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

In the Matter of	)	
	)	
BEEHIVE PETITION FOR	)	WC Docket No. 10-36
DECLARATORY RULING	)	

REPLY TO COMMENTS ON PETITION FOR DECLARATORY RULING

Russell D. Lukas
LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8660
rlukas@fcclaw.com

Attorney for Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada

March 11, 2010

TABLE OF CONTENTS

Page

GLOSSARY ii

INTRODUCTION AND SUMMARY 1

FACTS 4

ARGUMENT 7

CONCLUSION 14

GLOSSARY

Act	Communications Act of 1934, as amended
APA	Administrative Procedure Act
AT&T	AT&T Inc.
AT&T Comments	Comments of AT&T Inc., WC Docket No. 10-36 (Mar. 1, 2010)
Beehive	Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada
Beehive Pet.	Petition for Declaratory Ruling, WC Docket No. 10-36
Beehive Reply	Letter of Russell D. Lukas to Suzanne M. Tetreault, File No. EB-08-MDIC-0029 (May 12, 2008)
Complaint	Complaint, Case No. 2:08-CV-00389 (D. Utah filed Mar. 21, 2008)
Court	United States District Court for the District of Utah, Central Division in Case No. 2:08-CV-00389
Division	Market Disputes Resolution Division
Informal Complaint	Letter of Russell D. Lukas to Alexander Starr, File No. EB-08-MDIC-0029 (Mar. 21, 2008)
Motions Hearing	Hearing before the Court on October 6, 2009
Motions Order	Order issued by the Court on January 20, 2010
NECA	National Exchange Carrier Association, Inc.
NECA 5	NECA's Tariff F.C.C. No. 5.
Order	Memorandum Opinion and Order issued by the Court on October 13, 2009
Public Notice	Public Notice, DA 10-243 (Feb. 12, 2010)
Rule	One of the Federal Rules of Civil Procedure
Rules	Rules and Regulations of the Commission
Sprint	Sprint Communications Company L.P.

Sprint Answer	Letter from Michael B. Fingerhut to Sandra Gray-Fields, File No. EB-08-MDIC-0029 (Apr. 30, 2008)
Sprint Nextel	Sprint Nextel Corporation
Sprint Opp.	Opposition of Sprint Communications Company L.P., WC Docket No. 10-36 (Mar. 1, 2010)
Summary Judgment Memo	Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, Case No. 2:08-CV-00389 (D. Utah filed July 1, 2009)
Tenth Circuit	United States Court of Appeals for the Tenth Circuit
Title II	Part I of Subchapter II of the Act, 47 U.S.C. §§ 201-231
Transcript or Tr.	Reporter's transcript of the Motions Hearing

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Pursuant to the Public Notice and by its attorney,[1] Beehive hereby replies to the comments submitted by AT&T and Sprint in the above captioned proceeding. In response to those comments, the following is respectfully submitted:

INTRODUCTION AND SUMMARY

When it prepared its request for a declaratory ruling, Beehive did not have the transcript of the Court's hearing on Sprint's Rule 12(b)(6) Motion to dismiss Beehive's complaint. It now has the benefit of that transcript,[2] as well as the comments of AT&T and Sprint. Beehive has a better understanding of how the Court was misled down a primrose path to what had appeared to be an inexplicable decision.

The Transcript reveals that the Court reached its decision by reading § 207 of the Act in isolation. Sprint managed to convince the Court that the word "damaged" that Congress used in the prefatory phrase "[a]ny person claiming to be damaged by any common carrier subject to the provisions" of the Act has a meaning independent of the statutory terms "liability for damages" and "recovery of damages." We will show that the Court effectively read § 207 as imposing an

[1] The Glossary at page ii contains a list of Beehive's short form references.

[2] The Transcript is provided as Attachment 1.

election of remedies on any person claiming to be "damaged" by any common carrier subject to the Act.

We will also show that the legal definition of the word "damages" is the "pecuniary compensation" that can be recovered in court by a person who has suffered an injury through the unlawful act of another. Applying that definition to the relevant Title II provisions makes the plain meaning of § 207 unmistakable: it provides for the "recovery of damages" by any person claiming to have sustained an injury for which a carrier is liable for damages under § 206 *either* by filing a complaint with the Commission under § 208 or by bringing suit for the recovery of the damages in a federal district court, but the person has no right to pursue both a Commission complaint and a district court suit.

Neither Beehive's Informal Complaint for declaratory relief nor its Complaint for the recovery of its access service charges under NECA 5 were for the recovery of damages under Title II. Perversely, Beehive has been barred for having made an election of remedies under § 207 having never filed a complaint for damages with the Commission or the Court.

After strenuously arguing before the Division that the Commission was without jurisdiction to entertain Beehive's Informal Complaint, Sprint turned around and filed its Rule 12(b)(1) Motion to dismiss claiming that the Informal Complaint constituted an election of remedies under § 207 that left the Court without jurisdiction over Beehive's Complaint. That jurisdictional bar was based on Sprint's misrepresentation that the Complaint "sets forth the same facts and seeks the same relief" as the Informal Complaint.[3] The following table serves to summarize and distinguish the Informal Complaint and the Complaint.

[3] Sprint Opp., Attach. 3 at 2.

	INFORMAL COMPLAINT	COMPLAINT
Nature	Informal request for declaratory rulings	Action at law for the recovery of interstate access charges under NECA 5
Defendant	Sprint Nextel	Sprint
Filed	Mar. 21, 2008	May 13, 2008
Relief	Declaratory rulings that Sprint Nextel violated § 201(b) of the Act was bound by NECA 5 § 2.1.4	Judgment in the amount of $929,626 plus interest, late fees, and attorneys fees
Jurisdiction	47 U.S.C. § 208(a) and 5 U.S.C. § 554(e)	28 U.S.C. § 1331
Damages	No	No
Accrued	Jan. 1, 2008	Jan. 19, 2008
Statute of Limitations	None	47 U.S.C. § 415(a)
Limitations Period	None	Two years
Issues	(1) Whether Sprint Nextel violated § 201(b) of the Act by engaging in unreasonable self-help practices beginning with its decision in October 2007 to withhold payment of Beehive's access charges indefinitely until "traffic pumping" allegations against other LECs are resolved in court (2) Whether Sprint Nextel was bound under § 2.4.1 of NECA 5 to pay the disputed charges once Beehive denied the billing disputes	Whether Beehive operated and provided service to Sprint under NECA 5
Violation	47 U.S.C. § 201(b)	None
Time Period	After Oct. 1, 2007	Aug. 21, 2007 through Feb. 20, 2008
Conduct	Sprint Nextel's decision to withhold payment	Beehive's provision of access service
Decision	Division would not recommend action on the informal complaint	Court lacked jurisdiction because of Beehive's election of remedies under § 207 of the Act
Action	None	Dismissed without prejudice
By	Form letter	Order
Date	June 10, 2008	Jan. 20, 2010

Displaying none of the circumspection that one would expect from a nonparty to a dispute that dates back to October 2007, AT&T goes so far as to say that Beehive is showing its "chutzpah" by seeking a declaratory ruling, because the problems that it now faces are "entirely

the result of its own choices and inconsistent positions."[4] In truth, Beehive is back before the Commission because Sprint's inconsistent positions led it to suggest, and the Court to agree, that Beehive be given this opportunity.

FACTS

In its recitation of the "procedural history" of Sprint Nextel's dispute with Beehive,[5] Sprint resumes putting the same type of spin on the facts that misled the Court. At every opportunity, Sprint recasts Beehive's claims and misstates Beehive's arguments in general terms when Beehive took care to plead its case with precision. On some points, Sprint simply departs from the Commission's record.

Sprint represents that it began withholding payment of Beehive's charges in October 2007 after concluding that the "vast majority" of Beehive's traffic was "pumped traffic to free chat line and similar providers and did not meet the definition of access traffic in Beehive's tariffs."[6] But that was not what Sprint Nextel represented to Beehive. On October 8, 2007, Sprint Nextel submitted a claim to Beehive disputing $138,974.75 in access charges on the grounds it categorized as "toll fraud."[7] Moreover, Sprint Nextel suggested that it made the decision to withhold payment of Beehive's charges before it reached any conclusion about the nature of Beehive's traffic. The basis stated for the claim is set forth below in its entirety:

> 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.[8]

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[4] AT&T Comments at 3.

[5] Sprint Opp. at 3.

[6] *Id.*

[7] Informal Complaint at 3.

[8] *Id.*

According to Sprint, Beehive asserted in its Informal Complaint that, "by withholding payment, Sprint had violated Beehive's tariff, as well as §§ 203 and 201(b) of the ... Act."[9] Beehive actually alleged that by "withholding payment in violation of NECA 5 and without legal or factual justification," Sprint Nextel had engaged in an unreasonable practice that violated § 201(b).[10] It also alleged that Sprint Nextel was "employing the type of self-help measure that has been deemed inconsistent with § 203 ... and unacceptable by the Commission. *See MCI Telecommunications Corp.*, 62 FCC 2d 703, 705-06 (1976)."[11] But it never asserted that Sprint Nextel violated § 203, much less Sprint.

Sprint blatantly misstates the jurisdictional argument that Beehive presented at page 6 of the Informal Complaint. Beehive's acknowledgment of the Commission disinclination to act as a "collection agent" for carriers cannot be read as informing the Commission that "it would file a separate court action *based on the same facts*."[12] What Beehive actually informed the Division follows:

> [Beehive] is also aware that the Commission expects LECs to sue in state or federal courts to collect unpaid access charges. Beehive has elected to do just that and is in the process of preparing the appropriate court papers.[13]

Contrary to Sprint's representation, page 6 of the Informal Complaint included no attempt by Beehive to draw "a distinction between its FCC complaint seeking a 'declaratory' order that Sprint *pay the withheld charges*, over which it asserted the FCC had jurisdiction, and a

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[9] Sprint Opp. at 3.

[10] *See* Informal Complaint at 1, 8.

[11] *Id.* at 8.

[12] Sprint Opp. at 4 (emphasis added).

