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Alexander Starr, Chief  
Market Disputes Resolution Division  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: Informal Complaint: *Beehive Telephone Company, Inc. and  
Beehive Telephone Co., Inc. Nevada v. Sprint Nextel Corporation*

Dear Mr. Starr:

Pursuant to § 1.716 of the Commission's Rules ("Rules"), Beehive Telephone Company, Inc. and Beehive Telephone Co., Inc. Nevada (collectively "Beehive") request that the Commission investigate the unjust and unreasonable practice of Sprint Nextel Corporation ("Sprint") of refusing to pay Beehive's lawfully billed access charges as a form of "self help" in connection with its erroneous claim that the charges are the product of so-called "traffic pumping." On the basis of the following allegations of fact, Beehive requests a declaratory ruling that Sprint has violated § 201(b) of the Communications Act of 1934, as amended ("Act"), and is obligated to pay Beehive's billed access charges and late payment penalties.

### BACKGROUND

Beehive is one of the nation's smallest local exchange carriers. It was established in 1963 to bring telephone service to remote areas in Utah and Nevada. Beehive's subscribers are in tiny villages scattered throughout parts of nine Utah counties and two counties in Nevada. Beehive is among the issuing carriers that participate in NECA's traffic sensitive Tariff F.C.C. No. 5 ("NECA 5"). It provides switched access services pursuant to the rates, terms and conditions set forth in NECA 5.

NECA's 2007 annual access charge tariff filing was made on 15 days' notice under § 204(a)(3) of the Communications Act of 1934, as amended ("Act"). The revised access rates set forth in NECA 5 went into effect without suspension on June 30, 2007. See *July 1, 2007 Annual Access Charge Tariff Filings*, 22 FCC Rcd 11619, 11624 (WCB 2007) ("*Suspension Order*"). Because it charges the NECA 5 switched access rates, Beehive's rates are conclusively presumed to be reasonable under § 201 of the Act and are protected from retrospective refund liability in a formal complaint proceeding. See *Implementation of §401(b)(1)(A) of the Telecommunications*

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*Act of 1996*, 12 FCC Rcd 2170, 2181-83 (1997).

Sprint was among the interexchange carriers that complained to the Commission, and filed federal court actions, in early 2007 alleging that the LECs were engaged in traffic pumping or “access stimulation,” which is the practice of entering into contractual arrangements for the purpose of substantially increasing their terminating access minutes. These complaints led the Commission to take four actions.

First, the Wireline Competition Bureau (“WCB”) issued a declaratory ruling that carriers cannot engage in self help by blocking traffic to LECs allegedly involved in access stimulation. *See Call Blocking by Carriers*, 22 FCC Rcd 11629, 11632 (WCB 2007) (“*Declaratory Ruling*”). The WCB declared:

The Commission’s rules and regulations provide carriers with several mechanisms to address allegations of unreasonable access charges, including tariff investigations and informal and formal complaints. We find that carriers that contend that the access charges of a LEC are unreasonable should use these mechanisms to seek relief and may not engage in self help actions such as call blocking.

*Id.*, at 11629 (footnote omitted).

At the same time, the WCB granted Sprint’s petition to suspend and investigate the tariffs of carriers leaving the NECA traffic-sensitive pool and filing tariffs pursuant to § 61.39 of the Rules. *See Suspension Order*, 22 FCC Rcd at 11622. Sprint had contended that the LECs intended to engage in access stimulation practices. *See id.*, at 11620.

The WCB designated the 2007 annual access tariff filings of the LECs exiting NECA 5 for investigation specifically to address Sprint’s allegation that certain access stimulation practices may cause the switched access rates to become unjust and unreasonable. *See Investigation of Certain 2007 Annual Access Tariffs*, 22 FCC Rcd 16109, 16109 (WCB 2007) (“*Designation Order*”). However, the WCB announced that it would not require any LEC under investigation to respond to any issue in the proceeding if it requested a rule waiver to permit to join NECA 5. *See id.*, at 16110. Thus, the WCB recognized that rejoining NECA 5 constituted a “safe harbor procedure” with respect to allegations of access stimulation. *See id.*, at 16120. The Commission subsequently found that the access rates of the LECs that reentered NECA 5 were lawful, because those rates had gone into effect on June 30, 2007 in accordance with the Commission’s streamlined tariff filing rules and without suspension. *See Investigation of Certain 2007 Annual Access Tariffs*, 22 FCC Rcd 21261, 21263 (2007).

