCC's unlawful provision of service, its failure to provide service consistent with the FCC's rules, or its illegal mileage-pumping scheme would impact both the market value of the services provided (in the case of GLCC's *quantum meruit* claim) and the value of benefit conferred (in the case of GLCC's unjust enrichment claim),[130] and consequently should be taken into account.[131]

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[127] *See* Mot. at 21 (citing *Cole v. Hormier Distributing Co., Inc.*, 599 F.3d 856 (8th Cir. 2010); *Craftsman Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8th Cir. 2004)).

[128] *Craftsman Limousine*, 363 F.3d at 777 (criticizing expert for assuming cause of plaintiff's lost growth without considering factors "required" under the rule of reason analysis).

[129] *Cole*, 599 F.3d at 865; *see, e.g.*, Toof Report ¶ 127 (contrasting GLCC's returns, which allow it to make significant payments to its FCP partners, with CenturyLink's returns).

[130] While this point appears in the section of GLCC's brief relating to its *quantum meruit* claim, GLCC begins the discussion by noting that "Dr. Toof asserts that GLCC's claim for damages pursuant to its unjust enrichment claim may be subject to reduction . . . ." Mot. at 22. But, in reality, Dr. Toof's analysis applies to both of GLCC's state-law claims. *See* Toof Report ¶¶ 130, 133.

[131] *See* Restatement (Third) of Restitution and Unjust Enrichment §§ 49-51 (2011) (providing that unjust enrichment from unrequested benefits is "measured by the standard that yields the smallest liability in restitution" for innocent recipients, while even conscious wrongdoers generally are liable only for the "*net* profit attributable to the underlying wrong") (emphasis added); *Brown v. Kerkhoff*, 279 F.R.D. 479, 494 (S.D. Iowa 2012) ("[R]estitution is

Further, Dr. Toof's opinion that such losses should be taken into account is not—as GLCC contends—some backhanded effort to revive the counterclaims which Magistrate Judge Strand recommended be referred to the FCC for resolution.[132] As an initial matter, it is important to note that that Magistrate Judge Strand's recommended decision has not yet been adopted by the Court. Additionally, even if that recommended decision ultimately is adopted by the Court, that would not negate the facts that AT&T has suffered losses as a result of GLCC's unlawful conduct and that such losses impact the value of both the services allegedly provided as well as the benefits allegedly conferred. Because these matters are interlinked, they must be considered together. In no event should GLCC be permitted to recover amounts on its state-law claims that exceed the value of the services provided or the benefit conferred.

2. GLCC's Unjust Enrichment Claim.

In their reports, Messrs. Starkey and Fischer also discussed GLCC's unjust enrichment claim. Mr. Starkey set forth his understanding of the elements necessary under Iowa law to establish such a claim, and opined—based on his understanding of the record—that GLCC had stated a valid claim.[133] For his part, Mr. Fischer calculated what he contended are the damages associated with GLCC's unjust enrichment claim.[134]

In his expert report, Dr. Toof focused principally on Mr. Fischer's calculation of the benefit which AT&T allegedly received from GLCC's services, and pointed out a number of significant deficiencies in Mr. Fischer's analysis.[135] Foremost among those deficiencies was the fact that Mr. Fischer ignored one of the criteria identified in Mr. Starkey's expert report, thereby

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limited to that gain which was wrongfully obtained—that benefit for which a party is 'obligated by natural justice and equity to refund.'") (quoting *State, Dep't of Human Servs. ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 n.1 (Iowa 2001)).

[132] Mot. at 22.

[133] *See* Starkey Report at 17-18.

[134] *See* Fischer Report at 11-16.

[135] *See, e.g.*, Toof Report ¶¶ 22, 131-34.

generating a damage estimate for GLCC's unjust enrichment claim which exceeds by more than 10 times the amount which GLCC's lawfully could have collected under its tariff if GLCC had, in fact, provided service consistent with that tariff.[136] That result makes no sense and would effectively reward GLCC for having violated its tariff.[137]

GLCC raises four objections to Dr. Toof's analysis, none of which justifies the exclusion of Dr. Toof's expert report or testimony.

a. Dr. Toof Expressed No Opinion Regarding Preemption.

