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DEC - 6 2005

December 6, 2005

Federal Communications Commission
Office of Secretary

VIA COURIER

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **In the Matter of: Petition for Declaratory Ruling that USA Datanet Corp. Is liable for Originating Interstate Access Charges When it Uses Feature Group A Dialing to Originate Long Distance Calls**

WC Docket No. 05-276

USA Datanet Corp. Opposition and Motion to Dismiss

Dear Ms. Dortch:

Enclosed please find an original and four (4) copies of USA Datanet Corp.'s Opposition and Motion to Dismiss in the above-captioned Petition for Declaratory Ruling.

Should you need any further assistance, please do not hesitate to contact me at (202) 955-9788.

Respectfully submitted,

Todd D. Daubert/ewc

Todd D. Daubert
Counsel for USA Datanet Corp.

cc: Service list

Before the
Federal Communications Commission
Washington, D.C. 20554

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DEC - 6 2005

Federal Communications Commission
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In the Matter of

**Petition for Declaratory Ruling that USA
Datanet Corp. Is Liable for Originating
Interstate Access Charges When it uses
Feature Group A Dialing to Originate Long
Distance Calls**

WC Docket No. 05-276

USA DATANET CORP. OPPOSITION AND MOTION TO DISMISS

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Counsel for USA Datanet Corp.

Dated: December 6, 2005

SUMMARY

Frontier filed a lawsuit seeking damages against USA Datanet in the United States District Court for the Western District of New York. In response, USA Datanet filed a Motion to Dismiss Based Upon the Doctrine of Primary Jurisdiction and for Failure to State Claims Upon Which Relief Can Be Granted. The District Court chose to stay the action until the FCC issues a decision in the IP-Enabled Services Proceeding or addresses the VarTec Petition for Declaratory Ruling, at which time the Honorable Judge Siragusa can decide whether:

to dismiss Frontier's claims for failure to state claims upon which relief can be granted;

to refer to the FCC, pursuant to the doctrine of primary jurisdiction, the specific questions he deems necessary to answer in order to resolve the pending action; or

to address the merits of Frontier's claims without further input from the FCC.

Notably, in light of the Honorable Judge Siragusa's decision, Frontier's lawsuit remains pending in the Western District of New York. Moreover, the Honorable Judge Siragusa declined to refer *any* specific questions to the FCC pursuant to the doctrine of primary jurisdiction.

Frontier apparently was dissatisfied with Judge Siragusa's decision. However, rather than appeal the decision or discontinue its federal court lawsuit so that it could file a Formal Complaint with FCC against USA Datanet, Frontier filed a Petition for Declaratory Ruling with the FCC in which Frontier asks the Commission to award Frontier exactly the same relief and damages that Frontier is seeking in its pending lawsuit. Indeed, Frontier falsely claims that it filed the Petition pursuant to a primary jurisdiction referral, which confirms that Frontier is attempting to raise exactly the same issues, and is seeking exactly the same damages, as it is in its lawsuit pending in federal court.

Frontier's Petition is nothing more than a blatant attempt to establish concurrent jurisdiction over Frontier's collection action against USA Datanet in violation of Section 207 of the Communications Act of 1934. The FCC has recognized that the bar in Section 207 against instituting concurrent similar actions is jurisdictional, and that it prevents the agency from hearing petitions that essentially duplicate federal court complaints. Frontier is precluded as a matter of law from seeking, as it does here, substantially similar relief from both federal court and the Commission. The Petition, whose plain language seeks an order requiring USA Datanet to pay the same tariffed charges and late fees that are the subject of a federal complaint, runs headlong into Section 207 and should be rejected without consideration on the merits. Moreover, as Judge Siragusa found, Frontier is suffering no prejudice by the fact that its claims remain pending before the District Court until after the FCC issues a decision in the *IP-Enabled Services* or *Vartec* proceedings. The FCC should not, and indeed legally cannot, undermine the District Court decision by accepting Frontier's petition. Therefore, USA Datanet respectfully requests the FCC to reject Frontier's petition without consideration of the merits.

