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August 5, 2019

Via ECFS

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

Re: *AT&T Services, Inc. v. 123.Net*
Proceeding No. _____, Inf. Compl. File No. EB-14-MDIC-0003

Dear Ms. Dortch:

AT&T Services, Inc. (on behalf of itself and its operating affiliates) and AT&T Corp. (together, "AT&T") submits this Erratum to its Formal Complaint ("Complaint") against 123.Net (d/b/a Local Exchange Carriers of Michigan and/or Prime Circuits) ("LEC-MI").

The Erratum includes the verification required by 47 C.F.R. § 1.721(m), a revised Certificate of Fee Payment to reflect the required fee having been paid today, and amends the AT&T signature block to include two other attorneys: David L. Lawson and Gary L. Phillips. No substantive portion of the Complaint has been revised, altered or edited in any way. A corrected version of AT&T's Formal Complaint is attached hereto and a copy will be served on counsel for LEC-MI.

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

Sincerely,

/s/ Brian A. McAleenan

Brian A. McAleenan

Counsel for AT&T

**COMPLAINT INTAKE FORM
FOR COMPLAINTS FILED UNDER SECTIONS 208, 224, 255, 716, AND 717 OF THE
COMMUNICATIONS ACT OF 1934, AS AMENDED**

1. Case Name: AT&T Services, Inc. and AT&T Corp. v. 123.Net (d/b/a Local Exchange Carriers of Michigan and/or Prime Circuits)
2. Complainant's Name, Address, Phone and Facsimile Number, e-mail address (if applicable): AT&T Services, Inc., 1120 20th Street, N.W. Washington, D.C. 20036; AT&T Corp., One AT&T Way Bedminster, N.J. 07921
3. Defendant's Name, Address, Phone and Facsimile Number (to the extent known), e-mail address (if applicable): 123.Net (d/b/a Local Exchange Carriers of Michigan and/or Prime Circuits), 24700 Northwestern Highway, Suite 700 Southfield, MI 48075
4. Complaint alleges violation of the following provisions of the Communications Act of 1934, as amended: Sections 201(b) and 203(c)

Answer Yes, No, or N/A to the following:

- Y 5. Complaint conforms to the specifications prescribed by 47 CFR § 1.721.
- N/A 6. If Complaint concerns pole attachments, Complaint also conforms to the specifications prescribed by 47 CFR § 1.1404.
- Y 7. Complaint conforms to the format and content requirements of the Commission's rules, including but not limited to:
- Y a. If damages are sought, the Complaint comports with the specifications prescribed by 47 CFR § 1.723.
- Y b. Complaint contains a certification that complies with 47 CFR § 1.722(g).
- Y c. Complaint contains a certification that complies with 47 CFR § 1.722(h).
- Y d. Complaint includes an information designation that complies with 47 CFR § 1.722(i).
- Y e. Complaint attaches copies of all affidavits, tariff provisions, written agreements, offers, counter-offers, denials, correspondence, documents, data compilations, and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the Complaint.
- Y f. Complaint attaches a certificate of service that conforms to the specifications prescribed by 47 CFR §§ 1.47(g) and 1.734(f).
- Y g. Complaint attaches verification of payment of filing fee in accordance with 47 CFR §§ 1.722(k) and 1.1106.
- N/A 8. If Complaint is filed pursuant to 47 U.S.C. § 271(d)(6)(B), complainant indicates whether it is willing to waive the 90-day complaint resolution deadline.
- Y 9. Complainant has service copy of Complaint by hand-delivery on either the named defendant or one of the defendant's registered agents for service of process in accordance with 47 CFR §§ 1.47(e) and 1.734(c).
- Y 10. If more than ten pages, the Complaint contains a table of contents and summary, as specified in 47 CFR § 1.49(b) and (c).
- Y 11. Complainant has filed the correct number of copies required by 47 CFR § 1.51(c), if applicable, and 47 CFR § 1.734(b).
- Y 12. If Complaint is by multiple complainants, it complies with the requirements of 47 CFR § 1.725(a).
- Y 13. If Complaint involves multiple grounds, it complies with the requirements of 47 CFR § 1.725(b).
- N/A 14. If Complaint is directed against multiple defendants, it complies with the requirements of 47 CFR § 1.734.
- Y 15. Complaint conforms to the specifications prescribed by 47 CFR § 1.49.

Instructions

1. This form must be completed by the Complainant.
2. Submit a completed intake form with any formal complaint to indicate that the complaint satisfies all procedural and substantive requirements of the Communications Act of 1934, as amended, and applicable FCC rules.
3. The original form must be filed with the original complaint and a copy of the form attached to each copy of the complaint that is either filed with the Commission or served on the opposing party.

Notice: Sections 208, 224, 255, 716, and 717 of the Communications Act of 1934, as amended, provide the statutory framework for our current rules for resolving formal complaints. Pursuant to 47 CFR § 1.722(j), a completed intake form must be submitted with any formal complaint to indicate that the complaint satisfies the applicable procedural and substantive requirements under the Communications Act of 1934, as amended, and the FCC's rules. The information will be used by the Commission to determine the sufficiency of the complaint and aid its processing by the staff.

Remember: You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid Office of Management and Budget (OMB) control number. This collection has been assigned an OMB control number of 3060-0411.

We have estimated that each response to this collection of information will take, on average, 30 minutes. Our estimate includes the time to read the instructions, look through relevant records, gather and maintain the required data, and actually complete and review the intake form. If you have any comments on this estimate, or how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, OMD-PERF, Washington, D.C. 20554, Paperwork Reduction Project (3060- 0411). We also will accept your comments via Internet if you send them to pra@fcc.gov Please DO NOT SEND COMPLETED FORMS TO THIS ADDRESS.

The foregoing Notice is required by the Privacy Act of 1974, P.L. 93-579, December 31, 1994, 5 U.S.C. 552a(e)(3), and the Paperwork Reduction Act of 1995, P.L. 104-13, 44 U.S.C. Section 3501.

The Commission is authorized under the Communications Act of 1934, as amended, to collect the personal information we request in this form. We will use the information that you provide to determine the sufficiency of the complaint and to assist in processing and resolving the complaint. If we believe there may be a violation or potential violation of a Federal or state statute or regulation, rule, or order issued by a Federal or state agency, your form may be referred to the appropriate Federal, state, or local agency responsible for investigating, prosecuting, enforcing, or implementing the statute, rule, regulation, or order. In certain cases, the information in your Form may be disclosed to the Department of Justice, court, or other adjudicative body when: (a) the Commission; or (b) any employee of the Commission; or (c) the United States government, is a party to a proceeding before the body or has an interest in the proceeding.

If you owe a past due debt to the Federal government, the taxpayer identification number (such as your social security number) and other information you provide also may be disclosed to the Department of the Treasury Financial Management Service, other Federal agencies, and/or your employer to offset your salary, IRS tax refund, or other payments to collect that debt. The Commission also may provide this information to those agencies through the matching of computer records where authorized.

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

In the Matter of

AT&T Services, Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
202-457-3090

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

Complainants,

v.

123.Net (d/b/a Local Exchange Carriers of
Michigan and/or Prime Circuits)
24700 Northwestern Highway, Suite 700
Southfield, MI 48075

Defendant.

Proceeding Number ____

File No. ____

Inf. Compl. File No. EB-14-MDIC-0003

FORMAL COMPLAINT OF AT&T SERVICES, INC.

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AT&T SERVICES, INC
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Washington, D.C. 20036
202-457-3090

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Dated: August 5, 2019

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

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

In the Matter of

**AT&T Services, Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
202-457-3090**

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

Complainant,

v.

**123.Net (d/b/a Local Exchange Carriers of
Michigan and/or Prime Circuits)
24700 Northwestern Highway, Suite 700
Southfield, MI 48075**

Defendant.

Proceeding Number ____

File No. ____

Inf. Compl. File No. EB-14-MDIC-0003

**FORMAL COMPLAINT OF AT&T SERVICES, INC. AND AT&T CORP.
AGAINST 123.NET (d/b/a LEC-MI)**

1. Pursuant to Sections 4(i), 201, 203, 206, and 208 of the Communications Act (“Act”), 47 U.S.C. §§ 154(i), 201, 203, 206, 208, and Sections 1.711 *et seq.* of the rules of the Federal Communications Commission (“Commission”), 47 C.F.R. §§ 1.711 *et seq.*, and in accordance with the Commission’s October 2, 2017 Letter Ruling,¹ Complainants AT&T Services, Inc. (on behalf of itself and its operating affiliates) and AT&T Corp. (together, “AT&T”), hereby bring this Formal Complaint against Defendant 123.Net (d/b/a Local Exchange Carriers of

¹ Ex. 2, Lisa B. Griffin (Commission), Grant of AT&T Consent Motion for Waiver and to Extend the Time in which to Convert Its Informal Complaint as to LEC-MI (dated Oct. 2 2017) (ATT-0000020 to 0000026).

