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December 19, 2014

VIA ECFS, PROCEEDING No. 14-222

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *AT&T Services Inc. & AT&T Corp*. v. *Great Lakes Comnet, Inc. and Westphalia Telephone Company*, File No. EB-14-MD-013; Proceeding No. 14-222

Dear Ms. Dortch:

In the above-captioned matter, the Commission's Staff asked the parties to file with the Office of the Secretary copies of certain email correspondence between the parties and the Staff.

Pursuant to that instruction, enclosed are copies of two communications that I send to the Defendants and the Commission Staff. The first is an email setting out the parties' position on discovery and briefing. The second is an email attaching a decision in another proceeding involving the parties

Please contact me if you have questions.

Sincerely,

/s/ Michael J. Hunseder

Michael J. Hunseder

Enclosures

cc: Philip Macres, Counsel for Defendants, Lisa Griffin, FCC MDRD, A.J. DeLaurentis, FCC MDRD

Hunseder, Michael

From:	Hunseder, Michael
Sent:	Friday, December 12, 2014 5:13 PM
To:	Christopher Killion; Lisa Griffin; 'Anthony DeLaurentis'
Cc:	Zidlicky, Paul; Philip Macres; azoracki@kleinlawpllc.com
Subject:	RE: Formal Complaint, AT&T Services Inc. and AT&T Corp. v. Great Lakes Comnet, Inc. and Westphalia Tel. Co., File No. EB-14-MD-013

Counsel,

The Parties were unable to reach a settlement of this matter. The Parties were also unable to agree as to their respective Requests for Interrogatories or briefing. Set forth below are the Parties' respective positions on these issues (to be clear, each Party's position was drafted solely by the Party, although as counsel for AT&T I am sending this email on behalf of WTC and GLC, in order to avoid the need for multiple emails).

AT&T's Position.
In discussions with the Defendants, AT&T offered to withdraw its Re-filed Requests for Interrogatories (or some portion thereof), if the Defendants would agree to withdraw their Requests for Interrogatories (or some portion thereof). In lieu of that position, and in light of the stipulations in the Joint Statement, AT&T states that it is willing to withdraw Numbers 1, 5, and 6 of its Re-filed Requests for Interrogatories. As to Number 4 of its Re-Filed Request for Interrogatories, AT&T is willing to withdraw it in part, so that it reads as follows: "Identify (a) (and produce) any agreements that relate (directly or indirectly) to traffic that Defendants carry related to Peerless Communications, Inc. and (b) the routing of such traffic." AT&T stands by Numbers 2 and 3 of its Re-Filed Requests for Interrogatories. AT&T also stands by its written objections to the Defendants' Requests For Interrogatories and does not believe that any of the Requests for Interrogatories should be granted. AT&T further adds that, as set forth in the Commission Staff's e-mail dated December 2, 2014, the Parties' Joint Statement affects some of the Defendants' interrogatory requests and those requests should be withdrawn. AT&T also stands on its written response to the Defendants' Motion for Third Party Discovery.

As to briefing, if any discovery is ordered, additional briefing should be limited to addressing the discovery (and further limitations on pages for briefs may be appropriate, depending on the scope of any discovery). AT&T will, of course, submit briefing on any specific issues for which the Commission asks the parties to focus, as set forth in point 4 of the Commission Staff's email dated December 2, 2014. If there is no discovery, and if there is no request by the Commission for briefing on specific issues, then AT&T agrees with the Commission Staff's December 2 email that there is no need at this time for further general briefing on the issues. AT&T reserves its rights to request briefing in light of any subsequent developments, such as any relevant authorities issued since the pleadings closed.

GLC and WTC's Position.
GLC and WTC stand by their First Request for Interrogatories, which includes Interrogatories 1 through 7. While Commission Staff has inquired if GLC and WTC's Interrogatories 5 and 6 are still necessary given certain Joint Stipulations, presumably 109, 120, and 121, these Interrogatories remain necessary and appropriate because these Joint Stipulations do not provide the specific information sought. Moreover, if AT&T believes it requires clarification for any of GLC and WTC's Interrogatories, GLC and WTC will provide any requested clarifications; however, as written, GLC and WTC do not believe their Interrogatories need to be rephrased based on the Joint Stipulations. GLC and WTC also stand by their written objections to AT&T's Re-Filed Requests for Interrogatories and do not believe that any of these interrogatories should be granted.

In addition, GLC and WTC stand by their Motion for Third-Party Discovery ("Motion"). Relatedly, GLC and WTC made a filing earlier today that further demonstrates the Motion should be granted or that the Commission should waive GLC and WTC's obligation to obtain the associated certification from LECMI.

As to briefing, if any discovery is ordered, GLC and WTC agree that additional briefing should be limited to issues related to discovery and third-party discovery, including, but not limited to, the certifications. Like AT&T, GLC and WTC will, of course, submit briefing on any specific issues for which the Commission asks the parties to focus. Because the IBDC certification was received after the GLC and WTC's Answer was filed, GLC and WTC propose that, at a minimum, they be allowed to provide briefing on issues related to the certification. GLC and WTC reserve their rights to respond to any future request by AT&T for further briefing.

MICHAEL HUNSEDER
Partner

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From: Anthony DeLaurentis [mailto:Anthony.DeLaurentis@fcc.gov]
Sent: Tuesday, December 02, 2014 12:04 PM
To: Hunseder, Michael; Philip Macres; azoracki@kleinlawpllc.com; Dukin, Craig
Cc: Christopher Killion; Lisa Griffin; Anthony DeLaurentis
Subject: RE: Formal Complaint, AT&T Services Inc. and AT&T Corp. v. Great Lakes Comnet, Inc. and Westphalia Tel. Co., File No. EB-14-MD-013

Counsel,

Thank you for your Joint Statement. We are fine with you providing an update on December 5, 2014, regarding your continuing efforts to narrow the requested discovery, issues for potential briefing, and settlement efforts. In your further discussions please note the following:

1. Several requests for interrogatories appear to be impacted by your stipulations, and we would appreciate if you would let us know if any requests are not necessary or need to be rephrased. See, e.g., AT&T Requests for Interrogatories Numbers 1, 4, 5, 6, Defendants' Requests for Interrogatories Numbers 5, 6, and Stipulations 99, 102, 109, 120, 121.

2. To the extent that we grant any discovery requests, the discovery deadline will be December 29, 2014.

3. Based upon the submissions to date, we currently do not anticipate the need for a status conference. We are willing to meet with the parties, however, if you think that our assistance with settlement discussions would be helpful.

4. In light of the parties' extensive briefing in this proceeding thus far, we do not see the need for further general briefing on the issues. We are evaluating what specific issues, if any, we may ask the parties to focus on in any requested briefing, and will let you know after your update on December 5th.

Do not hesitate to contact if the need arises.

Thank you.

Anthony J. DeLaurentis
Special Counsel
FCC / Enforcement Bureau

Market Disputes Resolution Division
(202) 418-0198

From: Hunseder, Michael [mailto:mhunseder@sidley.com]
Sent: Monday, December 01, 2014 4:31 PM
To: Anthony DeLaurentis; Philip Macres; azoracki@kleinlawpllc.com; Dukin, Craig
Cc: Christopher Killion; Lisa Griffin
Subject: RE: Formal Complaint, AT&T Services Inc. and AT&T Corp. v. Great Lakes Comnet, Inc. and Westphalia Tel. Co., File No. EB-14-MD-013

Attached is the Parties' Joint Statement. An original and additional copies are being filed with the Office of the Secretary.

Thank you.

MICHAEL HUNSEDER
Partner

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From: Anthony DeLaurentis [mailto:Anthony.DeLaurentis@fcc.gov]
Sent: Thursday, October 23, 2014 2:15 PM
To: Hunseder, Michael; Philip Macres; azoracki@kleinlawpllc.com; Dukin, Craig
Cc: Christopher Killion; Lisa Griffin; Anthony DeLaurentis
Subject: Formal Complaint, AT&T Services Inc. and AT&T Corp. v. Great Lakes Comnet, Inc. and Westphalia Tel. Co., File No. EB-14-MD-013

Counsel,

See the attached Notice of Formal Complaint in the above-referenced case.

Thank you.

Anthony J. DeLaurentis
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Market Disputes Resolution Division
(202) 418-0198

Hunseder, Michael

From: Hunseder, Michael
Sent: Friday, December 12, 2014 5:26 PM
To: 'Christopher Killion'; 'Lisa Griffin'; 'Anthony DeLaurentis'
Cc: Zidlicky, Paul; 'Philip Macres'; 'azoracki@kleinlawpllc.com'
Subject: Courtesy Copy of ALJ Proposal for Decision; Formal Complaint, AT&T Services Inc. and AT&T Corp. v. Great Lakes Comnet, Inc. and Westphalia Tel. Co., File No. EB-14-MD-013
Attachments: U17619notpfd.121014.pdf

Attached is a courtesy copy of a Proposal for Decision entered by Administrative Law Judge Sonneborn of the Michigan Public Service Commission in Case No. U-17619, the case WTC and GLC brought against AT&T. The ALJ's recommendations are set forth on pp. 117-18 of the Proposal for Decision.

As indicated in the Notice of Proposed Decision, any exceptions to the Proposal for Decision need to be filed by December 19, 2014, and any replies to the exceptions need to be filed by December 29, 2014.

Please contact me if you have questions or need further information. Thank you.

MICHAEL HUNSEDER
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S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application and complaint of **WESTPHALIA TELEPHONE COMPANY,** and **GREAT LAKES COMNET, INC.,** against **AT&T CORP**.	)	Case No. U-17619

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on December 11, 2014.

Exceptions, if any, must be filed with the Michigan Public Service Commission, 7109 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before December 19, 2014, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before December 29, 2014. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Suzanne D. Sonneborn
Administrative Law Judge

December 11, 2014
Lansing, Michigan

STATE OF MICHIGAN

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application and complaint of **WESTPHALIA TELEPHONE COMPANY,** and **GREAT LAKES COMNET, INC.,** against **AT&T CORP**.	)	Case No. U-17619

PROPOSAL FOR DECISION

I.

PROCEDURAL HISTORY

On May 13, 2014, Westphalia Telephone Company (WTC) and Great Lakes Comnet, Inc. (GLC) (collectively, Complainants) filed a formal application and complaint against AT&T Corp. (AT&T). WTC is a Michigan corporation and a rural incumbent local exchange carrier (RLEC) that provides telecommunications exchange and exchange access services to businesses and residential customers in Michigan. GLC is a Michigan corporation, as well as a broadband network and switching infrastructure company and is licensed in Michigan as a facilities-based, competitive access provider (CAP). WTC is owned by Clinton County Telephone Company and in September 2011, Clinton County Telephone Company became a subsidiary of GLC. AT&T is an interexchange carrier (IXC) furnishing telecommunications services that enable customers from one local exchange area to call customers in other local exchange areas.[1] With their complaint, Complainants seek to enforce the terms of GLC's intrastate access tariff, M.P.S.C. No. 25(R) (GLC Tariff), as well as the Michigan Exchange Carriers, Inc. Tariff M.P.S.C. No. 25(U) (MECA Tariff), both of which are filed with the Commission,[2] by seeking to recover tariffed intrastate switched access charges that AT&T has refused to pay for intrastate calls routed by a third party carrier to GLC's tandem switch located in Westphalia, Michigan. Specifically, Complainants allege that AT&T had paid Complainants' invoices for switched access services without objection or complaint from 2002 until July 2012, when AT&T began wrongfully withholding a portion of the payments owed by claiming the charges were above contracted rates and the result of Complainants' scheme to inflate the originating and terminating access rates assessed against AT&T. Complainants further allege that AT&T's failure to pay the switched access charges owed under Complainants' tariffs constitutes a breach of tariff in violation of section 305(a) of the Michigan Telecommunications Act (MTA),[3] and that remedies are available to Complainants under sections 203, 204, and 205.[4] Complainants further allege, in the alternative, that AT&T's failure to pay the switched access charges constitutes a breach of implied-in-fact contract, unjust enrichment, breach of implied-in-law contract, and quantum meriut.[5] Complainants ask the Commission to issue an order finding that AT&T violated Complainants' respective

[1] AT&T is registered with the Commission as a facilities-based CAP, an IXC, and a competitive local exchange carrier (CLEC).
[2] The GLC tariff is indexed at: http://www.dleg.state.mi.us/mpsc/comm/clec/tarfindx.htm and the MECA tariff is indexed at: http://www.dleg.state.mi.us/mpsc/comm/clec/tarfindx.htm.
[3] MCL 484.2101 *et seq*.; various sections of the MTA are discussed throughout without further formal citation.
[4] See Complaint, paragraphs 7-10.
[5] At the outset, it is noted that while the complaint includes claims for breach of tariff, breach of implied-in-fact contract, and breach of implied-in-law contract, when read as a whole, the complaint indicates that these counts are in fact claims to recover amounts owed under Complainants' tariffs and will be so construed in this matter.

intrastate tariffs and breached their contract for regulated services under these tariffs. Complainants further request that the Commission issue an order requiring AT&T to: (i) immediately repay Complainants all amounts past due and owing for switched access services provided under Complainants' respective intrastate tariffs; (ii) cease and desist from failing to comply with and violating the intrastate tariffs; and (iii) pay Complainants for all switched access services that AT&T uses in accordance with Complainants respective intrastate tariffs on a going-forward basis.

In accordance with a May 22, 2014 memorandum from Administrative Law Judge Peter L. Plummer, a mediator was appointed for alternative dispute resolution pursuant to section 203a of the MTA. A mediator's recommended settlement was filed under seal in this docket on July 9, 2014, and the parties' confidential responses were filed under seal on July 14, 2014 (Complainants) and July 18, 2014 (AT&T).[6] By letter of July 21, 2014, the parties were advised that the prehearing conference would take place as previously scheduled on July 30, 2014. Prior to the prehearing conference, *pro hac vice* motions were granted for attorneys Philip J. Macre, Dennis Friedman, and Demetrios Metropoulos.

On July 24, 2014, AT&T filed an answer, affirmative defenses, and counterclaims. In AT&T's answer and affirmative defenses, AT&T acknowledges using the switched access services provided by Complainants but claims it has been harmed by Complainants' excessive and unlawful rates, warranting AT&T's payment of only those charges it deemed lawful and the withholding, beginning in approximately July

[6] This administrative law judge has reviewed neither the mediator's recommended settlement nor the parties' responses.

2012, of the portion of those charges that AT&T determined were in excess of the amount that Complainants were entitled to charge.

In AT&T's counterclaims, brought under sections 203, 204, 205, and 310(2) of the MTA, AT&T asserts that Complainants overcharged AT&T for switched access services by charging excessive switched access rates that violate Michigan law, artificially stimulating traffic by aggregating it with toll-free or '8YY' traffic from wireless carriers, and artificially inflating their mileage charges for carrying such traffic by inefficiently routing the traffic over 80 miles to Westphalia, Michigan. As a result, AT&T alleges that, between February 2010 and February 2013, AT&T has overpaid Complainants by $3,685,025.00 and, since February 2013, AT&T has only paid Westphalia that which Westphalia should have lawfully charged.[7] While asserting that the majority of Westphalia's overcharges are for interstate traffic,[8] AT&T requests that the Commission issue an order finding that Complainants' charges for intrastate switched access services violate Michigan law and requiring that Complainants repay AT&T for the excessive charges collected from AT&T and cease and desist from assessing and attempting to collect excessive charges for intrastate access.

In their answer to AT&T's counterclaims, Complainants reject the allegations that they assessed excessive, unlawful intrastate access charges or artificially inflated traffic or transport miles. In doing so, Complainants assert that the FCC's access stimulation rules do not apply to GLC or to the traffic at issue because (a) GLC is a CAP, not a CLEC, and the access stimulation rules only apply to CLECs; and (b) the FCC has rules that its access stimulation rules do not apply to 8YY traffic. Complainants further assert

[7] AT&T's counterclaims at 2.
[8] On April 4, 2014, AT&T filed an informal complaint against Complainants at the FCC, seeking recovery of previously-paid interstate overcharges.

that AT&T had direct or indirect control over the routing of the disputed traffic at issue because AT&T requested the routing via Access Service Requests (ASRs) and could have: (i) changed how 8YY traffic was routed; (ii) established direct end office trunks to Local Exchange Carriers of Michigan, Inc. (LECMI), the end office switch from which calls were routed over GLC's network or (iii) coordinated with its incumbent local exchange carrier (ILEC) affiliate, AT&T Michigan, to require that LECMI utilize AT&T Michigan as the access tandem provider.

On July 24, 2014, AT&T also filed a motion to consolidate, seeking to consolidate the instant case with Case No. U-17660.[9] Complainants filed a response on July 29, 2014. At the prehearing conference, this Administrative Law Judge (ALJ) heard argument on and ultimately denied AT&T's motion.[10] Also at the prehearing, a schedule was set that the parties agreed would permit this matter to be decided within the statutory timeframe.[11]

Pursuant to the established procedural schedule in this proceeding, Complainants and AT&T filed their response testimony with supporting exhibits and schedules on August 25, 2014, and both parties filed their rebuttal testimony on September 11, 2014. On September 22, 2014, hearings were held on Complainants' and AT&T's motions to strike testimony as well as on Complainants' motion to quash and motion in limine, with rulings issued as reflected in the record. Likewise, hearings

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[9] *In the matter of the Application and Complaint of Westphalia Telephone Company and Great Lakes Comnet, Inc against Level 3 Communications, LLC, Global Crossing Local Services, Inc. and Wiltel Communications, LLC*.

[10] As reflected in the transcript, I concluded that, where the second case had only just been filed on July 21, 2014, and remained subject to a mandatory alternative dispute resolution process, consolidation of the two cases was premature and, given the tight statutory timeframes governing the disputes, consolidation would not serve to promote the expeditious resolution of the issues but may instead unreasonably delay resolution.

[11] The parties also subsequently agreed to a protective order governing "confidential information."

were held on September 22, and 23, 2014, to receive all pre-filed testimony and allow for the cross-examination of all witnesses.

The evidentiary record is contained in 643 pages of transcribed testimony (including 214 pages of bound pre-filed testimony) and 84 exhibits.

In accordance with the established schedule, Complainants and AT&T filed their initial briefs on October 10, 2014, and Complainants, AT&T, and Staff filed reply briefs on October 24, 2014.

II.

STATEMENT REGARDING CONFIDENTIAL RECORDS

In accordance with a protective order that the parties entered into in this case pursuant to MCL 484.2210, the record contains a substantial amount of the evidence identified as confidential filings and testimony. While all of the evidence in the record was considered in reaching this Proposal for Decision (PFD), in recognition of the parties' protective order, this PFD will reference but not reveal the specifics of any evidence submitted as confidential. Nonetheless, this ALJ relies on that evidence as part of the basis for this decision and the confidential exhibits and testimony will be referred to and characterized as necessary.

III.

JURISDICTION

As noted above, Complainants' complaint against AT&T is brought under sections 203, 204, 205, and 305(a) of the Michigan Telecommunications Act, alleging violations of the terms and conditions of Complainants' intrastate tariffs. Specifically, Complainants assert that AT&T's failure to pay the intrastate switched access charges owed under Complainants' tariffs constitutes a breach of tariff in violation of section 305(a) of the MTA and that remedies are available to Complainants under sections 203, 204, and 205.[12]

Section 305(a) governs the obligations of providers originating or forwarding an intrastate call that is terminated on the network of another provider. Although Section 305(a) is not the source of substantive requirements at issue in this case, section 305(a)(2) does give the Commission jurisdiction to "resolve disputes regarding identification of traffic and disputes regarding compensation rights and obligations between providers who originate, forward, or terminate intrastate traffic."[13] Moreover, section 204 authorizes a telecommunications provider to file a complaint when it has been unable to resolve a dispute related to a regulated telecommunication service:

> If 2 or more telecommunication providers are unable to agree on a matter relating to a regulated telecommunication service or a matter prohibited by section 305, then either telecommunication provider may file with the commission an application for resolution of the matter. [14]

Here, there is no doubt that Complainants and AT&T are telecommunication providers, as defined in section 102(ff), and that Complainants and AT&T are unable to agree on a matter relating to a regulated telecommunication service, as contemplated by section 204. Nor is there any doubt that the "commission" charged with resolution under this section, and more broadly with administration of the Michigan Telecommunications Act,

[12] See Complaint, paragraphs 7-10.
[13] MCL 484.2305(a)(2).
[14] MCL 484.2204.

is the Michigan Public Service Commission. Section 203 provides the procedural mechanism for the Commission to address an application filed under section 204:

> Upon receipt of an application or complaint filed under this act, or on its own motion, the commission may conduct an investigation, hold hearings, and issue its findings and order under the contested hearings provisions of the administrative procedures act of 1969,1969 PA 306, MCL 24.201 to 24.328.[15]

Thus, the Commission clearly has jurisdiction to address Complainants' complaint as well as AT&T's counterclaims, brought under sections 203, 204, 205, and 310(2) of the MTA.

IV.

REGULATORY BACKGROUND

Switched access service charges are charges that long distance telephone companies (also called Interexchange Carriers or IXCs) pay to local service telephone companies (also called Local Exchange Carriers or LECs) for the use of their local network facilities to originate and terminate long distance (interexchange) calls. 3 Tr. 332. Switched access service charges are a form of intercarrier compensation. A helpful overview of intercarrier compensation was set forth in *Great Lakes Communication Corporation v AT&T Corp*, 2014 WL 2866474 (N.D. Iowa), wherein the court explained:

> Telephone calls often involve multiple service providers. When more than one provider is involved, arrangements must be made for those providers to obtain compensation for their respective roles. The Federal Communications Commission (FCC) oversees and governs this process with regard to telecommunications services that cross state lines. Services that occur entirely within a state are governed by that state's applicable regulatory agency which, in Iowa, is the Iowa Utilities Board (IUB).

[15] MCL 484.2203(1).

Switched access service charges are one form of intercarrier compensation. LECs, such as GLCC, offer switched access services that allow IXCs, such as AT & T, to originate and terminate long distance calls to end users. Thus, for example, if a caller in Iowa places a call to another state, the caller's local phone company (a LEC) accepts the call at a local switch that connects the caller to its network, carries the call over its local network and eventually hands off the call at a switch to the caller's selected long distance company (an IXC). The IXC then carries the call over its national network to a location near the called party's premises and hands it off at a switch to the called party's local telephone company (another LEC). That LEC then routes the call over its local network to a switch that is directly connected to the called party. The call is then connected to the called party.

In this example, the IXC would not be able to carry the long distance call (and, thus, bill its long distance customer) without the assistance of the originating and terminating LECs. For this reason, those LECs are permitted to assess originating and terminating access charges on the IXC. The charges are typically established by tariffs, filed by each LEC, or by express contracts between a LEC and an IXC. They may include separate elements such as “transport” (carrying calls over wires, or “trunks”) and “switching” (routing calls in various directions). Each element is ordinarily priced and billed pursuant to FCC rules and the rates and requirements contained in the applicable tariff or contract.

Under this system, the IXC has no control over the selection of the LEC at either end of the call. The IXC's long distance service customers make that choice. Once an IXC's customer chooses to take local service from a particular LEC, the IXC must rely on the customer's chosen LEC to originate calls to the long distance carriers' network. The same is true with respect to persons called by an IXC's customers. Those customers choose their own LECs and the IXCs must obtain terminating access services from those LECs when their customers make long distance calls to end users served by those LECs. If an IXC cannot obtain originating and terminating access services from certain LECs, then that IXC would not be able to serve customers who subscribe to the local telephone services of those LECs.