As explained above, Dr. Toof was not opining on whether GLCC's unjust enrichment claim would be preempted by the Filed Tariff Doctrine. Rather, as with GLCC's *quantum meruit* claim, he simply observed that GLCC's unjust enrichment claim "most likely" would be preempted.[138] Dr. Toof offered no further analysis because, in the context of this case, this issue is for the Court to decide. Indeed, AT&T has sought summary judgment on this issue.[139]

b. No Grounds Exist for Excluding Dr. Toof's Conclusion that [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]]

GLCC next seeks to exclude Dr. Toof's conclusion that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** In so moving, GLCC does not dispute that the FCC has capped the amounts that a CLEC engaged in access stimulation can recover pursuant to tariff, nor does GLCC address Dr. Toof's opinion that a recovery by GLCC in excess of its tariff would exceed the benefit actually conferred upon AT&T and thus violate one of the necessary elements for an unjust enrichment claim identified in Mr. Starkey's report. GLCC instead argues—for the first

[136] *See id*. ¶ 132.
[137] *See* Dkt. 80, at 28-32.
[138] Toof Report ¶ 131.
[139] *See* Dkt. 80, at 22-26.

time—that it is entitled to the extraordinary remedy of disgorgement "if GLCC establishes that AT&T is a conscious wrongdoer."[140]

There is absolutely no basis for granting GLCC the extraordinary remedy of profit disgorgement in this case.[141] Putting to one side the fact that GLCC has not pled any facts indicating that AT&T has acted as a "conscious wrongdoer" in withholding payment,[142] GLCC's unjust enrichment claim is an alternative remedy which—by GLCC's own admission—comes into play if, and only if, the Court determines that GLCC provided unlawful service and thus cannot collect its tariffed rate pursuant to Count II of its Complaint.[143] In other words, the Court must find that AT&T rightfully refused to pay GLCC.

Given that reality, it would make no sense to find that, in withholding payment from GLCC, AT&T acted as a "conscious wrongdoer," was "enriched by misconduct," knowingly violated GLCC's rights, or acted despite a known risk that it was doing so.[144] To the contrary, a finding that GLCC had violated its tariff would vindicate AT&T's decision to withhold payment. Accordingly, there is no merit to GLCC's criticism of Dr. Toof's conclusion that, in the context of this case, GLCC's recovery should be capped at its tariffed rate.[145] Indeed, any other result

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[140] *See* Mot. at 24.

[141] *See* Dkt. 80, at 31-32.

[142] GLCC must plead sufficient facts which, if proven, would entitle it to the "punitive" recovery it seeks. Fischer Dep. at 253-54 (describing recovery as "punitive" because it required AT&T to pay GLCC money which AT&T would have earned even if it had paid GLCC under its tariff). *See, e.g.*, *Shukh v. Seagate Tech., LLC*, 873 F. Supp. 2d 1087, 1092-93 (D. Minn. 2012) (dismissing request for punitive damages on Title VII claim where complaint "simply d[id] not contain enough factual information to plausibly suggest the requisite state of mind").

[143] *See* Dkt. 80, at 31.

[144] Third Restatement, § 51 (stating requirements necessary for disgorgement remedy); *see also* Dan B. Dobbs, Law of Remedies, § 4.1(4), at 567 (2d. ed. 1993) ("In general, the defendant who is not a serious wrongdoer is held only to make restitution measured by actual gains . . . of services . . . *which he in fact sought* in the relevant transaction.") (emphasis added).

[145] GLCC cites *Guyana Tel. & Tel. Co. v. Melbourne Int'l Commc'ns, Ltd.*, 329 F.3d 1241 (11th Cir. 2003), a case that does not remotely support its position that a disgorgement remedy is appropriate here. In *Guyana*, Defendants had participated in a scheme to make calls originating in the U.S. appear as though they originated in Chile, such that Defendants would not be required to pay termination fees to MCI for the benefit of Plaintiff GT&T, which had a contract with MCI for calls originating in the United States. *See id.* at 1244. One of the conspiring Defendants, Chilesat, "misrepresent[ed] to MCI that it had a 'direct accounting' relationship with GT&T[, such that] MCI did not

would provide a windfall to GLCC for its unlawful conduct.

Finally, as explained above, the fact that GLCC has a legal theory which is at odds with that utilized in Dr. Toof's analysis in not a ground for excluding his expert report or testimony.

c. No Grounds Exist for Excluding Dr. Toof's Conclusion that [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]]

GLCC raises two criticisms of Dr. Toof's conclusion that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** *First*, GLCC criticizes Dr. Toof's reliance **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** for the same reasons discussed in Section IV.C.1.c, *supra*. *Second*, GLCC asserts that Dr. Toof confuses the remedies for *quantum meruit* and unjust enrichment. Neither criticism justifies excluding Dr. Toof's expert report or testimony.

