

switching, and trunking facilities and for the use of common subscriber plant of the Telephone Company. Switched Access Service provides for the ability to originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end user's premises in the LATA where it is provided."

42. Counterclaim Defendant has collected and continues to attempt to collect payments from AT&T under this tariff for terminating switched access on calls to the "free" conferencing, chat room, and international calls offered by the FCPs. On information and belief, for the reasons stated above, Counterclaim Defendant has not and does not provide AT&T with terminating switched access services under Counterclaim Defendant's filed tariff for such calls.

43. Counterclaim Defendant has violated 47 U.S.C. § 203(c) by charging and continuing to charge for terminating switched access services under its filed tariff in a manner that is contrary to the rates, terms, and conditions in its published tariff.

44. AT&T has been damaged by Counterclaim Defendant's violations of Section 203(c), and prays for damages in an amount to be determined at trial, interest, attorneys' fees, court costs, declaratory relief, injunctive relief and such other relief as the Court may deem just and reasonable.

**COUNT II**  
**(Unreasonable Practice in Violation of 47 U.S.C. § 201(b);**  
**Billing For Services Not Provided)**

45. AT&T repeats and re-alleges each and every allegation contained in paragraphs 1 through 44 of its Counterclaims as if set forth fully herein.

46. Counterclaim Defendant has engaged in and continue to engage in unjust and unreasonable practices in connection with its provision of interstate communications services, in violation of 47 U.S.C. § 201(b), which provides that "all . . . practices" for and in connection

with interstate services "shall be just and reasonable," and "any such . . . practice . . . that is unjust and unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b).

47. Counterclaim Defendant has engaged in a scheme to knowingly charge AT&T and other long distance carriers for terminating switched access services pursuant to its tariff for long distance calls to the numbers advertised by the FCPs with which Counterclaim Defendant has a business relationship.

48. On information and belief, Counterclaim Defendant did not provide terminating switched access services for those calls as that term is defined by its tariff.

49. On information and belief, Counterclaim Defendant did not provide terminating switched access services for those calls, as provided for in the Act, including 47 U.S.C. § 153(16) (access services are "for the purpose of origination or termination of the telephone toll service"), and in governing rules and orders of the FCC.

50. By deliberately charging, demanding, and collecting compensation for service under its tariff that it does not provide, Counterclaim Defendant has engaged in unjust and unreasonable practices in violation of 47 U.S.C. § 201(b).

51. AT&T has been damaged by Counterclaim Defendant's violations of Section 201(b), and prays for damages in an amount to be determined at trial, interest, attorneys' fees, court costs, declaratory relief, injunctive relief and such other relief as the Court may deem just and reasonable.

**COUNT III**  
**(Fraudulent and Negligent Misrepresentation)**

52. AT&T repeats and re-alleges each and every allegation contained in paragraphs 1 through 51 of its Counterclaims as if set forth fully herein.

**Quest Communications Corporation v. Superior Telephone Cooperative, et. al.**

**Docket No. FCU-2007-0002**

**State of Iowa Department of Commerce Utilities Board**

FILED WITH  
Executive Secretary

FEB 20 2007

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IOWA UTILITIES BOARD

IN RE:

Qwest Communications Corporation,

Complainant,

v.

Superior Telephone Cooperative, The  
Farmers Telephone Company of  
Riceville, Iowa, The Farmers &  
Merchants Mutual Telephone Company  
of Wayland, Iowa, Interstate 35  
Telephone Company d/b/a Interstate  
Communications Company, Dixon  
Telephone Company, Reasnor  
Telephone Company, LLC, Great Lakes  
Communication Corp., and Aventure  
Communication Technology, LLC,

Respondents.

DOCKET NO. FCU-07-\_\_\_\_\_

**COMPLAINT, REQUEST FOR DECLARATORY RELIEF AND  
REQUEST FOR EMERGENCY INJUNCTIVE RELIEF**

Qwest Communications Corporation ("QCC"), pursuant to 199 IAC Chapters 4 and 7, and 199 IAC 22.14; and Iowa Code §§ 476.2, 476.3 and 476.5, complains against the terms, conditions, and application of the intrastate tariff of the named Respondents Superior Telephone Cooperative ("Superior"), The Farmers Telephone Company of Riceville, Iowa ("Farmers-Riceville"), The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa ("Farmers & Merchants"), Interstate 35 Telephone Company d/b/a Interstate Communications Company ("Interstate 35"), Dixon

**V. The Traffic Pumping Scheme is an Unfair and Unreasonable Practice.**

49. In addition to the tariff violations and discrimination listed above, the alliances, schemes, and other arrangements between Respondents and the various FCSCs constitute an unfair and unreasonable practice both within the meaning of the telecommunications-specific law in Iowa Code § 476.3 and the general Iowa unfair and unlawful business practices laws.

50. These practices are unreasonable because they represent an attempt to exploit the switched access rates Respondents charge and a tactic to direct traffic based on an unjust scheme and artifice to force Qwest, other long distance carriers, and their customers to subsidize FCSCs and Respondents.

51. These schemes constitute an unreasonable practice also because, as stated above, Respondents and the FCSCs switch their telephone numbers in order to conceal their illegal activities from QCC and other long distance carriers.

