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October 3, 2208

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Ave. NE
Washington, D.C. 20002

FILED/ACCEPTED
OCT - 3 2008
Federal Communications Commission
Office of the Secretary

Re: OLS, Inc. and TeleUno, Inc.
Petition for Declaratory Ruling Regarding Application of Sections 201(b) and 203(c) to Underlying Carrier's Practices and Charges, Filed September 19, 2008

Dear Ms. Dortch:

In response to the Petition for Declaratory Ruling submitted by OLS, Inc. and TeleUno, Inc. ("Petitioners"), Global Crossing Bandwidth, Inc. ("GX") took the unusual step of submitting an "initial response" prior to the Commission setting the Petition for public notice. In its response, GX requested that the Commission deny the Petition, arguing that there exists no controversy or uncertainty requiring Commission action. However, GX based its arguments on factual misrepresentations and a misreading of the record in the federal district court proceeding.

In disputing the existence of an ongoing controversy, GX erroneously stated the sole issue presented in the Petition is the reasonableness of the Minimum Monthly Usage Charges ("MMUCs"). GX' contention is flatly contradicted by the plain language of the Petition[1], as well as Petitioners' Memorandum of Law in Support of their Motion for Stay[2], currently pending before the district court. As set forth in Petitioners' filings, it is the total scope of GX' unreasonable conduct, including its implementation of the MMUC, its repeated threats of

[1] See Petition, pages 2-3.
[2] Attached as Exhibit A hereto.

disconnection, and its false promises of forgiveness of disputed charges in return for contract extensions, which serves as the basis of the Petition.

GX' response also failed to acknowledge that Petitioners pled various counterclaims before the district court, the majority of which were not resolved by the court's July 9, 2006 Decision and Order ("Decision and Order") and remain pending. Indeed, the district court specifically declined to enter final judgment in light of the pendency of Petitioner's counterclaims[3] and subsequently issued an order providing the parties with an opportunity to seek clarification of the Decision and Order.[4] Given that the court has declined to render a final judgment and has provided the parties with the opportunity to seek clarification of the Decision and Order, the existence of a continuing controversy is readily apparent. Moreover, resolution of the controversy necessitates consideration by the Commission. Because resolution of the pending controversies requires an analysis of technical and policy issues, the doctrine of primary jurisdiction dictates that the Commission, as the expert agency, should address such issues.

Contrary to GX' position, the district court's conclusions as to the reasonableness of the MMUCs does not negate the existence of a controversy as to that issue. Petitioners do not dispute that the court, in its Decision and Order, found the MMUCs to be reasonable.[5] However, the Decision and Order did little to resolve the controversy as to the MMUCs because it failed to appropriately address Petitioners' Section 201(b) challenges to the MMUCs and did not even mention Petitioners' Section 203(c) challenge. Rather, the court's flawed analysis and its lack of understanding of the intricacies of the issue only served to create greater uncertainty.

Perhaps the best example of the court's inability to fully grasp the complexities of the MMUC issue is illustrated by its misplaced reliance on the Commission's decision in *Ryder Communications*.[6] In the Decision and Order, the district court erroneously concluded that the Commission's decision in *Ryder* is dispositive as to the reasonableness of *all* minimum usage/termination charges. To the contrary, in *Ryder*, the Commission recognized that the more appropriate approach is to consider the reasonableness of such fees and charges on a case-by-case basis. As explained in the Petition, the present case is factually distinct from *Ryder*, and the court's illogical expansion of the Commission's holding in that case creates the danger of inconsistent rulings.[7] The district court's misreading of *Ryder* further illustrates the need for the Commission to exercise primary jurisdiction over the issues raised in the Petition.

As the expert agency entrusted by Congress to enforce the Federal Communications Act, it is incumbent on the Commission to determine the extent to which GX' conduct and practices violate Sections 201(b) and 203(c) of the Act. The issues for which Petitioners seek Commission action are not isolated disagreements between one underlying carrier and its carrier customer. Rather, such issues are endemic in the industry. The issuance of a declaratory ruling from the Commission addressing these issues will not only guide the district court in arriving at an appropriate resolution of the current dispute, it will provide much needed industry-wide guidance.

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[3] See Decision and Order, pages 33-34. The referenced pages of the Decision and Order are attached hereto as Exhibit B.

[4] See August 15, 2008 Amended Scheduling Order, attached hereto as Exhibit C.

[5] See Petition at Petition at ¶ 33.

