PUBLIC VERSION

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

AT&T CORP.,	)	
Complainant,	)	**FCC Docket No. 14-209**
v.	)	**File No. EB-09-MD-010**
ALL AMERICAN TELEPHONE COMPANY, INC., e-PINNACLE COMMUNICATIONS, INC., AND CHASECOM,	)	
Defendants.	)	

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Office of the Secretary

ALL AMERICAN TELEPHONE CO.,
e-PINNACLE COMMUNICATIONS, INC. AND CHASECOM
LEGAL ANALYSIS IN SUPPORT OF
AFFIRMATIVE DEFENSES, MOTION TO DISMISS AND PETITION FOR DECLARATORY RULING

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SUMMARY

The AT&T Supplemental Complaint for Damages must be dismissed on both venue and jurisdictional grounds. AT&T cannot seek damages from this Commission, because it has already placed claims for the same damages, using the same arguments, before the federal District Court of the Southern District of New York. As such, AT&T has selected the venue to hear its damages complaints, and is prohibited by § 207 of the Communications Act from pursuing damages from this Commission. The Commission also lacks jurisdiction to hear AT&T's claims. The *Liability Order* had the effect of establishing that the CAPs are not – and never were during the entire period of this dispute – common carriers. As such the CAPs are not subject to Title II jurisdiction, including the § 208 complaint process.

At all times relevant to this case, AT&T was bound by a settlement agreement it reached with the Beehive local exchange carriers – the incumbent LECs that the *Liability Order* found to be the entity that provided the switched access services that AT&T took. The settlement agreement estopps AT&T from claiming damages in the instant case.

AT&T's stipulations, admissions in its pleadings, expert witness testimony and conduct in other cases before other venues all require dismissal of AT&T's claims based on the principal of judicial estoppel. Specifically, AT&T is estopped from making the arguments that:

- The CAPs did not provide "any service" to AT&T.
- Equitable relief at court is preempted by the Commission's regulatory regime.
- The CAPs' "scheme" resulted in them invoicing excessive rates.
- AT&T does not have to pay for the service it took.
- The service that AT&T took is not switched access service.

AT&T has failed to meet the Commission's stringent standards for demonstrating damages. In fact, AT&T makes no showing at all that it was damaged – instead, it demands a full refund of any amounts it paid, based on flawed legal theories. The Commission has repeatedly found that such assertions do not constitute a "showing" adequate to support an award of damages.

AT&T's asserted damages would constitute unjust enrichment. By the findings of the *Liability Order* and AT&T's own testimony, AT&T received more than $11 million worth of terminating switched access service, and paid the CAPs only a quarter-million dollars. AT&T fails to even attempt to explain how it has been "damaged" by this.

An award of the "damages" that AT&T seeks – getting millions of minutes of terminating access service over a period of years for free – would constitute an uncompensated taking, prohibited by the 5th Amendment. The Genachowski Administration's unusual involvement in all aspects of this case, and its unprecedented actions involving All American, would constitute a regulatory taking if the Commission rules that AT&T is not required to pay for the services it has taken.

TABLE OF CONTENTS

I. BACKGROUND: 2

II. THE AT&T SUPPLEMENTAL COMPLAINT MUST BE DISMISSED ON VENUE AND JURISDICTIONAL GROUNDS 5

A. SECTION 207 OF THE COMMUNICATIONS ACT REQUIRES DISMISSAL WITHOUT PREJUDICE 5

B. THE COMMISSION LACKS TITLE II JURISDICTION OVER THE CAPS, AND SO CANNOT GRANT AT&T THE "DAMAGES" IT SEEKS 7

1. THE *LIABILITY ORDER'S* FINDING THAT THE CAPS ARE "SHAMS" IS TANTAMOUNT TO A FINDING THAT BEEHIVE IS THE SERVICE PROVIDER AND THAT THE CAPS WERE ITS AGENTS 7

2. THE *LIABILITY ORDER'S* FINDING THAT THE CAPS DID NOT OPERATE AS "*BONA FIDE* CLECS" IS TANTAMOUNT TO A FINDING THAT THE CAPS ARE NOT COMMON CARRIERS, AND THAT THE COMMISSION HAS NO JURISDICTION OVER THEM 7

