

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

SOUTHWESTERN BELL TELEPHONE)	
COMPANY, BELLSOUTH)	
TELECOMMUNICATIONS, INC.,)	
ILLINOIS BELL TELEPHONE COMPANY,)	
INDIANA BELL TELEPHONE COMPANY)	
INC., MICHIGAN BELL TELEPHONE)	
COMPANY, NEVADA BELL TELEPHONE)	Civil Action No. 3-09-cv-01268-P
COMPANY, PACIFIC BELL TELEPHONE)	
COMPANY, THE OHIO BELL TELEPHONE)	
COMPANY, THE SOUTHERN NEW)	
ENGLAND TELEPHONE COMPANY and)	
WISCONSIN BELL, INC.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
IDT TELECOM, INC., ENTRIX TELECOM)	
INC., and JOHN DOES 1-10,)	
)	
Defendants.)	

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION
TO STAY BASED ON THE DOCTRINE OF PRIMARY JURISDICTION
OR, IN THE ALTERNATIVE, TO DISMISS THE COMPLAINT
PURSUANT TO FED R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM**

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TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	1
BACKGROUND	5
I. Long-Distance Phone Calls And “Access Charges”	5
II. The FCC’s Orders On Prepaid Calling Card Services	6
A. Orders Prior To The 2006 <i>Comprehensive Calling Card Order</i>	6
B. The FCC’s 2006 <i>Comprehensive Calling Card Order</i>	8
C. IDT’s Attempt To Evade The FCC’s Orders	11
ARGUMENT	12
I. The Court Should Deny IDT’s Motion To Stay	12
A. The FCC Has Already Conclusively Decided The Issue Presented Here, When It Held That “All” Prepaid Card Providers Must Pay Access Charges	13
B. IDT’s Proposed Stay Is Contrary To The FCC’s Comprehensive Calling Card Order, And To IDT’s Own Professed Desire For Uniformity	15
C. The Court Should Reject IDT’s Attempts To Limit The FCC’s Comprehensive Order	16
D. IDT’s Motion Ignores The Costs Of Delay	18
II. The Court Should Deny IDT’s Fallback Motion To Dismiss	19
A. The Complaint Sufficiently Describes IDT’s Violation Of The AT&T LECs’ Switched Access Tariffs	19
B. There Is A Question Of Fact As To Whether IDT Has Constructively Ordered Access Services From The AT&T LECs	21
C. The Complaint States A Claim For Unjust Enrichment	24
CONCLUSION	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Advantel, LLC v. AT&T Corp.</i> , 118 F. Supp. 2d 680 (E.D. Va. 2000)	22, 23
<i>AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services</i> , 20 FCC Rcd. 4826 (2005) (“2005 Calling Card Order”)	3, 7, 8, 14, 16, 18
<i>AT&T Corp. v. Community Health Group</i> , 931 F. Supp. 719 (S.D. Cal. 1995).....	23
<i>DFW Metro Line Services v. Southwestern Bell Tel. Co.</i> , 901 F.2d 1267 (5th Cir. 1990)	19
<i>In re Core Communications, Inc.</i> , 531 F.3d 849 (D.C. Cir. 2008).....	18
<i>In re Regulation of Prepaid Calling Card Services</i> , 21 FCC Rcd. 7290 (2006) (“Comprehensive Calling Card Order”)	<i>passim</i>
<i>In re Time Machine, Inc.</i> , 11 FCC Rcd. 1186 (1995).....	7
<i>In re U.S. TelePacific Corp.</i> , 19 FCC Rcd. 24552 (2004).....	14
<i>Katz v. MCI Telecomms. Corp.</i> , 14 F. Supp. 2d 271 (E.D.N.Y. 1998)	21
<i>Logix Communications, L.P. v. Public Util. Comm’n</i> , 521 F.3d 361 (5th Cir.), <i>cert. denied</i> , 129 S. Ct. 223 (2008).....	13
<i>Marcus v. AT&T Corp.</i> , 138 F.3d 46 (2d Cir. 1998).....	19, 21
<i>Mississippi Power & Light Co. v. United Gas Pipe Line Co.</i> , 532 F.2d 412 (5th Cir. 1976)	12, 18
<i>People v. Monaco</i> , 710 N.W.2d 46 (Mich. 2006).....	13
<i>Qwest Services Corp. v. FCC</i> , 509 F.3d 531 (D.C. Cir. 2007).....	10, 11

TABLE OF AUTHORITIES

(continued)

	Page
<i>Southern New England Tel. Co. v. Global NAPs, Inc.</i> , 2005 WL 2789323 (D. Conn. 2005)	22
<i>Southwest Louisiana Healthcare Sys. v. MBIA Ins. Co.</i> , 2008 WL 5155752 (W.D. La. Dec. 8, 2008)	21
<i>Staton Holdings, Inc. v. First Data Corp.</i> , No. Civ. A 304CV2321P, 2005 WL 2219249 (N.D. Tex. Sept. 9, 2005)	12, 13, 17
<i>United Artists Payphone Corp. v. New York Tel. Co.</i> , 8 FCC Rcd. 5563 (1993)	22
<i>Wolff v. Rare Medium, Inc.</i> , 171 F. Supp. 2d 354 (S.D.N.Y. 2001)	21
 STATUTES	
28 U.S.C. § 2342	18
 OTHER AUTHORITIES	
47 C.F.R. § 69.5	6, 7, 24
73 Fed. Reg. 66,821 (2008)	18

Plaintiffs, the “AT&T Local Exchange Carriers” (“AT&T LECs”) respectfully submit their brief in opposition to the motion to stay or, in the alternative, to dismiss brought by defendants IDT Telecom, Inc. and Entrix Telecom, Inc. (collectively, “IDT”).

INTRODUCTION AND SUMMARY OF ARGUMENT

I. IDT claims (Motion, ¶ 16) that this Court should stay the AT&T LECs’ complaint “pending resolution of the issues” by the Federal Communications Commission (“FCC”). In reality, though, the FCC has already resolved those issues. IDT’s motion is simply an attempt to delay and continue frustrating the enforcement of the FCC’s plain orders.

IDT sells long-distance phone service, like Sprint and other long-distance providers. The only difference is that consumers pay for IDT’s service in advance, by purchasing prepaid “calling cards.” Like other long-distance providers, IDT uses the facilities of local phone companies (like the AT&T LECs) whenever its customers place a long-distance calling card call from an AT&T phone line. The applicable AT&T LEC “originates” the call and delivers it from the customer’s phone to an AT&T switch, and from there the call goes to IDT’s long-distance network and on to its final destination. In exchange for providing such access to their networks, the AT&T LECs are entitled, by FCC rules and by tariffs that have the force of federal law, to “switched access charges” from the long-distance carrier.