Switched access service arrangements are often more complicated than suggested by the example discussed above. For example, a small or rural LEC may not be connected to each IXC's network and, instead, must rely on an intermediate LEC to exchange call traffic with an IXC. That is, a long distance call directed to a LEC's customer may be handed off by the IXC to a *different* LEC, which then transports the call to the terminating LEC's system.[16]

As noted by the *Great Lakes* court, because interstate switched access services cross state lines, such services are regulated by the FCC. Whereas, intrastate switched access services that occur entirely within a state, ie. Michigan, are regulated by that state's public service commission – which, in this case, is the Michigan Public Service Commission.[17] Indeed, the MTA defines access service as "[a]ccess to a local exchange network for the purpose of enabling a provider to originate or terminate telecommunication services within the local exchange. Except for end-user common line services, access service does not include access service to a person who is not a provider."[18]

Carriers serving higher cost areas had traditionally been able to set their intercarrier compensation rates at levels substantially higher than providers serving lower cost areas. However, significant technological changes in the industry necessitated changes to the policies governing intercarrier compensation. In 2001, the FCC issued its *CLEC Access Reform Order,*[19] wherein the FCC adopted a new regulatory regime for interstate switched access services provided by CLECs to IXCs. Specifically, the FCC limited to a declining benchmark the amounts that CLECs may tariff for interstate access services, restricted the interstate access rates of competitive LECs entering new markets to the rates of the competing ILEC, and established a rural exemption permitting qualifying carriers to charge rates above the benchmark for their

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[16] *Great Lakes Communication Corporation v AT&T Corp* at 1-2.

[17] Indeed, the Communications Act explicitly exempts intrastate communication service from the FCC's reach. 47 U.S.C. § 152(b) (stating, in part, that 'nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.')

[18] MCL 484.2102(a).

[19] *In the Matter of Access Charge Reform: Reform of Access Charges of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001) ("*CLEC Access Reform Order*").

interstate access services. And, in May 2004, the FCC clarified certain aspects of the *CLEC Access Reform Order.*[20] Among them, the FCC found that the rate that a competitive LEC charges for access components when it is not serving the end-user but rather an "intermediate carrier" should be no higher than the rate charged by the competing ILEC for the same functions.[21] In so finding, the FCC noted that an IXC "may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power.[22] The FCC also described various small entities that may be affected by the rules adopted therein and expressly noted that "most providers of competitive local exchange service, competitive access providers, and 'other local exchange carriers' are small entities that may be affected by the rules and policies adopted herein."[23]

Finally, in November 2011, the FCC adopted a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a local exchange carrier.[24] Under this framework, all intercarrier compensation charges, including those charged for intrastate access, will be phased out. As an initial step in this process, the FCC capped the rates for most intercarrier compensation charges and laid out a transition path reducing certain intercarrier compensation rates from current rates to bill-and-keep rates. The FCC also adopted a recovery mechanism to provide

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[20] *In the Matter of Access Charge Reform: Reform of Access Charges of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd. 9108 (2004) ("*CLEC Access Reform Reconsideration Order*").
[21] *Id*. at 9116-9117.
[22] *Id*. at 9117.
[23] *Id*. at 9148.
[24] *In the Matter of Connect America Fund: A National Broadband Plan for our Future Establishing Just and Reasonable Rates for Local Exchange Carriers High-Cost Universal Support Developing a Unified Intercarrier Compensation Regime Federal-State*, 26 FCC Rcd. 17633 (2011).

limited recovery to providers for their reduced intercarrier compensation revenues. The FCC did not, however, preempt state intrastate access reform laws so long as such laws are not inconsistent with the FCC's reforms.

To be sure, in 2009, the Michigan Legislature sought to update and modernize intrastate access charges with the passage of Act 182 of 2009. Act 182 of 2009 amended section 310 of the MTA to require that all providers of toll access services set their intrastate switched toll access service rates at levels no higher than the corresponding interstate rates. Act 182 of 2009 established two separate transition paths toward this new requirement based upon whether a provider is considered eligible or non-eligible under the Act and created an access restructuring mechanism as a transition mechanism for eligible providers[25] to recover a portion of the lost revenues resulting from the reform.[26] The mechanism is supported by a mandatory monthly contribution by all providers of retail intrastate telecommunications services and all providers of commercial mobile service.[27] Also mandated by Act 182 of 2009, the Commission must submit an annual report to the Legislature describing the operation and administration of the Michigan Intrastate Switched Toll Access Restructuring Mechanism (ARM) and including, among other things, the total amount of money collected from contributing providers and the total amount of money disbursed to each eligible provider.[28] In the Commission's most recent report, the Commission

[25] An "eligible provider" is defined under section 310(23)(c) of the MTA as "an incumbent local exchange carrier as defined in section 251 of the telecommunications act of 1996, 47 USC 251, that as of January 1, 2009 had rates for intrastate switched toll access services higher than its rates for the same interstate switched toll access services, and that provides the services and functionalities identified by rules of the federal communications commission described at 47 CFR 54.101(a)."
[26] MCL 484.2310(2).
[27] A "contributing provider" is defined under section 310(23)b) of the MTA as "an entity required to pay into the restructuring mechanism."
[28] MCL 484.2310(10).

distinguished between those providers who met the definition of "eligible providers" (identifying them by name, including Complainant WTC) and those providers considered "non-eligible providers", a category comprised of both CLECs and ILECs.[29]

V.

TESTIMONY AND POSITIONS OF THE PARTIES

This section presents a summary of the direct, response, rebuttal, and cross-examination testimony presented by the parties.

A. Direct Testimony

1. Complainants

In support of their Complaint, Complainants offered direct testimony from three witnesses: Albert Eaton, John Summersett, and David Fox.

a. Albert Eaton

Albert Eaton is employed by GLC as its Chief Carrier Relations Officer and is responsible for relations between GLC and the various carriers who utilize its services. Mr. Eaton testified that, following the completion of a 1996 study on the feasibility of forming an independent network organization with its own fiber optic based transmission facilities, SS7 signaling system, and tandem switch through which to route traffic into and out of the end offices of its member RLECs and other LECs which wanted to reduce their dependency on the services provided only by the large ILECs, such a

[29] *Michigan Public Service Commission Report on the Michigan Intrastate Switched Toll Access Restructuring Mechanism* (November 26, 2013) at 9, 14, Figures 2 and 3.

network was formed by several RLECs in the lower peninsula.[30] This network was incorporated on August 5, 1996, as Michigan Independent Network, Inc. (MIN) and subsequently renamed on October 24, 1997, as Great Lakes Comnet, Inc.[31] Mr. Eaton explained that, thereafter, a network to connect the participating RLECs to a centralized tandem switch via a fiber optic network 'backbone' was designed along with a corresponding business plan.[32] This company became operational through the construction of the initial 'back-bone' fiber routes SS7 Network and the ultimate connectivity, at the request of all Michigan IXC's and the state's independent telephone companies comprising most of the shareholder owners of GLC common stock, of a tandem switch placed in Westphalia, which was dedicated to public service in 2001.[33]

According to Mr. Eaton, GLC is a broadband network and switching infrastructure company that enables modern and efficient deployment of a variety of voice, video, and data services.[34] Mr. Eaton further testified that GLC is not a CLEC, having registered with the Commission on April 2, 2003, as a facilities-based competitive access provider (CAP) in Michigan.[35] GLC owns and operates the Westphalia tandem switch, described by Mr. Eaton as a central switch to which more than 150 carriers are currently connected. Mr. Eaton explained that through the creation of their own independent network company, the participating RLECs endeavored to achieve a number of objectives, including but not limited to, route and network diversity. Likewise, with an independent, centralized tandem switch, IXCs and LECs are able to choose how to

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[30] 2 Tr. 65.
[31] *Id.*
[32] 2 Tr. 66.
[33] Id.
[34] Id.
[35] While GLC formerly held a CLEC license issued by the Commission on May 22, 1997, the Commission approved the surrender of GLC's CLEC license on May 28, 2003. 2 Tr. 66.

route their traffic, which competition offers providers an economically advantageous alternative to the large ILEC-owned tandems while also offering a 'single point of contact' for distribution, termination, and troubleshooting in a modern, cost-effective manner.[36] Mr. Eaton testified that the designation of Westphalia as the location and establishment of GLC's tandem switch followed a GLC-commissioned study by an independent engineering company and was based on an analysis of the following parameters: physical geographically centralized location(s) for connectivity via fiber constructed systems; (ii) use of existing assets and capabilities for maximum operating efficiencies; (iii) cost differentials under various location scenarios; (iv) proximity to all 'stakeholders' of interest; (v) technical capability and remaining service lives of existing routes; and (vi) location of historical end office switches.[37]

According to Mr. Eaton, GLC's network currently has 17 LECs in Michigan with their end-office switches 'homed' to the GLC tandem.[38] Mr. Eaton further testified that, pursuant to a September 2003 agreement with LECMI to connect LECMI with GLC's tandem, LECMI has routed traffic from its Southfield end office to GLC's tandem since October 23, 2003. Mr. Eaton sponsored the following Exhibits with his direct testimony:

- GLC Exhibit 19 - CV of Albert H. Eaton
- GLC Exhibit 20 - Public Notice WC Docket No. l 11-52 DA 11-696 (April 15, 2011)
- GLC Exhibit 21 - GLC Network Map
- GLC Exhibit 22 - E.B Docket No 116-19, Released June 19, 2006
- GLC Exhibit 23 - *A Homeland Security Issue: Tandem Diversity and the Public Switched Network*
- GLC Exhibit 24 - LECs Homed on GLC Tandem

[36] 2 Tr. 67-69.
[37] 2 Tr. 72-73.
[38] 2 Tr. 73; see also GLC Exhibit 24.

b. John Summersett

John Summersett, who is employed by GLC as its chief operating officer, characterized Complainants' underlying complaint as a dispute arising from AT&T's recent refusal to pay valid tariffed charges for switched access services for intrastate telephone calls routed by a third party provider to the GLC's tandem switch located in Westphalia, Michigan.[39] Mr. Summersett explained that as providers of switched access services, Complainants are required by Michigan law to file a schedule of the rates, services, and conditions of service, which Complainants have done by filing tariffs with the Commission – specifically, intrastate Access Tariff M.P.S.C. 25(R) (GLC Tariff) and the Michigan Exchange Carriers intrastate Access Tariff, M.P.S.C. 25 (U) (MECA Tariff).[40]

Mr. Summersett described the two categories of switched access charges disputed by AT&T as follows: (i) long distance traffic to and from end users served by Local Exchange Carriers of Michigan, Inc. (LECMI); and (ii) 8YY toll free traffic from wireless users, including customers of AT&T wireless, which is delivered through LECMI's end office switch and subsequently routed over GLC's network.[41] Mr. Summersett further illustrated the disputed traffic call pattern as follows:

> When a LECMI end user places a toll call to an AT&T end user, the call is transmitted from the LECMI end office switch over GLC and WTC transport facilities to the Great Lakes tandem switch. GLC's tandem switch routes the traffic to and from AT&T's /intraLATA interconnection trunks in accordance with translations in GLC's tandem switch. If the call is made to a customer of AT&T, AT&T's Access Customer Terminal Location (ACTL) as ordered by AT&T where AT&T then receives/delivers the incoming/outgoing call and completes it respectively. In this context, an AT&T "customer" means an end user of AT&T Corp, or one of its several

[39] 2 Tr. 102-103.
[40] 2 Tr. 104.
[41] 2 Tr. 105.

> affiliated entities. When a wireless customer makes an 800 toll-free call to an AT&T end user, the call is originated by the wireless service provider and delivered to LECMI's end office switch in Southfield, Michigan, where it enters the PSTN. The call is transmitted over the GLC and WTC transport facilities over local/intraLATA dedicated toll interconnection trunks to the GLC tandem switch. There, the toll-free dialed number is sent to the Service Management System (SMS) database for AT&T's routing instructions to be returned, then the traffic is routed by GLC's tandem switch to AT&T for termination per AT&T's routing instructions received. …[T]here are several rate elements with corresponding charges that apply for each function provided by the companies. In both scenarios, LECMI charges for tandem switched termination (TST) for routing the call from its End Office in Southfield to the GLC tandem switch in Westphalia. WTC charges for tandem switched facility ("TSF") by routing the call from its exchange boundary to the GLC tandem switch. Once the call reaches the GLC tandem system, GLC charges for TSF, TST, tandem switching ("TS"), and where applicable, 800 DB query to route the call to AT&T's interconnection trunks for completion.[42]

Mr. Summersett indicated that the GLC tandem switch has been used by LECMI for the routing of traffic originated by or terminated to LECMI for over 10 years, as reflected in the Local Exchange Routing Guide (LERG), a comprehensive national database of routing information that provides a common basis for service providers to directly report their numbering and routing information.[43] Mr. Summersett noted that by publishing its routes in the LERG, LECMI has given carriers, including AT&T, actual and constructive notice of their designated routes.[44] Mr. Summersett further testified that, by routing traffic to and from LECMI via the GLC tandem switch, AT&T complied with LECMI's routing information and instructions and consented to exchange traffic with LECMI pursuant to the rates and terms of GLC's Tariff and AT&T's Access Service Requests ("ASRs").[45]

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[42] 2 Tr. 105-106.
[43] 2 Tr. 106.
[44] 2 Tr. 107.
[45] *Id.*

According to Mr. Summersett, the ASR is the industry-recognized and accepted method of ordering access services as specified in applicable contracts and tariffs of telecom entities, including GLC and WTC, with the provision of the service controlled by the tariff provider.[46] The ASRs contain administrative data, key codes, billing information, contact information, and the type of service to be ordered, such as quantity, requisition type, desired due date.[47] Mr. Summersett referenced GLC Confidential Exhibit 4 as an example of an ASR submitted by AT&T in July 2004 indicating the routing of traffic from the LECMI end office to and from customers of AT&T.[48] Specifically, the end office code detail page of the ASR reflects its applicability to traffic coming from the LECMI end office in Southfield, Michigan, to the GLC tandem switch in Westphalia, Michigan. Mr. Summersett testified that, as the entity ordering the access service from GLC, AT&T voluntarily submitted the ASR to GLC.[49] Mr. Summersett further testified that because Complainants provided AT&T with intrastate switched access service in accordance with the ASRs submitted by AT&T and in strict compliance with the terms and conditions of the tariffs, AT&T was and remains obligated to pay the tariffed rates at the terms and conditions specified in the GLC Tariff for those services.[50]

Mr. Summersett sponsored the following Exhibits in support of his direct testimony:

- GLC Exhibit 1 - August 31, 2010 Letter from MPSC Staff
- GLC Exhibit 2 - Call Flow Diagram
- GLC Exhibit 3 - LERG Spreadsheet

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46 2 Tr. 109.
47 *Id.*
48 2 Tr. 110.
49 *Id.*
50 2 Tr. 112.

- GLC Confidential Exhibit 4 - ASR Submitted by AT&T to Great Lakes
- GLC Exhibit 5 - GLC Tariff, Section 2.1.4
- GLC Exhibit G - GLC Tariff, Section 6.1

c. **David Fox**

David Fox is employed as President of Westphalia Telephone Company and oversees WTC's preparation and issuance of Carrier Access Billing System (CABS) bills to IXCs, including maintaining bills rendered to AT&T and payments received from AT&T.[51] Mr. Fox testified that the tariffs applicable to the charges for services provided to AT&T are the GLC Tariff and the MECA Tariff, the latter of which mirrors the National Exchange Carriers Tariff, F.C.C. No. 5 (NECA Tariff), subject to certain exceptions.[52] Mr. Fox explained that AT&T voluntarily obtained intrastate switched access service from Complainants by submitting Access Service Requests (ASRs) and Complainants billed AT&T for such services using the CABS billing system.[53] In doing so, Complainant WTC acts as the "Bill Rendering Company" under a "Single Bill/Multiple Tariff" Meet Point Billing Arrangement set forth in section 2.4.7 of the GLC and MECA Tariffs, wherein the single bill/multiple tariff bill is prepared by the Bill Rendering Company but reflects all rates and charges for each connecting company's part of the service based on each company's access tariff.[54]

According to Mr. Fox, section 2 of the GLC and the MECA Tariffs governs both the Complainants' provision of service and billing AT&T for those services, as well as AT&T's obligation to pay the bills for services rendered. Mr. Fox testified that AT&T paid invoices rendered by Complainant WTC for switched access services without

[51] 2 Tr. 243, 246.
[52] 2 Tr. 246.
[53] 2 Tr. 247.
[54] 2 Tr. 248; see also section 2.4.7(B)(1)(a) of the MECA Tariff, a copy of which is contained in GLC Exhibit 9.

objection from approximately 2002 until July 2012, when AT&T began withholding payment on certain charges.[55] Complainants learned of AT&T's withholding of partial payment through correspondence from AT&T dated March 20, 2013, wherein AT&T claimed that the routing of traffic chosen by LECMI was "inefficient" and that WTC and LECMI were inflating the originating and terminating access rates assessed against AT&T, a practice that AT&T characterized as inconsistent with WTC's tariff and provisions of the Telecommunications Act.[56]

Mr. Fox indicated that AT&T's actions were contrary to the billing dispute procedures set forth in section 2.4.1(D)(1) of the MECA Tariff, the governing tariff for such billing disputes according to section 2.4.7(B) of the GLC and WTC Tariffs ("Should a billing dispute arise, the terms and conditions of the Bill Rendering Company will apply.")[57] Mr. Fox further testified that, instead of following these billing dispute procedures, AT&T sent Complainants additional correspondence dated June 6, 2013, again advising that, since AT&T's March 20, 2013 letter, it continued to withhold what AT&T considered to be "inappropriate" billings and would continue to do so.[58] AT&T also reiterated that the LECMI route to the GLC tandem was "inefficient" and the mileage charges were "unjust and unreasonable."[59] Thereafter, on a monthly basis, AT&T submitted to Complainants what AT&T has characterized as "dispute notifications" but which still, according to Mr. Fox, did not comport with the billing dispute procedures under Section 2.4.1(D)(1) of the MECA Tariff. *Id*. Accordingly, in response to AT&T's written claims, Mr. Fox testified that Complainants advised AT&T in

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55 2 Tr. 250.
56 2 Tr. 250; see also Confidential GLC Exhibit 11.
57 2 Tr. 251; see also GLC Exhibit 10.
58 2 Tr. 251-252; see also Confidential GLC Exhibit 12.
59 *Id.*

letters dated July 8, 2013, August 16, 2013, and September 12, 2013, that Complainants' intrastate switched access charges were assessed pursuant to applicable tariffs and that because AT&T's claims failed to detail the specific nature of AT&T's dispute or the basis on which AT&T calculated its "corrected rates" for partial payment, AT&T's claims of inappropriate billings were dismissed for lack of specificity.[60]

Finally, Mr. Fox testified that notwithstanding the underlying dispute as well as AT&T's informal complaint filed with the Federal Communications Commission (FCC) on April 4, 2014, against LECMI, GLC, and WTC alleging an "unlawful scheme to overcharge AT&T and other long distance carriers for switched access services," AT&T has continued to receive, and not attempted to cancel, switched access services from Complainants for which AT&T has not fully paid.[61] As a result, the total past amount due by AT&T for intrastate switched access services received from Complainants through August 31, 2014, is set forth in Confidential Revised GLC Exhibit 18.[62]

Mr. Fox sponsored the following Exhibits in support of his direct testimony:

- GLC Exhibit 7 - NECA Tariff 5, Section 2.1.4
- GLC Exhibit 8 - NECA Tariff 5, Section 2.4.1(C)(2)
- GLC Exhibit 9 - NECA Tariff 5, Section 2.4.7(B)(1)(a)
- GLC Exhibit 10 NECA Tariff 5, Section 2.4.1(D)
- GLC Confidential Exhibit 11 - March 20, 2013 letter from AT&T to WTC
- GLC Confidential Exhibit 12 - June 6, 2013 letter from AT&T to WTC
- GLC Confidential Exhibit 13 - July 8, 2013 letter from WTC to AT&T
- GLC Confidential Exhibit 14 - July 18, 2013 email from AT&T to WTC
- GLC Confidential Exhibit 15 - September 12, 2013 WTC response
- GLC Confidential Exhibit 16 - August 16, 2013 email from WTC to AT&T
- GLC Confidential Exhibit 17 - January 24, 2014 demand letter to AT&T

[60] 2 Tr. 253.
[61] 2 Tr. 254.
[62] Under cross-examination, Mr. Fox explained that Confidential Revised GLC Exhibit 18 reflected, in part, revisions required as a result of WTC determining that, during the time period July 1, 2012 through May 2013, WTC had erroneously billed AT&T using GLC's tariff rates for access service provided by WTC under WTC's tariff rates, which were not the same. 2 Tr. 309-310.

- GLC Confidential Revised Exhibit 18 - Spreadsheet showing total amount due

2. <u>AT&T</u>

In support of their counterclaims, AT&T provided the direct testimony of John W. Habiak.

a. <u>John W. Habiak</u>

Mr. Habiak is employed as a director of financial analysis for AT&T Corp., with responsibilities that include leading AT&T's investigation and resolution of disputes involving switched access charges billed to AT&T Corp, as well as the coordination of data collection and analysis, the review of switched access bills, and the support of policy and litigation efforts.[63] Mr. Habiak explained that switched access charges are the fees that a local exchange carrier (LEC) assesses upon wireline long distance providers when the LEC originates or terminates long distance calls made or received by the LEC's end users. The LEC owns the "loop" that connects those end users to the LEC's switch and the rest of the public switched telephone network and will typically assess switched access charges for "originating" and terminating" long-distance calls.[64] A LEC provides originating and terminating switched access service as follows:

<u>Originating</u>

> When an end user places an interexchange call (either an intrastate or interstate call) from a wireline phone, the call travels from the calling party's location over a loop provided by the LEC that serves that caller, to that LEC's local serving office (sometimes called an "end office" or "central office"). There, the LEC's local switch electronically routes the call along a wired path known as a transport trunk to the interexchange carrier's point of presence ("POP"). Depending on the relevant network architecture, the call may or may not go through an intermediate switch known as a

[63] 3 Tr. 330.
[64] 3 Tr. 332-333; see also AT&T Exhibit 3.

> "tandem" switch. At the POP, the LEC hands the call off to the interexchange carrier and the originating access service ends.
>
> Terminating
>
> The LEC at the receiving end of the call performs the same basic functions as the LEC at the originating end, only in reverse order. Instead of taking the call from the end user placing the call to the IXC's POP, the terminating LEC takes the call from the IXC's POP to the end user receiving the call.[65]

At both the originating and terminating ends, the LEC charges for various "rate elements" that correspond to the features and functions provided and the facilities used in carrying a particular call. At a high level, these rate elements include (i) switching at the end office, (ii) switching and multiplexing at a tandem office (if the call goes through a tandem), and (iii) transport between the end office and the IXC's POP. These rate elements are generally expressed as per-minute charges for each minute of the call's duration. Transport charges can also vary based on the length or "mileage" of transport facilities used for carrying the call.[66]

Mr. Habiak explained that AT&T does not decide which end users call its long-distance or 8YY customers, nor does it decide which calls its long-distance customers make. Instead, once a LEC delivers a call from a customer served by AT&T, AT&T has no choice but to accept and carry the call, and no choice but to hand that call off to the terminating LEC that serves the called party.[67] Mr. Habiak maintained that most of Complainants' originating switched access traffic comes from competitive local exchange carriers (CLECs) that serve dense urban or suburban areas and, before 2014, the vast majority of the CLEC traffic came from Local Exchange Carriers of

[65] 3 Tr. 333-334.
[66] 3 Tr. 334.
[67] 3 Tr. 335.

