

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

-----)
In the Matter of)
)
Establishing Just and Reasonable Rates) **WC Docket No. 07-135**
for Local Exchange Carriers)
)
-----)

COMMENTS OF AT&T CORP.

M. Robert Sutherland
Gary L. Phillips
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2057

James F. Bendernagel, Jr.
David L. Lawson
Michael J. Hunseder
Sidley Austin, LLP
1501 K Street NW
Washington, DC, 20005
202-736-8000
202-736-8711 (fax)

Brian Moore
AT&T Corp.
One AT&T Way
Bedminster, NJ 07921
908-234-6263

June 1, 2009

TABLE OF CONTENTS

INTRODUCTION 1

THE PETITION IS FATALY FLAWED 3

CONCLUSION..... 11

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

-----)
In the Matter of)
)
Establishing Just and Reasonable Rates) WC Docket No. 07-135
for Local Exchange Carriers)
)
-----)

COMMENTS OF AT&T CORP.

Pursuant to Section 1.45 of the Commission’s Rules, 47 C.F.R. § 1.45, AT&T Corp. (“AT&T”) hereby responds to the Petition for Declaratory Ruling (“Petition”) filed on May 20, 2009, by Defendants All American Tel. Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom (collectively, the petitioners or the “Beehive CLECs”).

INTRODUCTION

The Petition is a ploy by the Beehive CLECs to evade the Enforcement Bureau’s directive that they respond to factual allegations in AT&T’s Informal Complaint challenging their schemes to inflate access charge billings through sham arrangements.¹ The petitioners are deeply involved in traffic stimulation schemes of the sort that previously have been catalogued in this Docket, but, as AT&T has detailed in its Complaint, their conduct goes beyond even the usual traffic-stimulation abuses. The Beehive CLECs are not legitimate carriers at all. They are sham entities that provide no actual services to any residents of the extremely rural areas of Utah and Nevada where they supposedly “compete” with the incumbent Beehive Telephone. They exist solely as fronts to stimulate traffic to pornographic chat lines and other “free” services

¹ Informal Complaint of AT&T Corp., *AT&T Corp. v. All-American Tel. Co., et al.*, File No. EB-09-MDIC-0003 (filed Apr. 15, 2009) (“Complaint”); Letter Order, *AT&T Corp. v. All-American et al.*, File No. EB-09-MDIC-0003 (Apr. 20, 2009) (“EB Letter Order”).

offered in conjunction with calling service providers (“CSPs”) with which the Beehive CLECs have unusually close affiliations.²

AT&T’s longstanding dispute with the Beehive CLECs over their access charge billings is actively being litigated in the United States District Court for the Southern District of New York.³ In that case, initiated as a collection action by the Beehive CLECs, AT&T’s defenses and counterclaims allege, among other claims, that the Beehive CLECs have not provided the tariffed switched access services for which they have billed AT&T, that their chat line affiliates and other CSPs are not their “customers” within the meaning of their tariffs, and that the calls at issue did not, in fact, terminate in the rural Beehive territories (and, it turns out, the Beehive CLECs are not even certified to provide local service in Beehive’s Utah territory).⁴ The petitioners resisted discovery on these allegations, urging the court to grant them judgment as a matter of law.

In a recent order, the court rejected that argument, recognizing that the merit of each of the claims and counterclaims necessarily turned on disputed facts regarding petitioners’

² For instance, although All-American supposedly competes with Beehive, Beehive actively supported All-American’s competitive entry and one of its directors served as All-American’s attorney before the Utah PSC in connection with All-American’s request to be certified to provide service. Complaint ¶¶ 13, 27. All-American’s Director, President, and CEO, David Goodale, and one of its directors in Utah, Joy Boyd, serve, respectively, as an officer and as President of Joy Enterprises, Inc (“JEI”). *Id.* ¶ 6. JEI is an adult chat line provider, with the same Las Vegas, Nevada, address as All-American, and JEI previously was involved with Beehive in traffic-stimulation schemes. *Id.*

³ *All-American Tel. Co., et al. v. AT&T Corp.*, No. 07-cv-861 (S.D.N.Y.).