Three years ago, the FCC issued an order – in its own words – “**requiring all prepaid calling card service providers to pay intrastate and interstate access charges.**” *In re Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290, ¶ 27 (2006) (“*Comprehensive Calling Card Order*”; emphasis added). The order contains no exception or limitation – in fact, the FCC said no less than a dozen times that the order’s requirements apply to “all” calling card providers. *Id.* ¶¶ 1, 8, 10, 21, 22, 27, 41, 66, 68, 69, 70, 76. The FCC explained that it *intended* a no-exceptions, no-loopholes order to ensure “a level regulatory playing field for calling card

providers” and because “[a]ny uncertainty regarding the regulatory requirements applicable to prepaid calling cards” would “create[] incentives for providers to reduce exposure to charges they may owe or evade them altogether.” *Id.* ¶ 8. The FCC also made clear that its “all”-encompassing order was nothing new, but flowed from settled precedent. As the FCC observed, it had “always” treated “basic prepaid calling cards ... as telecommunications services” and thus made them subject to access charges (*id.* ¶ 43), and it had rejected previous attempts by card providers who claimed that their particular service was somehow different (*id.* ¶ 16).

Notwithstanding the FCC’s order “requiring all prepaid calling card service providers to pay intrastate and interstate access charges” (*id.* ¶ 27), IDT is employing a scheme “to reduce exposure to charges they may owe or evade them altogether” – the exact result that the FCC sought to preclude (*id.* ¶ 8). IDT offers a prepaid calling card service that allows its customers to place long-distance calls by dialing a number that *looks* like a local number to the AT&T LEC but ultimately goes to IDT’s long-distance network. So when IDT customers placed long-distance calls from an AT&T phone line, the AT&T LECs were duped into thinking that they were delivering local calls (like a call to the corner pizza place) and did not know that they were really carrying long-distance calls for which they should have been billing access charges. The AT&T LECs discovered IDT’s scheme and filed this suit to enforce the FCC’s order and their own effective federal and state tariffs.

IDT’s motion also seeks to evade the FCC’s order. First, IDT tries to disregard the FCC’s intentional and repeated holding that its order applies to “all” prepaid card service providers, and claims that the FCC’s order was limited to two particular arrangements that involved “8YY” dialing rather than the local-dialing scheme IDT has used here. The FCC *considered* those two arrangements, but its order was not *limited* to those arrangements. To the contrary, before issuing its order the FCC opened an industry-wide rulemaking to “consider[] this issue in a more

comprehensive manner” and “gather information about *all* types of current and planned calling card services,” precisely because it wanted to *avoid* the kind of “piecemeal” order that IDT now suggests. *In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, ¶ 38 (2005) (“2005 Calling Card Order”) (emphasis added). And when the FCC completed its investigation, it held that its rulings apply to “all” prepaid card providers. *Comprehensive Calling Card Order*, ¶¶ 1, 27. Further, contrary to IDT’s claim that the “8YY” dialing pattern was somehow critical, the FCC said that the 8YY dialing pattern made no difference at all: “We see no reason why the use of a different dialing pattern to make calls, without more, should result in a different regulatory classification.” *Id.* ¶ 20.

Next, IDT tries to muddle matters by noting that after the FCC issued its comprehensive 2006 order one local carrier, Arizona Dialtone, asked the FCC to address certain issues related to the use of bogus “local” numbers for prepaid calling cards. But that petition has no bearing on the dispositive issue here – whether the card provider owes access charges for calls placed on such cards. The FCC already resolved that question when it “require[ed] all prepaid calling card service providers to pay intrastate and interstate access charges” – and just to drive the point home, the FCC specifically held that “the use of a different dialing pattern to make calls” made absolutely zero difference to its decision. *Comprehensive Calling Card Order*, ¶¶ 20, 27. The Arizona Dialtone petition itself recognized that “it is undeniable that the Commission’s new prepaid calling card rules subject these types of calls to access charges.” IDT App. 00030. All Arizona Dialtone asked the FCC to do was establish procedures so local carriers could more easily “bill & collect the access charges to which they are entitled.” *Id.* at 00030-31. The procedural issue now before the FCC, then, is quite different from the one facing this Court.

Over and above the fact that the billing-procedure issues raised by the Arizona Dialtone petition are irrelevant to this suit, IDT is disingenuous in suggesting that the FCC is “actively

considering” that petition. IDT Br. at 1. The petition has languished before the FCC for over three years with no decision. As IDT knows full well, the FCC is really considering something else: a forward-looking review of *all* the different charges that *all* the various types of carriers assess for *all* the different services they perform for each other. That project has consumed over 8 years, and no FCC decision is expected anytime soon.

What IDT is asking this Court to do then, is to *ignore* the FCC’s current, binding order and simply sit on its hands in case the FCC *might* someday issue some prospective change to the existing rules as part of a ruling on carrier charges in general. Such delay is exactly what IDT wants, but it would be contrary to the FCC order that is in effect today. The FCC expressly chose to issue an order covering all prepaid calling card service providers *before* it completed its reform of all other carrier charges, because “immediate action in this proceeding is necessary to preserve universal service and provide regulatory certainty while the Commission considers systemic reform.” *Comprehensive Calling Card Order*, ¶ 8. IDT’s attempt to stall the enforcement of the FCC’s order until *after* the FCC considers systemic forward-looking reform would simply nullify the FCC’s unambiguous order and destroy the “regulatory certainty” the FCC established. Moreover, any prospective reform the FCC might adopt is irrelevant to the FCC’s current, binding order – and to the amounts IDT owes for past switched access services.

II. IDT’s fallback motion to dismiss is an equally baseless attempt to nullify federal law. First, the Court should reject IDT’s claim that the Complaint does not specify how IDT violated the AT&T LECs’ switched access tariffs. The Complaint explains, at length, how IDT has obtained switched access services from the AT&T LECs and how it has evaded payment of the tariffed switched access charges. IDT’s argument that the AT&T LECs had to attach or cite some specific tariff provision is a red herring: this case is not a dispute about a specific tariff provision, but instead involves IDT’s attempt to evade the switched access tariffs in their entirety.