Michigan (LECMI), a non-rural CLEC in Southfield, Michigan; Complainant GLC transported the traffic 83 miles to Westphalia, and delivered it to AT&T in Grand Rapids. Also, most of Complainants' terminating switched access traffic is bound for LECMI. AT&T would deliver the traffic to GLC in Westphalia, and GLC would route the traffic 83 miles to Southfield, where GLC would hand the call off to LECMI.[68] AT&T disputes Complainants' charges for this traffic, characterizing Complainants' application of high rural rates to non-rural CLEC traffic as an unreasonable attempt to get around the rules and inflate access charges.[69] Specifically, Mr. Habiak testified that CLECs are subject to FCC rules that "cap" their switched access rates at the level of the incumbent LEC that is their primary competitor. For non-rural CLECs in Michigan, like LECMI, the incumbent LEC for comparison is AT&T Michigan. Thus, if LECMI originates a long-distance call in Southfield that is bound for AT&T, LECMI should charge its non-rural rate for originating the call (which has to be equal to or less than the corresponding AT&T Michigan rate) and deliver it to the closest logical tandem: the AT&T Michigan tandem in West Bloomfield (7 miles away from Southfield). Instead, Complainant GLC picks up the call in Southfield and charges its own high rates for carrying the call to AT&T.[70]

Mr. Habiak indicated that AT&T first learned that Complainants were charging high rural rates for non-rural traffic through sharp increases in the volume of access minutes that Complainants billed to AT&T.[71] Mr. Habiak pointed to AT&T Exhibit 4 to illustrate that Complainants' switched access billings for the month of September 2011

[68] 3 Tr. 336-337.
[69] 3 Tr. 337.
[70] 3 Tr. 337-338.
[71] 3 Tr. 338.

were over four times higher than the corresponding monthly billings for January 2010.[72]

Mr. Habiak further testified that Complainants have increased their access volume by handling aggregated wireless 8YY traffic and assessing originating switched access charges on 8YY providers.[73] Mr. Habiak explained that, unlike wireline LECs, wireless carriers cannot charge for switched access service themselves – however, in recent years, some wireless carriers have sent 8YY traffic to "traffic aggregators" who in turn send it to wireline LECs and other access providers that can and do charge for switched access services.[74] Such traffic aggregators may provide tandem switching and some transport, and then hand off the traffic to the carriers that actually provide 8YY service, like AT&T, and then charge the carriers for originating switched access services.[75] Based on his experience in the industry, Mr. Habiak stated that the access providers will share the access revenues with the wireless carriers whose end users actually originate the traffic (or otherwise compensate them), as an incentive for them to join the aggregation arrangement.[76]

Mr. Habiak analyzed Complainants' bills and determined that the 8YY traffic in dispute follows a complicated, circuitous path that includes these steps, also illustrated in AT&T Exhibit 5:

1. An end user who buys wireless service makes an 8YY call to a business served by AT&T Corp.
2. The end user's wireless carrier routes the call to a principal traffic aggregator, which in this case is InComm (or its affiliate, U.S South, Communications, Inc.). InComm is based in Atlanta, Georgia, and it

[72] 3 Tr. 338-339; see also AT&T Exhibit 4.
[73] 3 Tr. 339.
[74] *Id.*
[75] *Id.*
[76] *Id.*

provides prepaid product and transaction services. See http://www.incomm.com/ and http://www.us-south.net/.

3. Incomm routes the call to one or more intermediate carriers that, at GLC's direction, take the call to LECMI in Southfield.
4. LECMI receives the 8YY aggregated traffic in Southfield and hands it off to GLC there.
5. GLC then transports the call from Southfield to Westphalia (where its tandem switch is located), and charges AT&T Corp. for 83 miles of switched access transport service.
6. GLC hands the call off to WTC in the Westphalia exchange where GLC's tandem switch is located.
7. WTC carries the aggregated 8YY traffic from the exchange boundary of the Westphalia exchange to GLC's tandem switch. This distance is less than 1 mile.
8. GLC (or some related company) performs an 8YY database dip to identify the carrier providing the 8YY service on that particular call (*e.g.*, AT&T Corp.), and GLC's switch directs the call to that carrier.
9. For calls going to AT&T Corp. end users, AT&T Corp. accepts the call at the Westphalia tandem and transports the call to its "point of presence" in Grand Rapids over dedicated transport facilities leased from GLC between Westphalia and Grand Rapids.
10. In Grand Rapids, the call enters AT&T Corp.'s network and is transported to locations across the country for termination to the 8YY toll-free customer.[77]

According to Mr. Habiak, Complainants are charging AT&T for the following services, at the following rates, that are allegedly performed by the following carriers (database query charges not included):

WTC Tandem Switched Facility $ 0.000418 per mile (for 1 mile)
GLC Tandem Switched Facility $ 0.000418 per mile (for 82 miles)
GLC Tandem Switched Termination Transport $ 0.002171
GLC Tandem Switching $ 0.005476[78]

Mr. Habiak further noted that, until March 2014, Cricket Wireless was the main originating wireless carrier. In March, 2014, Cricket was acquired by AT&T's parent company, AT&T Inc. but, despite the drop in wireless 8YY traffic from Cricket through

[77] 3 Tr. 340-341; see also AT&T Exhibit 5.
[78] 3 Tr. 341.

Complainants, as depicted in AT&T Exhibit 4, Complainants continue to apply high, rural rates (and very large transport charges) to non-rural CLEC traffic.[79]

In March 2013, AT&T formally disputed and began to withhold a portion of Complainants' bills based on AT&T's assertion of improper charges for non-rural CLEC traffic, wireless 8YY traffic, and excessive mileage.[80] AT&T contends that while Complainants were issuing improper bills going back to February 2010 when Complainants' switched access volumes began to increase, AT&T nonetheless paid these bills between February 2010 and February 2013 without realizing that a substantial portion of those bills was improper.[81] Mr. Habiak testified that AT&T has since disputed GLC's intrastate switched access rates as being excessive and unreasonable because they exceed by a multiple of more than 30 times the rates charged by the incumbent LEC with which GLC competes: AT&T Michigan.[82]

Mr. Habiak further testified that Complainants' traffic volume is indicative of access stimulation where the volume of billed access minutes of use between AT&T and the LECMI end office switch in Southfield increased by 170 percent between May, 2011 (7.46 million MOUs) and May, 2012 (20.13 million MOUs); and it increased by 123 percent between June, 2011 (8.63452 million MOUs) and June, 2012 (19.20 million MOUs).[83] Mr. Habiak further testified that Complainants are charging for excessive transport mileage from the circuitous nature of their routing arrangement. Specifically, instead of receiving the calls at a point somewhere near an AT&T point of presence and then delivering them to AT&T somewhere close by, Complainant GLC picks up CLEC

[79] 3 Tr. 342; see also AT&T Exhibit 4.
[80] 3 Tr. 345; see also AT&T Exhibit 6.
[81] 3 Tr. 345.
[82] 3 Tr. 347.
[83] 3 Tr. 348; see also Exhibit B to AT&T Exhibit 5.

and wireless 8YY traffic from the LECMI switch in Southfield and transports that traffic over 83 miles to Westphalia, where Complainant GLC hands the calls to Complainant WTC, which transports them to GLC's tandem in Westphalia. Under this arrangement, Complainant GLC assesses transport charges based on 83 miles of transport service.[84]

Furthermore, according to Mr. Habiak, the CLEC and 8YY traffic have no particular connection to Complainants or rural Michigan. The traffic originated by the CLECs is originated in non-rural Michigan, and AT&T could easily pick up the traffic from AT&T Michigan's tandem switches in non-rural Michigan. The wireless 8YY traffic is even further afield, originated by end users of wireless carriers at locations all over the country.[85] AT&T has numerous POPs, many of which are located in areas served by LECs with access rates that are much lower than Complainants' rates, where it could pick up the wireless traffic and the transport mileage would be much shorter than 80 miles, and in many cases less than 1 mile.[86]

According to Mr. Habiak, Complainants' routing arrangement has not resulted in any overall increase in AT&T's 8YY traffic and, consequently, no increase in 8YY revenue – and the only effect has been to artificially drive up access costs.[87] The end users making the 8YY calls are simply trying to call the 8YY business customer, and would not be aware of the intermediate arrangements involving wireless carriers, aggregators and Complainants in between them and their desired destination.[88]

Mr. Habiak explained that AT&T Exhibit 9 illustrates that GLC's overall per-minute rates for originating switched access service are some 30 times the per-minute

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[84] 3 Tr. 349.
[85] 3 Tr. 349.
[86] 3 Tr. 350.
[87] 3 Tr. 350.
[88] *Id.*

rates that AT&T Michigan would charge for the same service.[89] And for the transport element, GLC's 83-mile route results in per-minute transport charges that are over 300 times the per-minute rate AT&T Michigan would charge for transport (based on the 7-mile distance between the LECMI switch in Southfield and the AT&T Michigan switch in West Bloomfield).[90]

In addition to asserting that Complainants cannot properly charge for 83 miles of transport due to the inefficient routing of the traffic to inflate Complainants' mileage charges, Mr. Habiak testified that, up until May 2013, WTC was indicating on its bills to AT&T that WTC was provided this transport service.[91] However, if this was the case, the charges were equally unlawful because WTC's tariff only permits WTC to collect transport charges for transport within its Local Access Transport Area (LATA) and the transport service disputed by AT&T runs between Southfield (in LATA 340) and Westphalia (in LATA 340).[92] And, while AT&T called attention to WTC's improper transport charges in early 2013 and WTC's bills beginning in May 2013 were changed to reflect that WTC was billing AT&T on GLC's behalf for transport charges, WTC offered no explanation for the prior improper billings.[93]

Based on Mr. Habiak's review of Complainants' access bills covering usage from February 2010 through January 2013, in comparison to the amounts Complainants should have charged (using AT&T Michigan's rates and transport mileage), Mr. Habiak

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[89] 3 Tr. 351; see also AT&T Exhibit 9.
[90] *Id.*
[91] 3 Tr. 351.
[92] Section 6.1 of the WTC Tariff states that "Switched Access Service provides for the ability to originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end user's premises *in the LATA where it is provided*."
[93] 3 Tr. 353.

determined that AT&T is entitled to a refund from Complainants for overbillings in the amount of $3,683,025, as calculated in AT&T Exhibit 10.[94]

Mr. Habiak sponsored the following Exhibits in support of his direct testimony:

- AT&T Exhibit 3 – Switched Access Call Flow Diagram
- AT&T Exhibit 4 – Increase in Complainants' Access Billing
- AT&T Exhibit 5 – 8YY Call Flow Diagram
- AT&T Exhibit 6 – March 2013 Dispute Letter
- AT&T Exhibit 7 – Informal FCC complaint filed by AT&T Corp.
- AT&T Exhibit 8 – Informal FCC complaint
- AT&T Exhibit 9 – Comparison of Per-Minute Switched Access Rates
- AT&T Exhibit 10 – Calculation of Refund Owed to AT&T Corp.

B. Response Testimony

1. Complainants

a. John Summersett

In response to the direct testimony of AT&T's witness, Mr. Habiak, Mr. Summersett acknowledged that the primary traffic handled by Complainants that is associated with the switched access services for which AT&T is withholding partial payment is wireless 8YY traffic, but he disagreed that Complainant GLC controls the routing of such traffic that it received from LECMI.[95] Instead, Mr. Summersett explained that Complainants received and delivered the traffic in accordance with the ASRs it received from AT&T.[96] Mr. Summersett further disputed that AT&T had no choice but to receive traffic from LECMI via GLC's tandem, pointing out that AT&T voluntarily submitted ASRs to Complainants, expressly requesting to exchange traffic with

[94] 3 Tr. 353.
[95] 2 Tr. 118.
[96] 2 Tr. 119.

Complainants' customers, such as LECMI, via the GLC tandem switch.[97] Mr. Summersett further testified that, like AT&T and its wireless and ILEC affiliates having the ability to control the routing of traffic at issue in this case, LECMI also controlled the routing of traffic to and from its end office in Southfield, Michigan.[98] Specifically, LECMI is the gatekeeper on how the traffic it received at its Southfield end office is routed from its end office to AT&T. Put another way, LECMI could have sent the traffic to AT&T's access tandem of AT&T's wireline affiliate, AT&T Michigan, with which it has a trunk group, but instead chose to send the traffic to GLC's tandem. [99]

Mr. Summersett also highlighted Mr. Habiak's testimony that AT&T's wireless affiliate, Cricket, had a financial incentive to send the wireless-originated 8YY toll-free traffic to InComm, a traffic aggregator, because Cricket was paid by InComm for the traffic.[100] Mr. Summersett also noted that Complainants have since learned of at least one intermediate carrier, IBDC, that routed some of the 8YY traffic at issue here to LECMI.[101]

Mr. Summersett also refuted Mr. Habiak's suggestion that Complainants have engaged in access arbitrage, instead asserting that the jurisdiction of the traffic, associated with the amount at issue in this case was determined by the percent interstate usage (PIU) factor that AT&T provided to Complainants.[102] Specifically, Mr. Summersett testified that when Complainants received AT&T's prescribed PIU, they subtracted the PIU from 100 and the resulting difference was the intrastate percentage

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[97] *Id*.
[98] 2 Tr. 123.
[99] *Id.*
[100] 2 Tr. 124.
[101] *Id.*
[102] 2 Tr. 125.

of traffic. Using this percentage, Complainants then determined the intrastate traffic based on AT&T's total traffic over this route, and billed the appropriate intrastate access rates for the intrastate access services that were provided in handling this traffic.[103]

Mr. Summersett further disagreed that Complainants rates are excessive and unreasonable because the rates exceed the rates charged by the ILEC with which Complainant GLC competes.[104] According to Mr. Summersett, because Complainant GLC is a competitive access provider (CAP), it is not subject to the FCC's regulations governing CLEC switched access services.[105] Moreover, Complainant GLC's switched access rates are equal to those rates set forth in the NECA Tariff No. 5, which rates are subject to the review and approval of the FCC.[106] And, because Complainant GLC does not terminate or originate switched access traffic to or from end users through its competitive tandem service, its rates should be higher than rural switched access rates or rural LECs that are subsidized – and yet, Complainant GLC's rates are equal to 'the rate[s] prescribed in the NECA access tariff, assuming the highest rate band.'[107]

Mr. Summersett also denied that Complainants artificially stimulated their traffic volumes by carrying 8YY traffic that did not originate from their end users – because Complainant GLC's arrangements did not result in any overall increase in AT&T's 8YY traffic and because Complainant GLC has no end users to generate such traffic.[108] Mr. Summersett also denied that Complainant GLC charged excessive mileage inasmuch as the traffic routed from the LECMI end office in Southfield to the GLC tandem switch

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[103] *Id.*
[104] 2 Tr. 130.
[105] *Id.*
[106] *Id.*
[107] 2 Tr. 132.
[108] 2 Tr. 133.

has been 83 miles since the inception of the route.[109] Mr. Summersett sponsored the following Exhibits through his response testimony:

- GLC Exhibit 25 – AT&T Discovery Response to GLC-AT&T 0029 P 28
- GLC Exhibit 26 – AT&T Discovery Response to GLC-AT&T 0029 P 29
- GLC Exhibit 27 – AT&T PIU Factors
- GLC Exhibit 28 – Table of Tandems
- GLC Exhibit 29 – AT&T 8YY Service Rates

b. <u>David Fox</u>

In response to the testimony of AT&T's witness, Mr. Habiak, Mr. Fox disagreed with Mr. Habiak's claim that Complainant WTC's charges before May 2013 were unlawful because WTC was billing for services that crossed Local Access Transport Area (LATA) boundaries, which WTC's tariff precludes.[110] Specifically, Mr. Fox explained that, due to a billing error, the CABs invoices for the time period in question inadvertently referenced Complainant WTC's operating company number (OCN) as providing the 82.17 miles of tandem transport services, when in fact it was Complainant GLC that was providing such services.[111] When AT&T alerted Complainants to the error, AT&T's invoices were corrected in May 2013 – and, while Complainants initially ascertained no changes in the total amount invoiced to AT&T, Complainants discovered in August 2014 that there were some differences between GLC's and WTC's rates, warranting application of the net difference in these variances in Complainants' next billing cycle invoices to AT&T.[112]

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[109] *Id.*
[110] 2 Tr. 274.
[111] *Id.*
[112] 2 Tr. 275.

2. AT&T

a. Jack Habiak

In response to the direct testimony of Mr. Summersett, Mr. Habiak testified that AT&T's core position is that GLC's switched access rates are unreasonable and unlawful under federal law, and by operation of MTA section 310(2), they are likewise unlawful under state law because the switched access rates do not conform to the pricing limits imposed by FCC Rule 61.26 and to the mileage restrictions imposed by the FCC's decision in *AT&T Corp. v. Alpine Commc'ns,* 27 FCC Rcd. 11513, recon. Denied, 27 FCC Rcd. 16606 (2012). Separate from the federal law issues, AT&T contends that Complainants' charges were also impermissibly high because: (i) GLC/WTC billed AT&T for 100% of the Southfield-Westphalia transport route at their excessive rates (which are 30 times higher than LECMI's rates), even though GLC/WTC actually provided only 56% of the transport; (ii) GLC/WTC billed AT&T for LECMI local switching on the 8YY traffic, even though it admits that LECMI did not perform any local switching functions; and (iii) most of the intrastate 8YY traffic for which GLC/WTC billed AT&T under their Michigan tariffs, was non- Michigan traffic that is not subject to those tariffs. Rather, it is traffic that is intrastate as to other states (e.g., traffic that originated and terminated within the state of Florida).[113]

Mr. Habiak further contended that AT&T's discovery revealed that the financial arrangements that applied to the 8YY traffic as it moved from Cricket to Complainant GLC reflected a deliberate and sophisticated plan to maximize the size of Complainants'

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[113] 3 Tr. 368-369.

switched access charges to AT&T.[114] These arrangements are depicted in AT&T Exhibit 15, a revised call flow diagram which, according to Mr. Habiak, shows the round-about route taken by traffic that originated with wireless customers and terminated to AT&T customers, and it shows the number of carriers that inserted themselves into this process in order that each carrier can extract a fee on the 8YY traffic.[115] The diagram also shows that this traffic route was arranged so that the downstream carrier with the highest switched access rates (GLC) paid the upstream carriers either directly or indirectly to send them traffic and GLC, as the last carrier in line, could charge the IXCs (including AT&T) the highest possible rates on each minute of this traffic.[116] Moreover, all or nearly all of the 8YY traffic is not Michigan traffic as it originated with wireless customers located outside of Michigan, and most of the calls terminated outside of Michigan.[117]

Mr. Habiak further maintained, in response to Complainants' assertion that AT&T's charges for its 8YY service should be high enough to bear the cost of Complainants' switched access charges, that such charges must be evaluated on their own merits to determine whether they are lawful.[118] And, because unreasonably high access rates are passed on to retail end users, that provides more reason, not less, to curb Complainants' practices.[119] Likewise, according to Mr. Habiak, given its pre-existing connections to Complainant GLC's tandem, AT&T could neither reject the 8YY traffic that Complainant GLC delivered nor re-route the traffic at issue based on AT&T's

[114] Mr. Habiak's testimony regarding the details of these financial arrangements is protected by the confidentiality agreement among the parties and may be found at 3 Tr. 370-373 and at AT&T Confidential Exhibits 11, 12, 13, and 14.
[115] 3 Tr. 370-373; see also AT&T Exhibit 15.
[116] 3 Tr. 372.
[117] *Id.*
[118] 3 Tr. 374.
[119] *Id.*

control of Cricket because AT&T did not acquire Cricket until March 2014, after which acquisition the flow of 8YY traffic from Cricket to U.S. South (and on to GLC) ceased.[120]

Mr. Habiak also rejected Mr. Summersett's assertion that AT&T consented to exchange traffic with LECMI based on the rates and terms of GLC's Tariff by routing to and from LECMI pursuant to AT&T's instructions in the Local Exchange Routing Guide (LERG). Mr. Habiak stated this reasoning was flawed in three ways: (i) the routing instructions came from LECMI, not AT&T; (ii) once LECMI published its routing instructions in the LERG, AT&T had no choice but to receive or deliver traffic in compliance with LECMI's instructions; and (iii) all LECs publish their routing instructions in the LERG and all access customers accept traffic from LECs, and take traffic to LECs, in compliance with the LERG instructions; if compliance with the LERG constituted "consent" to all access charges, no access customer could ever dispute any LEC's access charges.[121] AT&T also rejected Complainants' assertion that, by requesting switched access service from GLC, AT&T agreed to pay excessive, unreasonable rates that violate state and federal law.[122] AT&T further maintained that Complainants' reliance on an ASR that AT&T submitted in July 2004 to suggest that AT&T thereafter agreed to all rates that might be charged on all traffic delivered over the connection for the next decade is absurd.[123] Nor has AT&T waived its right to contest Complainants' rates on the excessive volumes of traffic they contrived to bring into Michigan because AT&T paid such amounts for several years, especially where AT&T did not discover many of the facts regarding Complainants' traffic arrangement until the

[120] 3 Tr. 375.
[121] 3 Tr. 376-377.
[122] 3 Tr. 378.
[123] *Id.*

discovery process in this case revealed them.[124]

Mr. Habiak further contended that, in addition to being charged excessive intrastate switched access rates, AT&T was overcharged in three other ways. First, Complainants charged AT&T for transport that was provided by LECMI. Specifically, in the bills that Complainants issued to AT&T, they represented that the 82 miles of transport of the 8YY calls (from Southfield to Westphalia) were being billed on behalf of GLC – and, indeed, Mr. Summersett testified that such calls were "transmitted over the GLC and WTC transport facilities…to the GLC tandem switch."[125] However, in reality, LECMI provided roughly 44% of the transport from Southfield to Westphalia. This was calculated as follows: The distance from LECMI's switch in Southfield to the point in Flint at which LECMI delivered the traffic to GLC is 44 miles (using V&H coordinates). The distance from that point in Flint to GLC's switch in Westphalia is 57 miles. Thus, the transport provided by LECMI constituted 44% of the whole.[126] As a result, from February 2010 through January 2013, Complainants billed AT&T for 100% of transport by Complainants at GLC's tariff rates, which are 30 times higher than LECMI's, when 44% of the transport should have been attributed to LECMI at LECMI's rates, resulting in AT&T's overpayment in the amount of $1,142,575, as set forth in AT&T Exhibit 18.[127] Likewise, from February 2013 through July 2014, during which time AT&T paid Complainants for 7 miles of transport at transport rates equal to those of AT&T Michigan, and withheld payment of the rest of Complainants' transport charges, if one were to recalculate the transport bills rendered by Complainants for this time period to

[124] 3 Tr. 379.
[125] 3 Tr. 390-391; see also 2 Tr. 105-106.
[126] 3 Tr. 392.
[127] 3 Tr. 393, 395; see also AT&T Exhibit 18.

reflect the amount of transport provided by LECMI, at LECMI's transport rates, Complainants's charges for this period were still overstated by roughly $1,200,000.[128]

In addition to the improper transport charges for which AT&T was billed, AT&T maintained that, from February 2012 through at least July 2013, Complainants improperly billed AT&T for LECMI local switching charges on aggregated 8YY traffic that was never provided by LECMI.[129] Specifically, the 8YY calls in issue were never processed through the LECMI local switch, but instead came to LECMI in IP (internet protocol) format and were handled by LECMI's VOIP switch.[130] These improper local switch charges resulted in AT&T's overpayment in the amount of $815,372.[131]

Thirdly, Mr. Habiak testified that the aggregated 8YY traffic at issue in this case originated with mobile phone users all over the country who make calls to companies all over the country that purchase AT&T1-800 service. The traffic is aggregated and makes its way to Complainant GLC in Michigan, which then delivers the calls to AT&T in Westphalia.[132] AT&T contends that because most of this traffic originates in one state (where the cell site serving the calling party is located) and terminates in another state (where the AT&T 1-800 customer is located), it is interstate traffic that is covered by Complainants' interstate switched access tariffs, not their Michigan tariffs. AT&T further contends that of the remaining intrastate traffic, virtually none of it is *Michigan* intrastate traffic because it is not traffic that originates and terminates in Michigan – but, rather, it is traffic that, for example, was made by a wireless customer in Florida to an AT&T 1-800 customer in Florida and is therefore Florida intrastate traffic or other state

