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August 15, 2007

VIA EMAIL

EX PARTE FILING
WC DOCKET NO. 07-135

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Re: Response to AT&T *Ex Parte* Filing in WC Docket No. 07-135:
Establishing Just and Reasonable Rates for Local Exchange Carriers,
and Request for Declaratory Ruling

Dear Chairman Martin and Commissioners:

This letter responds to an *ex parte* filing in the above-captioned docket made by AT&T on July 30, 2007. It is submitted on behalf of six incumbent and competitive local exchange carriers ("LECs") that serve rural markets in Iowa, Minnesota, Utah and other states. These LECs are among many across the country that are currently being harmed by a campaign

of unlawful self-help – the refusal to pay lawfully tariffed access charges – that is being conducted by AT&T and some of the other largest interexchange carriers ("IXCs") in the country. As explained below, we request the Commission's immediate help in the form of a Declaratory Ruling that reiterates the Commission's numerous past rulings that the non-payment of lawfully tariffed access charges violates the Communications Act.

The AT&T letter reiterates the same arguments that AT&T has been making to this Commission for months: rural LECs that have initiated conference calling services are increasing their terminating traffic in ways that AT&T maintains are somehow illegal.

Numerous rural LECs – including several signatories to this letter – have actively worked with the Commission to address needed access charge reform, and have proposed clarifications to the Commission's rules that would eliminate uncertainty and provide widespread guidance to the community of rural carriers.[1] The undersigned rural LECs welcome the opportunity to participate in further rulemaking proceedings that will examine whether further changes to the carrier access rules are necessary.

However, we must also seek the Commission's help in stopping an unlawful practice that has been imposing severe harm on rural LECs for over a year. Specifically, AT&T and other large IXCs have been engaging in unlawful self-help by refusing to pay validly tariffed access charges since last year. The Commission has repeatedly found this practice to be unlawful – including multiple such rulings specifically against AT&T. AT&T's repeated resort to unlawful self-help constitutes regulatory arbitrage that circumvents the Commission's access charge regulatory regime, and inflicts massive harm on rural carriers. We ask that the Commission put a stop to this patently unlawful conduct by issuing a Declaratory Ruling that reconfirms the Commission's longstanding rules and policies prohibiting self-help.

I. THE CONDUCT OF THE RURAL LECS IS – AND AT ALL TIMES HAS BEEN – LAWFUL UNDER ESTABLISHED COMMISSION PRECEDENT

A. No Regulatory Body Has Ever Recognized Such a Term as "Traffic Pumping" – Developing Methods of Increasing Traffic Is a Common Practice Used by All LECs, Including AT&T

A search for the term "traffic pumping" on the legal research databases yields no results. That is because the term has never been recognized by regulators. Indeed, discovering

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[1] *E.g.*, Letter to the Commissioners, dated June 4, 2007, regarding *Proposal for Clarification of § 61.39 of the Commission's Rules re Computation of Access Charges*, signed by Interstate 35 Telephone Co.; the Farmers' Telephone Company of Riceville; and Superior Telephone Cooperative.

new ways of generating increased telecom traffic is what telecom carriers do, and what they have always done. We are unaware of any finding by this Commission, or any regulatory commission, that telecom carriers are generating "too much" traffic. Indeed, AT&T's assertions beg the questions:

- When AT&T Mobility entered into an arrangement with American Idol to provide the service that allows viewers to vote for their favorite vocalist by text message or cell phone call, the teaming was described in the media as: "This high volume application will be the first major wireless interactive TV tie-in ever seen in the U.S."[2] Does this constitute an "illegal traffic pumping scheme"? Or is AT&T exploiting a new service application designed to increase both its service and access revenues?

- When AT&T provided the initial funding for ITXC, the leading wholesaler of international IP telephony, did AT&T engage in "illegal traffic pumping?" Or do the Commission's policies support the realization of economies of scale and scope that are inherent in the aggregation, common routing, and standardization of telecom traffic?

- When rural carriers establish call centers and help desks in areas that are desperately seeking to stimulate job growth, is that "illegal traffic pumping"? Or is it a valuable means of bringing jobs to rural communities that need them?

