

Arent Fox

May 20, 2009

VIA HAND DELIVERY

Sandra Gray-Fields
 Market Disputes Resolution Division
 Federal Communications Commission
 Enforcement Bureau
 445 - 12th Street, SW
 Washington, DC 20554

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MAY 20 2009

Federal Communications Commission
Bureau / Office

Jonathan E. Canis

Attorney
 202.775.5738 DIRECT
 202.857.6395 FAX
 canis.jonathan@arentfox.com

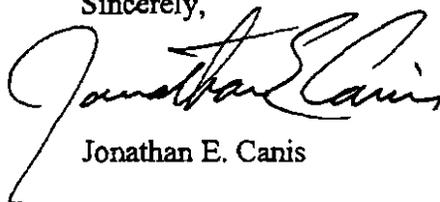
Re: All American Telephone Co., Inc., e.Pinnacle Communications, Inc. and ChaseCom
 Petition for Declaratory Ruling: File No. EB-09-MDIC-0003

Dear Ms. Gray-Fields:

On behalf of All American Telephone Co., Inc., e.Pinnacle Communications, Inc. and ChaseCom ("*Collection Action* Petitioners"), enclosed please find a courtesy copy of their "Petition for Declaratory Ruling to Reconfirm that Local Exchange Carrier Commercial Agreements with Providers of Conferencing "Chat Line" and Other Services Do Not Violate the Communications Act". This Petition is also submitted in response to AT&T's Informal Complaint, designed File No. EB-09-MDIC-0003, per the Bureau's letter dated April 20, 2009.

Should you have any questions or comments regarding the attached, please do not hesitate to contact me.

Sincerely,



Jonathan E. Canis

cc: Tracy E. Bridgham
 James F. Bendernagel
 Michael J. Hunseder
 David Lee Lawson

03/11/09 10:30:00 AM

Arent Fox

FILED/ACCEPTED

May 20, 2009

MAY 20 2009

Jonathan E. Canis

VIA HAND DELIVERY

Federal Communications Commission
Office of the Secretary

Attorney
202.775.5738 DIRECT
202.857.6395 FAX
canis.jonathan@arentfox.com

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Office of the Secretary, Room TW B204
Washington DC 20554

Re: Petition for Declaratory Ruling of All American Telephone Co., Inc., e-Pinnacle Communications, Inc. and ChaseCom to Reconfirm that Local Exchange Carrier Commercial Agreements with Providers of Conferencing, "Chat Line" and Other Services Do No Violate the Communications Act

and

FCC File No. EB-09-MDIC-0003

Dear Ms. Dortche:

On behalf of All American Telephone Co., Inc., e-Pinnacle Communications, Inc. and ChaseCom, enclosed please find an original and four (4) copies of the foregoing "Petition for Declaratory Ruling of All American Telephone Co., Inc., e-Pinnacle Communications, Inc. and ChaseCom to Reconfirm that Local Exchange Carrier Commercial Agreements with Providers of Conferencing, "Chat-Line" and Other Services Do No Violate the Communications Act "Petition)".

This Petition is also being filed as a response to an Informal Complaint designated File No. EB-09-MDIC-0003. An additional two copies are being filed for that purpose.

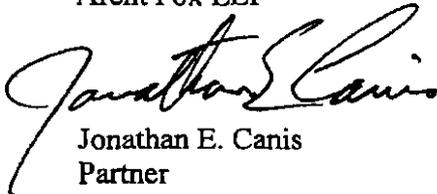
Please stamp and return the enclosed extra copy.

Arent Fox

Please direct any questions or communications regarding this matter to the undersigned.

Respectfully submitted,

Arent Fox LLP



Jonathan E. Canis
Partner

cc: Michael J. Copps, Acting Chairman
Jonathan S. Adelstein, Commissioner
Robert M. McDowell, Commissioner
Jennifer Schneider, Legal Advisor to Acting Chairman Copps
Mark Stone, Legal Advisor to Commisier Adelstein
Nicholas Alexander, Legal Advisor to Commissioner McDowell
Alexander Starr, Chief, Market Disputes Resolution Division
Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division
Tracy E. Bridgham, Market Disputes Resolution Division
Sandra Gray-Fields, Market Disputes Resolution Division
James F. Bendernagel
David Lee Lawson
Michael J. Hunseder

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

In the Matter of)
)
)

Petition for Declaratory Ruling to Reconfirm)
that Commercial Agreements Between LECs)
and Providers of Conferencing, Chat-Line and)
Other Services Do Not Violate the)
Communications Act)
)

WC Docket No. _____

(NOTE: ALSO FILED IN
FILE NO. EB-09-MDIC-0003)

**PETITION FOR DECLARATORY RULING
OF ALL AMERICAN TELEPHONE CO., INC.,
E.PINNACLE COMMUNICATIONS, INC. AND
CHASECOM
TO RECONFIRM THAT LOCAL EXCHANGE CARRIER
COMMERICAL AGREEMENTS WITH
PROVIDERS OF CONFERENCING, "CHAT LINE" AND
OTHER SERVICES
DO NOT VIOLATE THE COMMUNICATIONS ACT**

