

In the Matter of)	
)	
AT&T Corp.,)	
)	
Complainant,)	
)	EB Docket No. 14-209
v.)	File No. EB-09-MD-010
)	
All American Telephone Co., e-Pinnacle)	
Communications, Inc., ChaseCom,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 2015

Released: August 21, 2015

By the Commission:

I. INTRODUCTION

1. This is the damages phase of a formal complaint proceeding brought by AT&T Corp. (AT&T) against All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom (collectively, Defendants), which stems from a primary jurisdiction referral from the United States District Court for the Southern District of New York (Court). In a *Liability Order*, we granted AT&T's complaint, concluding that Defendants operated as sham competitive local exchange carriers (CLECs) that were created for the purpose of inflating terminating access revenues, and that they billed AT&T for access services they did not provide under valid tariffs. We subsequently affirmed that holding on reconsideration. AT&T now has filed a supplemental complaint seeking damages. In this Memorandum Opinion and Order, we grant the supplemental complaint, in part, and award AT&T damages of \$252,496.37, the amount that AT&T paid Defendants for services Defendants did not provide. Because Defendants may charge only for services they actually provide, it would be unjust to allow them to retain the amounts AT&T paid. However, we dismiss AT&T's request for interest and consequential damages, which AT&T can pursue in Court.

II. BACKGROUND

2. The *Liability Order* discussed in detail the facts of this case.¹ Consequently, we incorporate by reference the *Liability Order* and describe the facts only briefly here. Defendants purported to operate as CLECs in Utah and Nevada but in fact served only chat line/conferencing service providers.² Beehive Telephone Company, Inc., Nevada, and Beehive Telephone Company, Inc., Utah (collectively, Beehive), each an incumbent local exchange carrier (ILEC) that is not a party to this

¹ See *AT&T Corp. v. All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom*, Memorandum Opinion and Order, 28 FCC Rcd 3477, 3478–90, paras. 2–28, 3491–95, paras. 31, 33, 35–41 (2013) (*Liability Order*), petition for recon denied, 29 FCC Rcd 6393 (2014) (*Reconsideration Order*). Because Defendants did not seek judicial review of the *Liability Order* or the *Reconsideration Order*, those decisions are final and constitute the law of the case. See *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1103–05 (D.C. Cir. 2001); *Core Communications, Inc. v. Verizon Maryland, Inc.*, Order, 19 FCC Rcd 1935, 1939, n.30 (2004).

² *Liability Order*, 28 FCC Rcd at 3478, para. 3.

proceeding, created Defendants to perpetuate an access stimulation arrangement that Beehive originally undertook but could not sustain because the Commission's rules required Beehive to lower its tariffed rates.³ Defendants billed AT&T, an interexchange carrier, approximately \$13 million for access services Defendants allegedly provided.⁴ AT&T disputed those charges and paid Defendants only \$252,496.37.⁵

3. The *Liability Order* held that Defendants violated Sections 201(b) and 203 of the Communications Act of 1934, as amended (Act), by operating as “sham” CLECs created to collect access revenues that could not otherwise be obtained by lawful tariffs,⁶ and by billing AT&T for access services that they did not provide.⁷ Specifically, the *Liability Order* concluded that “Defendants neither owned nor leased facilities, nor . . . purchase[d] unbundled network elements typically used . . . to provide any telecommunications services to the public.”⁸ Instead, Beehive furnished the access services over its facilities and equipment.⁹ Beehive then issued bills for the services to AT&T under Defendants' names.¹⁰

4. AT&T's initial complaint bifurcated liability and damages, and the *Liability Order* authorized AT&T to file a supplemental complaint for damages.¹¹ In Count I of its Supplemental Complaint, AT&T requests a refund of the amounts it paid to Defendants, plus interest,¹² for services for which Defendants billed but did not actually provide.¹³ Count II of the Supplemental Complaint seeks amounts paid to Beehive as consequential damages resulting from Defendants' unlawful scheme.¹⁴ Finally, Count III of the Supplemental Complaint requests that the Commission address several other issues referred by the Court.¹⁵ Defendants have responded to each of these claims.¹⁶

³ *Id.* at 3480–81, paras. 12–13. *See also* 47 C.F.R. § 61.39. Access stimulation occurs when a local exchange carrier (LEC) with high switched access rates enters into an arrangement with a provider of high call volume operations that inflates or stimulates the access minutes terminated to the LEC. The LEC then shares a portion of the increased access revenues resulting from the increased demand with the “free” service provider. *See Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17874, para. 656 (2011), *pets. for review denied*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

⁴ Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues, File No. EB-09-MD-010 (filed Jan. 20, 2015) (Joint Statement) at 1, Stipulated Facts No. 5.