52. The Respondents actively try to hide facts associated with their scheme from long distance carriers like QCC. The FCC has specifically given long distance carriers like QCC the ability to block (refuse to deliver) long distance calls destined for companies like the FCSCs. However, long distance carriers like QCC cannot block long distance calls directed to an entire community such as to Superior, Iowa. Iowa Code § 476.20; 47 U.S.C. § 214(a). Thus, QCC must know the exact telephone numbers utilized by the Free Calling Service Companies in order to block the calls. The LEC Respondents serve very small communities, often with 1800 access lines or less. The LEC Respondents, however, have thousands of telephone numbers assigned to them. By way of illustration: (a) Superior has 175 access lines, but 10,000 telephone numbers

**MCI Communications Services, Inc. d/b/a Verizon Business Services v. Aventure  
Communication Technology, LLC  
Docket No. FCU-2008-0018  
State of Iowa Department of Commerce Iowa Utilities Board**

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
IOWA UTILITIES BOARD

MCImetro Transmission Access  
Transmission Services LLC d/b/a Verizon  
Access Transmission Services and MCI  
Communications Services, Inc. d/b/a Verizon  
Business Services,

*Complainants,*

v.

Aventure Communication Technology, LLC,

*Respondent.*

DOCKET NO. FCU-08- 18

**COMPLAINT, REQUEST FOR REVOCATION OF  
CERTIFICATE OF PUBLIC CONVENIENCE, AND  
REQUEST FOR AUTHORIZATION TO DISCONTINUE SERVICE**

This Complaint arises out of an illegal traffic pumping scam being run by Respondent Aventure Communication Technology, LLC ("Aventure").

In accordance with Chapter 476 of the Iowa Code and Iowa Administrative Code section 199, chapters 6 and 7, Complainants MCImetro Transmission Access Transmission Services LLC d/b/a Verizon Access Transmission Services and MCI Communications Services, Inc. d/b/a Verizon Business Services (collectively, "Verizon") ask the Board to put a stop to Aventure's fraudulent traffic pumping activities by revoking Aventure's certificate of public convenience and giving notice that further traffic pumping will result in the imposition of civil penalties. As an interim measure, Verizon requests authorization under Iowa Code section 476.20 and 199 IAC 22.14-16 to discontinue delivery of interexchange traffic to Aventure's traffic pumping conspirators.

Simply stated, Aventure was not, is not, and apparently never was intended to be the competitive local exchange carrier it claimed to be when it was certificated by the Board. In order to obtain a certificate of public convenience, Aventure represented to this Board that it intended to offer a wide range of local telephone services throughout Iowa, providing both residential and business customers with an alternative to the incumbent local telephone companies. (See Aventure's Application for Certificate of Public Convenience and Necessity (Exhibit A) at 1, 3). Aventure claimed that its operations would promote the public interest by increasing the level of competition in the state's telecommunications market. (*Id.* at 5). However, Aventure has made no effort to provide Iowa consumers with a meaningful alternative to the incumbent local telephone operators.

To the contrary, Aventure has virtually *no* legitimate residential or business customers that generate traffic in Iowa. Instead, Aventure appears to be a vehicle created for the purpose of carrying out a traffic pumping scheme – an illicit ploy designed to profit off perceived arbitrage opportunities in the regulatory framework. Adopting a business model that by now has become all too common in Iowa, Aventure pays certain sham “customers” (conference service providers or similar outfits) to take service by kicking back a portion of the access charges Aventure bills to the legitimate long distance carriers delivering traffic to its network.

While Aventure is not the first Iowa carrier to engage in such unlawful traffic pumping activity, it is among the major perpetrators that have besmirched the state's good name. In just a relatively short time, Aventure has assessed captive carriers like Verizon *millions of dollars* in fraudulent charges for traffic it purportedly “terminates” to “customers” that have no legitimate ties to Iowa and no purpose for doing business in Iowa other than to help Aventure perpetrate its illegal scheme. Indeed, Aventure's very reason for being appears to be traffic pumping, virtually

**ATTACHMENT 6**

**[Order from S.D. Iowa Judge Gritzner Staying Cases  
Pending Final *Farmers & Merchants* Decision]**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

AT&T Corp.,  
Plaintiff,

vs.

Aventure Communication Technology LLC, et al.,  
Defendants.

No. 4:07-cv-00043-JEG-RAW

**ORDER**

This matter comes before the Court on motion by Defendant Aventure Communication Technology LLC (Aventure) to rule on the motion by Plaintiff AT&T Corporation (AT&T) to enjoin Aventure from proceeding with their later-filed actions, which AT&T resists.<sup>1</sup> Neither party has requested a hearing, nor does the Court find a hearing is necessary. The matter is fully submitted and ready for disposition.

On January 29, 2007, interexchange carrier (IXC) AT&T filed this action against several Iowa-based local exchange carriers (LECs), including Aventure, as well as various website defendants, alleging, among other things, violations of federal tariffs as part of a "traffic pumping scheme." Similar lawsuits were filed by IXCs Qwest Communications Corporation (Qwest) and Sprint Communications Company L.P., Nos. 4:07-cv-00078 and 4:07-cv-00194, respectively; and AT&T filed a second lawsuit, No. 4:07-cv-00117 (collectively, the related telecommunication cases).

On March 1, 2007, in the United States District Court for the Southern District of New York, Aventure filed a collection action against AT&T, alleging AT&T unlawfully withheld payment of access charges, see Aventure Commc'n Tech., LLC v. AT&T, Inc., No 1:07-cv-01780-WHP. Other LECs filed similar collection actions against AT&T in the Southern District

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<sup>1</sup> Defendant FuturePhone.com LLC filed a responsive pleading indicating it does not resist Aventure's motion.

of New York: Farmers Tel. Co. of Riceville, Iowa, Inc. et al. v. AT&T, Inc., No. 1:07-cv-00859-WHP; and All Am. Tel. Co., Inc. et al. v. AT&T, Inc., No. 1:07-cv-00861-WHP (collectively, the NY Collection Actions).