Michigan and/or Prime Circuits) (“LEC-MI”) alleging violations of Sections 201(b) and 203 of the Communications Act (the “Act”), and state in support as follows:

SUMMARY AND INTRODUCTION

2. In April 2014, AT&T and other long distance carriers filed informal complaints against LEC-MI and two other local exchange carriers (“LECs”), alleging that these three LECs improperly billed access services on calls related to toll-free (or “8YY”) traffic that was generally originated by wireless callers around the nation and then aggregated in Michigan.² AT&T and the other long distance carriers alleged that the three LECs improperly billed a variety of end office switching, tandem, and transport charges. *Id.*

3. LEC-MI, the Defendant here, had billed AT&T end office access charges (and related rate elements) on the traffic at issue, and it admitted in response to AT&T’s informal complaint that, on 8YY aggregated traffic, “end office charges should not have been assessed” and that LEC-MI “erroneously billed” such charges to AT&T.³

4. However, no credits or refunds for the end office charges have been issued to AT&T by LEC-MI (or any other entity).⁴ LEC-MI has admitted that AT&T should not have been assessed the end office charges in question, and there is thus no serious question in this Complaint as to liability; further, determining the amount of the refunds owed is relatively straightforward. The refund calculations are set forth below and in the attached Joint Declaration. *Id.* AT&T

² See Ex. 3, Letter from Michael J. Hunseder, Counsel to AT&T Services Inc., to Rosemary McEnery, Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, File No. EB-14-MDIC-0003 (emailed April 4, 2014) (“AT&T Informal Complaint”) (ATT-0000027 to ATT-0000048); Ex. 4, Letter to R. McEnery, FCC, from R. Severy, Verizon, A. Sherr, CenturyLink, and K. Buell, Sprint, File No. EB-14-MDIC-0001 (emailed Feb. 26, 2014) (“IXC Informal Complaint”) (ATT-0000049 to ATT-0000066).

³ Ex. 5, Letter of J. Bowser, Counsel to LEC-MI, to A.J. DeLaurentis, FCC at 1, 5 (May 12, 2014) (“LEC-MI Inf. Compl. Resp.”) (ATT-0000067 to ATT-0000076).

⁴ Ex. 1, Joint Declaration of Geri Lancaster & Kurt Giedinghagen (“Joint Declaration” or “Joint Decl.”), ¶¶ 23-24, 26 (ATT-0000009 to ATT-0000010).

hoped to avoid having to convert its informal complaint as to LEC-MI, and to reach a negotiated settlement as to the amounts owed to AT&T.⁵ AT&T made multiple efforts to negotiate with LEC-MI, and when those negotiations were not successful, the parties engaged in Staff-supervised mediation before the Commission's Staff. *See infra*. However, those efforts, too, were unsuccessful, and AT&T now brings this formal complaint to recover the amounts that LEC-MI improperly billed and AT&T paid, plus interest.

5. In this Complaint, AT&T seeks a determination that (1) LEC-MI, as it has conceded, improperly billed AT&T end office access charges on the aggregated 8YY traffic; and (2) LEC-MI owes AT&T damages, plus interest, for the improper charges. As explained herein, LEC-MI improperly billed AT&T at least \$1,054,897 million in end office access charges on the aggregated 8YY traffic that AT&T paid, and owes AT&T a refund of that amount, plus interest. *See infra*; Ex. 1, Joint Decl. ¶¶ 23-24 (ATT-0000008).

6. The remainder of this Complaint is organized as follows: (i) a statement of the Commission's jurisdiction; (ii) a description of the supporting materials; (iii) the Certifications required by the Commission's rules; (iv) a description of the parties and relevant non-parties; (v) a description of the relevant factual and regulatory background; (vi) descriptions of LEC-MI's

⁵ As to the other two defendants in AT&T's Informal Complaint, AT&T filed a formal complaint on October 22, 2014, which the Commission granted in part, and which was affirmed in most respects by the Court of Appeals. *See AT&T Services Inc., et al. v. Great Lakes Comnet, Inc. et al.*, 30 FCC Rcd. 2586 (2015) ("*Great Lakes Comnet Order*"), *pet. for review denied in part, granted in part sub nom. Great Lakes Comnet v. FCC*, 823 F.3d 998, 1002-03 (D.C Cir. 2016). One of the defendants in that case, Great Lakes Comnet, Inc. ("GLC"), filed a bankruptcy petition, and in November, 2016, AT&T entered into a settlement agreement with GLC and another defendant, Westphalia Telephone Company ("Westphalia") (and other affiliated entities). Ex. 6, Settlement Agreement, dated January 4, 2017, among AT&T, GLC and Westphalia (ATT-0000077 to ATT-0000100). That settlement agreement resolved the tandem and transport charges on the aggregated 8YY traffic at issue, but did not resolve, or provide AT&T with any compensation concerning, the disputed end office charges billed by LEC-MI. *See* Ex. 1, Joint Decl. ¶ 26 (ATT-0000010).

wrongful conduct; (vii) two Counts setting forth violations of Sections 201(b) and 203 of the Act, respectively; (viii) AT&T's Prayer for Relief; and (ix) Legal Analysis.

JURISDICTION

7. The Commission has jurisdiction over this Complaint under Section 208 of the Act. 47 U.S.C. § 208. LEC-MI is a common carrier, 47 U.S.C. § 153, subject to Title II of the Act, including Sections 201, 203, 206, and 208.⁶ During the time period in question (January 2012 through April 2014), LEC-MI concurred in a tariff filed with the Commission by GLC and ostensibly billed AT&T for interstate switched access services pursuant to that tariff.⁷ Currently, LEC-MI has a stand-alone tariff on file with respect to its interstate access services.⁸

8. AT&T requests damages for LEC-MI's unlawful and unreasonable conduct, including but not limited to overcharges and interest, for amounts AT&T paid in excess of the lawful rate, and consequential damages.

STATEMENT REGARDING SUPPORTING MATERIAL

9. As part of this Complaint, AT&T provides a complete statement of facts establishing that LEC-MI has violated the Communications Act and the Commission's rules implementing the Act. *See infra* Section I. In addition, AT&T attaches as exhibits copies of the

⁶ See Ex. ___, Form 499 Filer Database, Detailed Information for LEC-MI, <http://apps.fcc.gov/cgb/form499/499detail.cfm?FilerNum=825633>. ("LEC-MI Form 499") (stating that LEC-MI is a local exchange carrier ("LEC"), which is a type of common carrier, and that it provides telecommunications services in Illinois, Indiana, Kentucky and Michigan).

⁷ See Ex. 15, Great Lakes Comnet, Inc., Tariff F.C.C. No. 20, Access Service, 5th Rev. (2012) ("GLC Tariff Excerpts") (ATT-0000209 to ATT-0000315); Ex. 8, 123Net-FCC-Base-Tariff ("Current LEC-MI Tariff Excerpts") (cover page noting that "Until May 2, 2014, regulations rates and charges for the provision of interstate access services by 123.Net, Inc. d/b/a Local Exchange Carriers of Michigan, Inc. were found in Great Lakes Comnet, Inc. Tariff F.C.C. No. 20, in which 123.Net, Inc. d/b/a Local Exchange Carriers of Michigan, Inc. was an issuing carrier") (ATT-0000108).

⁸ Ex. 8, Current LEC-MI Tariff Excerpts (ATT-0000107 to ATT-0000128).

documents and data compilations upon which it relies in support of this Complaint.⁹ Along with its Complaint, AT&T also submits: (i) a supporting Joint Declaration by Geri L. Lancaster and Kurt Giedinghagen; (ii) an information designation; and (iii) other forms and certifications required by the Commission's rules, 47 C.F.R. §1.721(a).

REQUIRED CERTIFICATIONS

10. Pursuant to the Commission's rules (47 C.F.R. § 1.721(a)(8)), AT&T hereby certifies that it has attempted in good faith to discuss the possibility of settlement with LEC-MI prior to filing the Formal Complaint. At various points in time, AT&T and LEC-MI engaged in settlement discussions, and also participated in Staff-supervised mediation that included: an in-person meeting at the FCC on October 25, 2018; numerous telephone conferences; and significant correspondence and exchanges of information. However, the parties were unable to reach a negotiated settlement.

11. AT&T Services Inc. (on behalf of itself and its operating affiliates) filed an informal complaint against LEC-MI (as well as two other entities) on April 4, 2014.¹⁰ The Commission provided LEC-MI with notice of the Informal Complaint in a letter dated April 11, 2014, and ordered that a response be provided. LEC-MI filed its response on May 12, 2014.¹¹

12. Although LEC-MI's response stated that it improperly charged AT&T and raised the prospect of providing appropriate credits and/or refunds, as described in more detail below, LEC-MI has not repaid AT&T for the overcharges in dispute. Ex. 1, Joint Decl. ¶ 26 (ATT-0000010); Ex. 5, LEC-MI Infl. Compl. Resp. at 5 (ATT-0000072). Because LEC-MI's response

⁹ See Exs. 1-16.