Next, IDT claims that it did not place a formal “order” for access services before receiving those services. But it is well established that such formalities are not required, and that one carrier *constructively* orders access service if it does not prevent its customers from using a second carrier’s network. Discovery may show that IDT constructively ordered switched access service from the AT&T LECs as a matter of law, but for present purposes it is sufficient that the constructive ordering doctrine raises factual issues that cannot be decided on a motion to dismiss.

BACKGROUND

I. Long-Distance Phone Calls And “Access Charges”

The AT&T LECs provide local phone service in parts of their respective states, and they operate “local exchange” networks. Complaint ¶¶ 3-12, 19. In addition to carrying local calls, the AT&T LECs also help long-distance providers (also called “interexchange carriers”) begin and complete long-distance calls. *Id.* ¶ 19. In exchange for giving long-distance providers this “access” to their local networks, the AT&T LECs are entitled to “switched access charges” by law and under their federal and state tariffs. *Id.*

To illustrate, let’s say a customer in Dallas chooses AT&T Texas as his local phone service provider and Sprint as his long-distance provider. To make a traditional long-distance call, he would dial the number 1, followed by the “area code” and then the seven-digit phone number he wants to reach. *Id.* ¶ 20. For example, if that Dallas customer wants to call someone in New York’s 212 area code, he might dial “1-212-555-1234.” *Id.* The caller’s local exchange carrier (in this example, AT&T Texas) then routes the call over its network to a point where it meets Sprint’s long-distance network. *Id.* From there, Sprint takes the call to New York and hands it off to the local carrier that serves the person being called. *Id.* That carrier delivers the call to its destination, and Sprint bills the Dallas customer for the call. *Id.*

Because the call “originated” on AT&T Texas’ local network, and because AT&T Texas delivered the call to Sprint (who benefited because it was able to charge its customer for the long distance call), AT&T Texas is entitled to receive “originating” switched access charges from Sprint. Complaint ¶ 21. Based on the Dallas area code and phone number of the customer that originated the call, and the New York area code and phone number that the customer dialed, AT&T Texas can tell it is a long-distance call and can bill Sprint for those originating switched access charges. *Id.*¹ The applicable FCC rule states that access “charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.” 47 C.F.R. § 69.5(b).

For interstate calls like the one described (and for international calls), the AT&T LECs’ switched access rates, terms and conditions are set forth in tariffs filed with the FCC. Complaint ¶¶ 22-23. For intrastate calls – *e.g.* if the Dallas customer calls someone in Houston – the AT&T LECs’ switched access rates are in tariffs filed with state regulatory commissions. *Id.* ¶ 24.

II. The FCC’s Orders On Prepaid Calling Card Services

A. Orders Prior To The 2006 *Comprehensive Calling Card Order*

Prepaid calling card services also give consumers the ability to make long-distance calls, just with a different payment method. *Id.* ¶¶ 25-26. The customer buys a prepaid calling card service from the service provider and pays a specific amount (say \$50) in advance. *Id.* Then, when he wants to make a long-distance call, he dials a number to reach the service provider’s central switching “platform” (typically a 1-800 or other “8YY” number). *Id.* ¶ 26. After the provider verifies the customer’s identification, the customer dials the long-distance number he

¹ The local carrier that serves the customer at the receiving end of the call in New York is entitled to “terminating” access charges. This case, however, is concerned with the switched access charges that the AT&T LECs are entitled to receive on the originating side of calls.

wants to reach, and the card provider collects revenue by deducting the price of the call from the customer's prepaid calling card service account. *Id.*

As discussed above, interstate access charges apply to “all interexchange carriers” that access local facilities to provide interstate or foreign telecommunications services. 47 C.F.R. § 69.5(b). For over a decade, the FCC has rejected attempts by card providers that sought exemptions from the rules that apply to other interexchange carriers. In 1995, the FCC observed it had “no special rules regarding debit card services” and rejected a card provider's claim that its long-distance services should be immune from state regulation (even for long-distance calls between people in the same state). *In re Time Machine, Inc.*, 11 FCC Rcd. 1186, ¶ 25 (1995).

In its *2005 Calling Card Order*, the FCC rejected similar arguments by a second card provider.² The card provider claimed that its “enhanced” calling card service – through which callers heard an advertisement when they reached the calling card “platform,” before they placed their long-distance call – was immune from state access charges and from assessments for a federal fund used to support universal service. *2005 Calling Card Order*, ¶¶ 1, 30. The FCC disagreed, explaining that “[o]ther than the communication of the advertising message to the caller, there is no material difference between [the] ‘enhanced’ prepaid calling cards at issue in this Order and other prepaid calling cards.” *Id.* ¶ 6. The FCC then held that “the mere insertion of the advertising message ... does not alter the fundamental character of the calling card service.” *Id.* ¶ 21. Rather, the advertising message was simply “incidental” to “the underlying service offered to the cardholder”: namely, the ability to “plac[e] a telephone call.” *Id.* ¶ 16. “Accordingly, consistent with ... precedent,” the FCC found that the card provider's service “is properly classified as a telecommunications service.” *Id.* ¶ 21.

² The card provider was AT&T Corporation. At the time of the 2005 order, AT&T Corporation was not affiliated with the AT&T LECs. Subsequently, AT&T Corporation merged with SBC Communications Inc. (the parent company of the AT&T LECs), which then took the name AT&T Inc. To avoid confusion, this brief refers to AT&T Corporation as the “card provider.”

B. The FCC's 2006 *Comprehensive Calling Card Order*

During the 2005 proceeding, the card provider asked the FCC to address two new types of calling card services: one that gave customers a “menu” of services (in addition to placing a call) and a second that transported calls by Internet Protocol (“IP transport”). The FCC, however, decided it would not “address the appropriate regulatory regime for variations of prepaid calling cards in a piecemeal manner.” *2005 Calling Card Order*, ¶ 38. Rather, the FCC “conclude[d] that the public interest would best be served by considering this issue in a more comprehensive manner, enabling us to gather information about all types of current and planned calling card services.” *Id.* The FCC accordingly issued a notice of proposed rulemaking to the industry, in which it sought comments not only about the two new services but also about “other existing or potential prepaid calling card services” to see if there were any features that might be “relevant to the classification of any existing or potential prepaid calling cards.” *Id.* ¶ 41.