Jonathan E. Canis
Katherine Barker Marshall
Aswathi Zachariah
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
202.857.6000

*Counsel to Petitioners, All American Telephone
Co., Inc., e.Pinnacle Communications, Inc., and
ChaseCom*

May 20, 2009

SUMMARY

This Petition for Declaratory Ruling responds to a primary jurisdiction referral from a collection action now pending before the Federal District Court for the Southern District of New York (“SDNY”), and is filed on behalf of the Plaintiffs in that case (the “*Collection Action* Plaintiffs”). The Plaintiffs in that case are three competitive local exchange carriers that have provided access service to AT&T and other interexchange carriers per effective federal tariffs, at rates prescribed by this Commission. AT&T refused to pay these access charges, and the Plaintiffs filed their collection action in March, 2007.

This Petition also responds to an Informal Complaint filed by AT&T, as AT&T’s response to the SDNY Court’s referral.

The matter referred is AT&T’s “sham entity” argument, which asserts that AT&T is somehow absolved of its obligation to pay tariffed rates for services it has taken from LECs because those LECs have engaged in “sham” arrangements with companies that provide “chat-line” and free conference calling services, and other services.

The AT&T Informal Complaint does not present a coherent legal theory, but rather consists of a series of invectives against the *Collection Action* Plaintiffs, and completely unsupported assertions of obligations that AT&T believes should be imposed upon CLECs. In its 26-page Informal Complaint, AT&T cites one Commission ruling to support its claims. Petitioners demonstrate that this one case actually supports the Petitioners’ rights to collect access charges for the traffic in question.

AT&T presents an Informal Complaint without precedential support because there is none. Rather, the Informal Complaint – filed only because the SDNY Judge forced AT&T to do

so – is part of a brutal campaign by AT&T to punish and intimidate its competitors by engaging in patently unlawful self-help refusals to pay access charges, while at the same time imposing legal costs by pursuing baseless and harassing litigation.

The Commission has broad discretion in selecting the procedural vehicle by which it will respond to the SDNY Court's referral, and the Commission should do so by issuing a Declaratory Ruling. There are currently over a dozen federal court cases and proceedings before state regulatory commissions that are hearing the identical "sham entity" argument referred by the SDNY Court. Given the variety of venues in which the same argument is being considered, the Commission must provide the national leadership necessary to quiet these disputes on a nation-wide basis. Failure to do so would result in inconsistent rulings, additional referrals to the Commission, wasted resources for the courts, commissions and litigators, and unconscionable delay in the courts' ability to decide the matters before them.

The use of a Declaratory Ruling is also commended by the fact that the Commission need only reaffirm the state of existing law, based on established Commission precedent. In fact, the Commission has ruled five times, in identical or very similar cases, in favor of the LECs and rejecting the arguments of AT&T and other IXC's.

AT&T brought identical arguments against LECs who established commercial agreements with chat-line operators in three separate complaints in the late 1990s. One of these cases even involved two entities that are now featured prominently in AT&T's Informal Complaint. In 2001 and 2002, the Commission rejected AT&T's arguments in all three cases, and unequivocally found for the LECs.

A more recent Commission decision is found in its ruling in *Qwest Communications Corp. v. Farmers & Merchants Mutual Tel. Co.* That order, issued in 2007, rejected Qwest's

“sham entity” arguments that are identical to those raised by AT&T and referred by the SDNY Court.

Finally, the only case that AT&T cites to support its Informal Complaint actually compels a ruling in favor of Petitioners. In *Total Telecommunications Services, Inc. and Atlas Telephone Co.*, the Commission did employ a “sham entity” analysis and did indeed find that the CLEC in that case was a sham extension of an ILEC. However, that decision was made before the Commission prescribed CLEC access charges. Starting in 2001, the type of sham arrangement identified in the *Total* case is impossible, because CLECs must mirror ILEC rates. As a result, the *Total* “sham entity” analysis is now obsolete and irrelevant. Moreover, even in finding that a sham arrangement did exist, the Commission found that AT&T was still obligated to pay tariffed access charges for the services it took. In this finding, the *Total* case compels rejection of AT&T’s arguments and a ruling in favor of Plaintiffs. In short, all existing precedent – five separate rulings issued consistently over a decade – require rejection of AT&T’s arguments.

For all these reasons, the Commission must show the leadership required by federal courts and regulators across the country and provide certainty to the industry. The only way to do so is to issue the requested Declaratory Ruling expeditiously.

Because this Petition also serves as an answer to AT&T’s Informal Complaint, it provides brief responses to two misstatements by AT&T in that document.