¹⁰ See Ex. 3, AT&T Informal Complaint (ATT-0000027 to ATT-0000048).

¹¹ Ex. 5, LEC-MI Inf. Compl. Resp. (ATT-0000067 to ATT-0000076).

did not satisfy AT&T's Informal Complaint, AT&T is now converting its Informal Complaint to this Formal Complaint.

13. The initial deadline to convert the Informal Complaint to a formal complaint in order for the formal complaint to “relate back” to the Informal Complaint was November 12, 2014, but the Commission granted several consent motions extending the time to convert.¹² The last such motion granted by the Commission allowed AT&T “until the date that is 60 days after the conclusion of the planned Mediation Session,” to convert its Informal Complaint into a formal complaint.¹³ In a letter order regarding mediation procedures dated September 13, 2018, FCC Staff stated that the mediation would continue “until the parties either settle their dispute or either party sends a letter to the other party and MDRD Staff stating that further discussions would not be productive.”¹⁴ On June 6, 2019, counsel for AT&T sent a letter to counsel for LEC-MI and MDRD Staff stating that further mediation discussions would not be productive.¹⁵ Accordingly, AT&T's deadline to convert its informal complaint to a formal complaint is August 5, 2019.

14. Pursuant to Section 1.718 of the Commission's Rules, 47 C.F.R. § 1.718, AT&T's formal complaint (i) has been filed by August 5, 2019, (ii) references the AT&T Informal Complaint; and (iii) is based on the same causes of action as the AT&T Informal Complaint. Consequently, this Formal Complaint is deemed to “relate back to the filing date of the informal complaint.” 47 C.F.R. § 1.718.

¹² Ex. 10, AT&T's Consent Motion for Waiver and to Extend the Time in which to Convert its Informal Complaint as to LEC-MI, pp. 2-5 (Jan. 29, 2018 (“grant stamped” Jan. 30, 2018)) (“January 2018 Consent Motion”) (ATT-0000134 to ATT-0000137).

¹³ Ex. 10, January 2018 Consent Motion, pp. 4-5 (ATT-0000136 to ATT-0000137).

¹⁴ Ex. 11, Letter from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau (Sept. 13, 2018) (ATT-0000140 to ATT-0000142).

¹⁵ Ex. 12, Mediation of AT&T Services Letter (June 6, 2019 letter) (ATT-0000143 to ATT-0000145).

15. Pursuant to the Commission's rules regarding separate actions (47 C.F.R. § 1.721(a)(9)), AT&T states that, as to Westphalia and GLC (but not LEC-MI), AT&T converted its informal complaint to a formal complaint.¹⁶ This Formal Complaint against LEC-MI is based on a number of the same facts (*e.g.*, the same call routing) alleged in the AT&T Informal Complaint and as found in the *Great Lakes Comnet Order*.

THE PARTIES

16. Complainant AT&T Services, Inc. performs centralized administrative support services including information technology and billing support services, real estate support services, procurement support services, human resources support services, training services and finance support services. *Great Lakes Comnet Order*, ¶ 5.

17. As relevant to the Complaint, AT&T Corp. is an interexchange carrier ("IXC") and provides end users the ability to make or receive long distance calls. *Great Lakes Comnet Order*, ¶ 5. On the calls at issue, as described below in more detail, AT&T provides 8YY toll-free service to end users across the country. *Id.* Pursuant to 47 C.F.R. § 1.721(a)(3), the names, addresses, and telephone number of AT&T's counsel are listed on the cover page of this Complaint.

18. Defendant LEC-MI has its principal place of business in Southfield, MI.¹⁷ For purposes of this Complaint, LEC-MI is operating as a common carrier, and specifically as a LEC, that is subject to the Act. 47 U.S.C. § 153(32) (defining LEC as, *inter alia*, a person "engaged in the provision of exchange access"). LEC-MI is also a competitive LEC ("CLEC") under the Act and the Commission's rules. *Great Lakes Comnet Order*, ¶ 8. AT&T provides further details about LEC-MI's operations in the Background section of this Complaint. *See infra* Section I.B.

¹⁶ See *AT&T Services, Inc. et al. v. Great Lakes Comnet, Inc. et al.*, 30 FCC Rcd. 2586, ¶¶ 1-42 (2015) ("*Great Lakes Comnet Order*").

¹⁷ See Ex. 9, LEC-MI Form 499 (ATT-0000129 to ATT-0000131).

RELEVANT NON-PARTIES

19. In addition to the above-named parties, the following non-parties are involved in the facts underlying this Complaint. GLC was a CLEC, as described in more detail below. *See Great Lakes Comnet Order*, ¶ 7. In the relevant time period, GLC operated a tandem switch in Westphalia, Michigan. *Id.* Westphalia is an incumbent local exchange carrier (“incumbent local exchange carrier” or “ILEC”) that provides telephone exchange and exchange access services to business and residential customers in Michigan. *Id.* ¶ 6. Its main switch is located in Westphalia, Michigan. *Id.* During the relevant period, Westphalia acted as a billing agent on behalf of both GLC and LEC-MI. Ex. 1, Joint Decl., ¶¶ 6-8 (ATT-0000004).

FACTS IN SUPPORT OF COMPLAINT

I. FACTUAL AND REGULATORY BACKGROUND

20. By way of background, AT&T offers a brief review of the following: (A) the Commission’s access rules for competitive local exchange carriers (“CLECs”); (B) the routing of the 8YY aggregated traffic at issue in this case; (C) the improper access charges billed and paid by AT&T on the 8YY aggregated traffic; and (D) the history of the disputes as to these charges and payments.

A. The Commission’s CLEC Access Rules.

21. In 2001, the Commission issued new rules to address CLEC access charges. Seventh Report and Order, *Access Charge Reform*, 16 FCC Rcd. 9923 (2001); 47 C.F.R. § 61.26. Under the rules, as a general matter, a CLEC can lawfully file a tariff for interstate switched access services only if its tariff was for the functional equivalent of access services provided by a “competing ILEC,” and only if the rate was at or below the competing ILEC’s rate. *Id.*; *see Qwest v. No. Valley*, 26 FCC Rcd. 8332, ¶ 8 (2011) (“*Northern Valley Order*”), *pet. for review denied*, 717 F.3d 1017 (D.C. Cir. 2013).

22. Further, the Commission’s “long-standing policy with respect to incumbent LECs is that they should charge only for services that they provide.” *CLEC Access Charge Reconsideration Order*, 19 FCC Rcd. 9108, ¶ 21 (2008). But some CLECs had contended that they should be allowed to charge the full suite of ILEC rates even when the CLECs acted only as an intermediate carrier. *Eighth Report & Order*, ¶¶ 15-17.

23. In 2004, the Commission issued a new rule, 47 C.F.R. § 61.26(f), that addressed this scenario directly, *i.e.*, when a CLEC was providing only a portion of the access services needed to originate or terminate a call to an end user. *Eighth Report & Order, Access Charge Reform*, 19 FCC Rcd. 9108, ¶¶ 14-21 (2004) (“*Eighth Report & Order*”). The Commission confirmed that, in these circumstances, “the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.” *Eighth Report & Order*, ¶ 17. ILECs cannot assess end office charges on calls that are originated or terminated by another carrier; accordingly, the Commission likewise determined that CLECs, too, may not assess end office charges on calls that were originated from or terminated to end users of another carrier (such as a wireless provider). *Id.*, ¶ 17, 21; *see also Great Lakes Comnet Order*, ¶ 13 (noting that wireless carriers that originate wireless calls generally cannot file tariffs for, or collect tariffed fees relating to, switched access services).

24. The Commission has also ruled that, when a CLEC elects to file a tariff for switched access services, the CLEC must route the calls to or from an end user that pays a fee to the CLEC for telecommunications services. *Northern Valley Order*, ¶¶ 7-9. As the Commission explained, a CLEC’s access service tariff must offer service that is “functionally equivalent” to the service of the competing ILEC. *Id.* ¶ 8. Under the Commission’s rules for ILECs, access services are billed on calls routed to or from an “end user” that is a customer of a service that is offered for a fee. *Id.*

¶ 9. Consequently, a “CLEC’s access service is functionally equivalent only if the CLEC provides access to customers to whom the CLEC offers its services for a fee.” *Id.*

B. Routing of the 8YY Aggregated Traffic.

25. The routing of the 8YY aggregated traffic at issue in this Complaint is the same that was at issue in the *Great Lakes Comnet Order*. *See id.* ¶¶ 13-15; *see also* Ex. 13, Refiled Declaration of John W. Habiak, ¶¶ 13-20, *AT&T Servs. v. Great Lakes Comnet*, File No. EB-MD-013 (public version) (filed Oct. 22, 2014) (“Habiak GLC Decl.”) (ATT-0000151 to ATT-0000153); Ex. 14, Joint Stmt. of Stipulated Facts, *et al*, *AT&T Servs. v. Great Lakes Comnet*, File No. EB-MD-013 (filed Dec. 1, 2014) (“GLC Joint Statement”) (ATT-0000165 to ATT-0000208).

