

No. 15-1354

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALL AMERICAN TELEPHONE CO., INC., *ET AL.*

PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA

RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

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STATEMENT OF PARTIES, RULINGS AND RELATED CASES

1. Parties

All parties appearing in this Court are listed in petitioner's brief.

2. Ruling Under Review

In the Matter of AT&T Corp., Complainant v. All American Telephone Co., e-Pinnacle Communications, Inc., ChaseCom, Defendants, 30 FCC Rcd 8958 (2015) (JA --)

3. Related Cases

The order on review has not previously been before this Court or any other court. A related case is pending before the United States District Court for the Southern District of New York: *All American Telephone Co., Inc. v. AT&T Corp.*, 07-CV-861(WHP) (S.D.N.Y.). The order on review arose in response to an administrative complaint filed to effectuate a primary jurisdiction referral to the FCC from the district court judge in that case.

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GLOSSARY

CLEC	competitive local exchange carrier
<i>Damages Order</i>	<i>AT&T Corp. v. All American Tel. Co., et al.</i> , 30 FCC Rcd 8958 (2015) (JA --)
ILEC	incumbent local exchange carrier
IXC	interexchange carrier
LEC	local exchange carrier
<i>Liability Order</i>	<i>AT&T Corp. v. All American Tel. Co., et al.</i> , 28 FCC Rcd 3477 (2013) (JA --)
<i>Liability Recon. Order</i>	<i>AT&T Corp. v. All American Tel. Co. et al.</i> , 29 FCC Rcd 6393 (2014) (JA --)

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BRIEF FOR RESPONDENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

All American Telephone Co., Inc., e-Pinnacle Communications, Inc. and ChaseCom (collectively petitioners) seek review of the FCC's *Damages Order*,¹ in which the FCC determined that petitioners owed AT&T Corp. more than \$250,000 for improperly billing and collecting payments for access services that they did not

¹ *AT&T Corp. v. All American Tel. Co., et al*, 30 FCC Rcd 8958 (2015) (“*Damages Order*”) (JA --).

provide to AT&T under a “sham” arrangement designed to circumvent the Commission’s rules. The *Damages Order* followed the *Liability Orders* – not before the Court – in which the FCC granted an administrative complaint filed by AT&T Corp. against petitioners, holding that petitioners violated the Communications Act in connection with a “traffic pumping” or “access stimulation” scheme.² As explained more fully below, access stimulation occurs when a local exchange carrier enters into an arrangement with an entity such as a chat line provider or free conference calling provider that receives large volumes of incoming traffic carried by long distance providers such as AT&T. Such an arrangement suddenly and significantly inflates the number and duration of inbound calls terminated by the local carrier on its network; this vast increase in minutes of terminating traffic, in turn, enables the local carrier to impose huge increases in fees – called access charges – on long distance carriers who need access to the local carrier’s network to complete calls. *See In re: FCC 11-161*, 753 F.3d 1015, 1144-45 (10th Cir. 2014) (describing access stimulation schemes), *cert denied*, 135 S.Ct. 2072 (2015); *see also Northern Valley Communications, LLC v. FCC*, 717 F.3d 1017, 1018-19 (D.C. Cir.

² *AT&T Corp. v. All American Tel. Co. et al*, 28 FCC Rcd 3477 (2013) (“*Liability Order*”) (JA--), *reconsideration denied*, 29 FCC Rcd 6393 (2014) (JA--) (“*Liability Recon. Order*”) (collectively, “*Liability Orders*”). Petitioners did not seek judicial review of the *Liability Orders*. *See* Pet. Br. at 5, 22; *Damages Order* n.1 (JA --).

2013) (same). The enormous and abrupt surge in access charges burdens long distance carriers and their customers. As the Commission has observed, such “wasteful arbitrage schemes” can result in hundreds of millions of dollars in costs imposed on long distance carriers annually that ultimately are borne by all telephone users. *Connect America Fund*, 26 FCC Rcd 17663, 17875 ¶¶663-664 (2011) (subsequent history omitted).

Petitioners’ challenge to the *Damages Order* presents the following issues:

1. Whether the FCC reasonably concluded that it had jurisdiction to award damages in this case.
2. Whether the Commission’s award of damages was reasonable and supported in the record.
3. Whether petitioners’ argument that the *Damages Order* is “purposely ambiguous” is properly before the Court, and, if so, whether the Commission reasonably decided AT&T’s supplemental complaint.
4. Whether petitioners are entitled to declaratory relief.

JURISDICTION

The Court generally has jurisdiction over the petition for review in this case pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The Commission’s order that is the subject of the petition for review was released on August 21, 2015.

Damages Order, 30 FCC Rcd 8958 (JA --). The petition for review was timely filed within 60 days of the applicable date established by 28 U.S.C. § 2344 and 47

C.F.R. § 1.4(b)(1). As discussed below, respondents contend that the Court lacks jurisdiction to consider certain arguments presented by petitioners because those arguments were not raised before the FCC as required by Section 405(a) of the Communications Act or because petitioners lack standing to assert those arguments. In addition, petitioners have not sought review of the *Liability Orders*, and the Court thus lacks jurisdiction to review those rulings.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Addendum to this brief.

COUNTERSTATEMENT

A. REGULATORY BACKGROUND

This case involves the FCC's rule governing interstate access tariffs filed by competitive local exchange carriers (CLECs). Such tariffs enable competitive local exchange carriers to bill long distance companies (interexchange carriers or IXCs) for access charges, which, in access stimulation cases, typically are per-minute fees assessed on interstate calls placed to customers of the competitive local exchange carriers.

The Commission regulates interstate access tariffs because competitive local exchange carriers have exclusive control over access to their customers, and interexchange carriers, which are obligated to transport long-distance calls to the competitive local exchange carrier's customers, are captive to tariffed access

charges. The access charge regime therefore is prone to abuse, such as when a competitive local exchange carrier sets its rates too high or, as in this case, inflates its revenues above the level assumed in the rate-setting process by taking steps that dramatically increase the amount of calls placed to its facilities. The second practice is called “traffic pumping” or “access stimulation.” *See generally Northern Valley Commun.*, 717 F.3d at 1018-19; *Farmers & Merchants Mutual Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011). Such practices cause interexchange carriers – and ultimately all of their customers – to bear unfair charges.

1. Interstate Access Charges And Their Abuse.

When a telephone user places a long-distance call, the call travels from the facilities of the user’s local exchange carrier to those of an interexchange carrier. The interexchange carrier then transports the call to the facilities of the recipient’s local exchange carrier, which connects the call to its destination. *See NARUC v. FCC*, 737 F.2d 1095, 1103-1104 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). Both local exchange carriers have traditionally recovered a part of the costs of providing interstate switched access service (hereafter, “access service”) by charging the interexchange carrier per-minute interstate switched access charges for originating and terminating the call – *i.e.*, for providing access to the local exchange carrier’s facilities. *See Access Charge Reform*, 12 FCC Rcd 15982, 15991 (1997).