III. AT&T IS BOUND BY ITS SETTLEMENT AGREEMENT WITH BEEHIVE 8

IV. JUDICIAL ESTOPPEL REQUIRES SUMMARY DISMISSAL OF AT&T'S CENTRAL ASSERTIONS 10

A. THE CAPS DID NOT PROVIDE "ANY SERVICE" TO AT&T 10

B. EQUITABLE RELIEF AT COURT IS PRE-EMPTED BY THE COMMISSION'S "REGULATORY REGIME" 12

C. THE CAPS' "SCHEME" RESULTED IN THEM INVOICING EXCESSIVE RATES 13

D. AT&T DOES NOT HAVE TO PAY FOR THE SERVICE IT TOOK 13

E. THE SERVICE AT ISSUE IS SOME "UNDEFINED, UNREGULATED" SERVICE 14

V. AT&T HAS FAILED TO MEET THE COMMISSION'S STANDARDS FOR DEMONSTRATING THAT DAMAGES ARE WARRANTED 15

VI. AT&T'S CLAIMED "DAMAGES" WOULD CONSTITUTE UNJUST ENRICHMENT 17

VII. AT&T'S CLAIMED "DAMAGES" WOULD CONSTITUTE AN UNCOMPENSATED TAKING, PROHIBITED BY THE 5TH AMENDMENT 17

VIII. CONCLUSION 19

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ALL AMERICAN TELEPHONE CO.,
e-PINNACLE COMMUNICATIONS, INC. AND CHASECOM
LEGAL ANALYSIS IN SUPPORT OF THEIR ANSWER AND AFFIRMATIVE DEFENSES, MOTION TO DISMISS AND PETITION FOR DECLARATORY RULING

Pursuant to 47 C.F.R. § 1.724 and the letter ruling issued by the Market Disputes Resolution Division ("MDRD") of the Enforcement Bureau dated October 29, 2014, and modified by a subsequent MDRD letter ruling dated November 7, 2014, All American Telephone Co., Inc. ("All American"), e-Pinnacle Communications, Inc. ("e-Pinnacle"), and ChaseCom (collectively, "the Collection Action Plaintiffs" or "CAPs") submit this Legal Analysis in Support of their Answer and Affirmative Defenses to the Supplemental Complaint of AT&T Corp. for Damages ("Brief"). AT&T Corp. ("AT&T") filed its Supplemental Complaint on October 24, 2014 in the above-captioned proceeding. This Brief is also being submitted to support the CAPs' Motion to Dismiss the Supplemental Complaint of AT&T Corp. for Damages, and their Petition for

Declaratory Ruling, which are being filed under separate cover contemporaneously with this Brief and their Answer.

LEGAL ANALYSIS

Below, the CAPs provide the Legal Analysis in support of their Answer and Affirmative Defenses to the AT&T Supplemental Complaint.

I. BACKGROUND:

The Genachowski Administration addressed access stimulation issues in a way that was a radical departure from the Powell and Martin Administrations. Rather than rely on proven and stable regulatory means of changing access rules through prospective modifications and adherence to precedent, it undertook a radical new approach – it invalidated the tariffs of the CAPs and numerous other carriers on a retroactive basis, on the basis of highly technical analysis of tariff language. Moreover, it took an inordinate amount of time – in the CAPs' case, the period from primary jurisdiction referral by the federal District Court for the Southern District of New York ("SDNY") to partial answer in a complaint proceeding took almost five years. And even then, the Genachowski Administration never resolved the dispute between any local exchange carrier ("LEC") and interexchange carrier ("IXC") – it bifurcated the few referral cases it acted on into "Liability" and "Damages" phases, and never completed a "Damages" phase in any case. In the case of the CAPs, it issued its decision in the *Liability Order*[1] after the Chairman announced his departure from the Commission, and never initiated a Damages phase.

This highly irresponsible approach had several adverse effects: It issued a series of decisions that created new law, with many unintended consequences. The retroactive voidance of numerous tariffs – in the case of the CAPs, six years after service was provided – created a

[1] *AT&T Corp. v. All American Tel. Co., e-Pinnacle Commc'ns, Inc., ChaseCom*, 28 FCC Rcd 3477 (rel. March 25, 2013) ("*Liability Order*").

regulatory gap that raised unprecedented questions of liability, jurisdiction, and the impact of the federal two-year statue of limitations. It ignored the primary jurisdiction requests of almost a dozen federal district court cases. And it left a series of novel, difficult and contentious issues for the following Administration to resolve.

As discussed in this Brief, and in the accompanying Answer and affirmative defenses, Motion to Dismiss and Petition for Declaratory Ruling, the CAPs demonstrate the following:

- The effect of the *Liability Order* is to render the CAPs non-common carriers, not subject to Title II jurisdiction. As such, they cannot be compelled to participate in any further complaint proceedings. This means that the Commission must finally resolve the SDNY Court's referral questions by issuing a Declaratory Ruling.

- AT&T's Supplemental Complaint for Damages raises no issues of fact that remain to be determined. Rather, AT&T bases it claims for asserted damages purely on (flawed) conclusions of law. This means it is appropriate for the Commission to respond completely to the SDNY Court's referral questions through a Declaratory Ruling.