As explained above, Dr. Toof's conclusion that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** is a good proxy for the maximum value of both the services (allegedly) provided and the benefit (allegedly) conferred is soundly based.[146] There is also no merit to GLCC's assertion that Dr. Toof has confused the remedies for *quantum meruit* and unjust enrichment. To the contrary, absent a showing of conscious wrongdoing, GLCC's recovery on a claim for unjust enrichment is limited to the benefit conferred upon AT&T, *i.e.*, the market value of the services provided.[147] Consequently, there is no basis for excluding Dr. Toof's testimony that **[[BEGIN CONFIDENTIAL]]** [redacted]

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collect termination charges from Chilesat because it believed that Chilesat was paying termination charges directly to [GT&T]." *Id.* As explained in the Third Restatement, this is the type of conduct required to find that a defendant acted as a "conscious wrongdoer." *See* Third Restatement, § 51, illustration 7. GLCC has not alleged, nor can it prove, that AT&T has acted in a fashion at all similar to the conspirators in the *Guyana* case.

[146] *Supra* Section IV.C.1.c.

[147] *See* Dkt. 80, at 30-31.

[redacted] **[[END CONFIDENTIAL]]**

d. No Grounds Exist for Restricting Dr. Toof's Ability to Critique the Inadequacies of Mr. Fischer's Damages Calculations.

Seeking a strategic advantage, GLCC asks the Court to bar Dr. Toof from testifying "regarding any costs that AT&T may have incurred in completing calls to GLCC's exchange, with the exception of the amounts actually paid by AT&T to [INS] for the provision of Centralized Equal Access."[148] There are several reasons why such a restriction should not be imposed, particularly at this stage of the litigation.

First, discovery had not been completed when Dr. Toof submitted his expert report or before his deposition. Most notably, AT&T had not deposed Messrs. Starkey and Fischer or completed its production of documents responsive to GLCC's discovery requests regarding the revenues and costs associated with AT&T's provision of long-distance services. In fact, that is why Dr. Toof and both of GLCC's witnesses expressly reserved their rights to revise and supplement their respective reports.[149]

Second, Mr. Fischer has admitted that in drafting his expert report, he mistakenly assumed that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** of AT&T's retail, long-distance minutes of use were billed on a time-and-usage basis such that AT&T realized significant, incremental revenue on this traffic.[150] That assumption was entirely wrong.[151] Mr. Fischer further admitted that in estimating the benefit that GLCC conferred upon AT&T through its traffic pumping, he neither accounted for nor made any effort whatsoever to determine what AT&T's costs were on that traffic.[152] Given that one of the purposes of Dr.

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[148] Mot. at 26.
[149] *Supra* Section II & notes 11, 25.
[150] *See* Fischer Dep. at 189-90, 193, 195-196, 203.
[151] *See id*. at 211-13.
[152] *See id*. at 185-86, 189.

Toof's expert report and testimony was to present testimony rebutting the opinions of GLCC's witnesses, he clearly should be permitted to address deficiencies in Mr. Fischer's analysis, particularly deficiencies which were identified after Dr. Toof's expert report was submitted.

Third, Mr. Fischer subsequently revised his rebuttal report to take certain costs into account.[153] Having availed itself of the opportunity to have its witness revise his calculations, GLCC now seeks to bar Dr. Toof from doing the same. GLCC's request is fundamentally unfair and should be rejected.

Finally, GLCC's request is premature. As GLCC is well aware, AT&T presented additional cost data in December 2014 on the margins it earns on its long-distance business. As the impending summary judgment motions could moot the issue, Magistrate Judge Strand has declined to rule on whether AT&T should be precluded at trial from relying on that data or related testimony.[154] Accordingly, it makes no sense at this time to preclude Dr. Toof from testifying on AT&T's costs. Further, Rule 26(e) allows an expert to supplement his or her report to correct inaccuracies or "add[] information that was not available at the time of the initial report."[155]

D. Dr. Toof's Analyses in Support of AT&T's Counterclaims are Soundly Based and Should Not Be Excluded.

GLCC does not challenge Dr. Toof's calculation of the damages that AT&T asserts are owed in connection with AT&T's First Counterclaim. GLCC does, however, challenge his expert report and testimony as they relate to AT&T's Second, Third, and Fourth Counterclaims.

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[153] *See id.* at 246-47.

[154] *See* Dkt. 74 (withholding ruling).

[155] *Sancom*, 683 F. Supp. 2d at 1063 (internal quotations omitted). An expert report from Dr. Toof accounting for AT&T's costs would not necessarily be excluded even if the Court denies AT&T's Motion for Summary Judgment and rules that the expert report does not satisfy Rule 26(e). *See id.* (applying a four-factor test in refusing to exclude expert report under Rule 37(c)(1) that did not qualify as a supplemental report under Rule 26(e)); *cf. Citizens Bank of Batesville, Ark. v. Ford Motor Co.*, 16 F.3d 965, 966-67 (8th Cir. 1994) (applying same test in affirming ruling to allow testimony from witnesses not timely identified).