With the breakup of the Bell System, the FCC began to regulate access charge tariffs. *See Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, 1192 (1984); *Access and Divestiture Related Tariffs*, 55 Rad. Reg. 2d 869, 870 (1984); 47 C.F.R. Part 69. Regulation is necessary because interexchange carriers are captive to a local exchange carrier's tariffed rates. Interexchange carriers may not block calls placed by their customers to specific numbers, *see Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd 11629 (WCB 2007), and may not pass through to individual callers the access charges incurred for any specific call, *see Implementation of Section 254(g) of the Communications Act of 1934*, 11 FCC Rcd 9564, 9568-9569 (1996). Moreover, with respect to any given call recipient, the local exchange carrier serving that person holds a "terminating access monopol[y]," and the interexchange carrier has little or no bargaining power to achieve lower access rates. *Developing A Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9616-9617 (2001).

The Commission has identified two major access charge abuses. First, because the interexchange carrier cannot choose which local exchange carrier it must utilize to reach a particular user, local exchange carriers may (in the absence of regulation) set their rates above cost, thereby earning excess profits on every minute of service. *See Access Charge Reform*, 16 FCC Rcd 9923, 9934-9936 ¶¶28-32

(2001). The Commission has explained that excessive access rates “shift an inappropriate share of the carriers’ costs onto the [interexchange carriers] and, through them, the long distance market in general.” *Id.* ¶22. That cost-shifting can “promote economically inefficient entry into the local markets.” *Id.* ¶33.

Second, a per-minute fee structure gives some local exchange carriers the incentive to engage in access stimulation schemes that greatly increase the number and duration of long-distance calls delivered to their facilities. Regulated access rates generally are grounded in the historical costs of providing service. *See generally Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990). If call volumes rise without a proportionate increase in costs, however, average costs fall and each minute of service becomes more profitable. The Commission has explained that average costs usually fall with increasing volume because whereas “there is a large fixed cost to purchasing a local switch,” the “incremental cost of increasing the capacity of a local switch is low” and perhaps even zero. *Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd 17989, 17996 (2007).

Those economics of telephone costs and rate structures thus cause some local exchange carriers to look for ways to generate higher call volumes. As the Commission has described it:

Access stimulation occurs when a [local exchange carrier] with high switched access rates enters into an arrangement with a provider of

high call volume operations such as chat lines, adult entertainment calls, and ‘free’ conference calls. The arrangement inflates or stimulates the access minutes terminated to the [local exchange carrier], and the [local exchange carrier] then shares a portion of the increased access revenues resulting from the increased demand with the ‘free’ service provider, or offers some other benefit to the ‘free’ service provider. The shared revenues received by the service provider cover its costs, and it therefore may not need to, and typically does not, assess a separate charge for the service it is offering.

Connect America Fund, 26 FCC Rcd at 17874 ¶¶656. The Commission has found that such “wasteful arbitrage schemes,” *id.* at 17873, result in hundreds of millions of dollars in costs imposed on interexchange carriers that ultimately are borne by all telephone users, *id.* at 17875-17876 ¶¶663-665.³ They also “almost uniformly make the [local exchange carrier’s] interstate switched access rates unjust and unreasonable” in violation of 47 U.S.C. § 201(b). *Id.* at 17874 ¶¶657.

2. Access Charge Regulation.

Prior to 1996, only a single local carrier typically served any given market, and it held an exclusive franchise granted by the state. In 1996, Congress opened up the local exchange marketplace to competition, banning exclusive franchises, 47 U.S.C. § 253(a), and creating a distinction between incumbent local exchange

³ See *Northern Valley Communications*, 717 F.3d at 1018 (Access stimulation is “a win-win for the [competitive local exchange carriers] and the conference call companies, while the long-distance carriers, who have to pay the tariffed access rates, pay significant amount to the [competitive local exchange carriers].”).

carriers, the existing carriers, *see* 47 U.S.C. § 251(h) (defining incumbent local exchange carrier), and competitive local exchange carriers, the new, competitive providers, *see* 47 C.F.R. § 61.26(a)(1) (defining competitive local exchange carrier).

Incumbent local exchange carrier switched access charges remain regulated in nearly every respect. The FCC's detailed rules at 47 C.F.R. Parts 61 and 69 prescribe the contents of incumbent local exchange carrier tariffs and the switched access rates that incumbent local exchange carriers may charge to interexchange carriers. By contrast, competitive local exchange carrier access charges at first were unregulated. The Commission believed at the time (erroneously) that competition between competitive local exchange carriers and incumbent local exchange carriers would discipline rates and avoid abuse of access charges by competitive local exchange carriers. Thus, competitive local exchange carriers were free to set their access rates and practices as they wished and were not subject to the detailed Part 69 tariff regulations imposed on incumbent local exchange carriers. *Access Charge Reform*, 16 FCC Rcd at 9926-9927. Competitive local exchange carriers also were free to charge their customers more for access service than incumbent local exchange carriers.

Until 2001, competitive local exchange carriers could file tariffs with the FCC but were "largely unregulated in the manner that they set their access rates." *Access Charge Reform*, 16 FCC Rcd at 9931 ¶21. In a pair of orders issued in 2001

and 2004, the *Access Charge Reform Order*, 16 FCC Rcd 9923, and the *Access Charge Reconsideration Order*, 19 FCC Rcd 9108, the Commission restricted the use of access tariffs by competitive local exchange carriers. It did so after finding that some competitive local exchange carriers were abusing the tariff process to “impose excessive access charges on [interexchange carriers] and their customers.” *Access Charge Reform Order* at 9924-9925; *see also id.* at 9934. The Commission thus decided in the 2001 *Access Charge Reform Order* to regulate more strictly [competitive local exchange carrier] interstate access tariffs “in order to prevent use of the regulatory process to impose excessive access charges on IXCs and their customers.” *Id.* at 9924-25 ¶2.