26. In short, the 8YY long distance traffic was originated by customers of wireless services (or, potentially, VoIP providers), and those callers can be located anywhere in the country. Ex. 13, Habiak GLC Decl. ¶ 13 (ATT-0000151 to ATT0000152).

27. Once one of the calls at issue was dialed by an end user customer, the call was handed off to one or more traffic aggregators, which had contracts or other arrangements with the wireless carrier (or originating VoIP provider). *See Great Lakes Comnet*, ¶¶ 13-14; Ex. 13, Habiak GLC Decl. ¶¶ 13-16 (ATT-0000151 to ATT0000154).

28. After the traffic aggregator (or aggregators) handled the traffic, it was handed off to intermediate service providers and delivered to LEC-MI’s end office switch in Southfield, Michigan. *Great Lakes Comnet Order*, ¶ 14; Ex. 13, Habiak GLC Decl. ¶ 16 (ATT-0000153 to ATT0000154).

29. As described below, on these 8YY aggregated calls, LEC-MI billed AT&T for end office switching and related access charges. Ex. 13, Habiak GLC Decl. ¶¶ 29, 34 (ATT-0000156 to ATT0000157; ATT-0000158 to ATT0000159). ; Ex. 1, Joint Decl. ¶¶ 12-14 (ATT-0000005 to ATT-0000006).

30. LEC-MI established an IP point of interconnection for this traffic, and sent the traffic to GLC. *Great Lakes Comnet Order*, ¶ 14; Ex. 13, Habiak GLC Decl. ¶ 16 (ATT-0000153).

31. GLC and Westphalia then carried the traffic, and ultimately handed it off to AT&T, which routed the calls to its 8YY customers. *Great Lakes Comnet Order*, ¶ 14; Ex. 13, Habiak GLC Decl. ¶ 16 (ATT-0000153).¹⁸

C. The Improper Access Charges on the 8YY Aggregated Traffic.

32. Until 2014, LEC-MI participated as an issuing carrier in a tariff filed by Great Lakes Comnet.¹⁹ LEC-MI's tariffed rate for local switching (or end office) access service as of January, 2012, was \$0.012 per minute.²⁰

33. In 2013, LEC-MI filed tariff revisions that reduced its tariffed rate for local switching access service to \$0.003594 per minute. *See* Ex. 7, GLC Tariff Revisions (ATT-0000101 to ATT-0000106). The tariff provides that the local switching rate includes "information surcharge, common trunk port, and tandem switched termination charges for the portion of those services directly provided by LEC[-MI]." *Id.*

34. LEC-MI's end office charges, including as to the aggregated 8YY traffic, were billed to AT&T by Westphalia, as a billing agent for LEC-MI. Ex. 1, Joint Decl. ¶¶ 6-8 (ATT-0000004). Westphalia also billed AT&T access charges that were provided by itself and by GLC. *Id.* ¶ 7. The bills indicated, via the use of an operating company number, or "OCN," the carrier

¹⁸ In the *Great Lakes Comnet* case, there was a dispute as to the entity that provided the transport between Southfield, Michigan and Westphalia, Michigan, which was where the Great Lakes Comnet tandem switch was located. *See Great Lakes Comnet Order*, ¶ 14; Ex. 13, Habiak GLC Decl. ¶¶ 17-19 (ATT-0000153 to ATT0000155). Because this case involves only the end office and related charges charged by LEC-MI, the identity of the entity that provided the transport on the traffic at issue is not relevant.

¹⁹ *See* Ex. 15, GLC Tariff Excerpts, Title Page 2 ("Issuing Carrier" includes LEC-MI) (ATT-0000211); Ex. 8, Current LEC-MI Tariff Excerpts (ATT-0000107 to ATT-0000128).

²⁰ *See* Ex. 15, GLC Tariff Excerpts, § 17LECMI2.3(A), Original Page 17LECMI-11 (ATT-0000315).

that was billing the specific rate elements. *Id.* Thus, the bills that AT&T received from Westphalia included local switching charges that were billed by (and allegedly provided by) LEC-MI. *Id.* ¶¶ 9-11 (ATT-0000004 to ATT-0000005).

35. In or around 2010, the access charges billed by LEC-MI, Westphalia, and GLC began to increase.²¹ Prior to November, 2009, the volume of traffic to and from AT&T through LEC-MI's switch in Southfield, Michigan was about 1 million minutes per month, and then began to rise steadily, reaching a peak of about 25 million minutes in May, 2013.²²

36. Nearly all of the increase related to charges for originating switched access.²³ AT&T later discovered – but not until around mid-2013 – that the increase in traffic billed by LEC-MI (and GLC and Westphalia) was because of 8YY aggregated traffic.²⁴ As AT&T explained, the bills it received up until 2013 showed (1) charges on behalf of an incumbent LEC (Westphalia), which were actually provided by competitive LECs; and (2) end office charges by LEC-MI.²⁵ As such, nothing on the bills indicated that the access serviced billed by LEC-MI, Westphalia, and GLC were associated with 8YY aggregation – indeed, the correspondence and bills made it appear as though all of the billed charges were associated with legitimate end users of LEC-MI's services.²⁶

37. Accordingly, as the Commission found, “AT&T did not know that (1) [GLC and Westphalia] billed for CLEC access services in a manner that reflected incorrectly that an ILEC

²¹ See *Great Lakes Comnet Order*, ¶ 14.

²² *Id.*

²³ *Id.* ¶ 38.

²⁴ See Ex. 16, AT&T's Reply to Answer, Response to Affirmative Defenses, and Information Designation, ¶ 40 & pp. 61-62, *AT&T Servs. Inc. v. Great Lakes Comnet*, File No. EB-14-MD-013 (filed Nov. 19, 2014) (“AT&T GLC Answer”) (ATT-0000316 to ATT-0000382); Ex. 1, Joint Decl. ¶ 14 (ATT-0000006).

²⁵ *Id.*

²⁶ *Id.*; Ex. 1, Joint Decl. ¶ 13 (ATT-0000006).

was providing them, and (2) [Westphalia] billed on behalf of LEC-MI end office switching on wireless calls, which had the effect of disguising the nature of the Defendants' arrangements and charges." *Great Lakes Comnet Order*, ¶ 36 n.125.

38. AT&T began disputing the access charges of LEC-MI, GLC and Westphalia on March 20, 2013. *See* Ex. 13, Habiak GLC Decl. ¶ 32 (ATT-0000158); Ex. 1, Joint Decl. ¶¶ 16-17 (ATT-0000006 to ATT-0000007). However, because the manner in which the access services were billed "disguis[ed]" the nature of the traffic, *Great Lakes Comnet Order*, ¶ 36 n.125, AT&T did not know about the 8YY aggregation issue, and its initial dispute letter did not raise any claims about overcharges on that traffic. *See* AT&T GLC Answer, ¶ 40; Ex. 1, Joint Decl. ¶ 13 (ATT-0000006). AT&T's initial March 2013 dispute therefore did not concern the 8YY aggregated traffic. AT&T only learned about the 8YY aggregation traffic after it received certain call records for the traffic. *See id.*; Ex. 1, Joint Decl. ¶ 14 (ATT-0000006).

39. Because neither LEC-MI nor anyone else disclosed the 8YY aggregation traffic, and because the bills disguised the nature of the arrangements, AT&T mistakenly paid LEC-MI substantial amounts for end office switching charges on the 8YY aggregation traffic. Ex. 1, Joint Decl. ¶ 19 (ATT-0000007). As explained below, and in the attached Joint Declaration, AT&T's analysis shows that it overpaid LEC-MI approximately \$1,054,897 million between February 2012 and July 2013. *Id.* ¶ 23 (ATT-0000009).

40. Once AT&T received call detail records and learned that it was being improperly billed, including being billed LEC-MI end office charges on 8YY aggregated traffic, AT&T began to withhold disputed charges, pending resolution of the billing dispute, and pursuant to the applicable tariffs.²⁷ AT&T began withholding from LEC-MI in July, 2013.²⁸

²⁷ *See* Ex. 1, Joint Decl. ¶¶ 16-17 (ATT-0000005 to ATT-0000006).

²⁸ Ex. 1, Joint Decl. ¶¶ 16-17 (ATT-0000006 to ATT-0000007).

41. As explained below, AT&T seeks as damages in this complaint, a refund of the end office charges that LEC-MI billed and that AT&T paid through July, 2013, plus applicable interest.²⁹

D. History of the Dispute.

42. AT&T filed its Informal Complaint against GLC, Westphalia, and LEC-MI on April 4, 2014. Ex. 3, AT&T Informal Complaint (ATT-0000027 to ATT-0000048). LEC-MI filed a response to AT&T's Informal Complaint on May 12, 2014, and it admitted that the end office charges on the 8YY aggregated traffic were erroneously billed. Ex. 5, LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072).