As explained below, there is no basis for excluding Dr. Toof's expert report or testimony regarding these Counterclaims.

1. No Grounds Exist for Excluding Dr. Toof's Analysis of AT&T's Second Counterclaim.

Pursuant to its Second Counterclaim, AT&T seeks a finding that the amounts billed by GLCC for the services allegedly provided were excessive and that a reasonable rate would be significantly less than GLCC's tariffed rate. In support of this Counterclaim, Dr. Toof presented an analysis in which he estimated the amounts which GLCC would have billed for the January 2012 – July 2014 time period **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

GLCC does not dispute the accuracy of Dr. Toof's calculations or that his analysis shows that GLCC was billing AT&T significantly more for interstate, as opposed to intrastate, switched access.[158] Rather, GLCC raises three criticisms. *First*, GLCC seeks to exclude this testimony based on the fact that Magistrate Judge Strand has recommended that AT&T's Second Counterclaim be referred to the FCC.[159] *Second*, GLCC challenges Dr. Toof's use of **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**as a proxy for a reasonable local switching rate.[160] *Third*, GLCC claims that Dr. Toof's analysis "is flawed

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[156] Toof Report ¶¶ 24, 137 & Ex. DIT-7. As explained above, based on his analysis Dr. Toof concluded that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** *Supra* Section IV.C.1.c.

[157] *See* Toof Report ¶¶ 24, 137 & Ex. DIT-7 (estimating amount that would have been billed at $.0007-per-mou rate); Fischer Report, Ex. 2 (estimating amounts billed under tariffed rate).

[158] *See* Mot. at 27-28; *see also* Fischer Dep. at 104 (Q: "[Do] you have any criticism or comment on the actual mathematics of [Dr. Toof's] calculation reflected in [DIT-7]?" A: "No, I do not. . . . They appear to be mathematically accurate.").

[159] *Id*. at 27.

[160] *Id*.

because it does not, in fact, present a calculation for AT&T's damages at all."[161] None of GLCC's criticisms has merit.

As to Magistrate Judge Strand's recommended decision, GLCC ignores the fact that that decision has not yet been adopted by the Court. Consequently, AT&T's Second Counterclaim is still at issue in this case and thus it was incumbent on AT&T to present expert testimony in support of its position. Indeed, if AT&T had failed to do so, GLCC might have argued that there had been a failure of proof. Further, Dr. Toof's analysis clearly is relevant—and serves as a counterpoint—to Mr. Fischer's estimate of the damages relating to GLCC's state-law claims.[162] Accordingly, even if Magistrate Judge Strand's recommended decision is adopted, Dr. Toof's analysis would still be relevant and thus should not be excluded.

As to Dr. Toof's use of **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** In addition, GLCC's disagreement with Dr. Toof's use of that rate is not a basis for excluding his expert report and testimony.[164] Finally, GLCC's third criticism is unfathomable. At no point has Dr. Toof characterized his analysis as a "damages calculation." Rather, the analysis was presented as clear support for AT&T's claim that the amounts billed were excessive and as a counterpoint to Mr. Fischer's damages estimate. Indeed, to avoid disputes as to the number of minutes billed, Dr. Toof utilized Mr. Fischer's numbers in performing his calculations.[165]

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[161] *Id*. at 28.
[162] *See* Dep. of D. Toof ("Toof Dep.") at 46-47 (discussing connection between his analysis in support of AT&T's Second Counterclaim and Mr. Fischer's *quantum meruit* analysis) (Excerpted pages attached hereto as Exhibit 8).
[163] *Supra* Section IV.C.1.c.
[164] *See Daubert*, 509 U.S. at 595.
[165] *See* Toof Report ¶ 23 ("To ensure consistency between my analysis and the testimony of Great Lakes' expert witnesses, Messrs. Fischer and Starkey, I have at this juncture employed their billing and mou data.").

2. No Grounds Exist for Excluding Dr. Toof's Analysis of AT&T's Third Counterclaim.

Pursuant to its Third Counterclaim, AT&T seeks damages arising from GLCC's unlawful refusal to provide AT&T with a direct connection, which would have eliminated both the 133 miles of transport charges billed by GLCC during the March 2012 – August 2013 time period as well as the INS charges billed for the entire period at issue. In support of this Counterclaim, Dr. Toof provided an estimate of the INS charges that would have been avoided if a direct connection had been provided.[166] Dr. Toof also calculated the savings that would have been available to AT&T if GLCC had agreed to provide such a connection.[167]

GLCC does not deny that a direct connection would have been less expensive than the tandem connection that was actually provided or challenge Dr. Toof's estimate **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** Indeed, Mr. Fischer actually relied on those calculations in making adjustments to his own damages estimate in his rebuttal report.[169] Instead, GLCC raises three criticisms, none of which justifies the exclusion of Dr. Toof's expert report or testimony.