- By invalidating the CAPs' tariffs retroactively, the *Liability Order* has created a regulatory "gap" that can only be filled by the SDNY Court, acting on the CAPs' claims for relief in *quantum meruit.*

- And of course, being a collection action, the Commission lacks authority to resolve all the questions issued by the SDNY Court – the question of damages awarded against AT&T in its capacity as a non-carrier customer of service can only be decided by the Court. Nevertheless, this Commission can, and must provide valuable guidance to the Court. The CAPs list the specific rulings they request from the Commission in the Proposed Order that accompanies their Petition for Declaratory Ruling.

The CAPs call on the Commission to close this case through the issuance of a Declaratory Ruling[2] for a number of reasons. First, there are no questions of fact that remain to be determined. As the CAPs show in their Answer and in this Brief, the CAP case is confirmed by admissions that AT&T has made on the record of this proceeding. Second, should the

[2] In the alternative, the CAPs note that the Commission could issue an order in the instant case, without further proceedings, based solely on the initial filings. The Commission took this approach in *All American Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723 (2011).

Commission decide to subject the CAPs to further legal expense by forcing them to participate in a § 208 formal complaint process, it would first, as a threshold matter, have to address the CAPs' showing that the *Liability Order* has the effect of rendering them non-common carriers, not subject to Title II jurisdiction. And finally, should the Commission decide to conduct a rate analysis as part of a "Damages" Phase proceeding, it would have to name the Beehive local exchange carriers ("Beehive") as parties to the case. The *Liability Order* has determined that Beehive is the entity that provided service and generated bills, and the record shows that Beehive is the only party with access to the revenue and cost data that would be required in a real damages analysis.

The CAPs request that this Administration do its best to cure the harm caused by the unprecedented delay effected by the former Administration by completing its response to the SDNY Court as soon as possible. Should the Commission decide to proceed with a rate case – and such action is not necessary to fully respond to the SDNY Court's referral questions and to resolve this case once and for all – the Commission would be bound by a five-month statutory deadline. But such a deadline should be imposed in any case – as stated by the Commission at the time it revised its § 208 complaint rules to conform to the Telecommunications Act of 1996:

> In addition, with respect to supplemental complaints for damages that are filed following a finding of liability on a matter that was not subject to a statutory deadline, we will endeavor to resolve such complaints <u>within five months of the date of filing</u>. This approach furthers the intent underlying the deadlines that Congress established for different types of complaints. [3]

[3] *Implementation of the Telecommunications Act of 1996,* 12 FCC Rcd 22497, ¶ 184 (1997) (emphasis added).

II. THE AT&T SUPPLEMENTAL COMPLAINT MUST BE DISMISSED ON VENUE AND JURISDICTIONAL GROUNDS

A. SECTION 207 OF THE COMMUNICATIONS ACT REQUIRES DISMISSAL WITHOUT PREJUDICE

Section 207 of the federal Communications Act, 47 U.S.C. § 207, provides that:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may *either* make complaint to the Commission as hereinafter provided for, *or* may bring suit for the recovery of damages for which such common carrier may be liable ... in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. (Emphasis added.)

The courts have recognized this language to be clear on its face – the same charges may not be brought before a federal court and the FCC. The proper response to claims precluded by a § 207 election is for a court to dismiss the claims without prejudice, so that, if they have merit, they can be brought before the other forum. *E.g., Premiere Network Svcs. v. SBC Communications, Inc.*, 440 F.3d 683, 692 (5th Cir. 2006).

AT&T's asserted damages claims are before the SDNY Court, and have not been referred to this Commission. In its counterclaims against the Collection Action Plaintiff's Amended Complaint, filed on August 7, 2008 (and appended toAT&T's Formal Complaint in the instant case at AT&T Exhibit 3), AT&T issued a series of claims for damages:

> By deliberately charging, demanding and collecting compensation for service under their tariff <u>that they do not provide</u>, Counterclaim Defendants [All American, e-Pinnacle, ChaseCom] have engaged in unjust and unreasonable practices. . . . (AT&T Ex. 3, at 40 ¶ 54) (emphasis added). AT&T has been damaged by Counterclaim Defendants' violations of Section 201(b), and prays for <u>damages in an amount to be determined at trial</u>, interest, attorneys' fees, court costs, declaratory relief, injunctive relief, and such other relief as the Court may deem just and reasonable." (*Id.* at 40, ¶ 55) (emphasis added). * * * Counterclaim Defendants, have in fact sought to <u>extract inflated terminating switched access charges</u> from AT&T and other long distance carriers by charging AT&T and other long distance carriers for terminating switched access services that Counterclaim Defendants <u>did not provide</u>. (*Id.* at 41 ¶ 58) (emphasis added). * * * AT&T is entitled to judgment under 28 U.S.C. § 2201(a) declaring that . . . (iii) AT&T <u>is not obligated to pay the interstate or</u>

> intrastate charges that appear in the bills rendered by the Counterclaim Defendants to AT&T that contain charges for calls made using the services of FCPs. (*Id.* at 44 ¶ 80) (emphasis added).