Specifically, the Commission promulgated rules that set forth the terms of a permissible competitive local exchange carrier switched access tariff, including the maximum switched access rate that a competitive local exchange carrier may tariff, which is benchmarked to the regulated rate of the competing incumbent local exchange carrier *See* 47 C.F.R. §§ 61.26(c) – (e). The Commission generally detariffed competitive local exchange carrier access service. *Access Charge Reform Order*, 16 FCC Rcd at 9925 ¶3, 9938 ¶40 (“mandatorily detariff[ing]” competitive local exchange carrier interstate switched access above the benchmark rate); 47 U.S.C. § 160. Thus, a competitive local exchange carrier may now file an interstate

access tariff only if the tariff is consistent with 47 C.F.R. § 61.26 – that is, generally no more than the incumbent’s tariff. If a competitive local exchange carrier wishes to provide access service on terms that are inconsistent with that Rule, it must do so pursuant to a contract that it has negotiated individually with the interexchange carrier outside of the FCC’s tariff regime. *Access Charge Reform Order*, 16 FCC Rcd at 9925 ¶3.

**B. THE DISTRICT COURT’S PRIMARY JURISDICTION
REFERRALS AND THE FCC’S INITIAL ACTIONS**

Petitioners purported to be competitive local exchange carriers authorized by state regulators to operate in Nevada and Utah. They provided service exclusively to a small number of chat line/conferencing service providers.⁴ They were created by a third party – Beehive Telephone Company – as part of a complex access stimulation scheme. *See Liability Order* ¶¶2-21 (JA --). In 2007 petitioners sued AT&T in federal district court to collect access charges they had billed as a result of that arrangement, most of which AT&T had refused to pay. Petitioners alleged in their complaint that AT&T’s refusal to pay violated petitioners’ federal tariffs, as well as Sections 201(b) and 203(c) of the Communications Act. *Id.* AT&T filed an an-

⁴ *See Liability Order* ¶3 (JA --). All American provided service in Nevada and Utah to a single chat line/conferencing service provider that was its parent-affiliate. *Id.* ¶17 & n.107 (JA --). The other petitioners provided service exclusively in Utah to a few such chat/conferencing providers. *Id.*

swer and counterclaims, asserting federal law claims that petitioners violated Sections 201(b) and 203 of the Communications Act. AT&T also claimed that, regardless of whether petitioners had provided access services pursuant to tariff, they committed unreasonable practices through “sham” arrangements designed for the purpose of inflating access charges. *Id.* ¶22 (JA --).

The District Court issued two primary jurisdiction referrals relating to the claims and counterclaims in that case. The first, issued in March 2009, referred AT&T’s “sham entity” counterclaim to the Commission.⁵ AT&T effectuated this referral by filing an informal complaint with the Commission on April 15, 2009, which it converted into a formal complaint on November 16, 2009. *Liability Order* ¶23 (JA --).⁶ The second, in February 2010, referred additional issues to the Commission.⁷ AT&T filed an Amended Complaint to effectuate certain issues in this second referral order. *Id.*⁸

⁵ *All American Tel. Co., Inc. v. AT&T, Inc.*, 07-Civ 861, 2009 WL 691325 (SDNY, Order, Mar. 16, 2009) (JA --).

⁶ *See* Formal Complaint of AT&T, File No. EB-09-MD-010 (filed Nov. 16, 2009).

⁷ *All American Tel. Co., Inc., et al. v. AT&T, Inc.*, 07-Civ 861(WHP) (Order, Feb. 5, 2010)(JA --); *see also All American Tel. Co., Inc., et al. v. AT&T, Inc.*, Memorandum & Order, 07-Civ 861, 2010 WL 7526933 (Jan. 19, 2010).

⁸ At the same time, petitioners filed their own formal complaint against AT&T with the FCC to effectuate the remaining issues in the second referral order. The Commission denied that complaint. *All American Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723 (2011), *recon. denied*, 28 FCC Rcd 3469 (2013) (JA --). Petitioners did not seek judicial review of those orders.

As provided by the Commission's rules, AT&T elected to have the agency address liability first and then, separately, damages in a subsequent phase of the proceeding. *See* 47 C.F.R. § 1.722(d). Thereafter, in a March 2013 decision, after compiling an "extensive record," the Commission held petitioners liable for violating Section 201(b) of the Act, 47 U.S.C. § 201(b). The Commission's conclusions were withering: Petitioners "violated section 201(b) of the [Communications Act] by operating as sham [competitive local exchange carriers] with the apparent purpose and effect of inflating their billed access charges to levels that could not otherwise be obtained by lawful tariffs." *Liability Order* ¶24 (JA --). Petitioners "had no intention at any point in time to operate as *bona fide* CLECs or provide local exchange service to the public at large. ... [Their] entire business plan was to generate access traffic exclusively to a handful of [chat line/conferencing service providers], and to bill for that traffic at tariffed rates that were benchmarked to Beehive's NECA rates ... [even though] they represented to the Utah [Public Service Commission] that they would *not* operate as CLECs in Beehive's territory, and their Utah [certificate of public convenience and necessity] specifically prohibited them from doing so." *Liability Order* ¶25 (JA --).⁹ "Billing AT&T for access

⁹ The Commission's conclusions were consistent with those of the Utah PSC, which in 2010 had revoked All American's certificate of public convenience and necessity and ordered it to withdraw from the state based on its "blatant legal violations" and its illegal operations in the state. *See Liability Order* ¶18 (JA --).

charges in furtherance of this scheme,” the Commission concluded, “constitutes an unjust and unreasonable practice in violation of Section 201(b) of the Act.” *Id.* ¶24 (JA --)

The Commission rejected petitioners’ claims that their billings to AT&T were lawful, finding that their “conduct violates Section 201(b) because they operated as sham entities in an effort to circumvent the Commission’s CLEC access charge and tariff rules, which would have brought the access stimulation scheme to an end.” *Id.* ¶31 (JA --).

The Commission also found that petitioners had violated “Sections 201(b) and 203 of the Act [47 U.S.C. §§ 201(b), 203] by billing for access services that they did not provide pursuant to valid and applicable interstate tariffs.” *Liability Order* ¶34 (JA --); *see generally id.* at ¶¶ 35-41 (JA --).¹⁰

The Commission explained that the Utah PSC had characterized All American “as a ‘mere shell company’ [that] lacked the technical, financial, and managerial resources to serve the customers it represented it would and could serve when applying for its” certificate of public convenience and necessity. *Id.* ¶19 (JA --).

¹⁰ The Commission found that petitioners did not have their own operating switches or facilities typically used to provide competitive local exchange services to the public, did not obtain any unbundled network elements that would have enabled them to provide local telecommunications services, and did not provide any access services to AT&T. Rather, after Beehive Telephone helped to create petitioners, it continued to provide the access services to AT&T in the same manner that it did beforehand despite petitioners’ claim that they provided the services. This scheme enabled petitioners to bill AT&T at higher rates than what would have been sustainable in the absence of the scheme. *Liability Order*, ¶¶16-17, 26-28, n.60 (JA --).