⁵ *Liability Order*, 28 FCC Rcd at 3487, para. 22.

⁶ *Id.*, at 3487–92, paras. 24–33.

⁷ *Id.*, at 3492–93, paras. 34–36.

⁸ *Id.*, at 3483–84, 3488, paras. 17, 25.

⁹ *Id.*, at 3482–84, 3488–9, paras. 16, 17, 26, 27.

¹⁰ *Id.*, at 3488–89, paras. 26, 27.

¹¹ *Id.*, at 3477, n.4. *See* Supplemental Complaint of AT&T Corp. for Damages, File No. EB-09-MD-010 (filed Oct. 24, 2014) (Supplemental Complaint).

¹² AT&T claims the amount it paid Defendants (\$252,496.37), plus interest, totals \$1,033,167.23. Supplemental Complaint at 23, para. 41.

¹³ *Id.* at 21–23, 28–31, 48–49, paras. 37–41, 55–63, 99–111.

¹⁴ *Id.* at 23–28, 49–50, paras. 42–52, 112–19. AT&T claims these damages, with interest, total \$18,588,420.00. *Id.* at 50, para. 119.

¹⁵ *Id.* at 32–48, 50–52, paras. 64–98, 120–28.

¹⁶ *See* All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom Answer and Affirmative Defenses Re AT&T Corp.'s Supplemental Complaint for Damages, File No. EB-09-MD-010 (filed Dec. 1, 2014) (Answer); All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom Motion to Dismiss Supplemental Complaint for Damages of AT&T Corp. for Damages, File No. EB-09-MD-010 (filed Dec. 1, 2014) (Motion to Dismiss); All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom Petition for Declaratory Ruling to Respond to Court Referral, File No. EB-09-MD-010 (filed Dec. 1, 2014) (Petition for

(continued....)

III. DISCUSSION

5. Based on the record in this case, we award AT&T damages of \$252,496.37, the amount AT&T paid Defendants for the services in dispute. We dismiss without prejudice AT&T's requests for interest and consequential damages, which AT&T may pursue with the Court. We also dismiss as moot the remaining referred issues.

A. Section 207 of the Act Does Not Bar AT&T's Claim for Damages.

6. Defendants contend that Section 207 of the Act precludes the Commission from deciding AT&T's damages in the context of a primary jurisdiction referral, because those issues are "before the SDNY Court."¹⁷ That section provides that a person claiming to be damaged by a common carrier subject to the Act may file a complaint at the Commission or file suit for recovery of damages in any United States district court, but cannot pursue both remedies.¹⁸

7. Section 207, however, "does not apply in the context of a primary jurisdiction referral."¹⁹ The Court's two referral orders squarely encompass issues relating to AT&T's direct damages,²⁰ and nothing prevents the Court from seeking the Commission's guidance prior to entering a final order.²¹

B. The Commission Has Jurisdiction Over Defendants.

8. Defendants maintain that the Commission lacks jurisdiction over them.²² We disagree. Section 208 of the Act vests the Commission with jurisdiction to adjudicate complaints regarding "anything done or omitted to be done by any common carrier" in violation of the Act.²³ The Act defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication."²⁴ Defendants meet this definition. They admit that they held themselves out as "providing service as common carriers,"²⁵ and they operated with nationwide authority under Section 214

(Continued from previous page) _____

Declaratory Ruling); All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom Legal Analysis in Support of Affirmative Defenses, Motion to Dismiss and Petition for Declaratory Ruling, File No. EB-09-MD-010 (filed Dec. 1, 2014) (Answer Legal Analysis).

¹⁷ See Answer at 18, para. 36, 64 (First Affirmative Defense); Answer Legal Analysis at 5–7.

¹⁸ 47 U.S.C. § 207.

¹⁹ *AT&T Corp. v. Beehive Tel. Cos.*, Memorandum Opinion and Order, 17 FCC Rcd 11641, 11653, para. 24 (2002) (citing *Allnet Comm'n Serv., Inc. v. National Exchange Carrier Ass'n, Inc.*, 965 F.2d 1118, 1122 (D.C. Cir. 1992)). Similarly, the cases Defendants cite to support their challenge to venue, see Answer Legal Analysis at 5–6, are not determinative because none involved a primary jurisdiction referral.