First, as with AT&T's Second Counterclaim, GLCC points out that Magistrate Judge Strand recommended referral of this issue to the FCC.[170] As noted above, however, Magistrate Judge Strand's recommendation has not yet been adopted by the Court. Consequently, that is not a valid basis for exclusion.[171] Additionally, even if that recommendation is adopted, Dr. Toof's analysis of the cost impact of providing a direct connection still would be relevant to a number of

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[166] *Id*. ¶¶ 25, 138-41 & Ex. DIT-8.
[167] *Id*. ¶ 141 & Ex. DIT-8.
[168] *See* Mot. at 28-31.
[169] *See* Fischer Rebuttal Report at 12-13 & Am. Ex. 4.
[170] *Id*. at 28.
[171] *Supra* Section IV.D.1.

other matters at issue in this case. For example, Dr. Toof's estimate of the potential savings associated with a direct connection helps to demonstrate the consequence of GLCC's failure to provide switched access service on a functionally-equivalent basis to the service provided by CenturyLink.[172] Further, Dr. Toof's analysis is relevant to Mr. Fischer's state-law damages claims, particularly regarding the benefits which AT&T allegedly obtained from GLCC's service.

Second, GLCC claims that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** is not a ground for excluding his expert report or testimony at this stage of the litigation.[175] Indeed, if that were the case, Mr. Fischer's reports and testimony also would be subject to exclusion because he explicitly relied on other individuals' analyses without any apparent attempt to verify their conclusions.[176]

Rather, the "general rule" is that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine

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[172] *See* Toof Dep. at 81-86 (discussing relevancy of analysis to direct connection issue).
[173] Mot. at 29-31.
[174] *See id.*
[175] Likewise, GLCC's criticism of Dr. Toof's having **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** In any event, this criticism, at most, goes to the weight to be accorded to Dr. Toof's analysis, not its admissibility.
[176] *See, e.g.*, Fischer Report at 6, 10 (relying on Mr. Starkey's analysis); Fischer Dep. at 112-13 (relied on Mr. Starkey's rebuttal report for understanding of GLCC's rationale for changing the way it billed AT&T in September 2013), 123-25 (classified amounts as "transport" based on Mr. Starkey's opinion), 217-21 (relied on colleague, Dr. Olesya Denney, in determining rounding protocol without ever ascertaining GLCC's actual rounding protocol).

the factual basis for the opinion in cross-examination."[177] Indeed, GLCC's own case law makes clear that an expert's reliance on information from another individual is a basis for exclusion only if such reliance renders the proposed testimony "so fundamentally unsupported that it can offer no assistance to the jury,"[178] and GLCC has made no such showing.[179] Because AT&T intends to present a witness at trial to testify about the data at issue (a fact that Dr. Toof noted during his deposition),[180] GLCC will have adequate opportunity to probe its reliability.[181]

Finally, GLCC's third criticism—that Dr. Toof should be barred from discussing INS charges that AT&T has not paid[182]—also does not withstand scrutiny. In his analysis, Dr. Toof clearly delineated between those INS charges which had been paid and those which were in dispute.[183] Further, the fact that AT&T has not paid INS for certain of the charges which were billed—and is currently embroiled in a lawsuit with INS regarding those charges[184]—in no way detracts from the fact that those charges would never have been assessed had GLCC provided

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[177] *Neb. Plastics, Inc. v. Holland Colors Ams., Inc.*, 408 F.3d 410, 416 (8th Cir. 2005) (internal quotations and citation omitted).

[178] *See U.S. Salt, Inc. v. Broken Arrow, Inc.*, 563 F.3d 687, 691 (8th Cir. 2009) (internal quotations and citation omitted) (cited in Mot. at 20).