Petitioners sought reconsideration of the *Liability Order*, and in a June 2014 order the Commission denied the petition in the *Liability Recon. Order* (JA --).¹¹ The Commission found no basis either for petitioners' challenges to procedural rulings or its claims of bias on the part of the Commission. *Id.* ¶¶ 9-15 (JA --).

Petitioners have not sought judicial review of the *Liability Orders*, and the time for challenging determinations in those orders has expired. *See Cellular Tel. & Internet Ass'n v. FCC*, 330 F.3d 502, 504 (D.C. Cir. 2003) (dismissing untimely challenge to FCC order for lack of jurisdiction).

C. THE ORDER ON REVIEW AWARDING DAMAGES TO AT&T

Following completion of the liability phase of the proceeding and issuance of the *Liability Orders*, in October 2014 AT&T filed with the Commission a supplemental complaint seeking damages arising from the liability findings in those orders. *See* (JA --). In the August 2015 *Damages Order* that is before the Court here, the Commission granted the supplemental complaint in part, awarding AT&T damages of \$252,496.37 – the amount that AT&T paid petitioners for services they did not provide. *Damages Order* ¶1 (JA --). As the Commission explained, because

¹¹ Beehive Telephone Co. also sought reconsideration of the *Liability Order*, claiming it could be injured in future matters by the precedential effect of that order. The Commission dismissed the Beehive petition because it had previously held that a party is not aggrieved by the mere precedential effect of a Commission order and because Beehive had offered no justification for its failure to seek to intervene earlier in the proceeding. *See Liability Recon. Order* ¶¶18-23 (JA --).

petitioners “may charge only for services they actually provide, it would be unjust to allow them to retain the amounts AT&T paid.” *Id.* The Commission dismissed without prejudice the supplemental complaint with respect to AT&T’s attempt to collect interest and consequential damages, noting that those claims remained before the court in the Southern District of New York. The Commission stated that its dismissal of those claims was not intended to preclude AT&T from pursuing them in that forum. *See id.* ¶12 (JA --).

The Commission rejected petitioners’ argument that the agency lacked jurisdiction over them in the damages phase of the proceeding. The Commission found to be absurd petitioners’ claim that the conclusion that petitioners had operated as “sham” entities and had violated the Communications Act meant that the Commission lacked jurisdiction over them. *Damages Order* ¶¶8-10 (JA --). Petitioners had held themselves out as providing service as common carriers, obtained state certificates to operate as competitive local exchange carriers, filed tariffs at the FCC for interstate services, billed for those services, and sued AT&T for amounts allegedly due for the provision of those interstate services. *Id.* The Commission explained that petitioners’ jurisdictional argument boiled down to the incredible assertion that “because they violated the Commission’s rules, they are not subject to the Commission’s rules.” *Id.* ¶9 (JA --). In addition, the Commission noted that this Court had recently considered a similar argument in a similar factual setting and found it

to be “flatly wrong.” *Id.* ¶9 (JA --), quoting *Farmers & Merchants*, 668 F.3d. at 719.

The Commission concluded that AT&T had “substantiated the amount of its direct damage” and was entitled to a refund of the money it had paid petitioners. *Damages Order* ¶11 (JA --). AT&T had submitted evidence in the record, which petitioners do not dispute, that it had paid petitioners \$252,496.37. *See id.* ¶11 & n.40 (JA --).¹² The Commission found no basis in the record for petitioners’ newly minted claims that they were entitled to retain this money on the theory that they were operating as billing and sales agents for Beehive Telephone Co. *Id.* ¶11 (JA --).

The Commission also found no basis for petitioners’ contention that an award of damages would amount to unjust enrichment to AT&T. *Damages Order* ¶13 (JA --). Petitioners had “demonstrated neither that they may plead equitable defenses in a [47 U.S.C. §] 208 complaint proceeding, nor that they may seek equitable relief relating to matters subject to regulation.” *Id.* (footnotes omitted). And petitioners’ concession that “they are entitled to compensation for access service only ‘through a valid tariff or a contract negotiated with AT&T,’” neither of which the Commission found in the *Liability Order* existed in this case, showed that there

¹² The record showed that petitioners had billed AT&T in excess of \$13 million. AT&T paid \$252,496.37 before it ceased paying the bills. *See Liability Order* ¶22 (JA --); *Damages Order* ¶4 (JA --); [Toof Rept. at 2](JA --).

was no “regulatory gap’ entitling [petitioners] to pursue alternate damage theories” in this proceeding. *Id.* n.50 (JA --).

Finally, the Commission rejected petitioners’ Fifth Amendment takings claim as without any factual foundation. The assertion that the Commission had “compelled” petitioners to provide service to AT&T under a “flawed” tariff that the Commission had prevented them from amending was based on a “rewrite of history.” *Damages Order* ¶20 (JA --). The Commission had rejected petitioners’ attempt to revise the tariff “because it violated the Commission’s rules,” and when the Commission ordered petitioners to file tariff revisions that complied with the rules, petitioners “chose not to do so.” *Id.*

SUMMARY OF ARGUMENT

1. The FCC determined in the *Liability Order* that petitioners operated as “sham” competitive local exchange carriers that were created for the purpose of improperly inflating access revenues, and that they billed AT&T for access services they did not provide in violation of the Communications Act. Petitioners have not challenged that determination, which is now final and not before the Court in this case.

In an effort to avoid the consequences of their unlawful activities, however, petitioners have challenged the Commission’s decision in the *Damages Order* to award damages to AT&T based on the amount of money it paid to petitioners for

services the Commission had found in the *Liability Order* that petitioners did not provide.

Petitioners concede that the FCC had jurisdiction to adjudicate AT&T's complaint at the liability stage. But they then implausibly claim that the Commission somehow deprived itself of jurisdiction when it determined they had violated federal law, operating as "sham" entities and not providing service pursuant to a lawful tariff. Hence, the theory goes, the FCC found they were not common carriers and were thus no longer subject to the agency's jurisdiction. According to petitioners, by finding their scheme to be unlawful, the Commission deprived itself of jurisdiction to provide any remedy for their unlawful activity. This Court recently rejected essentially the same claim made in similar circumstances, accepting the FCC's characterization of the argument as "flatly wrong" and noting that the carrier in that case, as here, had held itself out as a common carrier, had provided access services and had billed for such services. Therefore, it could not "immunize it[self] from the [Section 208] complaint process." *Farmers & Merchants*, 668 F.3d at 719. The same conclusion applies here.

2. Petitioners' argument that the *Damages Order* was "purposefully ambiguous" and thus should be clarified by the Court is barred because the question has never been presented to the Commission as required by Section 405(a) of the Com-

munications Act. In addition, petitioners lack standing to raise the argument because (1) it amounts to a request for an advisory opinion that this Court has no authority to issue, and (2) it seeks review of the precedential impact of the *Damages Order*, and the Court has rejected the proposition that parties have standing to challenge the precedential value of an agency order.

