

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

In the Matter of)	
)	
AT&T CORP.)	
)	
<i>Complainant</i>)	
)	
v.)	File No. EB-09-MD-010
)	
ALL AMERICAN TELEPHONE CO.)	
e-PINNACLE COMMUNICATIONS, INC.)	
CHASECOM)	
)	
<i>Defendants.</i>)	

**REPLY LEGAL ANALYSIS IN SUPPORT OF
SUPPLEMENTAL COMPLAINT OF AT&T CORP. FOR DAMAGES
AND IN RESPONSE TO DEFENDANTS' LEGAL ANALYSIS, AFFIRMATIVE
DEFENSES, MOTION TO DISMISS, AND PETITION FOR DECLARATORY RULING**

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Pursuant to Sections 206, 207, 208 and 209 of the Communications Act (“Act”), 47 U.S.C. §§ 206, 207, 208 and 209, and Section 1.726 of the Commission’s Rules, 47 C.F.R. § 1.726, Complainant AT&T Corp. (“AT&T”) hereby files this Reply Legal Analysis in Support of its Supplemental Complaint for Damages and in opposition to the Legal Analysis, Affirmative Defenses, Motion to Dismiss, and Petition For Declaratory Ruling filed on December 1, 2014, by Defendants All American Telephone Co., Inc. (“All American”), e-Pinnacle Communications, Inc. (“e-Pinnacle”), and ChaseCom (collectively, “Defendants”).

INTRODUCTION

In 2009, the Defendants affirmatively requested the Commission to address allegations that they were acting as “sham entities,”¹ and later that year affirmatively requested, and received, a primary jurisdiction referral for the Commission to decide several issues, including the validity of their Communications Act claims, the validity of and their compliance with their access services tariffs, and any compensation that they might be owed if they were found to have violated their tariffs.² As they explained in their brief to the District Court seeking referral, “the ultimate questions in this case” are all “within the particular jurisdiction and expertise of the FCC.”³

In taking these steps, the Defendants apparently believed that the Commission would rule in their favor on these issues. But in a series of orders, the Commission determined that the Defendants (1) could not bring Communications Act claims against AT&T as a putative purchaser of access services;⁴ (2) had violated Section 201(b) by operating as sham CLECs; and (3) had improperly billed AT&T for services that they did not provide pursuant to valid and applicable tariffs.⁵ The Defendants chose not to seek review in a court of appeals of any of these orders.

¹ Pet. For Decl. Ruling of All American Tel. Co. et al., File No. EB-09-MDIC-0003, WC Docket No. 07-135, at 27-28 (filed May 20, 2009) (the Defendants “request that the Commission respond to the referral of the ‘sham entity’ question . . . by issuing a Declaratory Ruling” that their commercial agreements “do not violate § 201(b)”);

² See Pls. Mem. In Support of Motion for Referral to FCC, at 1, *All American v. AT&T*, No. 07-861 (S.D.N.Y.) (filed Nov. 25, 2009); Order, Feb. 2, 2010, *All American v. AT&T*, No. 07-861 (S.D.N.Y.) (listing referred issues).

³ Pls. Mem. In Support at 1.

⁴ *All American v. AT&T*, 26 FCC Rcd. 723 (2011), *recon denied*, 28 FCC Rcd. 3469 (2013) (“*All American Recon Order*”).

⁵ *AT&T v. All American*, 28 FCC Rcd. 3477 (2013) (“*Liability Order*”), *recon denied*, 29 FCC Rcd. 6393 (2014) (“*Liability Reconsideration Order*”).

Having lost these issues, the Defendants now assert, *inter alia*, that the Commission (i) has *no* authority to award damages for their violations of the Act, despite the clear command of Sections 206 and 208, and (ii) should *not* decide their claims for alternative compensation, and instead should find the Defendants, as a result of their violations of the Act, to be free from the Commission's jurisdiction, so that they can pursue relief under a state law *quantum meruit* theory.

For the reasons set forth below and in AT&T's responses to their other filings, the Defendants' claims are completely lacking in merit and should be disregarded. The Commission can, and should, require the Defendants to refund the charges that they improperly billed, and to pay damages arising from their actions as sham CLECs. As explained in more detail below, there is obviously no merit to their position that they can ask the Commission to address whether they are sham entities, and then, when the Commission decides that they have violated the common carrier provisions of the Act by engaging in sham transactions, contend that (i) the Commission has actually found that they are not common carriers but were "agents" of Beehive, (ii) the Commission has no authority to award damages against them, and (iii) the Commission's ruling has created a "regulatory gap" that can be filled by the Defendants' state law *quantum meruit* claims. Such a holding would mean the Commission's *enforcement* authority under Section 208 is, in reality, a method of *de-regulating* entities (like the Defendants) that act as carriers and violate the Act and the Commission's rules with impunity. This plainly cannot be the law.

Further, having asked the Commission to address their claims for alternative compensation,⁶ the Defendants' claim that the Commission "does not have authority to tell" the District Court its views on this issue and should "defer to the Court" is – at best – disingenuous. See Answer ¶ 77; Pet. for Decl. Ruling, at 5-6. No party contends that the Commission should address the merits of any state law claim, nor is anyone contending that the Commission's views regarding preemption would necessarily be dispositive, but there is absolutely no merit to the Defendants' position that the Commission should stand by silently, and allow the Defendants to press forward in court with *quantum meruit* claims that are, at a minimum, seriously at odds with the Commission's *Liability Order* – and that, in truth, are pre-empted by the Commission's CLEC access regime and rules.⁷

In short, the Defendants not only want to escape liability for their violations of the Act, they want to be compensated in spite of their misconduct. Given the Commission's findings that the Defendants were not *bona fide* CLECs, and did not have facilities to provide services to AT&T, as well as the Defendants' extreme positions in both the litigation and in settlement,⁸ the Commission is entirely justified on this record in issuing rulings that would not allow the Defendants to obtain any compensation.

⁶ See Referred Issues, 2 and 3; Reply Mem., *All American v. AT&T*, No. 07-861, at 9 (Dec. 22, 2009) (asking the Court to refer the issue of "[i]f the interstate tariff does not apply, and the traffic is compensable, can a rate be established through a *quantum meruit* analysis conducted by a federal court using prevailing market rates for similar service").

⁷ For similar reasons, the Commission should reconsider its Letter Order of October 29, 2014 and address AT&T's consequential damages claim as well as its claim for prejudgment interest. As explained below, the Commission clearly has the authority to address such matters. Moreover, given Defendants' unlawful conduct, it is important that the Commission send a message that unlawful conduct, such as engaging in sham transactions, has adverse consequences.

⁸ The Defendants have not presented AT&T with a settlement offer since the *Liability Order* was issued. See Supp. Compl. ¶ 34.

ARGUMENT

I. THE COMMISSION HAS JURISDICTION OVER AT&T’S COMPLAINT AND MAY DIRECT THE DEFENDANTS TO PAY DAMAGES.

The Defendants’ two leading arguments are that (1) venue is improper because AT&T has already elected to pursue its claims in federal court under Section 207’s forum election provisions, and (2) the Commission has no jurisdiction over the Defendants because the Commission has held, in effect, that they are not carriers. Br. at 5-7. Neither claim has merit.

A. There Is No Merit To The Defendants’ Claim That Section 207 Bars AT&T’s Request For Damages.

Section 207 does not prohibit AT&T from filing its supplemental complaint for damages with the Commission – just as it did not apply either to AT&T’s initial complaint or the Defendants’ formal complaint against AT&T. As the Commission has held, “[i]t is well established that section 207 does not apply in the context of a primary jurisdiction referral.”⁹ Here, the Commission specifically “directed” the parties to “effectuate the Court’s referral” by having each party file a formal complaint.¹⁰ The Commission has also acknowledged that, as permitted under 47 C.F.R. § 1.722(d), AT&T “elected to bifurcate its liability and damages claims.”¹¹ AT&T’s supplemental complaint therefore is simply the bifurcated damages portion of the complaint that the Commission “directed” AT&T to file.¹² And, consistent with the

⁹ *AT&T Corp. v. Beehive Tel. Cos.*, 17 FCC Rcd. 11641, ¶ 24 (2002).