Rural carriers have been facing decreasing revenues for years, due in large part to line loss from declining rural populations, and from competition from cellular telephone providers, including AT&T's CMRS affiliate, AT&T Mobility. Indeed, the Commission incents the dislocation of rural wireline services by CMRS by granting cellular carriers – including AT&T Mobility – Eligible Telecom Carrier status, and providing them with High Cost Universal Service Fund subsidies.[3]

Given the current economic realities of providing service to rural areas, this country's rural carriers have a choice: They can offer new services to generate new telecom revenues, or they can rely on higher USF subsidies. We believe it is in the best interests of the carriers and the American public if rural carriers attempt to generate more traffic, new applications, and more efficient network utilization, in the first instance.

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2 http://findarticles.com/p/articles/mi_m0EIN/is_2003_Jan_17/ai_96551111/print.

3 In a recent filing to the Commission, Embarq estimates that AT&T Mobility's pending request for USF funding would cost the funds as much as $250 million. Embarq 2/15/07 *ex parte* in FCC CC Docket 96-45, p.4.

B. On Three Separate Occasions Over the Last Six Years, the Commission Has Rejected the Same Arguments Against Rural Conference Calling that AT&T Is Repeating Now

In three separate decisions, the Commission rejected AT&T's arguments against relationships between rural LECs and conference/chat providers, which relationships are identical to those cited yet again by AT&T in its July 30 letter. In *AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd 16130 (2001), AT&T filed a Formal Complaint against Jefferson Telephone, which is a rural LEC in Iowa. AT&T argued that Jefferson's fee arrangement with an information service provider violated §§ 201(b) and 202(a) of the Communications Act. The Commission rejected AT&T's arguments, finding that "AT&T has not met its burden of demonstrating that Jefferson's practice here is unjust and unreasonable" under either §§ 201(b) or 202(a) of the Communications Act, and dismissed AT&T's complaint with prejudice. *Id.* at 16136. The Commission repeated this finding the next year in two additional cases: *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002) and *AT&T v. Beehive Telephone Co.*, 17 FCC Rcd 11641 (2002).

In its July 30 letter, AT&T attempts to distinguish these cases by arguing that AT&T's complaints were based on different asserted violations of the Communications Act. Given that these cases involved exactly the same fact pattern that AT&T now complains of – indeed they even involve one of the same LEC parties that AT&T names in its July 30 letter – AT&T cannot be heard to argue that the same conduct that was found lawful in 2001 and 2002 is now unlawful. AT&T is certainly within its rights to seek changes in existing rules and policies, but it cannot make a *prima facie* case that the LECs' conduct is inconsistent with existing law.[4]

C. The Commission Has Repeatedly Declined to Find Revenue Sharing *Per Se* Unlawful – It Is a Common Industry Practice Used by All LECs, Including AT&T

The Commission has expressly approved revenue sharing agreements on numerous occasions. For example, in 1997, the Commission was asked to find that a 32 percent revenue sharing agreement for payphones between Pacific Bell (now AT&T) and the city of Huntington Park, California was unlawful. The Commission refused to do so. *California*

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[4] AT&T's July 30 Letter asks the Commission to issue a declaratory ruling that "Traffic Pumping" and "Kickbacks" are unlawful. Given that AT&T engages in both forms of conduct, AT&T cannot even offer a workable definition of either term. Moreover, as noted above, AT&T cannot cite to any authority that supports its case, because such authority does not exist. The relief requested by AT&T would require the adoption of new rules, and therefore AT&T's request cannot be granted by declaratory ruling.

Payphone Association, Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California, 12 FCC Rcd 14191, 14193, 14207 n. 87 (2004). In addition, in a recent notice and comment proceeding before the Commission, many commenters supported access revenue-sharing arrangements as legal and legitimate, and noted their prevalence in the marketplace. *Access Charge Reform*, 19 FCC Rcd 9108, 9140-41 & nn. 241, 242 (2004). In that proceeding, the Commission declined to find that revenue-sharing agreements between LECs and their customers based on minutes of use or access revenues generated by the customer were unjust or unreasonable. *Id.* at note 257.