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

In the Matter of)) Petition for Declaratory Ruling to Reconfirm) that Commercial Agreements Between LECs) and Providers of Conferencing, Chat-Line and) Other Services Do Not Violate the) Communications Act)	WC Docket No. _____
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**PETITION FOR DECLARATORY RULING
OF ALL AMERICAN TELEPHONE CO., INC.,
E.PINNACLE COMMUNICATIONS, INC. AND
CHASECOM
TO RECONFIRM THAT LOCAL EXCHANGE CARRIER
COMMERICAL AGREEMENTS WITH
PROVIDERS OF CONFERENCING, "CHAT LINE" AND
OTHER SERVICES
DO NOT VIOLATE THE COMMUNICATIONS ACT**

This Petition for Declaratory Ruling is submitted in response to a referral from a federal district court judge in an ongoing federal collection action by three competitive Local Exchange Carriers ("LECs") against AT&T Corp. ("AT&T"). It is also submitted in response to an Informal Complaint, which is the procedural vehicle that AT&T has chosen to pursue the federal court's referral before this Commission. As demonstrated in this Petition, the judge's referral raises issues that are identical to issues now pending in at least 12 federal court actions before at least four federal district courts, and issues that are pending in at two complaint proceedings before state regulatory commissions. These circumstances compel the Commission to address the federal court referral through a Declaratory Ruling, pursuant to Section 1.2 of the

Commission's Rules and Section 5(d) of the Administrative Procedure Act, as opposed to party-specific adjudication pursuant to a Section 208 Informal or Formal Complaint. As demonstrated herein, Petitioners seek a reconfirmation of the Commission's established law on these issues – the Commission has found decisively for CLECs on identical or similar issues no fewer than five times over the last decade.

I. INTRODUCTION AND BACKGROUND: THE COLLECTION ACTION, SUBSEQUENT REFERRAL AND AT&T'S INFORMAL COMPLAINT

Pursuant to Section 1.2 of the Commission's Rules, 47 U.S.C. § 1.2, and Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e), All American Telephone Company, Inc. ("All American"), e.Pinnacle Communications, Inc. ("e.Pinnacle") and ChaseCom ("ChaseCom") (collectively, the "*Collection Action* Plaintiffs" or "Petitioners") submit this Petition for Declaratory Ruling by their undersigned counsel. This Petition is also submitted in answer to an Informal Complaint of AT&T Corp., filed against the *Collection Action* Plaintiffs, and designated File No. EB-09-MDIC-0003 in an Official Notice of Informal Complaint issued by the Enforcement Bureau, dated April 20, 2009.

As discussed below, this Petition, and the related AT&T Informal Complaint, respond to a referral from a federal district court judge hearing in an access charge collection action filed by the *Collection Action* Plaintiffs against AT&T. The specific nature of the Court's referral is discussed below.

A. THE SDNY COLLECTION ACTION AND REFERRAL ORDER

On March 6, 2007, All American, e.Pinnacle and ChaseCom filed an action for the collection of unpaid access charges against AT&T before the Federal District Court for the Southern District of New York ("SDNY") (the "*Collection Action*")¹. A copy of the First

¹ *All American Tel. Co., Inc. v. AT&T, Inc.*, 07 Civ. 861 (S.D.N.Y. 2009) ("*Collection Action*").

Amended Complaint in the *Collection Action* is appended at Attachment 1. On March 16, 2009, Judge William Pauley referred one of AT&T's counterclaims to the Commission. Specifically, Judge Pauley refers AT&T's claim that commercial relationships between LECs and conference or chat-line operators render the LECs "sham entities" and that these relationships somehow violate § 201 (b) of the Communications Act, and somehow absolve AT&T of the obligation to pay lawfully tariffed rates for the access services it has taken from the Plaintiffs.

In making the referral, Judge Pauley noted that AT&T's "sham entity" argument – that commercial relationships between LECs and chat-line or conference operators somehow violated § 201(b) of the Communications Act – raises questions relating to telecommunications policy and ratemaking that are within the exclusive province of the Commission:

A determination of the appropriate tariff rate in the absence of a sham entity involves policy and technical decisions within the FCC's field of expertise. See MCI Telecomm. Corp. v. Dominican Commc'n Corp., 984 F. Supp. 185,189-90 (S.D.N.Y. 1997) (noting reasonable tariff determinations are best made by the FCC); see also MCI Telecomm. Corp. v. Ameri-Tel. Inc., 852 F. Supp. 659, 665 (N.D. Ill.1994) (referring claim raising the reasonableness of tariff to FCC); see also Total [Telecomm. Servs.. Inc. v. AT&T Corp.] 16 FCC Rcd. 5726 ¶ 39 (determining that the proper remedy for sham entity violation was the reasonable tariff that would be charged in the absence of the sham entity). In addition, were this Court to determine the appropriate rate for AT&T, that decision might discriminate against other customers of the CLECs. The FCC is in the best position to determine the appropriate rate for all customers using identical services. See MCI, 984, F. Supp. at 190 (noting that non-discrimination is one of the key components of the federal regulatory scheme). Thus, at least the first three factors weigh in favor of referring this claim to the FCC.²

Judge Pauley's decision is appended to this Petition at Attachment 2.

Judge Pauley did not issue an order directly referring this matter to the Commission. Rather, he instructed AT&T to bring the matter to the Commission, or face dismissal of AT&T's related counterclaim in his Court:

² *All American Tel. Co., Inc. v. AT&T, Inc.*, 2009 WL 691325, at *4 (S.D.N.Y. Mar. 16, 2009) (footnote omitted).