¹⁰ *Liability Order*, ¶ 1 n.1 (“This litigation stems from a primary jurisdiction referral . . . the Commission directed the parties to effectuate the Court’s referral by filing two formal complaints.”).

¹¹ *Id.* ¶ 1 n.4

¹² *Id.* ¶ 1 n.1; *see also id.* ¶ 1 n.4 (“Because this Order finds in AT&T’s favor on liability, AT&T may file *with the Commission* a supplemental complaint for damages” (emphasis added)).

Commission's specific instructions, AT&T has included in its supplemental complaint all of the issues referred by the District Court that are still awaiting resolution.¹³

Dismissal of AT&T's complaint under Section 207 would be especially inappropriate in this case. Here, the Court referred AT&T's sham entity claim to the Commission on its own initiative, and then the *Defendants* sought a broader primary jurisdiction referral, which the Court granted over AT&T's objection.¹⁴ Given that the Defendants have effectively chosen this forum by seeking and obtaining a primary jurisdiction referral from the Court, the Commission has no basis to entertain the Defendants' sudden desire to evade the consequences of the referral they sought by attempting to wrench the remaining referred issues back to federal court.

Further, the cases the Defendants cite are inapposite. Their principal case, *Mocatta Metals*, does not involve a primary jurisdiction referral.¹⁵ Rather, the plaintiff Mocatta initially went to federal court to obtain a temporary restraining order "by which [the defendant] ITT was restrained from terminating service to Mocatta until Mocatta perfected the filing of a complaint with the Commission."¹⁶ Once Mocatta filed a complaint with the Commission, the Commission agreed to hear the case on the condition that Mocatta first obtained the dismissal of its federal suit under Section 207. But as the Commission explained, the choice of forum remained the plaintiff's in *Mocatta*; the Commission was merely insisting that Mocatta make the forum

¹³ *Liability Order* ¶ 1 n.4 ("Commission staff subsequently ruled that the issues raised in Count III of the [AT&T] Complaint will be addressed in AT&T's damages proceeding, if any."); *see also id.* ¶ 23 n.99; *id.* ¶ 45 (ordered "pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act . . . that Count III will be addressed in connection with any damages complaint filed by AT&T"); *Liability Reconsideration Order*, ¶ 12 ("the damages proceeding will encompass the remaining issues referred by the District Court").

¹⁴ *See All American Recon Order*, 28 FCC Rcd 3469, ¶ 8.

¹⁵ *See Mocatta Metals Corp. v. ITT World Communications, Inc.* 44 F.C.C.2d 605 (1973).

¹⁶ *See Mocatta Metals Corp. v. ITT World Communications, Inc.* 54 F.C.C.2d 104, ¶ 2 (1975) (describing procedural background).

selection choice that Section 207 permits. Here, in part at the Defendants' behest, the District Court has chosen the Commission as the forum for initial resolution of these issues by entering an order of referral.¹⁷

B. The Commission Has Jurisdiction Over The Defendants.

Defendants make two convoluted arguments that the Commission lacks jurisdiction over AT&T's complaint. Neither argument has merit.

First, as Defendants correctly note (Br. at 7), the Commission found that the three Defendant CLECs here operated pursuant to "sham" arrangements. Defendants then argue that the fact that the Commission cited the *Total* case¹⁸ in support of that finding must mean that the Commission determined that the sham arrangements here were exactly like the one in *Total*.¹⁹ Thus, Defendants claim that if the Commission had applied the "full ruling of *Total*," the Commission would have concluded that the Beehive LECs were the actual "providers of service;" that the Defendants were acting as the Beehive LECs' "agents;" and that "the Beehive

¹⁷ Neither of the other two cases Defendants cite support dismissal either, because both are simply run-of-the-mill Section 207 cases that do not involve a primary jurisdiction referral. *See Cincinnati Bell Tel. Co. v. Allnet Communication Services, Inc.*, 17 F.3d 921, 923 (6th Cir. 1994) (holding merely that, having chosen to bring a claim for refund at the FCC, the defendant could not also thereafter raise the same claim as a counterclaim to a federal action); *Premiere Network Services v. SBC Communications*, 440 F.3d 683 (5th Cir. 2006) (plaintiff that had already filed a complaint with the Commission could not thereafter file a complaint on the same claims in federal court).

¹⁸ *Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 FCC Rcd. 5726 (2001) ("*Total*") *aff'd in part, rev'd in part*, 317 F.3d 227 (D.C. Cir. 2003).

¹⁹ Def's Br. at 7 (arguing that the "only precedent" the Commission cited was *Total*, that the Commission said *Total* was "relevant," but that the Commission "only implemented" the *Total* precedent partially to find that the Defendants were shams).

tariffed rates” therefore apply to the services at issue.²⁰

The *Liability Order* says no such thing, nor would such an interpretation be appropriate. Although the Commission found the *Total* ruling to be “relevant,”²¹ it expressly acknowledged that the nature of the sham arrangements at issue in this case differ from those in *Total*.²² In addition, the Commission said nothing in the *Liability Order* about the Defendants acting as agents for Beehive. To the contrary, the record shows, and the facts establish, that the Defendants held themselves out as actual, legitimate, competitive local exchange carriers; that they obtained certifications, filed tariffs, and billed AT&T under their own operating company number; and that they then sued AT&T in federal court in their own names, and alleged that they provided the service.²³ To be sure, all of this was done under false pretenses, to perpetuate a sham billing arrangement and traffic pumping scheme. But the fact that the Defendants took those steps completely undercuts any claim that Defendants were merely acting as Beehive’s “agents.”

Equally important, the Defendants miss the point the Commission was making when it described *Total* as “relevant,” even though not identical to this case. In *Total*, the Commission had not yet enacted the *CLEC Access Charge* regime (e.g., 47 C.F.R. § 61.26). The ILEC in *Total* was using the sham CLEC to charge rates *in excess* of what the ILEC as a regulated dominant carrier could charge in its ILEC tariff. Here, the Defendants were actually using the sham arrangement to charge *Beehive’s tariffed ILEC rate*, but as the Commission held, neither

²⁰ Def’s Br. at 7 (arguing that the “full ruling of *Total*” was that “in the absence of the ‘sham’ entities, the tariffed rates of the underlying LEC apply,” and if that ruling were applied here, the Commission would treat the Beehive rates as applicable and find the Defendants to be Beehive’s agents).

²¹ See Def’s Br. at 7 (quoting *Liability Order* ¶ 30).

²² E.g., *Liability Order* ¶ 30.

²³ See, e.g., *id.* ¶¶ 3, 14-16 (& n.53), 22.

Beehive nor the Defendants could lawfully have charged those rates absent the sham. *Liability Order*, ¶¶ 24, 27, 31. In contrast to *Total*, the sham here depended on Beehive raising its ILEC rate by re-entering the NECA pool while simultaneously using the sham CLECs to charge rates benchmarked to the new Beehive tariff (*id.* ¶¶12-15) – the purpose of which was to evade the fact that rate-of-return regulation would otherwise have forced Beehive to reduce its rates even further to account for the effect of the increased traffic resulting from its access stimulation activities.²⁴ Accordingly, regardless of whether the Defendants were Beehive’s “agents,” treating Beehive’s tariffed rates as the applicable rates would completely negate the Commission’s central findings in the *Liability Order*.²⁵

Second, the Defendants argue that the Commission, in finding that the Defendants were sham entities that were “not bona fide” CLECs, in essence determined that the Defendants are not common carriers under the Communications Act.²⁶ On the basis of this finding, the Defendants contend that the Commission has no jurisdiction to “hear formal or informal complaints” against the Defendants under Section 208 because “all such powers of the Commission expressly can be exercised only on ‘common carriers.’”²⁷

This argument is frivolous. Indeed, the D.C. Circuit has specifically held that this argument is “flatly wrong.”²⁸ In *Farmers & Merchants*, the traffic-pumping petitioner argued

²⁴ *Liability Order* ¶ 27.

²⁵ In all events, as the Defendants concede, Answer n. 54, the D.C. Circuit remanded portions of the *Total* order on which AT&T sought review, 317 F.3d at 238-39, and on remand the case settled before the Commission could reinstate its holding as to the appropriate remedy. 18 FCC Rcd. 11533 (2003). Accordingly, even if the Commission were to apply the “full ruling of *Total*,” it would not impose Beehive’s rates.