[13] Informal Complaint at 6 (citation omitted).

separate court action seeking damages for the same withheld charges."[14] Since it did not seek a declaratory "order that Sprint pay the withheld charges," Beehive drew no distinction involving that type of complaint. And Beehive has never asserted in any forum that the Commission has the jurisdiction to order Sprint to pay its access charges.

The declaratory relief that Beehive sought on the NECA 5 issue was a ruling that Sprint was "obligated" to pay Beehive's billed access charges.[15] In particular, Beehive asked the Commission to exercise its primary jurisdiction to issue a declaratory ruling that "[o]nce 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" under NECA 5 §§ 2.4.1(c)(2) & 2.4.1(C)(2) & 2.4.1(D)(4).[16] The requested ruling would not have been an "order that Sprint pay the withheld charges," and Beehive expressly acknowledge that it had to sue in court "to collect unpaid access charges."

Once again, Sprint claims that Beehive's Complaint to the Court was "based on the same issue it raised" in its Informal Complaint to the Division.[17] Sprint's claim is not true.

The declaratory rulings sought by the Informal Complaint were in anticipation of the counterclaim that Beehive knew was coming from Sprint. They were intended to "obviate the need for a primary jurisdiction referral" from the Court.[18] Consequently, the two issues Beehive presented to the Division were whether Sprint Nextel: (1) violated § 201(b) of the Act by engaging in unreasonable self-help practices beginning with its decision in October 2007 to withhold payment of Beehive's access charges indefinitely until "traffic pumping" allegations against other LECs were

[14] Sprint Opp. at 4 (emphasis added).

[15] Informal Complaint at 1, 8.

[16] *Id.* at 8.

[17] Sprint Opp. at 5.

[18] Informal Complaint at 6.

resolved in court;[19] and (2) was bound under § 2.4.1 of NECA 5 to pay the disputed charges once Beehive denied the billing disputes.[20]

Beehive's Complaint called on the Court to simply decide whether Beehive operated and provided service to Sprint under NECA 5.[21] It was Sprint's counterclaims that presented the Court with the issue of whether Sprint was entitled to withhold payment of Beehive's access charges. That explains why the regulatory background section of Beehive's Summary Judgment Memo addressed matters that had been included in its Informal Complaint.[22]

Finally, Sprint also misstates the single cause of action stated in Beehive's Complaint. Paragraphs 11 through 16 of the Complaint did not include the allegation that "Sprint could not withhold payment under the terms of Beehive's filed federal tariff."[23] NECA 5 permitted Sprint to withhold payments if it initiated a "good faith" billing dispute,[24] but only until Beehive denied the dispute,[25] which Beehive did with respect to the last of Sprint's disputes on March 11, 2008.[26] Regardless, Beehive's single cause of action under the filed-rate doctrine was simply for the recovery of its access charges.[27]

ARGUMENT

As Beehive showed, the Second and Fifth Circuits have been unable to ascertain the "nexus" between the claims in two forums that would trigger an election of remedies under §

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[19] *See* Informal Complaint at 4.

[20] *See id.* at 8.

[21] *See* Sprint Opp., Attach. 2 at 10.

[22] *See id.* at 6, Attach. 2 at 6-8.

[23] *See id.*, Attach. 1 at 3-4.

[24] *See* NECA 5 § 2.4.1(D)(1).

[25] *See id.* § 2.4.1(D)(3).

[26] *See* Informal Complaint at 5.

[27] *See* Sprint Opp., Attach. 1 at 3-4.

207.[28] Neither could the Court for a reason Beehive now understands. Before turning to the Transcript, Beehive will identify the "nexus" that is apparent from the plain meaning of §§ 206 and 207.

The Court ran astray based on its misunderstanding of the statutory term "damages," as it was used by Congress to impose "liability for damages" on common carriers under § 206[29] and to provide for the "[r]ecovery of damages" under § 207.[30] The legal definition of "damages" is "a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another."[31]

Applying the definition of "damages" to the statutory language of § 206 produces its clear meaning. The provision makes a carrier liable to pay a sum of money to a person "injured" by the carrier's violation of the Act to compensate for the injury the person "sustained in consequence of any such violation of [the Act], together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery."[32]

By applying the definition of "damages" to the "recovery of damages" provisions of § 207 gives meaning to the phrase "[a]ny person claiming to be damaged by any common carrier subject to the provisions" of the Act.[33] Claiming to be damaged for the purposes of § 207 means

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[28] *See* Beehive Pet. at 24-25 (citing *Digitel, Inc. v. MCI WorldCom, Inc.*, 239 F.3d 187 (2d Cir. 2001) and *Premiere Network Services, Inc. v. SBC Communications, Inc.*, 440 F.3d 683 (5th Cir. 2006)).

[29] 47 U.S.C. § 206.

[30] *Id.* § 207.

[31] *Black's Law Dictionary* 389 (6th ed. 1990). The term "liability for damages" means "liability for an amount to be ascertained by trial of the facts in particular cases." *Id.* at 914.

[32] 47 U.S.C. § 206.

[33] *Id.* § 207.

that a person is claiming to have sustained an injury as a consequence of a carrier's violation of the Act and for which § 206 imposes "liability for damages" on the carrier. So understood, § 207 authorizes a person to seek the recovery of compensatory damages for which a "carrier may be liable" under § 206 by: (1) making a "complaint to the Commission as hereinafter provided for" in § 208; or (2) bringing suit in any federal district court of competent jurisdiction.[34] Of course, § 207 contains the caveat that the person shall not have the *right* to pursue the recovery of damages in both the Commission and a court.[35]

Beehive submits that the minimum nexus between claims that can trigger an election of remedies under § 207 is that both seek the recovery of damages for a carrier's violation of the Act. The jurisdictional nexus to a violation of the Act was apparent to Sprint Nextel when it was before the Division arguing that the Commission was without authority to entertain, let alone decide, the Informal Complaint. One of Sprint's more forceful jurisdictional arguments was based on the plain meaning of Title II:

> Any reasonable interpretation of the language in the cognate provisions of the ... Act also leads to the inescapable conclusion that the Commission does not have jurisdiction in this case. Section 206 ..., for example, states that a carrier is liable for damages sustained by any person or persons if the carrier "shall do, or cause to or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done ...." Similarly, Section 208 enables any person to bring an action before the Commission "complaining of anything done or omitted to be done by any common carrier, subject to the Act, in contravention of the provisions thereof ...." Thus, the clear and unequivocal language in both provisions requires the person filing a complaint before the Commission against a common carrier to assert and demonstrate that a carrier has violated some provision of the Act. Beehive has not done so. As explained and contrary to Beehive's argument, Sprint Nextel

[34] 47 U.S.C. § 207.

[35] Beehive questions how the Court determined that an election of remedies under § 207 can create a jurisdictional bar when it provides only that a "person shall not have a right to pursue both such remedies." *Id.* The statutory language suggests that a court has the discretion to permit a person to pursue a suit for damages caused by a carrier's violation of the Act when the person had made similar claim in a complaint to the Commission.

> does not violate Section 201(b) ... by failing to pay Beehive for access services Beehive allegedly has provided Sprint Nextel.[36]

By making that jurisdictional argument, as well as several others, Sprint Nextel effectively certified that its claim that the Commission was without jurisdiction over the Informal Complaint was warranted by existing law. Consequently, Sprint Nextel also certified that the Informal Complaint could not bar Beehive's collection suit before the Court, because the Commission has held that the improper filing of an informal complaint does not constitute "an election of forum" under § 207 that would deprive a court of jurisdiction. *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd 24552, 24556 (2004). *See Contel of the South, Inc. v. Operator Communications, Inc.*, 23 FCC Rcd 548, 555 (2008) (dismissing without prejudice a § 201 claim that was effectively a "collection action"). Thus, if Sprint Nextel made its jurisdictional arguments to the Division in good faith, Sprint should have considered itself estopped from arguing in its Rule 12(b)(1) Motion that the Court was "jurisdictionally barred" from hearing the Complaint because Beehive had already elected to pursue its remedies at the Commission.[37]

At the Motions Hearing, counsel for Sprint began his argument by reading the text of § 207 and then asserting that "Beehive was a person claiming to be damaged" and that was the basis on which it filed its Informal Complaint.[38] He proceeded make the following arguments:

> If you look at the language of the statute, it doesn't say that the bar only applies when you seek damages in both places. It says any person claiming to be damaged may bring a complaint to the Commission or may bring suit for the recovery of damages in court. So if you're a person claiming to be damaged, which Beehive is -- it set forth the amounts in its FCC Complaint, and it was

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[36] Sprint Answer at 6.

[37] Sprint Opp., Attach. 3 at 2.

[38] Tr. 6.

certainly claiming to be damaged, which is the basis of its FCC complaint.[39]

* * * *

Secondly, Beehive says Section 207 only applies when the FCC has jurisdiction. That may or may not be true, but it doesn't matter in this case. Beehive's Complaint at the FCC said that the FCC has jurisdiction over the Complaint.

And Sprint disagreed. Sprint said there was no jurisdiction at the FCC over the Complaint, and the FCC didn't rule on that. If the FCC had ruled on that, it certainly wouldn't have told Beehive: go around and go file a formal Complaint if you want to.[40]

* * * *

We think that once you file a Complaint, that's it, under the plain language of the statute which says a person seeking to -- any person claiming to be damaged may either make complaint or may bring suit for the recovery of the damages, and that's the end of the matter in our view. They sought complaint -- they brought their Complaint at the FCC.

But, in any case, even if the jurisdictional issue is still there and this Court thinks that if the FCC doesn't have jurisdiction, that stops it, the Tele-America case says that they have got to go back to the FCC first.[41]

* * * *

They say their letter disclaimed damages. That may be so, but they claimed that the FCC had jurisdiction over the Complaint, as read, and as Your Honor points out in the language that the issue is, did they bring a Complaint at the FCC at the FCC? They did. It's on the same basic issues. Whether or not it is one for damages, that's sufficient to cause a bar of 207 to apply.[42]

* * * *

Beehive says it goes back to the FCC, the FCC is going to say that it has no jurisdiction. We agree with that, but that's not what Beehive told the FCC in its reply brief, and our point is, it's got to pursue its -- once it's elected its remedy, it's got to pursue its remedy there and see what happens.[43]

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[39] Tr. 6-7.