Because the remainder of this action can proceed without AT&T's sham entity claim, that claim is stayed pending the outcome of the administrative determination under the doctrine of primary jurisdiction. AT&T shall advise this Court within 10 days whether it will pursue its sham entity claim with the FCC. This court will dismiss the sham entity claim for failure to prosecute if AT&T does not file a complaint with the FCC within thirty days of this Order.³

Judge Pauley did not stay the case pending referral of the "sham entity" issue to the Commission, and in a subsequent order established a schedule for completion of discovery and submission of dispositive motions.

On March 25, 2009, AT&T submitted a letter to the Court, advising that it would proceed with its claim before the Commission. The AT&T letter noted that the Commission has discretion in choosing the procedural vehicle it uses to respond to court referrals, and that AT&T would seek direction from the Commission Staff. A copy of AT&T's letter to the Court is appended at Attachment 3. Whether AT&T actually sought such direction is unclear, but in any event, it filed its Informal Complaint with the Commission, dated April 15, 2009, and the *Collection Action* Plaintiffs were served with notice of the filing by the Enforcement Bureau on April 20, 2009. This Petition for Declaratory Ruling is both submitted to the Commission for its consideration, and submitted to the Enforcement Bureau in response to the AT&T Informal Complaint.

B. THE MATTER REFERRED

As reflected in the quote above, the matter referred by Judge Pauley is AT&T's "sham entity" argument. That argument, as stated in AT&T's Answer and Counterclaims in the pending *Collection Action*, is:

³ *Id.* at *4.

Count III

(Unreasonable Practice in Violation of 47 U.S.C. § 201(b) - Sham Entity)

57. On information and belief, Counterclaim Defendants [the *Collection Action* Plaintiffs] were constituted as sham entities designed solely for the purpose of engaging in the traffic pumping schemes discussed above to extract inflated terminating switched access charges from AT&T and other long distance carriers.

58. Counterclaim Defendants, have in fact sought to extract inflated terminating switched access charges from AT&T and other long distance carriers for terminating switched access services that Counterclaim Defendants did not provide.

59. The FCC has held creating a CLEC "as a sham entity designed solely to extract inflated access charges from IXCs ... constitutes an unreasonable practice in connection with the provision of access services in violation of Section 201 (b) of the Act." *Total Commc 'ns. Servs., Inc. and Atlas Tel. Co.*, 16 FCC Rcd. 5726, ¶16 (2001).⁴

The AT&T Answer is appended at Attachment 4.

C. THE AT&T INFORMAL COMPLAINT

AT&T's Informal Complaint is not so much a vehicle for seeking and supporting well-defined relief from the Commission, as it is simply a rant against practices and entities that AT&T apparently hates. For example, much of AT&T's Informal Complaint is dedicated to railing against Beehive Telephone – a non-party to the Complaint. In fact, Beehive Telephone is mentioned on 21 of the 26 pages of the Informal Complaint.

- AT&T Complains about the amount of access charges that Beehive is billing to AT&T. p. 12.
- At the same time, AT&T states that it is "not challenging Beehives' [access] charges with this informal complaint" but it has disputed them in the past. p. 13.

⁴ *Collection Action*, 97 Civ. 861, Answer and Amended Counterclaims of Defendant AT&T Corp. to Plaintiffs' First Amended Complaint, dated August 7, 2008.

AT&T also makes arguments that are clearly beyond the Commission's jurisdiction, and so are irrelevant to this proceeding:

- AT&T opposes the Utah Public Service Commission's grant of a certificate of public convenience and necessity to All American. p. 9.
- AT&T asserts that the "CLECs have brazenly violated" requirements of the Utah Public Service Commission. p. 23.

But most of all, the AT&T Informal Complaint simply makes up new obligations that it says should apply to CLECs:

- They must serve "genuine customers" – as defined by AT&T. p.3.
- They must route calls to "actual" or "genuine" residents. pp. 15, 23
- They may not have "unusually close connections" or "be affiliated" with chat-line and conference operators, or international calling service providers. pp. 4, 20.
- They may not submit access bills that "exceed the bills for access in similarly-sized communities." p. 15.
- They must compete with ILECs designated by AT&T. pp. 2, 13, 20, 22.
- They must provide both originating and terminating access. p. 16
- They must provide corporate and financial information to AT&T upon demand, and submit to AT&T's evaluation as to whether they are "*bona fide* competitive carriers." pp. 17, 25.
- They must reduce Beehive Telephone's revenues. p. 24.

Of course, AT&T does not provide a single citation for support of any of these assertions, and no support exists. In fact, as demonstrated throughout this Petition, established precedent flatly contradicts these assertions.

Significantly, AT&T does not challenge the access charges tariffed by the Petitioners.

Indeed, as demonstrated in this Petition, AT&T cannot – tariffs of the *Collection Action* Plaintiffs are uncontested and valid, and the rates included in those tariffs are conclusively

deemed reasonable under the Commission's rules.

The relief sought by AT&T is absolution from its obligation to pay Petitioners' lawful tariffed access charges. In essence, AT&T is asking this Commission to bless its campaign of self-help refusal to pay Petitioner's access charges, which AT&T has now been conducting for more than three years. As demonstrated in this Petition, the Commission's rules and policies, applied consistently for well over a decade, compel the opposite outcome.