These consistent rulings by the Commission reflect the fact that revenue sharing has long been common practice in the industry. Telecom carriers have always shared service revenues, provided free service or given other inducements to entities that generate large volumes of traffic, whether they are hotels, airports, shopping malls, payphone concessions, telemarketing groups, call centers, or any number of other high-volume traffic generators.

As the largest telecom provider in the country, AT&T is one of the largest practitioners – if not the largest – of these revenue sharing arrangements. As just one example, it is now widely reported that AT&T is paying Apple, Inc. a significant portion of its telecom service revenues as the price of obtaining its five-year exclusive iPhone concession. While AT&T has not disclosed the terms of the deal, headlines such as: *"AT&T Probably Kicking Apple Back Some Serious Change as Part of iPhone Revenue Sharing Deal"*[5] and *"Apple Shares Set New Record on AT&T Kickback Speculation"*[6] demonstrate that the existence of AT&T's revenue sharing arrangement with Apple is hardly a secret. There is nothing unlawful or undesirable about this revenue sharing – it reflects a widespread industry practice that has for decades allowed carriers to expand their services and increase their revenues.

AT&T's hypocrisy in this regard would be laughable if it were not imposing so much harm on rural carriers. While AT&T is solidifying its position as the largest telecom carrier in the country and reporting record revenues, AT&T is asking the Commission to effectively deregulate its special access, transit, broadband and other services. At the same time, AT&T is asking this Commission to impose broad new regulations on struggling rural ILECs

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5 Intomobile, http://www.intomobile.com/2007/07/19/att-probably-kicking-apple-back-some-serious-change-as-part-of-revenue-sharing-deal.html (July 19, 2007).

6 MacNews World, http://www.macnewsworld.com/story/58413.html (August 9, 2007). See also, Forbes.com, "AT&T's iPhone Blahs," http://www.forbes.com/2007/07/24/att-iphone-apple-markets-equity-cx_er_0724markets13_print.html (July 24, 2007); macnn, "iPhone Revenue Sharing Deal Exposed?" http://www.macnn.com/print/46050 (July 24, 2007).

and CLECs – regulations that AT&T intends will be designed solely to restrict the rural LECs' ability to increase their business and grow their revenues.

AT&T has every right to seek changes in existing Commission rules and policies, and is free to ask the Commission to overturn prior rulings. However, the precedent discussed above establishes unequivocally that the conduct of the rural LECs in offering conference services is lawful. Yet despite this unequivocal precedent, AT&T is raising meritless arguments to delay collection actions in federal courts. AT&T is abusing the legal and regulatory processes to extend as far as possible its campaign of punishing smaller carriers and competitors by its self-help refusals to pay access charges. As discussed below, long-established Commission precedent, including multiple rulings against AT&T directly, demonstrate that AT&T's actions violate the Communications Act.

II. AT&T'S SELF-HELP REFUSAL TO PAY LAWFULLY TARIFFED ACCESS CHARGES VIOLATES THE COMMUNICATIONS ACT AND REPEATED RULINGS BY THIS COMMISSION

The Commission repeatedly has found that carriers may not engage in "self-help" by withholding payment of access charges. In 1999, the Commission expressly found that AT&T violated section 201(b) of the Communications Act by refusing to pay for access services it obtained from a CLEC. *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999). This is just one of a long line of cases in which the Commission has found that self-help refusals to pay access charges by AT&T and other access service customers violates § 201(b) of the Communications Act.[7] This longstanding Commission policy has been affirmed by the Supreme Court in a very recent decision. *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, No. 05-705, slip op. at 9 (U.S. 2007).[8]

In addition, in 1976, the Commission also found that self-help refusal to pay access charges violates § 203(c) of the Communications Act, which provides that no carrier shall

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7 *E.g., Comunique Telecomms., Inc., Declaratory Ruling and Order, 10 FCC Red 10399, 10405 (1995)* (citing, *e.g., Tel-Central of Jefferson City Missouri, Inc., 4 FCC Rcd. 8338, 8339 (1989)* ("[T]he Commission has recognized that 'the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties . . . .'"); *Business WATS, Inc. v. AT&T Corp., 7 FCC Rcd 7942 (1992)* (finding a customer is not entitled to the self-help measure of withholding payment for tariffed services duly performed, but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper).