Of course, these are the identical claims that AT&T now brings before this Commission in Amended Complaint for Damages. The Courts have expressly found that the forum selection effect of § 207 applies to counterclaims in federal court.[4]

The Commission has also applied § 207 in this way. In *Mocatta Metals Corp. v. ITT World Comm'ns, Inc.*,[5] the Commission dealt with a case in which Mocatta filed a formal complaint on tariffed rates before the Commission several weeks after it filed a complaint on the same issues in federal district court (the same Southern District of New York court from which the instant case was referred). The Commission noted that "[o]rdinarily, the facts presented in this case, plus the Section 207 affirmative defense asserted by ITT would result in a dismissal of the complaint."[6] The Commission found, however, unusual circumstances required that Mocatta retain the right to bring its claim before the Commission. However, to do so, the Commission held that Mocatta would first have to withdraw its claims pending before the district court:

> Mocatta . . . must notify this Commission . . .whether it intends to press its . . . complaint against ATT before this Commission. Notification should include proof of dismissal of its June 25, 1973 complaint against ATT in the District Court, Southern District of New York. Failure to respond with the requisite notification will result in dismissal of the complaint before this Commission.[7]

Therefore, under established precedent applying § 207, AT&T selected the venue for its damages claims when it filed its counterclaims against the Collection Action Plaintiffs in the SDNY Court, and dismissal without prejudice of the Supplemental Complaint of AT&T Corp. for Damages is required. However, even if the Commission should find that some sort of

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[4] *Cincinnati Bell Tel. Co. v. Allnet Comm. Svcs., Inc.*, 17 F3d 921, 923 (1994) ("Because Allnet chose to pursue with the FCC its remedy concerning the 1987-88 access charges, it could not raise as counterclaim in district court its claim for a refund for those years." In this case, the converse applies with equal force.)

[5] 44 FCC 2d 605 (1973) ("*Mocatta*").

[6] *Id.* at 605.

[7] *Id.* at 607 (emphasis added).

"special circumstances" merit its hearing the AT&T claims – and there are no such special circumstances – under *Mocatta*, AT&T must withdraw its counterclaims in the SDNY collection action as a precondition to proceeding with the instant damages complaint.

B. THE COMMISSION LACKS TITLE II JURISDICTION OVER THE CAPS, AND SO CANNOT GRANT AT&T THE "DAMAGES" IT SEEKS

1. THE *LIABILITY ORDER'S* FINDING THAT THE CAPS ARE "SHAMS" IS TANTAMOUNT TO A FINDING THAT BEEHIVE IS THE SERVICE PROVIDER AND THAT THE CAPS WERE ITS AGENTS

The only precedent cited by the Commission in finding that the CAPs are "shams" is the "*Total Telecom*" case,[8] the only case – besides the *Liability Order* – in which the Commission has ever found a CLEC to be a "sham" entity.[9] Yet, while the *Liability Order* finds the *Total Telecom* case to be "relevant" precedent,[10] it is only implemented partially, to find that the CAPs were shams. If the full ruling of *Total Telecom* – that in the absence of the "sham" entities, the tariffed rates of the underlying ILEC apply – is applied to the case at bar, it leads to only one conclusion: That the Beehive local exchange carriers are the providers of service, which was arranged through the CAPs as their agents, and that the Beehive tariffed rates, which AT&T does not contest, apply to the services at issue in this case.

2. THE *LIABILITY ORDER'S* FINDING THAT THE CAPS DID NOT OPERATE AS "*BONA FIDE* CLECS" IS TANTAMOUNT TO A FINDING THAT THE CAPS ARE NOT COMMON CARRIERS, AND THAT THE COMMISSION HAS NO JURISDICTION OVER THEM

The *Liability Order* finds that the CAPs are "not bona fide" CLECs, who did not provide services "to the public" but instead "generate[d] access traffic exclusively to a handful of CSPs" and who were not authorized to operate as CLECs in the territory where they did business.[11]

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[8] *Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 FCC Rcd 5726 (2001) ("*Total Telecom*").
[9] *See Liability Order,* 28 FCC Rcd 3477, 3490-91 ¶ 30.
[10] *Id.*
[11] *Id.* at 3488 ¶ 25.