II. THE COMMISSION SHOULD RESPOND TO THE JUDGE'S REFERRAL BY ISSUING A DECLARATORY RULING

As demonstrated in this Section and Section III, the Commission should use its broad authority to choose the appropriate vehicle for responding to primary jurisdiction referrals by issuing a Declaratory Ruling. The use of this procedural vehicle is compelled by the fact that identical "sham entity" issues are pending in multiple federal court actions and regulatory proceedings across the country, and so leadership by the Commission to provide industry-wide guidance is required. In addition, the failure to quiet this issue by Declaratory Ruling would impose massive delays on already-delayed federal court proceedings, and would impose massive harm on LECs that are already threatened by the self-help campaigns of AT&T and the other large interexchange carriers ("IXCs"). Finally, a Declaratory Ruling is appropriate because it would merely restate established law – the Commission has ruled decisively in favor of LECs on this identical "sham entity" argument four times, and has otherwise ruled consistently with this policy in a fifth major case.

A. THE COMMISSION HAS BROAD DISCRETION IN CHOOSING THE METHOD OF RESPONDING TO JUDICIAL REFERRALS, AND ROUTINELY USES DECLARATORY RULINGS TO DO SO

The Commission has broad discretion in choosing how it will respond to a primary jurisdiction referral. As AT&T accurately describes in its letter to the Court, the Commission

may respond by initiating an informal complaint, formal complaint, or issuing a declaratory ruling. See Attachment 3. The Commission's Primary Jurisdiction Referrals Involving Common Carriers, issued in 2000, indicates that referrals are generally filed as formal complaints, but urges the affected parties to seek guidance from Commission Staff regarding the appropriate form of referral.⁵ Counsel for the *Collection Action* Plaintiffs met with the Enforcement Bureau Staff and the Commissioner's Offices to discuss why issuance of a declaratory ruling is the only effective and equitable means of proceeding.

The Commission routinely employs declaratory rulings to respond to primary jurisdiction referrals.⁶ In a 2003 Order, the Commission noted its approach to this issue:

The Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "terminate a controversy or remove uncertainty." When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary to assist the referring court.⁷

The Commission has used this judgment consistently to employ declaratory rulings to resolve matters in cases similar to the instant dispute. In 2001, the Commission responded to a referral from the Federal District Court for the Eastern District of Virginia in a case that – similar to the instant dispute – involved multiple IXCs and CLECs across the country.⁸ Moreover, the Commission chose the form of a declaratory ruling when it addressed widespread call blocking conducted by AT&T and other IXCs against rural LECs, which arose out of the same facts as the

⁵ *Primary Jurisdiction Referrals Involving Common Carriers*, 15 FCC Rcd 22449 (2000).

⁶ E.g., *Pleading Cycle Established for TON Services, Inc.*, 23 FCC Rcd 7862 (2008); *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, 22 FCC Rcd 300 (2007).

⁷ *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, 18 FCC Rcd 21813, 21823 ¶ 15 (2003).

⁸ *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, 17 FCC Rcd 19158 (2001). That ruling was later vacated by the D.C. Circuit Court of Appeals, but the Commission's choice of a declaratory ruling as a means of bringing certainty to the industry was not contested.

Collection Action and the AT&T Informal Complaint, which are the subject of this filing.⁹

While this action was not in response to a court referral, but rather taken on the Commission's own motion, the Commission's choice of a Declaratory Ruling was intended to clarify the law by ending a highly controversial practice that was affecting carriers and their customers on an industry-wide basis.

As discussed immediately below, the "sham entity" issues that the SDNY Court has referred to the Commission are now pending before over a dozen cases in multiple venues across the country. Just as with the Call Blocking Declaratory Ruling, the Commission again needs to provide regulatory certainty on an industry-wide basis, and the requested declaratory ruling is the only effective means of doing so.

B. THE PENDENCY OF IDENTICAL CLAIMS IN OVER A DOZEN PENDING CASES IN MULTIPLE VENUES COMPELS PROCEEDING BY DECLARATORY RULING

Over the last three years, AT&T has been joined by other IXCs – including Sprint, Qwest and Verizon – in engaging in self-help refusals to pay tariffed access charges. As a result, aggrieved LECs have filed collection actions in federal courts across the country. In addition, some of the IXCs have filed complaints against LECs, both in federal court and before state public service commissions. All of these disputes reflect identical issues – IXCs engaging in self-help refusals to pay access charges tariffed by ILECs and CLECs for calls made to free conference operators, chat-line service providers, and in some cases international calling services. All of these cases raise identical issues, and all of them contain some variant of the "sham entity" argument. A list of the 14 pending cases of which Petitioners are aware, and a

⁹ *Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, 22 FCC Rcd 11629 (2007).

brief synopsis of the “sham entity” argument raised in each of those cases, is provided below:¹⁰

1. Southern District of Iowa¹¹

AT&T Corp. v Superior Telephone Cooperative, et al., Docket No. 4:07-cv-00043 (S.D. Iowa).