[6] *In re Ryder Communications, Inc. v. AT&T Corp.*, 18 F.C.C.R. 13603 (2003).

[7] See Petition at 13-16.

In light of the need for clarification of these important issues, it is disappointing, but not surprising, that GX would resist Commission consideration of the Petition. GX' approach is telling because it reveals GX' reluctance to have its abusive practices scrutinized by the Commission and interested parties. GX' response also is predictable, in that it provides yet another illustration of GX' willingness to engage in deceptive and unreasonable conduct. It is this same conduct that led to the instant dispute and prevented an amicable and productive business relationship between the parties. Contrary to GX' self-serving and baseless arguments, the Commission should set the Petition for public notice in order to facilitate a comprehensive and thorough analysis of the issues raised by Petitioners.

An original plus nine (9) copies of this filing are enclosed herewith. An additional copy of this transmittal letter is also enclosed, to be date-stamped and returned.

Should you have any questions regarding this matter, kindly contact the undersigned.

Respectfully submitted,

Charles H. Helein

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GLOBAL CROSSING BANDWIDTH, INC., A California corporation, Plaintiff, vs. OLS, INC., a Georgia corporation, And TELEUNO, INC., A Delaware corporation, Jointly and severally. Defendants/Counter-Plaintiffs.	Civil Action No.: 05CV6423(L/P)

DEFENDANTS/COUNTER-PLAINTIFFS'
MEMORANDUM IN SUPPORT OF THEIR MOTION TO STAY

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GLOBAL CROSSING BANDWIDTH, INC., A California corporation, Plaintiff, vs. OLS, INC., a Georgia corporation, And TELEUNO, INC., A Delaware corporation, Jointly and severally, Defendants/Counter-Plaintiffs.	Civil Action No.: 05CV6423(L/P)

DEFENDANTS/COUNTER-PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO STAY

Defendants/Counter-Plaintiffs, OLS, Inc. ("OLS") and TeleUno, Inc. ("TeleUno"), (collectively referred to herein as "Defendants") respectfully submit their Memorandum of Law in support of their Motion to Stay the above-captioned proceeding.

INTRODUCTION

Defendants request a stay of the current proceeding in order to facilitate the referral of three discrete issues to the Federal Communications Commission ("FCC" or "Commission"):

1. Does Plaintiff's course of conduct, including impractical demands for payments of disputed amounts, repeated threats of disconnection unless invalid charges are paid, and coercing contract extensions in exchange for forgiveness of inflated and other invalid charges, violate the prohibition against unreasonable practices contained in Section 201(b) of the Federal Communications Act ("FCA")?

2. Do the Minimum Monthly Usage Charges ("MMUCs"), as imposed by Plaintiff, violate Section 201(b)'s prohibition against unreasonable and unjust charges?

3. Does the billing and collection of invalid charges and charges for which no service is rendered violate Section 47 U.S.C. § (c)'s provisions that no carrier may charge, demand, collect, or receive compensation for communications services except as specified in its schedule of charges (contract) or employ or enforce any classifications, regulations, or practices affecting such charges except as specified in its schedule of charges (contract), and constitute also separate violations of Section 201(b)'s prohibition against unreasonable practices?

Section 201(b) provides, in part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.

47 U.S.C. § 201(b).

Section 203(c) provides, in part:

> ... no carrier shall charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service . . .than the charges specified in the schedule then in effect . . . or employ or enforce any classifications, regulations, or practices affecting such charges except as specified in such schedule.

47 U.S.C. § 203(c).

As explained more fully herein, it is appropriate at this juncture to stay the proceeding until the FCC decides these discrete issues.[1] A number of Defendants' counterclaims, including the contention that Plaintiff's practices violate the FCA, remain in play, despite the issuance of this Court's July 9, 2008 *Decision and Order* (the "*Decision and Order*"). *See Decision and Order* at 26-28. No final judgment as to damages can be rendered until all of Defendants' remaining counterclaims have been resolved (*Id.* at 33-34), and resolution of Counts IV and V of

[1] A Petition for Declaratory Ruling is being filed with the Federal Communications Commission contemporaneously herewith. *See,* declaration attached hereto as Exhibit A.

Defendants' counterclaims implicates important policy issues that are more appropriately considered by the FCC.