⁴ *See* AT&T Corp., Answer and Amended Counterclaims to Plaintiffs’ First Amended Complaint, *All-American Tel. Co., et al. v. AT&T Corp.*, No. 07-cv-861 (S.D.N.Y.) (filed Aug. 7, 2008, corrected version filed Aug. 14, 2008); Complaint ¶¶ 15-20, 23 (describing proceedings before the Utah PSC regarding All-American’s provision of services in Beehive territories even though such activity was expressly excluded from the scope of its state certificate).

operations and arrangements.⁵ Discovery is now underway and a schedule for resolution of the claims and counterclaims has been established. With respect to one claim only – AT&T’s claim that the Beehive CLECs’ sham arrangements violate section 201(b) of the Act – the court deemed a primary jurisdiction referral appropriate. Referral Order at 7-8.

Accordingly, after consultation with Enforcement Bureau Staff, AT&T filed a 26-page Informal Complaint containing detailed factual allegations to support its sham entity claim. The Staff then ordered the Beehive CLECs to “respond in writing specifically and comprehensively to all material allegations raised in the informal complaint.” EB Letter Order at 1. Instead of complying with this order, the Beehive CLECs filed their Petition and requested that the Commission, in lieu of investigating the allegations in AT&T’s Complaint, issue a broad declaratory order. The Petition utterly fails to address the numerous and detailed factual allegations in AT&T’s Complaint, and AT&T intends to address that failure to comply with the Enforcement Bureau’s directive through appropriate filings with the Bureau. For this reason and many others, the Petition should be denied.

THE PETITION IS FATALLY FLAWED

The Petition is primarily intended as yet another dodge designed to waylay the factual inquiry, which AT&T has sought for years, into the Beehive CLECs’ sham arrangements, and should be disregarded for that reason alone. It is also entirely baseless on its merits.

A Declaratory Ruling Is Not A Better Procedure Than A Complaint Proceeding To Respond To The Court’s Referral Order And Decide AT&T’s Sham Entity Claim. For a number of reasons, it makes no sense to respond to the Court’s referral of AT&T’s relatively narrow and fact-specific sham entity claim via a declaratory ruling proceeding (*see* Pet. at 7-13).

⁵ Order, *All-American Tel. Co. et al. v. AT&T Corp.*, 2009 WL 691325, (S.D.N.Y. March 16, 2009) (“Referral Order”) (Exh. 10 to AT&T Complaint).

First, the Commission has repeatedly held that a declaratory ruling is not an appropriate procedure where the Commission needs to gather evidence and determine disputed issues of fact, and that is precisely what is required to resolve AT&T's sham entity claim.⁶ As the Commission has explained, a sham entity claim is fact-based and is established when a purportedly "*bona fide* carrier" uses "an arrangement among several entities to capture access revenues that could not otherwise be obtained by lawful tariffs."⁷

Accordingly, AT&T's Complaint alleged specific facts regarding petitioners' failure to provide any services to genuine customers and the nature of the petitioners' relationships with various CSPs and with Beehive. Complaint ¶¶ 10-34, 48-52. The Complaint also explained how these sham arrangements allowed these entities to inflate or impose access charges that could not otherwise be obtained. *Id.* ¶¶ 26, 49-50. Unless the petitioners are prepared to admit all of the factual allegations in AT&T's Complaint – and, to date, their response has been to refuse to

⁶ See, e.g., *American Network Inc.*, 4 FCC Rcd. 550, ¶ 18 (1989) ("A declaratory ruling may be used to resolve a controversy *if the facts are clearly developed and essentially undisputed*") (emphasis added); *Amendment of the Commission's Regulatory Policies*, 15 FCC Rcd. 7207, ¶ 22 n.43 (1999) ("the Commission has declined to issue a declaratory ruling when facts were disputed or not clearly developed"). The CLECs point to instances where the Commission has previously used declaratory ruling proceedings to resolve primary jurisdiction referrals, Pet. at 7-8, but such instances are not "routine[]" (*id.* at 8), and they almost always occur where the facts are undisputed or where a court intends to resolve factual disputes itself but requires the Commission's expertise on a legal or policy issue to do so. See, e.g., *Digital Cellular*, 20 FCC Rcd. 8723, ¶ 2 (2005) (using declaratory ruling where the referring court "has deemed that there is a fully developed factual record and the material facts are essentially undisputed").