On March 26, 2007, AT&T filed a motion before this Court to enjoin Aventure from pursuing its NY Collection Actions. Also on March 26, Defendants in the related telecommunication cases, including Aventure, filed motions to dismiss or stay this case, arguing, in relevant part, that AT&T's complaint should be dismissed because the "Filed Rate Doctrine" precludes the relief sought by AT&T. In the alternative, Aventure argued this case should be dismissed pursuant to the doctrine of primary jurisdiction or stayed pending referral to the Federal Communications Commission (FCC). Based on the motions filed in the present case, the Honorable William H. Pauley entered an order on May 4, 2007, staying the three NY Collection Actions pending this Court's ruling on AT&T's motion to enjoin. See Aventure v. AT&T, No. 1:07-cv-01780-WHP, Order of May 4, 2007 (Clerk's No. 15).<sup>2</sup>

On October 2, 2007, before this Court entered a ruling on the pending motions, the FCC issued a decision in Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co. (Farmers), No. EB-07-MD-001, 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 ¶25, 35. Thereafter, in response to the parties' requests to file supplemental briefs on the impact the

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<sup>2</sup> The same order was entered in Farmers Tel. Co. of Riceville, Iowa, Inc. et al. v. AT&T, Inc., No. 1:07-cv-00859-WHP (Clerk's No. 16); and All Am. Tel. Co., Inc. et al. v. AT&T, Inc., No. 1:07-cv-00861-WHP (Clerk's No. 17).

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. Order, Oct. 31, 2007 (Clerk's No. 71). The FCC granted Qwest's petition in January 2008, see Farmers, No. EB-07-MD-001, FCC 08-29, Order on Recons. (Jan. 29, 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 reconsideration. Order, Feb. 13, 2008 (Clerk's No. 91).

During the same period of time, AT&T entered joint stipulations with Defendant LECs Superior Telephone, Great Lakes Communications (Great Lakes), and Farmers Telephone Company of Riceville, Iowa, Inc., disposing of all claims between those parties.<sup>3</sup> Likewise, joint stipulations of dismissal were filed between the affected parties in the NY Collection Actions, thereby disposing of all claims and parties in Farmers Telephone Company of Riceville, Iowa, Inc. et al. v. AT&T, Inc., No. 1:07-cv-00859-WHP, and all claims by plaintiff Great Lakes in All American Telephone Co., Inc. et al. v. AT&T, Inc., No. 1:07-cv-00861-WHP. No stipulations of dismissal were filed in Aventure Communication Technology, LLC v. AT&T, Inc., No. 1:07-cv-01780-WHP.

On February 1, 2008, Judge Pauley vacated the Order of May 4, 2007, and lifted the stay in the All American Telephone Co., Inc. et al. v. AT&T, Inc., No. 1:07-cv-00861, case, finding the remaining plaintiffs were not among the defendants in the Iowa actions, and there was no evidence that the remaining plaintiffs had "any interest in the Iowa Action." All Am. Tel. Co., Inc. et al. v. AT&T, Inc., No. 1:07-cv-00861-WHP, Order, Feb. 1, 2008 (Clerk's No. 24).

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<sup>3</sup> AT&T also entered a joint stipulation of dismissal disposing of all claims and all parties in AT&T v. Reasnor Telephone Company LLC et al., No. 4:07-cv-00117 (Clerk's No. 45).

Thereafter, the plaintiffs in All American moved for summary judgment. Judge Pauley granted the motion, reasoning (1) there was “no relevant factual distinction” between the All American case and the FCC’s Farmers decision; (2) the FCC’s Farmers decision was entitled to great deference; (3) “the [LEC’s] services at issue f[ell] within the Access Tariffs;” and (4) “AT&T must abide by them.” Id. Order, July 24, 2008 (Clerk’s No. 43). Judge Pauley dismissed AT&T’s counterclaims but allowed AT&T ten days to file amended counterclaims. Id.

In the present case, in May 2008, Defendant FuturePhone.com LLC (Futurephone) filed a motion to lift the stay, which Aventure joined. Similar motions were filed in Qwest Commc’ns Corp., et al. v. Superior Tel. Coop., et al., No. 4:07-cv-00078, and Sprint Commc’ns Co. v. Superior Tel. Coop., et al., No. 4:07-cv-00194. The parties continued to file pleadings related to the issue of lifting the stay until September 15, 2008, when Magistrate Judge Ross Walters denied motions for leave to file supplemental briefs. Shortly thereafter, however, Futurephone filed a second motion requesting that the Court lift the stay solely to permit the filing of a counterclaim. Aventure did not join in Futurephone’s motion regarding the filing of a counterclaim, ostensibly because Aventure pleaded those claims in its NY Collection Actions. LEC Defendants in the related telecommunication cases filed similar motions for leave to file counterclaims.

