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

In the Matter of Sprint Communications Company LP Application for Review of the Tekstar Communications, Inc. Tariff	)))))))	WC Docket No. 10-226

COMMENTS OF AT&T CORP.

Pursuant to the Commission's *Notice*,[1] AT&T respectfully submits these Comments in support the Application For Review filed by Sprint Communications Company, LP ("Sprint")[2] seeking review and reversal of the October 6, 2010 Public Notice released by the Wireline Competition Bureau ("Bureau"),[3] in which the Bureau declined to reject or suspend the facially unlawful access tariff filed by Tekstar Communications, Inc. ("Tekstar").[4]

INTRODUCTION AND SUMMARY

Tekstar is one of the nation's largest operators of traffic pumping schemes, which the Commission has recognized are mere "arbitrage" schemes that "ultimately cost[s] consumers money."[5] Pursuant to these schemes, Tekstar "terminates" hundreds of millions of minutes each

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[1] Public Notice, *Comment Sought on Sprint Communications Company LP Application For Review Of The Tekstar Communications, Inc. Tariff*, WC Docket No. 10-226, DA 10-2196 (rel. Nov. 16, 2010) ("*Notice*").

[2] Application for Review, *Tekstar, Transmittal No. 3, Tariff F.C.C. No. 2*, WC Docket No. 10-226 (Nov. 9, 2010).

[3] Public Notice, *Protested Tariff Transmittals Action Taken*, WCB/Pricing File No. 10-09, DA 10-1917 (rel. Oct. 6, 2010).

[4] Tekstar, Transmittal No. 3, Tariff F.C.C. No. 2 (issued Aug. 17, 2010) ("Tariff No. 2").

[5] Connecting America: The National Broadband Plan, Federal Communications Commission, at 142 ("National Broadband Plan"). In traffic stimulation schemes, a "rural" local exchange carrier, like Tekstar, with high switched access rates premised on low traffic volumes provides

month in the rural areas it supposedly serves, which is far more than even the incumbent local exchange carrier (Qwest) terminates in those areas. These schemes have spawned multiple lawsuits by IXCs against Tekstar, and recent decisions by the Commission and the Iowa Utilities Board ("IUB") have found the type of traffic pumping schemes implemented by other local exchange carriers ("LECs") and also used by Tekstar to be unlawful.

Here, Tekstar has attempted to create its own legal loopholes by writing a new tariff with patently unlawful provisions designed to circumvent the Commission and IUB decisions that otherwise prohibit Tekstar from billing IXCs switched access charges for calls related to its traffic stimulation schemes. This tariff violates numerous provisions of the Communications Act and the Commission's rules.

One of those unlawful provisions is the subject of Sprint's Petition For Review. Sprint's Application correctly points out that Tekstar's Tariff No. 2 contains a cross-references to another tariff in violation of Commission Rule 61.74 (47 C.F.R. § 61.74). The Bureau, however, inexplicably and without addressing any of the legal or factual issues raised by Sprint (or in Tekstar's response to Sprint) issued a summary *Notice* stating that it would permit Tekstar's tariff to take effect. AT&T agrees with Sprint that the Bureau erred and that the Commission should correct that error on review.

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telephone numbers to a calling service provider ("CSP"). The CSP uses those numbers to offer free and low cost calling services (*e.g.*, chat, conference, international calling) that often generate millions calls to those numbers. The LEC bills interexchange carriers ("IXCs") and interconnecting wireless carriers switched access charges for these calls and shares the access revenues with the CSPs under various kick-back arrangements. *See Qwest Commn'cs Corp.* v. *Superior Tel. Coop.*, 2009 WL 3052208 (Iowa Utils. Bd. Sept. 21, 2009); *Qwest Commc'ns Corp.* v. *Farmers & Merchants Mut. Tel. Co.*, 23 FCC Rcd. 1615, ¶¶ 10-25 (2009) ("*Farmers*").

ARGUMENT

There is no legitimate justification for the Bureau to have permitted Tekstar's Tariff No. 2 to take effect, and it provided none. Tekstar's Tariff No. 2 unquestionably contains provisions that violate Commission Rule 61.74 and the Bureau had ample authority to reject or suspend Tekstar's tariff.