Count II of the Complaint filed by AT&T. charges that the LEC Defendants “engaged in unjust and unreasonable practices in violation of [47 U.S.C.] § 201(b)” and that the “LEC Defendants are involved in other unlawful schemes and sham arrangements that are also designed to inflate their monthly access charges to AT&T.” (Complaint ¶¶ 79-80) (emphasis added).

Qwest Communications Corporation v. Superior Telephone Cooperative, et al., Docket No. 4:07-cv-00078 (S.D. Iowa)

Count I of the Complaint filed by Qwest alleges that the LEC Defendants have engaged in an unjust and unreasonable practice in connection with their provision of interstate communication services, in violation of their 47 U.S.C. § 201(b) duties. ... [T]elephone companies were created in large part to serve as a conduit to generate excessive long distance traffic and, therefore, terminating switched access revenue from long distance carriers like [Qwest].” (Complaint ¶¶ 43, 46) (emphasis added).

Referencing Count I of the Complaint, Qwest argued in its Combined Resistance to Various LEC Defendants’ Motions to Dismiss that the “Defendants ‘tricked’ Qwest by contriving a scheme premised upon their creation of a fraudulent class of customers, and then inducing Qwest ... to pay the so-called access fees on the traffic that Defendants generated in the illegal scheme.” (Resistance to Motion to Dismiss § IV.C.2.) (emphasis added).

Sprint Communications Company, L.P. v. Superior Telephone Cooperative, et al., Docket No. 4:07-cv-00194 (S.D. Iowa)

Sprint, in its Combined Response to Defendants’ Motions to Dismiss or Stay, pointedly analogizes the case at bar to *Total Telecomms.*, 16 F.C.C.R. 5726: The gist of [Total] is that a sham transaction cannot be used to artificially increase revenues at the expense of other carriers. That is precisely what is occurring in this case, where there is no reason other than arbitrage for the subject calls to pass through small towns in Iowa.” (Response to Motion to Dismiss at fn 15) (emphasis added).

¹⁰ Petitioners are in possession of all of the pleadings cited in this section. However, in order to maintain a manageable Petition, only excerpts from the pleadings in those cases are appended at Attachment 5. Copies of the full pleadings referenced in this section will be provided upon request.

¹¹ All the Iowa cases are stayed pending a final FCC order in the *Farmers & Merchants* case.

2. Northern District of Iowa

**Aventure Communications Technology LLC v. MCI Communications Services, Inc.,
Docket No. 5:07-cv-04095 (N.D. Iowa)**

MCI alleges generally that Aventure violated § 201(b) of the federal Communications Act by engaging in “unjust and unreasonable practices by ... conspiring to artificially and exponentially increase the volume of long-distance phone traffic handled by Aventure.” (Answer/Counterclaim ¶ 96).

3. Federal District of South Dakota

Sancom, Inc. v. Qwest Communications Corp., No. 07-4147-KES (D. S.D.).

Qwest alleges that “Sancom has undertaken business relationships with certain partners [i.e., free call providers] ... to dramatically increase the amount of long distance traffic delivered through Sancom’s switches to Sancom’s partners, namely to the free calling service companies, and bill long distance carriers such as Qwest exorbitantly high terminating switched access charges.” Qwest First Amended Counterclaims.

Northern Valley Communications L.L.C. and Sancom, Inc. v. MCI Communications Services, Inc. d/b/a Verizon Business Services, Docket No. 1:07-cv-01016 (consolidated with No. 1:07-cv-04106) (D.S.D.)

Verizon alleges generally that Northern Valley and Sancom violated § 201(b) of the federal Communications Act by engaging in “unjust and unreasonable practices by ... conspiring to artificially and exponentially increase the volume of long-distance phone traffic handled by Northern Valley and Sancom.” (Answer as to Northern Valley ¶ 113; Answer as to Sancom ¶ 109).¹²

Sancom, Inc. v. Sprint Communications Company, Docket No. 4:07-cv-04107 (D. S.D.)

This case involves two types of companies that have conspired together to generate the charges at issue. Sancom is the first type of company, a local exchange carrier (“LEC”) that delivers calls to local customers, Sancom has conspired with a second type of company (“Call Connection Company”) that has established free or nearly free conference-calling, chat-line, or similar services that callers throughout the United States use to connect to other callers. Sancom and the Call Connection Companies collectively are engaged in unlawful schemes to bill Sprint (along with other carriers) for charges Sprint neither expressly nor implicitly agreed to pay because the charges are not authorized under applicable tariffs. The scam, which is commonly referred to as “traffic pumping,” has two components.

¹² Subsequent to the filing of the Answers, Northern Valley’s and Sancom’s Complaint, and Verizon’s related Counterclaims, were dismissed pursuant to a joint stipulation of dismissal. Verizon is still litigating the case as a counterclaimant against several counterdefendants.

Northern Valley Communications L.L.C. v. Sprint Communications Company, Docket No. 1:08-cv-01003 (D. S.D.)