²⁰ See *All Am. Tel. Co., Inc. v. AT&T, Inc.*, Memorandum & Order, 07-Civ 861, at *4 (WHP) (S.D.N.Y. Mar. 16, 2009) (First Court Referral Order) (noting that "[a] determination of the appropriate tariff rate in the absence of a sham entity involves policy and technical decisions with the FCC's field of expertise"); *All Am. Tel. Co., Inc. v. AT&T, Inc.*, Order Referring Issues to the Federal Communications Commission, 07-Civ 861 (WHP) (S.D.N.Y. Feb. 5, 2010) (Second Court Referral Order) (referring, among other issues, what compensation Defendants are entitled to if they failed to provide switched access services consistent with the terms of their tariffs). The Defendants specifically requested the Second Court Referral Order and drafted the issues that the Court referred. See *Reconsideration Order*, 29 FCC Rcd at 6398, n.51.

²¹ *Liability Order*, 28 FCC Rcd at 3486–7, paras. 22, 23.

²² See Answer at 7–8, 18, paras. 17, 36, 64 (Second Affirmative Defense); Answer Legal Analysis at 7–8.

²³ 47 U.S.C. § 208.

²⁴ 47 U.S.C. § 153(11).

²⁵ Answer at 7, para. 17.

of the Act.²⁶ Moreover, Defendants obtained state certificates to operate as CLECs, filed tariffs for their interstate services, and billed for those services under their own operating company numbers.²⁷ They then sued AT&T in federal court in their own names for amounts allegedly due for the provision of their interstate services,²⁸ and they requested that the Court refer to the Commission numerous issues relating to their operation as common carriers.²⁹

9. Defendants argue that the Commission lacks jurisdiction over them because the *Liability Order* found them not to be “bona fide” CLECs.³⁰ In other words, Defendants argue that because they violated the Commission’s rules, they are not subject to the Commission’s rules. The D.C. Circuit previously considered and rejected a similar argument as “flatly wrong.”³¹ As in *Farmers & Merchants*, Defendants held themselves out as common carriers and billed for their services, and the *Liability Order* concluded that they violated Sections 201(b) and 203 of the Act by doing so because they did not provide the services pursuant to valid and applicable tariffs.³² The Commission’s additional finding that the Defendants operated as “sham” entities “in an effort to circumvent the Commission’s CLEC access charge and tariff rules” does not diminish the Commission’s regulatory authority over them as a common carrier or render *Farmers & Merchants* irrelevant.³³

10. Defendants further contend that, because “the *Liability Order* has determined that [they] are not, and never were, common carriers, subject to Title II regulation,” they are “free to pursue their equitable claims against AT&T as unregulated billing/sales agents for the services AT&T admittedly took from them.”³⁴ The *Liability Order* made no such finding. On the contrary, Defendants presented themselves to the public as common carriers and therefore are themselves subject to Section 208.³⁵ Regardless, Defendants have adduced no evidence whatsoever—no contracts, no correspondence, no bills, no declarations or affidavits—showing that they acted merely as billing/sales agents for Beehive.³⁶

²⁶ All American Telephone, e-Pinnacle Communications, Inc., and ChaseCom’s Answer to AT&T Corp.’s Amended Formal Complaint, File No. EB-09-MD-010 (filed June 14, 2010) at 10, 11, 15, 22, 24, 26, 32, 37–38, 50, 57, 58, paras. 21, 23, 29, 51, 58, 63, 73–74, 78, 85, 87, 113, 125, 127.

²⁷ *Liability Order*, 28 FCC Rcd at 3481–83, 3489, 3493–94, paras. 13–16, 27, 37.

²⁸ *Liability Order*, 28 FCC Rcd at 3486–87, para. 22.

²⁹ *Liability Order*, 28 FCC Rcd at 3487, para. 23.

³⁰ Answer Legal Analysis at 7–8 (citing *Liability Order*, 28 FCC Rcd at 3488, para. 25).

³¹ *Farmers & Merchants Mut. Tel. Co. v. FCC*, 668 F.3d 714, 719 (D.C. Cir. 2011) (*Farmers & Merchants*).

³² *Liability Order*, 28 FCC Rcd at 3492–95, paras. 34–41.