8 The *Global Crossing* decision upholds a Commission determination that refusing to pay compensation to payphone providers violates § 201(b) of the Communications Act, and also creates a private right of action against the withholding carrier.

"charge, demand, collect, or receive a greater or less compensation, for such communication [than the tariffed rate]." *MCI Telecommunications Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph* Company, 62 FCC 2d 703, 706-07 (1976).

One month ago, the Wireline Competition Bureau issued a Declaratory Ruling that arose directly out of this pending access dispute between IXCs and the rural LECs. The Bureau ruled that, when the IXCs blocked phone calls to conference bridges served by rural ILECs, they violated § 201(b) of the Communications Act. *Establishing Just and Reasonable Rates for Local Exchange Carriers,* Declaratory Ruling and Order, WC Docket No. 07-135, DA 07-2863 (rel. June 28, 2007). While the focus of that Declaratory Ruling is call blocking, the Bureau made a point of condemning other forms of self-help as well: "We find that carriers that contend that access charges of a LEC are unreasonable should use these mechanisms [tariff oppositions and the § 208 Complaint process] to seek relief and may not engage in self help actions such as call blocking." *Id.* at ¶ 1 (emphasis added).

These rulings by the Commission have been mirrored by state regulatory commissions, which have found AT&T's self-help refusals to pay access charges to violate state communications laws and regulatory policy.[9] This established line of federal and state precedent demonstrates two things:

1. This Commission, and state regulatory commissions, have repeatedly found that self-help refusals to pay access charges are unlawful, and in the case of interstate charges, such conduct violates two different sections of the Communications Act; and

2. AT&T regularly has used self-help refusals to pay access charges as a tactic to bully smaller carriers and competitors for over thirty years, and its unlawful conduct continues to this day.

It is well past time for the Commission to put a stop to this unlawful conduct, and prevent AT&T and other large carriers from engaging in this blatant and unlawful form of regulatory arbitrage.

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[9] *E.g.,* Iowa Utilities Board, *Fibercomm, L.C., et al. v. AT&T Communications of the Midwest, Inc.*, Docket No. FCU-00-3, Final Decision and Order at 11-12 (Oct. 25, 2001); *AT&T Communications of the Midwest v. Iowa Utils. Bd., 687 N.W.2d 554, 562 (Iowa 2004)* ("AT&T cannot institute a challenge to the [tariffed] rate merely by not paying the bill."); Public Utility Commission of Texas, *Complaint of XIT Telecommunications and Technology, Inc. against AT&T Corporation*, P.U.C. Docket No. 22385; SOAH Docket No. 473-00-2224, 2001 Tex. PUC LEXIS 41 (June 1, 2001).

III. THE COMMISSION MUST TAKE ACTION TO SHUT DOWN THE ABUSE OF PROCESS THAT AT&T IS USING TO HARM ITS COMPETITORS

A. The Commission's Numerous Orders Governing Access Charges Created a Regulatory Regime that Was Designed to Resolve Outstanding Issues and Put An End to Unlawful Self-Help

Over the last 10 years, the Commission established an elegant regulatory structure that addressed both IXC complaints that access charges were excessive, and LEC complaints that AT&T and other IXCs were engaging in unlawful self-help by refusing to pay access charges. The Commission established a two-part regulatory structure: 1) Through industry compromise and rate prescription, the Commission established reasonable access rate levels on a nation-wide basis; 2) By clarifying the legality of tariffed rates, the Commission empowered LECs to rely on the Filed Rate Doctrine as an efficient means by which carriers could enforce payment of the lawfully tariffed rates.

The Commission described this structure in its *CLEC Access Charge Order*:

> [A]n IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to the Commission to determine the reasonableness of the rate.[10]

This regulatory structure was designed to be comprehensive, and it worked well for about five years. However, the current dispute over access charges illustrates that AT&T, and other large carriers, have discovered that they can ignore the Commission's rulings with impunity, and inflict significant harm on smaller carriers and competitors without fear of sanction.