On November 13, 2008, the Court denied Futurephone’s motion to lift the stay in its entirety but granted the motions to lift the stay to permit the filing of counterclaims. In that Order, the Court reiterated its intention to continue the stay of the related telecommunication cases until the FCC issues its reconsideration order of its Farmers decision, stating in pertinent part as follows:

Having considered the voluminous pleadings regarding the motion to lift the stay and, as noted above, recognizing the various nuances to each parties’ positions, the Court remains convinced that, with the exception of the unanticipated and inordinate passage of time, nothing material has changed

since the Court entered its Order of February 13, 2008. The Court finds its initial, strategic decision to stay these proceedings pending the outcome of active matters before the FCC remains sound. The Court is convinced that the final resolution of the Farmers case before the agency will have substantial impact by analogy, if not directly, on the cases before this Court. Although there is a clear indication that the cases will each turn on unique facts, they will turn on an axis defined by the FCC. While the Court acknowledges the position espoused by Judge Karen Schreier in her well-reasoned orders in the Sancom and Northern Valley cases, as well as the opposite position taken by Judge William Pauley in his equally well-reasoned order in the All American case, this Court finds that in the cases before this Court, is [sic] would be premature to take action prior to the FCC's issuance of its reconsideration order in the Farmers case. The parties have not presented the Court with any information that constitutes new or significantly changed circumstances that would support restarting the pending matters.

Order, Nov. 13, 2008 (Clerk's No. 121).

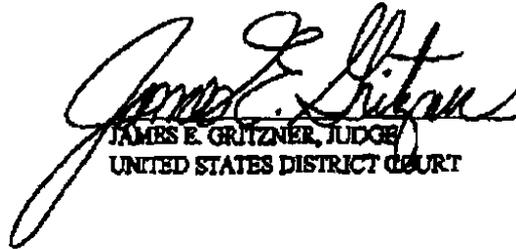
Even in the wake of an unanticipated delay in final action by the FCC, Aventure's current motion does not persuade the Court to abandon its prior decision. Aventure argues, in part, that the relief granted in the All American case, which is a companion case to its own NY Collection Action, constitutes a change of circumstances and demonstrates this Court has hindered Aventure from receiving the relief already realized by the plaintiffs in the companion NY Collection Action. The docket in that case, however, paints a different picture. In August 2008, after Judge Pauley granted the All American plaintiffs' motion for summary judgment, AT&T timely filed its amended counterclaims as well as a motion to reconsider. All Am. Tel. Co., Inc. et al. v. AT&T, Inc., No. 1:07-cv-00861-WHP (Clerk's Nos. 48, 45). AT&T's amended counterclaims are similar to the claims asserted in AT&T's complaint in the present case. Compare All Am. Tel. Co., Inc. et al. v. AT&T, Inc., No. 1:07-cv-00861-WHP (Clerk's No. 44), with AT&T, Inc. v. Superior Tel. Coop., et al., No. 4:07-cv-00043 (Clerk's No. 1). Plaintiffs moved to strike the counterclaims; however, that motion, as well as AT&T's motion for reconsideration, is currently pending. Thus, contrary to Aventure's assertion, the All American case is not resolved.

Aventure also fails to distinguish how its current motion differs in any significant manner from Futurephone's motion to lift the stay that Aventure joined and the Court denied just six weeks ago. Although the Court denied the motion to lift the stay in its entirety, the Court allowed Futurephone (as well as Defendants in the related telecommunication cases) to file counterclaims against the Plaintiff IXC's for statute-of-limitations purposes. Aventure has already asserted its claims against AT&T in its NY Collection Action. Aventure has not persuaded the Court that Aventure's interests represented in the NY Collection Action are different than either Futurephone's interests as pleaded in its counterclaim in the present case or any of the interests of Defendant LECs as pleaded in their counterclaims in the related telecommunication cases, which are before this Court and are also stayed. To allow Aventure to pursue its NY Collection Action while continuing the stay as to the other parties would result in the piecemeal litigation the Court is trying to avoid. Aventure will have the ability to resume litigation of its claims in the NY Collection Actions when the other parties in this case and the related telecommunication cases are similarly able to pursue their claims, that is, when the stay is lifted.

For the reasons stated, Aventure's Motion to Rule on AT&T's Motion to Enjoin (Clerk's No. 126) must be **denied**.

**IT IS SO ORDERED.**

Dated this 23rd day of January, 2009.

  
JAMES E. GRITZNER, JUDGE  
UNITED STATES DISTRICT COURT

**ATTACHMENT 7**

**[AT&T Corp. v. Jefferson Tel. Co.]**

**H**

16 F.C.C.R. 16130, 16 FCC Rcd. 16130, 2001 WL 994994 (F.C.C.)

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

**\*\*1** IN THE MATTER OF AT&T CORPORATION, COMPLAINANT,  
v.  
JEFFERSON TELEPHONE COMPANY, DEFENDANT.

File No. E-97-07  
FCC 01-243

Adopted: August 24, 2001

Released: August 31, 2001

**\*16130** By the Commission:**I. INTRODUCTION**

1. In this Memorandum Opinion and Order ("Order"), we deny a formal complaint filed by AT&T Corporation ("AT&T") against Jefferson Telephone Company ("Jefferson") pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").<sup>[FN1]</sup> AT&T challenges the lawfulness of an access revenue-sharing arrangement that Jefferson entered into with an information provider to which Jefferson terminated traffic. On the basis of the facts and arguments presented in this record, we conclude that AT&T has failed to meet its burden of demonstrating that Jefferson (i) engaged in discrimination prohibited by section 202(a) of the Act,<sup>[FN2]</sup> or (ii) violated section 201(b) of the Act<sup>[FN3]</sup> by breaching its duty as a common carrier to serve, in AT&T's words, as an "objective conduit" of communications services. Accordingly, we deny AT&T's complaint.<sup>[FN4]</sup>

**\*16131 II. BACKGROUND**

2. At all relevant times, Jefferson was an incumbent local exchange carrier ("LEC") located in Jefferson, Iowa that served approximately 3,400 access lines.<sup>[FN5]</sup> Jefferson provided local exchange service to end user customers, and originating and terminating exchange access services to AT&T and other interexchange carriers ("IXCs").<sup>[FN6]</sup> During 1994 and 1995, Jefferson charged IXCs access rates specified by the National Exchange Carrier Association ("NECA") pursuant to a tariff filed at the Commission.<sup>[FN7]</sup>

