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**The Communications Act Does Not Impose A "Duty to Purchase" Tariffed Services**

Some CLECs contend that a private party's act of filing an access tariff imposes a legal duty on all interexchange carriers to purchase the services in the tariff. Under that view, once a LEC files a tariff and begins sending traffic to an IXC (usually through the incumbent), an interexchange carrier may not decline to purchase the service, and its only recourse is to take the service, pay whatever rate the LEC has tariffed, and file a rate case alleging unreasonable rates in violation of Section 201(b). The CLECs advancing this view have argued that authority for their position can be found in (1) the "filed rate doctrine" and the related "pay and litigate" principle, and (2) Section 201(a) of the Act. We will discuss each in turn.[1]

## I. Neither The "Filed Rate Doctrine," Nor The "Pay And Litigate" Principle, Requires A Customer To Purchase A Carrier's Tariffed Services.

The CLECs contend that because they have validly filed tariffs for their access rates, and because the rates in a validly filed tariff are presumed reasonable unless declared unreasonable by the FCC, AT&T must have had a duty to purchase those CLECs' services. The law does not support that assertion.

The "filed rate doctrine," and its corollary, the "pay and litigate" principle, mean that when a customer has *ordered* a carrier's services, and those services have been provided, and billed, in accordance with the tariff's terms, the customer who believes that the tariffed rates are unlawful must first pay for those services, and then litigate the reasonableness of the rates.

These doctrines do not mean and have never been interpreted to mean that a customer has a duty to order the services in question in the first place. The Commission decisions establishing the "pay and litigate" principle are explicit on this point. They state that the principle applies only when the customer is challenging the amount of properly billed tariff charges "for voluntarily ordered services." S*ee Brooten v. AT&T*,

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1 As a preliminary matter, the position that these CLECs are urging the Commission to take would represent a retroactive reversal of the "market-based" approach to access charge reform that the Commission stated it was following throughout the past period now at issue. Plainly, where a customer has no right to decline to purchase service, there is no "market" of any sort – merely captive customers and, as a necessary corollary, pervasive rate regulation. Accordingly, the finding of a retroactive "duty to purchase" now would mean that a "market-based approach" had always been unlawful and foreclosed by the Act, and that private parties that relied on the Commission's market-based policy did so to their detriment. Moreover, throughout this same period, the Commission declined several opportunities – including one afforded by AT&T's Petition for Declaratory Ruling in 1998 – to clarify its position on the proposed "duty to purchase." In light of that history, the position these CLECs are urging the Commission to take now would place the Commission in a difficult posture on appeal even apart from the other legal issues which that position would raise.

12 FCC Rcd 13343, 13351 n.53 (1997); *Communique Telecomm. Inc*., 10 FCC Rcd 10399, 10405-06 n.73 (1995); *Business WATS, Inc. v. AT&T,* 7 FCC Rcd 7942, 7942 n.3 (1992); *MCI Telecommunications Corp*., 62 F.C.C. 2d 703, 706 (1976). In granting AT&T summary judgment on this question, Judge Ellis in the *Advamtel* case explained why the contrary position would make no sense: "Now, for example, suppose a CLEC wanted to charge a billion dollars. There is no way it would make any sense to pay that and litigate afterwards…." *Advamtel, et al.* v. *AT&T*, Tr. Sept. 7, 2001, at 18.

Notably, the "filed rate doctrine" and the "pay and litigate" principle apply to *all* carrier-customer relationships, not merely those where the customer is also a carrier. Indeed, the majority of cases applying those principles involve a carrier's relationship with an end-user customer, not another carrier. The CLECs' position on the "filed rate doctrine" and the "pay and litigate" principle would therefore mean that end users would likewise have been legally obligated to purchase all long-distance carriers' services (before they were detariffed) and are legally obligated today to purchase all tariffed local exchange carrier services. It is obvious that these doctrines require no such thing. An end user who believes that a carrier's tariffed services are unreasonably priced does not have a legal obligation nevertheless to purchase the service and bring a rate case under Section 208; the end user is of course free, despite the fact that the services are provided under a tariff, either to purchase service from another carrier or to forego the service entirely.