B. AT&T's Unlawful Self-Help Circumvents the Commission's Access Charge Regulatory Regime and Imposes Severe Harm On Rural LECs

In Utah, AT&T began withholding access payments from rural LECs as far back as April 2006. In Iowa, AT&T began to withhold access charges from rural LECs in November of 2006. After a period of unsuccessful attempts to negotiate a solution, a group of seven rural LECS filed a collection against AT&T in federal district court in early March 2007. Yet for the last six months, AT&T has been able to forestall these collection actions by filing frivolous lawsuits that argue against rural conference calling and the paying of fees to traffic generators –

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[10] *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923, ¶ 60 (2001) *("CLEC Access Charge Order")* (emphasis added).

the precise activities that this Commission has found to be lawful on multiple occasions. All this time, AT&T has been conducting unlawful self-help – refusing to pay the access charges while ignoring the dispute resolution provisions of the relevant tariffs, and by refusing to seek the appropriate regulatory relief through the tariff review or formal complaint processes. In this way, AT&T has circumvented the Commission's access charge regulatory structure, engaged in the same self-help conduct that the Commission has repeatedly found unlawful, and imposed extensive harm on the rural carriers. This unlawful self-help has now been going on in most cases for 10 months, and in some cases for as long as 17 months.

The Commission must take action to cure this enormous disparity in leverage between large and small carriers, and to deny AT&T the ability benefit from patently unlawful conduct.

C. The Commission Should Issuing a Declaratory Ruling that AT&T's Continuing Self-Help Refusal to Pay Lawfully Tariffed Rates Violates §§ 201(b) and 203(c) of the Communications Act

In the previous sections, we demonstrated that the Commission has repeatedly found unlawful the same type of self-help that AT&T has been practicing against the signatories to this letter and other rural LECs for more than a year. We have also demonstrated that the Commission has repeatedly found that the conduct of the rural carriers – the same conduct of which AT&T now complains – is not unlawful. It is simply unconscionable for the Commission to allow AT&T to continue to benefit from this patently unlawful conduct – the Commission must enforce its own rules and maintain the integrity of the access charge regulatory regime it has put in place.

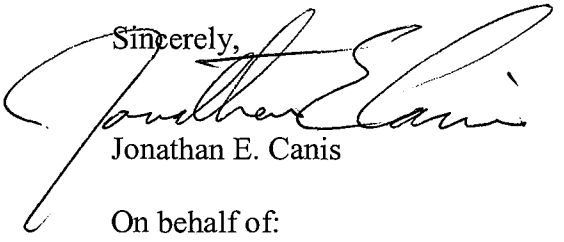
The most effective action the Commission can take to remedy this situation is to issue a Declaratory Ruling that the actions of AT&T and similarly situated IXCs – withholding payment of access charges, while refusing to bring a complaint to the Commission – constitute a violation of §§ 201(b) and 203(c) of the Act. The Declaratory Ruling should further state that, to avoid violating the Act, AT&T and other similarly situated carriers must comply with lawful tariff provisions regarding dispute resolution, must pay lawfully tariffed access charges, and must seek the appropriate relief before the Commission or the relevant state regulator. Finally, the Commission should state that it has made the regulatory structure regarding access charges abundantly clear, and it therefore will not accept referrals from federal courts on the reasonableness of access charges that appear in lawfully filed, effective tariffs.

IV. CONCLUSION

For the foregoing reasons, the Commission should issue a Declaratory Ruling that reiterates the Commission's longstanding orders and policies against unlawful self-help refusals to pay access charges. The Declaratory Ruling should make clear to any interested federal court that, if AT&T or other IXCs claim to have legitimate disputes regarding interstate access charges, the IXCs must pay the charges and pursue relief at the Commission through the available tariff review and formal complaint processes, and that the Commission will not entertain referrals from the courts on the reasonableness of the tariffed rates.

The undersigned carriers are prepared to participate in any rulemaking proceeding involving rural conferencing services and related issues. Thank you for your attention to this matter. Please contact the undersigned if we can provide any further information.

Sincerely,



Jonathan E. Canis

On behalf of:
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Aventure Communications;
The Farmer's Telephone Company of Riceville, Iowa;
Great Lakes Communications Corp.;
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