3. During the period at issue in this dispute, one of Jefferson's end-user customers was an information provider called International Audiotext Network ("LAN").<sup>[FN8]</sup>

IAN provided its customers a kind of multiple voice bridging service commonly known as "chat-line" service. This service connects incoming calls so that two or more callers can talk with each other simultaneously.<sup>[FN9]</sup> This differs from traditional conference call service in that callers to the chat line are randomly paired with other callers. In addition, unlike many chat-line operators, IAN did not impose any charges on callers. Instead, IAN obtained all of its revenues from Jefferson, \*16132 as described below. Thus, callers to IAN paid only their designated IXC for the calls, and paid only the IXC's tariffed, long-distance toll charges.<sup>[FN10]</sup>

4. During the time period at issue here, a long distance call by an AT&T subscriber to IAN was first routed to the subscriber's local telephone company. Next, the call was routed to AT&T, which transported the call across AT&T's long distance network. AT&T then handed the call to Jefferson (the "terminating access provider"). As the "terminating access provider," Jefferson routed the call to its end-user customer, IAN.<sup>[FN11]</sup> Jefferson then billed AT&T for terminating access services at the tariffed rate.<sup>[FN12]</sup>

\*\*2 5. Towards the end of 1992, Jefferson entered an agreement with IAN whereby Jefferson would make payments to IAN based on the amount of access revenues that Jefferson received for terminating calls to IAN.<sup>[FN13]</sup> In return, IAN would market and otherwise aid the chatline operations.<sup>[FN14]</sup> As mentioned above, the payments that Jefferson paid to IAN based on terminating access revenues constituted IAN's only source of revenue.<sup>[FN15]</sup> On July 31, 1995, the agreement between Jefferson and the chat line ended.<sup>[FN16]</sup>

6. In December 1996, AT&T filed the instant complaint.<sup>[FN17]</sup> According to AT&T, \*16133 Jefferson's access revenue-sharing arrangement with IAN violated section 201(b) by contravening the "basic principle of common carriage" that a carrier may only serve as an objective conduit of communications service, "without influenc[ing] or control[ing] ... the destination of a customer's calls within its authorized service area."<sup>[FN18]</sup> Such contravention occurred, in AT&T's view, because Jefferson "acquired a direct interest in promoting the delivery of calls to specific telephone numbers for the provision of a specific communication."<sup>[FN19]</sup> AT&T also contends that Jefferson's access revenue-sharing arrangement with IAN discriminated against Jefferson's other end user customers, in violation of section 202(a), because the arrangement "caused access revenues, which are intended to cover Jefferson's legitimate costs of service and its ability to maintain high quality service in the areas in which it operates, to be directed elsewhere."<sup>[FN20]</sup> AT&T requests an order (i) declaring that Jefferson's access revenue-sharing arrangement with IAN was unlawful, and (ii) awarding damages in the amount of the access fees that AT&T paid for calls to IAN, with interest.<sup>[FN21]</sup>

### III. DISCUSSION

#### **A. AT&T Has Not Demonstrated that the Access Revenue-Sharing Arrangement Between Jefferson and IAN Violated Section 201(b) of the Act by Breaching Jefferson's Duty as a Common Carrier.**

\*16134 7. According to AT&T, there are "two essential prerequisites" for common carriage.<sup>[FN22]</sup> First, a common carrier must "hold[] itself out to serve indifferently with regard to the service in question."<sup>[FN23]</sup> Second, a common carrier must "allow[] customers to transmit intelligence of their own design and choosing."<sup>[FN24]</sup> AT&T main-

tains that Jefferson violated the first of these fundamental principles (and, thus, section 201(b)) when it entered into the revenue-sharing arrangement with IAN and acquired a direct economic interest in terminating traffic to IAN.<sup>[FN25]</sup>

8. We agree with AT&T's general description of the fundamentals of common carriage.<sup>[FN26]</sup> We disagree with AT&T, however, that Jefferson violated the first of those fundamentals when it entered the revenue-sharing agreement with IAN.

9. AT&T alleges that Jefferson violated the "indifference" requirement of common carriage, because the revenue-sharing arrangement with IAN "caused Jefferson to have a direct, and greater, economic interest in delivering calls to one set of destination telephone numbers in its service area than to other destination numbers."<sup>[FN27]</sup> In AT&T's view, "it became Jefferson's prerogative, pursuant to the agreement, to transmit calls to IAN as opposed to transmitting calls to other destinations in its territory."<sup>[FN28]</sup>

**\*\*3** 10. AT&T mischaracterizes the "indifference" requirement as turning on a carrier's motive for providing service to a particular customer. This requirement hinges not on such intent, but rather on the carrier's conduct in actually serving customers. The critical inquiry is whether a carrier makes ad hoc determinations about the provision of service to particular \*16135 customers.<sup>[FN29]</sup> Stated another way, "a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve."<sup>[FN30]</sup> Thus, as Jefferson asserts, the crux of the 'indifference' inquiry is the manner in which service is offered to customers, not the carrier's interest in increasing the traffic carried on its network.<sup>[FN31]</sup> As long as a carrier provides service indifferently and indiscriminately to all who request it, the first prong of the common carriage test is satisfied.