There is, in any event, no basis for petitioners' ambiguity argument. The *Damages Order* responded to the issues raised in AT&T's supplemental complaint filed to effectuate the primary jurisdiction referral. The *Damages Order* did not purport to resolve petitioners' state law claims, as petitioners concede. Furthermore, this Court's jurisdiction in this case is limited to determining whether the order was arbitrary and capricious or otherwise unlawful, and petitioners fail to demonstrate that any alleged ambiguity goes to that question. It is not for this Court to provide guidance to the district court judge in the related matter pending in the Southern District of New York about how to interpret the *Damages Order*, and that is expressly what petitioners seek.

3. There was ample basis in the record for the Commission's conclusion that AT&T was entitled to an award of damages in the amount it had paid to petitioners. Petitioners did not dispute the amount that AT&T had paid nor have they disputed the conclusions in the *Liability Order* that they billed AT&T for services they did not provide.

Petitioners' complaints that they did not have discovery during the damages phase of the proceedings ignore the very substantial record that was before the FCC as a result of discovery during the liability phase of the proceeding and in other related proceedings. To the extent petitioners claim that there was delay in the liability phase of the proceeding, they are barred from raising that issue because they did not seek review of the *Liability Orders*. The Commission reasonably concluded that the ten-month period between AT&T's filing of its supplemental complaint and issuance of the *Damages Order* did not constitute unreasonable delay.

4. Petitioners' request for declaratory relief is simply a recasting of their substantive claims that the FCC lacked jurisdiction to adopt an award of damages and that the *Damages Order* is ambiguous. In any event, the Hobbs Act delineates the method by which participants in FCC proceedings may obtain review of FCC orders. That method plainly is adequate here and thus the Court should refuse to grant declaratory relief.

STANDARD OF REVIEW

This Court reviews FCC orders "under the deferential standard mandated by section 706 of the Administrative Procedure Act, which provides that a court must uphold the Commission's decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Achernar Broadcasting Co.*

v. *FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)). “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action ... and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). In determining whether the Commission’s action is “reasonable and reasonably explained,” the Court “must not substitute [its] judgment for that of the agency.” *National Tel. Coop. Ass’n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009).

Review of the FCC’s interpretation of the statutes it administers is governed by *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, unless the language of the statute “unambiguously forecloses the agency’s interpretation,” a reviewing court must “defer to that interpretation so long as it is reasonable.” *National Cable & Tel. Ass’n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009). “[T]he question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843. If so, the court must “accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.” *National Cable & Tel. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Moreover, contrary to petitioners’ assertion (Br. at 16), this two-step analysis applies to an

agency's ruling on its own jurisdiction. *See City of Arlington, Texas v. FCC*, 133 S.Ct. 1863, 1872 (2013).

ARGUMENT

I. THE FCC REASONABLY CONCLUDED THAT IT HAD JURISDICTION TO AWARD DAMAGES IN THIS CASE.

AT&T's complaint was filed pursuant to Section 208(a) of the Communications Act, 47 U.S.C. § 208(a), which authorizes the FCC to adjudicate a complaint "of anything done or omitted to be done by any common carrier" in violation of the Act's provisions. Petitioners concede that "[47 U.S.C.] § 208 provided the FCC with authority to hear the Liability phase complaint" Br. at 1, and that the "FCC was fully empowered to issue the *Liability Order*." *Id.* at 22. Having conceded that authority, however, petitioners claim that the FCC somehow divested itself of power to order a remedy in the case for violations of the Communications Act. They contend that they are not subject to the FCC's jurisdiction to award damages because they are not common carriers. Br. at 17, citing *Damages Order* ¶8 (JA --).

The Commission fully addressed, and rightly rejected, this baseless argument:

Defendants ... admit that they held themselves out as "providing service as common carriers," and they operated with nationwide authority under Section 214 of the Act. Moreover, Defendants obtained state certificates to operate as [competitive local exchange carriers], filed tariffs for their interstate services, and billed for those services under their own operating company numbers. They then sued AT&T in fed-

eral court in their own names for amounts allegedly due for the provision of their interstate services, and they requested that the Court refer to the Commission numerous issues relating to their operation as common carriers.

Damages Order ¶8 (JA --) (footnotes omitted). As the Commission noted, this Court considered precisely this argument – “that because they violated the Commission’s rules, they are not subject to the Commission’s rules,” –in similar factual circumstances only five years ago and rejected it as “flatly wrong.” *Id.* ¶9 (JA --) quoting *Farmers & Merchants*, 668 F.3d at 719.

Petitioners assert that the FCC’s findings in the *Liability Order* – that they were “sham entities that did not provide local telecommunications services” or any service “to the public at large” – meant that they were not “common carrier[s],” as defined in the Act (47 U.S.C. § 153(11)), and precluded the FCC from relying on Sections 206 and 208 of the Act to require them to pay damages. *See* Br. at 18-19.¹³ Yet as noted above, petitioners conceded in their filings with the Commission that they had held themselves out as common carriers – particularly by filing tariffs as common carriers and then representing in court and at the FCC that they were common carriers in order to collect tariffed charges for regulated services. *See*

¹³ Petitioners’ reliance on 47 U.S.C. §§ 153(51) and 153(53) (Br. at 18) adds nothing to their jurisdictional argument. Those provisions simply define the additional term “telecommunications carrier” as one who offers “telecommunications service” to the public for a fee and provides that such telecommunications carrier shall be treated as a common carrier.

[Answer to Supp. Compl. ¶17] (JA --). Under this Court's precedents, "one may be a common carrier by holding oneself out as such." *NARUC v. FCC*, 525 F.2d 630, 643 (D.C. Cir. 1976). The record before the Commission thus fully supports the agency's reasonable conclusion that it had jurisdiction to award damages under the Act's Title II common carrier provisions.

Petitioners' attempt to distinguish the *Farmers & Merchants* precedent is unpersuasive. *See* Br. at 21-23. The Court held in that case that Farmers, the carrier, had held itself out as a common carrier providing access service and billing for that service, and thus it "could not immunize it from the complaint process." 668 F.3d at 719. Yet such immunization is precisely what petitioners seek here. Petitioners argue (Br. at 22-23) that *Farmers & Merchants* is inapposite because they operated as "sham" entities that provided *no* service to AT&T, whereas the carrier in *Farmers & Merchants* provided some actual tariffed service unrelated to the access stimulation scheme. But the Commission properly found that its conclusion in the *Liability Order* that petitioners had "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." *Damages Order* ¶9 (JA --). Nothing about this Court's decision in *Farmers & Merchants* turned on the existence of entirely unrelated tariffed service.