In addition, the *Decision and Order* did not appropriately address Defendants' Section 201(b) and 203(c)[2] challenges to the MMUCs. In particular, the *Decision and Order* did not examine whether Defendants actually received any rate concessions GX alleged were bargained for in exchange for the payment of the MMUCs. However, in order to determine whether such charges violate Section 201(b), the open question as to the existence of adequate *quid pro quo* in the OLS and TeleUno Agreements (the "Agreements") must be addressed. This underscores the need for referral of this issue to the FCC, as the expert agency on such matters.

ARGUMENT

The doctrine of primary jurisdiction is "applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). "The primary jurisdiction doctrine serves two interests: consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency; and the resolution of technical questions of facts through the agency's specialized expertise." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994). "Courts apply the doctrine to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency." *Telstar Res. Group, Inc. v. MCI, Inc.*, 476 F.Supp.2d 261, 271 (S.D.N.Y. 2007), citing *Goya Foods, Inc. Tropicana Prods., Inc.*, 846 F.2d 848, 851 (2d Cir. 1988).

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[2] Indeed, the *Decision and Order* does not even address Defendants' Section 203(c) challenge to the MMUCs.

There is no set formula for application of the primary jurisdiction doctrine. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956). Rather, courts make such determinations on a case-by-case basis. *Gen. Elec. Co. v. Nedlloyd*, 817 F.2d 1022, 1026 (2d Cir. 1987). In considering whether the facts of a particular case support the application of the doctrine, the Second Circuit has identified four factors for courts to take into consideration:

(1) whether the issue is within the particular expertise of an agency;

(2) whether the issue is one within the discretion of an agency;

(3) whether there exists the likelihood of inconsistent rulings; and

(4) whether a prior application has been made to an agency.

Ellis v. Tribune Television Co., 443 F.3d 71, 83 (2d Cir. 2006).

As is shown in the following discussion, in the present case, each of the four factors enumerated above supports the application of the primary jurisdiction and the referral of certain discrete issues to the FCC. For example, the questions for which Defendants seek referral – the reasonableness of Plaintiff's practices and charges - raise "issues of fact not within the conventional experience of judges." *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952), but which are within the particular expertise of the FCC. Further, as in *Ellis*, these issues involve questions of public policy that are "difficult and unique" and that require consideration by the expert agency – the FCC. *Ellis,* 443 F.3d at 83 (internal citations omitted). Based on established application of the FCA, there is a likelihood of inconsistent rulings.[3]

[3] It could not have been anticipated that the *Decision and Order* would have dealt with the FCA in the manner in which it did, by, as is shown herein, misconstruing the applicable facts and precedent and by failing to address FCA provisions.

A. Consideration of the Reasonableness of Plaintiff's Practices and Charges Is Within the FCC's Particular Expertise and Discretion

The doctrine of primary jurisdiction is applied notwithstanding that the matter is properly before a court, as here, if the matter raises issues within an agency's particular field of expertise. *Total Telecomm. Serv., Inc. v. Am. Tel. & Tel. Co.*, 919 F. Supp. 472, 478 (D.D.C. 1996). Staying further action under the *Decision and Order* on Defendants' Section 201(b) counterclaims, as well as Defendants' 201(b) and 203(c) challenges to the MMUCs, until the FCC addresses the issues involved is appropriate because the reasonableness of tariffs, charges and practices of telecommunications providers is within the expertise of the FCC. Indeed, courts consistently recognize the applicability of the doctrine of primary jurisdiction to Section 201(b) challenges. *Nat'l Commc'ns Ass'n v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 223 (2d Cir. 1995); *Telstar Res. Group, Inc.*, 476 F. Supp. 2d at 272 ("Courts have commonly found that claims alleging 'unreasonable' practices in violation of § 201(b) of the FCA are within the primary jurisdiction of the FCC"); *Miranda v. Michigan*, 141 F.Supp.2d 747, 759 (E.D. Mich. 2001).

Similarly, courts uniformly have held that Congress has delegated to the FCC the discretion to determine the reasonableness of telecommunications carriers' practices and charges. "[T]he 'reasonableness' determination required by § 201(b) is inherently a discretionary question within the agency's purview." *Niehaus v. AT&T Corp.*, 218 F. Supp. 2d 531, 537 (S.D.N.Y. 2002); *In re Long Distance Telecomm. Litig. v. ITT-U.S. Transmissions Sys., Inc.*, 831 F.2d 627, 631 (6th Cir. 1987), quoting *Cons. Rail Corp. v. Nat'l Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 612 (1981) ("Section 201(b) speaks in terms of reasonableness . . . This is a determination that 'Congress has placed squarely in the hands of the [FCC].'").