## II. Section 201(a) Cannot Be Read To Obligate An IXC To Purchase A CLEC's Services Where The CLEC's Rates Are Not In Fact Reasonable.

As discussed, if an IXC has a duty to purchase a CLEC's access services, the source of that duty cannot be the "filed rate doctrine" or the "pay and litigate" principle. Any such rule would have to be found in the Act itself. The CLECs claim alternatively that section 201(a) requires an IXC to purchase a CLEC's services, regardless of whether the CLEC's rates are in fact reasonable. That claim lacks any basis in law, and cannot be squared with the Commission's recent decisions. We will address each of Section 201(a)'s clauses separately.[2]

[2] Section 201(a) provides:

> "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary and desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."

There are thus two separate clauses in Section 201(a), imposing two independent duties. The "reasonable request" clause that precedes the semicolon relates to a carrier's obligations directly to its customers, and the "physical connections/through routes" clause that follows the semicolon relates to a carrier's obligations to provide service in conjunction with other carriers.

## *A. The Reasonable Request Requirement.*

The first clause of Section 201(a) -- the "reasonable request" requirement -- was the basis for the Commission's imposition in the *CLEC Access Charge Reform Order* of a *prospective* obligation to purchase access services that the Commission determined would be reasonably priced. Some of the CLECs contend that Section 201(a)'s first clause also, however, required IXCs in the past to purchase any tariffed access service, merely because it was tariffed, unless and until that tariff was declared unreasonable by the Commission or a court. That contention is untenable.[3]

To begin with, such an interpretation would be inconsistent with the *CLEC Access Charge Reform Order*, in which the Commission held (¶ 92) that Section 201(a) "do[es] not expressly require IXCs to accept traffic from, and terminate traffic to, all CLECs, regardless of their access rates." The Commission further concluded that the Act does not "creat[e] the blanket duty that the CLECs seek to impose on the IXCs to accept all access service, regardless of the rate at which it is offered." "Certainly," the Commission observed, "we have made no finding that the public interest dictates such broad acceptance of access service, whatever its price." *Id.*[4] The CLECs' argument would therefore now require a contrary holding that Section 201(a) does indeed "creat[e] the blanket duty . . . to accept all access service, regardless of the rate at which it is offered," unless and until that rate is formally adjudicated to be unreasonable by the Commission or a court.

The CLECs have argued this position by claiming that their tariffs are "presumed lawful" unless and until the Commission holds them to be unlawful. Whatever the force of such a presumption in other contexts (such as the "pay and litigate" principle for voluntarily ordered services, in which that presumption was created and applied), its application in this manner to Section 201(a) is foreclosed both by the terms of Section 201(a) and by other Commission precedent. As the Commission held in the *CLEC Access Charge Reform Order*, a customer's request that an IXC pay an unreasonable rate for access service in order to provide the customer with long distance service is not a "reasonable" request under Section 201(a). And an unreasonable rate does not *become* unreasonable only after it is adjudicated to be unreasonable under Section 201(b). To the contrary, the whole purpose of such an adjudication is to determine whether the rate *was* unreasonable throughout the past period covered by the rate case. Such an adjudication would therefore necessarily establish that the IXC did not violate Section 201(a) by

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3 In that regard, Judge Ellis, in granting summary judgment on this point, specifically held that the *CLEC Access Charge Reform Order* and the construction of Section 201(a) it advanced can be applied only "prospectively," and for past periods "there was no regulatory constraint at all." Tr. 20.