[128] 3 Tr. 393-394.
[129] 3 Tr. 397.
[130] 3 Tr. 399.
[131] 3 Tr. 397; see also AT&T Exhibit 20.
[132] 3 Tr. 401.

intrastate traffic.[133] AT&T's analysis consisted of a review of the billing records that GLC provided to AT&T for March 2013 for all the aggregated 8YY traffic for which GLC billed AT&T – and, specifically, a review of the calling and the called numbers for the calls billed to AT&T Corp. to identify the states in which the traffic originated and terminated.[134] AT&T took a statistically significant sample of one day's calls and matched them to AT&T's records, and, from those AT&T records, determined the actual terminating location.[135] This was done because the call detail records from GLC/WTC contain the terminating 8YY number but not the terminating location of the party receiving the call.[136] AT&T maintains that this data and analysis is representative of the entire period of the dispute related to aggregated 8YY traffic from February, 2010 through January, 2014 and revealed that 1% of the total traffic for which AT&T was billed actually terminated to customers in Michigan.[137] Likewise, that analysis showed that, at most, only 1% of the total traffic for which AT&T was billed was actually originated by callers in Michigan.[138] Because of this, Mr. Habiak testified, Complainants' bills to AT&T, including both the bills that AT&T paid in their entirety and the bills that AT&T paid in part after it started withholding, covered all the interstate and intrastate traffic, not just the intra-Michigan traffic, and therefore were not authorized under Complainants' Michigan tariffs.[139]

Mr. Habiak pointed out that Complainant WTC's Tariff defines the switched access services as those that provide "the ability to originate calls from an end user's

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[133] 3 Tr. 402.
[134] 3 Tr. 403.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] 3 Tr. 402.

premises to a customer's designated premise *both of which premises are located in Michigan,* and to terminate calls from a customer's designated premises to an end user's premise, *both of which premises are located in Michigan."* [140] According to Mr. Habiak, since only 1% of the aggregated 8YY traffic is intrastate Michigan traffic, Complainants' claims should be reduced to cover only 1% of the traffic in issue.[141] In this regard, Mr. Habiak rejected Complainants' assertion that Complainants properly determined the jurisdiction of this traffic based not on the call detail records but on the PIU factors provided by AT&T to Complainants.[142] Mr. Habiak explained that AT&T's PIU factors were based on the normal, in-state, business-as-usual switched access traffic coming from GLC – not on the volumes of out-of-state, aggregated 8YY traffic that GLC brought to its system via traffic arrangements GLC entered into and the originating jurisdiction of which AT&T had no knowledge such that AT&T could adjust its PIU factors accordingly.[143] As such, GLC should not be able to collect these billed amounts by pointing to the PIU factors that its own conduct made inaccurate.[144]

Mr. Habiak sponsored the following Exhibits in support of his response testimony:

- AT&T Confidential Exhibit 11 – Traffic Termination Agreement
- AT&T Confidential Exhibit 12 – Carrier Services Agreement
- AT&T Confidential Exhibit 13 – GLC Supplemental Responses to AT&T First Set of Interrogatories Nos. 3, 4, 10, 13
- AT&T Confidential Exhibit 14 – Network Operating Agreement
- AT&T Exhibit 15 – 8YY Call Flow Diagram
- AT&T Confidential Exhibit 16 – John Summersett Deposition
- AT&T Confidential Exhibit 17 – GLC Payment Documents
- AT&T Exhibit 18 – Transportation Charges Billed to AT&T
- AT&T Exhibit 19 – NECA Tariff F.C.C. No. 4 Excerpt
- AT&T Exhibit 20 – GLC Overcharges for LECMI Local Switching

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[140] *Id.*; see also AT&T Exhibit 25 (Emphasis added).
[141] 3 Tr. 406.
[142] *Id.*
[143] *Id.*
[144] *Id.*

- AT&T Exhibit 21 – MECA Tariff M.P.S.C. No. 25(U), Section 6.1

C. Rebuttal Testimony

1. Complainants

Complainants provided the rebuttal testimony of Mr. Summersett and Mr. Fox.

a. John Summersett

While acknowledging for the first time in these proceedings that Complainant GLC was involved in two of the revenue share agreements or arrangements referenced by Mr. Habiak, Mr. Summersett indicated that such agreements were "common industry practice for carriers" and did not establish that GLC controlled the routing.[145] According to Mr. Summersett, notwithstanding such agreements, "GLC did not know for certain that other carriers with which GLC had agreements were actually going to send their traffic to GLC."[146] Mr. Summersett further explained that, on January 13, 2010, **CLEC 1**, on behalf of GLC, entered into a "Telecom Toll Free Termination 8YY Service Agreement" with **CARRIER 1**, whereby **CARRIER 1** would be compensated for switched access charges billed to and collected from certain IXCs for toll free 8YY traffic delivered to IXCs for termination.[147] Mr. Summersett also explained the background behind LECMI's establishment of Trunk Group 331 to route 8YY traffic[148] and described, as illustrated in GLC Exhibit 2, the manner in which 800 toll-free traffic from wireless

[145] 2 Tr. 146.
[146] *Id.*
[147] Mr. Summersett's testimony regarding the parties' relationship and terms of this agreement is marked Confidential and is contained at pages 148-149 of Volume 2 of the Confidential version of the hearing transcript.
[148] Mr. Summersett's testimony regarding the background of Trunk Groups 313 and 331 is marked Confidential and is contained at pages 150-153 of Volume 2 of the Confidential version of the hearing transcript.

users was delivered to the public switched telephone network at the LECMI end-office switch and then transmitted via Trunk Group 331 to the GLC access tandem, where it was then routed to the appropriate IXC for termination.[149] Mr. Summersett indicated that, pursuant to the terms of an agreement with LECMI, GLC handled LECMI's switched access traffic associated with Trunk Group 331 and compensated LECMI for utilizing GLC's access tandem for such traffic.[150] On March 20, 2014, GLC provided LECMI with written notice of cancellation of its agreement with LECMI effective six months after the issuance of the notice.[151]

In response to Mr. Habiak's assertion that AT&T only submitted ASRs to establish, maintain, or increase the capacity of its connection with a LEC and that the only ASR that Complainants have produced from AT&T is from 2004 (GLC Exhibit 3), well before the practices and charges disputed by AT&T, Mr. Summersett testified that Confidential GLC Exhibit 33 contains an ASR submitted by AT&T to GLC on February 17, 2014 and "is one of many ASRs GLC has received from AT&T since the initial ASR was submitted in 2004, requesting trunk group 209."[152]

In response to Mr. Habiak's assertion that GLC still maintains a revenue sharing agreement with LECMI, Mr. Summersett did not disagree that the Service Agreement between GLC and LECMI, the basis for the parties' shared revenue, remained in place but indicated that GLC stopped sharing revenue with LECMI under that agreement in 2012.[153]

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[149] 2 Tr. 153.
[150] 2 Tr. 154.
[151] *Id.*
[152] 2 Tr. 158-159.
[153] 2 Tr. 164.

In response to Mr. Habiak's assertion that GLC improperly charged AT&T at GLC's rates for the transport of 8YY calls from LECMI's Southfield end office switch to Westphalia when LECMI provided 44% of the transport from Southfield to Flint and then handed the traffic to GLC, Mr. Summersett did not deny that LECMI provided transport of 8YY calls from Southfield to Flint. Instead, Mr. Summersett challenged the accuracy of Mr. Habiak's "44%" determination.[154] And Mr. Summersett indicated that LECMI did not begin providing transport for such traffic until "[s]ometime after the Flint connection became operational" in 2009.[155] As well, Mr. Summersett indicated that LECMI, WTC, and GLC all agreed, pursuant to NECA Tariff No. 4, that GLC would bill for 99 percent of the transport and WLC would bill for 1 percent of the transport over the route in question, and LECMI would receive no percentage.[156] In support, Mr. Summersett cited AT&T Exhibit 21, which contains an excerpt from NECA Tariff 4, page 408, effective June 1, 2013, indicating the billing percentages for the route as follows: LECMI: 0%; Westphalia: 1%; GLC: 99%. Furthermore, Mr. Summersett disagreed with Mr. Habiak's position that the transport billing percentages should be based on the actual physical route used because the physical routing between two points is dependent on a variety of physical limitations, local ordinances, physical construction and placement of facilities such that the physical route always exceeds the mileage determined by a "direct' point to point calculation based on V&H coordinates of 2 locations.[157] Mr. Summersett also rejected Mr. Habiak's contention that the billing percentage agreed upon by all route participants was not placed in NECA Tariff No. 4 until June 2013. In doing so, Mr.

[154] 2 Tr. 166.
[155] 2 Tr. 167-168.
[156] *Id*.
[157] 2 Tr. 168-169.

Summersett referenced GLC Exhibit 38, which contains the relevant tariff page from July 1, 2010, with LECMI's (OCN 2550) billing percentage as 0%, GLC's (OCN 5164) as 99%, and WTC's (OCN 0735) as 1%.[158] Mr. Summersett further testified that LECMI's agreement since the inception of the route in question to a billing percentage of zero was consistent with standard industry practice, which practice requires carriers on the route to agree to the billing percentage.[159]

Mr. Summersett sponsored the following Exhibits in support of his rebuttal testimony:

- GLC Confidential Exhibit 30 – AT&T Response to GLC & WTC Request No. 0019
- GLC Confidential Exhibit 31 – AT&T Response to GLC & WTC Request No. 0021
- GLC Confidential Exhibit 32 - AT&T Response to GLC & WTC Request No. 0029
- GLC Confidential Exhibit 33 – AT&T February 17, 2014 ASR
- GLC Confidential Exhibit 34 – GLC Response to AT&T Request No. 034
- GLC Confidential Exhibit 35 – Excerpt, BIRRDS Database System Switching Entity Homing Arrangements
- GLC Confidential Exhibit 36 – MECABG Issue 10, September 2010
- GLC Confidential Exhibit 37 – NECA Tariff No. 4 Handbook, April 2009, Page 18
- GLC Confidential Exhibit 38 – NECA Tariff No. 4, Page 448, Effective July 1, 2010
- GLC Confidential Exhibit 39 – GLC Tariff M.P.S.C. No. 25(R), Section 2.4.7(B), Original Page 2-45, Effective March 26, 2002
- GLC Confidential Exhibit 40 – NECA Tariff F.C.C. No.5, Section 2.4.7(B), 7th Revised Page 2-45, Effective July 1, 2011
- GLC Confidential Exhibit 41 – NECA Handbook, Section 1.4.1, October 2013
- GLC Confidential Exhibit 42 – NECA Handbook, Section 6.A.1, October 2013
- GLC Confidential Exhibit 43 - NECA Handbook, Section 6.B.1, October 2013

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158 2 Tr. 170.
159 2 Tr. 171-172.

- GLC Confidential Exhibit 44 – NECA Tariff No. 4 Handbook, April 2009, Billing Percentage Information, Page 10
- GLC Confidential Exhibit 45 – Cricket Earnings June 2012 – June 2014
- GLC Confidential Exhibit 46 – September 4, 2014 Letter from AT&T Counsel to WTC/GLC Counsel
- GLC Confidential Exhibit 47 – IBDC Agreement September 8, 2014 Supplemental Response to ATT-003)

b. <u>David Fox</u>

In response to Mr. Habiak's assertion that AT&T was unlawfully billed by Complainants on LECMI's behalf for local switching services for 8YY traffic that were never provided by LECMI, Mr. Fox testified that, despite having been aware of this same concern by other IXCs and having credited these other IXCs beginning as early as May 2013 for improperly charging them local switching charges on 8YY traffic, Complainants only learned of AT&T's concern on April 11, 2014, through AT&T's informal complaint filed with the FCC against WTC, GLC, and LECMI.[160] Mr. Fox further testified that, while Complainants agree that AT&T is entitled to be credited for end office charges for local switching and common trunk port applied to 8YY traffic on invoices that WTC issued to AT&T on LECMI's behalf, Complainants have thus far failed to do so due to LECMI's objection – consequently, Complainants' monthly invoices continue to improperly bill AT&T in this regard.[161] Mr. Fox indicated that the amount Complainants intend to credit AT&T for local switching charges on 8YY traffic is that portion of the $815,372 "that is within the two year refund period specified in the applicable tariffs."[162]

Mr. Fox also refuted Mr. Habiak's analysis that, based on his review of the calling and the called numbers for the calls billed to AT&T, only 1 % of the total wireless traffic

[160] 2 Tr. 282-283.
[161] 2 Tr. 283-284; see also Confidential GLC Exhibits 48 and 49.
[162] 2 Tr. 285.

for which AT&T was billed terminated to customers in Michigan and little, if any, of the aggregated 8YY calls in dispute originated in Michigan and perhaps a negligible amount (less than 1%) terminated in Michigan. Specifically, Mr. Fox testified that, because the call detail records available to WTC and used in the billing process only reveal where the wireless number was issued to the customer and not the precise location of the customer when placing the wireless call, the states or origin and termination of such calls cannot be determined from the call detail records.[163] Mr. Fox indicated that Mr. Habiak's analysis is further flawed because the jurisdiction of the wireless traffic at issue in this case was determined by the percent intrastate usage (PIU) factors that AT&T provided to WTC in accordance with GLC's intrastate tariff.[164] According to Mr. Fox, when the call detail records do not indicate the jurisdiction of the wireless traffic, Section 2.3.11(C)(3) of GLC Tariff M.P.S.C. No. 25(R) requires IXCs such as AT&T to provide WTC with quarterly reports with the PIU factors to be applied by WTC for originating and terminating access minutes.[165] And, based on the PIU reports that AT&T provided Complainants, copies of which for the time period January 2011 to June 2014 are contained in GLC Exhibit 27, Complainants determined the percentage of AT&T's intrastate traffic over the route in question by subtracting AT&T's PIU from 100.[166] In response to Mr. Habiak's assertion that such PIU factors should not have been used as they were based on normal, in-state, business-as-usual switched access traffic coming from GLC and did not account for the originating jurisdiction from GLC's new traffic arrangements that "drastically changed the nature of its traffic by swamping its system

[163] 2 Tr. 286.
[164] 2 Tr. 288.
[165] *Id.,* see also GLC Exhibit 52.
[166] 2 Tr. 288.

with huge volumes of out-of-state traffic," Mr. Fox denied that GLC controlled what traffic was being sent over its network and insisted that GLC's charges were lawful.[167]

Mr. Fox sponsored the following Exhibits in support of his rebuttal testimony:

- Confidential GLC Exhibit 48 – May 12, 2014 Letter from LECMI to WTC
- Confidential GLC Exhibit 49 – May 22, 2014 Letter from WTC to LECMI
- GLC Exhibit 50 - NECA Tariff F.C.C. No. 5 at original page 2-18.1 through 2-21.1 MECA Tariff
- GLC Exhibit 51 – GLC Tariff F.C.C. No. 20 at Sec. 2.3.11(C)(3) (original page 2-23)
- GLC Exhibit 52 – GLC Tariff M.P.S.C. No. 25(R) at Sec. 2.311(C)(3) (original page 2-23)
- GLC Exhibit 53 – GLC Tariff M.P.S.C. No. 25(R) at 2-32
- GLC Exhibit 54 – MECA Tariff M.P.S.C. No. 25(R) (Sheet 1, Section 2.4.1)

2. <u>AT&T</u>

In his rebuttal testimony, Mr. Habiak rejected the assertion that AT&T was responsible for Complainants' routing of wireless 8YY traffic, pointing out that all of the wireless-originated 8YY traffic at issue here was originated by Cricket well before Cricket became an affiliate of AT&T in early 2014, at which point Cricket immediately ceased the flow of such traffic to GLC.[168] Mr. Habiak also rejected Mr. Summersett's claim that it was "unclear" why InComm routed the traffic the way it did where the evidence obtained in discovery has revealed that GLC was a party to access revenue sharing agreements that incentivized aggregators such as Incomm to stimulate traffic to GLC's network.[169] Mr. Habiak also rejected Mr. Summersett's claim that AT&T was not harmed because GLC did not artificially stimulate new 8YY traffic as missing the point – which is that the out-of-state 8YY traffic at issue was re-directed from switched access

[167] 2 Tr. 289.
[168] 3 Tr. 470.
[169] 3 Tr. 472.

providers with reasonable switched access rates to GLC, which then applied exorbitant rates.[170]

In response to Mr. Summersett's contention that GLC is a competitive access provider, not a CLEC, and therefore not subject to the FCC's caps on CLEC access rates, Mr. Habiak pointed out that, outside of this case – and, specifically, in GLC's federal tariff (Tariff FCC No. 20), GLC identifies itself as a rural CLEC.[171] Mr. Habiak further noted that GLC's extensive fiber network, as displayed on its website, reveals fiber rings in Chicago, Detroit, Lansing, Grand Rapids, and Ann Arbor – indicating that a substantial portion of GLC's service territories fall within urban, not rural, areas.[172] And, Mr. Habiak maintained, the traffic at issue in this case, that was either 8YY traffic originated by wireless end users across the country or long-distance traffic to and from LECMI, a CLEC in Southfield, cannot be considered rural traffic.[173] Mr. Habiak also rejected Mr. Summersett's assertion that GLC's rates are deemed just and reasonable because they are equal to the rates set forth in the NECA Tariff No. 5, pointing out that GLC is neither a member of NECA nor a concurring carrier in the NECA Tariff.[174] As such, GLC is not bound by the terms and conditions of that tariff and did not participate in the pooling and revenue allocation process that resulted in the FCC's determination that the tariff rates for NECA carriers are just and reasonable for them.[175] Finally, in further support of AT&T's requested refund from Complainants in the amount of $815.372 for local switching services never provided by LECMI, Mr. Habiak highlighted

[170] 3 Tr. 480.
[171] 3 Tr. 486; see also AT&T Exhibit 25.
[172] 3 Tr. 486; see also AT&T Exhibit 26.
[173] 3 Tr. 486.
[174] 3 Tr. 488.
[175] *Id*.

Complainants' recent discovery response wherein WTC acknowledged having advised LECMI in June 2013 that AT&T was entitled to a full credit for local switching charges.[176]

Mr. Habiak sponsored the following Exhibits through his rebuttal testimony:

- AT&T Confidential Exhibit 22 – GLC Discovery Response
- AT&T Confidential Exhibit 23 – Complete Copy of Agreement Between GLC and IBDC
- AT&T Exhibit 24 – Analysis of AT&T Michigan Transport Routing
- AT&T Exhibit 25 – Excerpt from GLC Federal Tariff, FCC Tariff No. 20
- AT&T Exhibit 26 – GLC Website Page
- AT&T Exhibit 27 – GLC Discovery Response On Local Switching Charges

D. Cross-examination

1. Complainants

a. Albert Eaton

Mr. Eaton testified that GLC owns at least one service company, Comlink, LLC, that is classified as a CLEC.[177]

b. John Summersett

Mr. Summersett conceded that the tariff page contained in Exhibit GLC-38 reflects billing percentages for a route ending with a carrier other than LECMI, GLC, and WTC.[178] This carrier is assigned an OCN of 092C, understood to be Westphalia Broadband Inc. (WBI), however the traffic at issue in this case wasn't handed off to AT&T by WBI.[179] On re-direct, Mr. Summersett acknowledged that the inclusion of the

[176] 3 Tr. 489; see also AT&T Exhibit 27.
[177] 2 Tr. 77.
[178] 2 Tr. 225-227.
[179] *Id.*

092C code in GLC's NECA 4 filing was erroneous inasmuch as it does not accurately represent the route in effect for the time period in question.[180] Consequently, Complainants filed a corrected tariff page effective June 1, 2013.[181] Mr. Summersett further conceded that, had AT&T reviewed this tariff page in August 2010 to ascertain the route from which AT&T was receiving 8YY traffic through the GLC tandem, the reference to a carrier with the OCN 092C "might raise a question to verify." [182]

c. David Fox

Mr. Fox described having made revisions to Confidential GLC Exhibit 18 to reflect both the outstanding balance of compensation owed by AT&T to Complainants through September 1, 2014, as well as to reflect corrections to the amount credited back to AT&T.[183] Specifically, after determining in May 2013 that WTC had improperly billed AT&T for transport services using WTC's carrier code (OCN) when WTC should have used GLC's carrier code, WTC subsequently determined that WTC had also improperly applied WTC's Tariff rates to the charges when WTC should have applied GLC's Tariff rates, requiring a correction to WTC's billings to AT&T beginning July 1, 2012.[184]

2. AT&T

a. John Habiak

On cross-examination, Mr. Habiak acknowledged that GLC did not control how InComm, IBDC, or LECMI sent its 8YY traffic but observed that GLC provided

[180] 2 Tr. 229.
[181] *Id.*
[182] 2 Tr. 233.
[183] 2 Tr. 307-308.
[184] 2 Tr. 309-310.

enormous incentives for how such traffic was ultimately routed to GLC by providing revenue share dollars.[185] Mr. Habiak also acknowledged that the analysis conducted by AT&T of a statistically significant sample of one day's calls to determine the jurisdiction of those calls included call detail records provided by GLC that did not indicate the location of the 800 number to which the calls terminated.[186] Because of this limitation, AT&T reviewed its own data to determine the location of AT&T's 8YY customer receiving the call.[187] And, given the mobile nature of this traffic, AT&T also reviewed its own datasets which reveal the station identifier for such calls, including the cell tower being used when the call was made, thus pinpointing approximately where that handset was when the call was made.[188]

b. <u>Dan Irvin</u>

Mr. Irvin is the chief executive officer of 123.NET, the successor corporation to LECMI, and was subpoenaed by AT&T to testify in this proceeding.[189] Mr. Irvin testified that in approximately 2003, LECMI established network connections with GLC for the exchange of 8YY traffic as well as end-user traffic routed to GLC.[190] To that end, LECMI entered into an agreement with LECMI in 2003 whereby GLC would provide the billing service on LECMI's behalf and LECMI would receive payment from GLC – specifically, GLC would retain 1% of the revenue for the elements billed under LECMI's OCN and would pay LECMI a percentage, the amount of which or the basis for it was

[185] 3 Tr. 617, 631.
[186] 3 Tr. 629.
[187] 3 Tr. 634.
[188] *Id.*
[189] 3 Tr. 521.
[190] 3 Tr. 524-525.

never clear to Mr. Irvin.[191] Mr. Irvin acknowledged however that he was not personally involved in the 2003 negotiations between LECMI and GLC.[192]

Mr. Irvin testified that LECMI became involved in aggregated 8YY traffic in approximately 2009 and indicated that the network components for the flow of this traffic through LECMI's VoIP switch included a session board controller, a VoIP switch and transport from LECMI's Southfield point of presence to Flint.[193] Mr. Irvin described having been told by GLC's Andre Cooks that the 8YY traffic would be good business and might not last long and that GLC wanted to maintain the traffic levels within certain guidelines.[194]

Mr. Irvin expressed certainty that, beginning in 2010, all 8YY traffic was transported over LECMI's fiber transport facility between Southfield and downtown Flint.[195] Mr. Irvin also acknowledged that while LECMI owns the system between Southfield and Flint, GLC billed carriers on LECMI's behalf for transport from Southfield to Flint using GLC's OCN, not LECMI's OCN.[196] And, as compensation, LECMI was not paid directly for the transport but received from GLC a percentage of the overall revenues that GLC collected as a result of using that transport.[197] Mr. Irvin further testified that he had no knowledge of any agreement between LECMI and GLC that 100% of the route between Southfield through Flint to Westphalia would be billed by GLC at GLC's tariff transport rates.[198] Mr. Irvin agreed that LECMI did not provide local

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[191] 3 Tr. 527.
[192] 3 Tr. 553.
[193] 3 Tr. 531-532.
[194] *Id.*
[195] 3 Tr. 532-533.
[196] 3 Tr. 574.
[197] 3 Tr. 580.
[198] 3 Tr. 533.

switching services to AT&T for the aggregated 8YY traffic at issue in this case.[199] Finally, Mr. Irvin was not aware whether LECMI negotiated or agreed to a billing percentage with GLC and WTC for the percentage of transport services to be billed by each company between Southfield and Wesphalia as contained in NECA Tariff 4.[200]

No testimony was offered by Staff in this proceeding.