³³ Answer at 51, para. 85; Answer Legal Analysis at 7–8.

³⁴ Answer at 19, para. 38. See also Answer at 2, 7, 19, 31, paras. 3, 17, 38, 63; Answer Legal Analysis at 7. Contrary to Defendants’ assertion, *Total Telecommunications Services, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001), *aff’d in part, rev’d in part*, 317 F.3d 227 (D.C. Cir. 2003) (*Total Tel*), does not support this argument. See Answer Legal Analysis at 7. In *Total Tel*, there was no finding that the sham CLEC acted as an agent of the ILEC. Nor was there any suggestion that the ILEC’s rates were unreasonable. Not so in this case: “But for the creation of Defendants,” the unlawful access stimulation scheme “would have ended because, under the Commission’s rules, Beehive itself no longer could charge high rates.” *Liability Order*, 28 FCC Rcd at 3491, para. 30. It would therefore be inappropriate, as Defendants suggest, to resort to Beehive’s rates when the very purpose behind creating Defendants was to perpetuate high rates that Beehive no longer could charge without violating the Commission’s rules.

³⁵ See discussion *supra* paragraphs 8-9.

³⁶ To the contrary, Defendants consistently maintained that *they* provided switched access services to AT&T, when, in fact, that was not true.

C. AT&T is Entitled to a Refund for Amounts It Paid to Defendants.

11. Local exchange carriers “should charge only for those services that they provide.”³⁷ The *Liability Order* found that Defendants did not provide any service to AT&T that would justify billing AT&T under their tariffs.³⁸ In fact, Defendants admit that they did not provide AT&T with access services and that Beehive did.³⁹ Nevertheless, Defendants billed AT&T in excess of \$13 million for those services, and AT&T paid Defendants \$252,496.^{37,40} As discussed above, Defendants’ contention that we must consider them to be “unregulated billing/sales agents” is unsupported.⁴¹ Accordingly, they are not entitled to compensation from AT&T “for the role they played in causing Beehive’s service to be provided to AT&T.”⁴² Any such claim would be between Defendants and Beehive and is outside the scope of this proceeding. Although Defendants argue that AT&T is not entitled to damages,⁴³ none of the authority they offer supports their position,⁴⁴ and AT&T has substantiated the amount of its direct damages.⁴⁵

12. Some aspects of the Supplemental Complaint exceed the scope of the Court’s referrals, and do not involve technical or policy considerations within the Commission’s “specialized experience, expertise, and insight.”⁴⁶ Specifically, AT&T’s consequential damages and interest claims are not before us and remain pending before the district court.⁴⁷ We have not denied these claims, and our dismissal of them without prejudice is not intended to preclude AT&T from pursuing them in Court.

13. Defendants contend that AT&T’s supplemental complaint should be dismissed because AT&T would be unjustly enriched if the Commission were to award damages.⁴⁸ But Defendants have

³⁷ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118–9, para. 21 (2004).

³⁸ *See supra* paragraph 3.

³⁹ Answer at 27, para. 57.

⁴⁰ Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues, File No. EB-09-MD-010 (filed Jan. 20, 2015) (Joint Statement) at 1–2, Stipulated Facts Nos. 5–7, 8–10.

⁴¹ *See supra* paragraph 10.

⁴² Answer at 8, para. 17.

⁴³ Answer at 67 (Seventh Affirmative Defense); Answer Legal Analysis at 15–16.

⁴⁴ The cases Defendants cite do not involve carriers that were “sham” entities or that provided no service. *See* Answer Legal Analysis at 15–16 (citing *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128 (2000); *In the Matter of Communications Satellite Corporation for Authority to Construct a ‘Standard B’ Earth Station Antenna and Associated Facilities at Hickam Air Force Base*, Decision, 97 FCC 2d 82 (1984)).

⁴⁵ *See* Joint Statement at 1–2, Stipulated Facts Nos. 5–7, 8–10; Supplemental Complaint at 4, para. 4 & Expert Report of David I. Toof, Ph.D. In Support of Supplemental Complaint for Damages, at 3–5, paras. 5–6, 8–11.

⁴⁶ *See* First Court Referral Order at *3; Second Court Referral Order at 2–3. *See also Nat’l Commc’ns Assoc. v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 222 (2d Cir.1995) (quoting *Far East Conf. v. United States*, 342 U.S. 570, 574 (1952)); *see also United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

⁴⁷ *See* Letter from Lisa B.Griffin, Deputy Division Chief, EB, MDRD, to James F. Bendernagel, Jr., Counsel for AT&T, and Jonathan Canis, Counsel for Defendants, File No. EB-09-MD-010 (filed Oct. 29, 2014).