43. GLC and Westphalia also responded to AT&T's Informal Complaint, denying that their charges were improper, and they also filed an action at the Michigan Public Service Commission against AT&T, which raised many of the same issues as AT&T's Informal Complaint. To ensure that federal law was properly interpreted and applied, *see, e.g., Great Lakes Comnet Order*, ¶ 20 & n.64 (noting the Commission's disagreement with the MPSC's decision), AT&T elected to convert, in part, its Informal Complaint into a formal complaint against Westphalia and GLC, and AT&T brought a liability complaint against those two entities. *See id.* ¶ 1.

44. AT&T, however, did not at that juncture convert its Informal Complaint against LEC-MI, which (unlike GLC and Westphalia) did not contest the key liability issue. Rather, and because AT&T hoped that a settlement of its claims could be reached (either before or after the

²⁹ A significant amount of the 8YY aggregated traffic was billed to AT&T as intrastate traffic under LEC-MI's Michigan tariff. See Joint Decl., Ex. A. The true jurisdiction of such traffic is not known. Given that 8YY aggregated traffic consists of calls to and from parties throughout the country, it is nearly certain that only a tiny portion of such traffic was truly Michigan intrastate traffic (and not interstate or intrastate within other states) for which LEC-MI could properly bill (even if its Michigan tariff lawfully permitted such billing). AT&T does not seek refund for that interstate traffic in this Complaint.

conclusion of its formal complaint against Westphalia and GLC), AT&T filed (with LEC-MI's consent) a series of consent motions in which it sought a waiver and an extension of time to convert its Informal Complaint against LEC-MI. *See, e.g.*, Ex. 10, January 2018 Consent Motion at 2-4 (ATT-0000134 to ATT-0000136). The Commission granted AT&T's first such motion on November 7, 2014. *Id.* The Commission also granted a number of additional consent motions, the last of which was filed on January 29, 2018 and grant-stamped on January 30, 2019. *Id.*

II. AS LEC-MI HAS ADMITTED, IT IMPROPERLY BILLED AT&T END OFFICE CHARGES ON 8YY AGGREGATED TRAFFIC.

A. LEC-MI's Charges for End Office Switching Violate The Commission's Rules, Its Tariff, and Sections 201(b) and 203 of the Act.

45. It is a violation of Section 201(b) and Section 203(c) of the Act for a carrier to bill a customer for interstate switched access service in violation of the rules of this Commission or the terms of the carrier's tariff.

46. LEC-MI violated Section 201(b) and Section 203(c) of the Act by billing AT&T end office access charges for traffic that, under the Commission's rules, cannot be assessed end office charges, and for which the terms of LEC-MI's tariff do not authorize the assessment of such end office access charges.

47. As explained above, "the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions." *Eighth Report & Order*, ¶ 17. Thus, on calls that are originated or terminated to or from the end user by another carrier or service provider (such as a wireless provider), LEC-MI may not lawfully impose any end office access charges. *Id.*, ¶ 17, 21. LEC-MI violated these rules when it billed AT&T end office charges on the 8YY aggregated traffic. Ex. 5, LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072).

48. Also, to assess tariffed charges for switched access, the CLEC must route the calls to or from an end user that pays a fee to the CLEC for telecommunications services. *Northern*

Valley Order, ¶¶ 7-9. The end users who placed the aggregated 8YY traffic (mainly customers of wireless carriers) were not end user customers of LEC-MI, and therefore did not pay LEC-MI a fee for telecommunications services. Accordingly, LEC-MI also violated these rules when it billed AT&T end office charges on 8YY aggregated traffic.

49. LEC-MI's billing of end office charges also violated the terms of its tariff.

50. The tariff in which LEC-MI concurred described switched access service as providing the ability to originate calls from, and terminate calls to, end users "of LEC[s] whose end office(s) subtend the company's tandem."³⁰ As explained above, the end users originating the calls were not end user customers of LEC-MI, but rather were customers of wireless (or possibly VoIP) carriers, and therefore were not end user customers of any LEC whose end office subtended the Great Lakes Comnet tandem. Accordingly, LEC-MI's tariff does not describe a service that is provided in connection with the 8YY aggregated traffic, and thus does not authorize any billing of end office charges on that traffic.

51. Also, that same section of the LEC-MI tariff states that the "switched access services" described therein can be used for connecting the "premises" of long distance carriers to an "end user premises."³¹ The tariff defines "premises" as a "building or buildings on contiguous property."³² A wireless phone is not a "premises" as described in the tariff. Thus, the tariff does not authorize any end office charges (or any access charges) on the 8YY aggregated traffic for this reason as well.

52. Lastly, the section of the tariff containing the LEC-MI rates states that those rates are "for interstate access services whose terms and conditions are specified on sections 1 through

³⁰ Ex. 15, GLC Tariff Excerpts § 6.1 (ATT-0000248).

³¹ *Id.*

³² *Id.* § 2.6.

16 of this tariff.”³³ But the “terms and conditions” of end office switching are not described in those sections, or anywhere else in the tariff. Rather, because the tariff was filed by GLC, and GLC was an intermediate carrier with no end office switches, the tariff only describes the rates and services associated with the “local transport” and “chargeable optional features” rate categories.³⁴ Thus, the rates for end office switching in the GLC tariff in which LEC-MI concurred are not tied to any services described in the tariff. Therefore, the tariff does not authorize any end office charges to be assessed.

B. AT&T Is Entitled To Damages, Including A Refund Of End Office Charges That LEC-MI Improperly Billed And Collected, Plus Interest.

53. AT&T lacks access to the call records and other materials necessary to identify its damages with absolute precision, *i.e.*, it cannot identify each specific call on which it was overcharged. However, AT&T has developed an analysis that provides a conservative, credible, and reasonably certain amount of damages. That analysis is described in the Joint Declaration, and summarized here.

54. After AT&T discovered LEC-MI’s 8YY aggregation activities, AT&T developed an analysis of the improper traffic using an average of the traffic volumes AT&T experienced before LEC-MI’s 8YY aggregation activities began to impact those volumes significantly. Ex. 1, Joint Decl. ¶¶ 16, 20-22 (ATT-0000006 to ATT-0000009). Specifically, AT&T based that analysis on the average LEC-MI interstate originating volumes during the 6 months (August 2011 through January 2012) before LEC-MI’s 8YY aggregation activities began in earnest. *Id.* ¶¶ 20-22. This analysis is conservative because there is evidence that LEC-MI’s 8YY aggregation

³³ *Id.* § 17LECM1-1.

³⁴ *Id.* § 6.1.3 (stating that GLC “does not currently provide services associated with the end office switch or functionality”).

activities began as early as 2010, and thus the August 2011 through January 2012 period used to develop the amount of legitimate traffic likely included 8YY aggregation traffic. *Id.* ¶ 16.

55. The average volume of originating interstate minutes during that 6-month span was 1,874,862 minutes per month. Ex. 1, Joint Decl. ¶ 17 (ATT-0000007). AT&T used that average as a proxy for the amount of legitimate interstate traffic LEC-MI originated, with all minutes above that average assumed to be unlawful 8YY aggregation traffic. *Id.* ¶ 22 (ATT-0000008). Using that method, AT&T developed its analysis of the improper 8YY aggregation traffic for the period from February 2012, which was the month LEC-MI's 8YY aggregation scheme began in earnest, through July 2013, which was the date of the last invoice issued before AT&T began withholding. *Id.* The local switching and shared port rates (as determined through AT&T's re-rating process) for each month were then applied to the improperly billed minutes to determine the amount that AT&T was overcharged for that month. *Id.*

56. Using that method, the total amount that LEC-MI overcharged AT&T for interstate, originating, end office access charges during the February 2012 through July 2013 period was \$1,054,897.³⁵ Ex. 1, Joint Decl. ¶ 23 (ATT-0000009).

57. In addition to the principal amount owed, the current LEC-MI tariff provides for the payment of interest, at the rate of 0.0005% per day, compounded daily, on overcharges that are refunded.³⁶ AT&T is entitled to interest from February 2012, when its asserted claim for

³⁵ AT&T understands that, during early discussions between the parties, LEC-MI representatives indicated that they had also calculated the amount by which AT&T was overcharged for interstate, originating, end office access charges, and that LEC-MI's calculation was not materially different from AT&T's calculation – specifically, a difference of less than 3%. Ex. 1, Joint Decl. ¶ 23, n.1 (ATT-0000009).

³⁶ Ex. 8, Current LEC-MI Tariff Excerpts, § 5.2.9.3.3 (ATT-0000118).

overcharges began, until May 2015.³⁷ The amount of interest owed on such overcharges, at the 0.0005% daily compounded rate, for the February 2012 to May 2015 time period is \$628,467.00. Ex. 1, Joint Decl. ¶ 24 (ATT-00000009).

