

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
AT&T Corp.,)	
)	
Complainant,)	
)	
v.)	File No.: EB-09-MD-010
)	
All American Telephone Co., e-Pinnacle)	Proceeding No. 14-209
Communications, Inc., ChaseCom,)	
)	
Defendants.)	

**JOINT STATEMENT OF STIPULATED FACTS,
DISPUTED FACTS AND KEY LEGAL ISSUES**

AT&T Corp. (“AT&T”) and Defendants All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom (“Defendants”) (together, the “Parties”) in accordance with the Federal Communications Commission’s (the “Commission”) December 15, 2014 Scheduling Order and the Commission’s rules, 47 C.F.R. §§ 1.732(h) and 1.733(b)(1)(v), hereby submit this Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues.

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I. STIPULATED FACTS

The Parties have defined “Stipulated Facts” as facts on which the Parties agree, but the inclusion of any fact as a stipulated fact does not constitute an admission by either Party that the fact is relevant or material to the legal issues in dispute in this case. The Parties have stipulated to these facts for purposes of this proceeding only.

1. On March 22, 2013, the Commission granted Counts I and II of AT&T’s complaint in this proceeding, finding Defendants liable for violations of Sections 201(b) and 203 of the Act.¹

2. In the Commission’s *Liability Order*, the Commission found that the Defendants, along with the Beehive Companies (referred to collectively as “Beehive”), committed an unreasonable practice, in violation of Section 201(b) of the Act (47 U.S.C. § 201(b)), by perpetuating an “access stimulation” arrangement. *Liability Order* ¶¶ 1, 10-18, 24-33.

3. The Commission also found, as an independent basis for liability, that Defendants violated Sections 201(b) and 203 by billing AT&T for “access services” they did not provide pursuant to valid and applicable tariffs. *Id.* ¶¶ 34-41.

4. The Commission authorized AT&T to file this supplemental complaint for damages. *Id.* ¶ 1 n.4.

5. Since April, 2006, All American billed AT&T for approximately \$12.9 million dollars in terminating switched access services (plus late payment fees in excess of about \$11 million) that All American claimed to have provided in Utah and Nevada.

¹ *AT&T Corp. v. All American Tel. Co. et al.*, 28 FCC Rcd. 3477 (2013) (“*Liability Order*”), *recon denied*, 29 FCC Rcd 6393 (2014) (“*Order on Reconsideration*”).

6. Between April, 2006, and May, 2007, e-Pinnacle billed AT&T for approximately \$197,000 in terminating switched access services (plus late payment fees) that e-Pinnacle claimed to have provided in rural territories in Utah.

7. Between April, 2006, and July, 2007, ChaseCom billed AT&T for approximately \$44,000 in terminating switched access services that ChaseCom claimed to have provided in rural territories in Utah.

8. On December 1, 2006, AT&T paid All American \$249,014.60 for services that All American billed to AT&T as access services under All American's tariff, which the FCC later found to be an unreasonable practice.

9. On April 1, 2006, e-Pinnacle billed and AT&T later paid \$3,145.36 for services that e-Pinnacle billed under its tariff, which the FCC later found to be an unreasonable practice.

10. On April 1, 2006, ChaseCom billed and AT&T later paid \$336.41 for services that e-Pinnacle billed under its tariff, which the FCC later found to be an unreasonable practice.

11. AT&T has sought damages for the payments that it has made to Defendants – including interest using the interest rates in the Defendants' tariffs that apply to late payments – in the following amounts: \$1,137,002 from All American, \$7,858 from e-Pinnacle and \$840 from ChaseCom.

12. AT&T has sought damages totaling about \$18.6 million, which represents AT&T's payments to Beehive for traffic associated with the scheme, plus interest using the applicable state-law interest rate.

13. In a Letter Order dated October 29, 2014, the Commission Staff stated that "some aspects of [AT&T's] 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." Letter Order, at 2 (Oct. 29, 2014) (citation omitted).

14. At all times prior to issuance of the *Liability Order*, Defendants purported to provide common carrier services, and in doing so, filed tariffs for common carrier services.

15. The Commission held in the *Liability Order* that Defendants did not provide switched access services to AT&T consistent with the terms of their tariffs. *See Liability Order* ¶ 34.