[40] Tr. 8.

[41] Tr. 9.

[42] Tr. 30.

[43] Tr. 31-32.

The Transcript unmistakably shows that the Court agreed with Sprint and decided the issue entirely on the literal language of § 207.[44] The Court explained:

> I am inclined to grant the motion. I cannot find any textual support or any binding persuasive cases from other -- there's no binding precedent from the Tenth Circuit or the Supreme Court. I just can't read the statute, the Second 207 language, in any way other than, under the circumstances as presently exist, precluding the filing of this action by Beehive in this Court.
>
> I'm not persuaded by the argument that there were efforts made by Beehive before the FCC to point out that it was not making a damages claim, but it was a party claiming to be damaged by a common carrier.
>
> * * * *
>
> So I'm not ruling on -- and I'm going to issue a short written decision. It's going to be primarily based on the text of the section. I think it means what it says. You get the salad bar or the soup bar, and if you choose the salad bar, and if you regret it after a couple of pieces of lettuce, you're stuck. That's the choice you made. And I'm not ruling on the jurisdictional issue.
>
> I will say this. I'm inclined to agree with Mr. Smith on the issue -- on that issue if the FCC claims -- or decides that it does not have jurisdiction, but I don't want to rule on that now because it's not before me. I don't have that before me now.
>
> The record that I have is not in dispute, that the FCC has never found that it did not have jurisdiction. They haven't ruled on that, so why should I? And that's the only reason, the little thin reed that makes me feel that, under this technicality, I've got to grant the motion to dismiss. And -- but since the whole case -- the rest of the case is still before me, if there is some procedural mechanism that would allow us to address that issue in the event the FCC decides it doesn't have jurisdiction, I don't think that's as easy a question to answer as you all seem to think.
>
> * * * *
>
> I'm just doing the best I can to read the statute, and that's what this comes down to, a pure job of statutory construction and, under the present facts, I just can't see a result other than this one.[45]

The Transcript belies AT&T contention that the problems Beehive now faces are entirely

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[44] *See* Tr. 20, 21, 23, 24

[45] Tr. 39.

of its own making. As it stands now, Beehive has been barred by the Court from pursuing a Complaint that does not constitute a "suit for the recovery of the damages for which [a] common carrier would be liable under the provisions of [the Act]."[46] Beehive brought suit for the recovery of its access charges under NECA 5, and even Sprint Nextel would concede that Sprint's failure to pay Beehive's access charges under NECA is not unlawful.[47] Consequently, Beehive's Complaint *did not even implicate § 207*, because that provision confers district court jurisdiction *only* to entertain suits "for damages resulting from a common carrier's violation of specific provisions of the Act." *Ivy Broadcasting Co. v. AT&T Co.,* 391 F.2d 486, 489 (2d Cir. 1968). *See Nordlicht v. New York Telephone Co.,* 799 F.2d 859, 862 (2d Cir. 1986), *cert. denied,* 479 U.S. 1055 (1987) (jurisdiction did not lie under § 207 because plaintiff did not allege a violation of a specific provision of the Act). Beehive's suit for the recovery of its access charges simply was not a suit for the recovery of damages for which Sprint was liable under the Act.

The Court assumed that Beehive had been "damaged" by the unlawful conduct alleged in the Informal Complaint.[48] But Beehive never alleged that it had been "damaged" by Sprint's violation of § 201(b). In fact, Beehive made it clear that it did "*not allege*, nor seek to recover, damages."[49] In fact, the only damages that Beehive could hope to recover for Sprint's practice of withholding payment of access charges would have been its "opportunity costs awaiting payments of amounts due to it." *MGC Communications, Inc. v. AT&T Corp.,* 15 FCC Rcd 308, 312 (1999). However, the Commission has held that that a monthly late payment fee under a carrier's tariff is adequate compensation "for its loss of use of the disputed charges." *Id.*

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[46] 47 U.S.C. § 207.

[47] *See supra* note 36 and accompanying text.

[48] *See* Tr. 24.

[49] Informal Complaint at 9 (emphasis added).

Because it was entitled to a late payment penalty under NECA 5 §§ 2.4.1(C)(2) and 2.4.1(D)(4), and since it did sue to recover the late payment penalties from Sprint,[50] Beehive could not make a claim for additional damages.

Not only did the Court envision that Beehive would return to the Commission for a ruling, but such a ruling would provide guidance to the Tenth Circuit when the issue of Beehive's alleged election of remedies finally reaches that court. Under the Court's scheduling order, discovery in the case will not close until July 14, 2010 and dispositive motions are not due August 15, 2010. Thus, the Court will not issue a final order appealable to the Tenth Circuit in the reasonably foreseeable future. Thus, a Commission declaratory ruling can be issued in time to instruct the Tenth Circuit, which has no precedent on the § 207 election-of-remedies issue.

Finally, the statute of limitations is running on Beehive's claims for the recovery of its billed charges. Accordingly, Beehive asks the Commission to expedite the issuance of declaratory rulings that: (1) it will not entertain a complaint by Beehive to recover its unpaid tariffed charges from Sprint; (2) only a claim for the recovery of damages caused by a carrier's violation of the Act can trigger an election of remedies under § 207; (3) the Informal Complaint did not make a claim for the recovery of damages for which Sprint Nextel was liable under the Act; (4) under current law, Sprint's failure to pay tariffed charges does not constitute a violation of law for which it is liable for damages under § 206 of the Act; and (5) neither the Informal Complaint nor the Complaint implicated an election of remedies under § 207.

CONCLUSION

Beehive respectfully requests that the Commission exercise its primary jurisdiction to remove the manifest uncertainty that surrounds the meaning of its enabling statute by issuing the

[50] *See* Sprint Opp., Attach. 1 at 5.

requested declaratory rulings.

Respectfully submitted,

Russell D. Lukas
LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, Virginia 22102
(703) 584-8660
rlukas@fcclaw.com

Attorney for Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada

March 11, 2010

ATTACHMENT 1

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

3

4

5 BEEHIVE TELEPHONE CO. et al.,)

6 Plaintiffs,)

7 vs.)Case No. 2:08-CV-380 DB

8 SPRINT COMMUNICATIONS, et al.,)

9 Defendants.)

10)

11

12

13

14 BEFORE THE HONORABLE DEE BENSON

15 DATE: OCTOBER 6, 2009

16 REPORTER'S TRANSCRIPT OF PROCEEDINGS

17 MOTION HEARING

18

19

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21

22

23

24

25 Reporter: REBECCA JANKE, CSR, RMR

1

2 A P P E A R A N C E S

3

4 FOR THE PLAINTIFF: ALAN L. SMITH, ESQ.

5 1492 EAST KENSINGTON, AVENUE

6 SALT LAKE CITY, UTAH 84105

7

8

9

10 FOR SPRINT: JENNER & BLOCK, LLP

11 BY: MARC A. GOLDMAN, ESQ.

12 1099 NEW YORK AVE. N.W., SUITE 900

13 WASHINGTON, D.C., 20001

14

15 PARR, BROWN, GEE & LEVELESS

16 BY: PAUL C. DRECKSEL, ESQ.

17 185 SOUTH STATE, SUITE 800

18 SALT LAKE CITY, UTAH 84111

19

20

21 FOR ALL AMERICAN: GARY R. GUELKER, ESQ.

22 747 EAST SOUTH TEMPLE, SUITE 130

23 SALT LAKE CITY, UTAH 84102

24

25

1 OCTOBER 6, 2009 SALT LAKE CITY, UTAH

2 P R O C E E D I N G S

3 * * *

4 THE COURT: Beehive Telephone Company, Inc.,
5 against Sprint Communications Company. This is
6 2:08-CV-380. And we're here on Sprint's motion to
7 dismiss Beehive's Complaint pursuant to Rule 12(b)(1).
8 And we also have scheduled for today the motion of the
9 plaintiffs to -- for partial summary judgment.
10 I'd like to take them up and then, also, so
11 it's clear, we also have a motion to file a surreply in
12 this partial summary judgment matter, and that's by
13 Sprint. So that's what we've got. And I need to know
14 who all of you are, so let's start here.
15 MR. SMITH: Alan Smith, Your Honor. I'm
16 appearing for the plaintiffs Beehive Telephone Company of
17 Utah and Nevada.
18 THE COURT: You speak really softly. Alan
19 Smith appearing for the plaintiffs?
20 MR. SMITH: Correct, Your Honor.
21 THE COURT: And what else did you say?
22 MR. SMITH: I just named the plaintiffs,
23 Beehive Telephone Company of Utah and Nevada.
24 THE COURT: Oh. Okay. Great. Thank you,
25 Mr. Smith.

1 MR. GUELKER: I'm Gary Guelker on behalf of All
2 American Telephone Company, third-party defendant.
3 THE COURT: How do you spell Guelker?
4 MR. GUELKER: It's G-u-e-l-k-e-r.
5 THE COURT: Is it Guelker or Guelker?
6 MR. GUELKER: Guelker, Your Honor.
7 THE COURT: Okay.
8 Yes, sir.
9 MR. DRECKSEL: Paul Drecksel and Marc Goldman
10 here on behalf of Sprint Communications Company.
11 THE COURT: And it's Drecksel?
12 MR. DRECKSEL: Right.
13 THE COURT: And Marc Goldman?
14 MR. GOLDMAN: Correct.
15 THE COURT: Okay. Thanks. And, Mr. Goldman,
16 you're from New York?
17 MR. GOLDMAN: I'm from D.C.
18 THE COURT: Oh. I looked at New York Avenue.
19 MR. GOLDMAN: New York Avenue, yep.
20 THE COURT: New York Avenue in Washington, D.C.
21 MR. GOLDMAN: Exactly.
22 THE COURT: You're with the firm of Jenner &
23 Block. And Mr. Drecksel is here with Parr, Brown,
24 correct?
25 MR. DRECKSEL: Correct, Your Honor.