[179] Interestingly, GLCC never takes issue with the validity of the estimate on which Dr. Toof relies. *See id*. Given that GLCC has admitted that it has provided direct connections to other entities, this omission is glaring and wholly undercuts the credibility of this aspect of its Motion. *See* Dep. of Joshua D. Nelson ("J. Nelson Dep.") at 122-25 (discussing GLCC's provision of a direct connection to T-Mobile) (Excerpted pages attached hereto as Exhibit 7). In his rebuttal report, Mr. Starkey admitted that a direct connection likely would be less expensive. *See* Starkey Rebuttal Report at 5 ("When traffic volumes are high-enough, the flat fee associated with a dedicated (or 'direct') transport link can be cheaper to the IXC than paying per-minute rate elements[.]"). Further, both Messrs. Starkey and Fischer certainly had the capability and access to information necessary to directly challenge Dr. Toof's analysis, but neither did so, further undercutting the efficacy of GLCC's claim. *See id*. at 3-7; Fischer Rebuttal Report at 7. Finally, as part of discovery, AT&T produced a number of documents regarding the costs of a direct connection which are consistent with, and provide support, for Dr. Toof's analysis. *See* ATT0000219; ATT0000285-86; ATT0000717-18; ATT0000722; ATT0001185-87; ATT0001809. But GLCC only inquired as to one of those documents at Dr. Toof's deposition, Toof Dep. at 92-95 (discussing ATT0000285-86), and did not examine Mr. Habiak—AT&T's corporate representative—regarding those documents or AT&T's estimate of the costs of a direct connection. *See generally* Deposition of John Habiak (Nov. 13, 2014).

[180] *See* Toof Dep. at 66-67 ("I would assume that if this goes forward, there will be a much more detailed analysis and there would be a[n] AT&T witness sponsoring these cost estimates.").

[181] *See Neb. Plastics*, 408 F.3d at 416.

[182] Mot. at 31.

[183] Toof Report ¶ 141 & Ex. DIT-8.

[184] *Iowa Network Servs., Inc. v. AT&T Corp.*, No. 3:14-cv-03439 (D. N.J.).

functionally-equivalent service to the service provided by CenturyLink and made a direct connection available to AT&T as GLCC has done with other entities. It also should be noted that if AT&T were to lose its dispute with INS, then the full amount of the charges assessed by INS would properly be included in AT&T's damages claim.[185]

3. No Grounds Exist for Excluding Dr. Toof's Analysis of AT&T's Fourth Counterclaim.

Pursuant to its Fourth Counterclaim, AT&T seeks a finding that the amounts included in GLCC's invoices for the 133 miles of transport from Des Moines to Spencer were unlawful and thus not collectible. In support of this Counterclaim, Dr. Toof discussed the applicability of the FCC's *Alpine* decision to the facts of this case, concluding that GLCC's billing of the 133 miles of transport was in violation of that decision, and estimated that GLCC's unlawful practice resulted in AT&T's being overcharged by more than $5.3 million.[186]

GLCC does not dispute the accuracy of Dr. Toof's calculation of the amount of the overcharges resulting from GLCC's billing of the 133 miles of transport, nor does GLCC dispute that it was billing AT&T for the exact same transport that was being provided to AT&T under the INS tariff.[187] Instead, GLCC argues that Dr. Toof's analysis of the *Alpine* decision is unreliable, focusing on Dr. Toof's description of the portion of the that decision regarding the ability of a LEC to bill for transport outside of the LATA in which it offers service.[188]

There is no merit to GLCC's criticism. While it is true that the FCC ruled in *Alpine* that certain LECs had violated their tariff by billing for transport service outside the LATAs in which

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[185] *See* Toof Dep. at 54-56, 58-59 (discussing relevancy of analysis regarding AT&T's Third Counterclaim in event AT&T does not prevail in INS litigation).
[186] *See* Toof Report ¶¶ 26, 142-46 & Ex. DIT-9.
[187] *See* Mot. at 31-32.
[188] *See id*.

they provided service,[189] that was not the only basis for the FCC's decision. Indeed, the FCC also found that if a tariff authorized a LEC to bill for transport over the INS network—transport for which INS was already charging IXCs—then the LEC tariff would be unreasonable and would violate Section 201(b) of the Act.[190] As the evidence clearly shows, that is exactly what GLCC did during the March 2012 – August 2013 time period.[191] GLCC billed AT&T for the very same service that INS was providing to AT&T under its tariff.

In sum, there is nothing unreliable about Dr. Toof's conclusion that GLCC's billing for 133 miles of transport during the March 2012 – August 2013 time period violated the *Alpine* decision. Consequently, there is no basis for excluding his expert report or testimony on this point.

V. CONCLUSION

For the foregoing reasons, GLCC's Motion in Limine to Exclude Testimony of AT&T's Expert Witness, David I. Toof, Ph.D., should be denied.

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[189] *See AT&T Corp. v. Alpine Commc'ns, LLC*, 27 FCC Rcd. 11511, ¶ 31 (FCC 2012).

[190] *See* Toof Report ¶ 145; Toof Dep. at 79-80 (describing finding in *Alpine* decision that similar scheme constituted illegal double-billing); Dkt. 80, at 36.

[191] *See* Toof Report ¶¶ 26, 145-46 & Ex. DIT-9; Dkt. 80, at 32-38.