While the comprehensive proceeding was underway, the card provider filed an emergency petition asking the FCC to “issue interim rules subjecting all prepaid calling card service providers to the same types of access charges” in order to “ensure parity among all prepaid calling card service providers.” *Comprehensive Calling Card Order*, ¶ 6. The FCC agreed “that immediate action in this proceeding is necessary to preserve universal service and provide regulatory certainty while the Commission considers systemic reform.” *Id.* ¶ 8. As the FCC explained, “[a]ny uncertainty regarding the regulatory requirements applicable to prepaid calling cards creates incentives for providers to reduce exposure to charges they may owe or evade them altogether.” *Id.* Conversely, the FCC found that uniform rules “will provide a level regulatory playing field for calling card providers, thereby reducing the potential for continued ‘gaming’ of the system.” *Id.*

To formulate these comprehensive rules, the FCC turned first to the two calling card services that had led it to open the rulemaking: menu-driven and IP transport cards. It held “that both types of prepaid calling cards are telecommunications services and that their providers are subject to regulation as telecommunications carriers.” *Id.* ¶ 10. “As a result” of that finding, “these providers are now subject to all of the applicable requirements of the Communications Act and the Commission’s rules, including requirements to ... pay access charges” and assessments for the federal universal service fund. *Id.* ¶ 21.

Next, the FCC considered the broader ramifications of its rulings for *all* card providers. As discussed above, the FCC held that providers of the menu-driven and IP transport cards “are obligated to pay interstate or intrastate access charges.” *Id.* ¶ 27. But the FCC recognized that it “previously has found that these same access charge obligations apply to basic prepaid calling cards and prepaid calling cards with unsolicited advertising.” *Id.* Thus, “[i]n conjunction with the Commission’s prior rulings regarding basic prepaid calling cards and prepaid cards with advertising,” the FCC’s ruling on the two new services meant that “all prepaid calling card providers will now be treated as telecommunications service providers.” *Id.* ¶ 10. “As such,” card providers are “subject to all of the applicable requirements of the Communications Act and the Commission’s rules, including requirements to ... pay access charges.” *Id.* ¶¶ 1, 21. To carry out its rulings, the FCC established reporting and certification “requirements that will apply, at least on an interim basis, to all prepaid calling card providers” in order “to provide regulatory certainty and ensure compliance with our existing access charge and [universal service fund] contribution requirements while we consider broader reform of those rules.” *Id.* ¶ 21.

IDT participated in the FCC’s rulemaking. IDT pointed out that similar access charge issues “have been raised in connection with other types of traffic” in a separate FCC proceeding that was (and still is) considering systemic reforms for all charges between carriers. *Id.* ¶ 31. The

FCC, however, decided not to delay a ruling on calling cards until it implemented overall reforms, because “the record in this proceeding supports the imposition of requirements on calling card providers on an interim basis.” *Id.*

Finally, the FCC considered whether its rulings would apply retroactively or only prospectively. It held that “retroactive application” would be “appropriate” for calling cards that use IP transport. *Id.* ¶ 43. As the FCC explained, “[t]hese calling cards offer the customer no capability to do anything other than make a telephone call, and therefore they are just like basic prepaid calling cards that the Commission always has treated as telecommunications services.” *Id.* By contrast, the FCC thought that retroactive application would be “unfair” for cards that offered service “menus.” *Id.* ¶ 45.

On appeal, no party raised any challenge to the FCC’s substantive rulings. *Qwest Services Corp. v. FCC*, 509 F.3d 531, 534 (D.C. Cir. 2007). Some parties challenged the FCC’s decisions regarding retroactive application. The D.C. Circuit agreed with the FCC that retroactive application was appropriate on calling cards that offer IP transport “for the very same reasons that persuaded the Commission”: that such cards “are just like basic prepaid calling cards that the Commission always has treated as telecommunications services.” *Id.* at 537. But the appellate court also held that the FCC should have given the same retroactive application to calling cards that offer service menus. As the court explained, there was no previous “settled law contrary to the rule established” by the FCC’s order. *Id.* at 540. Moreover, while the court noted the FCC’s concern that the order imposed access costs on menu-driven card providers, the court also acknowledged “the obvious fact that every loss that retroactive application of its statutory interpretation would inflict on providers of menu-driven card services is matched by an equal and opposite loss that non-retroactivity would inflict on access suppliers” (in other words, local carriers like the AT&T LECs). *Id.* “The Commission having determined the liability for such

access costs under its interpretation of the statute, we see no reason why the users should not pay in accord with that interpretation” – and no basis for giving any card providers “a sweeping release from apparently applicable statutory obligations.” *Id.* at 540-41.

C. IDT’s Attempt To Evade The FCC’s Orders

This suit concerns IDT’s attempt to evade the FCC’s mandate “requiring all prepaid calling card service providers to pay intrastate and interstate access charges.” *Comprehensive Calling Card Order*, ¶ 27. IDT sells prepaid calling card services that use telephone numbers that are “local” in the area in which those cards are sold (rather than the traditional 1-800 numbers) as platforms for its long-distance service. Complaint ¶ 33. The local phone numbers are assigned to IDT by carriers that provide competing local phone service in the AT&T LECs’ service areas. *Id.* To the AT&T LECs, long-distance calls made through IDT calling cards look like local calls. *Id.*

To illustrate, consider the Dallas customer we discussed above. *Id.* Once again, that customer places a call to New York from a phone line provided by AT&T Texas in Dallas’ 214 area code – but this time, he uses an IDT calling card and dials a “platform” number that begins with the 214 area code. *Id.* While the call is in reality an interstate long-distance call to New York, it would look to AT&T Texas like a local call from one Dallas phone to another Dallas phone. *Id.* Thus, AT&T Texas would transmit the call to the competing local carrier, just like a truly local call to a number served by that competitor. *Id.* At that point, the call would leave AT&T Texas’ network – and without AT&T Texas’ knowledge, it would go on to IDT’s calling card platform and then to New York. *Id.* Because IDT’s use of a “local” number prevented AT&T Texas from knowing that the call was really an interstate long-distance call, AT&T Texas would not charge IDT for originating switched access service. *Id.* The AT&T LECs discovered IDT’s scheme and have filed this suit to obtain an accounting of past switched access charges that IDT has evaded, collect those charges from IDT, and enjoin further evasions.