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**Petition for Declaratory Ruling that USA
Datanet Corp. Is Liable for Originating
Interstate Access Charges When it uses
Feature Group A Dialing to Originate Long
Distance Calls**

WC Docket No. _____

USA DATANET CORP. OPPOSITION AND MOTION TO DISMISS

USA Datanet Corp. (“USA Datanet”), by its undersigned counsel and pursuant to section 1.45(b) of the rules of the Federal Communications Commission (“Commission”)¹, hereby opposes the above-captioned Petition for Declaratory Ruling (“Petition”) filed with the Commission by Frontier Telephone of Rochester, Inc. (“Frontier”) on November 22, 2005. By filing this Petition, which Frontier falsely claims is based upon a primary jurisdiction referral from the United States District Court for the Western District of New York,² Frontier has improperly asked the FCC to exercise concurrent jurisdiction over a tariff dispute and damages claim that is currently pending before the United States District Court for the Western District of New York, in violation of Section 207 of the Communications Act of 1934, as amended.³ Therefore, USA Datanet respectfully requests that the Commission dismiss the Petition.

¹ 47 C.F.R. § 1.45(b).

² *Frontier Telephone of Rochester, Inc., v. USA Datanet Corp.*, Decision and Order, 05-cv-0656 CJS (W.D.N.Y. Aug. 4, 2005) (“Order”) (Petition Exhibit D).

³ 47 U.S.C. § 207.

I. BACKGROUND

USA Datanet is a provider of Internet Protocol (“IP”) enabled services, which are commonly referred to as Voice over Internet Protocol (“VoIP”) services, throughout the state of New York. In order to provide VoIP services, USA Datanet purchases originating telecommunications services from a third-party carrier, Paetec Communications, Inc. (“Paetec”), a competitive local exchange carrier (“CLEC”), which is, in turn interconnected with other carriers, including Frontier.

USA Datanet does not exchange any traffic directly with Frontier; rather, all traffic originating on Frontier’s network is handed off to Paetec, which in turns hands the traffic off to USA Datanet. Frontier concedes that USA Datanet is not directly interconnected with Frontier. Nonetheless, Frontier claims that it is entitled to access charges from USA Datanet under its federal tariff, despite the fact that Frontier’s tariff does not describe any charges that can be applied to service providers – whether unregulated information service providers or regulated interexchange carriers – with which Frontier is not directly interconnected. Based on this claim, Frontier brought suit against USA Datanet in the United States District Court for the Western District of New York, seeking payment of outstanding access charges as well as tariffed late payment charges.

USA Datanet sought dismissal of Frontier’s federal complaint on two grounds: (1) the doctrine of primary jurisdiction; and (2) failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).⁴ On August 8, 2005, the District Court denied USA Datanet’s motion to dismiss and to refer Frontier’s claims to the FCC, but stayed the proceeding

⁴ See Defendant’s Memorandum of Law in Support of its Motion to Dismiss Based upon the Doctrine of Primary Jurisdiction and for Failure to State Claims Upon Which Relief Can Be Granted, 05-cv-6056 (CJS) (dated Mar. 31, 2005) (Petition Exhibit C).

pending the outcome of two relevant Commission proceedings discussed in USA Datanet's papers.⁵

Rather than await the Commission's decisions in those proceedings, Frontier impermissibly sought to sidestep the District Court's decision by filing the Petition, which Frontier falsely claims is a primary jurisdiction referral. As explained below, Frontier's Petition is nothing more than a blatant attempt to establish concurrent jurisdiction over Frontier's collection action against USA Datanet in violation of Section 207 of the Communications Act of 1934. The FCC has recognized that the bar in Section 207 to instituting concurrent similar actions is jurisdictional, and that it prevents the agency from hearing petitions that essentially duplicate federal court complaints. Frontier is precluded as a matter of law from seeking, as it does here, substantially similar relief in both federal court and the Commission. Therefore, USA Datanet respectfully requests the FCC to reject Frontier's petition without consideration of the merits.

II. SECTION 207 OF THE ACT PRECLUDES THE COMMISSION FROM TAKING JURISDICTION OVER THE PETITION

The Communications Act prohibits persons from seeking damages from common carriers before both a federal district court and the FCC. Specifically, Section 207 provides in relevant part as follows:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter **may either make complaint to the Commission** as hereinafter provided for, **or may bring suit** for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction;

⁵ *Order* at 14.

but such person shall not have the right to pursue both such remedies.⁶

The plain language of Section 207 is clear and unambiguous: an action for damages against a common carrier cannot be brought simultaneously to federal court and to the Commission.