1. *Tekstar's Tariff Is Unlawful on Its Face.* Tekstar's Tariff No. 2 is unlawful because it relies on a cross-reference to its local tariffs. The Commission's rules state that "no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument."[6] Tekstar's Tariff No. 2, however, provides that "the term 'subscribes' . . . means to obtain from [Tekstar] local exchange service *under the terms and conditions of [Tekstar's] local exchange tariff*, and to be billed and pay for such services *under any applicable terms governing the payment of the services provided thereunder*."[7] The Commission has routinely rejected tariffs that contain such cross-references, under both Sections 204 and 208 of the Act, 47 U.S.C. §§ 204, 208.[8]

Tekstar claims that "Rule 61.74 is aimed at a reference in a tariff that serves to incorporate and rely upon the *content* of documents other than the tariff," whereas, according to Tekstar, its "reference to its local tariff serves only to qualify the definitions of 'End Users' and

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[6] 47 U.S.C. § 61.74(a).

[7] Tariff No. 2, § 2.6 (emphasis added).

[8] *See, e.g.*, *Bell Atlantic-Delaware Inc.* v. *Global NAPS, Inc.*, 15 FCC Rcd. 5997 (2000) (discussed below); *Southwestern Bell Telephone Co.*, 4 FCC Rcd. 2624 (1988) (finding a reference to another tariff to be a "patent violation of the Commission's Rules"); *Lincoln Telephone and Telegraph*, 78 FCC 2d 1219 (1980) ("Lincoln's simple referencing of the Northwest Bell rate constitutes a violation of Section 61.74. . . . Accordingly, . . . we find rejection to be in order.").

'Customer.'"[9] The rule itself, however, makes no such distinction. Rule 61.74 flatly prohibits any tariff from referring to another tariff; there is no exception for references that "qualify the definitions" (whatever that may mean). Indeed, the Commission's rules contain numerous explicit exceptions to Rule 61.74, none of which applies to the situation here. Thus, where the Commission intended for there to be exceptions to Rule 61.74, it said so, and it purposefully did not allow for the type of exception Tekstar argues for here.

In any event, the cross-reference in Tekstar's tariff does not even fall within the "qualify the definitions" exception Tekstar has advanced. Tekstar contends that Rule 61.74 prohibits only cross-references that incorporate the "content" of other tariffs, and it does not prohibit cross-references to other tariffs that are intended to "qualify" terms in a tariff.[10] But Tekstar's Tariff No. 2 does cross-reference (and indeed, depends on) the "content" of its local exchange tariff. Tekstar's Tariff No. 2 provides that "the term 'subscribes' . . . means to obtain from [Tekstar] local exchange service *under the terms and conditions of [Tekstar's] local exchange tariff*, and to be billed and pay for such services *under any applicable terms governing the payment of the services provided thereunder*."[11] Accordingly, the only way for an access purchaser to know if an entity meets the definition of "subscribes" under Tariff No. 2 is to determine whether that entity is obtaining service "under the terms and conditions" of Tekstar's local exchange tariff and whether it is paying for such services "[u]nder any applicable terms governing the payment for the services provided thereunder." And, the only way to know whether that is true is to actually assess whether that entity is complying with the *content* of Tekstar's local exchange tariff. It is

[9] Reply of Tekstar Communications, Inc., To Petitions To Reject Or in The Alternative Suspend And Investigate, *Tekstar Communications, Inc. FCC Tariff No. 2, Transmittal No.* 3, at i, 1-2 (Sep. 29, 2010) ("Tekstar Opposition").

[10] *Id.*

[11] Tariff No. 2, § 2.6 (emphasis added).

impossible to determine whether an entity is a "subscriber" under Tekstar's Tariff No. 2 without making reference to the content and substance of Tekstar's local exchange tariffs.

The Commission and the D.C. Circuit have found tariffs with cross-references that are indistinguishable from those at issue here to be unlawful under Rule 61.74. For example, in *Global NAPs, Inc.* v. *FCC*, 247 F.3d, 252 (D.C. Cir. 2001), Global NAPs filed a federal tariff that referenced an "interconnection agreement."[12] The "application of the tariff [wa]s contingent upon whether [Global NAPs] was paid 'under the terms of [that] interconnection agreement.'"[13] As the D.C. Circuit explained, however, a tariff "on its face, violates the FCC's rule [61.74]" if "[a]ny reasonable construction of the tariff's language would require a customer to consult the [cross-referenced document] to determine whether the tariff applied,"[14] and held that the tariff violated the rule. Here too, whether an entity "subscribes" to a service, thereby making Tekstar's Tariff No. 2 applicable, turns on whether that entity "obtain[s] from [Tekstar] local exchange service under the terms and conditions of [Tekstar's] local exchange tariff, and [is] billed and pay[s] for such service under any applicable terms governing the payment for the services provided thereunder."[15] In both cases, a putative customer must look to the cross-referenced document to determine whether the tariff is applicable, and thus Tekstar's tariff, like the tariff at issue in *Global NAPs,* is patently unlawful under Rule 61.74.[16]

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[12] *Global NAPs,* 247 F.3d at 258.