All of these findings lead to one conclusion – the CAPs are not "common carriers" of "telecommunications services" as defined in the Communications Act. A provider of "telecommunications service" must offer service "directly to the public, or to such classes of users as to be effectively available directly to the public."[12] By voiding their tariffs *ab initio*, and finding that they served "only a handful" of users (or in the case of All American, just one), the *Liability Order* has confirmed that the CAPs did not offer service to the public. A "common carrier" or "carrier" is defined as a Telecommunications Carrier.[13] Therefore, the *Liability Order* confirms that the CAPs are not subject to the Commission's authority to prescribe rates for the CAP services under § 205 of the Act, to hear formal or informal complaints against them under § 208, to consider claims for damages against them under § 207, or order them to pay damages under § 209, because all such powers of the Commission expressly can be exercised only on "common carriers."[14]

III. AT&T IS BOUND BY ITS SETTLEMENT AGREEMENT WITH BEEHIVE

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(Start of Confidential Section)

[12] 47 U.S.C. §§ 153 (46).
[13] 47 U.S.C. §§ 153 (10) & (45).
[14] *See, e.g., All American Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723 (2011).

[15] *Liability Order*, 28 FCC Rcd at 3491 ¶ 30 n. 136.
[16] Settlement agreement, p. 1, 2nd "Whereas" clause.
[17] AT&T Supplemental Complaint for Damages at ¶¶ 14, -16.
[18] *Id.* at ¶ 15.

(End of Confidential Section)

CONFIDENTIAL

IV. JUDICIAL ESTOPPEL REQUIRES SUMMARY DISMISSAL OF AT&T'S CENTRAL ASSERTIONS

Based on its stipulations and statements in the instant proceeding and its expert witness testimony, AT&T is estopped from making the following claims:

A. THE CAPS DID NOT PROVIDE "ANY SERVICE" TO AT&T

AT&T and its expert witness admit throughout their pleadings that AT&T received terminating switched access traffic that was caused to be delivered by the CAPs:

[19] *Id.* at ¶ 16.
[20] *Id.* at ¶ 14.

- Stipulation # 52: "AT&T has not disputed the number of minutes of traffic associated with the Joy telephone numbers. (Joint Statement of Stipulated Facts, dated July 16, 2010, stamped "Filed/Accepted July 20, 2010" ("7/16/10" Stipulation)).

- The number of Local Switching MOUs billed by All American exactly matches the number of Tandem Transport Facility and Tandem Transport Termination MOUs billed by Beehive, and that AT&T paid to Beehive without complaint. *Toof Report*, Exhibit DIT-10.

- 7/16/10 Stipulation # 58: "AT&T has paid some tandem switching and transport charges to Beehive for traffic destined to the CLECs."

- 7/16/10 Stipulation # 57: All numbers in the CAPs' bills reflect Beehive CLLI codes.

- 7/16/10 Stipulation # 70: All CAP equipment was located in Beehive offices.

- The Toof Report is based on the assumption that "All American's access minutes are properly attributable to Beehive . . . ." *Toof Report* at 5 ¶15.

- 7/16/10 Stipulation # 35: "AT&T is not challenging Beehive's interstate access tariff rates . . . ", also cited in *Liability Order* at 3492 ¶ 33 n.145.

And of course, the gravamen of AT&T's Amended and Supplemental Complaints is that the CAPs caused "millions of minutes" of terminating calls for AT&T's long distance customers.[21]

In addition, as discussed in Section II(A) above, under § 207 of the Communications Act, AT&T is precluded from asking the Commission to adjudicate claims it has pending in court. AT&T's claim that the CAPs "did not provide" service to AT&T are squarely before the SDNY court, made as part of AT&T's counterclaims against the CAPs.

> By deliberately charging, demanding and collecting compensation for service under their tariff <u>that they do not provide</u>, Counterclaim Defendants [All American, e-Pinnacle, ChaseCom] have engaged in unjust and unreasonable practices. . . . (AT&T Ex. 3, at 40 ¶ 54) (emphasis added). Counterclaim Defendants, have in fact sought to <u>extract inflated terminating switched access charges</u> from AT&T and other long distance carriers by charging AT&T and other long distance carriers for terminating switched access services that Counterclaim Defendants <u>did not provide</u>. (*Id.* at 41 ¶ 58)

As such, AT&T is barred from raising that claim before this Commission.

[21] *E.g.*, Supplemental Complaint at ¶¶ 58, 59.