Further, Defendants' Section 201(b) counterclaims implicate important policy decisions that are within the expertise and discretion of the FCC. Specifically, it is within the FCC's

discretion to consider the possible adverse impacts Plaintiff's unreasonable practices could have on the deployment of advanced services and on competition. See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) ("Congress enacted the Telecommunications Act . . . to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'") (internal citations omitted). As in *Ellis*, these public interest concerns are "similar to the type of 'public interest' or 'reasonableness' determinations that the Supreme Court has emphasized require administrative-rather than judicial-review under the primary jurisdiction doctrine." *Ellis*, 443 F.3d at 84. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones..." *Id.*, quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

As opposed to *Nat'l Commc'ns Ass'n.*, the questions presented for FCC determination go beyond whether or not Defendants timely paid their bills. Rather, Defendants seek FCC guidance as to whether Plaintiff's pattern and practice of behavior and charges are unreasonable in violation of Section 201(b). Likewise, the present case also is distinguishable from *TCG New York, Inc. v. City of White Plains*, wherein the Second Circuit declined to dismiss a case on primary jurisdiction grounds because there existed no issue of material fact in that case. 305 F.3d 67 (2d Cir. 2002).

In contrast to *White Plains*, there are number of factual disputes remaining between the parties that the *Decision and Order* did not address. In particular, Plaintiff continues to refuse to honor representations it made in order to coerce contract extensions from Defendants. *See* February 23, 2006 Declaration of Gary Eubanks, Declaration of Michele Jones at ¶¶98-104. This issue was not before the Court on either party's motion for summary judgment and remains

pending. Further, as discussed in more detail below, in considering whether the MMUCs violate Section 201(b), this Court did not conduct a detailed analysis of each party's course of conduct and did not consider facts evidencing the lack of valid *quid pro quo* in the Agreements. The existence of *quid pro quo* is a material fact, and to the extent there exists a dispute as to the existence of *quid pro quo*, issuance of summary judgment in favor of either party was not appropriate.

Defendants also argued that Section 203(c) barred Plaintiff from billing and/or collecting charges that are shown to be invalid. This raises the question as to whether Plaintiff's very complaint in the case is barred by the FCA and whether it constitutes yet a separate unreasonable practice outlawed by Section 201(b). These issues illustrate why the FCC, as the expert agency, is better equipped to address and resolve these matters.

B. Denial of Defendants' Request for a Stay Would Create the Danger of Inconsistent Rulings

Staying the current proceeding is further warranted in light of the danger of inconsistent rulings. As noted by this Court, the FCC has considered the reasonableness of minimum commitment fees in other contexts. See *In re Ryder Commc'ns, Inc. v. AT&T Corp.*, 18 F.C.C.R. 13603 (2003). However, this Court's expansion of the FCC's *Ryder* decision and its failure to conduct a fact-based inquiry equivalent to that which the FCC conducted in *Ryder* results in a substantial danger of inconsistent rulings.

The *Decision and Order* erroneously concluded that the FCC's decision in *Ryder* is dispositive as to the reasonableness of *all* minimum usage/termination fees. However, in *Ryder*, the FCC based its decision on the particular facts presented in that case, and the FCC's holding in that case cannot be read as a wholesale endorsement of every minimum usage scheme concocted by wholesale carriers. Rather, the FCC determines the reasonableness of such fees on

a case-by-case basis. This much is evidenced by the FCC's plain language in *Ryder* – "CT 6831's early service termination provision, *read in context*, comports with the reasonableness requirement of section 201(b)." *Id.* at 13619 (emphasis added). Expanding the scope of *Ryder* beyond that which was contemplated by the FCC increases the risk of inconsistent rulings. Thus, a determination as to the extent to which *Ryder* is applicable to the present case is best made by the FCC.

The danger of inconsistent rulings is further augmented by the absence of a comprehensive analysis of the technical and factual issues in contention in this case. In *Ryder*, the FCC conducted an extensive inquiry into the bargaining relationship of the parties. *Ryder*, 18 F.C.C.R. at 13614-615. A crucial component of the FCC's 201(b) reasonableness analysis was the existence of valid *quid pro quo*. While the FCC acknowledged that it has approved the inclusion of early termination clauses in other contracts, it specified that such allowances were dependent on the existence of valid *quid pro quo* in each case. *Id.* at 13617. Despite its reliance on *Ryder*, this Court largely glossed over the fact that the FCC conducted a highly detailed analysis of the facts in that case.