⁴⁸ Answer at 66 (Sixth Affirmative Defense); Answer Legal Analysis at 16–17. Defendants wrongly characterize the *Liability Order* as finding that “AT&T received ‘in excess of \$11 million’ worth of terminating switched access Local Switching service.” *See* Answer Legal Analysis at 16. The *Liability Order* actually said that “Defendants participated in an access stimulation scheme *designed to collect* in excess of eleven million dollars of improper terminating access charges from AT&T.” *Liability Order*, 28 FCC Rcd at 3477, para. 1 (emphasis added).

demonstrated neither that they may plead equitable defenses in a Section 208 complaint proceeding,⁴⁹ nor that they may seek equitable relief relating to matters subject to regulation.⁵⁰ Even assuming they could make these arguments, Defendants have failed to establish the necessary elements for unjust enrichment, because they did not provide a service to, or confer a benefit on, AT&T.⁵¹ Defendants contend in this damages proceeding that, as “billing/sales agents” of Beehive, they “have the right to be compensated [by AT&T] for the role they played in causing the Beehive service to be provided to AT&T.”⁵² Their assertion is unsupported by the record, however.⁵³

D. AT&T’s Settlement Agreement With Beehive Is Irrelevant to This Dispute.

14. Defendants argue that, because of a 2007 settlement agreement between AT&T and Beehive, “AT&T is estopped from claiming that any rates other than Beehive rates are applicable to the traffic at issue in this proceeding.”⁵⁴ As Defendants acknowledge, the *Liability Order* “dismissed th[is] argument,”⁵⁵ and they have waived their right to challenge the Commission’s finding by not appealing the *Liability Order* or *Reconsideration Order*.⁵⁶ Even if we considered the argument again, however, we would reject it. The settlement agreement between AT&T and Beehive has no bearing on the present case, which involves AT&T’s claims concerning *Defendants’* conduct and charges during the complaint period.⁵⁷

E. Judicial Estoppel Does Not Warrant Dismissal of AT&T’s Claims.

15. Defendants maintain that AT&T is judicially estopped from making various claims and arguments.⁵⁸ Courts may invoke judicial estoppel at their equitable discretion to prevent the “improper

⁴⁹ See *Qwest Communications Co. v. Sancom, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 1982, 1993–94, para. 27 (Enf. Bur. 2013) (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 597, para. 95 (1998) (questioning whether the equitable doctrine of unclean hands should ever bar a Section 208 complaint)).

⁵⁰ The *Liability Order* did not create a “regulatory gap” entitling Defendants to pursue alternate damage theories. Answer at 31–33, 46, 52–53, paras. 63, 64, 81, 86. As Defendants acknowledge, they are entitled to compensation for access services only “through a valid tariff or a contract negotiated with AT&T.” Answer at 4, para. 6; *but cf.* Answer at 32, para. 68. See 47 C.F.R. § 61.26; *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9924, para. 3 (2001). The *Liability Order* found that Defendants violated Sections 203 and 201(b) of the Act by billing AT&T in the absence of a valid tariff, and Defendants did not otherwise have a negotiated agreement with AT&T. Defendants cannot avoid the Commission’s regulation of competitive interstate switched access services by violating the very rules the Commission created to govern those services. Their reliance on the unreported decision in *Manhattan Telecommunications Corp. v. Global NAPs, Inc.*, 2010 WL 1326095 (S.D.N.Y. 2010), is misplaced, because that case involved the regulatory classification of VoIP services, which is not at issue here.

⁵¹ See 66 Am. Jur. 2d Restitution and Implied Contracts § 11 Unjust Enrichment (party claiming unjust enrichment must establish that it provided a service that warranted payment and that the receiving party would be unjustly enriched if such payment were not made).

⁵² Answer at 2, 7–8, 26, paras. 3, 17, 56.

⁵³ See *supra* paragraph 10 & note 36.

⁵⁴ See Answer at 65 (Third Affirmative Defense); Answer Legal Analysis at 10.

⁵⁵ Answer Legal Analysis at 9 (citing *Liability Order*, 28 FCC Rcd at 3491, para. 30 n.136).

⁵⁶ See *supra* note 1.