11. The record does not demonstrate that Jefferson failed to remain appropriately "indifferent" as a common carrier, notwithstanding its access revenue-sharing arrangement with IAN. In particular, the record contains no evidence that Jefferson ever made any individualized decisions in specific cases concerning whether and on what terms to provide interstate access services. Jefferson provided interstate access service at the same rate to all IXCs who ordered it pursuant to a tariff filed with the Commission. Moreover, Jefferson provided terminating interstate access service with respect to calls placed to all of the telephone numbers in Jefferson's exchange, not just to those numbers assigned to IAN. Finally, the record contains no indication that Jefferson ever deliberately routed to IAN an interstate call intended for a different end user.

12. AT&T points to the fact that the agreement between Jefferson and IAN required IAN to engage in certain marketing practices, and required Jefferson to block certain local calls to IAN.<sup>[FN32]</sup> These circumstances fall far short of giving Jefferson an unlawful interest in IAN, given that, as stated above, Jefferson provided interstate access services indifferently and indiscriminately to all who requested them.

13. We note that AT&T relies for support on a 1996 Notice of Proposed Rulemaking and a 1995 advisory letter issued by the Chief of the former Enforcement Division of the Common Carrier Bureau.<sup>[FN33]</sup> In the 1996 NPRM, the Commission sought comment on whether the practice at issue at here "could be interpreted as not being just and

reasonable under section 201(b)."<sup>(FN34)</sup> The Marlowe Letter opined that an international long distance carrier would violate section 201(b) if it were to share with an information provider the toll revenues collected on calls \*16136 to the information provider.<sup>(FN35)</sup> Neither item persuades us here.<sup>(FN36)</sup> For the reasons set forth above, based on the record in this case, in which AT&T argues that Jefferson's access revenue-sharing arrangement with IAN violated section 201(b) solely because it allegedly breaches common carriage duties, we conclude that AT&T has not met its burden of demonstrating that Jefferson's practice here is unjust and unreasonable. To the extent the former Enforcement Division's advisory letter is inconsistent with our holding here, we overrule the Division's letter.

\*\*4 14. For these reasons, we find that AT&T has not demonstrated that Jefferson violated its duty as a common carrier upon entering the revenue-sharing arrangement with IAN. Accordingly, we deny Counts One and Two of the Complaint.<sup>(FN37)</sup>

**B. AT&T Has Not Demonstrated that the Access Revenue-Sharing Arrangement Between Jefferson and IAN Violated Section 202(a) of the Act.**

15. AT&T cursorily contends that Jefferson discriminated against its end users, in violation of section 202(a) of the Act,<sup>(FN38)</sup> by failing to use all of its access revenues to maintain its network.<sup>(FN39)</sup> AT&T's contention fails to state a discrimination claim under section 202(a), because AT&T fails to allege that Jefferson treated one customer differently from another.<sup>(FN40)</sup> Notably, AT&T fails to allege either that (i) Jefferson offered a better deal to IAN than to other similarly situated end-user customers, or (ii) Jefferson treated one IXC differently than others in its provision of interstate access services. AT&T simply argues that Jefferson's network as a whole could have been better, had Jefferson not shared revenues with IAN. Whatever claim this odd argument may state, it is not one under section 202(a). Thus, we deny Count Three of AT&T's \*16137 Complaint.<sup>(FN41)</sup>

**IV. CONCLUSION**

16. Although we deny AT&T's complaint, we emphasize the narrowness of our holding in this proceeding. We find simply that, based on the specific facts and arguments presented here, AT&T has failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement with an end-user information provider. We express no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end user customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements.

**V. ORDERING CLAUSES**

17. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 202, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, and 208, that the above-captioned complaint filed by AT&T IS DENIED IN ITS ENTIRETY, and this proceeding is TERMINATED WITH PREJUDICE.

18. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 202, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201,

202, and 208, that Jefferson's Motion to Dismiss (filed February 18, 1997), Jefferson's Motion to Compel (filed May 6, 1997), and AT&T's Motion to Compel (filed May 6, 1997) are DENIED.

## FEDERAL COMMUNICATIONS COMMISSION

\*\*5 Magalie Roman Salas  
Secretary

FN1. 47 U.S.C. § 208.

FN2. 47 U.S.C. § 202(a).

FN3. 47 U.S.C. § 201(b).

FN4. See generally Hi-Tech Furnace Systems, Inc. v. FCC, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the burden of proof is on the complainant in a proceeding conducted under 47 U.S.C. § 208).

FN5. AT&T Corp. v. Jefferson Telephone Company, Complaint, File No. E-97-07 (filed Dec. 23, 1996) at 2, ¶ 4 ("Complaint"); AT&T Corp. v. Jefferson Telephone Company, Answer of Jefferson Telephone Company, File No. E-97-07 (filed Feb. 18, 1997) at 1, ¶ 4 ("Answer"); AT&T Corp. v. Jefferson Telephone Company, Initial Brief of AT&T Corp., File No. E-97-07 (filed Oct. 31, 1997) at 1 ("AT&T Brief"). Jefferson claims that it was a connecting carrier within the meaning of section 2(b)(2) of the Act. Jefferson Brief at 3-4, citing 47 U.S.C. § 152(b)(2). Section 2(b)(2) of the Act provides, in pertinent part: "[N]othing in the Act shall be construed to apply or to give the Commission jurisdiction with respect to ... any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier ..., except that sections 201 through 205 of this Act, both inclusive, shall ... apply to [such] carriers ...." 47 U.S.C. § 152(b)(2). Jefferson asserts that it is engaged in interstate communication solely through physical connection with other carriers, so section 2(b)(2) immunizes it from complaints filed pursuant to section 208 of the Act; in Jefferson's view, only sections 201 through 205 of the Act apply to it, and not section 208. Jefferson Brief at 3-4, citing Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701, 704-07 (1<sup>st</sup> Cir. 1977). The Commission has consistently rejected this interpretation of section 2(b)(2) of the Act, and held that section 208 applies even to connecting carriers. See, e.g., Com Services, Inc. v. The Murraysville Telephone Co., Memorandum Opinion and Order, 100 FCC 2d 210, 217, ¶ 16 (1985); TPI Transmission Services, Inc. v. Puerto Rico Telephone Co., Memorandum Opinion and Order, 4 FCC Rcd 2246, 2248 n.19 (Com. Car. Bur. 1989) (both declining to follow Comtronics, and relying on Ward v. Northern Ohio Telephone Co., 300 F.2d 816, 819-21 (6<sup>th</sup> Cir. 1962), instead). Accordingly, even assuming, arguendo, that Jefferson was a "connecting carrier" under section 2(b)(2) of the Act, we reject Jefferson's assertion that it is immune from complaints filed pursuant to section 208.