B. EQUITABLE RELIEF AT COURT IS PRE-EMPTED BY THE COMMISSION'S "REGULATORY REGIME"

AT&T claims that the tariff and contracting rules that the Commission adopted in the *Eighth Report and Order* and the *CLEC Access Charge Order* create a comprehensive regulatory scheme that preempts carriers from pursuing equitable claims at court. This assertion is belied by AT&T's actions – it routinely files complaints with the alternate theories of *quantum meruit* and/or unjust enrichment, together with claims of tariff violation and/or contract violation. It is estopped by these actions from making its pre-emption claim in the instant proceeding, and it must be stricken. Here are some examples:

- *AT&T Corp. v. Mosaica Education, Inc., et al,* 2008 WL 2705422, *1 (D. De.., July 10, 2009) (AT&T Corp. sues under "breach of contract, tariff violation, and quantum meruit/unjust enrichment.")

- *AT&T Corp. v. The Vialink Co.*, 2005 WL 2007102, *1 (N.D. Tx., Dallas Div., Aug. 18, 2005) (AT&T Corp. sues under "breach of contract, claim on account, and unjust enrichment.")

- *AT&T Corp. v. Michigan Internet Assoc., Ltd.,* 2008 WL 1766652, *1 (E.D. Mi., Southern Div., Apr. 16, 2008) (AT&T Corp. sues under "breach of contract and quantum meruit/unjust enrichment). "To the extent that Plaintiff provided telecommunications services to Defendant over the years but cannot establish that these services were governed by written or oral agreements, it may seek to recover for these services under the quantum meruit/unjust enrichment theory advanced in its complaint. Moreover, it may continue to pursue this and its breach of contract theory in the alternative, so long as questions of fact remain as to whether all of the services provided by Plaintiff were covered under a contract. *Id.* at *2 (emphasis added).

- *AT&T Corp. v. MerchantWired L.L.C.*, 2006 WL 3076671, *1 (S.D. IN., Oct. 27, 2006) (AT&T Corp. sues under breach of contract and quantum meruit/unjust enrichment). MerchantWired claims that AT&T cannot pursue a claim for quantum meruit because AT&T is seeking to recover the same amounts for the same services it is attempting to recover under its breach of contract claim. AT&T contends that its claim for quantum is an alternative claim upon which relief could be granted in the event that the contracts relied upon by AT&T were found to be invalid. AT&T further contends that since its quantum meruit claim is an alternative claim, there is no threat of double recovery. *Id.* at *6 (emphasis added). * * * Even if an express contract exists, a plaintiff is allowed to plead a quantum meruit claim in the alternative in case the express contract is found to be invalid. *Id.* at *7.

- *Southwestern Bell Tel. Co. v. Fitch*, 643 F. Supp. 2d 902, 905 (2009) (AT&T Texas sues under "breach of contract, *quantum meruit*, and anticipatory breach.) "As held above, federal procedural rules permit AT & T Texas to plead in the alternative. Although a party 'generally cannot recover under *quantum meruit* when there is a valid contract covering the services or materials furnished,' the party 'may, however, seek alternative relief under both contract and quasi-contract theories.'" *Id.* at 911 (citations omitted).

There are many more examples.

C. THE CAPS' "SCHEME" RESULTED IN THEM INVOICING EXCESSIVE RATES

AT&T cannot assert that the CAP Local Switching rates are excessive because it has admitted that the CAP rates match Beehive's tariffed rates, and that it is not contesting the Beehive rates:

- 7/16/10 Stipulation # 45: Except for a 6-month period, All American's Local Switching rates accurately matched those in the Beehive tariff.
- 7/16/10 Stipulation # 35: "AT&T is not challenging Beehive's interstate access tariff rates . . . ", also cited in *Liability Order* at 3492 ¶ 33 n.145.
- Stipulation # 52: "AT&T has not disputed the number of minutes of traffic associated with the Joy telephone numbers. (Joint Statement of Stipulated Facts, dated July 16, 2010, stamped "Filed/Accepted July 20, 2010" ("7/16/10" Stipulation)).
- The Toof Report is based on the assumption that "All American's access minutes are properly attributable to Beehive . . . ." *Toof Report* at 5 ¶15.
- 7/16/10 Stipulation # 57: All numbers in the CAPs' bills reflect Beehive CLLI codes.

D. AT&T DOES NOT HAVE TO PAY FOR THE SERVICE IT TOOK

AT&T claims that it should get a full refund of all monies it paid the CAPs, and that the Commission should absolve it of any obligation to pay any amount for the services it took. Effectively, AT&T is asking the Commission to prescribe a rate of "zero" for the service. But prior to the *Liability Order*, AT&T's expert witness, Dr. David Toof, conducted a "cost study" of the CAP traffic, and concluded that the "cost of service" rate that should be charged for the CAP

traffic is 0.2496 cents.[22] Of course, the CAPs do not agree with Dr. Toof's conclusions, but nevertheless, AT&T's assertion now that a zero rate is appropriate, by definition, would set a below-cost rate for the CAP traffic. Due to its reliance on the Toof Report's calculation of actual costs, AT&T is estopped from now claiming that the rate for the service can be zero.