ARGUMENT

I. The Court Should Deny IDT's Motion To Stay.

IDT first seeks to stay this suit based on the doctrine of primary jurisdiction. “The courts should be reluctant to invoke the doctrine of primary jurisdiction, which often ... results in added expense and delay to the litigants.” *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 419 (5th Cir. 1976). As this Court has recognized, “a court considering deferring to an agency’s jurisdiction must weigh the benefits of obtaining the agency’s aid against the need to resolve the litigation expeditiously and may defer only if the benefits of agency review exceed the costs imposed on the parties.” *Staton Holdings, Inc. v. First Data Corp.*, No. Civ. A 304CV2321P, 2005 WL 2219249 at *2 (N.D. Tex. Sept. 9, 2005) (AT&T App. 0004, 0005). In striking that balance, “when the agency’s position is sufficiently clear or nontechnical ... courts should be very reluctant to refer.” *Mississippi Power & Light*, 532 F.2d at 419.

IDT’s motion fails all these tests. Here, there are no benefits in waiting for further word from the FCC. The FCC has issued a painfully clear order “requiring all prepaid calling card service providers to pay intrastate and interstate access charges” with no exceptions. *Comprehensive Calling Card Order*, ¶ 27. Conversely, the costs of delaying this suit are immense: over and above the costs of indefinitely delaying enforcement of the AT&T LECs’ rights, delay here would *undermine* the FCC’s order, which the FCC expressly designed to provide binding rules for “all” card service providers *before* the FCC issued its long-delayed prospective reforms. IDT’s professed desire for uniformity refutes, rather than supports, its motion. As the FCC held (*id.* ¶ 8), the way to achieve “a level ... playing field” is to *enforce* the FCC’s order that all card providers must pay access charges – not to stall the enforcement of that order and allow one provider (IDT) to continue violating that order.

A. The FCC Has Already Conclusively Decided The Issue Presented Here, When It Held That “All” Prepaid Card Providers Must Pay Access Charges.

IDT cites (at 7) the general rule that primary jurisdiction is invoked “when a claim requires the resolution of issues that are within the special competence of an administrative body.” But IDT leaves out the corollary. As this Court has held, “the doctrine of primary jurisdiction does not contemplate courts staying their proceedings after the rulings on the predicate issues have been made.” *Staton Holdings*, 2005 WL 2219249, at *3 (AT&T App. 0006). The FCC ruled on the predicate issues when it issued its order “requiring all prepaid calling card service providers to pay intrastate and interstate access charges.” *Comprehensive Calling Card Order*, ¶ 27. The order contains no exceptions or limitations. Moreover, the FCC established “new reporting and certification rules” to enforce its access charge requirements, and those rules likewise “apply to all prepaid calling card providers.” *Id.* ¶ 41. Those procedures would be meaningless if card providers could simply bypass the access charge rules by selling card services that use a dialing pattern that looks “local.”

The FCC’s order is clear and nontechnical, and there is no need to wait for an FCC order that is already here. The Fifth Circuit has held that when the FCC says “all,” its mandate must be enforced. See *Logix Communications, L.P. v. Public Util. Comm’n*, 521 F.3d 361, 365 (5th Cir.) (enforcing FCC rule that counts “all UNE loops” as business lines according to its “plain meaning” and rejecting carrier’s attempt to exclude some loops), *cert. denied*, 129 S. Ct. 223 (2008). “There is no broader classification than the word ‘all.’ In its ordinary and natural meaning, the word ‘all’ leaves no room for exceptions.” *People v. Monaco*, 710 N.W.2d 46, 50 (Mich. 2006). Indeed, the FCC expressly ruled out the exception IDT seeks to carve out now – the use of a different dialing pattern, here a pattern that looks “local” – when it held there was “no reason why the use of a different dialing pattern to make calls, without more, should result in a different regulatory classification.” *Comprehensive Calling Card Order*, ¶ 20.

While the FCC’s unambiguous word “all” is dispositive, the FCC made clear that an “all” encompassing, no-exception rule was exactly what it intended. When it started the proceeding that led to the *Comprehensive Calling Card Order*, the FCC chose not to address “calling cards in a piecemeal manner” and instead sought a “a more comprehensive” resolution governing “all types of current and planned calling card services.” *2005 Calling Card Order*, ¶ 38. Thus, it asked industry participants – including IDT – to address *any* features that might be “relevant to the classification of *any existing or potential prepaid calling cards*.” *Id.* ¶ 41 (emphasis added).

And at the end of the proceeding, the FCC explained *why* it was issuing a comprehensive order “requiring all prepaid calling card service providers to pay intrastate and interstate access charges.” *Comprehensive Calling Card Order*, ¶ 27. The FCC reasoned that uniform rules for all providers “will provide a level ... playing field,” and “reduc[e] the potential for continued ‘gaming’ of the system.” *Id.* ¶ 8. The FCC sought to eliminate “[a]ny uncertainty regarding the regulatory requirements applicable to prepaid calling cards” so there could be no “incentives for providers to reduce exposure to charges they may owe or evade them altogether.” *Id.*

In this suit, the AT&T LECs simply seek to enforce the FCC’s existing order and collect the amounts due under their switched access tariffs. The FCC has made clear that “[t]he proper forum for such a dispute is the federal district court,” not the FCC. *In re U.S. TelePacific Corp.*, 19 FCC Rcd. 24552, ¶ 8 (2004) (“long-standing Commission precedent holds that ... the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges”). This Court, not the FCC, has primary jurisdiction.³

³ As a result, this tariff case is in contrast with Case No. 3:09cv1494-P, which involves disputes arising under an interconnection agreement. While the FCC has held that tariff collection matters like this one belong in federal court, the FCC has stated that interconnection agreement disputes should be addressed in the first instance by the applicable state regulatory commission.

B. IDT's Proposed Stay Is Contrary To The FCC's *Comprehensive Calling Card Order*, And To IDT's Own Professed Desire For Uniformity.

As demonstrated above, a stay would serve no legitimate purpose because the FCC has already ordered “all” prepaid card service providers to pay access charges. More fundamentally, IDT's proposed stay is *contrary* to the FCC's order. The purpose of IDT's motion is to stay this suit – and thereby stall the enforcement of the FCC's binding order – while the FCC considers prospective reforms to all carrier charges. But when the FCC issued its order, it expressly rejected IDT's attempt to achieve that result. Before the FCC, IDT pointed out “that similar issues have been raised in conjunction with other types of traffic” in the same “intercarrier compensation rulemaking” that IDT wants the Court to wait for here. *Comprehensive Calling Card Order*, ¶ 31. The FCC, however, refused to wait because “the record in this proceeding supports the imposition of requirements on calling card providers on an interim basis.” *Id.*

The whole purpose of the FCC's 2006 order, then, was to establish rules for calling cards *before* the FCC developed prospective reforms on a more global basis. That is because the FCC “conclude[d] that immediate action in this proceeding is necessary to preserve universal service and provide regulatory certainty *while* the Commission considers systemic reform.” *Id.* ¶ 8 (emphasis added). It would be antithetical to the FCC's order to put off enforcement – and to let IDT continue violating that order – until *after* the FCC issues prospective reforms. Likewise, it would be contrary to the FCC's order for this Court to adopt IDT's wait-and-see approach when the FCC rejected the exact same argument.