**II. PETITIONERS' CLAIM THAT THE *DAMAGES ORDER* IS
"PURPOSELY AMBIGUOUS" IS NOT PROPERLY BEFORE
THE COURT AND IN ANY EVENT IS BASELESS.**

Petitioners claim that the *Damages Order* "is purposely ambiguous in its discussion of [petitioners'] claims under state law" and that "to the extent it can be read to limit [petitioners'] ability to prosecute such claims, the order is ultra vires and must be vacated in part." Br. at 23; *see generally* Br. at 23-40. Petitioners are barred from presenting this question because they did not raise it before the Commission. Moreover, they lack standing to raise this challenge because the relief they seek is essentially an advisory opinion from the Court to confine the precedential value of the *Damages Order*.

In any event, to the extent the *Damages Order* even addressed what petitioners describe as their "claims under state law," the *Order* is not ambiguous. Moreover, petitioners fail to demonstrate that even if ambiguity exists, such ambiguity makes the *Damages Order* arbitrary, capricious, or otherwise unlawful.

A. Petitioners Are Barred From Raising The Issue.

The first obstacle to the Court's consideration of this argument is that petitioners never raised it before the FCC. Under 47 U.S.C. § 405(a), the "filing of a petition for reconsideration" is a "condition precedent to judicial review" of any FCC order "where the party seeking such review ... relies on questions of fact or law upon which the Commission ... has been afforded no opportunity to pass."

This Court has strictly construed that section, holding that it “generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission.” *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003); *see also In re Core Communications, Inc.*, 455 F.3d 267, 276-77 (D.C. Cir. 2006); *American Family Ass’n, Inc. v. FCC*, 365 F.3d 1156, 1166 (D.C. Cir. 2004).

To be sure, petitioners could not have become aware of this claimed ambiguity until the Commission issued the *Damages Order*. However, this Court has held that “even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file ‘a petition for reconsideration’ with the Commission before it may seek judicial review.” *Core Communications*, 455 F.3d at 277 (citing *AT&T Corp. v. FCC*, 86 F.3d 242, 246 (D.C. Cir. 1996)). Petitioners did not seek reconsideration of the *Damages Order*.

This case well illustrates the wisdom of the statute’s requirement. An argument that the agency order is written so as to make it “ambiguous” and capable of being read in a manner that makes the ruling “beyond the FCC’s expertise and the scope of its complaint proceeding” (Br. at 24) is precisely the sort of claim that, even separate and apart from the mandate of Section 405(a), logically should be made first to the agency. If such an argument were to have any basis, the FCC could easily correct any ambiguity on reconsideration and thereby avoid the necessity of judicial review at all. Thus, since petitioners did not present this argument

to the Commission in a petition for reconsideration of the *Damages Order*, they are barred by 47 U.S.C. § 405(a) from raising it before this Court on review.

B. Petitioners Lack Standing To Raise Their Ambiguity Argument.

Even if Section 405(a) were not a bar to consideration of petitioners' ambiguity argument, petitioners would lack standing to raise it here. It is well established that Article III limits federal judicial jurisdiction to cases and controversies (U.S. Const. art. III, § 2), and that federal courts are without authority "to render advisory opinions [or] 'to decide questions that cannot affect the rights of litigants in the case before them,'" *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (citation omitted); *see also Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011). The doctrine of standing "reflect[s] and enforce[s]" that limitation. *Id.*

Petitioners' claim that the *Damages Order* is ambiguous amounts to a request for an impermissible advisory opinion from this Court to limit the precedential value of that order in a manner that, presumably, would benefit petitioners. However, this Court has repeatedly rejected the proposition that parties have standing to challenge the precedential value of an agency order. *See, e.g., American Family Life Assur. Co. of Columbus v. FCC*, 129 F.3d 625, 629-30 (D.C. Cir. 1997) ("Yet we have said before, and we say again, that the 'mere precedential effect of [an] agency's rationale in later adjudications' is not an injury sufficient to

confer standing on someone seeking judicial review of the agency's ruling.”)(citing cases).

The Court should reject petitioners’ invitation that it, in effect, clarify the *Damages Order* to serve petitioners’ purposes in the litigation pending in the Southern District of New York. Petitioners’ ambiguity argument should be dismissed for lack of standing.

C. To The Extent That The Commission Addressed The Issue Of Petitioners’ State Law Claims, The Damages Order Was Reasonable.

The *Damages Order* responded to the issues presented in AT&T’s administrative complaint effectuating the district court’s primary jurisdiction referrals. Petitioners’ claim (Br. at 24) that the Commission “purposely obfuscated the issue” of whether petitioners retained any “state law claims in equity” is groundless. This contention apparently is based on the Commission’s conclusion that two of the questions referred by the district court were moot in light of its finding in the *Liability Order* that petitioners “did not provide any service to AT&T” *Damages Order* ¶21 (JA --); see *Liability Order* ¶¶16, 17, 25-27 (JA --). According to petitioners, the Commission’s failure to answer these questions *could* be interpreted to mean that AT&T “never received a benefit ... that may be compensable under state law principles of equity.” Br. at 25. This claim is unsound.

In the first place, the Commission did not “refuse[] to answer” (Br. at 24) the two particular questions from the district court’s referral, or “purposefully obfuscate” (*id.*) anything. Rather, it found that the questions were moot in light of its determinations made in the *Liability Order*, which petitioners have not challenged, that petitioners “did not provide any service to AT&T that would justify billing AT&T under their tariff.” *Damages Order* ¶11, citing *Liability Order* ¶¶34-36 (JA --); *see also Damages Order* ¶13 (petitioners “did not provide a service to, or confer a benefit on, AT&T.”) (JA --). This unambiguous determination is clearly within the FCC’s expertise. *See, e.g., Farmers & Merchants*, 668 F.3d at 719-20 (such determinations involve a “subject demonstrably within the Commission’s expertise.”). Having reached that conclusion, it was reasonable for the Commission to find that it was unnecessary to answer questions that had been predicated on an assumption that petitioners *had* provided service to AT&T.

The FCC properly resolved the questions before it in response to the complaints filed by AT&T following the primary jurisdiction referrals. Petitioners cite no basis for their apparent view that the *Damages Order* is arbitrary and capricious because there may exist further questions with respect to petitioners’ dispute with AT&T that were not resolved. As noted above, petitioners are improperly seeking an advisory opinion from the Court regarding the precedential value of the *Damages Order*. Petitioners are free to argue in other forums whatever they want about

the meaning of the Commission's determinations. However, particularly where petitioners have never sought clarification from the Commission on these points by filing a reconsideration petition, there is no basis to find the *Damages Order* arbitrary and capricious or otherwise unlawful because of petitioners' unwarranted claim that it is "ambiguous."