²⁶ Def’s Br. at 7-8.

²⁷ Def’s Br. at 8.

²⁸ *Farmers & Merchants Mutual Telephone Co. v. FCC*, 668 F.3d 714, 719 (D.C. Cir. 2011).

(as the Defendants do now) that the Commission’s ruling that the IXC did not have to pay its tariffed rates meant that “the service was not a common carrier service offered in a tariff and the Commission exceeded its authority by considering [the IXC’s] complaint under the Communications Act’s Title II common-carrier provisions.”²⁹ The court held that the Commission “had jurisdiction to consider [the IXC’s] complaint pursuant to 47 U.S.C. § 208(a), which provides authority to adjudicate complaints of ‘of anything done or omitted to be done by any common carrier’ in violation of the Communications Act.”³⁰ The key was that “Farmers *held itself out* as a common carrier providing access services to IXCs” and “billed . . . for that service,” and the Commission’s ruling that the petitioner had provided service outside the terms of its tariff in violation of the Act “could not immunize it from the complaint process.”³¹

In an effort to distinguish the Court of Appeals decision, the Defendants argue that *Farmers & Merchants* did not involve a finding that the traffic pumping petitioner was engaged in a sham transaction.³² However, the fact that the Defendants’ conduct in this proceeding is arguably more egregious than the conduct in *Farmers & Merchants* hardly justifies a finding that the Commission’s regulatory oversight capabilities have somehow been diminished. To the contrary, simple common sense suggests that, in these circumstances, the Commission’s powers to enforce the Act would be heightened, and that the Defendants’ ability to avail themselves of state law remedies would be even more remote. Indeed, to reach any other conclusion would in and of itself create a massive gap in the regulatory framework.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Answer ¶ 85.

Finally, it should be noted that the Defendants raised this argument in the related complaint proceeding that they filed against AT&T, and the Commission properly rejected it.³³ Given that the Commission's *Order* in that proceeding was not appealed and is now final, that is yet another reason for rejecting the Defendants' latest effort to resurrect this argument.

II. AT&T's SETTLEMENT WITH BEEHIVE IS NOT RELEVANT AND, IN ANY EVENT, DOES NOT PRECLUDE AT&T FROM OBTAINING RELIEF FROM THE DEFENDANTS.

Relying on a confidential settlement agreement between Beehive and AT&T dated August 20, 2007, Conf. Ex. B, the Defendants argue that "AT&T is estopped from arguing that it could file a complaint against the Beehive tariffed rates, or refuse to pay them, at all times relevant to the case at bar." Def's Br. at 10. This argument has no merit.

First, the Defendants have already raised arguments claiming both (i) that the AT&T/Beehive settlement agreement bars AT&T from obtaining relief;³⁴ and (ii) that AT&T's Complaint is directed against Beehive's rates.³⁵ The Commission has previously considered and rejected both arguments. *See Liability Order* ¶ 30 n.136 ("Nor do we find persuasive Defendants' reliance on a settlement agreement between AT&T and Beehive, which involved a claim pre-dating the period at issue here"); *id.* ¶ 33 ("it is *Defendants' conduct*, not Beehive's rates, that is at issue"). In fact, the Defendants concede that they raised an argument about the settlement agreement, and that the "*Liability Order* dismissed the argument." Def's Br. at 9. Further, their claim that the Commission's finding is "demonstrably wrong" cannot be raised

³³ *See All American Reconsideration Order*, 28 FCC Rcd 3469, ¶ 8.

³⁴ *Compare* Def's Br. at 9 ("AT&T Is Bound By Its Settlement Agreement With Beehive") *with* Initial Br. of All American, *et al.*, at 21 (filed Dec. 20, 2010) ("AT&T Was Bound By A Voluntarily Negotiated Agreement With Beehive").

³⁵ Def's Legal Analysis In Support Of The CLECs' Answer, at 13-16, 62-63 (filed June 14, 2010) (arguing that the "gravamen of [AT&T's] complaint is the assertion that Beehive's rates and traffic volumes are excessive"); Reply Br. of All American, at 8-9 (filed Jan. 14, 2011).

here. The Defendants could have petitioned for review of the Commission’s rejection of their arguments, but they elected not to do so. Those determinations, which are now final and non-appealable, constitute the law of the case and cannot be re-argued in this proceeding.³⁶ Consequently, the Defendants’ arguments can be rejected on this ground alone.

Second, even if the Commission were to consider the Defendants’ arguments again, they lack merit. AT&T’s first claim for damages is for refunds of the amounts that the *Defendants* – not Beehive – improperly billed and collected under *their* tariffs and pursuant to *their* unreasonable practices, *i.e.*, the sham arrangements. Defendants simply do not explain how a settlement agreement between AT&T and Beehive affects the refunds that Defendants should pay for improperly billing AT&T under *their* unlawful tariffs that *they* violated (*see Liability Order* ¶¶ 34-41), and there is no conceivable basis for such a claim. **[BEGIN**

CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³⁶ *Core Communications, Inc. v. Verizon Maryland Inc*, 19 FCC Rcd. 1935, n.30 (2004); *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1134 (D.C. Cir. 1994) (describing the law of the case doctrine as “the practice of courts generally to refuse to reopen what has been decided”).

³⁷ **[BEGIN CONFIDENTIAL]** [REDACTED]
[REDACTED] **[END CONFIDENTIAL]**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END
CONFIDENTIAL]

As to AT&T's second claim for damages, relating to payments that AT&T made to Beehive as a result of the Defendants' sham operations, the settlement agreement is also irrelevant. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END
CONFIDENTIAL] Regardless of the effect of the agreement on AT&T's rights against Beehive (and vice-versa), the agreement simply cannot – as a matter of basic contract law, and for all the reasons stated above – operate to limit any damages claimed by AT&T from the Defendants for their unlawful conduct.

The Defendants' argument seems to be that the sham arrangements could not give rise to consequential damages because [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] Again, however, this agreement is irrelevant.

³⁸ [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

That is because the Commission found in the *Liability Order* that, absent the Defendants' unreasonable practices and sham arrangements, the "Commission's CLEC access charge and tariff rules . . . would have brought the [Defendants' and Beehive's] access stimulation scheme to an end." *Liability Order* ¶ 31 (emphasis added). Absent the Defendants' sham arrangements, Beehive would not have billed AT&T, and AT&T would not have paid, the \$15 million associated with the access stimulation scheme. Indeed, the scheme was hatched with the express purpose of enabling Beehive to assess transport charges on AT&T. *See Liability Order* ¶¶ 16, 28. As AT&T explained, Supp. Compl. ¶¶ 42-48, its payments to Beehive are thus consequential damages that are properly awarded as "expenses that would flow under these circumstances as natural consequences from the [Defendants'] violation." *Aaron v. GTE California*, 10 FCC Rcd. 11519, ¶ 10 (1995).³⁹

III. AT&T HAS MADE NO ADMISSIONS THAT PRECLUDE IT FROM OBTAINING DAMAGES FROM DEFENDANTS.

The Defendants also argue that "judicial estoppel" requires "summary dismissal of AT&T's central assertions," and they point to five claims that AT&T should be barred from

³⁹ In Confidential Exhibit A, Defendants attach various settlement correspondence among the parties and among the parties and the Commission Staff. Most of the correspondence is labeled confidential, related to settlement, and inadmissible under Rule 408 of the Federal Rules of Evidence. Other correspondence is related to the Commission's Staff-supervised mediation, which has always been confidential in nature. Accordingly, Confidential Exhibit A is not admissible in this proceeding. *See American Cellular v. BellSouth Telecomms.*, 22 FCC Rcd. 1083, n.100 (E.B. 2007) (Rule 408 "bars" references to settlement negotiations "that are proffered to prove or disprove liability and/or damage").

raising. Def’s Br. at 10-14. The Defendants fail to set out the standard for judicial estoppel, but as the Commission has explained, “[j]udicial estoppel applies where a party assumes a successful position in a legal proceeding, and then assumes a contrary position simply because interests have changed, and is especially so if the change in position prejudices a party who acquiesced in the position formerly taken.”⁴⁰ As explained below, there is no merit to the Defendants’ arguments that AT&T is judicially estopped from making any of the assertions in its Supplemental Complaint for damages.⁴¹

A. AT&T Has Never Stipulated That The Defendants Provided Services To AT&T.

Defendants claim that AT&T admitted “throughout [its] pleadings” that AT&T received “terminating switched access traffic” that was “caused to be delivered by [the Defendants],” and based on these supposed admissions, contend that AT&T cannot lawfully assert that the Defendants did not provide services to AT&T. Def’s Br. at 10. This is baseless.