VI.

TARIFF ISSUES

Complainants assert that the intrastate switched access rates in dispute in this case are governed by GLC's intrastate access services tariff, on file with the Commission since March 26, 2002, and the MECA intrastate access services tariff (of which WTC is a concurring carrier), which has been on file with the Commission since March 22, 1993, and which mirrors the rates, terms, and conditions of the National Exchange Carriers Association Tariff F.C.C. No. 5 (NECA Tariff), subject to certain exceptions.[201] Complainants further assert that they have for years provided AT&T with intrastate switched access services that AT&T ordered and that were provided by Complainants at the rates, terms, and conditions specified in their lawful intrastate tariffs but that, since July 2012, AT&T has unlawfully withheld partial payment of these tariffed switched access charges without justification and without following the proper dispute procedures in violation of these tariffs.[202]

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[199] 3 Tr. 545.
[200] 3 Tr. 584-585.
[201] Complaint, ¶¶ 47, 48.
[202] Complainants' brief at 4-8.

In response, AT&T contends that AT&T has properly withheld payment of a portion of Complainants' charges for switched access services because Complainants' tariff rates do not comply with section 310 of the Act. Specifically, AT&T asserts that because Complainant GLC is considered a competitive local exchange carrier (CLEC) as a matter of federal law and because Complainant GLC has engaged in access stimulation, Complainant GLC's intrastate switched access rates exceed the rates allowed by federal law for CLECs providing the same interstate services and exceed the rates allowed by federal law for carriers that engage in access stimulation.[203] AT&T further contends that Complainants have improperly billed AT&T under Complainants' tariffs for transport services, transport mileage, and end office local switching services, and intrastate 8YY traffic.[204]

Section VI.A. will therefore first evaluate whether the unpaid charges that Complainants seek to collect from AT&T under Complainants' tariffed intrastate switched access rates are in compliance with section 310 of the Act by evaluating whether: (i) Complainant GLC is a CLEC as a matter of federal law such that Complainant GLC's intrastate switched access rates must be benchmarked to those same interstate rates allowed for CLECs; and (ii) Complainant GLC engaged in unlawful access stimulation such that Complainant GLC's intrastate switched access rates must be benchmarked to those of the price cap LEC with the lowest interstate switched access rates in the state. Section VI.B. will then evaluate whether Complainants improperly billed AT&T under Complainants' tariffs for transport services, transport mileage, and end office local switching services, and intrastate 8YY traffic.

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[203] AT&T's brief at 15-21.
[204] *Id.* at 25-33.

A. Whether Complainants' tariff rates for intrastate switched access services comply with section 310 of the Act.

1. Whether Complainant GLC is a competitive local exchange carrier and therefore required by section 310 of the Act to have intrastate switched access rates that do not exceed the rates allowed by federal law for the same interstate services.

a. AT&T's Position

AT&T explained that the FCC established the CLEC cap in 2001 in recognition that "[c]ompetitive entrants into the exchange access market" had "been largely free" of the regulations to which incumbent LECs have been subjected and, as a result, CLEC access rates were on average "above 4 cents per minute," an amount "well above the rates that ILECs charge for similar service."[205] The FCC therefore ruled that CLECs' tariffed interstate access rates in any given area had to be capped at the interstate rates of the competing incumbent LEC in that area.[206] AT&T contends that the FCC subsequently addressed the circumstance in which an access provider "is not serving the end-user" but instead provides only an intermediate part of the link between the end user and the IXC – in this context, the intermediate CLEC's charge for the partial functions it provides must "be no higher than the rate charged by the competing incumbent LEC for the same functions."[207] In so holding, the FCC maintained that "the rate 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

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[205] AT&T's brief at 16-17, citing *CLEC Access Reform Order*, ¶¶ 8, 22.
[206] *CLEC Access Reform Order*, ¶ 52.
[207] AT&T's brief at 18, citing *In re Access Charge Reform & Reform of Access charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd. 9108 (*CLEC Access Reform Clarification Order*"), ¶17.

same functions."[208] This additional restriction on intermediate access providers was necessary, AT&T asserts, because, the FCC found that "an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier."[209]

AT&T further argues that GLC meets the FCC's definition of a "local exchange carrier" because GLC is "engaged in the provision of …exchange access" and GLC meets the FCC's definition of a "CLEC" because it "provides some…of the interstate exchange access services used to send traffic to or from an end user."[210] As such, GLC's tariffed rates are subject to the FCC's cap and "may not exceed the rate charged by the competing ILEC for the same access services." [211] Here, AT&T contends, GLC's per-minute rates for originating switched access service are "some 30 times" the per-minute rates that Michigan Bell, the competing incumbent LEC, charges for the same service.[212]

AT&T further argues that GLC's attempt to seek an exemption from the FCC's rules based on its Michigan designation as a CAP leads to the very result rejected by the FCC (whereby multiple competitive LECs are permitted to charge the full benchmark rate when they only provide part of the interstate switched access services used in connecting an end-user to an IXC) and makes no sense because GLC is then given free rein to charge many times more than a carrier that provides all of the transport on that call.[213]

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[208] *Id.* at 22, citing *CLEC Access Reform Clarification Order*, ¶¶10-17.
[209] *Id.*
[210] AT&T's brief at 18, citing 47 U.S.C. §153(32) and 47 C.F.R. §61.26(a)(1).
[211] *Id*., citing 47 C.F.R. §61.26(f).
[212] *Id*., citing 3 Tr. 351, lines 499-500; AT&T Exhibit 9.
[213] *Id.* at 23-24, citing *CLEC Access Reform Clarification*, ¶14.

AT&T also points out that GLC has admitted in its federal tariff, which is the source of the rates it seeks to enforce here for intrastate traffic, that GLC is "a rural CLEC under Section 61.26(a)(6)" of the FCC's Rules.[214]

Finally, AT&T argues that GLC is not a "rural" CLEC because a significant portion of GLC's service territory falls within non-rural areas and because the LECMI traffic at issue here originates from or terminates to end users served by LECMI, which operates in the Detroit metropolitan area and has a switch in non-rural Southfield.[215]

b. <u>Complainants' Position</u>

Complainants assert that GLC is only registered to operate as a competitive access provider (CAP) in Michigan for the provision of competitive tandem services to other carriers.[216] Complainants further assert that GLC is not bound by the aforementioned FCC access service reform, wherein the FCC has "explicitly noted that the reason for promulgating the CLEC benchmark rule was its finding that CLEC switched access could be characterized as a 'bottleneck service' – i.e., service which AT&T had no choice but to use."[217] Complainants further assert that the FCC has also recognized that the constraints placed on CLECs under 47 U.S.C. §61.26 are not meant to apply to CAPs like GLC that do not own the end office switch through which the traffic originates or terminates.[218]

Alternatively, Complainants assert that if GLC is indeed considered a CLEC, GLC qualifies for the exemption provided for a "rural CLEC" under 47 C.F.R.

[214] AT&T's brief at 24, citing AT&T Exhibit 25.
[215] AT&T's brief at 25, citing 3 Tr. 486.
[216] Complainants' brief at 16-19.
[217] Complainants' brief at 18, citing *Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 30 (2001) ("*CLEC Access Reform Order*").
[218] *In the Matter of Connect America Fund*, FCC 11-161, WC Docket No. 10-90 (November 18, 2011), 26 FCC Rcd 17663, ¶ 1306.

§61.26(a)(6) because GLC does not "serve (i.e., terminate traffic to or originate traffic from) any end users."[219] As such, Complainants contend that GLC is authorized by 47 C.F.R. §61.26(e) to "assess the rate prescribed in the NECA access tariff assuming the highest rate band," which GLC contends it charges.[220]

c. <u>Staff's Position</u>

Staff agrees with Complainants' characterization of GLC as a CAP and not a CLEC and notes that GLC is only registered to operate as a CAP in Michigan.[221] Staff further maintains that, even if GLC were to be considered a CLEC under FCC rules, it would qualify for the rural CLEC exemption under those same rules where GLC does not terminate or originate switched access service from any end users.[222]

d. <u>Analysis</u>

At the outset, it is important to note that the CLEC and rural CLEC exemption provisions referred to by Complainants and AT&T relate to interstate access charges and involve federal telecommunications policy, which is not set by the Commission. However, key to resolving the disputes between the parties in this case is a determination of whether Complainant GLC's intrastate switched access rates comply with section 310 of the Act, which provides in relevant part:

> (2) <u>A provider of toll access services shall set the rates for intrastate switched toll access services at rates that do not exceed the rates allowed for the same interstate services by the federal government and shall use the access rate elements for intrastate switched toll access services that are in effect for that provider and are allowed for the same interstate services by the federal government</u>. Eligible providers shall comply with this subsection as of the date established for the commencement of the operation of the restructuring mechanism under subsection (9). Providers

[219] Complainants' brief at 20-21, citing 47 C.F.R. §61.26(a)(6).
[220] *Id.*
[221] Staff's reply brief at 3-4.
[222] *Id*. at 5.

> other than eligible providers shall not charge intrastate toll access service rates in excess of those rates in effect as of July 1, 2009 and shall reduce the differential, if any, between intrastate and interstate switched toll access service rates in effect as of July 1, 2009 in no more than 5 steps of at least 20% each of the differential on the following dates: January 1, 2011; January 1, 2012; January 1, 2013; January 1, 2014; and January 1, 2015. Providers may agree to a rate that is less than the rate allowed by the federal government.[223]

As expressly contemplated by the language of section 310(2), a determination of whether Complainant GLC's intrastate switched access rates comply with section 310 of the Act necessarily requires a determination of whether GLC's interstate access rates are limited by federal law, which analysis includes consideration of Complainant GLC's federal carrier status. Moreover, while the MTA does not define a "competitive local exchange carrier", it expressly adopts its federal counterpart's definition of an "incumbent local exchange carrier" in defining an "eligible provider." [224]

Under federal law, for purposes of tariffing of competitive interstate switched exchange access services, a "CLEC" is defined as "a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. 251(h).[225] A "local exchange carrier" is further defined as "any person that is engaged in the provision of telephone exchange service or exchange access."[226]

Here, the evidence in the record supports the conclusion that Complainant GLC is a local exchange carrier inasmuch as it owns and operates a tandem switch and

[223] MCL 484.2310(2). (Emphasis added).
[224] MCL 484.2310(23)(c).
[225] 47 C.F.R. §61.26(a)(1).
[226] 47 U.S.C. §153(26).

provides exchange switched access services to more than 150 carriers.[227] And, the evidence in this case further supports the conclusion that Complainant GLC "provides some …of the interstate exchange access services used to send traffic to and from an end user" and therefore substantively meets the definition of a CLEC set forth in 47 C.F.R. §61.26(a)(1).[228] Notably, Complainants have not denied that the access services provided by GLC substantively fall within this definition. Instead, Complainants rely heavily on Complainant GLC's registration with the Commission as a "competitive access provider," a label defined neither in the MTA nor its federal counterpart, without acknowledging that Complainant GLC's status under state law is relevant primarily to a determination whether GLC needs a license from the state to provide basic local exchange service,[229] rather than what federal law requires.

The determination that Complainant GLC substantively meets the federal definition of a CLEC is also not inconsistent with the August 31, 2010 determination by the Commission's Staff that Complainant GLC is a facilities-based access provider, which effectively established that Complainant GLC is a provider of "access service," defined under the MTA as "access to a local exchange network for the purpose of enabling a provider to originate or terminate telecommunication services within the local exchange."[230] This determination is also supported by GLC's Michigan tariff, which defines the term "access tandem" as "a Telephone Company switching system that

[227] 2 Tr. 67-69.
[228] 2 Tr. 72-74; 2 Tr. 105-106.
[229] Section 301(1) of the Act provides that "[a] telecommunications provider shall not provide or resell basic local exchange service in this state, without a license issued from the commission under this act."
[230] GLC Exhibit 1; MCL 484.2102(a).

provides a concentration and distribution function for originating or terminating traffic between end offices and a customer designated premises."[231]

And, while Complainants maintain that the FCC's access reform does not apply to GLC's provision of competitive tandem services to other carriers, which services Complainants maintain are not the "bottleneck services" that the FCC intended to address, this argument must fail where the FCC has expressly extended such reform to intermediate carriers, holding in relevant part:

> [T]he 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. We conclude that regulation of these rates is necessary for all the reasons that we identified in the *CLEC Access Reform Order*. Specifically, … an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power.[232]

In this case, the evidence shows that, as with the above scenario, AT&T does not decide which end users call its long-distance or 8YY customers, nor does it decide which calls its long-distance customers make.[233] Instead, AT&T has no choice but to accept the traffic from the intermediate carrier (Complainant GLC) chosen by the originating or terminating carrier (LECMI) – and it is this absence of a choice over which the FCC deemed further rate regulation of intermediate carriers such as Complainant GLC necessary.[234] Moreover, Complainants' insistence that LECMI has routed traffic from its Southfield end office to GLC's tandem since approximately October 23, 2003, as a result of LECMI's request and LECMI's establishment of the route is not supported

[231] GLC Michigan Tariff, Section 2.6.
[232] In the Matter of Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 19 FCC Rcd. 9108 (2004) at 9116, ¶17. (Emphasis added).
[233] 3 Tr. 335.
[234] *Id.*

by the evidence in the record. Specifically, the evidence establishes that Complainants initiated the relationship with LECMI and proposed the ultimately agreed upon terms of the GLC Network Operating Agreement and Service Agreement, the details of which are part of the confidential record but that included only LECMI's delivery of 8YY traffic to GLC's network in exchange for a fee that GLC would increase "[a]s [LECMI] swing[s] more usage."[235]

It is also persuasive that Complainant GLC has admitted in its federal tariff, which is the source of the rates it seeks to enforce here for intrastate traffic, that Complainant GLC is a rural CLEC under 47 C.F.R. § 61.26(a)(6).[236] Specifically, on December 15, 2010, Complainant GLC advised the FCC of changes to Tariff F.C.C. No. 20 and in doing so, described itself in the tariff as "a rural CLEC under Section 61.26(a)(6) of the Federal Communications Commission's (FCC's) Rules, 47 C.F.R. § 61.26(a)(6)" with "operations [that] are exclusively in the rural areas of a Non-rural ILEC and several Rural ILEC."[237] Complainant GLC further described itself in the tariff as a "[r]ural CLEC originating and terminating traffic in the territory of a [r]ural ILEC" and, as such, its "rates for Switched Access Services are equal to the rates prescribed in NECA Tariff F .C.C. No. 5 for Switched Access Services."[238]

A "rural CLEC" is defined as "a CLEC that does not serve (*i.e.,* terminate traffic to or originate traffic from) any end users located within either: **(i)** Any incorporated place

[235] AT&T Confidential Exhibit 14.
[236] AT&T's brief at 24, citing AT&T Exhibit 25.
[237] AT&T Exhibit 25, Tariff F.C.C. No. 20, Section 6.4.
[238] *Id*.

of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or **(ii)** An urbanized area, as defined by the Census Bureau.[239] The Census Bureau defines an "urbanized area" as "densely developed territory that contains 50,000 or more people."[240] A CLEC that meets the definition of a "rural CLEC" is, subject to certain exceptions, entitled to a "rural exemption" to the FCC's benchmark rate rule which rural exemption provides in relevant part that "a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching."[241] However, this exemption to the FCC's benchmark rule is not available if any portion of the CLEC's access traffic originates from or terminates to end users located within either of the two types of areas specified by the FCC.[242] Observing that the exemption would "apply only to a small number of carriers serving a small portion of the nation's access lines," the FCC emphasized that its purpose "was to encourage competitive entry in truly rural markets."[243] The FCC further reasoned that "[i]f a competitive LEC chooses to serve more concentrated, non-rural areas, in order to offset the cost of serving high-cost, rural customers, it should not also receive the subsidy of charging NECA rates for access to its rural end-users."[244]

In this case, it cannot be said that Complainant GLC's service area is rural where the evidence shows that a large portion of Complainant GLC's long distance traffic billed

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[239] 47 C.F.R. §61.26(a)(6).
[240] http://www.census.gov/geo/reference/gtc/gtc_urbanrural.html#ua.
[241] 47 C.F.R. §61.26(e).
[242] *CLEC Access Reform Order*, 19 FCC Rcd. 9923 (2001), para 76.
[243] *Id*. at 9126, 9127, ¶¶ 33, 37.
[244] *Id.* at 9127, ¶ 37.

to AT&T is originated at LECMI's end office in Southfield, the population of which exceeds 50,000.[245] Nor can it be said that the 8YY traffic at issue here is rural where it originated with wireless customers throughout the country and terminated to AT&T's business end users.[246] Moreover, Complainant GLC's fiber network includes fiber rings in the non-rural areas of Chicago, Detroit, Lansing, Grand Rapids, and Ann Arbor.[247] In this regard, the ALJ is also wholly unpersuaded by Complainants' alternative argument that GLC meets the definition of a "rural CLEC" because GLC does not terminate or originate switched access traffic to or from end users through its competitive tandem service and therefore can be considered a "CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users…".[248] Not only have Complainants contextually misapplied the definition of a "rural CLEC" by relying on a select phrase therein and not on its entirety, but Complainants have overlooked that GLC's own description of itself in its federal tariff as a "[r]ural CLEC originating and terminating traffic."[249]

For these reasons, the ALJ finds that, at all times relevant to this proceeding, Complainant GLC was a "CLEC" within the meaning of 47 C.F.R. §61.26(a)(1) and that Complainant GLC was not a "rural CLEC" within the meaning of 47 C.F.R. §61.26(a)(6). Accordingly, under 47 C.F.R. §61.26(c), Complainant GLC's tariffed interstate switched access service rates were to be benchmarked to the rate charged for similar services by the competing ILEC, and, likewise, under section 310 of the Act, Complainant GLC's intrastate switched access service rates were required to be set at levels no higher than

[245] http://www.city-data.com/city/Southfield-Michigan.html.
[246] 3 Tr. 486.
[247] AT&T Exhibit 26, also found at http://www.glcom.net/network/glc_network_map.pdf.
[248] Complainants' brief at 20, citing portion of 47 C.F.R. §61.26(a)(6).
[249] Tariff F.C.C. No. 20, Section 6.4.

these benchmarked interstate rates. However, the evidence in this case shows that Complainant GLC's per-minute rates for originating intrastate switched access service are approximately 30 times the per-minute rates that the competing incumbent LEC (Michigan Bell) charges for the same service and that, overall, Complainant GLC is charging more than 4 cents per minute, well over the 2.5 cents per minute that the FCC identified as a "safe harbor" for CLEC tariffed access rates in its *CLEC Access Reform Order*.[250] The ALJ therefore finds that because Complainant GLC's intrastate switched access rates are higher than the interstate switched access rates charged by the competing ILEC, Complainant GLC's rates for intrastate switched access services do not comply with section 310 of the Act.

2. Whether Complainants have engaged in unlawful access stimulation so as to render Complainants' intrastate switched access rates unjust and unreasonable in violation of section 310 of the Act.

a. Background

Access stimulation occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and "free" conference calls.[251] The arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the "free" service provider, or offers some other benefit to the "free" service provider.[252] The shared revenues received by the service provider cover its costs, and it therefore may not need to, and typically does not, assess a separate charge for the service it is

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[250] 3 Tr. 351; AT&T Exhibit 7; see also *CLEC Access Reform Order* at ¶ 49.
[251] *In the Matter of Connect America Fund: A National Broadband Plan for Our Future*, 26 FCC Rcd. 17663 (2011), at ¶ 656.
[252] *Id.*

offering.[253] Meanwhile, wireless and interexchange carriers (collectively IXCs) paying the increased access charges are forced to recover these costs from their customers, even though many of them do not use the services stimulating the access demand.[254]

Access stimulation schemes work because when LECs enter traffic-inflating revenue-sharing agreements, they are currently not required to reduce their access rates to reflect their increased volume of minutes. The combination of significant increases in switched access traffic with unchanged access rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable under section 201(b) of the Telecommunications Act.[255] Access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment.[256]

When access stimulation occurs in locations that have higher than average access charges, which is the typical pattern, the average per-minute cost of access and thus the average cost of long-distance calling is increased.[257] Consequently, while the FCC afforded rural competitive LECs an exemption that permits them to "benchmark" to the access rates prescribed in the NECA access tariff, assuming the highest rate band for local switching, this framework is undermined by access stimulation.[258] This is so because if a rate-of-return incumbent LEC that the competitive LEC is being benchmarked to were to experience the level of demand increase commensurate with

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[253] *Id.*
[254] *Id.*
[255] *Id.* at ¶ 657.
[256] *Id.* at ¶ 663.
[257] *Id.*
[258] *In the Matter of Connect America Fund: A National Broadband Plan for our Future*, 26 FCC Rcd. 4554 (2011), at ¶650.

access-stimulating competitive LECs, they would be required to lower their access rates, likely quite significantly.[259] Thus, access stimulation activities conducted by competitive LECs using the rural exemption, whose interstate access rates are benchmarked to the NECA tariff rates, exploit the lack of connection between the rates charged by the competitive LEC for providing switched access services (which are not affected by changes in demand) and the rates that would be charged by a rural incumbent LEC for providing such services (which are determined on the basis of a projected demand level).[260]

Access stimulation is deemed to have occurred when two conditions are met. The first condition is that the LEC has entered into an access revenue sharing agreement.[261] This condition is met when a rate-of-return LEC or a competitive LEC: "has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account."[262] Revenue sharing may include payments characterized as marketing fees

[259] *Id.*
[260] *Id.*
[261] *Id*. at ¶ 667.
[262] *Id.* at ¶ 669, citing fn 1105.

or other similar payments that result in a net payment to the access stimulator.[263] Moreover, any arrangement between a LEC and another party, including affiliates, that results in the generation of switched access traffic to the LEC and provides for the net payment of consideration of any kind, whether fixed fee or otherwise, to the other party, including an affiliate, is considered to be “based upon the billing or collection of access charges.”[264]

The second condition is met where the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access minutes of use (MOUs) in a month compared to the same month in the preceding year.[265]

If a competitive LEC, including a rural CLEC, meets the definition of access stimulation, it must benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state by filing a revised interstate switched access tariff within 45 days of meeting the definition.[266] However, if a LEC has terminated its revenue sharing agreement(s) before the 45-day deadline established by the FCC, or if the competitive LEC's rates are already below the benchmark rate, such a LEC does not have to file a revised interstate switched access tariff.[267] Furthermore, once a rate-of-return LEC or a competitive LEC has met both conditions of the definition and has filed revised tariffs, when required, it may not file new tariffs at rates other than those required by the revised pricing rules until it terminates its revenue sharing agreement(s), even if the LEC no longer meets the 3:1 terminating-to-originating traffic ratio condition of the definition or traffic growth threshold.[268]

[263] *Id.* at ¶ 670.
[264] *In the Matter of Connect America Fund*, 77 FR 14297-01, 2012 WL 748548 (2012), ¶ 27.
[265] *In the Matter of Connect America Fund: A National Broadband Plan for our Future*, 26 FCC Rcd. 4554 (2011), at ¶ 667.
[266] *Id.* at ¶ 679; see also 47 C.F.R. § 61.26(g)(1) and (g)(2).
[267] *Id.* at ¶¶ 679, 680.
[268] *Id.*

b. AT&T's Position

AT&T argues that Complainants have satisfied both conditions deemed by the FCC to be indicative of access stimulation. First, AT&T points out that Complainants have admitted that GLC entered into two access revenue sharing agreements in which GLC paid other carriers a share of its access revenues for driving wireless 8YY traffic – which otherwise had no connection to WTC, GLC, or even LECMI – onto GLC's network.[269] AT&T further contends that the volume of interstate access minutes of use billed to AT&T increased by 170 percent between May 2011 and May 2012 and by 123 percent between June 2011 and June 2012, thus satisfying the second condition required to meet the definition of access stimulation.[270] As a result, AT&T maintains, GLC's rates violate section 310 of the Act because they unlawfully exceed the corresponding rates of Michigan Bell, the LEC governed by "price cap" regulation "with the lowest switched access rates in the state" of Michigan.[271]

c. Complainants' Position

Complainants reject AT&T's allegation that Complainant GLC has engaged in access stimulation because, as a competitive access provider, Complainant GLC is not subject to the FCC's access stimulation rules and, in any event, GLC's tandem does not control what traffic is sent to it.[272] Complainants further assert that the traffic at issue in this case is wireless-originating 8YY traffic which, Complainants contend, the FCC excluded from the access stimulation rules because "any commission paid in connection with 8YY calling does 'not create an incentive for those actually placing the

[269] AT&T's brief at 14, 20; Habiak Confidential Testimony at 3 Tr. 418-422; AT&T Confidential Exhibits 13, 14, and 23.
[270] AT&T's brief at 20, citing 3 Tr. 348.
[271] *Id.*, citing 47 C.F.R. Section 61.26(g)(1).
[272] Complainants' brief at 23.

calls to artificially inflate their 8YY traffic.'"[273] Complainants further state that the 8YY traffic in this case was not artificially increased because the calls made were legitimate and were provided by wireless carriers and ultimately delivered to AT&T's end users.[274] Moreover, Complainant GLC had no control over the originating or terminating end user(s) to influence any type of traffic stimulation.[275] Finally, Complainants maintain that it cannot be engaged in access stimulation for the traffic at issue where "prior agreements GLC had with third parties for compensation have terminated" and "the traffic at issue has stopped coming to GLC."[276]

d. Staff's Position

Staff's reply brief does not address that Complainant GLC was a party to revenue-sharing agreements or whether such agreements are indicative of Complainants having engaged in access stimulation during the time period at issue in this case.

e. Analysis

Considering the complete record in this case, the ALJ will not make a finding that revenue sharing arrangements are inherently unreasonable. This record is focused on whether Complainants participated in an access stimulation scheme such that Complainants' actions produced an unreasonable result regarding the assessment of intrastate access charges; the record thus lacks information about whether there are other revenue-sharing arrangements that may be reasonable or what the distinguishing characteristics of those services might be. Having said this, the sharing of access

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[273] Complainants' brief at 24, citing *CAF Order*, 26 FCC Rcd 17663, para. 673.
[274] Complainants' brief at 26 citing Summersett Testimony at 2 Tr. 160.
[275] *Id*.
[276] *Id.* at 27.

revenues may often be an indication that a particular service arrangement is unreasonable. To be sure, if access rates are set at a level intended to recover the costs of providing access services, then a carrier's willingness to share a substantial portion of its access revenue with one or more carriers is evidence that the carrier's rates are too high for the volume of traffic being terminated.