1 THE COURT: And, Mr. Smith, you're on your own.
2 MR. SMITH: I am today, Your Honor.
3 THE COURT: Mr. Guelker, where are you from?
4 MR. GUELKER: I'm local as well, Judge.
5 THE COURT: Well, good for you. With a firm?
6 MR. GUELKER: Jensen & Guelker.
7 THE COURT: Okay. Great.
8 MR. GUELKER: Thank you.
9 THE COURT: As I said, We'll take the motion to
10 dismiss first.
11 So, Mr. Goldman, you can address that.
12 MR. GOLDMAN: Thank you, Your Honor. The
13 motion to dismiss is very simple. Beehive filed a
14 Complaint against Sprint at the FCC and then subsequently
15 filed a Complaint on the same issues in this Court.
16 Section 207 of the Communications Act prevents them from
17 doing that. That section is set forth on page 5 of
18 Sprint's motion, and it says:
19 "Any person claiming to be damaged by any
20 common carrier subject to the provisions of this
21 chapter may either make a Complaint to the
22 commission as hereinafter provided for or may
23 bring suit for the recovery of the damages for
24 which the common carrier may be liable under the
25 provisions of this chapter in any District Court

1 of the United States, but such person shall not
2 have the right to pursue both such remedies."
3 Beehive was a person claiming to be damaged.
4 That was the basis on which it filed its Complaint at the
5 FCC. It did so on the same underlying facts as are at
6 issue here, and it subsequently filed the action here.
7 Now, the FCC, what they did with Beehive's
8 Complaint was they issued a letter basically saying we
9 can't take any further action on this informal Complaint,
10 but you're invited to file a formal Complaint.
11 There is a series of decisions, including out
12 of the Tenth Circuit. That's the TON Servs. decision;
13 there's a Second Circuit decision, Digital; there's a
14 primier decision out of the Fifth Circuit, all of which
15 say once you file an informal Complaint, you can no
16 longer bring an action in District Court.
17 Now, Beehive has two responses, basically, to
18 this motion. It first says that it didn't bring --
19 the FCC action was different than this action because it
20 didn't seek damages before the FCC.
21 First of all, that's not the test. If you look
22 at the language in the statute, it doesn't say that the
23 bar only applies when you seek damages in both places.
24 It says any person claiming to be damaged may make
25 Complaint to the commission or may bring suit for the

1 recovery of damages in court. So if you're a person
2 claiming to be damaged, which Beehive is -- it set forth
3 the amounts in its FCC Complaint, and it was certainly
4 claiming to be damaged, which is the basis of its FCC
5 Complaint.
6 It doesn't matter whether what it seeks is
7 identical, but -- and the Digital case makes that clear.
8 It says the question is whether there is a nexus or not,
9 and, the point is, you shouldn't be able to pursue
10 parallel actions in both places. And, moreover,
11 Beehive's action at the FCC was effectively an action for
12 damages. The relief it sought there was a declaration by
13 the FCC that Sprint owed Beehive the very same money that
14 it seeks in this court. If that's not technically an
15 action for damages, it certainly is the equivalent
16 Beehive points to the Digital case, which we
17 rely on, because Digital is the case that sets forth the
18 nexus test in the Second Circuit. And Beehive says
19 Digital doesn't say specifically whether -- reserved the
20 holding on the question of whether -- what would happen
21 if you sought damages in your District Court case but not
22 at the FCC. But Digital actually involved an FCC
23 Complaint that didn't seek any damages.
24 And what the Digital Court said was -- the
25 Second Circuit said is:

1 Look, even if the question is whether you
2 sought damages in both places, Digital's FCC Complaint
3 couldn't have been seeking anything but damages because
4 the future-oriented relief question in that case had been
5 resolved. The action complained of had stopped.
6 So, effectively, the only thing that could have
7 been at stake is money. Well, that's true here, too.
8 What Beehive seeks -- sought before the FCC concerned
9 past actions. It sought a declaration concerning
10 monetary relief. Certainly it is the equivalent thing
11 for purposes at least of assessing relief under Section
12 207.
13 Secondly, Beehive says Section 207 only applies
14 when the FCC has jurisdiction. That may or may not be
15 true, but it doesn't matter in this case. Beehive's
16 Complaint at the FCC said that the FCC had jurisdiction
17 over the Complaint.
18 And Sprint disagreed. Sprint said there was no
19 jurisdiction at the FCC over the Complaint, and the FCC
20 didn't rule on that. If the FCC had ruled on that, it
21 certainly wouldn't have told Beehive: Go around and go
22 and file a formal Complaint if you want to.
23 That's what it told Beehive to do.
24 Beehive points to a decision called
25 Tele-America. In that decision, a party had filed a

1 Complaint at the FCC, subsequently filed suit in Federal
2 Court and then -- and argued that was permissible because
3 there was no jurisdiction over the FCC Complaint, and the
4 Tele-America Court said: No. We're going to dismiss.
5 If the FCC turns around and says it had no jurisdiction,
6 then it's a different matter and we'll come back to
7 Didtrict Court.
8 That's what the FCC in fact did. It said there
9 was no jurisdiction. Because there was no jurisdiction,
10 you could come back to Court.
11 Now, we actually disagree. We think that once
12 you file a Complaint, that's it, under the plain language
13 of the statute which says a person seeking to -- any
14 person claiming to be damaged may either make complaint
15 or may bring suit for the recovery of the damages, and
16 that's the end of the matter in our view. They sought
17 complaint -- they brought their Complaint at the FCC.
18 But, in any case, even if the jurisdictional
19 issue is still there and this Court thinks that if the
20 FCC doesn't have jurisdiction, that stops it, the
21 Tele-America case says that they have got to go back to
22 the FCC first.
23 THE COURT: Wouldn't it seem to be only fair
24 that if Congress is saying you've got to elect whether to
25 go get relief in this forum or that forum or seek relief

1 in this forum or that forum, that there is an implicit
2 requirement that the forum choice is among two that are
3 available to you?
4 MR. GOLDMAN: Well, I agree that that may be
5 fair, and that may be a good reason for Beehive not to go
6 to the FCC in the first place. I would say they assume
7 that risk. But, again, even if you interpret the statute
8 that way, the point here is, the FCC has not said it
9 didn't have jurisdiction. And the risk the other way is
10 that if they can go to the FCC and then, whenever another
11 party says there is no jurisdiction, sort of disclaim it
12 on their own and go to Court, when the FCC hasn't ruled,
13 then basically that gives them two bites at the apple.
14 The FCC may have decided not to continue with
15 the informal Complaint because it had views on the
16 merits. Beehive may have sensed that the FCC had views
17 on the merits that were against it, and by taking this
18 approach what happens is they can sort of stop halfway
19 through, based on their sense, and go to Court.
20 The other thing is, under their view, they can
21 pursue both actions now because they can continue here.
22 The FCC has told them, go ahead and file a formal
23 Complaint. They can go ahead and do that. And that's
24 exactly what Section 207 is designed to prevent.
25 That's all that I have.

1 THE COURT: Okay. Let me hear from
2 Mr. Smith.
3 MR. SMITH: Thank you, Your Honor.
4 THE COURT: You didn't get a finding of no
5 jurisdiction by the FCC, and now you want to essentially
6 ask me to find that there was no jurisdiction there or
7 that there is no jurisdiction there for this case. Is
8 that fair?
9 MR. SMITH: It's fair to say we didn't get a
10 finding of no jurisdiction.
11 THE COURT: Okay. The second part you don't
12 agree with?
13 MR. SMITH: I think that Beehive and Sprint
14 disagree on how properly to characterize what Beehive's
15 FCC counsel did, and all I can recommend for the Court
16 there is what I'm sure the Court has already done, which
17 is to --
18 THE COURT: I really hate to do this, but would
19 you speak a little more into that microphone.
20 MR. SMITH: I'm sorry, Your Honor.
21 THE COURT: You're fine. You're just a little
22 hard to hear.
23 MR. SMITH: I will speak up a little bit. I
24 tend to start soft and then I get --
25 THE COURT: It's booming by the end?

1 MR. SMITH: Yes.

2 THE COURT: Okay. Go ahead.

3 MR. SMITH: I'm sure the Court has gone through
4 the papers and, in that event, it's important to look
5 carefully at what Beehive's FCC counsel actually did when
6 it initiated its process at the FCC. And the letters
7 that are now exhibits, I think three times over in the
8 papers before the Court, show that Beehive's counsel, a
9 very experienced FCC practitioner, took pains to craft
10 his correspondence and informal Complaint so that he made
11 the FCC aware and he was aware of the many, many, many
12 FCC precedents which forebad a carrier like Beehive to
13 seek relief or damages against somebody like Sprint
14 which, in this instance, at the FCC level and the posture
15 of that informal Complaint, wasn't a carrier, it was a
16 customer.

17 And in fact Mr. Lukas or Beehive cited the
18 TelePacific case, cited to other FCC precedents and
19 disclaimed, in view of those precedents, because they
20 said that the commission did not have jurisdiction on a
21 case for damages, that, in fact, he was not seeking
22 damages. Instead, what he wanted was alternate relief.
23 He wanted equitable relief. He wanted declaratory relief
24 on the unjust practice charge under Section 201 of the
25 Communications Act.