Preliminarily, the stipulations and the expert report to which the Defendants cite (*see id.* at 11) were filed on July 16, 2010, and November 13, 2009, respectively. *After* those submissions were made, there was significant additional discovery of Beehive, All American/Joy, e-Pinnacle, and ChaseCom, including the deposition of Doug Wingrove of Beehive, which took place on October 27, 2010. AT&T Ex. 132. It was this discovery, including primarily Mr. Wingrove’s testimony, that revealed (among other problems) that the Defendants had no operative switching facilities to provide services to AT&T. Shortly after the

⁴⁰ *Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers*, 19 FCC Rcd 13494, ¶ 8 n.34 (2004).

⁴¹ AT&T notes that the Defendants do not even attempt to show that they “acquiesced” in any position taken by AT&T or were “prejudiced” as a result. In these circumstances, given the Defendants’ inequitable conduct and tariff violations, *Liability Order*, ¶¶ 19-41, this is an especially inappropriate case to invoke judicial estoppel, even assuming the Defendants could show that AT&T had somehow taken a contrary position – which they plainly cannot.

discovery was conducted, AT&T's Initial Brief set forth the key relevant facts from that discovery, including the Defendants' lack of operative switching facilities that could have provided services to AT&T. *See* Initial Br. of AT&T, at 2, 8-12, 17-18 (filed Dec. 20, 2010).

Based on that evidence, the Commission then made factual findings, including that

All American never had its own operating switch in Nevada, and traffic to telephone numbers associated with its Nevada operations terminated to Joy's equipment located at Beehive's facilities in Utah not in Nevada. Nor did All American have a switch in Utah until one was installed sometime in 2008.⁶⁴ That switch, however, was connected to the Internet and was not physically connected to Joy's equipment in Utah.⁴²

In these circumstances, there is absolutely no basis to apply judicial estoppel. Even if AT&T had made the admissions that the Defendants claim in a preliminary phase of the liability proceeding – which is demonstrably not true – once all the evidence was gathered, it is indisputable that the position AT&T is now taking in the damages phase is exactly the same position it took at the conclusion of the liability phase. Further, AT&T's current position is based on the Commission's own findings that the Defendants did “not own or lease any switches that are typically used to provide competitive LEC services to the public.” *Liability Order* ¶ 17.

Second, and in any event, there is simply no factual basis for the Defendants' claims that AT&T has ever admitted that (i) the Defendants provided services to AT&T; (ii) AT&T received “switched access” traffic from the Defendants; or (iii) the Defendants “caused” traffic “to be delivered.” Def's Br. at 10-11.

Since the outset of this case, AT&T has alleged that the Defendants did not provide any services to AT&T. Notably, as the Defendants' concede, AT&T's District Court counterclaims, which were filed in 2008, asserted that the Defendants had billed for services that “they do not provide.” *See* Def's Br. at 11 (citing to AT&T Amended Answer and Counterclaims, ¶¶ 54, 58

⁴² *Liability Order* ¶ 17 (citing to, *inter alia*, Deposition of D. Wingrove).

(filed Aug. 14, 2008)). Further, in its Amended Complaint, AT&T made clear its allegations that the Defendants “do not have any of their own facilities to provide the services in question, and instead the calls have been routed over the same Beehive facilities used before the sham arrangements were in place.” AT&T Am. Compl. ¶ 61 (filed May 7, 2010); *id.* ¶¶ 26, 66 (“the CLECs became the *nominal* providers of facilities”).

Further, although AT&T has stipulated to the *traffic volumes* that were billed by the Defendants, *e.g.*, Joint Stmt. ¶ 52 (July 16, 2010), that has nothing to do with whether any services were provided or who actually provided them. Nor, as AT&T has explained, does that stipulation mean that AT&T received “switched access” traffic.⁴³ If anything, that stipulation is relevant to establish the volume of the charges that the Defendants improperly billed to AT&T.

AT&T also has not made any admissions to the effect that the Defendants “caused” traffic “to be delivered.” Def’s Br. at 9. To the contrary, AT&T’s position, based on its understanding of the Defendants’ scheme and access stimulation schemes generally, is that Joy Enterprises and other such “free” calling providers were the entities that promoted the free calling services that led to the calls for which the Defendants improperly billed AT&T. *See, e.g.* AT&T Am. Compl. ¶¶ 16, 47-49. In any event, it is simply absurd to claim that “caus[ing]” traffic to be delivered” is a service provided *to AT&T*. If that were true, then any person who publicly advertises his or her telephone number and then receives telephone calls could sue AT&T for “causing” “traffic to be delivered.”

⁴³ Previously, the Defendants have improperly attempted to place undue weight on this stipulation, and their attempt to do so here should be rejected. *See, e.g.*, Initial Br. of All American, *et al.*, at 19-20 (filed Dec. 20, 2010); *cf.* AT&T Reply Br. at 5 (Jan. 14, 2011).

In short, the Defendants' view that they can operate according to sham arrangements in order to perpetuate a harmful access stimulation scheme, and then claim a right to be compensated for generating the traffic to the sham enterprise is completely lacking in merit.

B. AT&T Is Not Estopped From Making Its Pre-Emption Claims As To Access Services Provided By A Competitive LEC.

The Defendants' assertions that AT&T should be estopped from presenting its pre-emption claims (Def's Br. at 12-13) also have no merit. *First*, one aspect of AT&T's pre-emption claim is that, because the Defendants provided no services to AT&T, a holding under state law that the Defendants are entitled to compensation would conflict with that holding and with the Commission's general rule that LECs cannot charge for services they do not provide. Supp. Compl. ¶ 78; *Eighth Report and Order*, 19 FCC Rcd. 9108, ¶ 21 (2004). In addition, another aspect of AT&T's pre-emption claim is that, given the Commission's liability finding that the Defendants operated as sham CLECs, *Liability Order* ¶¶ 24-33, any state law judgment that purported to award the Defendants compensation on equitable grounds would be inconsistent with, and pre-empted by, the Commission's sham entity determinations that the Defendants acted inequitably and unreasonably under Section 201(b). *See* Supp. Compl. ¶ 88. The Defendants do not even suggest that AT&T has taken a position contrary to either of these claims, and thus there is no basis for judicial estoppel as to these claims, even if the Defendants' assertions in this regard were otherwise correct.

Second, and in any event, the Defendants are simply incorrect in claiming that AT&T has taken a position contrary to the other aspects of its pre-emption claim. AT&T's primary claim is that the Commission's detailed regulatory regime for CLEC access services establishes two exclusive means by which CLECs can recover charges from long distance carriers for

terminating long distance calls: either a validly filed tariff, or an express, negotiated contract.⁴⁴

Defendants do not come close to establishing that a competitive LEC can successfully recover switched access charges from its customers on state law quasi-contract grounds.