4 Moreover, while the *CLEC Access Charge Reform Order* did not formally adjudicate the reasonableness of specific CLEC rates in prior periods, it found that there had been market failures that led generally to unreasonably high access rates. In concluding that it was necessary to cap CLEC access rates, the FCC found (¶ 30) that CLECs control "a series of bottleneck monopolies over access to each individual end user." It further found (¶¶ 34, 38, 39, 59, 84) that CLECs have been "exploiting" that monopoly power by seeking to impose "unreasonable access rates" that would "shift a substantial portion of their start up costs onto the long distance market."

refusing to provide service *prior to* the agency determination that the rate was unreasonable.

That becomes apparent once one examines how any litigation of this sort would actually proceed in practice. Assume, for example, that Judge Ellis had accepted (as he did not) the CLECs' argument and held, under the first clause of Section 201(a), that AT&T was required to purchase every plaintiff CLEC's service because none of the rates had yet been formally adjudicated to be unreasonable. Assume further that AT&T then pursued its rate case under Section 208 and -- as was the case with BTI -- the rate was found to be unreasonable. At that point, it could no longer be suggested that AT&T's earlier refusal to purchase the service had been unreasonable. However, that is what the CLECs' position here would require, and it would not be legally supportable. To the contrary, if the Commission or a court were to hold that the rate was unreasonable during the period in which the "request" was made, that would mean that *the IXC could not have violated Section 201(a) by refusing that request* because it had never received a reasonable request. By contrast, it would make no sense – and be contrary to Section 201(a) – to hold that the rate, and therefore the request, were unreasonable but the IXC nevertheless acted unlawfully by refusing an *un*reasonable request.

That was the precise holding of the Commission in *Total Telecommunications Services v. AT&T*. The Commission held in that case that AT&T had no obligation under Section 201(a) to provide service to end-users through Total because Total's rates had been unlawful. Specifically, the Commission held that "[i]f an AT&T customer asks AT&T to provide a service that would require AT&T to transport traffic to a carrier that charges an unlawful rate to terminate the traffic, the customer's request is not 'reasonable' under section 201(a)." *Total Order*, ¶ 21. Critically, the Commission held that the unlawfulness of Total's rates justified AT&T's actions in declining to order Total's services *even though Total's rates were tariffed and AT&T's refusal to order preceded any actual adjudication of the unreasonableness of the rates.* Consequently, any claim that IXCs are required to purchase all tariffed services, regardless of the level of the tariffed rates, simply because they are tariffed, directly conflicts with *Total*. [5]

### *B. The "physical connection/through routes" requirement.*

Some CLECs have also argued that an IXC's decision not to purchase a CLEC's access service violates the second clause of Section 201(a). This claim is untenable, for at least three independent reasons

First, on its face, the duty to establish physical connections applies only *after* the Commission, following an opportunity for a hearing, finds such connection to be in the public interest. AT&T could not have violated section 201(a)'s physical connection

[5] Some CLECs have suggested that *Total* could be distinguished because it involved a "sham arrangement" to inflate access charges. The language in paragraph 21, quoted above, is obviously broader than that. In any event, the distinction they propose makes no sense. There is no conceivable legal basis under Section 201(a) for treating a "sham arrangement" that is unlawful *because* it enables the CLEC to charge excessive and unreasonable rates differently from any other situation in which a CLEC charges excessive and unreasonable rates.

requirement by declining to order a CLEC's services in the past, since the Commission never entered any such order covering those past periods. As the Commission noted in the *CLEC Access Charge Reform Order* (¶92) in rejecting the claim that Section 201(a) required an IXC to purchase a CLEC's access services, "certainly, we have made no finding that the public interest dictates such broad acceptance of access service, whatever its price."

Second, none of the CLECs with whom AT&T has a dispute established a direct physical connection with AT&T. Instead, each CLEC routed traffic to AT&T through an ILEC's tandem switch, and AT&T has already established physical connections with every ILEC.