1 And so the Complaint was carefully crafted
2 because he knew about the election issue. He knew of the
3 commission precedents which said: We are not going to
4 take jurisdiction if it's a dispute between you the
5 carrier and one of your customers.
6 And, in view of that, he didn't seek damages
7 and he disclaimed, you know, any right to damages. And
8 he asked only that this unjust practice under Section
9 201, this self-help practice, in view of other FCC
10 precedents, be ruled upon.
11 After that he asked for mediation, and,
12 essentially, what he was trying to do, I think, Your
13 Honor, is just bring Sprint to the table to get some kind
14 of an informal resolution which hopefully could be
15 formalized in an appropriate settlement before the FCC.
16 Sprint's response was that they didn't want to
17 mediate. They said: You can't sue us here because we're
18 a customer, and they said there's no jurisdiction here,
19 which is what Beehive's counsel already recognized and
20 had told the FCC in terms of damages in light of the
21 FCC's precedents.
22 And so the matter was left to languish, and
23 Beehive decided that it had been a futile effort and it
24 would pursue its remedy for damages in the only place
25 which it had, jurisdictionally speaking, which is Federal

1 District Court, a position which the letters from
2 Sprint's counsel to the FCC firmly acknowledge.
3 THE COURT: Let me ask you this. I don't know
4 that much about FCC practice, but if Beehive were
5 successful in its efforts to get the declaratory judgment
6 that it sought from the FCC, a declaration that the
7 self-help practices of Sprint were wrongful and that
8 the -- as I understand it, that Beehive's charging for
9 the services that it claimed it was entitled to charge
10 for, was proper. If you got that declaration from the
11 FCC, wouldn't that, under just -- in all practical
12 effects, cause Sprint to pay up the money?
13 I mean, what good would that declaration be?
14 MR. SMITH: I'm not sure it would, Your
15 Honor.
16 THE COURT: Then why would anybody seek it?
17 MR. SMITH: Because, as a matter of declaratory
18 relief, it would indicate that they could no longer
19 exercise self-help, and I don't know if there would be
20 any type of sanction if they disobeyed that sort of an
21 order or not. It would probably shift the ground
22 procedurally and put the procedural shoe on Sprint's foot
23 at that point.
24 THE COURT: To do what?
25 MR. SMITH: To go in and contest the fairness

1 and reasonableness of Beehive's charges before the FCC.
2 THE COURT: So you are telling me --
3 MR. SMITH: That's the regime, Your Honor, as I
4 understand it.
5 THE COURT: So you go there to seek a
6 declaration that is basically meaningless in terms of
7 getting your money paid?
8 MR. SMITH: No. I don't think it's
9 meaningless.
10 THE COURT: All right, then, wouldn't it result
11 in money getting paid most likely?
12 MR. SMITH: Well, one would hope, but my
13 expectation, given the posture of these parties and how
14 we get to this particular set of issues, my expectation
15 is that they would have gone to the FCC and they would
16 have contested the reasonableness of the charges, and, in
17 the meantime, they would have had to be on a paying
18 basis.
19 THE COURT: Wouldn't it, procedurally -- I
20 don't know how it works in this regard either, but once
21 you sought a declaration from the FCC that involved
22 Sprint and its practices, wouldn't Sprint have had an
23 opportunity to defend itself in that proceeding already?
24 MR. SMITH: They might have, Your Honor. I
25 don't know. I can't answer that.

1 THE COURT: You would think so.
2 MR. SMITH: I'm not that expert in the FCC
3 procedures either.
4 THE COURT: Do you know? Mr. Goldman, do you
5 know?
6 MR. GOLDMAN: Yes. Sprint would have made the
7 same sorts of responses that it is making here.
8 THE COURT: In the original informal Complaint
9 proceeding?
10 MR. GOLDMAN: Well, it could have made it in
11 the informal Complaint. Instead, Sprint contested
12 jurisdiction, but --
13 THE COURT: But in responding, just like a
14 matter in Court here, it's responding in a way it's
15 defending itself?
16 MR. GOLDMAN: Exactly.
17 THE COURT: The first line of defense might be
18 to say the FCC has no jurisdiction because we are not
19 being sued as a common carrier or complained against, we
20 are being complained against as a customer. Apparently
21 that was the gist of it, but more to the broader point,
22 they get to defend themselves before a declaration is
23 made by the FCC?
24 MR. GOLDMAN: Absolutely. Sprint would have
25 made all the same arguments that it's making here today.

1 THE COURT: At the end of that process, is it
2 fair to say, as a practical matter, in your experience,
3 since Sprint would be expected or would naturally be
4 coughing up the money?
5 MR. GOLDMAN: Yeah. I mean, I think that's
6 right as a practical matter. I don't think it's typical
7 that there is a declaratory action at the FCC that money
8 is owed because --
9 THE COURT: No. I didn't say that. I'm just
10 saying that if the FCC, which regulates you, if you're
11 Sprint, now they've declared that your practice is
12 improper, and Beehive's bills were proper, it would seem
13 like there would be something going on there such as the
14 possibility of sanctions or something. Otherwise, why
15 would a company like -- or an entity like Beehive seek a
16 declaration if it's just some kind of hollow words?
17 I'm just trying to understand, as a practical
18 consequence, what happens if Beehive had gotten the
19 declaration that, as you call it, Beehive's counsel had
20 sought? There has to be some value.
21 MR. GOLDMAN: In our view, it would be the same
22 as a Court judgment, a Court declaration.
23 THE COURT: As a practical consequence, not as
24 an order of the Court in calculating the amount of
25 damages and so on?

1 MR. GOLDMAN: Right.

2 THE COURT: Since you all seem to agree you

3 couldn't file for damages, per se, because it would be

4 seeking a collection of tariffs and somehow that's

5 forbidden.

6 MR. SMITH: Whatever the practical consequences

7 of that kind of relief would be, Your Honor. I'd just

8 like to make a couple of observations. One. It doesn't

9 put money in Beehive's pocket because it's clear and we

10 all have to agree that the FCC does not have jurisdiction

11 to enter a money judgment, a damages award.

12 THE COURT: I think no one is suggesting

13 that.

14 MR. SMITH: And so it doesn't put the money in

15 Beehive's pocket, and it doesn't necessarily put the

16 money in its pocket, but, retrospectively, from the date

17 of the declaratory judgment, it just says: Going

18 forward, here is the rule. You've got to abide by it,

19 and if you don't, there may be some appropriate penalty.

20 So it does not give at all the kind of relief

21 that we're seeking now in this Court, which is money for

22 August, 2007, to the present.

23 And, as a practical matter, that's a huge

24 difference.

25 THE COURT: Oh, it is?

1 MR. GOLDMAN: Yes.
2 MR. SMITH: Yes. It's about $3 million worth
3 of difference.
4 THE COURT: All right.
5 MR. SMITH: So I -- I just want to look at the
6 statute. And, at the very least, there has to be,
7 whether you call it a nexus or parallel points or some
8 substantial similarity between what a carrier is doing at
9 the FCC and then what it does in the Federal Court, in
10 order for the election provisions of Section 207 to
11 apply. Number 1, you have to sue the same party.
12 There's an undisputed fact that Beehive did not file its
13 informal Complaint against Sprint. It filed it against
14 Nextel. Whether by accident or otherwise, it had the
15 wrong party. When it found out that it had the wrong
16 party was about the same time it realized that the FCC
17 proceeding was going nowhere and therefore it sued the
18 correct party, Sprint, in this forum.
19 So, at the outset, you don't even have the same
20 parties, and there can't be a nexus without that under
21 Section 207, and there can't be parallel points without
22 that under Section 207.
23 The second dissimilarity is that 207 doesn't
24 even apply because the action, whether at the FCC or
25 here, is against Sprint not as a carrier but as a

1 customer. And 207 only applies to suits against
2 carriers. So, Sprint is a carrier, it's an interexchange
3 carrier, but in this particular posturing of the parties,
4 it's being sued as a customer. And that, in fact, is
5 what Sprint offered to the FCC as a basis for the FCC to
6 take no action.
7 THE COURT: I thought Sprint didn't get sued.
8 MR. SMITH: I mean Nextel. Excuse me, Your
9 Honor. Now I'm confused as well. But there was a
10 difference, and, essentially, what Nextel said is: You
11 know, even if we were Sprint, you know, we wouldn't be a
12 customer in this sense and, therefore, you don't have any
13 jurisdiction.
14 THE COURT: I wonder if it's that clear. The
15 language says, and I'm quoting from Section 207, "any
16 person claiming to be damaged." So that's easy, I
17 assume, easy to interpret, any person claiming to be
18 damaged. Now, the key words are "by any common carrier,
19 subject to the provisions of this chapter." And here I
20 don't think there is any dispute that Sprint is a common
21 carrier.
22 MR. SMITH: There isn't a dispute that,
23 speaking generally --
24 THE COURT: Yes.
25 MR. SMITH: -- it's a common carrier.

1 THE COURT: That's their whole business.
2 MR. SMITH: But speaking to the particulars of
3 Section 207 and how the FCC applies that statute, it's a
4 question of capacity, Your Honor, and they are a customer
5 under the tariff under which Beehive is suing and, in
6 fact, for my argument on this, Your Honor --
7 THE COURT: Yes.
8 MR. SMITH: -- I rely upon the argument from
9 Nextel's counsel, which is in the book of exhibits both
10 sides have submitted to you.
11 THE COURT: Right. I'm not looking at that
12 argument or anything else right now, but in the plain
13 language of that section, any person claiming to be
14 damaged by any common carrier is subject to the
15 provisions of this chapter. Now, it would seem that,
16 literally, Sprint is a common carrier subject to the
17 provisions of this chapter, and Beehive has claimed to be
18 damaged by that person. I don't know that -- if you just
19 are going to take the literal meaning of that, it would
20 seem that it could be argued that any complaint against
21 Sprint could be brought at the FCC. So it's referring to
22 a common carrier subject to the provisions of this
23 chapter.
24 MR. SMITH: All I can say, Your Honor, is that
25 the FCC, which has the primary jurisdiction to construe

1 provisions of the Telecommunications Act, has read this
2 to mean that when you're suing someone like Sprint as a
3 customer, it doesn't apply.
4 THE COURT: I don't know how they get around
5 the literal meaning of that language, I don't, but maybe
6 they do, as a matter of practical meaning.
7 MR. SMITH: I'm not privy to the minds at the
8 FCC, Your Honor. Actually, in this respect, I'm more or
9 less relying upon our FCC counsel's input and the
10 argument from the Nextel counsel, which is in the book of
11 exhibits, which argument was made to the FCC.
12 But, again, moving to a third point, Your
13 Honor, it does say, again, looking at the text, if we're
14 going to rely more literally on the language of the text,
15 any person claiming to be damaged --
16 THE COURT: That's a good place to start.
17 MR. SMITH: -- damaged may be sued for the
18 recovery of damages. And, again, pointing to the
19 informal Complaint that Mr. Lukas filed for Beehive at
20 the FCC, he was very, very clear. He said: I'm not
21 asking for damages. I know you can't hear that. I know
22 that from your precedents, FCC. You eschew any
23 jurisdiction as far as that is concerned, and so my suit
24 is not for damages, it is for declaratory relief on this
25 self-help remedy we're pursuing.