The agreements reached between Northern Valley and one or more of the Call Connection Companies constitute agreements to take unlawful actions. The agreements between Northern Valley and one or more of the Call Connection Companies constitute a civil conspiracy or conspiracies, and Northern Valley and the Call Connection Companies are liable for the harm caused by the unlawful acts taken in furtherance of the conspiracy. These acts include the advertising of the free calling services, the provision of kickbacks, and the billing of access charges on traffic for which no access charges were due.

Sancom, Inc. v. AT&T Corp., Docket No. 4:08-cv-04211 (D. S.D.)

AT&T alleges generally that Sancom violated 47 U.S.C. § 201(b) by engaging in “unjust and unreasonable practices in connection with its provision of interstate communications services” by “knowingly charg[ing] AT&T ... for terminating switched access services pursuant to its tariff for long distance calls to the numbers advertised by the [free call providers] with which [Sancom] had a business relationship.” (Answer ¶¶ 46-47).

Northern Valley Communications L.L.C. v. XO Communications Services, Inc., Docket No. 1:09-cv-01002 (D. S.D.)

This collection action is still in its initial motions stage, and XO has only filed a Motion to Dismiss, and has not filed an Answer or Counterclaims to date. However, the complaint involves the collection of access charges for calls made to conference operators and other service providers, and so can be anticipated to address issues identical to the other collection actions described in this Petition.

Northern Valley Communications L.L.C. v. AT&T Corp., Docket No. 1:09-cv-01003 (D. S.D.)

AT&T alleges generally that Northern Valley violated 47 U.S.C. § 201(b) by engaging in “unjust and unreasonable practices in connection with its provision of interstate communications services” by “knowingly charg[ing] AT&T ... for terminating switched access services pursuant to its tariff for long distance calls to the numbers advertised by the [free call providers] with which [Northern Valley] had a business relationship.” (Answer ¶¶ 46-47).

Northern Valley Communications L.L.C. v. Qwest Communications Corporation, Docket No. 1:09-cv-01004 (D. S.D.)

This collection action is still in the pleadings stage, and Qwest has only filed a Motion to Dismiss, and has not filed an Answer or Counterclaims to date. However, the complaint involves the collection of access charges for calls made to conference operators and other service providers, and so can be anticipated to address issues identical to the other collection actions described in this Petition.

4. The Iowa Utilities Board

Qwest Communications Corporation v. Superior Telephone Cooperative, et al., Docket No. FCU-2007-0002 (Iowa Utilities Board)

Qwest's complaint alleges generally that the Defendants violated Iowa telecommunications law by engaging in "alliances, schemes, and other arrangements ... [that] constitute an unfair and unreasonable practice ... because they represent an attempt to exploit the switched access rates [Defendants] charge and a tactic to direct traffic based on an unjust scheme and artifice to force Qwest ... to subsidize [free calling service companies] and [Defendants]." (Complaint ¶¶ 49-50). Both AT&T and Sprint intervened in that case, and supported the Qwest claims.

MCI Communications Services, Inc. d/b/a Verizon Business Services v. Aventure Communication Technology, LLC, Docket No. FCU-2008-0018 (Iowa Utilities Board)

The Verizon complaint in this case asserts that the CLEC "pays certain sham 'customers' (conference service providers or similar outfits) to take service by kicking back a portion of the access charges. . . ." Complaint at 8.

Excerpts from the filings cited above are appended to this Petition at Attachment 5.

C. FAILURE TO RESOLVE THIS INDUSTRY-WIDE DISPUTE EXPEDITIOUSLY WOULD LEAD TO GROSS INEFFICIENCIES AND UNCONSCIONABLE DELAY

As the *Collection Action* Plaintiffs demonstrate above, the number of cases in multiple federal courts and before multiple state regulatory commissions that raise "sham entity" arguments identical to that referred by the SDNY Court compels this Commission to resolve this matter on an industry-wide basis, by expeditiously issuing a Declaratory Ruling. Failure to do so would impose an unconscionable burden on the courts, the state commissions and the litigators – and ultimately on the Commission itself. There is no question that the Commission will face additional referrals from the other courts hearing these related complaints.

Moreover, absent Commission leadership on this issue, it is virtually certain that that the different federal judges and state regulatory commissioners hearing this dispute will issue inconsistent rulings on the same issue. The Commission has it within its power to prevent inconsistent rulings, further appeals, and petitions for preemption by taking this opportunity to

bring regulatory certainty to the industry.

Furthermore, the past use of the 208 complaint process to address this issue manifestly has not worked. As Petitioners describe in Section III(A), (B) and (C) below, this Commission has ruled on this same “sham entity” argument four times over the last decade, in four separate complaint proceedings – the *Jefferson*, *Beehive*, *Frontier*, and *Farmers & Merchants* decisions and ruled consistently with these decisions in *Total Telecommunications* (all discussed and cited below). The fact that this identical issue is surfacing again, in the AT&T Informal Complaint and in the 14 other complaints discussed in this Petition, is ample evidence that the Section 208 complaint process is not an effective means of resolving this matter.