Here, the Agreements provided for the imposition of MMUCs in exchange for Plaintiff's promise that it would provide certain rate concessions and rate credits to Defendants. In other words, the *quid pro quo* consisted of two elements: (1) rate reductions to Plaintiff's standard rate offerings and (2) two one-time incentive credits of $25,000.00 if Defendants met certain benchmarks. In the context of Plaintiff's standard rate offerings, both in their pleadings and at oral argument, Defendants repeatedly cited the fact that no such concessions had been made by Plaintiff. The absence of such concessions brings into question of the very existence of any valid *quid pro quo* for the MMUCs. *See*, February 23, 2006 Declaration of Michele Jones at ¶¶ 25-26,

Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 22, and *Decision and Order* at 14. In response, Plaintiff was unable to produce a single shred of evidence that the rates it specified in the Agreements were discounted or otherwise different from those that it would have offered in the absence of the MMUCs. Yet, the *Decision and Order* did not consider whether the rates offered by Plaintiff were actually reduced rates. This is a crucial issue that must be addressed by the FCC because if the rates in the Agreements do not reflect a discounted rate schedule, valid *quid pro quo* cannot exist. Thus, the MMUCs would be an unreasonable charge in violation of Section 201(b).

In addition, the *Decision and Order* also neglected to give adequate consideration as to whether the inclusion of the $25,000.00 credits in the Agreements represented valid *quid pro quo*. Defendants maintain that the methodology by which Plaintiff determined Defendants' eligibility for the $25,000.00 credits is an unreasonable practice. Plaintiff's interpretation and application of Section 3.9 of the Agreements eliminated any realistic possibility that Defendants could be awarded the $25,000.00 credits because, in order to be eligible for the first $25,000.00 credit, Defendants would have had to meet the threshold of $150,000.00 in usage charges for each of the first four billing cycles, including the initial testing period. The inclusion of the test period in the credit eligibility period is facially unreasonable, as evidenced by the fact that OLS generated $182,719.53 in usage fees over the entire first billing cycle <u>following</u> the test period. *See* February 23, 2006 Declaration of Michele Jones at Exhibit 1. Yet, the *Decision and Order* did not address or explain how the inclusion of credits that are, in reality, impossible to earn can be considered a reasonable practice. Additionally, because these credits were included in the Agreements in exchange for the MMUCs, the absence of any realistic opportunity to earn the credits further negates the existence of valid *quid pro quo*.

To the extent that the FCC has not addressed the reasonableness of practices similar to those employed by Plaintiff, *i.e.* coercing contract extensions, making impractical payment demands and threatening disconnection, consideration of these issues by the FCC will promote uniformity and provide guidance for other telecommunications providers. *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681, 685-686 (E.D. Mich. 1999). Determining the extent to which *Ryder* is factually distinct from the present case and determining whether Plaintiff's course of conduct was unreasonable involve "issues of fact not within the conventional experience of judges." *Far E. Conference*, 342 U.S. at 574 (1952). The FCC is better equipped to perform such inquiries, and these issues should be referred to the FCC in order to promote uniformity with past and future rulings.

And finally, through determination of these issues, the FCC will be given the opportunity to establish the proper reach of Section 203(c)'s prohibition on making attempts to bill and collect invalid bills. Congress recognized that carriers regulated by the FCA would have the power and resources to bring suits against their customers regardless of actual merit to their claims. Thus, carriers could coerce customers into paying invalid bills as a lesser burden to being sued or even threatened with suit. To prevent this abuse of size and power, Congress outlawed the practice of attempting to bill and collect charges not properly included in their schedule of charges and not agreed to by customers because such charges were not properly included or applied as intended. By referring the issue of the Plaintiff's violation of Section 203(c), the FCC will have the opportunity to notify carriers like Plaintiff that bringing suits for invalid charges may have the unexpected consequence of being found to be in violation of Section 203(c) and Section 201(b) as an unreasonable practice. Such a decision may have the beneficial effect of lessening coercive lawsuits being brought in federal courts by carriers and of

achieving Congress' goal of preventing carriers from using their superior resources to coerce unjustified settlements by bringing or threatening to bring suits regardless of the validity of their charges.