Petitioners also argue at length that the *Damages Order* "cannot bar state claims by preemption or by action of the filed rate doctrine." Br. at 27. As to the latter, petitioners themselves concede that the "Filed Rate Doctrine is not an issue in the instant case – it was not pled by AT&T, and was not invoked by the FCC." Br. at 34. The Court obviously need not, and should not, address a matter that petitioners state "is not an issue" in this case.¹⁴

As to petitioners' discussion of preemption of their state law claims, the *Damages Order* did not purport to resolve that preemption issue. Indeed, petitioners concede that "[n]owhere in the *Damages Order* does the FCC expressly hold that state equity claims are preempted by its access charge regulations" Br. at 29. And the Commission did not purport to address whether in the district court pe-

¹⁴ The Commission mentioned the filed rate doctrine, which holds, among other things, that a carrier is prohibited from collecting charges for services that are not described in its tariff, at only one point in the *Liability Order* that petitioners have not challenged, see *Liability Order* ¶ 37 & n. 161 (JA --), and not at all in the *Damages Order* that is before the Court.

tioners might be able to prove a state law claim based on an expanded factual record in that proceeding involving, for example, petitioners' belated theory that they operated as a billing and sales agent for Beehive Telephone Co. *See Damages Order* ¶¶10-11 (JA --). There is thus no basis for petitioners to contend that this Court must "define the scope of the FCC's jurisdiction, and advise the SDNY Court that it may proceed to hear [petitioners'] remaining state law claims." *Id.*

This Court's jurisdiction here to review the lawfulness of the FCC's *Damages Order* under the Hobbs Act, 28 U.S.C. § 2342(1), and pursuant to the standards set out in Section 706 of the APA, 5 U.S.C. § 706, does not include providing advice to the district court concerning how it should interpret that order in some further proceeding. Such an approach is inconsistent with the "highly deferential" standard of review under the APA that "presumes agency action to be valid" and will find an agency to have acted arbitrarily or capriciously only "if it has relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation either contrary to the evidence before the agency or so implausible as not to reflect either a difference in view or agency expertise." *Defenders of Wildlife v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016).

In contending that the *Damages Order* is "ambiguous," petitioners do not claim that the order violates any of these standards – only that some language in

the order might be construed in the litigation in the Southern District of New York or in some future proceeding in a manner that could impede petitioners' ability to make some arguments regarding their conduct with respect to their claims against AT&T. Petitioners can make their arguments about their state law claims to the district court and, if they do not prevail, obtain review at that point – of the district court's ruling. That is an entirely hypothetical matter that this Court need not, and should not, address.

III. THE DAMAGES AWARD WAS REASONABLE AND SUPPORTED BY THE RECORD.

The Commission determined in the *Liability Order* that petitioners violated Sections 201(b) and 203 of the Communications Act, 47 U.S.C. §§ 201(b), 203, by operating as “sham” competitive local exchange carriers created to “capture access revenues that could not otherwise be obtained by lawful tariffs” and by billing AT&T for services that they did not provide pursuant to valid and applicable tariffs. *See Liability Order* ¶¶24-41 (JA --). “The *Liability Order* found that [petitioners] did not provide any service to AT&T that would justify billing AT&T under their tariffs.” *Damages Order* ¶11 (JA --). Petitioners did not challenge those findings. And as the Commission observed in the *Damages Order*, petitioners admitted that they did not provide access services to AT&T but nevertheless billed AT&T “in excess of \$13 million for those services and AT&T paid [petitioners]

\$252,496.37.” *Id.* citing [Answer 27 ¶57; Jt Stmt Stip Facts at 1-2, Stip Facts Nos. 5-7, 8-10] (JA --).

Despite these uncontested facts, petitioners nonetheless contend for the first time in this Court that the damages award was unlawful because the Commission “made no finding of pecuniary loss to AT&T.” Br. at 41. Petitioners made no claim to the FCC that it was required to make a finding of “actual pecuniary loss” before it could award damages.¹⁵ Having failed to raise this argument below, as we have noted with respect to other of petitioners’ arguments, they cannot now raise the claim on review. 47 U.S.C. § 405(a).

Regardless, the Commission’s award of damages was based on two undisputed facts: (1) AT&T paid petitioners the amount of \$252,496.37;¹⁶ and (2) petitioners “did not provide a service to, or confer a benefit on, AT&T.” *Damages Order* ¶13 (JA --); *see also Liability Order* ¶¶34-41 (JA --). Those undisputed facts amply supported the award of damages in this case. As the Commission pointed

¹⁵ At most, they argued that a complainant like AT&T must demonstrate that it was damaged and in what amount. *See* Br. at 41-42 (citing *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd 5128 (2000) and *Communication Satellite Corp.*, 97 F.C.C.2d 82 (1984)). That argument does not constitute a claim that the agency must make a finding of “actual pecuniary loss” before awarding damages. As the Commission pointed out in rejecting petitioners’ reliance on those cases below, they “do not involve carriers that were ‘sham’ entities or that provided no service.” *Damages Order* n. 44 (JA --).

¹⁶ *See Damages Order* n. 40 (JA --); *see also* [AA Legal Analysis 12/1/14 at 16; AT&T Reply Legal Analysis 12/22/14 at 23-25] (JA --).

out, it is well-established that “[l]ocal exchange carriers ‘should charge only for those services that they provide.’” *Damages Order* ¶11 (JA --). Having concluded in the *Liability Order* that petitioners did not provide services to or confer benefits on AT&T, it was reasonable for the Commission to award damages to AT&T to refund the amount the record showed it paid to petitioners.

Petitioners’ additional complaints regarding lack of discovery and delay relating to the damages award have no merit. Br. at 43-45. Contrary to the impression that petitioners seek to leave, there was in fact an extensive record in this case, including discovery taken during the liability phase of this proceeding, as well as in the case in the Southern District of New York that led to the primary jurisdiction referral, in proceedings before the Utah Public Service Commission, and several other federal district court cases. *See, e.g., Liability Order* n.104 (JA --) (“The record exceeds 7,000 pages, including pleadings, discovery responses, deposition transcripts, court exhibits, Utah PSC exhibits, and other miscellaneous documents.”). The Commission reasonably denied petitioners’ request for additional discovery during the damages phase of the proceeding, finding that there was no need for discovery in light of the extensive record already adduced in the liability phase of this proceeding.¹⁷

¹⁷ *See* [Griffin 2/13/15 ltr] (JA --).