E. THE SERVICE AT ISSUE IS SOME "UNDEFINED, UNREGULATED" SERVICE

AT&T argues that, if it took any service from the CAPs (which it denies), it was not a regulated service, and further asserts that there is no need to define it.[23] However, AT&T's expert witness' evaluation is entirely based on the assumption that the CAP traffic is the Local Switching element of switched access service. On this basis, and the basis of the other admissions that follow, AT&T is estopped from asserting otherwise.

- The number of Local Switching MOUs billed by All American exactly matches the number of Tandem Transport Facility and Tandem Transport Termination MOUs billed by Beehive, and that AT&T paid to Beehive without complaint. *Toof Report*, Exhibit DIT-10.

- All of Dr. Toof's data came from NECA reports of switched access traffic. *Toof Report* at 5 ¶ 14.

- The Toof Report is based on the assumption that "All American's access minutes are properly attributable to Beehive . . . ." *Toof Report* at 5 ¶15.

- 7/16/10 Stipulation # 58: "AT&T has paid some tandem switching and transport charges to Beehive for traffic destined to the CLECs." (Thus admitting that the CAP traffic is the Local Switching "tail circuit" of Beehives' terminating switched access service.)

[22] Expert Report of David. I Toof, PhD ("*Toof Report*"), dated November 11, 2009, filed at AT&T Amended Complaint Ex. A, at 6.
[23] *E.g.,* Supplemental Complaint at 47 ¶ 98.

V. AT&T HAS FAILED TO MEET THE COMMISSION'S STANDARDS FOR DEMONSTRATING THAT DAMAGES ARE WARRANTED

The Commission has stated the requirements for making a case for damages succinctly: "We require that a complainant seeking damages must file in its complaint or supplemental complaint either a detailed computation of damages or a detailed explanation of why such a computation is not possible at the time of filing."[24] AT&T has not done so, and in fact presents no factual support for its damages claims at all. Instead, it states a series of legal conclusions, and relies on them exclusively to support its damages claims. This completely fails to meet the Commission's standards.

In seeking damages under the Commission's rules the complainant bears the burden of proof. This is a significant burden, as articulated by the Commission in the *New Valley* case[25], in which New Valley had been billed for intra-building circuits by Pacific Bell, before realizing that the service was not listed in the Pacific Bell tariff. New Valley sought a refund of all monies it paid Pacific Bell. The Commission rejected the New Valley damages claim, finding:

> A complainant in a section 208 proceeding has the burden of demonstrating that the challenged rate is unlawful and, if damages are sought, what a lawful rate would have been. Having established that Pacific Bell had violated section 203 by failing to tariff the intrabuilding circuits for which New Valley was charged, New Valley was still required to demonstrate that it was damaged by Pacific Bell's actions and in what amount. As discussed in more detail below, the Bureau properly determined that New Valley's showing falls far short in this regard.[26] * * * It is well-established that in a formal complaint proceeding pursuant to section 208 of the Act, the complainant has the burden of establishing: (1) a violation of the Act or Commission rules or orders; and (2) actual damages suffered as a consequence of such violation.[27]
>
> New Valley has not demonstrated that the charges it paid for intrabuilding circuits were not reasonably related to Pacific Bell's costs of providing the

[24] *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, ¶ 190 (1997).
[25] *New Valley Corp. v. Pacific Bell,* 15 FCC Rcd 5128 (2000).
[26] *Id.* at 5133 (emphasis added).
[27] *Id.* at 5134 ¶ 14, citing *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981) (emphasis added).

> intrabuilding circuits within the framework of our special access rules and policies in place at the time of the underlying complaint, and that other just and reasonable charges should have been applied.[28]

Similar details are provided in the Commission's earlier ComSat decision:[29]

> Thus, the court in *RCA Global Communications, Inc.* v. *Western Union Telegraph Company*, 521 F. Supp. 998 (S.D.N.Y. 1981) recognized that even though Western Union violated the Act by failing to file a tariff for its international communications service, RCA had to allege and prove damage flowing from a lack of a tariff before it could recover.[30] * * * It is also well established that in a complaint proceeding, the complainant has the burden of proving both *the fact and the amount* of damages with the same degree of certainty as would be required to sustain a recovery in a court of law. (citations omitted, emphasis in original).[31] * * * The fact that a complainant has shown that a common carrier has, by certain acts or omissions, subjected itself to criminal prosecution or corrective proceedings by the commission is not a basis for recovery of pecuniary damages without a showing of specific pecuniary injury.[32]