1 THE COURT: Mr. Smith, though, wouldn't you
2 agree that Beehive was claiming to have been damaged by
3 Sprint's self-help practices?
4 MR. SMITH: But it didn't seek damages as a
5 remedy.
6 THE COURT: Where does it say in that language
7 that you have to bring the suit for recovery of damages
8 before the FCC?
9 MR. SMITH: May bring suit for the recovery of
10 damages. I'm reading that clause in conjunction with --
11 THE COURT: But that's after the "or." "Any
12 person claiming to be damaged by a common carrier may
13 either make complaint to the commission as hereinafter
14 provided for or --" now we're into Court, my Court -- "or
15 may bring suit for the recovery of the damages for which
16 such common carrier may be liable in United States
17 District Court."
18 I don't see where the first half of that
19 requires it to be a suit or a Complaint seeking the
20 recovery of money damages.
21 MR. SMITH: Well, my response to that is
22 three-fold. Your Honor.
23 THE COURT: Okay.
24 MR. SMITH: One. There is some textual support
25 for the argument, and, at best, it may be ambiguous.

1 Two.

2 THE COURT: Where is the support?

3 MR. SMITH: It says damaged and damages

4 twice.

5 THE COURT: But you wouldn't expect a person to

6 be bringing a Complaint if the person didn't feel the

7 person was damaged. Why else would you make a complaint

8 of any kind, anywhere, from when you were a little kid

9 before your mother? You know, "My brother hit me."

10 You don't complain unless you feel you've been

11 injured or damaged. Isn't that fair?

12 MR. SMITH: Well, I go back to the homely

13 hypothetical that I gave in our responsive pleading on

14 this motion, Your Honor. Let's say that Sprint had just

15 squatted in our back yard and set up a tent and was

16 selling squares, you know, on our property, which, in a

17 sense, Beehive would claim is what is happening here.

18 Now, there's a trespass there. They are using our

19 property. They are generating revenue off of our

20 property. They are not paying us rent. We are certainly

21 damaged by that trespass. We are losing the opportunity,

22 possibility of what we can do in our own back yard.

23 THE COURT: Fair enough.

24 MR. SMITH: What are our remedies? Well, I can

25 sue them for damages based on a trespass claim, or I can

1 sue for ejectment, which doesn't involve any money, or I
2 can call the police and say that there's an unlawful act
3 occurring in my back yard, and I would like you, as an
4 officer of the state, to take care of it.
5 In a sense, what Beehive did, when it went to
6 the FCC, was to exercise the third of those alternatives.
7 FCC -- the second or third -- you're the policeman here.
8 You made rulings at least four times now --
9 THE COURT: I understand that, but we're
10 getting far away from -- you said you had a three-fold
11 response to my question. The first one was that there
12 was textual support, and you said no matter how
13 ambiguous. And we were into the middle of that. Let's
14 go on to the second one.
15 MR. SMITH: Good encouragement, Your Honor. I
16 appreciate that.
17 THE COURT: Okay.
18 MR. SMITH: The second one is that the cases,
19 so far as I have read them, and I'm relying mainly on the
20 two District Court cases which are cited in the Digital
21 case from the Second Circuit, have made this distinction
22 between the initial Complaint at the FCC for declaratory
23 relief and the damages Complaint, with the former not
24 constituting an election. And the FCC, as well, has read
25 its own statute this way, and we have put what the FCC

1 said in our footnote in our brief. And so the second
2 reasoning is, however we wrestle together here with this
3 whole thing between counsel and the Court as far as what
4 the statutory language, what the textual meaning may be,
5 there is judicial precedent which reads this the way that
6 Beehive suggests. And there is FCC precedent which
7 construes the statute to mean what Beehive says.
8 And the third reason, Your Honor, is, and we
9 first made the point in our brief, and that is that it's
10 clear that the FCC will not take jurisdiction on claims
11 for damages of this sort.
12 And so, knowing that and realizing that is a
13 futile endeavor, Beehive's counsel carefully crafted its
14 informal Complaint to disclaim this kind of relief. It
15 says that if you're not giving me declaratory relief, I
16 don't want any damages, then that's all I'm interested
17 in. In fact, I know that's all I can be interested in
18 because of precedents. There can't be any kind of a
19 meaningful election unless Beehive gets the relief for
20 damages that it's now seeking in this Court.
21 If you dismiss this Complaint, we're going to
22 go back there, and we'll file a formal Complaint, and
23 they are going to rule they don't have jurisdiction. And
24 you're going to have that TelePacific case all over
25 again. They'll say we already ruled on this point. We

1 told District Courts that, you know, you can't get
2 damages here. We don't have jurisdiction for that here.
3 Go back.
4 And then we'll be back here. In the meantime,
5 however, time will be lost and possibly, as in the TON
6 case, Sprint will argue that sometime the Statute of
7 Limitations defense now has intervened in the case, and
8 Beehive will be prejudiced all because it's being forced
9 to make a meaningless election that the statute, as
10 construed by the FCC for a long, long time now, has never
11 contemplated.
12 And it's the futility and nonsensical part of
13 that that really strikes at the heart of this. If it's
14 an election-of-remedies type statute, then, per force,
15 you have to have a meaningful election in front of you.
16 Beehive knew it didn't have a meaningful election in
17 terms of the damages remedy. That's why it said in its
18 correspondence to the FCC that it wasn't seeking damages.
19 THE COURT: Okay. I understand that.
20 MR. SMITH: Thank you, Your Honor.
21 THE COURT: Thank you.
22 MR. SMITH: Appreciate the time.
23 THE COURT: I appreciate your argument.
24 Mr. Goldman, tell me --
25 Were you planning on saying anything?

1 MR. GUELKER: I was not, Your Honor.
2 THE COURT: Okay. Thanks, Mr. Guelker.
3 Mr. Goldman, tell me how you respond to the
4 wrong name argument. They said they brought a Complaint
5 against Nextel, not Sprint.
6 MR. GOLDMAN: That's right. They did. And
7 after Sprint raised that in its letter back to the FCC,
8 Beehive continued to argue that there was jurisdiction.
9 That's in its reply letter, which is Exhibit 3 to our
10 filing. So, Beehive's position apparently was that the
11 FCC still had jurisdiction over the issues before it,
12 which could only have been issues concerning Sprint
13 because that was the party involved, despite the issue of
14 the wrong name.
15 And as this Court knows, there's lots of issues
16 where a party sues a party with the wrong name. It's
17 amended later. And the FCC has done exactly the same
18 thing. In fact, in one of the cases that they cite --
19 it's the Long Distance U.S.A. case involving some similar
20 tariff issues -- the FCC said the Complaint sued the
21 children's subsidiaries but it provided sufficient
22 information to allow the parents to respond and therefore
23 the FCC was going to continue with the Complaint. Now,
24 we argue --
25 THE COURT: Is your argument a sort of a waiver

1 one?

2 MR. GOLDMAN: Our argument is, yeah, a sort of

3 waiver one, and, effectively, that the likelihood is or

4 that there's a reasonable likelihood the FCC would have

5 continued with this and would have considered it to be an

6 action against Sprint, and that's effectively what

7 Beehive was arguing to the FCC, and that's what the FCC

8 has done in the past.

9 Now, to hold otherwise, to argue that, to hold

10 that on the name issue that they are relieved of their --

11 of the problems caused by Section 207 causes some

12 significant issues because what it allows parties to do

13 is exactly what they did here -- whether they did it

14 deliberately or not, I don't know -- but sue somebody

15 with the wrong name. Then the other party responds, and

16 it looks like the FCC may go the wrong way. They make

17 their best arguments but don't say anything about the

18 name issue, and if they are successful, like the FCC did

19 in the Long Distance U.S.A. case, would allow the case to

20 continue and rule with them on the merits.

21 If it looks like they are in trouble they say:

22 Hey, we accidently sued the wrong party, and we sued

23 somebody else in District Court.

24 The issues are the same in the two cases. If

25 you look at the liability questions, they are exactly the

1 same. Much of the language is word-for-word the same in
2 the Complaint at the FCC and their Complaint here, and I
3 don't think their mistake, deliberate or inadvertent,
4 should get them out of their election before the FCC.
5 Just want to make a couple other quick points.
6 They say their letter disclaimed damages. That may be
7 so, but they claimed that the FCC had jurisdiction over
8 the Complaint, as read, and as Your Honor points out in
9 the language that the issue is, did they bring a
10 Complaint at the FCC? They did. It's on the same basic
11 issues. Whether or not it is one not for damages, that's
12 sufficient to cause the bar of 207 to apply.
13 They say, secondly, Section 207 didn't apply
14 because Sprint was a customer. Your Honor has pointed
15 out some questions about that argument as a matter of
16 statutory language. I'm not going to say that we agree
17 with that. We argued at the FCC differently. We argued
18 that the FCC only has jurisdiction over suits against
19 carriers in their function as carriers.
20 But Beehive argued otherwise. Beehive argued
21 that there was jurisdiction over this suit as brought.
22 And that included in its reply to Sprint's argument, and
23 again, this is Exhibit 3, and it said: With respect to
24 jurisdiction, the commission has held that it has
25 jurisdiction to implement the requirement of Section 201

1 B.

2 THE COURT: Slow down while you're reading.

3 MR. GOLDMAN: Sorry. The commission also takes

4 an expansive view of its jurisdiction under 201 B to

5 prevent unjust and unreasonable practices --

6 THE COURT: You are not showing down.

7 MR. GOLDMAN: The commission also takes an

8 expansive view of its jurisdiction under Section 201 B to

9 prevent unjust and unreasonable practices by carriers in

10 connection with their communication services.

11 They go on to say: The breadth of this

12 commission's Section 201 B jurisdiction clearly reaches a

13 carrier's practices as an interstate access service

14 customer.

15 So that was their view in their reply brief.

16 And, again, the FCC didn't rule on that, and our only

17 point is, they need to continue that pursued at the FCC.

18 They can't turn around and disclaim jurisdiction because

19 they don't think the FCC is going to go in their favor,

20 which is effectively what they are doing here.