The Commission has held that Section 207 is a jurisdictional, not merely discretionary, bar to concurrent complaints.⁷ In fact, in *COMSAT*, the Commission dismissed a complaint with prejudice under Section 207 despite the fact that the related court action had been terminated. The Commission held that “[u]nder section 207, a complainant may not pursue a lawsuit against a common carrier ... and also file a complaint with the Commission under section 208.”⁸ It reasoned that the basis of Section 207 is “avoiding duplicative litigation and maximizing judicial economy,”⁹ and thus, even though *COMSAT*’s federal suit for damages had already been dismissed, the Commission would conflict with Section 207 if it took jurisdiction of *COMSAT*’s subsequent, similar claim.

The Commission does recognize an exception to Section 207 where the district court has referred questions of regulatory law under the doctrine of primary jurisdiction.¹⁰ Where a federal judge determines that resolution of a lawsuit before the court would be facilitated by referring specific questions to the FCC, and the judge in fact refers specific questions to the agency, Section 207 does not bar the agency from resolving those specific questions. As demonstrated in Section II below, however, the district court here did not issue

⁶ 47 U.S.C. § 207 (emphasis added).

⁷ *COMSAT Corp. v. IDC Mobile Communications, Inc.*, 15 FCC Rcd 7906 (2000).

⁸ *COMSAT*, 15 FCC Rcd at 7916 ¶ 26.

⁹ *Id.*

¹⁰ See, *Mocatta Metals Corp. v. ITT World Communications, Inc.*, 44 FCC.2d 605 (1973); see also, *Fair Mount Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 53 Rad. Reg. 2d 639 (1983).

such a referral, choosing instead to await the Commission's decisions in two proceedings dealing with the core issue of this controversy: whether originating VoIP traffic entitles carriers to access charges.¹¹ Frontier therefore cannot claim that the *Order* renders its Petition exempt from the jurisdictional bar of Section 207.

The Commission also will assert jurisdiction over complaints seeking relief that is different from that sought in federal court.¹² Again, that exception does not apply here to the current situation. Frontier's federal complaint seeks payment of "amounts due for interstate originating switched access services in the amount of at least \$679,066.20, plus late fees in the amount of \$251,457.50."¹³ Frontier's Petition seeks exactly the same relief, an order directing USA Datanet "to pay Frontier interstate Feature Group A access charge elements as stated herein, together with Frontier's tariffed late payment charges."¹⁴ Indeed, Frontier's false claim that the Petition is based on a primary jurisdiction referral demonstrates that Frontier's Petition raises exactly the same issue Frontier raised in its lawsuit in federal court. Having already chosen to seek damages in federal court, Section 207 bars Frontier from raising the same issues before the Commission, and bars the FCC from considering those issues.

Dismissal of the Petition is not only mandated by Section 207, but it also is appropriate as a matter of equity. Frontier will suffer no prejudice due to dismissal of its

¹¹ *Order* at 4-5 (citing *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004); Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers (filed Aug. 20, 2004)).

¹² *See, American Sharecom v. The Mountain States Tel. & Tel. Co.*, Memorandum Opinion and Order, 8 FCC Rcd at 6727, 6728 ¶ 9 (1993); *see also, Long Distance/USA, Inc. v. The Bell Tel. Co. of Penn.*, Memorandum Opinion and Order, 7 FCC Rcd 408, 410 n. 30 (1992); *see also RVS Cablevision Corp. v. Wisconsin Bell, Inc.*, Memorandum Opinion and Order, 56 Rad. Reg. 2d 229 n.2 (1984).

¹³ Complaint ¶ 28; *see also id.* ¶ 34 & p.8 (Petition Exhibit B).

¹⁴ Petition at 9-10.

Petition. As the district court aptly noted, “it does not appear that some additional delay will harm Frontier, since Frontier is only now pursuing claims that date back to 1999.”¹⁵ Those claims are now lodged with the district court, where they will remain for adjudication once the purpose of the Court’s stay is satisfied – that is, once the Commission decides the pending *IP-Enabled Services* and *VarTec* matters, at which time the Judge Siragusa can determine the best means for resolving Frontier’s lawsuit. The Commission therefore should have no reservation about complying with the mandate in Section 207 to dismiss the Petition.