In support of their position, the Defendants cite to five cases in their Legal Analysis. Br. at 12-13. Only four of those involved AT&T Corp., the complainant in this proceeding. But even a mere cursory review of these cases demonstrates that AT&T's *allegations* in those cases are not contrary to its current position. This is because the services at issue in those cases were long distance services, not access services, and AT&T was acting in those cases as a long distance carrier, not as a competitive LEC. As the Commission is well-aware, the regulatory regime applicable to long distance services offered by long distance companies like AT&T Corp. is far different from the regulatory regime for CLEC access services, like those for which the Defendants billed AT&T.⁴⁵

Unlike CLEC access services, the long distance services offered by AT&T have been subject to mandatory de-tariffing for well over a decade.⁴⁶ As the Commission explains on its website, “[e]xcept in very limited circumstances, long-distance companies are *not permitted* to file tariffs for long-distance service because the FCC has determined that the long-distance

⁴⁴ See Supp. Compl. ¶¶ 79-88; see 47 U.S.C. §§ 203, 211; 47 C.F.R. § 61.26; *Seventh Report and Order*, 16 FCC Rcd. 9923, ¶¶ 3-4, 55, 82-87 (2001); *Qwest Commc’ns v. Northern Valley*, 26 FCC Rcd. 8332, ¶¶ 6, 11 (2011); *Liability Order*, 28 FCC Rcd. 3477, ¶ 37 (“until a CLEC files valid interstate tariffs under Section 203 of the Act or enters into contracts with IXCs for the access services it intends to provide, it lacks authority to bill for those services”).

⁴⁵ It is also noteworthy in assessing the Defendants’ judicial estoppel claim that none of those cases involved a successful attempt to collect on state law quasi-contract grounds. See *Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers*, 19 FCC Rcd 13494, ¶ 8 (“[j]udicial estoppel does not apply” where a party’s litigation position was not adopted).

⁴⁶ Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20730 (1996); *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

market is competitive.”⁴⁷ Accordingly, long distance carriers generally do not provide their services pursuant to tariffs, but under service agreements. As such, it would not violate the FCC’s regulatory scheme if a long distance carrier sought to recover damages on a quasi-contract basis in the event, for example, the service agreement was found not to encompass the services at issue.

The market for CLEC access services, by contrast, is quite different; most notably it is not competitive. *Seventh Report and Order* ¶¶ 3, 30. In fact, the Commission, since 2001, has determined that regulation of CLEC access services is necessary to prevent CLECs from abusing their “bottleneck” monopolies over long distance carriers, and imposing high access rates that are not subject to negotiation. *Id.* Based on these findings, the Commission promulgated a detailed regulatory regime, and the Commission has unambiguously stated that under this regime, “CLECs may impose interstate access charges either through tariffs or contracts negotiated with IXCs.” *Northern Valley* ¶ 6; *Liability Order* ¶ 37.

The Defendants’ Answer (¶ 79) also claims that AT&T is estopped because of the *AT&T v. FCC* case,⁴⁸ which involved a wireless carrier’s claim for compensation from AT&T for terminating calls. Here again, the regulatory regime applicable to wireless carriers is much different from the one applicable to competitive LECs. Wireless carriers cannot file tariffs seeking compensation for terminating calls, and thus the Commission has concluded that the only possible way for them to obtain compensation is via a contract. Under this regulatory regime, the Commission in *AT&T v. FCC* did not necessarily exclude the possibility of an implied in fact contract in a situation where the price was already fixed. But that holding provides no support for the Defendants’ claim for compensation here, because under the

⁴⁷ <http://www.fcc.gov/encyclopedia/tariffs> (emphasis added).

⁴⁸ 349 F.3d 692, 701 (D.C. Cir. 2003).

regulatory regime for CLECs, the Commission has stated that contracts need to be express, “negotiated” contracts. *Northern Valley I*, ¶ 6; *Liability Order*, ¶ 37. Additionally, on the facts here, the Defendants did not plead an implied-in-fact contract claim, and in any event, it is absolutely clear that there was no “meeting of the minds” sufficient to establish such a contract, let alone a rate. Supp. Compl. ¶ 78 n.88.⁴⁹ Further, the *AT&T v. FCC* case supports AT&T’s position, because, as the D.C. Circuit explained, the Commission “left little room for confusion” as to *quantum meruit* claims, “strongly suggesting that a claim based on *quantum meruit* would be preempted.” *AT&T*, 349 F.3d at 701 (citing *Declaratory Ruling*, 17 FCC Rcd. 13198, n.40). Because that is the only equitable claim the Defendants have pled, *see* Suppl. Compl. ¶ 78, the case strongly supports AT&T’s position.

In short, because of the different regulatory regimes, claims by competitive LECs under state law for recovery of services for originating or terminating long distance calls are preempted, but claims by long distance carriers are not.

C. The Defendants’ Other Grounds For Estoppel Also Lack Merit.

The Defendants also briefly raise three other estoppel arguments, Def’s Br. at 13-14, but none have merit. *First*, they contend that AT&T cannot claim that the Defendants’ “Local Switching rates are excessive because it has admitted that [their] rates match Beehive’s rates, and that it is not contesting the Beehive rates.” Br. at 13. The Defendants made this precise argument in the liability phase of this case, *see* Initial Brief at 20-21, AT&T rebutted it, AT&T Reply Br. at 5-6, and the Commission rejected the Defendants’ arguments and agreed with AT&T. *See Liability Order* ¶ 31 (“Defendants’ assertion that their billings to AT&T were lawful because they benchmarked their rate” to Beehive is “irrelevant. . . . Defendants were not

⁴⁹ Notably, the Defendants’ Answer (¶ 88) does not even address AT&T’s factual claim that there was no meeting of the minds, and it should be deemed to be admitted.

competing with Beehive in any real sense”). If any party is “estopped” here, it is the Defendants, for raising an argument that has been fully considered and rejected.

Second, the Defendants assert that AT&T is barred from claiming it is not obligated to pay Defendants anything because AT&T’s expert conducted “a ‘cost study’ of the [Defendants’] traffic,” and “concluded” the appropriate rate would have been 0.2496 cents. Br. at 13-14. This is inaccurate. AT&T’s expert did not purport to conduct a cost study of the Defendants’ traffic.⁵⁰ Rather, AT&T’s expert examined certain data submitted by Beehive, and then used the subsequent traffic volumes billed and associated with the Defendants’ access stimulation scheme to show that, absent the sham arrangements, “Beehive’s local switching rate would have declined even further (to 0.25 cents per minute by 2007), if Beehive continued to be the entity that charged terminating access.” *Liability Order*, ¶ 12 (citing Complaint Ex. A, Expert Report of David I. Toof, PhD, at 6, ¶ 16). Accordingly, Dr. Toof’s analysis does not purport to, nor does it, represent fair compensation for the Defendants – which did not provide any services to AT&T.

Third, the Defendants assert that AT&T argues in its Supplemental Complaint that any service it received from the Defendants is “not a regulated service.” Br. at 14 (citing Supp. Compl. ¶ 98). But this simply mischaracterizes AT&T’s Complaint. Paragraph 98 states that while “the Defendants did not provide any services to AT&T on the long distance calls at issue,” even if they had, the caselaw on access stimulation confirms “that such services *would be*

⁵⁰ At the time that AT&T submitted Dr. Toof’s expert report, AT&T had not yet completed discovery that would have allowed it to conduct a cost study. When it did obtain discovery about the Defendants’ operations, the discovery and other findings (such as the findings of the Utah Public Service Commission) showed that All American was a “mere shell company” (AT&T Ex. 96, *Utah PSC Revocation Order*, at 18, 23-24) and had never operated a switch to provide services, *see Liability Order* ¶ 17. In those circumstances, where Defendants had no telecommunications facilities to provide actual telecommunications (or any other) services, it was pointless to conduct a cost study of the Defendants’ operations.

regulated common carrier services.” Suppl. Compl. ¶ 98 (citing *Farmers Appeal Order*, 668 F.3d at 719; *AT&T v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001)) (emphasis added). Given the Defendants’ misstatements of AT&T’s position, there is no basis for an estoppel.

IV. AT&T’S DAMAGES ARE FULLY SUPPORTED BY THE FACTS AND THE LIABILITY ORDER.

The Defendants’ attempt to show that AT&T has not met its burden of proof in calculating its damages is unavailing. The Defendants begin with the uncontroversial proposition that the Commission requires complainants to demonstrate both the fact and the amount of any damages from a violation of the Act.⁵¹ The Defendants further claim that “AT&T has not done so” – rather, the Defendants attempt to create the impression that AT&T is attempting to collect damages for the services for which it actually withheld payment.⁵²

This is utter nonsense. The Commission expressly found in the *Liability Order* that the Defendants were sham entities that did not actually offer any services to AT&T, and that the Defendants violated Sections 201(b) and 203 by billing AT&T for access services that they did not provide pursuant to any valid or applicable tariff.⁵³ It is undisputed that AT&T *paid* some of these unlawfully issued bills, and the Commission has authorized this damages complaint.⁵⁴ As the Defendants themselves acknowledge, AT&T has submitted an expert report that calculates the amounts it paid to the penny: AT&T “paid a total of \$252,496.37” for those services (Def. Br. at 16), and AT&T’s expert has determined that the damages for those unlawfully extracted payments total to \$1.033 million for all three Defendants, using the interest rate contained in

⁵¹ Br. at 15 (citing *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd. 22467, ¶ 190 (1997)).