16. Defendants did not provide any services via unbundled network elements (UNEs).

17. For every minute of use ("MOU") of traffic billed by All American, the traffic was initiated from AT&T's long distance callers, and routed to the Beehive Telephone incumbent local exchange carriers in Nevada and Utah, and then terminated by Beehive to Joy Enterprise's equipment located at Beehive's facilities in Utah.

18. As a general matter, for the traffic at issue in this case, Beehive provided the Tandem Switching, Tandem Transport and Tandem Termination functions and billed AT&T for them.

19. As a general matter, AT&T paid Beehive's tariffed rates for the rate elements that Beehive invoiced.

20. For purposes of this case and for the time period relevant to this proceeding, AT&T does not contest Beehive's tariff rates.

II. DISPUTED FACTS

The Parties have defined “Disputed Facts” as facts (i) on which the Parties cannot agree or (ii) for which a Party states that it does not have sufficient supporting information to allow for a stipulation. In cases where a fact is disputed due to a lack of sufficient supporting information, the Parties reserve the right to agree to further stipulation upon the receipt of additional information.

A. AT&T’S DISPUTED FACTS

1. Defendants did not provide services of any kind to AT&T as part of their “sham” operations.

2. The Commission found that the Defendants had not provided any services to AT&T on the long distance traffic at issue, *e.g.*, *Liability Order* ¶ 17.

3. Defendants have admitted that they did not provide services to AT&T other than switched access services. *See Answer* ¶ 61.

4. Defendants did not own, lease or operate a switch at any time relevant to the Supplemental Complaint, nor did they provide any services via unbundled network elements (UNEs).

5. AT&T has never stipulated, stated, or taken the position that Defendants provided services to AT&T.

6. Defendants did not generate or cause the traffic at issue in this case, but even if true, generating such traffic would not have been a “service” to AT&T for which the Defendants could obtain compensation.

7. Defendants’ “sham” operations did not provide value of any kind to AT&T. To the contrary, the Defendants’ operations caused damages to AT&T.

8. AT&T paid Beehive approximately \$15.4 million dollars from 2006 to 2010 for traffic associated with the access stimulation arrangements.

9. AT&T did not become aware of the full extent of Defendants' "sham" operations until AT&T obtained discovery from Defendants in this case.

10. At all times prior to issuance of the *Liability Order*, Defendants held themselves out as common carriers

11. Defendants did not act as Beehive's billing/sales agents as part of their "sham" operations.

12. Defendants have not submitted any evidence that they were acting as Beehive's agents in this "scheme" to overbill AT&T by millions of dollars.

13. The existence of an agency relationship between Defendants and Beehive would not establish that Defendants provided services to AT&T.

14. AT&T attempted in good faith to negotiate a settlement of this case with Defendants.

B. DEFENDANTS' DISPUTED FACTS

1. AT&T received \$11 million worth of Local Switching services that the Defendants invoiced for, but paid the Defendants just over \$250,000.

2. For the time period relevant to this proceeding, AT&T and Beehive had a settlement agreement in effect that required AT&T to pay Beehive's tariffed rates for the traffic it took from Beehive, with the exception of one Tandem-related rate element.

3. AT&T never contested the routing of the traffic that Beehive invoiced – that is, it never complained that Beehive MOUs billed at the Nevada tariffed rate were actually terminated to Utah, or vice versa.

4. For every MOU of traffic invoiced by the Defendants, and at issue in this proceeding, AT&T receives revenues from its long distance service customers, least-cost routing agreements, and/or wholesale service providers.

5. AT&T has suffered no damages cognizable by the Federal Communications Commission in AT&T's dealings with the Defendants.

III. KEY LEGAL ISSUES

Pursuant to 47 C.F.R. 1.732(h), the parties submit this statement of key legal issues presented by this Complaint proceeding. The inclusion of an issue as key does not necessarily mean that issue is disputed.

A. AT&T'S KEY LEGAL ISSUES

1. By holding themselves out as common carriers, purporting to provide and bill for common carrier services, Defendants are subject to liability and damages under Section 206-208 of the Communications Act.

2. Under Section 206 of the Communications Act . . . an offending carrier is liable for the full consequential damages of its violation of the Act.²

3. AT&T is entitled to direct damages for the amounts it paid to the Defendants but that the Defendants improperly billed under their tariffs and Sections 201(b) and 203.