C. Defendants Have Sought Guidance from the FCC

While Defendants did not make application to the Commission prior to filing their request for a stay, this final factor does not negate the necessity of granting a stay and asserting the doctrine of primary jurisdiction. Specifically, it was Plaintiff, not Defendants, who initiated the present action before this Court. The local rules contain compulsory counterclaim provisions, which mandated that Defendants file counterclaims in response to Plaintiff's complaint. Given the procedural posture of this case, there was little reason for Defendants to seek relief from the FCC prior to the issuance of the *Decision and Order*. However, the failure of the *Decision and Order* to consider the detailed factual background of the parties' relationship now underscores the need for FCC determination. As such, Defendants filed a request for declaratory ruling with the FCC simultaneously with the filing of the instant Motion to Stay.

Courts have stayed or dismissed proceedings pending agency review even in the absence of prior application to the appropriate agency. See *Telstar Res. Group, Inc.*, 476 F. Supp. 2d at 273; *Clark v. Actavis Group HF*, No. CIV.A.08-2293, 2008 WL 2879678, at *5 (D. N.J. 2008); *LO/AD Commc'ns, B.V.I., Ltd. v. MCI WorldCom*, No. 00 Civ. 3594, 2001 WL 64741, at *6 (S.D.N.Y. 2001).[4] Thus, the absence of this factor does not weigh against the application of primary jurisdiction. Rather, the application of the doctrine is required under the circumstances.

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[4] Moreover, because courts remain free to assert the doctrine of primary jurisdiction *sua sponte*, the Court arguably could have referred Defendants' Section 201(b) arguments to the FCC on its own initiative. *Global Naps, Inc. v. Bell Atl.-New Jersey, Inc.*, 287 F. Supp.2d 532, 547-548 (D. N.J. 2003).

D. Concerns of Judicial Economy Weigh in Favor of Granting Defendants' Motion to Stay

There is some conflict as to whether the issue of judicial economy should be considered by courts in determining whether to apply the doctrine of primary jurisdiction. *Ellis*, 443 F.3d at 90. As noted in *Ellis*, the Supreme Court has stated that a court's inquiry should be limited to two issues: uniformity and expertise. *Id.* In this case, it is clear that the interest in judicial economy is best served by allowing the expert agency, the FCC, to first address the discrete issues, saving this Court the time of further consideration until those discrete issues are expertly determined.

The exercise of the FCC's primary jurisdiction at this point in the proceeding is appropriate and does not unduly prejudice the Plaintiff. Defendants are seeking stay of the current proceeding rather than an outright dismissal. Thus, Plaintiff retains the ability to obtain final judgment from this Court once the FCC renders its decision on the discrete issues and once the remaining counterclaims are resolved. In addition, seeking a stay rather than a dismissal adequately protects Plaintiff's interests because Plaintiff can seek a termination or modification of the stay in the event the FCC does not act in a timely fashion. *Waudby v. Verizon Wireless Serv., LLC*, No. 07-470, 2007 WL 1560295, at *6 (D.N.J. 2007), citing *Phone-Tel Comm'n, Inc. v. AT&T Corp.*, 100 F. Supp. 2d 313, 321-22 (E.D. Pa. 2000).

Moreover, in *Ryder*, the district court stayed that matter at an almost identical stage - after trial, but before entering a final judgment as to damages. *Ryder*, 18 F.C.C.R. at *13610. Simply put, the risk of delay cannot outweigh the advantages of having the expert agency address the serious policy concerns implicated by Plaintiff's practices and charges. As stated herein, if larger providers are permitted to engage in unreasonable conduct in violation of the

FCA, such an environment would stifle competition and pose a risk to the deployment of advanced services.

CONCLUSION

Based on the foregoing arguments, Defendants respectfully assert that granting their Motion to Stay is appropriate in order to allow the FCC to consider whether Plaintiff's practices and charges violate Section 201(b) and Section 203(c).

Dated: September 19, 2008

Respectfully submitted,

OLS, INC. AND TELEUNO, INC.