58. AT&T filed its Informal Complaint against LEC-MI in April 2014, and due to the extensions of the time to convert that Informal Complaint to a formal complaint described above, under the Commission's rules this Formal Complaint is, for statute of limitations of purposes, deemed to have been filed as of the filing of the Informal Complaint in April 2014.

59. AT&T seeks refunds extending back to February 2012, which is two years and two months before AT&T filed its informal complaint. The Act contains a two-year statute of limitations on claims for refunds of overcharges. 47 U.S.C. § 415(c). That statute of limitations, however, does not begin to run until "the cause of action accrues." *Id.* Consistent with federal actions generally, actions under the Act do not accrue until the plaintiff "discovers (or with due diligence should discover) that it has been overcharged."³⁸ As explained in the *Great Lakes Comnet Order* and in the Joint Declaration, LEC-MI's billing disguised the true nature of the 8YY aggregation traffic until at least July 2013.³⁹ AT&T, therefore, did not discover, and with due diligence could not have discovered, LEC-MI's overcharges until July 2013 at the earliest. Accordingly, the two-year statute of limitations on all LEC-MI's overcharges, including the overcharges on the February 2012 and March 2012 invoices, did not begin to run until July 2013.

³⁷ AT&T has chosen to forego interest for a period of time May 2015 because, at that point, AT&T decided to move forward with a formal complaint against Great Lakes Comnet and Westphalia, and requested that its complaint against LEC-MI be stayed pending the outcome of the proceedings against the other parties. However, AT&T asserts the right to interest again after June 2019, when the mediation efforts broke down. The calculation of post-June 2019 interest cannot be made until the dispute is resolved, and the relevant interest period becomes defined.

³⁸ *MCI Telecommunications Corp. v. F.C.C.*, 59 F.3d 1407, 1416 (D.C. Cir. 1995).

³⁹ *Great Lakes Comnet Order*, ¶¶ 36, n.1, 37; Ex. 1, Joint Decl. ¶¶ 12-14 (ATT-00000005 to ATT-00000006).

AT&T's April 4, 2014 Informal Complaint, to which this Formal Complaint relates back, was filed within two years of July 2013, and is therefore timely as to all invoices in dispute.

COUNT I

(Section 201, 47 U.S.C. § 201(b))

60. AT&T repeats and re-alleges each and every allegation contained in paragraphs 1 to 59 of this Formal Complaint as if set forth fully herein.

61. Under Section 201(b) of the Act, “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful” 47 U.S.C. § 201(b).

62. Billing a long distance carrier for access charges that are impermissible under the Commission's rules is an unjust and unreasonable practice that violates Section 201(b). *See, e.g., AT&T Corp. v. YMax Commc'ns Corp.*, 26 FCC Rcd. 5742, ¶ 34 & n.105 (2011).

63. As explained above, LEC-MI violated the Commission's rules when it assessed AT&T end office charges on the 8YY aggregated calls because the end office functions were performed by other carriers, and LEC-MI cannot collect for services provided by other carriers. LEC-MI also violated the Commission's rules by imposing end office charges on calls that were not “end users” under Commission regulations because they did not pay LEC-MI a fee for telecommunications.

64. LEC-MI's end office charges to AT&T on the 8YY aggregated calls are therefore unjust and unreasonable and, consequently, violate Section 201(b) of the Act. AT&T was damaged when it paid those unlawful bills.

65. As a direct and proximate result of LEC-MI's violations of the Act, AT&T is entitled to refunds of all amounts paid pursuant to improper bills, plus interest thereon. As described above, AT&T is owed a refund of \$1,054,897, plus interest.

COUNT II
(Section 203, 47 U.S.C. § 203(c))

66. AT&T repeats and re-alleges each and every allegation contained in paragraphs 1 to 59 of this Formal Complaint as if set forth fully herein.

67. Section 203(c) of the Act provides that “[n]o carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication[s] unless schedules have been filed and published in accordance with the provisions of this chapter . . . ; and no carrier shall . . . employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.” 47 U.S.C. § 203(c).

68. As demonstrated above, LEC-MI has violated its obligation under the Act to provide service in accordance with a lawful, valid tariff, in several respects.

69. The access services described in the LEC-MI tariff are only authorized to be provided to end users of LECs whose end office switches subtend the GLC switch. The wireless end users associated with the 8YY aggregated traffic are not end users of LEC-MI or other carriers whose end offices subtend the GLC tandem switch.

70. Also, the LEC-MI tariff describes access service as providing long distance carriers with a connection to an end user’s “premises,” which is a physical building. The connections to the wireless phones that placed the 8YY aggregated calls at issue were not provided to end user buildings, and thus were not to an end user’s “premises” under the tariff.

71. In addition, the LEC-MI end office switching rates are not linked to any end office switching services described in the tariff.

72. For the foregoing reasons, LEC-MI has billed AT&T charges in violation of its tariff and, consequently, Section 203.

73. As a direct and proximate result of LEC-MI’s violations of the Act, AT&T has been improperly billed by LEC-MI on wireless originated traffic, and is entitled to refunds for the all

amounts it paid pursuant to LEC-MI's improper bills, plus interest thereon. As described above, AT&T is owed a refund of \$1,054,897, plus interest.

PRAYER FOR RELIEF

74. Wherefore, and pursuant to Section 1.721(a)(7) of the Commission's rules, 47 C.F.R. § 1.721(a)(7), Complainant AT&T requests that the Commission:

- (a) find that Defendant LEC-MI has violated Sections 201(b) and 203 of the Act (47 U.S.C. §§ 201(b), 203) by improperly billing AT&T end office switching charges on 8YY aggregated traffic, contrary to the terms of the Commission's rules and orders and LEC-MI's tariff; and
- (b) award AT&T refunds of \$1,054,897, plus interest, as described herein.

LEGAL ANALYSIS

75. The charges in dispute here are the end office charges that LEC-MI, through its billing agent Westphalia, billed AT&T on 8YY aggregation traffic and that AT&T paid. There is no dispute that AT&T should never have been billed those end office charges, and no dispute that AT&T is entitled to be compensated for those end office charges that it paid. Indeed, LEC-MI admitted those very points in its response to AT&T's informal complaint. This is, therefore, a straightforward refund action.

76. Despite its admissions, LEC-MI has contended that it is not liable to refund to AT&T the sums at issue. In particular, LEC-MI has contended that, because GLC and its affiliate Westphalia engaged in fraudulent and other illegal activities, LEC-MI is relieved of its liability to AT&T. As explained below, black-letter law firmly forecloses LEC-MI's excuses. Despite LEC-MI's efforts to divert and distract from the undisputed facts, this remains a straightforward refund action against the entity that unlawfully billed AT&T end office access charges.

I. THE END OFFICE CHARGES THAT LEC-MI BILLED, AND AT&T PAID, ON 8YY AGGREGATION TRAFFIC WERE UNLAWFUL AND AT&T SHOULD BE REFUNDED THE PAYMENTS IT MADE, WITH INTEREST.

77. As LEC-MI has admitted, the end office charges assessed on AT&T for the 8YY aggregation traffic at issue were unlawful, Ex. 5, LEC-MI Resp. to Inf. Compl. at 5 (ATT-0000072), and AT&T is owed the full amount of its damages related to the unlawful charges it paid. 47 U.S.C. § 206 (“In case any common carrier shall do” anything “unlawful” under the Act, then “such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter”).

A. LEC-MI Violated Section 201(b) By Billing AT&T End Office Charges On Wireless Calls In Violation Of The Commission’s Rules.

78. Section 201(b) of the Act provides that “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.” 47 U.S.C. § 201(b). Billing a long distance carrier for access charges that are impermissible under the Commission’s rules is an unjust and unreasonable practice that violates Section 201(b).⁴⁰

79. As explained herein, the Commission’s rules forbid CLECs from assessing end office charges on calls originated or terminated by other carriers. Accordingly, when LEC-MI billed AT&T end offices charges on the 8YY aggregated traffic (which consisted primarily of wireless calls), LEC-MI violated the Commission’s rules and, consequently, Section 201(b).

80. Under the Commission’s rules, in general, a CLEC can lawfully file a tariff for interstate switched access services only if its tariff was for the functional equivalent of access

⁴⁰ *E.g., AT&T Corp. v. Alpine Communications, LLC, et al.*, 27 FCC Rcd. 11511, ¶¶ 29, 44-48 (2012), *recon denied*, 27 FCC Rcd. 16606 (2012) (“*Alpine*”).

services provided by a “competing ILEC,” and only if the rate was at or below the competing ILEC’s rate.⁴¹

81. The Commission has adopted a rule to address scenarios, like the scenario here, in which a CLEC provides only a portion of the access services needed to originate or terminate a call to an end user.⁴²

82. The Commission confirmed that, in these circumstances, “the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.” *Eighth Report & Order*, ¶ 17. Accordingly, on calls that are originated or terminated to or from the end user by another carrier or service provider (such as a wireless provider), a CLEC, like LEC-MI, may not impose any end office access charges. *Id.*, ¶ 17, 21.⁴³

83. The Commission’s rules also dictate that, in order to assess switched access charges pursuant to a tariff, the CLEC must route the calls to or from an end user that pays a fee to the CLEC for telecommunications services. *Northern Valley Order*, ¶¶ 7-9. Because the Commission’s rules for ILECs define access service as providing origination from or termination to “end users,” which are defined to be customers of a telecommunications service that is offered for a fee, *id.* ¶ 9, a “CLEC’s access service is functionally equivalent only if the CLEC provides access to customers to whom the CLEC offers its services for a fee.” *Id.*

84. Accordingly, because the end users who placed the 8YY aggregated calls were wireless customers, and not customers of LEC-MI, they did not pay LEC-MI a fee for

⁴¹ 47 C.F.R. §61.26; *Northern Valley Order*, ¶ 8.