Dated: January 12, 2015

/s/ *Richard W. Lozier*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 12, 2015 the foregoing document was served upon the following counsel for Great Lakes Communications Corp. by the means indicated:

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

In the Matter of	)
	)
AT&T CORP. **One AT&T Way** **Bedminster, NJ 07921** **Tel: 908-234-6263**	)
	)
Complainant,	)
	)
v.	)
	)
ALL AMERICAN TELEPHONE CO. **8635 W. Sahara Ave. Suite 498** **Las Vegas, NV 89117**	)
	)
e-PINNACLE COMMUNICATIONS, INC. **400 N. 300 W., Suite 114** **Provo, UT 84604**	)
	)
CHASECOM **1612 State Street** **Santa Barbara, CA 93101**	)
	)
***Defendants*.**	)

EXPERT REPORT OF DAVID I. TOOF, PH.D

I, David I. Toof, Ph.D, under penalty of perjury, hereby swear and affirm the following based on personal knowledge:

WITNESS BACKGROUND

1. I am a self-employed independent consultant. My business address is 1840 Mt. Ephraim Road, Adamstown, Maryland 21710. For more than thirty-five years I have provided consulting services to regulated utility industries and I have previously provided testimony

before federal and state regulatory agencies, including the Federal Communications Commission, federal and state courts and various arbitration panels. I was with Ernst & Young and its predecessor firms from 1975 until 1996 and obtained my Ph.D. from Temple University in 1978. My resume is attached as Exhibit DIT-1.

2. On August 7, 2009, I filed an Expert Report with the Federal District Court for the Southern District of New York presenting my analysis of the damages suffered by AT&T with regard to billings from All American Telephone Company, Inc. ("All American"), e-Pinnacle Communications, Inc. ("e-Pinnacle"), and ChaseCom, collectively, the "CLECs." In that report, I demonstrated that none of the access services billed to AT&T by the CLECs were valid and that, in my opinion, they suffered no damages. I also concluded that AT&T had been damaged in the amount of $252,496.37 plus accrued interest of $141,612.93[1] for a total damages claim of $394,109.30. It is my understanding that a copy of that report has been attached to AT&T's Complaint in this proceeding.

SUMMARY OF STATEMENT

3. I understand that AT&T's complaint alleges that All American, e-Pinnacle and ChaseCom are not *bona fide* carriers but are being operated according to sham arrangements that are intended to increase the access charges assessed in connection with traffic pumping schemes involving Beehive Telephone Company, Inc. ("Beehive"). My understanding is that AT&T alleges that, rather than have Beehive bill access charges directly to AT&T and other interexchange carriers ("IXCs"), All American and the other CLECs were used to bill the charges, which facilitated an increase in the billed rates.

[1] Interest has been calculated at an interest rate consistent with the late payment penalties specified in All American's, e-Pinnacle's and ChaseCom's FCC tariff as appropriate.

4. The purpose of this report is: (1) to update the amount of charges billed to AT&T by All American, pursuant to these sham arrangements, to include bills dated through September 2009; and (2) to describe what would have happened to the per minute switched access rates of Beehive if Beehive had continued directly to bill all of the access charges associated with the traffic pumping schemes, instead of having All American (et. al.) bill those charges.

5. I conclude that Beehive's per minute access rates for local switching, which had been steadily declining since at least 2001, would have continued to drop, to somewhere between 0.3511 cents per minute and 0.2496 cents per minute. Consequently, there were ample financial incentives to use All American and other CLECs to bill this traffic, because, as I understand it, their rates for access charges are permitted to mirror Beehive rates, without regard to the volume of traffic carried.

UPDATE OF BILLED AMOUNTS

6. As discussed above, in my report dated August 7, 2009, I provided spreadsheets showing the monthly billed switched access charges (plus late payment penalties) to AT&T from All American, e-Pinnacle and ChaseCom. Of these three entities, only All American continues to bill AT&T for current minutes of use. My initial report included bills from All American through June, 2009. Since my initial report, I have been provided additional bills issued by All American to AT&T through September, 2009.

7. Based on my review of invoice records maintained by AT&T, as well as invoices produced by All American, All American has billed AT&T for $14,235,548.94 of access services and late payment penalties through September, 2009. Of this amount, $6,911,245.32 was billed for access services in Nevada and $7,324,303.62 was billed for access services in Utah. As I understand it, all of these bills were for terminating access services, and none were for originating access services. Details of the monthly invoices are attached as Exhibit DIT-2.