⁷ *Matter of AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, 16 FCC Rcd. 19158, n.33 (2001), *overruled on other grounds*, 292 F.3d 808 (D.C. Cir. 2002); see Complaint ¶¶ 44-47 (describing the Commission's holding in *Total Telecomm. Servs. Inc. v. AT&T Corp.*, 16 FCC Rcd. 5726 (2001) ("*Total*") ("Our conclusion rests on the relationship between Atlas and Total; *the evidence* compels the conclusion that the two entities are not independent or competitive"), *aff'd in part, rev'd in part sub nom.*, *AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003) ("*Total II*")); see also *Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd. 11629, n.20 (2007) ("an arrangement between a chat line service provider and competitive access provider (formed by an ILEC for purposes of the arrangement) that did not provide local exchange service and had no customers other than the chat line was a sham").

address them at all – then it is clear that there will be a number of disputed fact issues and that discovery will be necessary.⁸ Consequently, the Commission cannot decide AT&T’s sham arrangement claim by declaratory ruling.

Second, the central premise of the Petition – that the Commission could use a declaratory ruling efficiently to resolve the traffic stimulation disputes between AT&T and the Beehive CLECs as well as numerous other cases – is false. AT&T’s sham entity claim against these three CLECs is *not*, as they claim, Pet. at ii, 9-13, “identical” to claims raised in “over a dozen” federal court and state regulatory proceedings. The Beehive CLECs attempt improperly to conflate AT&T’s sham entity claim with the more commonly asserted claim – such as the one raised before the Commission in the *Farmers* case⁹ – that LECs do not in fact provide access services pursuant to their tariffs when they route traffic stimulation calls to CSPs’ equipment. These two types of claims are distinct. To AT&T’s knowledge, with one exception,¹⁰ no long distance

⁸ There are certain other facts relevant to AT&T’s sham entity claim (such as the full extent of the petitioners’ affiliations with the CSPs and Beehive) that have not yet been fully explored, and are uniquely in the possession of the Beehive CLECs and these other entities. *E.g.*, Complaint ¶¶ 32 n.30, 51, 53-54. Accordingly, the Commission will need to use the discovery procedures typically employed in complaint proceedings to gather facts regarding AT&T’s sham entity claim.

⁹ *Qwest Commc’ns Corp. v. Farmers & Merchants Tel. Co.*, 22 FCC Rcd. 17973, ¶¶ 35-39 (2007) (“*Farmers I*”), recon. granted in relevant part, 23 FCC Rcd. 1615, ¶ 7 (2008) (“*Farmers II*”), recon pending.

¹⁰ AT&T’s pending complaint against Aventure in the Southern District of Iowa raises sham entity violations similar in nature to those raised by its Complaint here. AT&T’s claim is subject to a motion for primary jurisdiction referral, but the case has been stayed since 2007 to await a decision in the *Farmers* case.

carrier has raised a sham entity claim in any of the other traffic stimulation cases.¹¹ Rather, the primary claim raised by the long distance carriers in these other cases is the claim like the one at issue in the underlying New York litigation between AT&T and the Beehive CLECs and in *Farmers*: that the LEC has not provided access services within the meaning of its tariffs when completing calls to CSPs.