[13] *Id.*

[14] *Id.*

[15] Tariff No. 2, § 2.6.

[16] For these reasons, there is clearly no merit to Tekstar's attempt to distinguish *Global NAPs* on the grounds that it was "based on entirely distinct facts and the tariff was ruled unlawful for fundamentally distinct reasons than those present here." Tekstar Opposition at 6. Tekstar's only other argument is that some other carriers also have filed tariffs with cross-references. Even if other carriers had filed tariffs that violate Rule 61.74, that is no justification for Tekstar's violation of the rule.

2. *The Commission Should Reverse the Bureau's Decision.* The Bureau's failure to reject or suspend Tekstar's tariff is contrary to the public interest. As explained above, Tekstar's tariff is designed to evade the Commission's ruling in *Farmers*, but the Bureau's decision allows a tariff to go into effect that violates Commission rules, facilitates traffic stimulation schemes, and contravenes fundamental principles that tariffs should provide clear and unambiguous guidance to putative customers so that they understand when the tariff applies. The Bureau's non-action also signals to other carriers engaged in traffic stimulation schemes that the Commission will allows tariffs like these, which are designed to evade the Commission's rulings, to take effect even though they violate the Commission's rules on their face. The Bureau's decision here is even more troubling because it offered no explanation whatsoever for its failure to enforce the Commission's rules.

The Commission and the courts have long recognized that tariffs, like Tekstar's Tariff No. 2, that facially conflict with the Commission's rules are "patent nullities as a matter of substantive law" and should be "rejected" outright,[17] and the Commission and the courts have specifically rejected tariffs that violate Rule 61.74.[18]

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[17] *Capital Network System* v. *FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("The Commission's authority to reject filings extends to those . . . with technical or procedural flaws"). *See also RCA American Communications, Inc.*, 89 FCC 2d 1070, n.12 (1982) ("Failure to comply with prior Commission orders, policies or prescriptions may warrant rejecting a tariff as a patent nullity as a matter of substantive law"); *AT&T Revisions to Tariff FCC Nos. 258 and 267*, 69 FCC 2d 1696, n.2 (1978) ("We may find a tariff revision null and void if, as here, it patently conflicts with the provisions of the Communications Act"); *All American Telephone Company, Inc. Tariff F.C.C. No. 3*, 25 FCC Rcd. 5661, ¶ 4 (2010) (rejecting "tariff revisions [that] violate the Commission's rules requiring tariffs to clearly establish a rate"); *ITT World Communications, Inc.*, 73 FCC 2d 709, n.4 (1979) ("Where the Commission can determine that the tariff is unlawful on its face, it may be rejected without further investigation").

[18] *See, e.g., Global NAPs, Inc.* v. *FCC*, 247 F.3d, 252, 258 (D.C. Cir. 2001); *See, e.g., Global NAPs, Inc.* v. *FCC*, 247 F.3d, 252, 258 (D.C. Cir. 2001); *Bell Atlantic-Delaware Inc.* v. *Global NAPS, Inc.*, 15 FCC Rcd. 5997 (2000); *Southwestern Bell Telephone Co.*, 4 FCC Rcd. 2624 (1988); *Lincoln Telephone and Telegraph*, 78 FCC 2d 1219 (1980).

Further, Section 204 of the Communications Act, 47 U.S.C. § 204, grants the Commission broad authority, on its own initiative or upon request, to suspend and investigate tariff filings that propose rates that are of questionable lawfulness. Suspension and investigation of tariffs is an essential element of the core mandate to ensure just and reasonable rates where highly suspect tariffs that raise substantial questions of lawfulness are filed on a streamlined basis.[19]

CONCLUSION

For the foregoing reasons, the Commission should find that Tekstar's Tariff No. 2 violates Section 61.74 of the Commission's rules and grant the relief sought in Sprint's Application for Review.

Respectfully submitted,

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December 1, 2010

[19] *See, e.g.*, Memorandum Opinion and Order, *July 1, 2004, Annual Access Charge Tariff Filings*, 19 FCC Rcd. 23877, ¶ 7 (2004) ("*NECA Investigation Order*") ("When tariffs . . . are filed pursuant to the 'deemed lawful' provisions of the statute . . . it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates").

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2010, I caused true and correct copies of the foregoing Comments of AT&T Corp. to be served on all parties as shown below.

Dated: December 1, 2010
Washington, D.C.

/s/ Christopher T. Shenk

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