IDT's cry for uniformity (Br. at 12-15) is simply another reason to reject its motion. The FCC has already established a “level regulatory playing field” by “requiring all prepaid calling card service providers to pay intrastate and interstate access charges.” *Comprehensive Calling Card Order*, ¶¶ 8, 27. The way to preserve uniformity and avoid inconsistent results is to *enforce*

the FCC's order – not to put the order on hold and reward IDT for not playing by the rules, or to give IDT an unfair advantage over competing service providers that obey the FCC's order.

C. The Court Should Reject IDT's Attempts To Limit The FCC's Comprehensive Order.

IDT's motion for a stay boils down to the untenable notions that (i) even though the FCC "requir[ed] all prepaid calling card service providers to pay intrastate and interstate access charges" it did not really mean "all," and (ii) even though the FCC sought to eliminate "[a]ny uncertainty regarding the regulatory requirements applicable to prepaid calling cards," its order is still somehow uncertain. IDT's arguments ignore the FCC's order.

1. There is no basis for IDT's contention (at 5) that "[b]y its own express terms, the June 30 FCC order is limited only to two types of 'enhanced calling cards' that are accessed by toll-free 8YY dialing." There is no "express term" in the order that contains the limitation that IDT posits now. To the contrary, the order's express terms "requir[e] all prepaid calling card service providers to pay intrastate and interstate access charges." *Comprehensive Calling Card Order*, ¶ 27. The order is not limited to "some" providers, and it does not exclude any providers from the obligation to pay access charges. Further, the access charge obligations extend to all "providers," without regard to any variations in the calling service they might offer. Indeed, the FCC expressly said that the 8YY dialing pattern, which IDT now claims was significant, was irrelevant, finding "no reason why the use of a different dialing pattern to make calls, without more, should result in a different regulatory classification." *Id.* ¶ 20. Moreover, the FCC made clear from the outset of its rulemaking that it would *not* issue a "piecemeal" order, but instead "consider[] this issue in a more comprehensive manner." *2005 Calling Card Order*, ¶ 38.

While the FCC *considered* the two 8YY arrangements, its order was not "limited to" those arrangements the way IDT asserts (at 5). Instead, the FCC considered them "[i]n conjunction with [its] prior rulings," which "found that these same access charge obligations

apply to basic prepaid calling cards and prepaid calling cards with unsolicited advertising.” *Comprehensive Calling Card Order*, ¶¶ 10, 27. Putting two and two together, the FCC held that “all prepaid calling card providers will now be treated as telecommunications service providers” (*id.* ¶ 10) and thus be “subject to all of the applicable requirements of the Communications Act and the Commission’s rules, including requirements to ... pay access charges” (*id.* ¶ 21).

2. IDT is also off base in suggesting (at 6) that Arizona Dialtone “[r]ecogniz[ed] the limitations” of the FCC’s comprehensive order when it filed a petition for reconsideration. The reality is just the opposite: Arizona Dialtone recognized that “it is undeniable that the Commission’s new prepaid calling card rules subject these types of calls [calls originated through ‘local’ numbers] to access charges.” IDT App. at 00030. Arizona Dialtone sought guidance on a different issue that is irrelevant here: the procedural “mechanism for LECs to bill & collect the access charges to which they are entitled.” *Id.* at 00030-31.⁴

More fundamentally, it is irrelevant whether some *party* to the FCC proceeding asserted there was some ambiguity in the FCC’s order. It is for the Court to decide whether the FCC’s order is clear, based on the order’s plain language. The FCC held that access charge obligations apply to “all” prepaid card service providers. As in *Staton Holdings*, the Court should “continue to operate” under the FCC order that is in effect today, not wait “years” to see if the FCC might issue prospective changes in the future. 2005 WL 2219249, at *3 (AT&T App. 0006).

3. IDT’s last resort is nothing but an unlawful collateral attack on the FCC’s order. IDT argues (at 11) that long-distance calls made through “locally dialed” calling cards “are not subject to access charges but rather to reciprocal compensation” based on its view of a 2002 decision by the D.C. Circuit. But the FCC has ruled that “all” prepaid card providers must pay

⁴ The FCC’s order refutes IDT’s suggestion (at 9) that there is some ambiguity about “which party is responsible to pay access charges.” The *Comprehensive Calling Card Order* plainly states (¶ 27) that the ultimate responsibility “to pay interstate and interstate access charges” rests on “all prepaid calling card service providers.”

access charges. To the extent IDT thought that calling cards with “local” dialing should not be subject to access charges, it should have said so before the FCC issued its comprehensive 2006 order – when the FCC told parties, including IDT, to address “any existing or potential prepaid calling cards” (2005 Calling Card Order, ¶ 41) – or on appeal to the D.C. Circuit. Yet *no* party, let alone IDT, appealed the FCC’s substantive ruling. Under the Hobbs Act, the federal appellate court “has exclusive jurisdiction ... to determine the validity of ... [the FCC’s] final orders,” 28 U.S.C. § 2342, and this Court cannot entertain IDT’s argument.

D. IDT’s Motion Ignores The Costs Of Delay.

The Fifth Circuit has recognized that primary jurisdiction referrals often cause “added expense and delay to the litigants.” *Mississippi Power & Light*, 532 F.2d at 419. Thus, a “court must always balance the benefits of seeking the agency’s aid with the need to resolve disputes fairly yet as expeditiously as possible.” *Id.* As demonstrated above, there would be *no* benefit from a stay here, because the FCC’s order is already clear; indeed, a stay would undermine the FCC’s order. Moreover, IDT’s motion fails to confront the costs of delay.