CALCULATION OF BEEHIVE RATE

8. Beehive's principal place of business is listed as 200 E. Sunset Road, Lake Point, Utah, 84074. As I understand it, prior to July 1, 2007 Beehive filed its own periodic cost-of-service interstate access tariffs with the FCC. I am attaching as Exhibits DIT-3 (2001), DIT-4 (2003) and DIT-5 (2005) copies of those submissions.

9. During these periods, the per-minute rate for the local switching element of switched access charges in Beehive's tariffs was approximately 4.59[2] cents beginning July 1, 2001. This rate fell to 1.52[3] cents on July 1, 2003 and further decreased to 1.02[4] cents on July 1, 2005.

10. The decrease in the rates for local switched access is largely due to a significant increase in the minutes of use handled by Beehive. In 2000, Beehive routed 25,997,069[5] minutes of use, and then 47,271,560 in 2001 and 75,842,509 minutes in 2002.[6] By 2003, minutes had increased to 92,123,172 and 148,369,144 in 2004.[7]

11. Effective July 1, 2007, Beehive choose not to make a stand-alone cost-of-service tariff filing. Rather, Beehive's adopted the NECA interstate access tariff.

12. I was asked to estimate what Beehive's cost-of-service would have been on July 1, 2007 if such a filing had been made. My starting point was Worksheet 2 of Beehive's March 17, 2006 Transmittal No. 32 to the FCC (attached as Exhibit DIT-6) with regard to Beehive Tariff No. 1. This worksheet summarizes the cost basis for Beehive's interstate local switching,

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[2] *See* Exhibit DIT-3, page 7.

[3] See Exhibit DIT-4, page 5.

[4] See Exhibit DIT-5, page 2.

[5] See Exhibit DIT-3, page 12.

[6] See Exhibit DIT-4, page 12.

[7] See Exhibit DIT-5, page 10.

tandem switching, transport facility and transport termination rates. Note that the rates are based upon 2003 and 2004 revenue requirement and access minutes. I am attaching a copy of that worksheet as Exhibit DIT-7.

13. To estimate Beehive's 2007 cost-of-service I updated Worksheet 2 (Exhibit DIT-7) to reflect Beehive's 2005 and 2006 actual access minutes.[8] The source for this data was the NECA and USAC Data found on the FCC statistical reports website.[9] It is my understanding that the source of this data is Beehive. According to this report, for the period 2005 and 2006, Beehive reported 697,051,956 interstate access minutes for Nevada and Utah combined. I've attached as Exhibit DIT-8 the relevant portions of this report.

14. As shown on Exhibit DIT-9, updating Worksheet 2 to reflect the cost-based rates associated with actual 2005 and 2006 access minutes yields a local switching rate of 0.3511 cents per minute. In comparison, for bills dated September, 2007, the All American Utah switched rate (based upon the Beehive NECA rate) was 2.4435 cents per minute and 2.8085 cents per minute for bills dated as of September, 2008.

15. Moreover, if one assumes that All American's access minutes are properly attributable to Beehive the analysis presented in Exhibit DIT-9 overstates the cost-of-service rate. As shown on Exhibit DIT-2, for the period April through December 2006, All American billed AT&T for 100,897,465 minutes of terminating access. As shown on Exhibit DIT-10, recognizing these All American minutes as Beehive minutes further reduces the cost-of-service local switching rate from 0.3511 cents to 0.3067 cents per minute.

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[8] Lacking any publically available Beehive cost data I have maintained the revenue requirement at the 2005 cost-of-service level.

[9] http://www.fcc.gov/wcb/iatd/neca.html.

16. Further, AT&T is not the only IXC subject to All American's interstate terminating access charges. The analysis presented on Exhibit DIT-10 includes no access minutes for any other IXC. According to an August 2008 FCC Report, *Trends in Telephone Service*, issued by the Industry Analysis and Technology Division of the Wireline Competition Bureau,[10] in 2006 AT&T had a 35.6% share of direct dial InterLATA minutes. I have prepared Exhibit DIT-11 to reflect the cost impact of assuming that AT&T had a 35.6% share of the access minutes terminated by All American in the period April to December 2006. As shown on Exhibit DIT-11, the recognition of an additional 182,522,384 of terminating access minutes would further reduce the cost-of-service rate to 0.2496 cents per minute.

17. I reserve the right to update my analysis if further relevant information is obtained.

[10] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of November, at Washington, D.C.

David I. Toof, Ph.D

Subscribed and sworn to before me this 11th day of November 2009.

LaVerne Watson Johnson
Notary Public

Washington, District of Columbia
On this 11th day of November, 2009
David I. Toof, Ph. D.
personally appeared before me and signed in my presence
having acknowledged the same to be his free act and deed.

Notary Public
My Commission Expires May 14, 2012