⁵² See Br. at 16 (“This raises the obvious question: if the CAPs ‘scheme’ resulted in inflated access charges . . . is AT&T ‘damaged’ if it never paid them?” (emphasis in original)).

⁵³ See AT&T Complaint ¶ 3 (citing *Liability Order* ¶¶ 1, 10-18, 24-33, 34-41).

⁵⁴ See, e.g., *Liability Order* ¶ 1 n.4.

Defendants' tariffs.⁵⁵ These precise calculations easily meet the Commission's standard of proof.

Moreover, the cases the Defendants cite are not to the contrary. In *New Valley*, as the Defendants note (at 15), the Commission found that the defendant had billed the plaintiff for a service that the plaintiff discovered was not listed in the defendant's tariff.⁵⁶ As AT&T has previously explained, however, the Commission specifically held in *New Valley* that the defendant had actually provided a service functionally similar to the one that was billed, and on that basis the Commission ruled that the plaintiff was not entitled to a full refund of its payments as damages.⁵⁷ Here, the Commission has found that the Defendants were sham entities that did *not* actually provide any service of any kind to AT&T, and thus *New Valley* is inapplicable.

The *COMSAT* case is even farther afield.⁵⁸ There, Western Union and COMSAT were competing for the right to provide certain services to the Department of Defense, and Western Union alleged that COMSAT had committed violations of the Act that resulted in Western Union losing the bid.⁵⁹ In the passage the Defendants quote, the Commission noted that, to receive damages, it is not enough to show merely that the defendant violated the Act; the plaintiff must be able to connect the violation to a showing of how that violation resulted in the claimed

⁵⁵ See AT&T Complaint ¶ 4 & Toof Report ¶¶ 5-6, 8-11. Although the Defendants do not specifically contest this, AT&T also submitted precise calculations of the amounts that AT&T paid to Beehive as a direct consequence of this scheme. See AT&T Complaint ¶ 5 & Toof Report 12-20.

⁵⁶ *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd. 5128 (2000) ("*New Valley*").

⁵⁷ See AT&T Complaint ¶¶ 74-75; *New Valley* ¶¶ 8-23.

⁵⁸ *Communications Satellite Corporation for Authority to Construct a "Standard B" Earth Station Antenna and Associated Facilities at Hickam Air Force Base*, 97 F.C.C.2d 82 (1984) (cited in Def. Br. at 16) ("*COMSAT*").

⁵⁹ *Id.* ¶¶ 20-21.

damages.⁶⁰ In *COMSAT*, the Commission ruled that Western Union simply had not shown that COMSAT's violations were the proximate cause of its losing the Department of Defense bid (in which it was only the fourth lowest bidder), and therefore it was not entitled to damages.⁶¹ But here the connection is obvious: the Defendants unlawfully issued bills to AT&T for services that they did not provide; AT&T paid the bills; and as the *Liability Order* establishes, absent the Defendants' violations of the Act, AT&T would not have paid those amounts.⁶² AT&T has thus met its burden.

V. THERE IS NO UNJUST ENRICHMENT TO AT&T BY REQUIRING THE DEFENDANTS TO REPAY CHARGES THEY IMPROPERLY BILLED IN VIOLATION OF THEIR TARIFFS AND PURSUANT TO SHAM ARRANGEMENTS.

The Commission should not consider the Defendants' unjust enrichment claim. The Defendants argue that they have provided AT&T "more than \$11 million in services" but that AT&T has paid "only a quarter million dollars" for those services, which "drove all three CAPs out of business."⁶³ Citing no cases, the Defendants claim that AT&T's nonpayment "constitutes a prima facie case for unjust enrichment."⁶⁴ However, the Defendants concede, as they must, that the Commission "is not empowered to grant, or even consider, their claims against AT&T a

⁶⁰ *Id.* ¶¶ 25-26.

⁶¹ *Id.* ¶¶ 27-30.

⁶² The basis for AT&T's consequential damages claim is equally clear. Indeed, the Commission has specifically found that in the absence of the sham arrangements, the access stimulation would have ended. *Liability Order* ¶¶ 12-13, 24, 27, 31. As a consequence, the traffic would not have occurred and Beehive would not have billed and collected access charges relating to that traffic. *See id.*

⁶³ Br. at 17.

⁶⁴ *Id.*

non-carrier customer,” but it asks the Commission to take note of this “prima facie” case as a “basis” for dismissing AT&T’s damages claims.⁶⁵

The Defendants’ argument is flawed on multiple levels. First, the Commission’s *holding* in the *Liability Order* was that the Defendants were sham entities that billed AT&T for services that they did not provide. Accordingly, AT&T was not unjustly enriched by \$11 million; rather, it paid the Defendants a “quarter million dollars” for services it did not receive and which the Defendants should now return to AT&T as damages. Any “judicial notice” here of a prima facie unjust enrichment claim in the opposite direction would thus be directly contrary to the central holdings of the *Liability Order*.

Further, the Defendants’ request that the Commission somehow factor an unjust enrichment notion into its damages assessment makes no sense for another reason. As the Defendants concede, the Commission has no jurisdiction or authority to consider any unjust enrichment claim by the Defendants against AT&T, which would be (at best) a state law claim against a customer rather than a carrier. Moreover, even if the Commission were inclined to take the time to analyze whether any such “prima facie” case of unjust enrichment exists here, the Defendants have not explained how a prima facie state law unjust enrichment claim could provide any “basis” for a damages determination under the federal Communications Act.⁶⁶

Finally, it is difficult to understand how the Defendants can ask the Commission to consider an unjust enrichment claim against AT&T when no such claim was asserted by the Defendants in the underlying federal court litigation.

⁶⁵ *Id.*

⁶⁶ The Commission has generally shown resistance to applying equitable doctrines in the context of a Section 208 formal complaint case. *Qwest Communications Co. v. Sancom, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd. 1982, 1993-94 (2013); *AT&T Corp. v. Bell Atlantic-Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 59, n.233 (1998).

VI. AN AWARD OF DAMAGES TO AT&T PRESENTS NO TAKINGS ISSUE.

The Defendants' takings argument should be rejected out of hand. The Defendants contend that, in 2010, All American attempted to revise its tariff, but "the Genachowski Administration" took the "literally unprecedented step" of rejecting that tariff, which had the effect of keeping the prior tariff in effect.⁶⁷ The Defendants further allege that this tariff rejection meant that the Commission itself "took an active role in governing the provision of service" between the Defendants and AT&T, and in light of this "active role," any ruling here that AT&T did not have to pay the Defendants would constitute the final step in establishing a regulatory taking.⁶⁸

These claims are meritless. First, AT&T's complaint for damages seeks the return of money that AT&T paid to Defendants in the 2006-2007 timeframe, after which AT&T exercised its right under the tariffs to dispute the bills and withhold payment. It is no defense to that claim to argue that "the Genchowski Administration" rejected an attempt to amend the All American tariff *in 2010*.

Further, even if that were not the case, there is no conceivable takings claim here. Any contention that the Title II tariffing and *CLEC Access Charge* regime is confiscatory would be patently frivolous.⁶⁹ All the Defendants had to do was follow the rules: if a carrier provides the access service described in its tariff, the regulatory tariffing regime in place provides more than ample opportunity to recover constitutionally adequate compensation for the provision of such

⁶⁷ Br. at 17-18.

⁶⁸ *Id.* at 18.

⁶⁹ See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301-02, 307-12 (1989) ("a state scheme of utility regulation does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in service to the public.'").

services.⁷⁰ The Commission’s conclusion that the Defendants did not follow those rules, but instead created sham entities that attempted to abuse the tariffing process to bill for services that they did not provide, could not possibly constitute a regulatory taking.