Consequently, the Commission would *not* resolve disputes in the other pending traffic-stimulation cases if it proceeded via a declaratory ruling with respect to the sham entity claim. The reality is that there are virtually no such sham entity claims currently pending. Even if other long distance carriers had raised sham entity claims, however, a declaratory ruling proceeding regarding such claims would not resolve all pending litigation, for two reasons. Any other sham entity claims would be, like AT&T's claim, fact-bound and, for the same reasons described above, could not be efficiently decided in an omnibus declaratory ruling proceeding that only considers legal issues. Indeed, this likely explains why the petitioners, which have steadfastly sought to avoid disclosing any factual information about their arrangements with CSPs and other entities involved in their traffic stimulation schemes, want to employ such a procedure. Further, and in all events, a declaratory ruling proceeding regarding sham entity claims would not resolve the other pending claims in the traffic stimulation cases, such as whether the local carriers can show that they in fact provided access services pursuant to their tariffs.

¹¹ The short excerpts from various pleadings cited in the Petition (at 10-13) do not establish otherwise. In fact, examination of those pleadings confirms that they do not raise section 201(b) sham entity claims. Rather, the Section 201(b) claims raised in those other cases are variants of the claim described above, which asserts that a LEC did not provide tariffed access services. Moreover, the stray references in these pleadings to "sham" transactions refer either to the fact that these traffic-stimulation activities can be characterized as "schemes" or as "shams" or to the efforts of some LECs – such as the LEC in the *Farmers* case (*Farmers II* ¶¶ 6-11) – to disguise the nature of their arrangements with CSPs through, *inter alia*, abuses of the Commission's discovery processes, so that they would appear to be complying with the terms of their tariffs.

Third, the petitioners' claims that there would be "massive delays" if the Commission refused to institute an expansive declaratory ruling proceeding (*e.g.*, Pet. at 13-15) are entirely groundless. Preliminarily, there is no merit to the argument that the long distance companies have caused delays merely because they have asserted their rights under the LEC access tariffs to refuse to pay disputed access bills associated with traffic-stimulation schemes. To the contrary, to the extent there have been delays in the court cases, that has been due in large part to the local carriers' own strategic decisions.

The quickest way to resolve all of the individual traffic-stimulation disputes would have been for discovery to have begun in earnest in each of the individual cases, so that the parties could have obtained relevant information, evaluated the likelihood of their success on the merits of their specific claims, and then determined whether to try to settle the cases or to proceed to trial. The traffic-stimulation LECs, however, have resisted any discovery into their business practices or their arrangements with the CSPs, and have argued repeatedly that all discovery should be stayed while courts consider their legal challenges to the long distance carriers' claims and defenses. The local carriers would undoubtedly be well-served by shielding the facts of their abusive operations and arrangements from the light of day – as the recent Iowa Utilities Board ("IUB") traffic stimulation proceeding starkly confirms – but the reality is that if the local carriers had not resisted discovery and had instead promptly turned over the relevant material, many of these cases would be over or nearing completion.¹² Certainly, it cannot be the case, as the petitioners claim, that the use of a declaratory ruling proceeding, rather than complaint

¹² In this regard, the IUB traffic stimulation case, in which the IUB conducted a hearing earlier this year and has received final post-hearing briefs, appears to be closest to a resolution on the merits. It is no coincidence that in this case significant discovery began early on, *i.e.*, by late in 2007.

proceedings, would make a material difference in the time required to resolve all of the claims in these traffic stimulation cases.

The Commission’s Prior Decisions Do Not Remotely Support The Petitioners’ Request For Declaratory Ruling. Because there is plainly no basis for the declaratory ruling the petitioners seek – namely, that *all* “commercial agreements” between *any* LEC and *any* CSP, regardless of their terms, are *per se* reasonable under Section 201(b) – they are reduced to arguing that a ruling in their favor is compelled by the Commission’s prior decisions. The Commission has already properly rejected that argument.