In this case, the confidential record shows that from September 23, 2003, until September 20, 2014, and from January 13, 2010, until December 31, 2013, Complainant GLC and GLC's wholly-owned CLEC subsidiary and affiliate, ComLink, LLC, were parties to two revenue-sharing agreements, the specific details of which are protected by the protective order issued in this case, but that in general were designed to aggregate and deliver wireless 8YY traffic to GLC's network.[277] And, as revealed by the confidential record, the party with whom GLC's CLEC subsidiary and affiliate, Comlink, LCC, entered into a "Telecom Toll Free Termination 8YY Service Agreement" on January 13, 2010, acted as an agent of GLC for the purpose of marketing and aggregating minutes of wireless 8YY traffic that originated all over the country and delivering it to LECMI, in exchange for which this party was paid by GLC a confidential amount for every minute of 8YY toll free traffic that GLC billed to and collected from certain IXCs, including AT&T. [278] Moreover, pursuant to GLC's September 23, 2003 service agreement with LECMI, GLC compensated LECMI by sharing with LECMI access revenues that GLC received on traffic that LECMI delivered to GLC.[279]

[277] AT&T Confidential Exhibits 1, 2, 13, 14, 22, and 23; see also 2 Tr. 146-149.
[278]Further details regarding these and other financial arrangements are protected by the confidentiality agreement among the parties and may be found at 3 Tr. 370-373, 471-474 (Confidential version), AT&T Confidential Exhibits 11, 12, 13, 14, 16 (at pages 35-37, 43, 51, 57-59, 62-65, and 156), and AT&T Confidential Exhibit 17.
[279] *Id.*

In short, it is undisputed that these two agreements directly or indirectly resulted in significant net payments by GLC to the other parties to the agreements (including affiliates), in which GLC's payments were based on the billing or collection of access charges from interexchange carriers, including AT&T.[280] While Complainants ultimately acknowledged GLC's participation in such agreements, Complainants only did so as a result of AT&T's discovery in this case. Indeed, the response testimony of GLC's witness, John Summersett, that GLC *believed* CARRIER A had a revenue-sharing agreement with one or more traffic aggregators without disclosing that GLC itself (through its subsidiary, Comlink, wherein GLC's agents are housed) had such an agreement with CARRIER A and that CARRIER A acted as GLC's "agent" is, at minimum, disturbing.[281] And Complainants' alternative argument that "GLC cannot be engaged in access stimulation for the traffic at issue" where "the prior agreements GLC had with third parties for compensation have terminated" ignores the fact that such agreements were in existence during the bulk of the time period at issue in this case and were certainly in existence at the time that AT&T first disputed the access charges.[282]

The evidence in this case also shows that the volume of interstate access minutes of use between AT&T and the LECMI switch in Southfield increased by 170 percent between May, 2011 (7.46 million MOUs) and May, 2012 (20.13 million MOUs), and it increased by 123 percent between June, 2011 (8.63452 million MOUs) and June, 2012 (19.20 million MOUs).[283]

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[280] *Id.*
[281] 2 Tr. 124; see also AT&T Confidential Exhibit 16 at 63.
[282] Complainants' brief at 27.
[283] 3 Tr. 348; see also Exhibit B to AT&T Exhibit 5.

Thus, the evidence in the record shows that, between January 13, 2010, and December 31, 2013, and between September 23, 2003, until September 20, 2014, Complainant GLC was a party to two revenue-sharing agreements that resulted in a greater than 100 percent increase in access minutes and consequently a jump in revenues, the combination of which establishes that Complainant GLC engaged in access stimulation causing Complainants' otherwise unchanged intrastate switched access rates to run afoul of section 310 of the Act. Indeed, it is the level of Complainants' intrastate access rates, in part, that made the access sharing possible and profitable for Complainants in this case.[284]

While Complainants have argued on the one hand that the FCC's access stimulation rules are inapplicable to GLC because such rules only apply to CLECs, this ALJ has already found that GLC's access services provided in this case are substantively those of a CLEC.[285] However, even if the Commission were to instead find that GLC is not a CLEC, the fact is that the 8YY toll-free traffic at issue in this case and billed to AT&T under GLC's intrastate access rates was largely the result of the revenue-share agreement that GLC orchestrated between its CLEC subsidiary, Comlink, LLC, and a traffic aggregator. To be sure, GLC's witness John Summersett referred interchangeably to GLC and Comlink, on GLC's behalf, when he testified that GLC understood that this particular traffic aggregator was seeking a Michigan CLEC to handle its 8YY toll-free traffic and GLC ultimately entered into an agreement with the aggregator pursuant to which GLC would pay it for sending 8YY traffic downstream for

[284] The Complainants' interstate access rates were also a factor, and perhaps even the more important factor given the percentage of 8YY traffic that is interstate – however, that part of this transaction is outside the Commission's jurisdiction.
[285] See Section VI.A.i. analysis, *infra.*

routing over GLC's network.[286] Still further, there is no dispute that the access stimulation rules apply to both non-rural and rural CLECs, the latter of which GLC claims to be in its federal tariff. The ALJ is also unpersuaded by Complainants' assertion that "GLC's arrangements did not result in any overall increase in AT&T's 8YY traffic, since end users making the 8YY calls are simply trying to call AT&T's 8YY business customer."[287] This argument overlooks the fact that GLC incentivized other carriers to bring the 8YY traffic onto GLC's network, rendering it subject to GLC's higher switched access rates when it would have otherwise been handled by another carrier whose CLEC-based access rates were significantly lower. This argument also overlooks the fact that Complainant GLC's intrastate switched access rates exceeded the allowable benchmark for such traffic, despite the FCC's mandate that "access rates for 8YY traffic must be at or below the benchmark."[288]

This ALJ emphasizes that, in finding that Complainant GLC engaged in access stimulation, no determination is being made regarding the use or provision of revenue-sharing agreements in general. Rather, it is this ALJ's concern is that in circumstances like those presented in this case where (i) a provider's access rates are set with reference to a relatively low historical volume of access services, (2) the subsequent volume of those services is considerably greater, (3) the incremental cost of increased traffic is less than the charge per minute, and (5) the provider is willing to share a substantial portion of its access revenues, the result is an unreasonable rate, in the absence of any other factors.

[286] 2 Tr. 154.
[287] Complainants' brief at 25-26.
[288] *In the Matter of Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd. 9108 (2004) at 9143, ¶ 71.

This ALJ therefore finds that because Complainant GLC was engaged in access stimulation within the meaning of 47 C.F.R. §61.26(g) throughout the time period of the charges disputed by AT&T, Complainant GLC was required but failed to benchmark its tariffed interstate switched access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state, and Complainant GLC was required but failed to accordingly benchmark its tariffed intrastate switched access rates pursuant to section 310 of the Act. As a result, Complainants' intrastate switched access charges assessed against AT&T in excess of the rates of the price cap LEC with the lowest interstate switched access rates in the state do not comply with section 310 of the Act.

3. Recommended relief

This ALJ therefore finds that because Complainant GLC's intrastate switched access rates are higher than the interstate switched access rates charged by the competing incumbent LEC, and because Complainant GLC was engaged in access stimulation within the meaning of 47 C.F.R. §61.26(g) throughout the time period of the charges disputed by AT&T, Complainant GLC's rates for intrastate switched access services do not comply with section 310 of the Act. And, given the aforementioned analyses, this ALJ finds that AT&T did not violate the terms of Complainants' tariffs when AT&T withheld partial payment for intrastate switched access charges that Complainants billed to AT&T.

Consequently, this ALJ recommends that, where AT&T already paid Complainants for intrastate switched access services at the rate charged by the competing incumbent LEC beginning March 2013, Complainants' complaint seeking AT&T's payment from March 2013 to the present should be dismissed. Furthermore, Complainants should be required to refund AT&T those payments AT&T made to Complainants prior to March 2013 in excess of the intrastate switched access rates charged by the competing ILEC, subject to the applicable limitations period, as discussed in Section VII.B. below. Finally, Complainant GLC should be required to file a revised intrastate tariff that shows rates no greater than the interstate rates for the same elements and which rates will parallel the access rate charged by the competing incumbent LEC. The requirement that Complainant GLC file a revised intrastate switched access tariff will also address Complainant GLC having engaged in access stimulation because, while Complainant GLC has since terminated its two revenue-sharing agreements, the second of which was terminated on September 30, 2014, Complainant GLC's intrastate switched access rates are not already below the benchmark rate of the price cap LEC with the lowest interstate switched access rates in the state, thus warranting Complainant's revised tariff consistent with the FCC's directive on this issue.[289]

B. <u>Whether Complainants improperly billed AT&T for intrastate switched access services in violation of Complainants' tariffs.</u>

As noted above, AT&T further contends that Complainants have improperly billed AT&T under Complainants' tariffs for transport services, transport mileage, and end office local switching services, and intrastate 8YY traffic. Each of these issues will be discussed separately below.

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[289] *In the Matter of Connect America Fund: A National Broadband Plan for our Future*, 26 FCC Rcd. 4554 (2011), at ¶¶ 667, 669.

1. **<u>Whether Complainants improperly billed AT&T for intrastate switched access transport services.</u>**

a. **<u>AT&T's Position</u>**

AT&T asserts that, up until May 2013, Complainant WTC was indicating on its bills to AT&T that WTC was providing the transport service from LECMI's end office in Southfield to GLC's tandem switch in Westphalia.[290] However, if this was case, the charges were unlawful because Complainant WTC's tariff only permits WTC to collect transport charges for transport within its Local Access Transport Area (LATA) and the transport service disputed by AT&T runs between Southfield (in LATA 340) and Westphalia (in LATA 340).[291]

AT&T further asserts that Complainants improperly billed AT&T for 100% of the Southfield-Westphalia transport route based on GLC and WTC tariff rates when LECMI provided roughly 44% of the transport. Specifically, in the bills that WTC issued to AT&T, GLC and WTC represented that the 83 miles of transport of the 8YY calls (from Southfield to Westphalia) were being billed on behalf of GLC – and, indeed, Mr. Summersett testified that such calls were "transmitted over the GLC and WTC transport facilities…to the GLC tandem switch."[292] However, AT&T maintains that LECMI provided roughly 44% of the transport from Southfield to Westphalia by delivering the traffic to GLC in Flint and the distance from LECMI's switch and distance from LECMI's switch in Southfield to the point in Flint at which LECMI delivered the traffic to GLC is 44 miles, while the distance from that point in Flint to GLC's switch in Westphalia is

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[290] 3 Tr. 351.
[291] Section 6.1 of the WTC Tariff states that "Switched Access Service provides for the ability to originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end user's premises *in the LATA where it is provided*."
[292] 3 Tr. 390-391.

57 miles. As a result, from February 2010 through January 2013, WTC billed AT&T for 100% of transport by GLC at GLC's tariff rates, which are 30 times higher than LECMI's, when 44% of the transport should have been attributed to LECMI at LECMI's rates under GLC's tariff, resulting in AT&T's overpayment in the amount of $1,142,575, as set forth in AT&T Exhibit 22.[293]

AT&T further asserts that Complainants' 83-mile route resulted in per-minute transport charges that were over 300 times the per-minute rate AT&T Michigan would charge for transport (based on the 7-mile distance between the LECMI switch in Southfield and the AT&T Michigan switch in West Bloomfield).[294] AT&T maintains that where Complainants assigned all transport mileage to themselves and billed at their own rates despite LECMI owning nearly half of the actual transport facilities, and where Complainants' 83-mile route provides no benefits to AT&T, its customers, or to end users because the 8YY traffic was originated by end users of wireless carriers all over the country, Complainants' 83-mile transport charges run afoul of the FCC's decision in *In the Matter of AT&T Corp. v. Alpine Communications, LLC, et al*, 27 FCC Rcd. 11511 (2012). In that case, the FCC concluded that the admitted manipulation by various LECs of their points of interconnection in order to inflate or pump their mileage charges and increase their net revenues and profits, without the provision of any enhanced service choices or benefits to customers, rendered the NECA Tariff under which the LECs sought protection to be unjust and unreasonable in violation of 201(b) of the federal Act.[295]

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[293] 3 Tr. 393, 395.
[294] 3 Tr. 351.
[295] *Alpine*,supra, ¶¶ 44, 45.

b. Complainants' Position

Complainants acknowledge that, after AT&T alerted Complainants in correspondence dated March 20, 2013, that Complainant WTC was improperly billing AT&T for transport between Southfield and Westphalia, transport that WTC could not have lawfully collected because WTC's tariff is limited to traffic within the Westphalia LATA, Complainants corrected its invoices beginning in May 2013.[296] Specifically, Complainants' witness, David Fox, explained that, due to a billing error, the invoices for the time period in question inadvertently referenced WTC's operating company number (OCN) as providing the 82.17 miles of tandem transport services, when in fact it was GLC that was providing such services.[297] And while WTC initially ascertained no changes in the total amount invoiced to AT&T, GLC since discovered in August 2014 that there were differences between GLC's and WTC's rates, warranting application of the net difference in these variances in GLC's next billing cycle invoices to AT&T.[298]

In response to Mr. Habiak's assertion that GLC improperly charged AT&T at GLC's rates for the transport of 8YY calls from LECMI's Southfield end office switch to Westphalia when LECMI provided 44% of the transport from Southfield to Flint and then handed the traffic to GLC, Mr. Summersett did not deny that LECMI provided transport of 8YY calls from Southfield to Flint. Instead, Mr. Summersett challenged the accuracy of Mr. Habiak's "44%" determination.[299] And Mr. Summersett indicated that LECMI did not begin providing transport for such traffic until "[s]ometime after the Flint connection

[296] 2 Tr. 274-275; see also AT&T Exhibit 6, GLC Exhibit 12 at p. 2.
[297] 2 Tr. 274-275.
[298] 2 Tr. 275.
[299] 2 Tr. 166.

became operational" in 2009.[300] As well, Mr. Summersett indicated that LECMI, WTC, and GLC all agreed, pursuant to NECA Tariff No. 4, that GLC would bill for 99 percent of the transport and WLC would bill for 1 percent of the transport over the route in question, and LECMI would receive no percentage.[301] In support, Mr. Summersett cited AT&T's Schedule JH-21, which contains an excerpt from NECA Tariff 4, page 408, effective June 1, 2013, indicating the billing percentages for the route as follows: LECMI: 0%; Westphalia: 1%; GLC: 99%. Furthermore, Mr. Summersett disagreed with Mr. Habiak's position that the transport billing percentages should be based on the actual physical route used because the physical routing between two points is dependent on a variety of physical limitations, local ordinances, physical construction and placement of facilities such that the physical route always exceeds the mileage determined by a "direct' point to point calculation based on V&H coordinates of 2 locations.[302] Mr. Summersett also rejected Mr. Habiak's contention that the billing percentage agreed upon by all route participants was not placed in NECA Tariff No. 4 until June 2013. In doing so, Mr. Summersett referenced Exhibit GLC-38, which contains the relevant tariff page from July 1, 2010, with LECMI's (OCN 2550) billing percentage as 0%, GLC's (OCN 5164) as 99%, and WTC's (OCN 0735) as 1%.[303] Mr. Summersett further testified that LECMI's agreement since the inception of the route in question to a billing percentage of zero was consistent with standard industry practice, which practice requires carriers on the route to agree to the billing percentage.[304]

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[300] 2 Tr. 167-168.
[301] *Id*.
[302] 2 Tr. 168-169.
[303] 2 Tr. 170.
[304] 2 Tr. 171-172.

Complainants further reject AT&T's assertion that Complainants were engaged in mileage pumping with its 83-mile route. Specifically, Complainants maintain that it was LECMI that requested and established this route, not GLC, and as a result, LECMI has routed traffic from its Southfield end office to GLC's tandem since approximately October 23, 2003.[305] Complainants further maintain that, unlike the circumstances in *Alpine*, the point of interconnection between LECMI and GLC has remained unchanged since the route was first established and was not created for the purpose of artificially increasing access revenues.[306]

c. <u>Staff's Position</u>

Staff's reply brief does not address whether Complainants improperly billed AT&T for switched access transport services during the time period at issue in this case.

d. <u>Analysis</u>

The evidence in the record establishes that from July 1, 2012, through August 2014, Complainants improperly billed AT&T for intrastate switched access transport charges provided by WTC using GLC's tariff rates rather than WTC's tariffed rates.[307] Complainants acknowledge this and acknowledge that AT&T was/is entitled to be credited for the erroneous billings.[308]

The evidence in the record also establishes that beginning in 2010, all 8YY traffic at issue in this case was transported over LECMI's fiber transport facility between Southfield and Flint, where LECMI then handed the traffic to GLC.[309] Complainants do not dispute this arrangement. Notwithstanding this transport route for the traffic, from

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[305] Complainants' brief at 13.
[306] Complainants' brief at 15.
[307] 2 Tr. 274-275, 309-310; 3 Tr. 351-352.
[308] 2 Tr. 275.
[309] 2 Tr. 532-533.

February 2010 through July 2013, Complainant WTC billed AT&T for 100% of the transport as having been provided by GLC at GLC's tariff rates, without acknowledging that 44% of the transport should have been attributed to LECMI using LECMI's rates under GLC's tariff, which rates are 30 times lower than GLC's rates.[310]

Complainants' justification for this billing arrangement is that it was agreed to by both GLC and LECMI and is contained in NECA Tariff 4. However, Complainants failed to produce any evidence of such an agreement and Mr. Irvin testified that he had no knowledge of any such agreement between LECMI and GLC.[311] Conversely, the September 19, 2003 correspondence from GLC to LECMI in connection with the parties' entry into a GLC Network Operating Agreement and Service Agreement contemplates the use of LECMI's rates inasmuch as "section 17 LECMI Rates and Charges" was inserted into GLC's tariff as part of the parties' agreement.[312]

Moreover, while Complainant GLC maintains that the agreed upon billing percentages for the transport route were reflected in NECA Tariff 4 as demonstrated by Exhibit GLC-38, Mr. Summersett conceded that the tariff page contained in Exhibit GLC-38 reflected billing percentages for a route ending with a carrier other than LECMI, GLC, and WTC.[313] This carrier is assigned an OCN of 092C, understood to be Westphalia Broadband Inc. (WBI), however the traffic at issue in this case wasn't handed off to AT&T by WBI.[314] Complainants did not file a corrected tariff page until June 1, 2013, and, even then, the revised tariff page reflected that it was a new route,

[310] 3 Tr. 28 (Confidential).
[311] 3 Tr. 533.
[312] AT&T Confidential Exhibit 14.
[313] 2 Tr. 166; 2 Tr. 225-227.
[314] 2 Tr. 225-227.

not a corrected route.[315] Indeed, Complainants acknowledged that, had AT&T reviewed this tariff page in August 2010 to ascertain the route from which AT&T was receiving 8YY traffic through the GLC tandem, the reference to a carrier with the OCN 092C "might raise a question to verify."[316]

Accordingly, it is found that, from July 1, 2012, through August 2014, Complainants improperly billed and collected payment from AT&T for intrastate switched access transport charges provided by WTC using GLC's tariff rates rather than WTC's tariffed rates. It is further found that, from February 2010 through July 2013, Complainants improperly billed and collected payment from AT&T for 100% of the transport having been provided by GLC at GLC's tariff rates, when 44% of the transport should have been attributed to LECMI using LECMI's rates under GLC's tariff.