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EXHIBIT B

V. Relief

The final question that must be addressed is what relief should be granted at this point. The Court has granted summary judgment for Global on the MMUC and PICC issues. The dispute over the MMUC issue, at least, appears to be strictly over the enforceability of the MMUC provisions, not the amount due. Nevertheless, I do not believe that it would be advisable to enter judgment at this time in Global's favor on these claims, since some of defendants' counterclaims remain pending and may eventually offset the amounts to which Global is entitled. *See Waxman v. Envipco Pick Up & Processing Services, Inc.*, No. 02 Civ. 10132, 2006 WL 236818, at *12 (S.D.N.Y. Jan. 17, 2006) (granting defendant's motion as to liability with respect to its conversion counterclaim, but deferring calculation of damages to trial, in part because "the amount of such damages will ultimately be offset against the damages owed to plaintiffs on their breach-of-contract claim"); *Control Techniques, Inc. v. Oliver*, Civ. No. N-90-237, 1991 WL 47345, at *1 (D.Conn. Feb. 21, 1991) (granting summary judgment to plaintiff on one count of its complaint, but stating that "[f]inal computation of damages under Count One ... must await the disposition of the remaining claims," in part because of "the possibility that Oliver's counterclaim, if successful, may offset the debt owed to CTI in Count One"); *In re Fulcrum Direct, Inc.*, Nos. 98-1767, 2003 WL 1878070, at *7 (Bankr. D.Del. Apr. 14, 2003) (finding that debtor Fulcrum had "established that it [wa]s owed $98,064.55 by Associated Footwear," but adding that "whether Associated Footwear, Inc., is entitled to offset any of the

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[13](...continued)
(Cal. Pub. Util.Comm'n Sept. 7, 2006), so regardless of whether they are literally contained in Global's papers, the only real issue is whether they are relevant to the issues before me and thus whether I should consider them, not whether they should be stricken from defendants' papers.

$98,064.55 against its alleged damages for Fulcrum's alleged breach of contract requires further evidence," and that "[t]herefore, entry of a judgment on this issue is deferred pending further order"). I therefore grant summary judgment in Global's favor on the issue of liability with respect to those claims, but will not enter judgment as to damages until the parties' remaining claims have been resolved.

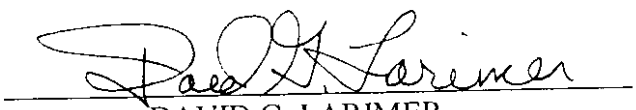
CONCLUSION

Defendants' motion for summary judgment (Dkt. #23) is denied. Defendants' motion to strike (Dkt. #42) and supplemental motion to strike (Dkt. #69) are denied as moot.

Plaintiff's cross-motion for summary judgment (Dkt. #39) is granted in part and denied in part. Plaintiff's motion is granted on the issue of liability with respect to plaintiff's claims that defendants failed to pay its monthly minimum usage charges and primary interexchange carrier changes. The calculation of damages on those claims must await further proof or stipulation between the parties.

Plaintiff's motion for summary judgment on defendants' counterclaims is also granted in part and denied in part. Defendants' counterclaims are dismissed to the extent that they arose prior to December 9, 2003. Defendants' second counterclaim, for tortious interference with contracts, and their third counterclaim, for "tortious interference with prospective business prospects," are dismissed in their entirety.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
July 8, 2008.

EXHIBIT C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GLOBAL CROSSING BANDWIDTH, INC.,
a California corporation,

Plaintiff,

v.

OLS, INC., a Georgia corporation, et al.,

Defendants.

AMENDED SCHEDULING ORDER

05-CV-6423L

Pursuant to a telephone conference having been held with this Court on August 14, 2008, it is

ORDERED that:

1. Defendants shall file any motions to stay this litigation on or before **September 19, 2008**.

2. Any party seeking clarification of Judge Larimer's July 8, 2008 Decision and Order on the parties motions for summary judgment (Docket # 87) shall file its motion on or before **September 19, 2008**.

3. Counsel for both parties are directed to advise this Court in writing by no later than **September 19, 2008** whether they would like this Court to schedule a status conference.

No extension of the above cutoff dates will be granted except upon written application, made prior to the cutoff date, showing good cause for the extension. Application for extensions should be made to the Magistrate Judge. Joint or unopposed requests to extend the

deadlines set forth in this order need not be made by formal motion, but rather may be sought in a letter to the court. Letter requests must detail good cause for the extension and propose new deadlines.

IT IS SO ORDERED.

Marian W Payson

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
August 15, 2008

CERTIFICATE OF SERVICE

I, Charles H. Helein, do hereby state and affirm that copies of the foregoing Response of Petitioners OLS, Inc. and TeleUno, Inc., to the Response of Global Crossing Bandwidth, Inc., has been served upon the following, this 3rd day of October, 2008, in the manner indicated:

Joan Griffin *(Via Email)*
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Charles H. Helein