In addition to the WCB’s declaratory ruling and the investigation of the 2007 access tariff filings, the Commission initiated a rulemaking to consider whether the rules governing the tariffing of traffic-sensitive switched access services should be amended to ensure that access

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rates remain just and reasonable despite a substantial growth in terminating access traffic. *See Establishing Just and Reasonable Rates for LECs*, 22 FCC Rcd 17989 (2007) (“*Rulemaking Order*”) Although it initiated the rulemaking on its own motion, the Commission cited a civil suit filed by Sprint as among the IXC complaints that prompted it to examine whether rule changes were necessary. *See id.*, 17992 n.37. The rulemaking proceeding is ongoing.

Finally, the Commission granted in part a formal complaint alleging that a LEC earned an excessive rate of return as a result of a deliberate plan to increase the amount of the access traffic it terminated via agreements with conference calling companies. *See Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, 22 FCC Rcd 17973 (2007). The Commission found that the LEC had earned an unlawful rate of return, but that the complainant was not entitled to damages because the defendant’s rates had been “deemed lawful” in accordance with § 204(a)(3) of the Act. *See id.*, at 17892-93. It also held that the LEC did not violate §§ 201(b) or 203 when it imposed terminating access charges on traffic delivered to conference call companies. *See id.*, at 17986-88.

#### THE DISPUTE

The process under which customers may dispute Beehive’s bills is governed by § 2.4.1(D) of NECA 5, which provides:

(1) A good faith dispute requires the customer to provide a written claim to the Telephone Company. Instructions for submitting a dispute can be obtained by calling the billing inquiry number shown on the customer’s bill, or, when available, by accessing such information on the Telephone Company’s website also shown on the customer’s bill. Such claim must identify in detail the basis for the dispute, and if the customer withholds the disputed amounts, it must identify the account number under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed to permit the Telephone Company to investigate the merits of the dispute.

(2) The date of the dispute shall be the date on which the customer furnishes the Telephone Company the account information required in (D)(1), above.

On October 8, 2007, Sprint submitted a claim to Beehive disputing \$138,974.75 in access charges on the grounds it categorized as “toll fraud.” *See infra* Attachment 1. The basis stated for the claim was as follows:

Sprint has grave concern regarding the nature of the terminating traffic billed, given the extraordinary increase in volume related to past demand. Our regulatory and legal teams are in the process of performing some analysis of the traffic, -disputing terminating charges.

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Beehive was directed to contact Ms. Julie Walker with regard to the claim. *See infra* Attachment 1. In an email sent to Beehive on January 1, 2008, Ms. Walker elaborated on Sprint's claim:

The issue is not volume-related, but rather driven by the nature of the traffic itself – specifically chat line/free conference terminations. Sprint, like other IXC's, has seen terminating access volumes skyrocket from carriers who have contracted with 3<sup>rd</sup> party conferencing companies, solely to stimulate access billed to the IXC's, whereupon the vast revenues generated by such traffic, are then shared, presumably. \* \* \* Speaking off-hand, I believe we've determined that about 1.2M of your 1.3M current volumes are terminating to a "Manhole Party Crowd" chat line. I'm sure you are aware that many such "access pumping" claims have been brought before the FCC and Federal Court, by several IXC's. Sprint, with other IXC's, continues to hold firm that, until this access pumping issue is firmly understood, and finally resolved in such courts, our claims are valid.

*See infra* Attachment 2, at 3.

In an email sent January 2, 2008, Ms. Kathryn Lawler informed Beehive that Sprint had "quite a bit of evidence" that Beehive was engaged in "access pumping." *See infra* Attachment 3. Ms. Lawler invited Beehive to show that it was not engaged in that activity. *See id.* In response to that invitation, Beehive attempted to schedule a time when the parties could discuss the matter. Sprint never responded. *See infra* Attachment 4, at 2.