2. Whether Complainants improperly billed AT&T for intrastate switched access local end office switching.

a. AT&T's Position

AT&T maintains that, from February 2012 through July 2013,[317] Complainant WTC improperly billed AT&T for over $815,372 in end office switching services on 8YY traffic and attributed LECMI as having provided such services.[318] However, LECMI has subsequently admitted that it did not provide end office switching on the 8YY traffic.[319] AT&T points out that Complainants do not disagree that they billed AT&T for a service that no one provided but refuse to provide AT&T with a refund until LECMI refunds Complainants for the amount Complainants paid LECMI following receipt of AT&T's

[315] 2 Tr. 225-227; see also AT&T Exhibit 19.
[316] 2 Tr. 233.
[317] Beginning August 2013, AT&T withheld payment of local switching charges.
[318] 3 Tr. 397; see also AT&T Exhibit 27.
[319] 3 Tr. 399; 3 Tr. 545.

payments of the erroneous charges.[320] AT&T suggests this argument should be rejected inasmuch as AT&T paid Complainant WTC, not LECMI, and therefore Complainant WTC is the party responsible for providing AT&T with a refund.

b. Complainants' Position

Complainants' initial brief does not address AT&T's assertion that AT&T was unlawfully billed by GLC on LECMI's behalf for local switching services for 8YY traffic that were never provided by LECMI, however Complainants acknowledge in their reply brief that "WTC stands ready to make a credit of over $815,000 to AT&T as soon as [LECMI]'s consent is granted."[321]

c. Staff's Position

In its reply brief, Staff acknowledges that LECMI has admitted that it did not perform end office switching services on the 8YY traffic for which Complainant WTC billed AT&T.[322] Nonetheless, Staff maintains that the Commission should "disregard this issue at this time" and not direct Complainants to refund AT&T for the amount in which AT&T was improperly charged ($815,373) because "non-parties to this case may be responsible for this disputed amount" and because "this dispute was not raised in either the initial complaint or in AT&T's counterclaim."[323]

d. Analysis

The evidence in this case establishes no dispute amongst the parties that Complainants, on behalf of LECMI, improperly billed AT&T for local end office switching services that LECMI never provided. To be sure, LECMI agreed that it did not provide

[320] 3 Tr. 489.
[321] Complainants' reply brief at 19.
[322] Staff's reply brief at 8.
[323] *Id*.

local switching services to AT&T for the aggregated 8YY traffic at issue in this case.[324] And Complainants' witness, David Fox, testified that, despite having been aware of this same concern by other IXCs and having credited these other IXCs beginning as early as May 2013 for improperly charging them local switching charges on 8YY traffic, WTC and GLC first learned of AT&T's concern on April 11, 2014, through AT&T's informal complaint filed with the FCC against WTC, GLC, and LECMI.[325] Mr. Fox further testified that, while Complainants agree that AT&T is entitled to be credited for end office charges for local switching and common trunk port applied to 8YY traffic on invoices that Complainant WTC issued to AT&T on LECMI's behalf, Complainant WTC has thus far failed to do so due to LECMI's objection – consequently, current monthly invoices to AT&T continue to improperly bill AT&T in this regard.[326] Mr. Fox indicated that the amount for which Complainants believe AT&T is entitled to a credit for improperly billed local switching charges is that portion of the $815,372 "that is within the two year refund period specified in the applicable tariffs."[327]

Given that Complainants were made aware as early as April 11, 2014, of having improperly billed AT&T for local switching charges on 8YY traffic, and that the crux of AT&T's July 24, 2014 counterclaims is to recover monies unlawfully charged and collected by Complainants, and that the parties have addressed this issue in their witnesses' respective response testimony, this ALJ concludes it is appropriate for the Commission to resolve this dispute.

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[324] 3 Tr. 545.
[325] 2 Tr. 282-283.
[326] 2 Tr. 283-284; see also GLC Confidential Exhibits 48 and 49.

[327] 2 Tr. 285.

Accordingly, it is found that, from February 2012 through July 2013, Complainants improperly billed and collected payment from AT&T for intrastate switched access local switching charges on 8YY traffic.

3. **Whether Complainants improperly billed AT&T for intrastate switched access services using PIU factors on traffic that was jurisdictionally interstate in nature.**

a. **AT&T's Position**

AT&T asserts that Complainants violated their tariffs because they should have determined the actual intrastate percentage of AT&T's 8YY traffic rather than apply a Percentage Interstate Usage (PIU) factor to bill for this traffic. Specifically, AT&T maintains that the aggregated 8YY traffic at issue in this case originated with mobile phone users all over the country who make calls to companies all over the country that purchase AT&T Corp's 1-800 service. The traffic is aggregated and makes its way to GLC in Michigan, which then delivers the calls to AT&T Corp. in Westphalia.[328] AT&T contends that because most of this traffic originates in one state (where the cell site serving the calling party is located) and terminates in another state (where the AT&T Corp. 1-800 customer is located), it is interstate traffic that is covered by GLC's or WTC's interstate switched access tariffs, not their Michigan tariffs. AT&T further contends that of the remaining intrastate traffic, virtually none of it is *Michigan* intrastate traffic because it is not traffic that originates and terminates in Michigan.[329] AT&T maintains Complainants billed AT&T for this non-Michigan traffic contrary to Complainant WTC's tariff under which AT&T was billed, which defines the switched access services subject to that tariff as services that provide "the ability to originate calls

[328] 3 Tr. 401.
[329] 3 Tr. 402.

from an end user's premise to a customer's designated premise both of which premises are located in Michigan, and to terminate calls from a customer's designated premise to an end user's premise, both of which premises are located in Michigan."[330]

AT&T's analysis consisted of a review of the billing records that GLC provided to AT&T for March 2013 for all the aggregated 8YY traffic for which Complainants billed AT&T – and, specifically, a review of the calling and the called numbers for the calls billed to AT&T Corp. to identify the states in which the traffic originated and terminated.[331] AT&T took a statistically significant sample of one day's calls and matched them to AT&T's records, and, from those AT&T records, determined the actual terminating location.[332] This was done because the call detail records from Complainants contain the originating number and terminating 8YY number but not the terminating location of the party receiving the call.[333] AT&T maintains that this data and analysis is representative of the entire period of the dispute related to aggregated 8YY traffic from February 2010 through January 2014 and revealed that 1% of the total traffic for which AT&T was billed actually terminated to customers in Michigan. Likewise, that analysis showed that, at most, only 1% of the total traffic for which AT&T was billed was actually originated by callers in Michigan.[334] Thus, less than 1% of the 8YY calls in dispute was Michigan intrastate traffic and the remaining 99+% is not Michigan intrastate traffic and cannot be subject to Complainants' intrastate switched access tariffs. Because of this, AT&T maintains that the bills that Complainants sent to AT&T,

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[330] AT&T's brief at 34, citing section 6.1 of Tariff M.P.S.C. No. 25(U), a copy of which is contained in AT&T Exhibit 21.
[331] 3 Tr. 403.
[332] *Id.*
[333] *Id.*
[334] *Id.*

including both the bills that AT&T paid in their entirety and the bills that AT&T paid in part after it started withholding, covered all the intrastate traffic, not just the intra-Michigan traffic, and therefore were not authorized under Complainants' intrastate tariffs.[335]

AT&T further contends that this same result is reached based on the language of section 2.311(C)(1) of Complainant GLC's tariff, which provides in relevant part that "every call that enters a customer network at a point within the same state as that in which the called station (as designated by the called station telephone number) is situated is an intrastate communication."[336] AT&T argues that this language means that a call originating outside of Michigan is nonetheless considered an intrastate Michigan call if it enters AT&T's network at a point in Michigan and the AT&T 8YY customer (the 'called station') is also in Michigan. And, because only a negligible amount (about 1%) of the 8YY calls that entered AT&T's network in Michigan terminated to called parties in Michigan, only 1% of the traffic could be considered Michigan intrastate traffic.

According to AT&T's witness, Mr. Habiak, since only 1% of the aggregated 8YY traffic was actually intrastate Michigan traffic, Complainants' claims should be reduced to cover only 1% of the traffic in issue. In this regard, Mr. Habiak rejected Complainants' assertion that Complainants properly determined the jurisdiction of this traffic based not on the call detail records but on the percent interstate use (PIU) factors provided by AT&T to WTC.[337] Mr. Habiak explained that AT&T's PIU factors were based on the normal, in-state, business-as-usual switched access traffic coming from GLC – not on the volumes of out-of-state, aggregated 8YY traffic that GLC brought to its

[335] 3 Tr. 402.
[336] AT&T's brief at 35, citing section 2.3.11(C)(1) of Tariff M.P.S.C. No. 25(R).
[337] 3 Tr. 406.

system via traffic arrangements GLC entered into and the jurisdiction of which AT&T had no knowledge such that AT&T could adjust its PIU factors accordingly.[338] As such, GLC should not be able to collect these billed amounts by pointing to the PIU factors that its own conduct made inaccurate.

b. Complainants' Position

Complainants adamantly reject the analysis of AT&T's witness, Mr. Habiak, as discussed above.[339] Specifically, Complainants' witness, David Fox, testified that because the call detail records available to WTC and used in the billing process only reveal where the wireless number was issued to the customer and not the precise physical location of the customer when placing the wireless call, the states of origin and termination of such calls cannot be determined from the call detail records.[340] According to Mr. Fox, when the call detail records do not indicate the physical location of where the wireless traffic originates or where the wireless traffic terminates, the jurisdiction of the wireless traffic cannot be determined. In these circumstances, section 2.3.11(C)(3) of GLC Tariff M.P.S.C. No. 25(R) requires IXCs such as AT&T to provide WTC with quarterly reports with the PIU factors to be applied by WTC for originating and terminating access minutes.[341] Mr. Fox further testified that AT&T provided WTC with PIU reports from which WTC determined the percentage of AT&T's intrastate traffic over the route in question by subtracting AT&T's PIU from 100.[342] Using this percentage, WTC would then determine the intrastate traffic based on AT&T's total

[338] *Id.*
[339] 2 Tr. 285, citing Habiak's Response Testimony at 3 Tr. 403.
[340] 2 Tr. 286.
[341] See 2 Tr. 288 and GLC Exhibit 52.
[342] 2 Tr. 288; see also GLC Exhibit 27.

traffic over the route and bill the appropriate intrastate access rates for the intrastate access services provided in handling the traffic.[343]

In response to Mr. Habiak's assertion that such PIU factors should not have been used as they were based on normal, in-state, business-as-usual switched access traffic coming from GLC and did not account for the jurisdiction from GLC's new traffic arrangements that "drastically changed the nature of its traffic by swamping its system with huge volumes of out-of-state traffic," Mr. Fox denied that GLC controlled what traffic was being sent over its network and insisted that GLC's charges were lawful.[344]

Complainants further contend that AT&T's call analysis was not competent because it only consisted of an analysis of the calls for a single day, and Mr. Habiak's testimony regarding AT&T's call analysis was unreliable because Mr. Habiak acknowledged he was not a statistician and did not personally prepare the data from which the analysis derived.[345]

c. <u>Staff's Position</u>

Staff's reply brief acknowledges AT&T's claim that only a fraction of the traffic at issue is actually intrastate in nature, however Staff indicates that Complainant WTC billed AT&T for the traffic pursuant to the PIUs that AT&T provided to Complainant WTC.[346] Staff maintains that the PIU is the basis on which the industry relies to identify the jurisdiction of the traffic. Staff further maintains that AT&T did not complain about

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[343] 2 Tr. 125.
[344] 2 Tr. 289.
[345] Complainants' brief at 34.
[346] Staff reply brief at 3.

the jurisdictional manner in which Complainants were billing AT&T until the instant proceeding.[347]

d. Analysis

Complainants' obligations with regard to determining the jurisdictional nature of switched access traffic and its related access minutes are governed by section 2.3.11(C) of Tariff M.P.S.C. No. 25(R), which provides in relevant part:

> 2.3 Obligations of the Customer (Cont'd)
> 2.3.11 Jurisdictional Report and Certification Requirements (Cont'd)
> (C) Jurisdictional Reports -Switched Access
> For Switched Access Service, the Telephone Company cannot in all cases determine the jurisdictional nature of customer traffic and its related access minutes. In such cases the customer may be called upon to provide a projected estimate of its traffic, split between the interstate and intrastate jurisdictions. The following regulations govern such estimates, their reporting by the customer and cases where the Telephone Company will develop jurisdictional percentages.
> *****
> Pursuant to Federal Communications Commission Order FCC 85-145 released April 16, 1985, interstate usage is to be developed as though every call that enters a customer network at a point within the same state as that in which the called station (as designated by the called station telephone number) is situated is an intrastate communication and every call for which the point of entry is a state other than that where the called station (as designated by the called station telephone number) is situated is an interstate communication.
> *****
> (3) Feature Group D
> When a customer orders Feature Group D Switched Access Service(s) the customer may provide the projected intrastate usage for each end office in its order. Alternatively the Telephone Company, where the jurisdiction can be determined from the call detail, will determine the projected intrastate percentage as follows:
>
> For originating access minutes, the projected intrastate percentage will be developed on a monthly basis by end office where the Feature Group D Switched Access Service access minutes are measured by dividing the measured intrastate originating access minutes (the access minutes where the calling number is in one state and the called number is in

[347] *Id.*

> another state) by the total originating access minutes, when the call detail is adequate to determine the appropriate jurisdiction.
>
> For terminating access minutes, the data used by the Telephone Company to develop the projected intrastate percentage for originating access minutes will be used to develop the projected intrastate percentage for such terminating access minutes.
>
> When originating call details are insufficient to determine the jurisdiction for the call, the customer will supply the projected intrastate percentage or authorize the Telephone Company to use the Telephone Company developed percentage. This percentage will be used by the Telephone Company as the projected intrastate percentage for originating and terminating access minutes. The projected intrastate percentage of use will be obtained by subtracting the projected interstate percentage for originating and terminating minutes from 100 (intrastate percentage = 100 - interstate percentage).[348]

Based on this tariff language, when the telephone company (Complainants) can determine the jurisdictional nature of Feature Group D switched access traffic (which includes 8YY traffic) from the originating call details, the telephone company will determine the projected intrastate percentage on a monthly basis for both originating and terminating access minutes. Section 2.3.11(C)(3) of Complainant GLC's intrastate tariff also provides that Complainants are to develop the projected intrastate percentage of originating traffic if Complainants can do so "by end office." In such instances, the projected intrastate percentage for the originating access minutes is to be developed by dividing the measured intrastate originating access minutes by the total originating access minutes – which data is to then be used to develop the projected intrastate percentage for terminating access minutes.

However, section 2.3.11(C)(3) provides further that "[w]hen originating call details are insufficient to determine the jurisdiction for the call" — that is, when Complainants

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[348] Section 2.3.11(C) of Tariff M.P.S.C. No. 25(R), Original Pages 2-18.1, 2-19, 1st Revised Page 2-20, Original Pages 2-21, 2-22, 2-23, 2-24, Effective March 26, 2002. (Emphasis added).

cannot determine the jurisdiction of originating traffic "by end office"[349] – the traffic is indeterminate and Complainants are required to apply a Percentage Interstate Usage (PIU) factor provided by the customer to allocate a percentage of the total volume of calls as either intrastate or interstate for billing purposes. And, pursuant to the above tariff language, the customer is to develop this PIU factor "as though every call that enters a customer network at a point within the same state as that in which the called station (as designated by the called station telephone number) is situated is an intrastate communication and every call for which the point of entry is a state other than that where the called station (as designated by the called station telephone number) is situated is an interstate communication."[350]

In *Qwest Communications Company, LLC, Complainant, v. Budget Prepay Inc.*, 28 F.C.C.R. 5170, 2013 WL 1833126, the FCC analyzed virtually identical federal tariff language and concluded that the telephone company was "obligated to determine the actual jurisdiction of originating [8XX] traffic only if it can do so 'by end office.' Otherwise, the traffic is indeterminate and is billed by applying a PIU."[351] In that case, the FCC noted that the underlying incumbent LEC, from which the telephone company (Budget) leased facilities to provide local exchange service to end users and exchange access service to interexchange carriers, was responsible for recording the originating call detail used to generate the access charge bills at issue, which call detail would have included minutes of use by end office.[352] The FCC further noted that this call detail necessarily would not reveal the jurisdiction of the 8XX traffic because Budget's end

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[349] *Id.*
[350] *Id.*
[351] *Id.* at ¶ 14.
[352] *Id.*at ¶ 15.

users did not dial the called party's number until the call had left the underlying LEC's network and reached Budget's platform.[353] The FCC concluded that, "the underlying LEC had no information as to the called party number, and therefore could not generate records revealing whether the call was interstate or intrastate."[354]

In this case, the evidence in the record shows that when a wireless customer makes an 800 toll-free call to an AT&T end user, the call is originated by the wireless service provider[355] and delivered to LECMI's end office switch in Southfield, Michigan, where it is then transmitted over the GLC and WTC transport facilities to the GLC tandem switch.[356] The evidence further shows that the vast majority of disputed traffic in this case is wireless 8YY traffic, the call detail records for which would reveal the originating calling party number – specifically, the state in which the cell phone was issued to the caller – without recognizing the actual geographic location of the roaming party.[357] And, based on the originating call detail available to Complainants and used in the billing process to generate the access charge bills at issue, Complainants were able to record the state(s) of origin of 8YY traffic but not the terminating state since the calling party was an 8YY subscriber.[358]

However, notwithstanding Complainants' ability to determine the state(s) of origin for the 8YY traffic at issue, the vast majority of which has been revealed to have

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[353] *Id.*
[354] *Id.*
[355] Significantly, Complainants do not allege that the wireless traffic at issue in this case *originates* in Michigan by end users served by LECMI's end office which raises an additional concern regarding whether Complainants were legitimately providing originating tandem switch and transport functions in accordance with Section 6.1 of Complainant GLC's Michigan tariff, which describes switched access service in relevant part as "the ability to originate calls from an end user's premises to a customer designated premises."
[356] 2 Tr. 105-106.
[357] 2 Tr. 286.
[358] 2 Tr. 286; 3 Tr. 402-403.

originated outside of Michigan,[359] Complainants knowingly applied the PIUs provided by AT&T as a substitute for Complainants' own obligation to determine whether to characterize the traffic as intrastate or interstate in nature (and accordingly bill such traffic under Complainants' intrastate tariff in the originating state or under Complainants' interstate tariffs) and, in doing so, billed AT&T for all originating 8YY traffic, regardless of the state of origin, based on AT&T's PIUs.[360]

Complainants' application of AT&T's PIU factors in this context was further flawed because, pursuant to Complainant GLC's intrastate tariff, AT&T was required to develop its PIUs based on the assumption that only Michigan-originated traffic would be billed by Complainants as intrastate traffic [to wit, "every call that enters [AT&T's] network at a point within the same state as that in which the called station (as designated by the called station telephone number) is situated is an intrastate communication."][361] Presumably, then, and without the availability of originating call detail information, AT&T would have developed its PIUs based on the terminating call detail available to AT&T and with the understanding that the PIUs it provided to Complainants would only be applied to calls that originated in Michigan and not to traffic that originated from other states and was routed to Michigan, the latter of which information was available only to Complainants and not to AT&T.

For these reasons, this ALJ finds that Complainants knew or should have known that AT&T developed its PIUs with the expectation that they would be applied to

[359] While Complainants have questioned the reliability of AT&T's analysis (at 3 Tr. 403) as having consisted only of a review of one day's calls and having been conducted by a non-statistician, Complainants' arguments are unpersuasive where AT&T's analysis was largely based on the billing and call detail records that Complainant GLC provided to AT&T and where Complainants certainly could have conducted their own analysis of the same or a different time frame and presented rebuttal evidence of their results.
[360] GLC Exhibit 27.
[361] 3 Tr. 406.

Michigan-originated traffic, to which Complainants' intrastate tariffs apply, and, therefore, Complainants' application of such PIUs to 8YY traffic that Complainants knew or should have known was not originating in Michigan was unreasonable. Where the relevant tariff language provides that the jurisdiction of a call is to be determined by the calling party number, in a circumstance such as the instant case when a significant volume of wireless traffic is originating from out of state but the physical locations of the calling parties are not known, the opportunity exists for the telephone company to circumvent its obligations under the tariff and instead rely upon the customer's provision of PIU factors in order that a greater proportion of the wireless traffic may be billed at the higher intrastate access rate. Here, it is found that Complainants did indeed circumvent their tariff obligations in this regard and, despite knowing that a significant percentage of the disputed 8YY traffic did not originate in Michigan, Complainants improperly relied upon AT&T's provision of PIU factors, the latter of which resulted in a greater proportion of the wireless traffic being billed at the higher intrastate access rate. Consequently, it is found that, from February 2010 through January 2014, Complainants improperly billed and collected payment from AT&T for intrastate switched access charges on wireless 8YY traffic, only 1% of which actually originated in Michigan.

4. <u>Recommended Relief</u>

Because Complainants improperly billed and collected payment from AT&T from July 1, 2012, through August 2014 for intrastate switched access transport charges provided by WTC using GLC's tariff rates rather than WTC's tariffed rates, this ALJ recommends that Complainants be required to refund AT&T the amount of AT&T's overpayments for these charges for this time period.

Because Complainants improperly billed and collected payment from AT&T from February 2010 through July 2013 for 100% of the intrastate switched access transport having been provided by GLC at GLC's tariff rates, when 44% of the transport should have been attributed to LECMI using LECMI's rates under GLC's tariff, this ALJ recommends that Complainants also be required to refund AT&T the amount of AT&T's overpayments for these charges for this time period, subject to the applicable statute of limitations, as discussed in Section VII.

Because Complainants improperly billed and collected payment from AT&T from February 2012 through July 2013 for intrastate switched access local switching charges on 8YY traffic, this ALJ recommends that Complainants also be required to refund AT&T the amount of AT&T's overpayments for these charges for this time period.

Finally, while Complainants improperly billed and collected payment from AT&T from February 2010 through January 2014 for intrastate switched access charges on wireless 8YY traffic, only 1% of which actually originated in Michigan, and was therefore largely jurisdictionally interstate in nature, any recommended refund to AT&T appears to have been rendered moot by the relief recommended in Section VI.A.3. – specifically, that Complainants be required to refund AT&T those payments AT&T made to Complainants prior to March 2013 in excess of the intrastate switched access rates charged by the competing ILEC, subject to the applicable statute of limitations discussed in Section VII.B.

VII.

OTHER ISSUES

The remaining issues to be addressed include whether AT&T is precluded from obtaining the relief sought in AT&T's counterclaim by the billing dispute provisions of Complainants' tariffs, by the limitations periods imposed under Complainants' tariffs and section 205 of the Act, and by the unclean hands and voluntary payment doctrines.

A. Whether AT&T failed to comply with the billing dispute provisions of Complainant WTC's tariff and engaged in unlawful self-help by partially withholding payment of Complainants' tariffed charges for intrastate switched access service.

1. Complainants' Position

Complainants maintain that AT&T did not follow the proper procedures for disputing the bills for the charges at issue pursuant to the terms of WTC's tariff, section 2.4.1(D)(1) of which provides in relevant part:

> A good faith dispute requires the customer to provide a written claim to the Telephone Company. Instructions for submitting a dispute can be obtained by calling the billing inquiry number shown on the customer's bill, or, when available, by accessing such information on the Telephone Company's website also shown on the customer's bill. Such claim must identify in detail the basis for the dispute, and if the customer withholds the disputed amounts, it must identify the account number under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed to permit the Telephone Company to investigate the merits of the dispute.[362]

Complainants contend that the correspondence submitted by AT&T to Complainants on March 20, 2013, June 6, 2013, and July 18, 2013, did not contain sufficiently detailed information to constitute a "good faith dispute" as defined in the

[362] Section 2.4.1(D)(1) of Tariff F.C.C. No. 5, a copy of which is contained in Exhibit GLC-10.

aforementioned tariff section and, despite Complainants' requests, AT&T failed to provide additional information that would allow Complainants to investigate and resolve the disputed charges.[363] Specifically, Complainants maintain that AT&T did not indicate which charges were disputed and which charges were undisputed, as a result of which Complainants could not ascertain what charges AT&T's partial payments were to be applied towards, which Complainants assert runs afoul of the court's holding in *Level 3 Communications, LLC v Telephone Operating Company of Vermont, LLC*, 2011 WL 6291959 (D.Vt.2011), wherein the court held that "[a] deliberate practice of withholding payment for undisputed charges belies any claim of good faith and undercuts Level 3's repeated assertions that it has paid all undisputed charges in full."[364] Complainants further contend that AT&T engaged in unlawful self-help by partially withholding payment of Complainants' tariffed charges for intrastate switched access.[365] Complainants therefore assert that it would be grossly inequitable to allow AT&T to ignore the provisions of WTC's tariff for properly disputing payment.