III. THIS DISPUTE IS NOT PROPERLY SET FOR DECLARATORY RULING

Even if Section 207 did not bar the Petition, Frontier should not be permitted to employ the declaratory ruling process in order to pursue what amounts to a collection action. The Petition is not the product of a primary jurisdiction referral, nor does it seek the Commission’s ruling on a regulatory issue of general application. Rather, Frontier seeks a ruling on whether a specific party – USA Datanet – owes a specific amount of money pursuant to a specific tariff – Frontier’s federal tariff – due to the specific manner in which USA Datanet is interconnected with Paetec. A formal complaint, rather than a declaratory ruling, is the proper procedural vehicle for resolving this type of dispute. However, since Frontier has already filed a lawsuit against USA Datanet in the United States District Court for the Western District of New York, which remains pending, Frontier cannot file a formal complaint with the FCC. It is likely for this reason that Frontier brought this dispute to the FCC as a “Petition for Declaratory Ruling,” despite the fact that the pleading raises the type of dispute, and requests the type of relief, that is appropriate only for a formal complaint.

¹⁵ *Order* at 13.

A. The District Court Did Not Refer Any Questions to the FCC Pursuant To A Primary Jurisdiction Referral

Contrary to Frontier's unfounded assertion, this matter is not before the Commission "pursuant to the Court's referral on the ground of primary jurisdiction."¹⁶ In fact, USA Datanet requested a primary jurisdiction referral from the district court and was denied that relief.¹⁷ *There is no referral from the district court.* The Commission therefore has no obligation to respond to Frontier's demand for relief. Rather, as explained above, Section 207 bars the Commission from considering Frontier's Petition.

As stated in Section I. above, the district court discussed at length two quite similar proceedings already underway at the Commission: the *IP-Enable Services NPRM* and the *VarTec Petition for Declaratory Ruling*.¹⁸ The core controversy in those dockets is virtually identical to that posed in the Petition: whether IP-based services are among the services for which originating access must be paid. The district court expressly recognized that the *IP-Enabled Services* docket "is particularly concerned with the issue of whether, and to what extent, VoIP providers should have to pay access charges."¹⁹ The district court also noted that "the VarTec matter that is now pending before the FCC also *raises an issue that is almost identical to the one being raised in the instant case.*"²⁰ Thus, the district court imposed a stay,²¹ concluding that "it would be prudent" to await the FCC's decisions in these proceedings, which will

¹⁶ Petition at 5.

¹⁷ See, e.g., Defendant's Memorandum of Law In Support Of Its Motion To Dismiss Based Upon The Doctrine of Primary Jurisdiction And For Failure To State Claims Upon Which Relief Can Be Granted (Appended to the Petition as Exhibit C) at 21 ("USA Datanet respectfully requests that the Court . . . dismiss the Complaint, without prejudice, and refer Plaintiff's claims to the FCC").

¹⁸ Order at 4-5,10-11.

¹⁹ *Id.* at 12-13.

²⁰ *Id.* at 13 (emphasis added).

²¹ *Id.* at 14.

“resolve[] the issue of whether or not VoIP providers such as Datanet are liable for access charges.”²² Once the FCC issues decisions in one or both of these proceedings, the Honorable

Judge Siragusa can decide whether:

to dismiss Frontier’s claims for failure to state claims upon which relief can be granted;

to refer to the FCC, pursuant to the doctrine of primary jurisdiction, the specific questions he deems necessary to answer in order to resolve the pending action; or

to address the merits of Frontier’s claims without further input from the FCC.

The *Order* is clear that the district court did not find it necessary or advisable to issue yet another request for a Commission decision when two germane, if not controlling, decisions are forthcoming. Frontier’s Petition is thus not an implementation of a court directive, as was the case in *Mocatta Metals*, but rather a unilateral and improper attempt to seek relief in an additional forum – the Commission. This attempt contravenes the plain language of Section 207, as well as the Commission’s precedent implementing that provision, and thus must be rejected.²³

B. This Dispute Is Plainly an Enforcement Matter That Should Not Be Resolved Through The Declaratory Ruling Process.

The Petition seeks monetary damages and not a statement of generally applicable law. In the Petition’s Conclusion, Frontier requests that the Commission rule

[T]hat Datanet and any similarly situated carriers are responsible to pay Frontier interstate Feature Group A access charge