21 Beehive says it goes back to the FCC, the FCC

22 is going the say it has no jurisdiction. We agree with

23 that, but that's not what Beehive told the FCC in its

24 reply brief, and our point is, it's got to pursue its --

25 once it's elected its remedy, it's got to pursue its

1 remedy there and see what happens.
2 THE COURT: Okay.
3 Mr. Smith, is there anything you want to say in
4 response to that rejoinder?
5 MR. SMITH: Yes. I'd like to clarify, if I
6 may, Your Honor. I think that Mr. Goldman misspeaks when
7 he says that we argued that the FCC had jurisdiction over
8 this matter, implying that this matter means what is now
9 before Your Honor. It's clear, I think, if you read
10 Mr. Lukas's letters, because he is an experienced
11 practitioner, he knows the consequences of this kind of
12 an argument in view of Section 207, he took pains to
13 distinguish his jurisdictional arguments in a way that
14 Mr. Goldman has not fairly presented to the Court, in my
15 view.
16 Jurisdiction over the unjust practice claim
17 under Section 201 is not the same as jurisdiction over a
18 damages claim against a customer since Nextel or Sprint
19 was a customer in its capacity in that relation
20 at that time.
21 So, when Sprint is quoting to you what
22 Beehive's position was if front of the FCC, it's not
23 making that essential distinction, and I think that is an
24 essential distinction that needs to be kept in mind.
25 Beehive was arguing for jurisdiction which it believed

1 the commission clearly had on the 201 B issue. It was --
2 made pains to distinguish that jurisdiction from Section
3 207 implications of a damages claim, something it knew
4 the commission didn't have jurisdiction to do. It said
5 so in correspondence to the commission, and it eschewed
6 that belief expressly in its correspondence.
7 The only other comment I would make, Your
8 Honor, is this. And that's a practical suggestion to the
9 Court, depending on -- and I'm not predicting the outcome
10 on this motion. I know Your Honor can do a number of
11 different things. Our -- we, first of all, of course,
12 would want the Court to deny and overrule the motion, but
13 if the Court grants the motion, believing that some kind
14 of an election that matters here needs to be taken into
15 account, then we would suggest a couple of things.
16 One. The thought occurs to me, Your Honor,
17 that there may be diversity jurisdiction in this case,
18 even though there may not be federal question
19 jurisdiction in the event of this election, and I would
20 like the opportunity, with leave of the Court, as is
21 often done in cases of dismissal, to review that. I'm
22 not expressing an opinion on it. I don't know the
23 answer. But I would want an opportunity to review that
24 and file an amended Complaint if there were diversity
25 jurisdiction.

1 Second. In any case, I think it may be
2 appropriate for the Court, rather than to dismiss the
3 matter, to follow the same kind of or a similar kind of
4 procedure as was adopted by the District Court in the
5 TelePacific case, which is to hold this in abeyance, with
6 a referral to the FCC to get clarification from the FCC
7 on any jurisdictional point or construction of its
8 Section 207, and if, as in TelePacific, the Court affirms
9 and says, "Yes, I have jurisdiction," to send it back and
10 have the matter removed here.
11 Those are just my procedural, practical
12 suggestions, Your Honor. Thank you.
13 THE COURT: Just on that point, if I were to
14 grant the motion to dismiss, what would happen to the
15 case that's before me here? Wouldn't their counterclaim
16 still be alive?
17 MR. SMITH: I suppose, Your Honor -- and that's
18 actually part of the argument we made in our responsive
19 brief, that insofar as this election statute is designed
20 to economize and streamline litigation and to avoid
21 duplicative and possibly consistent litigation, the
22 dismissal of Beehive's Complaint actually works against
23 that purpose.
24 THE COURT: What do you say to that? What
25 would happen to your counterclaim if I were to grant your

1 motion to dismiss?

2 MR. GOLDMAN: I think Your Honor is right. Our

3 counterclaims are alive. That's a consequence of two

4 things; one, the statute, and, secondly, the fact that

5 they ended up suing here, and that's where we brought our

6 counterclaims, and once we brought our counterclaims

7 here, because of 207, we can't bring them at the FCC. So

8 we're sort of stuck where we are with respect to those.

9 THE COURT: All right. Thank you. I am

10 inclined to grant the motion. I cannot find any textual

11 support or any binding persuasive cases from other --

12 there's no binding precedent from the Tenth Circuit or

13 the Supreme Court. I just can't read the statute, the

14 Section 207 language, in any way other than, under these

15 circumstances as presently exist, precluding the filing

16 of this action by Beehive in this Court.

17 I'm not persuaded by the argument that there

18 were efforts made by Beehive before the FCC to point out

19 that it was not making a damages claim, but it was a

20 party claiming to be damaged by a common carrier. Nor do

21 I find there to be any merit to the argument that they

22 admittedly sued the wrong party. Sprint, the right

23 party, the party that was intended to be sued, certainly

24 got notice of the Complaint, responded to it, and the

25 battle lines were formed and led to a ruling by the FCC

1 on the informal Complaint, inviting Beehive to take the
2 next step and go to a formal Complaint.
3 And that's where things stand in the FCC and,
4 as a matter of statutory construction, that's how I'm
5 inclined to rule. I'm going to issue a written opinion.
6 I came to the bench inclined that way, but, as I
7 instructed my law clerk, let's hold off until we hear
8 oral arguments because I can sometimes be persuaded the
9 other way. I wasn't today. I think the text is what it
10 is.
11 As a practical matter, I think it's too bad
12 because I think what Mr. Smith said at the end there is
13 true. It's not economizing. It's going to complicate
14 things, especially if Sprint continues to persist in
15 persuing and prosecuting its counterclaim, which frames
16 the same issues, that their self-help is okay and that
17 you guys are involved in, both of you, your clients, in
18 this traffic -- what do you call it?
19 MR. GOLDMAN: Traffic pumping.
20 THE COURT: Traffic pumping and all of that. I
21 think by this ruling I'm mooting the motion for partial
22 summary judgment. That same argument might be made in
23 the context of their counterclaim. I don't know. But I
24 think, under the present circumstances, it wouldn't be
25 appropriate to hear argument on the motion for partial

1 summary judgment by a plaintiff when the plaintiff has
2 been dismissed. Does that make sense?
3 MR. SMITH: The logic of Your Honor's ruling is
4 unimpeachable.
5 THE COURT: So I'm not ruling on -- and I'm
6 going to issue a short written decision. It's going to
7 be primarily based on the text of the section. I think
8 it means what it says. You get the salad bar or the soup
9 bar, and if you choose the salad bar, and if you regret
10 it after a couple of pieces of lettuce, you're stuck.
11 That's the choice you made. And I'm not ruling on the
12 jurisdiction issue.
13 I will say this. I'm inclined to agree with
14 Mr. Smith on the issue -- on that issue if the FCC
15 claims -- or decides that it does not have jurisdiction,
16 but I don't want to rule on that now because it's not
17 before me. I don't have that before me now.
18 The record that I have is not in dispute, that
19 the FCC has never found that it did not have
20 jurisdiction. They haven't ruled on that, so why should
21 I? And that's the only reason, the little thin reed that
22 makes me feel that, under this technicality, I've got to
23 grant the motion to dismiss. And -- but since the whole
24 case -- the rest of the case is still here and Beehive is
25 still before me, if there's some procedural mechanism

1 that would allow us to address that issue in the event
2 the FCC decides it doesn't have jurisdiction, I don't
3 think that's as easy a question to answer as you all
4 maybe seem to think.
5 I think, as I said earlier in exploration of
6 one or the two of you, the language seems pretty plain to
7 me on its face, and if we're holding Congress to what it
8 writes, it could be argued that Beehive was damaged by a
9 common carrier subject to the provisions of this chapter,
10 literally, and -- but you don't have to sue them in their
11 capacity as a common carrier.
12 I don't know. That's a tougher question. It
13 is. I think the temptation by the FCC is always going to
14 be, well, that has to be a suit based on your common
15 carrier status, but I don't know that that comports with
16 the literal language, and a Court hasn't ruled on that
17 yet, a Court of Law, as opposed to the FCC.
18 Now, that is a trickier issue. I'm not going
19 to tackle it until it's ripe. It may never be ripe.
20 Since the FCC itself has said, "We will entertain a
21 formal Complaint," it's ambiguous to me that they think
22 they don't have jurisdiction. Why would they say to
23 bring in a formal Complaint if it was so apparent that
24 they didn't have jurisdiction? It's one aspect of this
25 case that I've found curious. They are not acting like

1 they don't have jurisdiction.
2 So, they are like the restaurateur saying,
3 "Come on back to the salad bar. It's still open." I
4 don't know. So I'll issue something. It will be fairly
5 brief, three or four pages, giving you something a little
6 more concrete from which you can take an appeal if you
7 feel an appeal is necessary on this issue. I'm just
8 doing the best I can to read the statute, and that's what
9 this comes down to, a pure job of statutory construction
10 and, under the present facts, I just can't see a result
11 other than this one.
12 Mr. Smith?
13 MR. SMITH: Is it fair to assume, Your Honor,
14 that you will address the other questions, practical
15 questions about leave to amend and the like?
16 THE COURT: Oh, I see.
17 MR. SMITH: In your written ruling? And one
18 further thought, along the same lines, again, just in the
19 interest of expedition, I'm sure that Beehive would
20 consider an appeal, but it would, of course, be, under
21 the circumstances, an interlocutory and we would need
22 some kind of a certification.
23 THE COURT: Yeah. I will have to -- I'll have
24 to look at that if you make that request. I'd be
25 surprised if the Circuit would be inclined to accept an

1 interlocutory review even if I certified it. They don't
2 like extra work anymore than you do.
3 MR. SMITH: But we have such a compelling
4 argument, Your Honor, and it is such a distinct set of
5 facts, you have to admit, they might entertain it in any
6 event.
7 THE COURT: I don't know. On the other
8 question, I don't see how you're going to get
9 jurisdiction under diversity if you don't have subject
10 matter. I just don't see how this language is going to
11 allow you to come in here through a different door.
12 You're still a person claiming -- in my view, claiming to
13 be damaged by a common carrier, subject to the provisions
14 of the chapter, and you elected, your client elected to
15 file a Complaint with the commission. How that party can
16 then say that, well, I'm diverse with Sprint out in Utah.
17 I'm going to file a diversity action.
18 I'll let you make that argument. I'm not going
19 to foreclose it, but as I sit here, I can't see how
20 that's going to change my interpretation of this statute,
21 which bars you from being here.
22 MR. SMITH: It suppose it would depend upon
23 whether there is any case law which looks at alternate
24 bases for federal jurisdiction, and, in view of those,
25 whether this election provision somehow cuts off --