Not only has AT&T not made a case for damages, its pleadings demonstrate the opposite – that without compensation to the CAPs, AT&T will be unjustly enriched. The *Liability Order* finds that AT&T received "in excess of $11 million" worth of terminating switched access Local Switching service,[33] and AT&T's own Supplemental Complaint admits that it paid a total of $252,496.37 for it.[34] This raises the obvious question: if the CAPs' "scheme" resulted in inflated access charges – and there is no tested demonstration in the record of this proceeding, and no quantified finding by the Commission, that it did – is AT&T "damaged" if it never paid them? Not surprisingly, there is no precedent on point, presumably because, until AT&T filed its Supplemental Complaint, no party has had the temerity to make such a claim. AT&T makes no factual showing to support a claim for damages, and its claim merits summary dismissal.

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[28] *Id.* at 5137 ¶ 20. -

[29] *In the Matter of Communications Satellite Corporation for Authority to Construct a 'Standard B' Earth Station Antenna and Associated Facilities at Hickam Air Force Base*, 97 FCC2d 82 (1984).

[30] *Id.* at 90-91 (emphasis added).

[31] *Id.* at 91.

[32] *Id.*

[33] *Liability Order*, 28 FCC Rcd at 3477 ¶ 1.

[34] Supplemental Complaint at paragraphs 101, 103 and105.

VI. AT&T'S CLAIMED "DAMAGES" WOULD CONSTITUTE UNJUST ENRICHMENT

As discussed in the immediately preceding section, AT&T admits that it has paid the CAPs only a quarter million dollars for more than $11 million in services. The record also shows that AT&T's self-help refusals to pay drove all 3 CAPs out of business. This, without more, constitutes a prima facie case for unjust enrichment. The CAPs understand that the Commission is not empowered to grant, or even consider, their claims against AT&T, in its capacity as a non-carrier customer. Nevertheless, the prima facie showing of unjust enrichment provides additional basis for the Commission to dismiss AT&T's damages claims.

VII. AT&T'S CLAIMED "DAMAGES" WOULD CONSTITUTE AN UNCOMPENSATED TAKING, PROHIBITED BY THE 5TH AMENDMENT

In 2007, the Commission issued a Declaratory Ruling that responded to a rash of disputes between IXCs and LECs across the country. The ruling prohibited carriers from blocking calls as a means of obtaining leverage in rate disputes.[35] That ruling unquestionably served the public interest by maintaining the integrity of the national phone network, but it also imposed an obligation upon carriers to provide service to each other, while their ability to obtain compensation for such service was in doubt.

In 2010, in the middle of the nation-wide disputes over access stimulation, and during the pendency of the SDNY referral at the Commission, All American attempted to revise its tariff, in order to cure the asserted flaws that had become the center of AT&T's arguments against it. The Genachowski Administration took the literally unprecedented step of rejecting the proposed new tariff, and ordered All American to re-file its old tariff, thereby re-instating the tariff language

[35] *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call-Blocking by Carriers, Declaratory Ruling and Order,* 22 FCC Rcd 11629 (2007).

flaws that AT&T had been asserting.[36] Three years later, the *Liability Order* used the language of that re-filed tariff, made under protest, to invalidate the tariff retroactively. This recounting is not proffered to rehash old disputes with Commission procedures, but to demonstrate that the Commission took an active role in governing the provision of service between All American and the other CAPs and AT&T, during the five-year pendency of the SDNY Court's referrals.

Should the Commission grant AT&T the relief it seeks, by absolving it of any responsibility to compensate the CAPs for the service it took, such action would constitute a "regulatory taking" in violation of the 5th Amendment.[37] In order for a takings claim to be ripe, two elements must be met: (1) the administrative agency has reached a final, definitive position as to how it will apply the regulation at issue, and (2) the plaintiff has attempted to obtain just compensation through the procedures provided by the State.[38] Both preconditions will be met if the Commission grants AT&T the relief it seeks.

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[36] This incident is recounted in detail in the Petition for Reconsideration and Clarification of All American Telephone Co., e-Pinnacle and ChaseCom, seeking reconsideration of the *Liability Order*, filed in the above-captioned docketed proceeding, and dated April 24, 2013, at 18-20.

[37] *Arthur v. District of Columbia,* 857 A.2d 473, 491 (D.C. Ct. App. 2004) (discussing the distinction between a "physical taking" and a "regulatory taking").

[38] *US West Communications, inc. v. Minnesota Public Utilities Commission*, 55 F.Supp. 2d 968, 988 (D. Mn. 1999).

VIII. CONCLUSION

For the reasons stated in this Legal Analysis, AT&T's Supplemental Complaint for Damages should be dismissed without further proceedings.

Respectfully submitted,

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