⁴² 47 C.F.R. § 61.26(f); *Eighth Report & Order, Access Charge Reform*, 19 FCC Rcd. 9108, ¶¶ 14-21 (2004) (“*Eighth Report & Order*”).

⁴³ See also *Great Lakes Comnet Order*, ¶ 13 (noting that wireless carriers generally cannot file tariffs for, or collect tariffed fees relating to, switched access services).

telecommunications service. LEC-MI, therefore, did not perform the “functional equivalent” of end office switching on the 8YY aggregated calls, rendering LEC-MI’s assessment of end office charges on those calls was unlawful.

85. By billing AT&T end office charges on the 8YY aggregated traffic in violation of the Commission’s rules, LEC-MI engaged in an unjust and unreasonable practice that violated Section 201(b) of the Act. LEC-MI is, therefore, liable to AT&T for the damages AT&T incurred when it paid those unlawful bills. *See* 47 U.S.C. § 206.

B. LEC-MI Violated Section 203(c) By Billing AT&T Access Charges In Violation Of The Terms Of Its Tariff.

86. In addition to violating Section 201(b), LEC-MI violated Section 203(c) of the Act, which provides that “[n]o carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication[s] unless schedules have been filed and published in accordance with the provisions of this chapter . . . ; and no carrier shall . . . employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.” 47 U.S.C. § 203(c). The terms of LEC-MI’s tariff did not authorize it to assess end office charges on the 8YY aggregated traffic. Accordingly, when LEC-MI billed end office charges to AT&T on that traffic, it violated the terms of its tariff and Section 203(c).

87. The GLC tariff in which LEC-MI concurred during the relevant time-period described switched access service as providing the ability to originate calls from, and terminate calls to, end users “of LEC[s] whose end office(s) subtend the company’s tandem.”⁴⁴ As explained above, the end users originating the calls are not customers of LEC-MI, but rather were customers of wireless (and possibly VoIP) carriers, and therefore were not customers of any LEC whose end

⁴⁴ Ex. 15, GLC Tariff Excerpts, § 6.1 (ATT-0000248).

office subtended the GLC tandem. Accordingly, LEC-MI's tariff did not describe a service that is provided in connection with the 8YY aggregated traffic, and thus did not authorize any billing of end office charges on that traffic.

88. That same section of the tariff states that the "switched access services" described therein can be used for connecting the "premises" of long distance carriers to an "end user premises."⁴⁵ The tariff defines "premises" as a "building or buildings on contiguous property."⁴⁶ Wireless phones, which were used for the 8YY aggregated traffic at issue, are not "premises" as described in the tariff. Thus, the tariff does not authorize any end office charges (or any access charges) on the 8YY aggregated traffic for this reason as well.

89. Moreover, the section of the tariff (which again was filed by GLC and in which LEC-MI concurred) containing the LEC-MI rates states that those rates are "for interstate access services whose terms and conditions are specified on sections 1 through 16 of this tariff."⁴⁷ But the "terms and conditions" of end office switching are not described in those sections. Nor are they described anywhere else in the tariff. Rather, as revealed in Section 6.1.3, the tariff only describes the rates and services associated with the "local transport" and "chargeable optional features" rate categories, because GLC, as an intermediate carrier, did "not currently provide services associated with the end office switch or functionality."⁴⁸ Thus, the rates for end office switching in the GLC tariff in which LEC-MI concurred are not tied to any end office services

⁴⁵ *Id.*

⁴⁶ *Id.*, § 2.6.

⁴⁷ *Id.* § 17LECMI-1.

⁴⁸ *Id.* § 6.1.3.

described in the tariff. Therefore, the tariff did not authorize any end office charges to be assessed.⁴⁹

90. By billing AT&T end office charges on the 8YY aggregated traffic that were not authorized by its tariff, LEC-MI violated its tariff and Section 203(c) of the Act. LEC-MI is therefore liable to AT&T for the damages AT&T incurred when it paid those unlawful bills. *See* 47 U.S.C. § 206.

II. LEC-MI'S ARGUMENTS TO AVOID LIABILITY FOR THE OVERCHARGES BILLED TO AND COLLECTED FROM AT&T ARE UNAVAILING.

91. LEC-MI has denied it is liable to refund any overpayments that AT&T made to LEC-MI's billing agent, Westphalia, but LEC-MI purportedly never received. That is flatly wrong under the Act, Commission precedent, and basic agency law precepts.⁵⁰

92. Section 217 of the Act provides that “[i]n construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.” 47 U.S.C. § 217. As the Commission has explained, “Congress's clear intent in enacting section 217 was to ensure that common carriers not flout their statutory duties by delegating them to third parties.” *In the Matter of Long Distance Direct, Inc.*, 15 FCC Rcd. 3297, ¶ 9 (2000).

⁴⁹ *E.g.*, 47 U.S.C. § 203(c); *AT&T Corp. v. Central Office Tel.*, 514 U.S. 214, 223 (1998) (“Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached”); *MCI WorldCom Network Servs. v. PaeTac Commc’ns, Inc.*, 204 Fed. Appx. 271, 271 n.2 (4th Cir. 2006) (“under the filed rate doctrine, a carrier is expressly prohibited from collecting charges for services that are not described in its tariff”).

⁵⁰ AT&T assumes Michigan law governs the agency law issues in dispute. AT&T’s research revealed no material differences among Michigan and other jurisdictions on these issues.

93. The Commission has explained that it “has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors, and has consistently refused to excuse [regulatees] from forfeiture penalties where actions of employees or independent contractors have resulted in violations.” *Eure Family Ltd. Partnership*, 17 FCC Rcd. 21861, ¶ 7 (2002). And, in construing these provisions of the Act (and related provisions), the Commission has consistently looked to “basic tenet[s] of agency law.” *American Paging, Inc.*, 12 FCC Rcd. 10417, ¶ 11 (1997).

94. Section 7.08 of the Restatement of Agency provides in pertinent part: “A principal is subject to vicarious liability for a tort committed by an agent in dealing ... with a third party ... when actions taken by the agent with apparent authority constitute the tort.” Restatement (Third) of Agency § 7.08. Thus, the key issue is whether Westphalia had apparent authority, which arises when a third party reasonably believes that the agent is acting with actual authority from the principal. Restatement (Third) of Agency §§ 2.03, 7.08. Here, LEC-MI had used Westphalia as its billing agent for access charges throughout the entire relevant period (and before), during which time Westphalia held itself out as LEC-MI’s agent for access billing. Ex. 1, Joint Decl. ¶¶ 6-7, 26 (ATT-0000004; ATT-0000010). LEC-MI never once complained that AT&T had failed to pay its access bills at all, that AT&T was improperly paying Westphalia instead of LEC-MI (or another agent), or otherwise indicated in any way to AT&T that Westphalia did not have authority to bill AT&T for access charges generally or end office charges specifically. *Id.* ¶ 26 (ATT-0000010). Moreover, LEC-MI acknowledged in its response to AT&T’s Informal Complaint that it had an arrangement with GLC “under which GLC had billing responsibility for LEC-MI’s interexchange traffic” and that “GLC assigned the billing responsibilities to [Westphalia].” Ex. 5, LEC-MI Inf.

Compl. Resp. at 2 (ATT-0000069).⁵¹ Westphalia thus had, and LEC-MI cannot credibly deny that Westphalia had, apparent authority to bill the end office charges in dispute.

95. On account of this apparent authority, LEC-MI is liable to AT&T for the overcharges at issue even if Westphalia never conveyed AT&T's payments to LEC-MI, or engaged in fraudulent activities harmful to LEC-MI. A "principal's liability under the rule stated in this section does not depend on whether the principal benefits from the agent's tortious conduct."⁵² In an apt illustration discussed in the Restatement, an agent for a coin dealer misrepresented the value of a set of coins to buyer.⁵³ The agent "persuade[d buyer] to pay cash for the coins and to leave the coins with [Agent] so that they [could] be safely stored" with the coin dealer.⁵⁴ The agent "then abscond[ed] with both the coins and the cash paid by [buyer]." *Id.* Despite losing the coins and receiving none of the buyer's cash, the coin dealer is liable to the buyer for his full loss.⁵⁵

96. Relatedly, the Michigan Supreme Court has embraced the fundamental rule that "[p]ayment to [an agent] [i]s payment to his principals." *Emlong Nurseries, Inc. v. Warner*, 110 N.W.2d 713 (Mich. 1961). Other cases are in accord.⁵⁶

⁵¹ See also *Great Lakes Comnet Order*, ¶ 36, n.125 (Commission stating that Westphalia billed AT&T for end office services on behalf of LEC-MI).