FN6. Complaint at 2, ¶ 4; Answer at 1, ¶ 4.

FN7. Complaint at 2, ¶ 5; Answer at 1, ¶ 5; AT&T Brief at 1; AT&T Corp. v. Jefferson Telephone Company, Initial Brief of Jefferson Telephone Company, File No. E-97-

07 (filed Oct. 31, 1997) at 2 ("Jefferson Brief). The applicable NECA rate for terminating access service at that time was between \$.06 and \$.07 per minute. Complaint at 2, ¶ 5; Answer at 1, ¶ 5.

FN8. AT&T Brief at 2, Ex. 2; Jefferson Brief at 1-2.

FN9. Complaint at 3, ¶ 6 n.1; Answer at 1-2. ¶ 6; AT&T Brief at 3; Jefferson Brief at 2.

FN10. Complaint at 3, ¶ 6; Answer at 2, ¶ 6; Jefferson Brief at 2; AT&T Brief at 3. See Jefferson Brief at Exhibit 1, Declaration of James L. Daubendiek, at 2-3, ¶ 6 ("Daubendiek Declaration") (stating that "[t]he caller paid the tariffed long-distance rates assessed by whichever interexchange carrier the caller chose to use.").

FN11. See generally *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, FCC 01-84, 16 FCC Rcd 5726, 5729, ¶ 6 (2001).

FN12. Complaint at 4, ¶ 8; AT&T Brief at 4; Jefferson Brief at 2; Daubendiek Declaration at 2-3, ¶ 6.

FN13. Complaint at 2-3, ¶ 6; Answer at 2, ¶ 6; AT&T Brief at 1-2; Jefferson Brief at 2. See Daubendiek Declaration at 2, ¶ 5.

FN14. See AT&T Brief at Confidential Exhibit 4, paragraph 2, detailing the obligations of IAN pursuant to the agreement between Jefferson and IAN. In a letter dated June 11, 2001, Jefferson explicitly granted the Commission permission to discuss publicly this section of the agreement. See *AT&T Corp. v. Jefferson Telephone Company*, Letter from James U. Troup and James H. Lister, Counsel for Jefferson Telephone Co., to Warren Firschein, Attorney, Enforcement Bureau, FCC, File No. E-97-07 (dated June 11, 2001).

FN15. This arrangement stimulated traffic and boosted Jefferson's terminating access revenues. While the arrangement was in place, Jefferson terminated as much as 2,000,000 minutes per month, whereas after the arrangement ended, Jefferson terminated about 130,000 minutes per month. Complaint at 3-4, ¶ 7; Answer at 2, ¶ 7; AT&T Brief at 4; AT&T Brief at Ex. 9, *AT&T Corp. v. Jefferson Telephone Company*, Defendant's Response to AT&T Corp.'s First Set of Interrogatories, File No. E-97-07 (filed Apr. 21, 1997), Response to Interrogatory No. 4.

FN16. Jefferson Brief at 1; Daubendiek Declaration at 2, ¶ 4.

FN17. Jefferson argues that AT&T's claims are time-barred because AT&T knew or should have known of Jefferson's revenue-sharing arrangement with IAN more than two years prior to the filing of the complaint. *AT&T Corp. v. Jefferson Telephone Company*, Reply Brief of Jefferson Telephone Company, File No. E-97-07 (filed Nov. 7, 1997) at 3-4 ("Jefferson Reply"). See 47 U.S.C. § 415(a) (providing that an action to recover charges must be initiated within two years from the time the cause of action accrues). In support of its argument, Jefferson relies solely on the fact

that AT&T appended to its Initial Brief a newspaper article from the San Diego Union-Tribune dated November 14, 1994 that describes the revenue-sharing arrangement. Jefferson Reply at 3. See AT&T Brief at Ex. 2. Thus, according to Jefferson, "the window of opportunity to file a complaint closed on November 14, 1996." Jefferson Reply at 3. We disagree. Just because AT&T submitted the newspaper article in this record does not demonstrate that an AT&T representative read the article at the time it was published. Without more, it would be equally reasonable to conclude that AT&T first learned of the article in the course of prosecuting this case. Thus, the record does not support a conclusion that AT&T's claims are time-barred.