And in all events, the proper rejection of All American’s revised tariff in 2010 does not mean that the Commission “took an active role” in the Defendants’ provision of service, as if the Commission somehow thereafter forced the Defendants to provide service under unlawful and confiscatory terms. The Defendants had every opportunity to re-file a lawful tariff, and/or to engage in lawful access arrangements, at any time. Instead, as the Commission documented in the *Liability Order*, the Utah Public Service Commission revoked All American’s certification to provide service in Utah in April 2010, and All American ceased operating in both Utah and Nevada in the summer of 2010 (the other two Defendants had ceased operations in 2007).⁷¹

VII. THE COMMISSION SHOULD ADDRESS ALL OF AT&T’S ALLEGED DAMAGES, OR, AT A MINIMUM, MAKE CLEAR THAT SUCH ALLEGATIONS CAN BE RAISED BEFORE THE DISTRICT COURT.

In its October 29, 2014 Letter Order, the Commission stated that “some aspects of the damages Complaint exceed the scope of the referred issues, and they otherwise do not involve technical or policy considerations within the FCC’s specialized experience, expertise, and insight. Consequently, the Commission will not address (1) any damages allegedly owed to AT&T relating to AT&T’s payments to Beehive (Section I.B. and Count II of the Complaint); (2) calculation of interest on any damages allegedly owed to AT&T; and (3) attorneys’ fees allegedly owed to AT&T.” Order at 2. AT&T respectfully believes that its consequential damages, specifically its payments to Beehive arising from the sham arrangements, and its

⁷⁰ Indeed, under access stimulation schemes like the one in which Defendants were engaged, LECs were charging rates that “almost uniformly” were unjust and unreasonable. *Connect America Order*, ¶ 656.

⁷¹ *Liability Order* ¶¶ 18-19.

request for prejudgment interest, are properly raised at the Commission because they are within the scope of the District Court's referral.⁷²

While the District Court has *subject matter* jurisdiction under Section 206 and 207 of the Act to decide AT&T's sham entity claim, and to award damages (including consequential damages) to AT&T, the Court in 2009 invoked the primary jurisdiction doctrine to refer the entirety of AT&T's sham entity claim. *See* March 17, 2009 Order at 6-7. The Court did not (as it did in its second referral order) refer specific issues to be decided. *Compare id.* with Feb 5, 2010 Order. Accordingly, a proper reading of the Court's March 17 Order is that it has asked the Commission to resolve both liability issues and the question of damages arising from that claim. As AT&T alleged in its Supplemental Complaint, its payments to Beehive arose because of the Defendants' sham operations. Suppl. Compl. ¶¶ 3, 5, 33-34, 42-52. Thus, deciding whether those payments should be awarded as damages under the Commission's precedents applying Section 206 can properly be decided by the Commission as part of the sham entity referral.⁷³

Further, the Commission clearly has jurisdiction to award consequential damages for violations of the Act. 47 U.S.C. §§ 206, 208 (when a common carrier violates the Act, "such carrier shall be liable to the person or persons injured thereby for the *full amount of damages sustained in consequence* of any such violation.") (emphasis added). As AT&T more fully discussed in the Supplemental Complaint, the Commission's precedents provide that "[u]nder Section 206 of the Communications Act . . . an offending carrier is liable for the full consequential damages of its violation of the Act."⁷⁴ The Commission has further explained that

⁷² Indeed, if the Court did intend to refer damages issues, then failing to decide AT&T's damages now could result in an inefficient process, by which the Parties would return to the Court after this supplemental damages phase, only to be told by the Court to return to the Commission.

⁷³ *See id.* ¶¶ 43-44 (citing Commission precedents).

⁷⁴ *Aaron v. GTE California, Inc.*, 10 FCC Rcd 11519, ¶ 10 (1995).

the permissible “damages claimed by Complainants could be *expenses that would flow under these circumstances as natural consequences from the violation.*”⁷⁵ In this case, the Commission found that Beehive’s ability to charge IXCs for transport was one of the primary reasons that the Defendants and Beehive engaged in the sham arrangements.⁷⁶ In addition, there are strong institutional reasons why the Commission should consider AT&T’s entire damages claim. The finding that an entity engaged in a sham transaction is at bottom an affront to the regulatory process itself, which should be directly dealt with by the Commission.

Likewise, the Commission has the power to and should decide whether AT&T is entitled to recover prejudgment interest. Under the Commission’s existing precedents, an award of prejudgment interest is a matter of discretion for the Commission, and an “award of interest in a common carrier complaint case is thus guided by considerations of fairness.” *US Sprint*, 8 FCC Rcd. 1288, ¶ 51. Here, the Commission engaged in the task of evaluating the detailed factual record of the Defendants’ extensive misconduct, and it is arguably in a better position to decide on what amount of prejudgment interest is fair (and what interest rate is applicable).

Finally, if the Commission adheres to its position that it will not consider AT&T’s claims for damages involving payments to Beehive or for prejudgment interest, then it should, at a minimum, make it absolutely clear that it believes that the District Court is the appropriate forum in which AT&T may pursue those claims. In particular, the Commission should address, and squarely reject, the Defendants’ position that the Commission October 29 Letter Order “disallowed” AT&T’s asserted damages. *E.g.*, Answer ¶ 4. The Defendants seem to believe that

⁷⁵ *Edwards v. Bell Tel. Co. of Nev.*, 74 FCC 2d 322, ¶¶ 16-17 (1979) (emphasis added).

⁷⁶ *See Liability Order* ¶ 28 (“Beehive still made money. It charged the IXCs for tandem switching and transport of the stimulated traffic, which benefited Beehive” – at AT&T’s expense); *id.* ¶ 16 (Beehive and the Defendants chose a location for the conferencing equipment “that enabled Beehive to maximize the amount of transport mileage that it could charge for the stimulated traffic.”).

the Letter Order was a ruling *on the merits* of those damages claims, but this is plainly not accurate. While AT&T believes that the damages it has pleaded can and should be decided at the Commission, if the Commission disagrees, then the Commission should make it completely clear that AT&T can pursue its claims at the District Court. What would be unfair, and should be avoided, is some type of “shell game” in which AT&T (having had its sham entity claim referred by the Court) is told by the Commission to pursue its claims at the District Court, only to hear at the District Court that it should have pursued its claims at the Commission.

VIII. DEFENDANTS’ CLAIMS AS TO ISSUES 2 AND 3 LACK MERIT

The Defendants do not squarely address either referred issues 2 or 3 in their Legal Analysis, but they do touch upon those issues in their Answer and Petition for Declaratory Ruling. But their proposals for how the Commission should respond to those referred issues are groundless and make no sense.

A. As To Issue 2, There Is No Dispute That The Defendants Did Not Provide “Some Other Regulated Service.”⁷⁷

As explained in AT&T’s Supplemental Complaint, because the Defendants did not provide services to AT&T, they also did not provide any regulated services, and certainly did not provide regulated services for which they are entitled to compensation. Suppl. Compl. ¶¶ 55-76. While the Defendants dispute AT&T’s contention that they did not provide service to AT&T, they concede that they did not provide any regulated service, other than switched access service. In fact, they contend that “[t]he services at issue in this proceeding were at all times classified as

⁷⁷ Referred Issue 2 is “[i]f [the Defendants] failed to provide switched access services consistent with the terms of their tariffs, did [the Defendants] provide some other regulated service to AT&T for which they are entitled to compensation? If so, what is the rate that should be applied to that service?”

interstate switched access service.” Pet. for Decl. Ruling, at 5.⁷⁸ Consequently, there is no dispute that the Defendants did not provide “some other regulated service.”