²² *Id.*

²³ When a court refers questions to the FCC pursuant to the doctrine of primary jurisdiction, the judge determines which specific questions must be answered in order to resolve the pending lawsuit. Here, the district court did not refer any questions to the FCC, and the questions Frontier suggests are misleading and incomplete. Accordingly, even if the FCC answered the questions Frontier posed, the district court nonetheless might choose to refer yet further questions to the FCC if and when the stay is lifted.

elements as stated herein, together with Frontier's tariffed late payment charges.²⁴

On its face, this request is for monetary damages, relief the Commission, and most certainly the Wireline Competition Bureau, does not afford in the guise of a declaratory ruling. Simply put, the Commission does not award damages via declaratory ruling.²⁵ Absent a primary jurisdiction referral, which is demonstrably absent here, the Commission will not opine on the propriety of applying any carrier's tariff to a particular service.²⁶

At its most basic, the Petition represents a collections action. Frontier has a tariff on file that it purports applies to USA Datanet's decidedly indirect interconnection to its network. Frontier seeks payment of the rates in that tariff, plus late fees, by USA Datanet. Moreover, it comes to the Commission with a request for a ruling that USA Datanet pay those charges and late fees.²⁷ Indeed, Frontier attaches as Exhibit B its federal complaint that quantifies, to the penny, the amount of money that it believes it is owed. All reasonable inferences point to a conclusion that Frontier is seeking an enforceable judgment, drafted by the Wireline Competition Bureau and reviewed by the full Commission, for payment. This request cannot be construed as a request for clarification of regulatory law that may be applied generally to the telecommunications industry.

²⁴ Petition at 9-10 (emphasis added).

²⁵ *E.g., Communications Vending Corp. v. Citizens Communs. Co.*, Memorandum Opinion and Order, 17 FCC Rcd 24201, 24226 ¶ 60 ("The individual Defendants in these cases could not have reasonably assumed, based on the APCC petition for declaratory ruling, that they would have been sued by these particular Complainants, or that they would be liable for damages."); *aff'd, Communications Vending Corp. of Ariz. v. FCC*, 365 F.3d 1064, 1076 (D.C. Cir. 2004) (FCC declaratory ruling did not impact affected parties' right to damages).

²⁶ *See Mocatta Metals*, 44 FCC.2d 605 ¶ 3.

²⁷ Petition at 9-10.

York are such that Frontier is owed originating access charges. Its presentation is intensely fact-based and is no broader than any garden-variety commercial dispute between two parties.

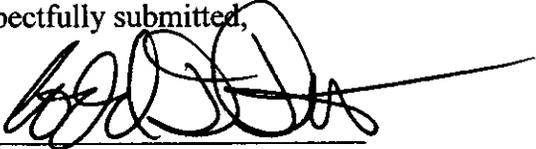
Declaratory rulings were not intended for such parochial purposes, but rather the Commission's extensive enforcement procedures are better suited to resolve this dispute once it properly can be brought to this agency.²⁹ The FCC simply cannot allow Frontier to file a Petition in which Frontier request a ruling that would require the FCC to disregard the factually intensive contract dispute that underlies Frontier's lawsuit before the District Court. Accordingly, the Petition should be dismissed.

²⁹ See also Primary Jurisdiction Referrals Involving Common Carrier, DA 00-2606 (rel. Nov. 16, 2000) ("**Generally, primary jurisdiction referrals in cases involving common carriers are appropriately filed as formal complaints with the Enforcement Bureau pursuant to section 208 of the Communications Act of 1934, as amended.** There may be circumstances, however in which this approach may not be appropriate. Accordingly, parties to a case in which a primary jurisdiction referral has been made are strongly encouraged to contact the Chief of the Market Disputes Resolution Division of the Enforcement Bureau for guidance *before* filing any pleadings or otherwise proceeding before the Commission in such referral.") (emphasis added).

IV. CONCLUSION

For these reasons, USA Datanet respectfully requests the FCC to reject the
Petition without consideration of the merits.

Respectfully submitted,

By: 

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Dated: December 6, 2005

Certificate of Service

I, Erin W. Emmott, hereby certify on this 6th day of December, 2005, that the foregoing Opposition and Motion to Dismiss was served via email on the following persons:

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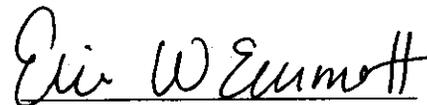
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