Third, none of the CLECs are seeking establishment of a "through route" or a "division of charges." The terms "through routes" and "division of charges" are terms of art with well-accepted meanings. As the Supreme Court has held in the analogous case of rail transport under cognate provisions of the Interstate Commerce Act, a "'through route' is an arrangement, express or implied, between connecting [carriers] for the continuous carriage of [traffic] from the originating point on the line of one carrier to destination on the line of another." *Thompson* v. *United States*, 343 U.S. 549, 556 (1952); *Society of Plastics Industry, Inc.* v. *Interstate Commerce Comm.*, 955 F.2d 722, 724-25 (D.C. Cir. 1992). Where a "through route" is established, the *end user* pays a "joint rate" for the carriage of the traffic from the point of origination and termination, and the carriers participating in the provision of the through route divide the charges paid by the end user between them pursuant to a "division of charges" formula. *Id.* Neither carrier is required to purchase anything from the other (and neither is the end user, of course – its decision to purchase service likewise remains wholly voluntarily).

While the second clause of Section 201(a) thus authorizes the FCC to require carriers to participate in jointly providing service to, and charging, end users, it provides no authority for the FCC to require one carrier to purchase and pay for the services of another – and certainly not a duty that could apply retroactively, prior to the Commission's issuance of a public interest finding.

## III. AT&T's Appeal Of The *CLEC Access Charge Reform Order*

Finally, we will briefly explain the basis of our appeal of the *CLEC Access Charge Reform Order*, because the legal error on which we believe that Order rests would be greatly magnified by a retroactive decree of the sort now being proposed.

The *CLEC Access Charge Reform Order* construed the "reasonable request" language of Section 201(a)'s first clause to include a right of an end user to dictate which LEC an IXC will purchase access service from in order to provide service to that end user. AT&T believes, to the contrary, that the "reasonable request" clause has nothing to do with carrier-to-carrier arrangements, but governs a carrier's relationship with end users. If an IXC like AT&T is willing to provide long-distance service to any customer that requests it (though not necessarily by purchasing access service from the particular

CLEC the customer designates), then, in AT&T's view, that carrier complies with Section 201(a).

If Section 201(a) were limited to the first clause, it could perhaps be argued that both the Commission's reading of that clause as encompassing carrier-to-carrier obligations, and AT&T's reading of that clause as not encompassing such obligations, are possible readings. But Section 201(a) is not limited to the first clause. It has a second clause which (a) directly addresses the circumstances under which carrier-to-carrier obligations can be imposed, and, most importantly, (b) *places substantial limits* on the Commission's authority to impose such obligations.

In particular, as noted above, an order under Section 201(a)'s second clause (1) can be imposed only prospectively, after an opportunity for a hearing and a public interest finding; and (2) can require only the establishment of physical connections, through routes, and a division of charges.

We will argue in the appeal of the *CLEC Access Charge Reform Order* that the Commission in that Order circumvented the express limitations Congress placed on its authority to order carrier-to-carrier arrangements in the second clause by seeking improperly to impose such obligations under the first clause. Indeed, all of the limitations in the second clause could be cast aside if it were permissible to construe the "reasonable request" language to encompass carrier-to-carrier arrangements.

Specifically, in the *CLEC Access Charge Reform Order*, the Commission ignored that its authority over carrier-to-carrier arrangements is limited to ordering physical connections, through routes, and divisions of charges. Congress deliberately preserved through those aspects of Section 201(a)'s second clause the *voluntary* nature of purchases under these arrangements: no carrier or end user is forced to purchase any service, but a carrier may be required by the Commission to connect with another carrier and create a through route in order to permit an end user to voluntarily choose to purchase service from each and obtain the connectivity between two points that the end user desires. The Commission eliminated that restriction – that purchases must still be voluntary – through its improper reading of the first clause.

The retroactive order that the CLECs propose here would magnify the error that AT&T believes was made in the *CLEC Access Charge Reform Order*. Such an order would not only circumvent the requirement in Section 201(a)'s second clause that orders imposing carrier-to-carrier arrangements be for physical connections, through routes, and divisions of charges, but would also (unlike the *CLEC Access Charge Reform Order*) circumvent the additional requirement in the second clause that any such order be prospective only.