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March 11, 2010

VIA ECF

Marlene Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Ross A. Buntrock

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Re: *Ex Parte* Presentation: In the Matter of Beehive Telephone Co., Inc. and Beehive Telephone Co., Inc. Nevada, Petition for Declaratory Ruling, WC Docket No. 10-36

Dear Ms. Dortch:

Northern Valley Communications, LLC (“Northern Valley”), by counsel, respectfully submits this *ex parte* presentation regarding the Petition for Declaratory Ruling (the “Petition”) filed by Beehive Telephone Company, Inc. and Beehive Telephone Company Inc. Nevada (collectively, “Beehive”).

Northern Valley provides this limited *ex parte* presentation to address a single issue raised by Beehive’s Petition and the Opposition filed by Sprint Communications Company, LP (“Sprint”), namely whether the Commission should declare that an Interexchange Carrier’s (“IXCs”) refusal to pay tariffed access charges is a violation of the Communications Act of 1934, 47 U.S.C. §201 *et. seq.* (the “Act”). See Sprint’s Opp. at 16-19; Beehive Petition at 10 (“The Act does not make a customer’s failure to pay tariffs charges unlawful.”) & 16 (“an alleged failure to pay access charges due under NECA 5 does not state a cause of action under the Act.”). While sympathetic to Beehive’s struggles to collect for the work that it has done (and is doing) in terminating Sprint’s long-distance customers’ calls (and thus enabling Sprint to bill and collect for those calls), Northern Valley respectfully urges the Commission to avoid making any declaration that would condone or encourage an IXC’s engagement in “self-help” activities through the withholding of tariffed access charges.¹

As the Commission is well aware, Northern Valley, like Beehive, is a victim of access theft by many IXCs, including Sprint, Qwest Communications Company, LP, and AT&T Corporation, based on unfounded assertions that calls destined to conference call providers are not within the confines of Northern Valley’s tariff, which has spawned three federal court cases.

¹ Northern Valley offers no opinion about whether the Commission should issue a declaratory ruling confirming, as Beehive suggests, that it would not exercise jurisdiction over Beehive’s complaint based on the case law generally holding that the Commission does not serve as a collection agent for unpaid access charges.

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Each of these IXCs have withheld substantial sums of invoiced terminating access charges from Northern Valley. Each of the IXCs have withheld these sums without regard to whether the particular call is disputed, or whether the call is routed to a “traditional” residential or business end user. Northern Valley firmly believes that these actions constitute an “unjust and unreasonable” practice in violation of the Act; a practice that this Commission should do nothing to encourage.

Substantial Commission precedent supports Northern Valley’s position. Chief among this precedent is *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd. 11647 (1999), a case filed by a Competitive Local Exchange Carrier (“CLEC”) against an IXC for failure to pay originating access charges. Not only did the Commission exercise jurisdiction over the case, but it expressly found that AT&T’s refusal to pay originating access charges was a violation of section 201’s prohibition against unjust and unreasonable practices. *See id.* at ¶ 27 (“Having failed effectively to terminate its access relationship with MGC, we conclude that AT&T’s refusal to pay for the originating access service that it has received since August 22, 1991, amount to impermissible self-help and a violation of section 201(b) of the Act.”); *see also Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone of Missouri, Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1989) (“[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...”); *Business WATS, Inc., v. AT&T Co.*, 7 FCC Rcd. 7942, ¶ 2 (1989) (“The Commission previously has stated that a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier’s applicable tariffed charges and regulations.”) (citing *MCI Telecommunications Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company*, 62 FCC 2d 703, ¶ 6 (1976)).

Indeed, when the Commission established the current regulations governing the assessment of CLEC access charges, it sought to prevent the exact behavior in which the IXCs are continuing to engage. The regulatory structure governing CLEC access charges was established by the *Seventh Report and Order*. In that Order, the Commission struck a compromise. It strictly regulated CLEC access rates to ensure that they were set at reasonable levels, and they deemed those tariffed rates to be conclusively reasonable, to ensure that IXCs could not refuse payment. In establishing this system, the Commission expressly noted its concerns over the IXCs’ repeated use of self-help by simply refusing to pay tariffed access charges:

Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs’ primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus,

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Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. We are concerned that the *IXCs appear routinely to be flouting their obligations under the tariff system*. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.

Seventh Report and Order, 16 FCC Rcd. at 9932, ¶ 23 (citations omitted, emphasis added).

And though the IXCs have continued to defy the Commission's rules and routinely flout their tariff obligations, a fact which is surely frustrating to all LECs, this offers no reason to conclude that the Commission should now simply turn its back on the LECs by declaring the IXCs' behavior to be beyond the bounds of the Act. Accordingly, the Commission should decline Beehive's invitation to declare that "self-help" refusal to pay invoiced access charges is not a violation of section 201(b).

Sincerely,



Ross A. Buntrock
Counsel for Northern Valley Communications,
LLC