FN18. Complaint at 4, ¶ 10. See *id.* at 4-6, ¶¶ 11-16. AT&T asserts this claim in two substantively identical causes of action (Counts One and Two), which we consider collectively. In its Initial Brief, AT&T cursorily maintains for the first time that the revenue-sharing arrangement between Jefferson and IAN also violated section 201(b) by "evading the requirements" of section 228 of the Act, 47 U.S.C. § 228, known as the Telephone Disclosure and Dispute Resolution Act ("TDDRA"). AT&T Brief at 15-17. AT&T failed to raise this issue in its Complaint, however. Therefore, the record provides an inadequate basis on which to assess the merits of this potentially challenging argument. See, e.g., Consumer Net v. AT&T Corp., Order, 15 FCC Rcd 231, 300, ¶ 40 n.93 (1999) (declining to consider an argument raised for the first time in the briefs); Building Owners and Managers Association International v. FCC, - F.3d -, 2001 WL 754910, n.14 (D.C. Cir. 2001) (declining to address an issue raised cursorily in the brief). Accordingly, we decline to address this issue, and restrict our discussion of section 201(b) to AT&T's "common carriage" claim.

FN19. Complaint at 4, ¶ 11. See *id.* at 4-6, ¶¶ 11-16.

FN20. Complaint at 7, ¶ 20. See *id.* at 6-7, ¶¶ 18-21.

FN21. Complaint at 7-8.

FN22. AT&T Brief at 7-15. See Complaint at 4-5, ¶¶ 10-12; AT&T Reply at 5-8.

FN23. AT&T Brief at 7, relying on Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1479 (D.C. Cir. 1994); National Ass'n of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976); National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641-42 (D.C. Cir. 1976).

FN24. AT&T Brief at 7-8, relying on Southwestern Bell Telephone Co. v. FCC, 19 F.3d at 1480; NARUC v. FCC, 525 F.2d at 640-42.

FN25. Complaint at 4-5, ¶¶ 10-13; AT&T Brief at 7-15; AT&T Reply at 5-9; AT&T Corp. v. Jefferson Telephone Company, Opposition to Motion to Dismiss, File No. E-97-07 (filed Mar. 5, 1997) at 3-4 ("Opposition to Motion to Dismiss").

FN26. See Southwestern Bell v. FCC, 19 F.3d at 1480-81 (stating that, "[i]f the carrier chooses its clients on an individualized basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entry is a private carrier for that particular service."). See also NARUC v. FCC, 525 F.2d at 640-42.

FN27. AT&T Brief at 5. See Complaint at 5, ¶ 12.

FN28. AT&T Brief at 9. See Complaint at 4-5, ¶¶ 10-13; AT&T Brief at 7-15; AT&T Reply at 5-9; Opposition to Motion to Dismiss at 3-4.

FN29. See Southwestern Bell v. FCC, 19 F.3d at 1480-81; NARUC v. FCC, 533 F.2d at 608-09; NARUC v. FCC, 525 F.2d at 641.

FN30. NARUC v. FCC, 533 F.2d at 608-09. See NARUC v. FCC, 525 F.2d at 641 (stating that "to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve ....").

FN31. Jefferson Brief at 7.

FN32. See note 16, *supra*.

FN33. Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, Order and Notice of Proposed Rule Making, 11 FCC Rcd 14738 (1996) ("Pay-Per-Call NPRM"); Ronald J. Marlowe, 10 FCC Rcd 10945 (CCB-ED 1995), application for review pending ("Marlowe Letter").

FN34. Pay-Per-Call NPRM, 11 FCC Rcd at 14752, ¶ 41. See *id.* at 14755-56, ¶¶ 47-48.

FN35. See Marlowe Letter, 10 FCC Rcd at 10945.

FN36. For example, the Marlowe Letter suggested that, "[t]hrough payments to an information provider ..., a carrier would abandon objectivity and acquire a direct interest in promoting the delivery of calls to a particular number for the provision of a particular communication." Marlowe Letter, 10 FCC Rcd at 10945. As described above, we disagree. As long as a carrier does not make individualized decisions in specific cases concerning whether and on what terms to provide service, a carrier does not abandon the requisite "objectivity" by sharing revenues with an information provider.

FN37. We note that AT&T explicitly disavowed any claim that the terminating access rate charged by Jefferson was unjust and unreasonable under section 201(b). AT&T Brief at 12. We express no view on the reasonableness of Jefferson's rates.

FN38. Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, ... facilities, or services ... or to make or give any undue or unreasonable preference or advantage to any particular person." 47 U.S.C. § 202(a).

FN39. Complaint at 6-7, ¶¶ 17-21; AT&T Brief at 17-19.

FN40. See generally PanAmSat Corp. v. COMSAT Corp., Memorandum Opinion and Order, 12 FCC Rcd 6952, 6965, ¶ 34 (1997); American Message Centers v. FCC, 50 F.3d 35, 40 (D.C. Cir. 1995); Competitive Telecommunications Association v. FCC, 998 F.2d 1058,

1062 (D.C. Cir. 1993).

FN41. In light of all of the foregoing rulings, Jefferson's Motion to Dismiss, Jefferson's Motion to Compel, and AT&T's Motion to Compel are denied as moot. *AT&T Corp. v. Jefferson Telephone Company*, Motion to Dismiss, File No. E-97-07 (filed Feb. 18, 1997) ("Jefferson's Motion to Dismiss"); *AT&T Corp. v. Jefferson Telephone Company*, Motion to Compel, File No. E-97-07 (filed May 6, 1997) ("Jefferson's Motion to Compel"); *AT&T Corp. v. Jefferson Telephone Company*, Motion to Compel, File No. E-97-07 (filed May 6, 1997) ("AT&T's Motion to Compel").

16 F.C.C.R. 16130, 16 FCC Rcd. 16130, 2001 WL 994994 (F.C.C.)  
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