IDT’s omission is not surprising, because the delays from a stay here would be intolerable. IDT seeks a stay pending an FCC decision on a comprehensive overhaul of all charges between all carriers, which is coupled with a reform of the fund supporting universal service. That proceeding has been ongoing since 2001 – a fact IDT blithely admits (at 9) when it notes that the FCC docket number is “01-92.” The FCC had hoped to issue a decision in that docket by November 2008 in order to satisfy a D.C. Circuit remand order regarding charges for certain Internet communications. See *In re Core Communications, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008). But when November 2008 came, the FCC gave up, issuing a narrow order on Internet issues alone and once again seeking public comment on broader reform. See 73 Fed. Reg. 66,821 (2008). The FCC’s then-Chairman issued a statement that he was “disappointed that we will miss

the opportunity for comprehensive reform” because “[t]he issues of Intercarrier Compensation and Universal Service reform have been in front of the Commission for years.” AT&T App. 0001. A year has passed, the Chairman has been replaced, and even IDT does not contend that an order will come anytime soon. A recent article describes investors as “cynical” about the FCC’s process, and “[m]any believe the overhaul will never happen.” AT&T App. 0002. Not surprisingly, the 2006 Arizona Dialtone petition has languished for over three years in this morass with no FCC action. It is thus disingenuous for IDT to claim (at 1) the FCC is “actively considering” reforms.

II. The Court Should Deny IDT’s Fallback Motion To Dismiss.

A. The Complaint Sufficiently Describes IDT’s Violation Of The AT&T LECs’ Switched Access Tariffs.

The Complaint alleges that IDT is violating the FCC’s *Comprehensive Calling Card Order* and the AT&T LECs’ federal and state tariffs. Like the FCC’s order, these tariffs are publicly available documents that have “the force and effect of law.” *DFW Metro Line Services v. Southwestern Bell Tel. Co.*, 901 F.2d 1267, 1268 n.4 (5th Cir. 1990); *see also Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) (holding that tariffs are the “law, [and] not mere contracts”).⁵ The violation alleged in the Complaint is simple:

- The AT&T LECs’ tariffs set forth their rates, terms and conditions for originating switched access services on long-distance calls (Complaint ¶¶ 22-24, 38, 47);

⁵ The interstate access tariffs for Plaintiff Southwestern Bell are publicly available at <http://cpr.bellsouth.com/pdf/fcc-swbt/fccswbt.htm> (Title SWBT 73 -- Access Service). The switched access provisions are at Section 6. The other Plaintiffs’ tariffs are available at <http://cpr.bellsouth.com/pdf/fcc/1006.pdf> (Title FCC Tariff 1; BellSouth); <http://cpr.bellsouth.com/pdf/fcc-ait/fccait.htm> (Title AIT 2; Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell, and Wisconsin Bell); <http://cpr.bellsouth.com/pdf/fcc-nb/fccnb.htm> (Title NBTC 1; Nevada Bell); <http://cpr.bellsouth.com/pdf/fcc-pb/fccpb.htm> (PBTC 1; Pacific Bell); and <http://cpr.bellsouth.com/pdf/fcc-snet/fccsnet.htm> (SNET 39; Southern New England Telephone).

- Like other long-distance providers, IDT obtains access services from the AT&T LECs when IDT customers originate long-distance calls from AT&T phone lines (*id.* ¶¶ 20-21, 25-28, 32-35);
- But by disguising long-distance calls as local, IDT has evaded the tariffs and, most important, its obligation to pay for the switched access services it has obtained and used to provide long-distance services (*id.* ¶¶ 33-34, 39-42, 48-52).

IDT tries to manufacture a pleading requirement that all complaints seeking to enforce tariffs must identify a specific provision of a specific tariff that has been violated, and then asks the Court to dismiss the Complaint because the AT&T LECs did not comply with IDT's rule. IDT's argument fails for three separate reasons.

First, IDT ignores the violation alleged in the Complaint. This is not a case where the parties disagree about the meaning of some specific provision in a specific tariff. IDT's violation is that it has tried to evade the AT&T LECs' switched access tariffs altogether, by obtaining access service from the AT&T LECs without their knowledge, without complying with any of the tariff procedures for ordering service, and without paying the AT&T LECs for the access services that IDT obtained from them.⁶ IDT's claim that the AT&T LECs must identify a "specific provision" – when IDT has essentially evaded and violated the entire switched access tariff – is simply a red herring.

Second, IDT cites no cases that adopt its invented pleading requirement in the tariff context. Instead, IDT relies on a false analogy to cases from other jurisdictions that dismissed

⁶ IDT mischaracterizes the Complaint when it claims (at 16) that "Plaintiffs allege that IDT ... breached Plaintiffs' tariffs, by not purchasing local number services from Plaintiffs and instead purchasing those services from third parties." No such allegation appears in the Complaint. IDT may purchase as many local numbers as it likes, from whatever third parties it likes – but when IDT's customers originate long-distance calls on the AT&T LECs' networks, IDT is obtaining originating switched access services from the AT&T LECs, and it must pay the appropriate tariffed charges for those services.

claims for breach of contract because the contract was not attached to the complaint or otherwise included in the record. As discussed above, however, tariffs are not contracts; they have the force and effect of law, like a statute or regulation. *See, e.g., Marcus*, 138 F.3d at 56. Moreover, the tariffs at issue here are a matter of public record, and are readily available. *See Katz v. MCI Telecomms. Corp.*, 14 F. Supp. 2d 271, 274 (E.D.N.Y. 1998) (“Tariffs ... are public records and may properly be considered in connection with a Rule 12(b)(6) motion to dismiss.”). IDT, a sophisticated international telecommunications company, is surely familiar with the AT&T LECs’ tariffs and cannot reasonably maintain that it must “guess” (Br. at 18) at the tariffs that apply to switched access services. IDT itself belies its professed inability to find the AT&T LECs’ tariffs, when it discusses (and makes incorrect arguments about) particular provisions of the AT&T LECs’ switched access tariffs. IDT Br. at 18; see also Section II.B *infra*.

Third, neither of IDT’s contract cases support its attempt to dismiss the complaint with prejudice. The court in *Wolff v. Rare Medium, Inc.* merely dismissed the complaint “with leave to re-plead.” 171 F. Supp. 2d 354, 356 (S.D.N.Y. 2001). The court in *Southwest Louisiana Healthcare Sys. v. MBIA Ins. Co.* “dismissed” a contract claim but did not say whether it was doing so with or without prejudice. 2008 WL 5155752 at *6 (W.D. La. Dec. 8, 2008) (IDT App. 00110). In any event, the dismissal came after the plaintiffs had amended their complaint several times. *Id.* at *4 (IDT App. 00108-09). IDT itself appears to concede that its argument does not support a dismissal with prejudice here, as it ultimately retreats to the suggestion that the Court “order Plaintiffs to file an amended pleading.” IDT Br. at 17. As shown above, the Complaint sufficiently pleads IDT’s violation, and further elaboration is unnecessary.