Not only is the complaint process inadequate to provide certainty on an industry-wide basis, it is also necessary to provide certainty on a timely basis. The Commission’s recent decision in *Qwest v. Farmers & Merchants* is a case in point. Qwest filed its complaint against Farmers & Merchants on May 2, 2007. The Commission found that the highly expedited five-month schedule that applies to rate cases should apply, and completed the full hearing and issued its order on October 2, 2007.¹³ However, Qwest filed a petition for reconsideration of that Order, and that reconsideration proceeding has now been pending for 17 months. By the simple act of filing a petition for reconsideration, Qwest effectively turned a proceeding with a five-month statutory deadline into a two-year case.

This delay before the Commission has resulted in delay before the federal courts. The Federal District Court for the Southern District of Iowa has three cases pending before it (and another subject to a pending motion to remove from the Northern District of Iowa), all relating to the same IXC/CLEC dispute over access charges associated with calls to conference and chat-line operators. The earliest of these cases was filed in February 2007. To date, the judge has

¹³ *Qwest Commcn's Corp. v. Farmers & Merchants Mutual Tel. Co.*, 22 FCC Rcd 17973 (Oct. 2, 2007).

made no dispositive procedural or substantive rulings in those cases, but has kept them stayed, expressly waiting for the Commission to issue its final order in the *Farmers & Merchants* case.

The Judge provided the following procedural history and current status of the cases:

On October 2, 2007, before this Court entered a ruling on the pending motions, the FCC issued a decision in [Farmers & Merchants], a case factually similar to the present case, filed by Qwest against Farmers & Merchants Mutual Telephone Co. (Farmers), alleging violations of federal tariffs through a traffic-pumping scheme. The FCC determined that, based on existing regulations, although Farmers had exceeded its prescribed rate of return by increasing traffic through agreements with conference calling companies, Farmers had not acted in an unlawful manner. *Id.* at 125, 35. Thereafter, in response to the parties' requests to file supplemental briefs on the impact the FCC's Farmers decision had on the pending motions, this Court set a supplemental briefing schedule. However, when the Court discovered Qwest would file a petition for reconsideration before the FCC, the Court vacated the briefing schedule and deferred supplemental briefing until the FCC decided whether to grant Qwest's petition. . . . The FCC granted Qwest's petition in January 2008 ...; and on February 13, 2008, this court extended its October 31, 2007, Order indicating the Court would defer ruling on the pending motions until the FCC issued its ruling on Qwest's petition for reconsideration¹⁴

A copy of the S.D. Iowa order is appended to this Petition at Attachment 6. Thus, cases involving an access charge collection action filed in February 2007 remain stayed indefinitely until the Commission issues a final order on reconsideration of its decision in the *Farmers & Merchants* formal complaint. Once that final Commission order is released, the three (or four, if the Northern District case is moved) federal court actions – which have already been pending for almost two and a half years – can begin. There can be no clearer example of the unconscionable delays that have been imposed by the Commission's reliance on the Section 208 complaint process to date, and the extraordinary delays that would result from continued reliance on this clearly inappropriate vehicle. For all the reasons discussed above, the Commission cannot

¹⁴ *AT&T Corp. v. Adventure Commc'n. Tech. LLC*, No. 4:07-cv-00043, Order, dated Jan. 23, 2009, at 2-3 (citations omitted).

continue to rely on the complaint process to resolve issues related to the industry-wide dispute between LECs and IXCs over access charges related to chat-line and conference traffic. The Commission must resolve the “sham entity” referral expeditiously and with industry-wide application, by issuing a Declaratory Ruling.

III. THE COMMISSION SHOULD RECONFIRM ITS REPEATED FINDINGS THAT COMMERCIAL AGREEMENTS BETWEEN LECs AND SERVICE PROVIDERS SUCH AS CONFERENCE AND “CHAT LINE” OPERATORS DO NOT VIOLATE THE COMMUNICATIONS ACT

As demonstrated below, AT&T has filed formal complaints against LECs engaging in commercial agreements with chat-line operators three times over the past eight years, raising arguments identical to those it raises in the instant Informal Complaint. AT&T has been rejected by the Commission every time. Moreover, the Commission’s recent *Qwest v. Farmers & Merchants* decision rejects similar arguments made by Qwest, fully consistent with the earlier AT&T precedent. Finally, in its 26-page Informal Complaint, AT&T only cites one Commission decision in purported support of its position. We demonstrate that that case is inapposite to AT&T’s arguments, and actually supports the Plaintiffs’ rights to recover their validly tariffed access charges from AT&T. Thus, the Commission has decisively ruled in favor of LECs on issues identical or similar to those raised in the SDNY Court’s referral five times over the past eight years. The fact that the law and policy on this issue is so firmly established fully supports the use of a Declaratory Ruling to respond to the referral.

A. THE COMMISSION HAS ALREADY REJECTED IDENTICAL ARGUMENTS RAISED BY AT&T AGAINST IDENTICAL SERVICE ARRANGEMENTS – EVEN INCLUDING SOME OF THE IDENTICAL PARTIES – THREE TIMES

In December 1996, AT&T filed a Section 208 complaint against Jefferson Telephone Company. The Commission denied the AT&T complaint in an Order issued in 2001.¹⁵ The

¹⁵ *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001).