B. As To Issue 3, The Defendants Cannot Recover Compensation On State Law Grounds.⁷⁹

It is also clear that the Defendants cannot recover compensation for their “services” on state-law theories such as *quantum meruit*, because any such claims are preempted by the Commission’s pervasive regulatory regime relating to such services. In an attempt to circumvent the preemptive effect of the Commission’s regulatory regime, the Defendants claim that (1) the Commission lacks the power “to tell the district court” about its regime or to opine on its preemptive effect, and (2) the Commission’s determination that the Defendants violated Sections 201(b) and 203 of the Act created a “regulatory gap” that can and must be filled by state law. Neither of these arguments has merit.⁸⁰

1. The Commission Has Authority To Decide Question 3 And The Pre-emption Issue.

In support of its claim that the Commission has no power to advise the District Court that the Commission’s regulatory regime preempts Defendants’ state-law claim, Defendants rely upon an AT&T “admission” that is wholly concocted. by Defendants. As Defendants should

⁷⁸ But that contention effectively undermines the Defendants position on Issue 3. See *infra*, Part VIII.B.2.

⁷⁹ Referred Issue 3 is “[i]f [Defendants] did not provide a regulated service to AT&T, are [Defendants] entitled to compensation to be established under a quantum meruit, quasi-contract or constructive contract theory, or some other theory?” See Second Referral Order.

⁸⁰ As AT&T explains above, it is not estopped from arguing preemption here. See *supra*, Part III.B.

know, and as AT&T makes clear in the footnote which the Defendants mischaracterize,⁸¹ whether Defendants' quasi-contract claim is preempted is an entirely distinct question from whether it has merit under state law. *See id.*, ¶ 77 & n.2 (arguing that the "quasi-contract claim is pre-empted" and distinguishing that argument from the merits of that claim, which AT&T "thus does not address").

Although courts do not always defer to an agency's conclusions regarding preemption,⁸² at a minimum, agency views are entitled to some weight, in light of agencies' "unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle" to Congress's objectives. *Wyeth*, 555 U.S. at 577.⁸³ Here, the District Court referred Issue 3 to the Commission, at the Defendants' request. Because both AT&T and the Defendants agree that the Commission should not decide the merits of any state law claim, it is difficult to understand what the Court intended the Commission to address in responding to Issue 3, if not for the pre-emptive effect of its regulations.

⁸¹ In claiming that AT&T "admits" that the Commission cannot rule on preemption here, Answer, ¶ 77, Defendants distort AT&T's statement that "the Commission does not generally have jurisdiction *to address the merits* of any particular state law quasi-contract claim." Supp. Compl. ¶ 77, n.2.

⁸² It is well-established that "[f]ederal regulations have no less pre-emptive effect than federal statutes," so long as the agency intends its regulation to have pre-emptive effect and, if so, that its regulation "is within the scope of the [agency's] delegated authority." *Fidelity Fed. S. & L. v. De la Cuesta*, 458 U.S. 141, 153-54 (1982); *see also Wyeth v. Levine*, 555 U.S. 555 (2009) ("an agency regulation with the force of law can pre-empt conflicting state requirements") (citing *Geier v. American Honda Motor Co.*, 529 U. S. 861 (2000); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U. S. 707, 713 (1985)).

⁸³ *See id.* ("The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness") (citing *United States v. Mead Corp.*, 533 U. S. 218, 234-235 (2001); *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944)).

Accordingly, any claim by the Defendants that the Commission may not address preemption is inconsistent with both the cases cited above as well as the referral that the Defendants sought. *See All American Recon*, 28 FCC Rcd. 3469, ¶ 8 (2013) (rejecting the Defendants’ “perplexing” argument that the Commission lacked authority to decide the issues referred by the Court, and finding it “troubling” that they would have “put the court, the Commission, and AT&T through the time, effort, and expense of this primary jurisdiction referral process” that they had requested).

2. The Commission’s Finding That The Defendants Violated Section 201(b) By Acting As Sham CLECs Creates No Gap That State Law Can Supplement By Awarding Compensation To Sham CLECs.

The Defendants claim that the *Liability Order* established that they were never common carriers subject to the Act, thereby creating a “regulatory gap” which must be filled by state law. *See Answer*, ¶¶ 64-66, 81, 83, 86. The Defendants’ failure to successfully manipulate the Commission’s regulatory regime does not mean, however, that they were never subject to that regime in the first place. The Defendants were created as CLECs and held themselves out as common carriers, filing their own tariffs for common carrier service, in an attempt collect access charges that, if lawfully billed, AT&T and other IXC’s would have “had to pay” under the Commission’s regulatory regime. *See Liability Order*, ¶¶ 7-9, 13-15, 24, 33. The Commission thus ruled that the Defendants violated Section 201(b) of the Act, a ruling which necessarily entails the conclusion that the Defendants are common carriers. *See Liability Order*, ¶¶ 24, 33; 47 U.S.C. § 201(a)-(b) (prescribing duties of common carriers). It simply makes no sense that the Defendants can violate a provision of Title II if they “are not governed by [it]” as the Defendants claim. *Answer*, ¶ 66.

The D.C. Circuit reached a similar conclusion in *Farmers*, rejecting as “flatly wrong” Farmers’ argument that, if its tariffed rates were invalid, Farmers was not a common carrier

subject to Title II. *Farmers & Merch. Tel. Co. v. FCC*, 668 F.3d 714, 719 (D.C. Cir. 2011). Like Farmers, the Defendants “held [themselves] out as . . . common carrier[s] providing access service[s] to IXCs,” and like Farmers, they remain subject to Title II. *Id.*

Moreover, nothing in *MetTel*⁸⁴ or *Total Telecom*⁸⁵ supports the Defendants’ argument against preemption here. The court in *MetTel* purported to “fill[] the gap left by the FCC’s pronouncements” regarding access charges in the provision of VoIP services, services which are not at issue here. *MetTel*, 2010 WL 1326095, at *3. Here, there is no “gap” in the Commission’s pronouncements regarding how the Defendants could provide and charge for access services. *See, e.g.*, Liability Order, ¶ 9 (noting that “CLECs (such as Defendants)” could provide and charge for interstate access services only through tariffing or negotiated agreement). As to *Total Telecom*, that case did not concern state-law claims at all. Neither the Commission in initially suggesting that the creator of the sham entity might recover a “reasonable access charge,”⁸⁶ nor the D.C. Circuit in vacating that determination and remanding the case,⁸⁷ held or implied that a sham CLEC could proceed on alternative state-law theories after it was determined that it could not recover access charges.

Finally, by contending that “[t]he services at issue in this proceeding were at all times classified as interstate switched access service” (Pet. for Decl. Rlg at 5), the Defendants have effectively conceded that their state law claims are preempted. If, as Defendants contend, the services at issue are interstate switched access services, then it is absolutely clear that the

⁸⁴ *Manhattan Telecommc’ns Corp. v. Global NAPs, Inc.*, No. 08 Civ. 3829(JSR), 2010 WL 1326095 (Mar. 31, 2010).

⁸⁵ *Total Telecommc’ns Servs., Inc. v. AT&T Corp.*, 16 FCC Rcd. 5726 (2001).

⁸⁶ *Total Telecom*, 166 FCC Rcd. at 5743, ¶¶ 37-39.

⁸⁷ *See AT&T Corp. v. FCC*, 317 F.3d 227, 238-39 (D.C. Cir. 2003) (remanding in part for a determination as to “whether any entity . . . actually provided access service to AT&T”).

Defendants “lack[ed] authority to bill for those services,” “[u]ntil [they] file[d] valid interstate tariffs under Section 203 of the Act or enter[ed] into contracts with [AT&T] for the access services [they] intend[ed] to provide.” *Liability Order* ¶ 37. The Commission has found that the Defendants did not have valid interstate tariffs for access services, and it is also undisputed that there were no express contracts between any Defendant and AT&T for “the access services [they] intend[ed] to provide.” Accordingly, the Defendants lacked authority to bill for any interstate switched access services, and because they did not use the two federal law mechanisms to bill for access services, they cannot recover for those services on their alternative, *quantum meruit* theory.

CONCLUSION

For the reasons set forth above as well as in its other pleadings, the Commission should reject the Defendants’ affirmative defenses and grant the relief that AT&T in its supplemental complaint has requested.

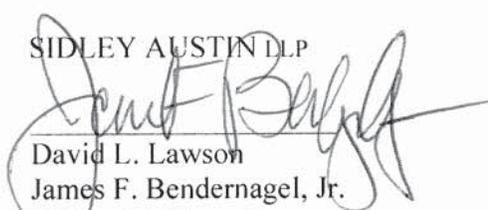
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