⁵⁷ *Liability Order*, 28 FCC Rcd at 3492, para. 33 (“[I]t is Defendants’ conduct, not Beehive’s rates, that is at issue.”). See Reply Legal Analysis at 12.

⁵⁸ Answer at 65 (Fourth Affirmative Defense), Answer Legal Analysis at 10–14.

use of the judicial machinery.”⁵⁹ It “applies where a party assumes a successful position in a legal proceeding, and then assumes a contrary position simply because interests have changed, and the change in position prejudices a party who acquiesced in the position formerly taken.”⁶⁰ Defendants list various statements and stipulations made by AT&T during this proceeding,⁶¹ but this alone is insufficient to warrant the Commission invoking judicial estoppel.⁶² To establish entitlement to estoppel, Defendants must show that (1) AT&T’s statements are “clearly inconsistent” with its earlier position; (2) AT&T succeeded in persuading the Commission to accept its earlier position, such that accepting its later position would create the perception that the Commission was misled in either stage of its complaint process; or (3) if AT&T were not estopped, it would derive an unfair advantage or Defendants would suffer an unfair detriment.⁶³ Defendants fail to satisfy this test.

16. First, Defendants failed to show that AT&T’s statements are “clearly inconsistent” with an earlier position. Defendants contend that AT&T previously “admitted” in its initial pleadings that Defendants provided a service to them.⁶⁴ But neither AT&T’s stipulation regarding traffic volumes billed by Defendants⁶⁵ nor AT&T’s payment to Beehive for tandem switching⁶⁶ has any bearing on the separate and distinct question of whether Defendants actually provided access services. Following discovery, AT&T has consistently maintained that Defendants did not provide any services to AT&T because they did not own or lease any switches.⁶⁷ The *Liability Order* reached the same conclusion.⁶⁸

17. Moreover, Defendants have not demonstrated that, in prior cases, AT&T successfully persuaded the Commission to take a position that is clearly inconsistent with its argument here that equitable relief is pre-empted by the Commission’s “regulatory regime.”⁶⁹ All of the cases cited by Defendants involved different regulatory schemes from the one governing the tariffing of CLEC access charges.⁷⁰

18. Finally, we find no reason to believe that AT&T would derive an unfair advantage if not estopped because we find no merit to Defendants’ three remaining estoppel arguments. First, the

⁵⁹ See *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

⁶⁰ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Memorandum Opinion and Order, 19 FCC Rcd 13494, 13499, para. 8, n.34 (2004) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)).

⁶¹ Answer Legal Analysis at 10–14.

⁶² See *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (“[S]everal factors typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case Additional considerations may inform the doctrine’s application in specific factual contexts.”).

⁶³ See *id.*

⁶⁴ Answer Legal Analysis at 10.

⁶⁵ See Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-09-MD-010 (filed July 16, 2010) at 11, para. 52.

⁶⁶ See *id.* at 12, para. 58.

⁶⁷ See Reply Legal Analysis at 16–17; see also Amended Formal Complaint of AT&T Corp., File No. EB-09-MD-010 (filed May 10, 2010) at 14, 34-5, 37-8, paras. 26, 61, 66. Neither AT&T’s.

⁶⁸ See *supra* paragraphs 2-3 (discussing the *Liability Order*’s findings that Defendants served only chat line/conferencing service providers and did not provide access services).

⁶⁹ Answer at 44–45, para. 80; Answer Legal Analysis at 12–13.

⁷⁰ See Reply Legal Analysis at 18–21. The cases Defendants cite involved long distance and wireless services, which the Commission regulates differently than access services. See Reply Legal Analysis at 18-21.

Commission already considered and rejected Defendants' argument concerning Beehive's rates, and AT&T is not precluded from claiming Defendants' rates are excessive.⁷¹ Second, Defendants inaccurately characterize the expert report proffered by AT&T. It did not purport to address what compensation is owed to Defendants, and it is not inconsistent with AT&T's position in this damages phase.⁷² Third, AT&T has not argued that the service it received from Defendants is an "undefined, unregulated" service.⁷³ Again, Defendants misstate AT&T's position.⁷⁴