2. <u>AT&T's Position</u>

AT&T rejects Complainants' assertion that AT&T's March 20, 2013 dispute letter containing two pages of detail describing the rate elements and unreasonable practices contested by AT&T did not constitute a good faith dispute.[366] AT&T further contends that absent from Complainants' argument is any demonstration that the submission of a good faith dispute under Complainant WTC's tariff is a prerequisite to AT&T's assertion of its counterclaims in this proceeding – and, AT&T points out, Complainant WTC's tariff

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[363] Complainants' brief at 10, citing 2 Tr. 252-253 and Confidential GLC Exhibits 11, 12, and 14.
[364] Complainants' brief at 42, citing *Level 3, supra*.
[365] Complainants' brief at 41.
[366] AT&T's reply brief at 30.

is silent in this regard. AT&T further argues that the *Level 3* case relied upon by Complainants is inapposite because the tariff in dispute and that the plaintiff sought to enforce allowed for the imposition of an embargo if a carrier that was buying services under the tariff withheld payment and failed to submit a good faith dispute.[367] AT&T asserts that WTC's tariff provides for a consequence if a party fails to submit a good faith dispute and Complainants' attempt to have the Commission read a consequence into the tariff should be rejected.

3. Staff's Position

Staff asserts that AT&T's March 20, 2013 correspondence constituted a "detailed dispute letter" sufficient to comply with the dispute notice provisions of Complainants' tariff.[368] Staff does not further opine as to whether AT&T engaged in unlawful self-help by partially withholding payment of Complainants' tariffed charges for intrastate switched access service**.**

4. Analysis

The evidence in the record shows that, in a two-page letter dated March 20, 2013, AT&T advised Complainants that both WTC and LECMI appeared to be "engaged in an unreasonable practice designed to inflate the originating and terminating access rates AT&T is assessed," as a result of which AT&T had begun partially withholding payment on invoices issued by WTC, which invoices AT&T referenced by account number.[369] In that same letter, AT&T explained that WTC could not charge AT&T for

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[367] *Id*. at 31, citing *Level 3, supra*, at 2-3.
[368] Staff's reply brief at 7.
[369] Confidential GLC Exhibit 11.

services provided outside of the LATA in which its end users are located.[370] AT&T further expressed concern with WTC's billing on behalf of LECMI for local transport and its own local transport, as well as with WTC's billing for interstate tandem switching on GLC's tandem at rates higher than AT&T would pay alternative tandem providers.[371] Finally, AT&T observed that WTC appeared to be billing the incorrect rate for interstate tandem services provided by GLC.[372]

The evidence further shows that the content of AT&T's March 20, 2013 dispute notice was sufficient enough for Complainants to immediately correct their erroneous billings to AT&T in at least one regard – namely, WTC's billing outside of WTC's LATA.[373]

In *Great Lakes Communication Corporation v. AT&T Corp*., 2014 WL 2866474 (N.D.Iowa), the court reviewed GLCC's tariff billing dispute provisions, which include language similar to that contained in section 2.4.1(D)(1) of WTC's tariff. In doing so, the court held that AT&T's email message, which referenced GLCC's invoice, explained the grounds for disputing the invoice, and advised GLCC that AT&T would continue to withhold payment on future invoices until the concerns set forth in AT&T's message were resolved, "satisfied the legitimate purpose of the notice requirements by advising GLCC of the dispute and giving it the opportunity to investigate and resolve that dispute."[374] Consequently, the court concluded that AT&T's failure to strictly comply

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370 *Id.*
371 *Id.*
372 *Id.*
373 Confidential GLC Exhibit 12.
374 *GLCC, supra*, at 23.

with the tariff's notice requirements did not entitle GLCC to judgment as a matter of law.[375]

In this case, this ALJ finds that AT&T's March 20, 2013 letter included sufficient detail to satisfy the legitimate purpose of the billing dispute requirements of Complainant WTC's tariff, particularly given that Complainants corrected their erroneous billings to AT&T in at least one respect following this March 20, 2013 notice. However, even if the Commission were to conclude otherwise, AT&T has correctly noted that the submission of a good faith dispute under Complainant WTC's tariff is not a prerequisite to AT&T's assertion of its counterclaims in this proceeding.

Furthermore, with respect to AT&T's "self-help" actions in withholding payment of disputed intrastate switched access charges, this ALJ finds that unilaterally withholding payment is not a preferred form of dispute resolution in economic disputes between carriers unless it is clearly contemplated under the applicable dispute resolution provisions, which it was not in this case. However, based on the findings this ALJ has made herein that Complainants' intrastate switched access rates do not comply with section 310 of the Act and that no money is owed by AT&T, there is thus no need for any remedy against AT&T's self-help actions in this case.

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[375] *Id.*

B. Whether AT&T's requested relief is limited by the applicable limitations period imposed under Complainants' tariffs.

1. Complainants' Position

Complainants assert that even if it can be said that AT&T properly brought a billing dispute under Complainants' tariffs, any refund to which AT&T would be entitled is limited by section 2.4.1(E) of GLC's Tariff, which provides in relevant part:

> [A]ll requests for refunds or adjustments must be made in writing to the Telephone Company within two (2) years after the date when the bill that the Customer seeks to dispute was rendered. No refunds or adjustments will be made for billing disputes that occurred more than two (2) years before the date a customer makes a written request to the Company for adjustment.[376]

Complainants argue that the earliest date that AT&T gave any indication that it was disputing certain charges was in its March 20, 2013 letter and, assuming this letter constituted a proper refund request, "AT&T would have a claim to a refund only going back to 2011."[377] However, Complainants reject that this letter was in accordance with the dispute resolution provisions of Complainants' tariff and instead maintain that Complainants were first put on notice of AT&T's refund request on July 24, 2014, with the filing of AT&T's counterclaim.

2. AT&T's Position

AT&T asserts that because its March 20, 2013 dispute letter was indeed a proper refund request, AT&T is indeed entitled to a refund back to March 20, 2011 under Complainants' relevant tariff provisions.[378] And, because AT&T's total counterclaim relates to bills rendered from February 2010 through February 2013, 84.5% of AT&T's

[376] Section 2.4.1(E) of GLC's Tariff; see also GLC Exhibit 53, which contains a copy of this section.
[377] Complainant's brief at 43-44.
[378] AT&T's reply brief at 32.

total $3,683,025 refund claim (not including local switching), relates to bills rendered after March 20, 2011.[379] AT&T further asserts that, for the remaining 15.5% of AT&T's refund claim (or $570,869) that accrued prior to March 20, 2011, Complainants' argument that AT&T is barred from relief must fail because any delay in presenting a written request for refund was caused by false representations in Complainants' billing statements which concealed the bases for AT&T's refund claim. In support of this assertion, AT&T maintains that, having met the conditions for "access stimulation," Complainant GLC was required but failed to file a revised tariff reflecting the rate cap and this "furtive concealment" as recognized by the FCC in *Connect America Fund* allows any refund liability to be applied to the date that Complainant GLC should have revised its rates which, according to the FCC, was within 45 days of having met the definition.[380] AT&T further notes that Complainants' bills represented that Complainants provided 100% of the transport between Southfield and Westphalia and that LECMI provided "end office switching" services for which Complainants charged AT&T, and GLC represented in its federal tariff that it was a rural CLEC entitled to charge higher rates under the NECA tariff – all of which were later determined to be untrue. AT&T contends that it is untenable for Complainants to suggest that AT&T should have sought a refund sooner when Complainants concealed the bases for that refund.

3. Staff's Position

Staff maintains that AT&T's March 20, 2013 billing dispute notification to Complainants sufficiently constituted a written adjustment request to allow for a refund

[379] *Id*. at 33, citing *Connect America Fund*, ¶ 697.
[380] *Id.*

no more than two years before March 20, 2013, as contemplated by section 2.4.1(E) of GLC's Tariff.[381]

4. Analysis

As noted in Section VII.A.'s analysis above, AT&T's March 20, 2013 letter included sufficient detail to satisfy the legitimate purpose of the billing dispute provisions contained in section 2.4.1(D)(1) of Complainant WTC's Tariff. Consequently, this ALJ finds that the refund relief requested by AT&T in AT&T's counterclaim is appropriately governed by the time limitations imposed by section 2.4.1(E) of Complainant GLC's Tariff and section 2.4.1 of Complainant WTC's Tariff, which limitations preclude a refund or adjustment for billing disputes that occurred more than two years before March 20, 2013, or before March 20, 2011.

C. Whether AT&T's requested relief is limited by the applicable limitations period imposed under section 205 of the Act.

1. Complainants' position

Complainants maintain that the language of section 205 of the Act ("[t]he penalties under this act shall not be imposed for a violation that occurred more than 2 years before the date the complaint was filed") precludes AT&T from recovering any relief before July 24, 2012, which is two years prior to the date of AT&T's counterclaim.[382]

[381] Staff's reply brief at 6-7.
[382] Complainant's brief at 44-45.

2. AT&T's position

AT&T asserts that section 205 expressly applies to "*penalties under this act*" and therefore has no effect on AT&T's ability to seek, or the Commission's power to order, remedies for damages or refunds.[383] AT&T notes that the Commission has previously held "that MCL 484.2205(1) is unambiguous and that it does not bar the Commission from investigating and resolving complaints that pre-date the filing of a complaint by more than two years."[384] In so holding, the Commission observed that "[w]hile the party filing a complaint more than two years after the occurrence of the event that gave rise to the complaint has . . . forfeited the right to seek penalties, the Commission still has authority . . . "to 'investigate and resolve complaints' and to 'order remedies . . . to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation."[385]

3. Staff's position

Staff maintains that should the Commission determine that AT&T is entitled to a refund, any such refund is limited by section 205 of the Act which provides that "[t]he penalties under this act shall not be imposed for a violation that occurred more than 2 years before the date the complaint was filed."[386] Staff thus asserts that AT&T's requested relief should be limited to no earlier than two years before the date that AT&T filed its counterclaims, or to July 24, 2012.[387]

[383] AT&T's reply brief at 34. (Emphasis added).
[384] *Id.*, citing *Page v. AT&T Michigan*, Case No. U-15173, 2007 WL 861090, at 3.
[385] *Id.*
[386] Staff's reply brief at 6-7.
[387] *Id.*

4. **Analysis**

It is clear from the plain language of section 205 of the Act that the two-year limitation is applicable only to penalties under the Act and not to damages or refunds, the latter of which is sought by AT&T. This reading is indeed consistent with the Commission's own interpretation of section 205 in *Page v AT&T, supra*:

> The Commission finds that MCL 484.2205(1) is unambiguous and that it does not bar the Commission from investigating and resolving complaints that pre-date the filing of a complaint by more than two years. Rather, the sole prohibition on the Commission's authority set forth in MCL 484.2205(1) to investigate and resolve a complaint filed under the MTA appears in the second sentence, which limits the Commission's authority to impose the *penalties* set forth in Section 601 of the MTA, MCL 484.2601. An examination of MCL 484.2601 confirms this interpretation. MCL 484.2601 provides, in part:
>
> > If after notice and hearing the commission finds a person has violated this act, the commission shall order remedies and *penalties* to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation, including, but not limited to, 1 or more of the following.....MCL 484.2601 (emphasis added).
>
> Together, MCL 484.2205(1) and MCL 484.2601 establish that the Commission may investigate and resolve any complaint, whether it is more or less than two years old. While the party filing a complaint more than two years after the occurrence of the event that gave rise to the complaint has, pursuant to the second sentence of MCL 484.2205(1), forfeited the right to seek penalties, the Commission still has authority, pursuant to the first sentence of MCL 484.2205(1) and MCL 484.2601, to "investigate and resolve complaints" and to "order remedies ... to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation."

Accordingly, where AT&T's counterclaim does not seek penalties under section 205 of the Act, this ALJ finds that AT&T's requested relief is not limited by the two-year limitations period set forth in section 205 of the Act.

D. Whether AT&T's requested relief is limited by the unclean hands and voluntary payment doctrines.

1. Complainants' position

Complainants argue that AT&T's counterclaim is barred by the equitable doctrine of unclean hands because AT&T has continued to use Complainants' services while refusing to pay for them.[388] Complainants further contend that AT&T is disputing payment on 8YY traffic that originated with Cricket, however AT&T not only knew that Cricket was sending its traffic to traffic aggregators in mid-2013 and took no action to curtail or limit the traffic, but AT&T completed its acquisition of Cricket in March 2014 and would therefore receive an unjust windfall if awarded a refund in this proceeding.[389] Complainants further assert that where AT&T "voluntarily paid [the rates charged] with full understanding of the charges, [and] full knowledge of the tariffs on record, AT&T is precluded from a refund under Michigan's 'voluntary payment doctrine.'[390]

2. AT&T's position

AT&T maintains that Complainants' unclean hands argument is only a defense to claims for equitable relief and does not affect claims for damages or other remedies at law.[391] AT&T further asserts that the argument is factually baseless where Cricket's participation in an 8YY traffic aggregation arrangement occurred before its acquisition by AT&T and where AT&T's refund claims pertain to payments before March 2013, a year before the Cricket acquisition.

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[388] Complainants' brief at 39.
[389] *Id.*
[390] *Id*. at 46.
[391] AT&T's reply brief at 38-39.

In response to Complainants' 'voluntary payment doctrine' argument, AT&T contends that such an argument is inapplicable here as it is inconsistent with Complainants' tariffs wherein Complainants agreed to permit refunds of any amounts paid, so long as the payor made a written demand within two years of the related bill.[392] AT&T further argues that, even if the doctrine were applicable, AT&T's payments were not voluntary as required by the doctrine where AT&T did not have full knowledge of all the circumstances at the time of payment – including that 44% of the transport billed by Complainants was provided by LECMI, or that Complainants were billing for end office switching that was not performed.[393]

3. <u>Staff's position</u>

Staff's reply brief does not address whether AT&T's requested relief is limited by the unclean hands and voluntary payment doctrines.

4. <u>Analysis</u>

To determine whether a party comes before the court with clean hands, the primary consideration is whether the party sought to mislead or deceive the other, not whether the other party relied upon the misrepresentations.[394] The Commission has previously rejected a party's assertion of an unclean hands defense in the absence of any evidence of invalidity by the party against whom the defense was asserted.[395]

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[392] *Id*. at 36.
[393] *Id*. at 37.
[394] *Attorney General v. PowerPick Player's Club of Mich, LLC*, citing *Stachnik v. Winkel,* 394 Mich. 375, 387; 230 NW2d 529 (1975).
[395] *In the matter of the formal complaint of Michigan Bell Telephone Company, d/b/a/ AT&T v. B&S Telecom, Inc., et al*, Case No. U- 16501, 2011 WL 3621853

In this case, there is no evidence in the record establishing that AT&T engaged in any such misleading, deceptive, or invalid behavior. Moreover, the unclean hands doctrine is grounded in the principles of equity and there is no dispute that AT&T's counterclaim seeks a monetary refund, not equitable relief.[396]

With respect to the voluntary payment doctrine,[397] Michigan law holds that a voluntary payment cannot be recovered when it is made with "full knowledge of all the circumstances upon which it is demanded, and without artifice, fraud, or deception on the part of the payer...."[398] However, a voluntary payment made as a result of a mistake of material fact may be recovered.[399]

The Commission has previously held that the voluntary payment doctrine did not prevent an award of damages where a complainant paid a higher rate for service because it had been illegally denied access to service at lower tariffed rates.[400] Specifically, the Commission concluded:

> The ALJ rejected as frivolous the arguments that the filed rate and voluntary payment doctrines prevent an award of damages. He concluded that those were not applicable where a complainant paid a higher rate for service because it had illegally been denied access to service at lower tariffed rates.
>
> The Commission agrees that the arguments are frivolous. MCI WorldCom is not challenging the legality of Ameritech Michigan's special access rates but rather the legality of applying those rates to its requests for service. Similarly, MCI WorldCom cannot be said to have acquiesced in Ameritech

[396] "It is well settled that one who seeks equitable relief must do so with clean hands." *Attorney General v. PowerPick Player's Club of Mich, LLC,* 287 Mich.App 13, 52; 783 NW2d 515 (2010).
[397] It should be noted that Complainants failed to include the voluntary payment doctrine as an affirmative defense in Complainants' answer to AT&T's counterclaim, as mandated by Rule 513 of the Commission's Rules (R 460.17513).
[398] *Slavik v. Baskin Law Firm*, 2013 WL 6921530, (Mich. App. 2013), citing *Montgomery Ward & Co v. Williams,* 330 Mich. 275, 284; 47 NW2d 607 (1951), quoting *Pingree v. Mutual Gas Co,* 170 Mich. 156, 157; 65 NW 6 (1895).
[399] See *Montgomery Ward, supra.*
[400] *In the matter of the application and complaint of Worldcom Technologies Inc. v. Ameritech Michigan, et al*, Case No. U-12072, 2000 WL 36114929.

> Michigan's unlawful conduct and the charges it imposed in furtherance of that conduct. Furthermore, Section 601 of the MTA, MCL 484.2601; MSA 22.1469(601), requires the Commission to make the complainant whole, a requirement with which Ameritech Michigan's arguments cannot be squared.[401]

Based on the evidence in this case, it likewise cannot be said that AT&T acquiesced to Complainants' unlawful intrastate switched access rates and the charges that Complainants imposed under those rates. Moreover, Complainants' defense in this regard cannot be reconciled with the Commission's obligation under section 601 to make the complainant – or, counter-complainant, as is the case here – whole.

For these reasons, this ALJ finds that AT&T's requested relief is not precluded by the unclean hands and voluntary payment doctrines.

VIII.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The threshold issues in this case are whether Complainants have met their burden of proving that AT&T has violated the terms and conditions of Complainants' intrastate tariffs by withholding payment for intrastate switched access services that Complainants provided to AT&T and, conversely, whether AT&T as counter-complainant has met its burden of proving that Complainants overcharged AT&T for switched access services by charging excessive switched access rates that violate Michigan law, artificially stimulating traffic by aggregating it with toll-free or '8YY' traffic from wireless carriers, and by artificially inflating their mileage charges.

[401] *Id*. at 12.

Section 203(8) of the Act provides that the burden of proving a case rests with the party filing the complaint.[402] Rule 515 of the Rules of Practice and Procedure before the Commission also provides that the complainant shall generally have the burden of proof as to matters constituting the basis for the complaint and the respondent shall have the burden of proof as to matters constituting affirmative defenses.[403]

For the reasons articulated in detail above, this ALJ finds that while Complainants have not met their burden of proof, AT&T has done so. To be sure, the evidence in this record has revealed not only that Complainant GLC's intrastate switched access rates do not comply with section 310 of the Act, but that Complainants have engaged in a pattern of erroneous billings that in each instance (i.e. billing for transport by WTC outside its LATA at GLC's rates, billing for transport by LECMI at GLC's rates, billing for local end office switching never provided by LECMI, billing for jurisdictionally interstate 8YY traffic) involved an opportunity to apply Complainant GLC's unlawful intrastate access rates to the services. This ALJ makes no determination regarding whether this pattern of overbillings was intentional or inadvertent error, however it is clear that they were not in accordance with Complainants' tariffs, or with the requirements of federal law and section 310 of the Act, consequently entitling AT&T to a refund for those overbillings that fall within the limitation period specified in Complainant GLC's tariff. This ALJ therefore makes the following findings of fact and conclusions of law:

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[402] MCL 484.2203(8).
[403] R 460.17515.

1. At all times relevant to this proceeding, Complainant GLC was a "CLEC" within the meaning of 47 C.F.R. §61.26(a)(1) and was not a "rural CLEC" within the meaning of 47 C.F.R. §61.26(a)(6).

2. Under section 310 of the Act, Complainant GLC's intrastate switched access service rates are required to be set at levels no higher than the corresponding interstate switched access rates for similar services by the competing ILEC.

3. Complainant GLC's intrastate switched access rates are higher than the interstate switched access rates charged by the competing ILEC.

4. From February 2010 through the present, Complainants improperly billed AT&T for intrastate switched access services using Complainant GLC's intrastate switched access rates that do not comply with section 310 of the Act.

5. From February 2010 through February 2013, Complainants improperly collected payment from AT&T for intrastate switched access services using Complainant GLC's intrastate switched access rates that do not comply with section 310 of the Act.

6. Between January 13, 2010 and December 31, 2013, Complainant GLC engaged in access stimulation because Complainant GLC was a party to two revenue-sharing agreements that resulted in a greater than 100 percent increase in access minutes and consequently a significant increase revenues and profits.

7. From July 1, 2012 through August 2014, Complainants improperly billed and collected payment from AT&T for intrastate switched access transport charges provided by Complainant WTC using Complainant GLC's tariff rates rather than Complainant WTC's tariffed rates.

8. From February 2010 through July 2013, Complainants improperly billed and collected payment from AT&T for 100% of the transport having been provided by GLC at GLC's tariff rates, when 44% of the transport should have been attributed to LECMI using LECMI's rates under GLC's tariff.

9. From February 2012 through July 2013, Complainants improperly billed and collected payment from AT&T for local switching charges on 8YY traffic.

10. From February 2010 through January 2014, Complainants improperly billed and collected payment from AT&T for intrastate switched access charges on wireless 8YY traffic, only 1% of which actually originated in Michigan, and the remainder of which originated and terminated in other states.

11. AT&T did not violate the terms of Complainants' tariffs when AT&T withheld partial payment for intrastate switched access charges that Complainants billed to AT&T.

12. AT&T's March 20, 2013 letter included sufficient detail to satisfy the legitimate purpose of the billing dispute requirements of Complainant WTC's tariff.

13. AT&T's counterclaim is limited by Complainants' tariffs to a refund or adjustment for payments made no earlier than March 20, 2011.

14. AT&T's counterclaim is not limited by the two-year limitations period set forth in section 205 of the Act.

15. AT&T's counterclaim is not precluded by the unclean hands and voluntary payment doctrines.

Any arguments or proposed findings of fact that were not specifically addressed in this Proposal for Decision were either found to be irrelevant, unsupported by the record, or unnecessary for the disposition of this case.

IX.

CONCLUSION AND RECOMMENDATION

Based on the findings of fact and conclusions of law set forth above, and for the reasons stated herein, this ALJ recommends that the Commission issue an order that does each of the following:

1. dismisses Complainants' complaint;

2. directs Complainants to refund AT&T those intrastate switched access payments AT&T made to Complainants from March 2011 through February 2013 in excess of the intrastate switched access rates charged by the competing ILEC;

3. directs Complainants to file a revised intrastate tariff with rates no greater than the interstate rates for the same elements and which rates will parallel the access rate charged by the competing incumbent LEC;

4. directs Complainants to refund AT&T payments improperly billed and collected from July 1, 2012, through August 2014 for intrastate switched access transport charges provided by WTC using GLC's tariff rates rather than WTC's tariffed rates, from July 1, 2012, through August 2014;

5. directs Complainants to refund AT&T payments improperly billed and collected from March 2011 through July 2013 for intrastate switched access transport charges with 100% of the transport having been provided by GLC at GLC's tariff rates,

when 44% of the transport should have been attributed to LECMI using LECMI's rates under GLC's tariff;

6. directs Complainants to refund AT&T payments improperly billed and collected from February 2012 through July 2013 for intrastate switched access local end office switching charges on 8YY traffic;

7. directs AT&T to file their calculations of the amount of charges for the traffic at issue in this case and eligible for refund or credit consistent with these recommendations within 30 days of the date of the Commission's order.[404]

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

____
Suzanne D. Sonneborn
Administrative Law Judge

ISSUED: 12/11/14
drr

[404] As noted in Section VI.B.4., while Complainants improperly billed and collected payment from AT&T from February 2010 through January 2014 for intrastate switched access charges on wireless 8YY traffic, any recommended refund to AT&T within the applicable limitations period of March 2011 through January 2014 has been rendered moot by the relief recommended in paragraph (1) herein and by the fact that AT&T has since March 2013 withheld payment of those intrastate switched access charges in excess of the intrastate switched access rates charged by the competing ILEC.