⁵² Restatement (Third) of Agency § 7.08, cmt. (b).

⁵³ *Id.*, Ill. 1 & 2.

⁵⁴ *Id.*

⁵⁵ *Id.*; see also *id.*, Ill. 4 (where insurance agent "does not forward the [third party's] premiums" to his principal, but "instead us[es] the funds for [the agent's] own purposes," principal is liable to the third party despite not receiving the funds because agent's "conduct in accepting [the] premium payments is attributed to ... Insurance Co."); *Alberici Constructors, Inc. v. Oliver*, 2012 WL 6738491, *3 (E.D. Mo., December 31, 2012) (principal liable to third parties for acts of agent with apparent authority "even when the principal is innocent and deprived of any benefit").

⁵⁶ E.g., *In re Pajaro Dunes Rental Agency, Inc.*, 174 B.R. 557, 579-80 (Bankr. N.D. Cal. 1994) ("It is established that if an agent has authority to receive or collect payment, giving money to that agent is equivalent to payment to the principal himself"); *In re Cooper*, 2 B.R. 188, 194 (Bankr. S.D. Tex. 1980) ("payments made to an agent [are] the same as payments made directly to the principal").

97. Michigan courts also have applied these precepts to hold principals liable even when the principal never received the subject funds from its agent. For example, in *Mossman v. Millenbach Motor Sales*, 280 N.W. 50 (Mich. 1938), plaintiff tendered a truck to the agent of defendant, a used car dealership, but never received payment for the truck. Rather, the dealership’s agent “sold the truck to a third party, pocketed the proceeds and disappeared.” *Id.* at 52. The Michigan Supreme Court held that defendant dealership was liable to plaintiff for the sale price of the truck, despite losing the truck and never receiving the sale proceeds. *Id.* Likewise, in *Mais v. Allianz Life Insurance Co.*, 34 F. Supp. 3d 754 (W.D. Mich. 2014), the court held that defendant financial institution was liable to plaintiff for funds “stol[en]” by its agent and not “deliver[ed] ... to [the principal],” *id.* at 760.⁵⁷

98. As these authorities show, LEC-MI is liable to AT&T for all of the overcharges AT&T paid to LEC-MI’s agent, Westphalia, even if Westphalia did not pass all (or even any) such overcharges on to LEC-MI.

99. LEC-MI similarly has argued that it is not liable under the so-called “adverse interest” exception to the general rule of principal liability for an agent’s torts. Where applicable, this “adverse interest” exception bars the imputation of an agent’s actions to the principal. But the

⁵⁷ It is no answer for LEC-MI to say that Westphalia lacked actual authority to overcharge AT&T or to refrain from conveying AT&T’s payments to LEC-MI; indeed, none of the agents in the above-described examples was authorized to engage in wrongful conduct. The key is the agent’s apparent authority to engage in the subject transactions with the plaintiff. *See also Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950-51 (N.Y. 2010) (principal “must, therefore, be responsible for the acts of its authorized agents even if particular acts were unauthorized”; “risk of loss from the unauthorized acts of a dishonest agent falls on the principal that selected the agent”); *Ripon Knitting Works v. Ry. Express Agency, Inc.*, 207 Wis. 452 (1932) (when agent overcharged customer and collected payments, agent “did [so] within the scope of his authority as a delivery and collection agent of defendant,” rendering defendant liable, even though “defendant never expressly authorized” the misrepresentations and defendant “did not profit thereby”).

adverse interest exception is inapplicable here because AT&T is a third party with no knowledge of the improper billing.⁵⁸

100. “The ‘adverse interest exception’ draws ‘[a] distinction ... between a case of management stealing or looting from the company and a case where management is stealing from outsiders. ... The exception applies in the first instance (stealing from the principal) but not the second (stealing from outsiders).” *Oliver*, 2012 WL 6738491 at *3.⁵⁹ Similarly, the Ninth Circuit has held that “the adverse interest rule doesn’t apply” when the agent violated “the rights of a third party who dealt with the principal in good faith.” *In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 476 (9th Cir. 2015). Furthermore, the Restatement teaches that, notwithstanding the adverse interest exception, liability “is imputed [to the principal] when necessary to protect the rights of a third party.”⁶⁰ Restatement (Third) of Agency § 5.04.⁶¹ The adverse interest exception is simply inapposite to AT&T’s requested refunds.

⁵⁸ See *Great Lakes Comnet Order*, ¶¶ 36-37, n.125 (showing, based on the bills at issue, AT&T did not know Westphalia “billed on behalf of LEC-MI end office switching on wireless calls”).

⁵⁹ See also *id.* at *2 (principal liable to third party for acts of agent with apparent authority “even when the agent acts wholly out of personal motive or with the purpose of defrauding his principal”) (citation omitted).

⁶⁰ The law “reserves this most narrow of exceptions for those cases ... where the fraud is committed *against* a corporation rather than on its behalf”; thus, “when insiders defraud third parties *for* the corporation, the adverse interest exception is not pertinent.” *Kirschner*, 938 N.E.2d at 952. Sound policy underlies this rule, as it “encourages principals to exercise caution to avoid hiring agents who may defraud third parties ...”; yet, there is “no need to further encourage a principal to hire an agent who will not defraud the *principal itself*.” *Oliver*, 2012 WL 6738491 at *3. Also, because LEC-MI’s liability is rooted in Westphalia’s apparent authority, not principals of *respondeat superior*, it makes no difference that Westphalia was a non-employee agent of LEC-MI. Cf. *id.* at *2 (explaining difference between apparent authority and *respondeat superior* as bases for vicarious liability).

⁶¹ Also, the adverse interest exception concerns whether an agent’s actions can be imputed to the principal to establish liability. *E.g.*, *MCA Fin. Corp. v. Grant Thornton LLP*, 687 N.W.2d 850, 857 (2010). But as discussed above, for actions by third parties, liability hinges on the agent’s apparent authority. Indeed, the agents in the Restatement illustrations and cases noted above, who stole both the goods and the sales proceeds, certainly acted adversely to their principals. But in none of those cases were such adverse actions even mentioned as a factor in the analysis – the existence of the agent’s apparent authority alone determined the principal’s liability.

CONCLUSION

101. For the reasons explained herein, the end office charges that AT&T was billed and paid on the 8YY aggregation traffic at issue were unauthorized under both the Commission's rules and LEC-MI's tariffs, and therefore were unlawful and violated Sections 201(b) and 203(c) of the Act. LEC-MI's arguments to avoid liability for the amounts AT&T on traffic LEC-MI admits was unlawfully billed to AT&T are unavailing. AT&T is entitled to refunds of the unlawful charges in the amount of \$1,054,897, plus interest.

Respectfully submitted,

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Dated: August 5, 2019

Counsel for AT&T

REVISED CERTIFICATE OF FEE PAYMENT

Pursuant to Commission Rule 1.722(k) (47 C.F.R. § 1.722(k)), I hereby declare under penalty of perjury that (1) AT&T paid the \$235 filing fee for the Formal Complaint (pursuant to Commission Rule 1.734(b), 47 C.F.R. § 1.734(b)) electronically on August 5, 2019, and (2) AT&T Services, Inc.'s FRN is 0008644056 and AT&T Corp.'s FRN is 0005937974. Proof of payment is attached hereto.

Respectfully submitted,

/s/ Brian A. McAleenan
Brian A. McAleen

Your payment has been submitted to Pay.gov and the details are below. If you have any questions or you wish to cancel this payment, please contact FCC Financial Operations Group Help Desk at ARINQUIRIES@fcc.gov at 877-480-3201 option 6.

Application Name: Remittance Advice
Pay.gov Tracking ID: 26J9HQ16
Agency Tracking ID: PGC3280314
Transaction Type: Sale
Transaction Date: Aug 5, 2019 10:09:48 AM

Account Holder Name: Mark D. Schneider
Transaction Amount: \$235.00
Card Type: Visa
Card Number: *****2989

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WRITTEN VERIFICATION

Pursuant to 47 C.F.R. § 1.721(m), I, Christi Shewman, have read AT&T's submissions and certify that this Formal Complaint and supporting materials are well grounded in fact, warranted under existing law, and have not been filed to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding, or for any other improper purpose.



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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2019, I caused a copy of the foregoing Formal Complaint, as well as all accompanying materials, to be served as indicated below to the following:

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Respectfully submitted,

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