F. Awarding AT&T's Damages Does Not Constitute an Uncompensated Taking Under the Fifth Amendment.

19. Defendants contend that they were compelled to "provide, or to cause Beehive to provide, service to AT&T" under a "flawed" tariff that they attempted to cure, but that the Commission prevented them from amending.⁷⁵ Defendants argue that, by rejecting All American's attempts to amend its tariff, the Commission took an "active role in governing the provision of service between [Defendants] and AT&T."⁷⁶ According to Defendants, "[s]hould the Commission grant AT&T the relief that it seeks, by absolving it of any responsibility to compensate the [Defendants] for the service it took, such action would constitute a 'regulatory taking' in violation of the 5th Amendment."⁷⁷

20. Defendants' rewrite of history is unavailing. The Commission rejected All American's revised tariff because it violated the Commission's rules.⁷⁸ Specifically, the revised tariff did not "contain clear and explicit explanatory statements regarding the rates and regulations" and did not "specifically identify . . . the rates being cross-referenced so as to leave no doubt as to the exact rates that will apply."⁷⁹ Moreover, the Commission ordered All American to file tariff revisions to remove the rejected material within five business days, and encouraged All American "to work with its intended carrier-customers to resolve their concerns before filing a new tariff."⁸⁰ All American chose not to do so. As such, the Commission's enforcement of its access charge and tariffing rules does not constitute a taking.⁸¹

⁷¹ *Liability Order*, 28 FCC Rcd at 3491, para. 31.

⁷² Reply Legal Analysis at 22.

⁷³ Answer Legal Analysis at 14.

⁷⁴ See Supplemental Complaint at 27, para. 98 ("Defendants did not provide any services to AT&T on the long distance calls at issue . . . even if they had provided services on the long distance calls at issues, cases such as *Farmers Appeal Order*, 668 F.3d at 719, and *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001), confirm that any such services would be regulated common carrier services . . .").

⁷⁵ Answer at 65–66 (Fifth Affirmative Defense); Answer Legal Analysis at 17–18.

⁷⁶ Answer Legal Analysis at 18.

⁷⁷ *Id.*

⁷⁸ See 47 C.F.R. §§ 61.2, 61.25.

⁷⁹ *In the Matter of All American Telephone Company, Inc.*, Tariff F.C.C. No. 3, Order, 25 FCC Rcd 5661, 5662–63 (WCB May 21, 2010) at paras. 4, 5 (*All American Tariff Order*).

⁸⁰ *All American Tariff Order*, 25 FCC Rcd at 5662-63, para. 7 & n.14.

⁸¹ See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301–02, 307–12 (1989) ("a state scheme of utility regulation does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in service to the public'"). In any event, the Defendants would not be entitled to compensation because they provided no service to AT&T. *Liability Order*, 28 FCC Rcd at 3482–84, 3488–89, paras. 16, 17, 25–27; Answer at 26–27, paras. 56–57. Finally, AT&T's damages claim extends to the 2006–2007 timeframe, which predates the 2010 events Defendants rely upon for their takings claim. See Joint Statement at 2, Stipulated Facts 8–10; Answer Legal Analysis at 17–18; Reply Legal Analysis at 27.

G. The Remaining Court-Referred Issues and Questions are Moot.

21. The remaining issues that the Court referred are predicated on the assumption that Defendants provided a service to AT&T.⁸² Because we found in the *Liability Order* that Defendants did not provide any service to AT&T,⁸³ those issues have no bearing on Defendants' entitlement to compensation, and we therefore dismiss them as moot.⁸⁴

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Count I is GRANTED IN PART as described herein.

23. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that AT&T's claim for interest in Count I is DISMISSED WITHOUT PREJUDICE.

24. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Count II is DISMISSED WITHOUT PREJUDICE.

25. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Count III is DISMISSED AS MOOT.

26. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, and the Commission's rules 1.720–1.736, 47 C.F.R. §§ 1.720–1.736, that Defendants' Motion to Dismiss is DENIED.

27. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, and the Commission's rules 1.720–1.736, 47 C.F.R. §§ 1.720–1.736, that Defendants' Petition for Declaratory Ruling is DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁸² See Supplemental Complaint at 38–48, 50–52, paras. 77–98, 120–28; see also Second Court Referral, Exhibit A (asking the Commission to identify the classification of the service provided by Defendants, and the rate or compensation, if any, to which they are entitled for the services provided).

⁸³ *Liability Order*, 28 FCC Rcd at 3482–84, 3488–89, paras. 16, 17, 25–27.

⁸⁴ We also dismiss as moot Defendants' Motion to Dismiss and Petition for Declaratory Ruling, which rely on the same arguments rejected in this Order.