Jefferson Tel., et al and *Farmers*. The petitioners first assert that “the Commission has ruled decisively in favor of LECs on this identical ‘sham entity’ argument four times.” Pet. at 7; *see id.* at 16-19. In fact, the cases they cite – *Jefferson Telephone, Frontier, Beehive*¹³ and *Farmers* – did not even address such sham entity claims. Indeed, no sham entity claim was ever asserted in these cases, and they instead involved entirely different claims. In *Jefferson, Frontier, and Beehive*, the Commission considered a very specific and narrow legal argument asserted against an access revenue sharing agreement: that it “violated section 201(b) *solely* because it allegedly breache[d] common carriage duties.”¹⁴ In *Jefferson*, which found that such agreements did not violate common carriage duties, the Commission “emphasize[d] the narrowness of [its] holding” explaining that it was based on the “specific facts and arguments presented here, and acknowledged that “other revenue sharing agreements between LECs” and other entities might violate § 201(b) or be otherwise unlawful for other reasons. *Jefferson*, 16

¹³ *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001) (“*Jefferson*”); *AT&T Corp. v. Frontier Commc’ns of Mt. Pulaski, Inc., et al.*, 17 FCC Rcd. 4041 (2002) (“*Frontier*”); *AT&T Corp. v. Beehive Tel. Co., Inc., et al.*, 17 FCC Rcd. 11641 (2002) (“*Beehive*”).

¹⁴ *See Jefferson*, 16 FCC Rcd. 16130, ¶¶ 13, 15; *Frontier*, 17 FCC Rcd. 4041, ¶ 1; *Beehive*, 17 FCC Rcd. 11641, ¶ 29.

FCC Rcd. 16130, ¶ 16. Likewise, in *Farmers*, the Commission clearly explained that Qwest did not raise any sham entity claim. *Farmers*, ¶ 27 & n.98. Accordingly, these four cases provide no support whatsoever for the petitioners.

Nor do these four cases support a broader ruling that all LEC access revenue sharing arrangements, or all access bills associated with the traffic stimulation schemes, are *per se* reasonable. The Commission has taken pains to point out that the holdings in *Jefferson* and similar cases were “narrow[]” and do *not* suggest “that the Commission has already found that it is lawful to impose access charges” on traffic stimulation calls routed pursuant to revenue sharing arrangements. *Jefferson* ¶ 16; *Farmers* ¶ 34 n.115.

Total. The petitioners acknowledge that in *Total* the Commission found that a LEC had improperly created a competitive carrier as a “sham entity” in order to stimulate traffic to a chat line and share the associated access revenues, but they claim that this decision has been overruled or, alternatively, supports their Petition. Pet. at 20-23. The petitioners’ attempt to distinguish and at the same time rely on *Total* is entirely unconvincing. Contrary to their claim, the Commission’s *CLEC Access Charge Reform Order* did not overrule or supersede the *Total* decision (which had been issued only a month before), but rather cited it with approval.¹⁵ The Commission has also discussed *Total* in subsequent decisions without ever indicating that it has been made “obsolete,” as the Beehive CLECs contend – to the contrary, just six months after it

¹⁵ Seventh Report and Order, *In The Matter Of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd. 9923, ¶ 34 n.82 (2001) (“*CLEC Access Charge Reform Order*”).

issued the *CLEC Access Charge Reform Order*, the Commission “reaffirm[ed]” *Total*.¹⁶

The fact that the Commission’s rules now prevent a CLEC from charging more for access services than the “competing ILEC,” *see* 47 C.F.R. § 61.26, does not undercut *Total* or “eliminate the arbitrage opportunit[ies]” for CLECs (Pet. at 21) – indeed, the “free calling” scams at issue have been carried out by both incumbent carriers (as in the *Farmers* case) and competitive carriers (as in this case).¹⁷ Moreover, the Beehive CLECs cannot avoid *Total* by arguing that the case concerned only “the relationship between [a] CLEC and [an] ILEC,” (Pet. at 22), because the close relationship between the CLECs, the Beehive ILEC and the CSPs supports AT&T’s claim that the CLECs are sham entities, established to impose access billings that otherwise could not be imposed directly.¹⁸ For the reasons stated in AT&T’s Complaint, *Total* fully supports AT&T’s sham entity claim.¹⁹

¹⁶ *See Matter of AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, 16 FCC Rcd. 19158 ¶ 22 & n.33 (rel. October 22, 2001), *overruled on other grounds*, 292 F.3d 808 (D.C. Cir. 2002); *see also Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd. 11629 n.20 (2007). Likewise, the *Total* decision was appealed to the D.C. Circuit, and the Commission did not ever suggest during the appeal (which was not decided until 2003) that it had overruled the *Total* decision.