Beehive did not consider Sprint's claim to be a "good faith" billing dispute under § 2.4.1(D)(1) of NECA 5. *See id.*, at 3. Nevertheless, Beehive treated the claim as if it triggered a good faith dispute. It did so purely out of an abundance of caution and without conceding that Sprint's self-help action was lawful. *See id.*

Beehive denied Sprint's claim on January 18, 2008 in accordance with NECA 5 § 2.4.1(D)(3). *See id.*, at 1. Sprint was notified that the denial was based on the fact that Beehive was not engaged in "access pumping" as Sprint defined the term before the Commission. *See id.*, at 2. In the current rulemaking on access stimulation, Sprint argued that access pumping involved an arrangement that: (1) increases the volume of interstate traffic for which the LEC will assess charges on the access service subscribers; (2) involves a service that is advertised or promoted to entities other than the access services subscriber; and (3) involves net payments by the LEC to the entity which provides the service being advertised or promoted. *See* Comments of Sprint Nextel Corporation, WC Docket No. 07-135, at 20 (Dec. 17, 2007).

Beehive denied Sprint's claim as inconsistent with the facts. *See infra* Attachment 4, at 2. There had been no "extraordinary increase" in the amount of traffic that Sprint delivered to Beehive prior to October 4, 2007. *See id.* To the contrary, the volume of interstate terminating traffic that Beehive handled in the last five months of 2007 was 27% less than the volume of

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traffic that was delivered to it during the same period in 2006. *See infra* Attachment 4, at 2. Beehive also does not terminate traffic to a "Manhole Party Crowd" chat line. *See id.* Finally, Beehive has no contract with a third party conferencing company under which it shares its revenues. *See id.* Sprint's allegations to the contrary were baseless.

Beehive responded to Sprint's categorization of its claim as "toll fraud" even though Beehive did not view the characterization as an allegation that it had engaged in fraudulent conduct generally or in toll fraud specifically. *See id.* Beehive noted that the legal definition of the word "fraud" is "[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with something valuable belonging to him or to surrender a legal right." *Black's Law Dictionary* 660 (6th ed. 1990). Under federal fraud statutes, fraud involves an intentional misrepresentation or concealment of a material fact. *See generally Neder v. United States*, 527 U.S. 1, 20-23 (1999). Beehive represented that it had not intentionally misrepresented any material fact to Sprint, nor concealed a material fact from Sprint, for any purpose. *See infra* Attachment 4, at 2. Indeed, Sprint had not alleged otherwise. *See id.*

In the context of telecommunications, the term "toll fraud" is generally understood to involve a scheme to obtain telecommunications service without paying for the service. *See, e.g., Telephone Number Portability*, 13 FCC Rcd 9578, 9581 n.15 (NSD 1998). Beehive informed Sprint that it could not be charged with toll fraud since it does not take service from Sprint. *See infra* Attachment 4, at 3.

Sprint indicated that it would respond in writing to Beehive's decision, but it has not done so. Instead, on February 12, 2008 and March 10, 2008, Sprint disputed two more of Beehive's invoices on the same grounds that Beehive had rejected. *See infra* Attachment 5, at 10-12. In fact, Sprint has made the same claim using identical language with respect to every invoice that it has received from Beehive from November 1, 2007 to the present. *See id.*, at 1, 3, 4, 7, 9, 10, 11. Beehive denied each claim. *See infra* Attachment 6. The table below shows the dates of the disputes, the dates of disposition, and the total payments that Sprint has withheld to date.