1 THE COURT: Loses its prohibitory --
2 MR. SMITH: I don't know the answer to that, I
3 confess, Your Honor.
4 THE COURT: That's why I'd let you do it. I've
5 got to say, it seems like a waste of time to me, but it
6 seems like Congress -- this isn't a regulation by the
7 FCC. This is congressional language.
8 MR. SMITH: It's not a waste of time because
9 it's a scientific experiment, and I will learn something
10 one way or the other which will add to my store of
11 knowledge, and if you don't hear back from us, Your
12 Honor, you will know how we came out on our research.
13 THE COURT: It's the final clause of the
14 Section which makes me think you're not going to find
15 anything helpful. But such person shall not have the
16 right to pursue both such remedies, period. And you are
17 here bringing suit for the recovery of damages. And
18 there you sought a declaration from the FCC that embodies
19 the same issues. So go ahead. You have the right. I'll
20 give you an opportunity to raise a --
21 MR. SMITH: Thank you, Your Honor.
22 THE COURT: And what it would be is a motion
23 for leave to file an Amended Complaint, seeking different
24 jurisdictional -- asserting a different jurisdictional
25 basis. If you decide to do that, let me give you a

1 deadline of 15 days.
2 MR. SMITH: Thank you, Your Honor.
3 THE COURT: Fair enough?
4 MR. SMITH: Fair enough.
5 THE COURT: Okay. Today is the -- what is it
6 the 6th or 7th or something?
7 MR. SMITH: Today is the 6th.
8 THE COURT: The 6th. Let's say the 21st. File
9 that motion and support for it within 15 days.
10 MR. SMITH: Thank you, Your Honor.
11 THE COURT: So by the 21st. If you haven't
12 done it by then, we'll assume it isn't forthcoming.
13 MR. SMITH: Understood. Thank you.
14 MR. GOLDMAN: Your Honor, can I raise one
15 thing? And I hesitate to do this, having prevailed on
16 the motion to dismiss, but with respect to the summary
17 judgment motion, I don't know whether Beehive is seeking
18 summary judgment with respect to Sprint's counterclaims
19 or not, as you've indicated, but to the extent they are,
20 I've actually obviously flown out here, and I don't know
21 if they are going to say that they are -- still are
22 seeking it, but I just want to make sure that if they
23 are, I guess, from my prospective, now would be a good
24 time to argue it but not great.
25 THE COURT: What do you say to that?

1 MR. SMITH: That's a good catch. Thank you.
2 And he would want to make his trip as worthwhile as
3 possible. Your Honor, the way I could see the motion for
4 partial summary judgment was this way. First and
5 foremost, we would want it relief on the Complaint, which
6 Your Honor has now dismissed and mooted. And, second,
7 insofar as their counterclaim extended to the August,
8 2007-going-forward period, naturally the argument we make
9 has some implications.
10 I think I'm not sure what they are about in
11 their counterclaim, if their counterclaim seeks damages
12 for the pre-August, 2007 period, and, to that extent,
13 it's probably off the table at this juncture.
14 MR. GOLDMAN: I think the answer would be our
15 counterclaim, some of them, they are not limited in that
16 way, the damages we seek are limited in that way because
17 that's what we -- that's the amount that we paid out,
18 but --
19 MR. SMITH: But no money has been paid since
20 August of 2007, and so --
21 THE COURT: Well, this is up to you. If you
22 want to take a look at it and decide whether you want to
23 renew it as a motion for summary judgment on their
24 counterclaim, if you want to take some time to consider
25 that, tell me.

1 MR. SMITH: I think that's probably a good way
2 to proceed, Your Honor, because this does put us in a bit
3 of limbo, and my recommendation is to just leave the
4 matter and take it off the table or to table the motion,
5 if you will --
6 THE COURT: Yes.
7 MR. SMITH: -- to use a metaphor.
8 THE COURT: Okay.
9 MR. SMITH: And if we deem it appropriate,
10 we can renew it at a later time. Thank you.
11 THE COURT: I think, in light of the fact that
12 your motion to dismiss was just granted, I'll let
13 Mr. Smith do what he wants with his own motion, which has
14 been mooted as an obvious practical consequence of my
15 ruling on the motion to dismiss. So I'm going to let him
16 do what he wants with it. For all I knew, when I
17 contemplated taking the bench today, I thought, well, if
18 I grant the motion to dismiss -- I'm not sure I will, but
19 if I do, then I wonder if there will be argument on the
20 motion for partial summary judgment, if they will want
21 it.
22 And then I thought, well, maybe it doesn't
23 completely overlap. I don't know. And I didn't study
24 the counterclaims like I did the motion for partial
25 summary judgment. And then I also contemplated the

1 possiblity that now that I've sent you back --
2 essentially sent you back to the FCC, that you may want
3 to suspend your counterclaim and take your chances at the
4 FCC. I don't know. You know, those are strategy issues
5 that I anticipated both sides might want to consider. If
6 you're still insisting that they don't have jurisdiction
7 at the FCC, interestingly enough, that may end up hurting
8 you now in light of my preliminary indication to believe
9 that the FCC -- my preliminary feeling that is if the FCC
10 says it doesn't have jurisdiction over that matter that
11 was started with the informal Complaint that is now
12 morphed into a formal Complaint, I would be inclined --
13 I'm not ruling on it -- I would be inclined to say
14 Beehive is back in properly in this Court in its
15 Complaint and sort of resurrect its Complaint.
16 I don't know. You might want to think about
17 that, what that -- I don't know if you can change
18 positions at the FCC, if it puts you in an awkward spot.
19 Given all that, I thought the chances of you wanting to
20 go ahead and change the motion for partial summary
21 judgment on your Complaint to a motion for summary
22 judgment on the counterclaim, I thought was probably not
23 likely to happen.
24 I've read it and am ready to hear argument if
25 you want, but let me say, it's up to you if you want to

1 refile your motion for partial summary judgement. This
2 thing did not help anything or it may help a great deal,
3 and I'm hesitant to say this and maybe I shouldn't, but I
4 did not have a strong inclination on the motion for
5 partial summary judgment, because, quite frankly, it's
6 complicated, and legally it's complicated as well as
7 factually, and whether he took a state partner under
8 NECA, or whatever you call it, entitles you to partial
9 summary judgment, I was really looking forward, frankly,
10 to hearing your oral arguments on that.
11 My inclination was that it was probably not a
12 matter that was -- that was appropriate for summary
13 judgment. My sense was there were too many disputed
14 issues of fact. But I'm not -- I'm not at all certain
15 about that, so that was one that was very much up in the
16 air, but my slight inclination in talking about
17 preponderance, I was, when I came to the bench, thinking
18 I was inclined not to grant the motion for partial
19 summary judgment. Fortunately or unfortunately, the
20 thing looked to me more likely than not to be headed for
21 trial. I don't know. I just say that by way of whatever
22 it's worth because I can clearly change my mind on that
23 one, and I'm sure your arguments will help me.
24 But if you renew it and see that -- if they are
25 deciding to move forward with all due haste with their

1 counterclaim, we will see where we are.
2 I'll get a written ruling out on this. So I
3 haven't ruled finally on the motion to dismiss, let's put
4 it that way, until I get the ruling out. And that should
5 help you because you've got a 15-day window to file
6 something to amend your -- to amend your Complaint.
7 Here's one little procedural problem I have,
8 though. If I grant this motion to dismiss, your
9 Complaint is dismissed, but you're still before the Court
10 as a counterclaim defendant. If the FCC decides they do
11 not have jurisdiction, and if I decided that that means
12 that you're entitled to be in here on your original
13 Complaint, procedurally, can that allow Beehive to be
14 back in here as a plaintiff?
15 MR. GOLDMAN: I think they would have to
16 refile, and there may be a way to consolidate at that
17 point.
18 THE COURT: Well, that may be the way to do it,
19 and you wouldn't resist a consolidation?
20 MR. GOLDMAN: No. We wouldn't resist
21 consolidation.
22 THE COURT: And that's probably -- well,
23 whether you like it or not, you would be back before me
24 so that you wouldn't be litigating your Complaint with
25 another Judge in this district and responding to a

1 counterclaim before me in this Court. So I think that's
2 probably the way it would have to work.
3 You did a very nice job. By the way, I thought
4 your briefing was excellent, both sides. I don't know
5 who writes your briefs. Do you do your own?
6 MR. SMITH: I did, Your Honor.
7 THE COURT: Well, very good job. I thought the
8 briefing was way above average on both sides, so it was
9 illuminating and helpful, and you confused me a lot about
10 that Digital case, but otherwise it was very
11 straightforward and a very good job.
12 Okay. We will see, then, what do you on the
13 motion to amend, and we will see if you renew your motion
14 for summary judgement. Thank you.
15 MR. SMITH: Thank you, Your Honor.
16 MR. GOLDMAN: Thank you, Your Honor.
17 MR. GUELKER: Thank you Judge.
18 THE COURT: We are in recess.
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2 REPORTER'S CERTIFICATE

3 STATE OF UTAH)

4) ss.

5 COUNTY OF SALT LAKE)

6

7 I, REBECCA JANKE, do hereby certify that I am a

8 Certified Court Reporter for the State of Utah;

9 That as such Reporter I attended the hearing of

10 the foregoing matter on October 6, 2009, and thereat

11 reported in Stenotype all of the testimony and

12 proceedings had, and caused said notes to be transcribed

13 into typewriting, and the foregoing pages numbered 1

14 through 48 constitute a full, true and correct record of

15 the proceedings transcribed.

16 That I am not of kin to any of the parties and

17 have no interest in the outcome of the matter;

18 And hereby set my hand and seal this 2nd day of

19 March, 2010.

20

21

22

23

24

25 REBECCA JANKE, CSR, RPR, RMR