¹⁷ The petitioners’ argument that *Farmers* holds that *Total* is irrelevant to AT&T’s sham entity claim (Pet. at 21-22) is bizarre. In *Farmers*, the Commission said that *Total* was “not dispositive” because, as described above, Qwest did not raise a sham entity claim in that case. This manifestly does not mean the case is not relevant to AT&T’s Complaint, which does raise such a claim.

¹⁸ Indeed, at page 5 of the Petition, the Beehive CLECs accurately note that there are several references in the Complaint to the Beehive ILEC.

¹⁹ The CLECs’ claim (Pet. at 22) that *Total* supports their Petition because it “stands for the proposition that AT&T cannot refuse to pay access charges for calls to chat line providers” is factually inaccurate. AT&T petitioned for review of the holding in *Total* that required AT&T to pay a “reasonable access charge,” and the D.C. Circuit reversed and remanded the Commission’s holding. *Total II*, 317 F.3d at 238-39. Because the case settled before the Commission could act on remand, there is no valid holding regarding the proper remedy against a local carrier that has committed an unreasonable practice by assessing access charges via sham arrangements.

CONCLUSION

The appropriate course of action for the Commission to pursue is clear. It should require that the Beehive CLECs respond via the complaint proceeding that AT&T instituted. That is the best way to gather evidence relevant to AT&T's claims and to decide factual disputes that arise once the Beehive CLECs respond to the allegations that AT&T has asserted, so that the Commission can properly respond to the Court's referral order.

As to the broad legal issues regarding the reasonableness of LECs' traffic stimulation and access revenue sharing practices, the Commission should act promptly in WC Docket No 07-135 and i) issue the modest rule changes advocated by AT&T, RICA, and other commenters that would discourage further traffic-stimulation activities and ii) issue a declaration that certain types of access revenue sharing agreements are unreasonable practices.²⁰ As to the Petition, it would waste the Commission's resources to open a new docket to consider it, and the Commission should simply enter the Petition in WC Docket 07-135 and, for the reasons described above, deny it when it issues the relief described above.

²⁰ *See, e.g.*, Comments of AT&T Corp., WC Docket No. 07-135, at 19-40 (filed Dec. 17, 2007) (discussing rule changes and new rules); Reply Comments of AT&T Corp., WC Docket No. 07-135, at 16-31 (Jan. 16, 2008); Letter of Brian Benison, AT&T, and Steve Kraskin, Rural Independent Competitive Alliance, to Marlene H. Dortch, FCC, WC Docket No. 07-135; CC Docket No. 01-92 (filed Nov. 25, 2008) (joint proposal from AT&T and RICA to address traffic stimulation abuses).

Respectfully submitted,

/s/ David L. Lawson

M. Robert Sutherland
Gary L. Phillips
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2057

James F. Bendernagel, Jr.
David L. Lawson
Michael J. Hunseder
Sidley Austin, LLP
1501 K Street NW
Washington, DC, 20005
202-736-8000
202-736-8711 (fax)

Brian Moore
AT&T Corp.
One AT&T Way
Bedminster, NJ 07921
908-234-6263

June 1, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on June 1, 2009, a copy of the foregoing Comments of AT&T Corp., was served on the following persons, using the method of service indicated:

/s/ Michael J. Hunseder

Michael J. Hunseder

Jonathan Canis
Arent Fox LLP
1050 Connecticut Avenue NW
Washington, D.C. 20036
(by fax and first class mail)