Bill Date	Disputed (\$)	Dispute Date	Dispute Denied
Oct. 1, 2007	138,974.75	Oct. 8, 2007	Jan. 18, 2008
Nov. 1, 2007	129,025.03	Nov. 12, 2007	Mar. 13, 2008
Dec. 1, 2007	169.59	Dec. 17, 2007	Jan. 29, 2008
Dec. 1, 2007	7,091.63	Dec. 17, 2007	Jan. 29, 2008
Dec. 1, 2007	129,025.03	Dec. 17, 2007	Jan. 29, 2008
Jan. 1, 2008	141,972.64	Jan. 15, 2008	Jan. 29, 2008
Jan. 1, 2008	29,355.31	Jan. 15, 2008	Jan. 29, 2008
Feb. 1, 2008	144,446.05	Feb. 12, 2008	Feb. 12, 2008
Mar. 1, 2008	275,900.05	Mar. 10, 2008	Mar. 11, 2008
<b>Total</b>	<b>995,960.08</b>		

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According to its boilerplate claim, Sprint has had "grave concern" for the past five months regarding the nature of the traffic that Beehive allegedly was terminating, because of the "extraordinary volume" of the terminating traffic. *See infra* Attachment 1, Attachment 5, at 1, 3, 4, 7, 9, 10, 11. In addition, Sprint alleges that its "regulatory and legal teams" have been in the process of analyzing the traffic for five months without reaching a conclusion. *See id.*

#### JURISDICTION

Beehive recognizes that the Commission is disinclined to serve as a "collection agent" for carriers with respect to unpaid tariffed charges. *E.g., Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, 7472 n.93 (2004). It is also aware that the Commission expects LECs to sue in state or federal courts to collect unpaid access charges. *See id.* Beehive has elected to do just that and is in the process of preparing the appropriate court papers

Beehive knows full well that courts often refer matters such as this to the Commission under the doctrine of primary jurisdiction. *See Toll Free Service Access Codes*, 15 FCC Rcd 11939, 11944-45 (2000). In fact, a court has held that the Commission enjoys primary jurisdiction over a dispute involving unpaid access charges, especially when it was engaged in an ongoing rulemaking proceeding addressing issues that were virtually identical to those at issue in the dispute. *See U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552, 24554 (2004). Beehive is asking the Commission to exercise its primary jurisdiction to obviate the need for a primary jurisdiction referral and to expedite the resolution of its dispute with Sprint.

The Commission entertains complaints for declaratory relief. *See, e.g., AudioText International, Ltd. V. AT&T Corp.*, 19 FCC Rcd 3429, 3429 (2003). Beehive only seeks declaratory relief from the Commission. It does not allege, nor seek to recovery, damages. Nor does it have to. *See* 47 U.S.C. 208(a) (providing no complaint can be dismissed because of the absence of direct damage to the complainant). Therefore, § 207 of the Act does not apply and Beehive may prosecute this request for declaratory relief and a subsequent court action for damages. *See AT&T Corp. v. Beehive Telephone Company, Inc.*, 17 FCC Rcd 11641, 11653 (2002).

#### COMPLAINT

As of October 8, 2007, when it first disputed Beehive's access charges, Sprint was prohibited from taking self-help actions to avoid terminating access charges resulting from allegedly access stimulation activities. *See Declaratory Ruling*, 22 FCC Rcd at 11629. Beehive was participating in NECA 5, which the Commission had recognized as a "safe harbor" with respect to allegations of access stimulation. *See id.*, at 16120. As a participant in NECA 5, Beehive was neither subject to refund liability, *see Rulemaking Order*, 22 FCC Rcd at 17990-91, nor "to individual rate of return scrutiny." *Qwest*, 22 FCC Rcd at 17979. Moreover, the

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Commission had decided that the imposition of terminating access charges on stimulated access traffic was not unlawful if the charges were in accordance with the governing tariff. *See id.*, at 17986-88. Finally, the Commission had just initiated a rulemaking to determine if rule changes were necessary to ensure that access stimulation activities did not produce unjust and unreasonable rates. *See Rulemaking Order*, 22 FCC Rcd at 17989. But any rule changes that the Commission adopts would not aid Sprint, since they will operate prospectively. *See AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992).

If Sprint could make a prima facie case that Beehive's access service charges were unlawful on October 8, 2007, it was incumbent on Sprint to file suit under § 206 of the Act or a Commission complaint pursuant to § 208(a). *See generally Declaratory Ruling*, 22 FCC Rcd at 11629 & nn.3, 4. Sprint did neither because it had no such case. In point of fact, it cannot be argued in good faith that access stimulation activities are unlawful per se when a formal rulemaking is underway to determine if rules are necessary to regulate such activities.