Petitioners offer no more persuasive explanation here as to why discovery was necessary, what further discovery they sought, or how it would have affected the FCC's damages determination. This is particularly telling in view of petitioners' failure to dispute either the conclusions reached in the *Liability Order* or AT&T's showing as to the payments it made to petitioners. The Commission has broad discretion whether and to what extent to grant discovery requests in complaint proceedings like this. *See Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 789-90 (D.C. Cir. 2000). Petitioners fail to demonstrate that the Commission abused that discretion here.

Petitioners' claims of delay likewise are baseless. Their assertion that the initial liability phase of the proceeding was subject to a statutory five-month deadline (Br. at 45) is wrong. The Commission held in the *Liability Order* and again in denying petitioners' petition for reconsideration of the *Liability Order* that action on the complaint in this case is not the type of proceeding to which the statutory deadline to which petitioners advert is applicable. *See Liability Order* n.190 (JA --); *Liability Recon. Order* ¶15 (JA --). Moreover, as we have noted, petitioners failed to seek review of those orders, and they are not subject to challenge here. The *Damages Order* that is before the Court was issued on August 21, 2015, fewer than ten months after AT&T filed its Supplemental Complaint (JA --) that the

Damages Order addressed. There is no basis for petitioners' unwarranted claim of "extraordinary delay." Br. at 45.

IV. PETITIONERS' REQUEST FOR DECLARATORY RELIEF IS WITHOUT MERIT.

Petitioners' claim that they are "entitled to declaratory relief" (Br. at 46) pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, is simply a recasting of their unsound arguments that (1) the FCC lacks jurisdiction over them because they are not common carriers, and (2) the *Damages Order* is unlawfully ambiguous. *See, e.g.*, Br. at 47 ("this Court is required to" provide declaratory relief "[i]n light of the ambiguity of the *Damages Order*"); Br. at 48 (declaratory relief is necessary to "confirm[] that ... the *Liability Order* had the effect of determining that the [petitioners] cannot be classified as common carriers, and so are no longer subject to the FCC's Title II jurisdiction ..."). As we have discussed above, petitioners' jurisdictional and ambiguity arguments are both without any basis. No different result is warranted based on petitioners' relabeling of those arguments as requests for declaratory relief.¹⁸

¹⁸ Petitioners sought similar declaratory relief from the FCC. The most recent petition, filed in December 2014, asked the FCC for declaratory relief with respect to a number of issues, including that petitioners "are not common carriers, and so are not subject to [the Commission's] jurisdiction." *See* [All American Petition for Decl. Ruling at 2 (Dec. 1, 2014)] (JA --). The Commission dismissed that petition as moot because it relied on the same arguments, raised in defense to

In any event, this is not an appropriate case for declaratory relief. This Court can “refuse to grant declaratory relief if alternative remedies are better or more effective.” *Cartier v. Secretary of State*, 506 F.2d 191, 200 (D.C. Cir. 1974), cert. denied, 421 U.S. 947 (1975). Congress adopted the exclusive statutory review provisions in 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a) for FCC orders of this type – the very provisions that petitioners have invoked to seek review – and the (entirely effective) review available pursuant to those provisions is the appropriate means for review of FCC final orders. Moreover, just as the Commission concluded in response to petitioners’ declaratory relief petitions, denial of petitioners’ substantive arguments in these circumstances moots any claim for declaratory relief.

AT&T’s Supplemental Complaint, that the FCC had rejected. *See Damages Order* n.16 (JA --). Petitioners do not seek review here of that dismissal. Petitioners also styled the complaint they filed following the district court’s primary jurisdiction referral as a “Formal Complaint and Motion for Declaratory Ruling.” *See All American Tel. Co., et al.*, 26 FCC Rcd 723 n.1 (2011) (JA --). The Commission denied petitioners’ complaint, concluding that it was irrelevant whether the agency’s response to the referral order was action on “a petition for declaratory ruling ... or a formal complaint” *Id.* n.6 (JA --). Petitioners did not seek judicial review of that ruling, which is now final.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review in part and otherwise deny it, as well as deny the request for declaratory judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of F.R.A.P. Rule 32(a)(7)(B) because it contains **9122** words, excluding the parts of the brief exempted by F.R.A.P. Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of F.R.A.P. Rule 32(a)(5) and the type style requirement of F.R.A.P. Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface, Times New Roman 14pt, using Microsoft Word 2013.

/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

May 3, 2016

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47 U.S.C.A. § 160**§ 160. Competition in provision of telecommunications service**

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C.A. § 201

§ 201. Service and charges

* * *

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C.A. § 203**§ 203. Schedules of charges****(a) Filing; public display**

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of \$6,000 for each such offense, and \$300 for each and every day of the continuance of such offense.

47 U.S.C.A. § 208

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C.A. § 251

§ 251. Interconnection

* * *

(h) “Incumbent local exchange carrier” defined

(1) Definition

For purposes of this section, the term “incumbent local exchange carrier” means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission’s regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

* * *

47 U.S.C.A. § 405**§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order**

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

* * *

47 C.F.R. § 1.722**§ 1.722 Damages.**

* * *

(d) If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:

(1) Comply with paragraph (a) of this section, and

(2) State clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.

* * *

47 C.F.R. § 61.26**§ 61.26 Tariffing of competitive interstate switched exchange access services.**

(a) Definitions. For purposes of this section, the following definitions shall apply:

(1) CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of “incumbent local exchange carrier” in 47 U.S.C. 251(h).

(2) Competing ILEC shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

(3) Switched exchange access services shall include:

(i) The functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching;

(ii) The termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated

provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.

(4) Non-rural ILEC shall mean an incumbent local exchange carrier that is not a rural telephone company under 47 U.S.C. 153(44).

(5) The rate for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) Rural CLEC shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c), (e), and (g) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) of this section or

(ii) In the case of interstate switched exchange access service, the lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding June 20, 2001.

(c) The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate.

(d) Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) and (c) of this section, in the event that, after June 20, 2001, a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption. Except as provided in paragraph (g) of this section, and

notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to that NECA rate, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge. Beginning July 1, 2013, all CLEC reciprocal compensation rates for intrastate switched exchange access services subject to this subpart also shall be no higher than that NECA rate.

(f) If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by § 51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

(g) Notwithstanding paragraphs (b) through (e) of this section:

(1) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state.

(2) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall file revised interstate switched access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in § 61.3(bbb), or within forty-five (45) days of [date] if the CLEC on that date is engaged in access stimulation, as that term is defined in § 61.3(bbb).

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ALL AMERICAN TELEPHONE COMPANY, INC.,
ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,

Respondents.

No. 15-1354

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that on May 3, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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