4. AT&T is also entitled to recover from the Defendants the amounts of "access services" that AT&T paid to Beehive as a result of the Defendants' scheme. *See* Supp. Compl. Part I.B.

² *Aaron v. GTE California, Inc.*, 10 FCC Red 11519, ¶ 10 (1995).

5. It is reasonable in the circumstances presented here, where the Defendants and Beehive conspired together, for AT&T to seek to recover these moneys from either Beehive or the Defendants.

6. Because the Defendants engaged in willful misconduct, it is appropriate to award AT&T prejudgment interest.

7. None of the affirmative defenses raised by Defendants in response to AT&T's damages claims has any merit.

8. As to Referred Issue 2,³ because the Commission found that the Defendants had not provided any services to AT&T on the long distance traffic at issue, *e.g.*, *Liability Order* ¶ 17, the Defendants did not provide any other regulated service to AT&T and are not entitled to any compensation from AT&T. Supp. Compl. Part II.A; Eighth Report and Order and Fifth Order on Reconsideration, *In the Matter of Access Charge Reform, et al.*, 19 FCC Rcd. 9108, ¶¶ 21 (2004) ("*Eighth Report and Order*") (carriers may only bill for services that they actually provide).

9. As to Referred Issue 3,⁴ because Defendants did not provide any services to AT&T, they also are not entitled to any compensation under any state law quasi-contract or equitable claim, and in all events any such claims are pre-empted in the circumstances presented here.

³ 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?" See Order, *All American Tel. Co. v. AT&T Corp.*, No. 07-861 (S.D.N.Y. Feb. 5, 2010) ("Second Referral Order").

⁴ 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.

10. As to Referred Issue 5,⁵ the additional questions have no significant effect on the other referred issues. Issue 5a, which relates to the Commission’s benchmarking rules for CLEC access services, has already been addressed and found to be “irrelevant.” *Liability Order* ¶ 31. Issues 5c and 5d, which appear to be related to issues of unreasonable discrimination, have no impact because the extensive record contains no evidence of any unreasonable discrimination. As to issue 5e, which relates to possible “classifications” of any service by the Defendants, the issue is irrelevant because Defendants provided no services to AT&T or the public.

B. DEFENDANTS’ KEY LEGAL ISSUES

1. As a result of the Commission’s ruling in *AT&T Corp. v. All American Telephone Co., Inc., e-Pinnacle Communications, Inc., ChaseCom*, 24 FCC Rcd 3477 (2013), the Defendants cannot be classified as common carriers, and so are not subject to Title II regulation.

2. The Defendants caused millions of minutes of switched access Local Switching service to be provided to AT&T.

3. The Commission’s unprecedented retroactive invalidation of Defendants’ tariffs creates a regulatory “gap” that must be filled by hearing their claims in quantum meruit, under state law, in federal district court.

4. The result of the Commission’s unprecedented retroactive invalidation of Defendants’ tariffs is that no regulatory scheme applies to the traffic at issue in this case. As a result, there is no regulatory preclusion of equitable relief under state law.

5. The only rates that can apply to the MOUs at issue in this case, either in a claim based on tariff or in equity, are the rates tariffed by Beehive during the relevant time period.

⁵ Referred Issue 5 is “[w]hat is the impact of the following questions on resolution of the foregoing issues.”

6. AT&T is estopped by § 207 of the Communications Act, by its statements in other proceedings, and by its filings in the “liability phase” of the instant proceeding, from claiming that it should pay nothing for the Local Switching service invoiced by the Defendants.

7. The service at issue in this case is switched access Local Switching service, and whether the Defendants are defined as common carriers or not does not affect this classification.

8. The Commission’s letter ruling of October 29, 2014 precludes AT&T from pursuing before the Commission claims for refunds of access charges paid to Beehive, interest charges, or attorney’s fees.

9. AT&T has failed to make an actionable showing under the Commission’s rules that it has been damaged.

10. An award of any damages to AT&T would constitute unjust enrichment to AT&T.

11. An award of any damages to AT&T would constitute an uncompensated regulatory taking, in contravention of the 5th Amendment.

12. Under the Commission’s rules and policy, the Commission must resolve the instant case and respond in full to the SDNY Court’s referral within 5 months from the date AT&T filed its Complaint for Damages. Legal Analysis at 3-4.

* * *

Dated: January 20, 2015

Respectfully submitted,

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