Sprint had no grounds under the Act or the Rules to withhold payment on October 8, 2007. However, NECA 5 gave Sprint a basis on which to withhold payment if it presented Beehive with a "good faith" billing dispute. *See NECA 5 § 2.4.1(D)(1)*. But the law is clear that once Sprint elected to withhold payment and dispute Beehive's bills, it fell subject to the terms of the billing dispute provisions of NECA 5.

When a telecommunications service is provided pursuant to a tariff on file with the Commission, that "tariff controls the rights and responsibilities of the customer and the carrier, as a matter of law." *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, 2815 (2003). Under the "filed rate" doctrine, "effective tariff provisions are binding both upon the carrier and the customer until the Commission or a court of competent jurisdiction finds them to be unlawful." *Communique Telecommunications, Inc. d/b/a Logical*, 14 FCC Rcd 13635, 13650 (1999). Under the doctrine, the billing dispute provisions of § 2.4.1(D) of NECA 5 were legally binding on Beehive and Sprint. *See generally Powers Law Offices, PC v. Cable & Wireless USA, Inc.*, 326 F. Supp. 2d 190, 192-94 (D. Mass. 2004) (enforcing a 45-day notice requirement in the billing dispute provisions of a carrier's tariff to grant summary judgment in the carrier's favor on claims its charges were unlawful).

NECA 5 required Sprint "identify in detail the basis of the dispute" in order to permit Beehive "to investigate the merits of the dispute." NECA 5 § 2.4.1(D)(1). Sprint only identified its "grave concern" regarding the nature of the traffic as its basis to dispute Beehive's access charges. Sprint was somewhat more specific in emails subsequently sent to Beehive. It informally alleged that Beehive was "access pumping" by terminating traffic to a "Manhole Party Crowd" chat line. *See infra* Attachment 2, at 3. That was Sprint's sole allegation; it was the only matter that Beehive investigated; and it was baseless.

Beehive concluded that Sprint's billing dispute was unrelated to the facts, the terms of

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NECA 5, or the current state of the law. That conclusion is based on: (1) Sprint's commitment to "hold firm" until the access pumping issue is addressed by the Commission and the federal courts; (2) its refusal to produce the "quite a bit of evidence" that it claimed to show that Beehive was engaged in traffic pumping; and (3) it continues to make the same boilerplate claim even after Beehive refuted and denied the claim in detail. In short, Sprint disputed Beehive's access charges solely on the basis of legal theories it hoped would be adopted by the Commission and/or the courts. See *infra* Attachment 4, at 3. And Sprint withheld payment of charges based on lawful rates knowing that the Commission and the courts could not allow it to recover its payments even if its legal theories became law and there was any evidence to support its traffic pumping allegations.

Sprint's oft-repeated claim was denied by Beehive seven times. Once notified of the disposition of its claims in accordance with NECA 5 § 2.4.1(D)(3), Sprint was bound by the tariff to pay the billed charges and the late payment penalties. See NECA 5 §§ 2.4.1(C)(2) & 2.4.1(D)(4). Sprint currently owes Beehive \$1,012,883.67 in charges and penalties. It is still withholding payment in violation of NECA 5 and without legal or factual justification.

By refusing to pay billed charges and late payment penalties in accordance with NECA 5, Sprint is employing the type of self-help measure that has been deemed inconsistent with § 203 of the Act and unacceptable by the Commission. See *MCI Telecommunications Corp.*, 62 FCC 2d 703, 705-06 (1976). Moreover, Sprint is doing so with notice that an allegation of access stimulation is not a basis for questioning the legitimacy of the traffic and for engaging in self-help. See *Declaratory Ruling*, 22 FCC Rcd at 11632. Consequently, Sprint's self help action constitutes an unjust and unreasonable practice in violation of § 201(b) of the Act. See *id.* at 11631.

For all the reasons discussed above, Beehive asks that the Commission issue an order finding that Sprint has violated § 201(b) of the Act, and declaring that Sprint is obligated to pay Beehive's billed access charges and late payment penalties. Beehive also requests mediation of this dispute at the Commission.

Very truly yours,



Russell D. Lukas

cc: Laura H. Carter