B. There Is A Question Of Fact As To Whether IDT Has Constructively Ordered Access Services From The AT&T LECs.

IDT’s attempt to turn tariffs into private contracts fares just as poorly when IDT argues (at 19) that it had to formally accept “Plaintiffs’ offers” in order to be bound by the AT&T

LECs' tariffs. Tariffs are not offers or contracts; they are law, and IDT cannot veto a tariff any more than it can veto the FCC's binding orders or any other law. The court in *Southern New England Tel. Co. v. Global NAPs, Inc.*, 2005 WL 2789323 at *7 (D. Conn. 2005) (AT&T App. 0012) rejected this exact argument, repudiating the notion that a LEC's tariffs "do not apply to them unless they are specifically invoked in their purchase of services." The court held that the plaintiff LEC sufficiently asserted claims for tariff violations by alleging that the defendant "did make use of [the LEC's] facilities in such a way that it[s] tariffs applied to [defendant]" and by alleging that the defendant "failed to perform under the terms of the tariff." *Id.*

Equally unavailing is IDT's argument (at 18) that it did not formally "subscribe[] to" the access services it has used. IDT's form-over-substance view has been rejected by the FCC and federal courts. In *United Artists Payphone Corp. v. New York Tel. Co.*, 8 FCC Rcd. 5563, ¶ 13 (1993), the FCC held that "presubscription is not the only way to 'order' service from a carrier and, thus, become a 'customer.'" As the FCC recognized, in today's market (where numerous providers compete) callers can "choose their preferred ... providers by using access codes" and can place calls even if those calls were not specifically authorized in advance by their service provider. *Id.* Accordingly, a service provider – like IDT here – need not place a formal "order"; it can still be liable under AT&T tariffs if it "constructively 'ordered' service from AT&T, thus establishing an inadvertent carrier-customer relationship" if it does not take "reasonable steps to prevent unauthorized callers from gaining access to the AT&T network." *Id.*

Numerous federal courts have applied the FCC's "constructive ordering doctrine." For example, one court applied the doctrine to deny a long-distance provider's motion for summary judgment in a suit brought by several local exchange carriers to recover unpaid access charges. *Advantel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 686 (E.D. Va. 2000). Just as IDT does here, the long distance provider argued "that it [wa]s not obligated to pay because it never ordered any

services pursuant to the terms specified in the tariff.” *Id.* at 684. The court, however, rejected the long distance provider’s argument, finding that genuine issues of material fact remained as to whether it had constructively ordered the access services in dispute. *Id.* at 687. The court held that the doctrine *had* to be applied to avoid “massive rate discrimination”; otherwise the long-distance provider “will have received millions of dollars of [access] services for free.” *Id.*

Similarly, in *AT&T Corp. v. Community Health Group*, 931 F. Supp. 719, 723 (S.D. Cal. 1995), the court held, as a matter of law, that the defendants were “customers” of AT&T even though it was “undisputed ... that Defendants did not affirmatively order AT&T [service].” Rather, a hacker accessed the defendants’ phone system and placed calls over AT&T’s network. As the court explained, the constructive ordering doctrine applied as a matter of law because “Defendants have come forth with no showing that they acted in any way to control the unauthorized charging of AT&T ... calls to their system.” *Id.* at 723.

The same FCC-adopted and court-applied doctrine bars IDT’s motion to dismiss. IDT does not dispute that it sold prepaid calling card services to customers, nor does it dispute that IDT’s customers used IDT’s service to originate long-distance calls from AT&T LEC phone lines. Thus, there is no dispute that IDT received originating switched access service from the AT&T LECs. Moreover, IDT makes no allegation, much less any showing, that it even attempted to prevent its customers from originating long-distance calls from the AT&T LECs’ phone lines. Thus, IDT’s allegation that it did not formally “order” or “subscribe to” access service in advance is patently insufficient. Discovery may show that IDT constructively ordered access services as a matter of law, as occurred in *Community Health*, and that the AT&T LECs will be entitled to summary judgment. For now, though, as in *Advantel*, there are issues of fact that preclude the Court from granting IDT’s motion to dismiss.

C. The Complaint States A Claim For Unjust Enrichment.

Supplementing their tariff claims, the AT&T LECs allege in the alternative that IDT is liable under the doctrine of unjust enrichment. The AT&T LECs have conferred benefits on IDT (IDT customers have used the AT&T LECs' networks to originate long-distance calls that generate revenue for IDT) and IDT has unjustly retained those benefits by evading the originating switched access charges that the AT&T LECs are entitled to receive by law. Complaint, ¶ 56. IDT's challenges to this claim lack merit.

1. IDT (at 23) retreads its argument that the AT&T LECs' tariffs do not "apply to IDT," and that it is not "in direct contact" with the AT&T LECs, because it did not enter into a formal contract with them. These arguments fail under the constructive ordering doctrine, as discussed in section II.B *supra*.

2. IDT misses the point in claiming (at 24) that it has not "violated any law" by obtaining "local" phone numbers from competing local carriers. The AT&T LECs do not claim that IDT violated any law in buying or using local numbers from other local carriers. Rather, IDT's violation is that it has obtained access to and used the AT&T LECs' networks for originating long-distance calls, and it has refused to pay the applicable tariffed access charges (a refusal that violates the FCC's order that "all" card service providers must pay access charges).

3. Equally fruitless is IDT's claim (at 23) that the AT&T LECs "have already been compensated for their services" through their local service rates. The AT&T LECs' local service rates compensate them for providing local service and carrying local calls. Providing access to long-distance carriers, and carrying long-distance calls, are a separate service for which the AT&T LECs are also entitled to compensation. See 47 C.F.R. § 69.5(b). If IDT were correct, there would be no access charges for any long-distance calls, and the FCC would not have held that "all" card providers (like all other long-distance providers) must pay such charges.

CONCLUSION

For the reasons set forth above, the AT&T LECs respectfully request that the Court deny Defendants' motion to stay and their alternative motion to dismiss for failure to state a claim.

Dated: November 19, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies, on this 19th day of November, a true and correct copy of the foregoing was served upon lead counsel for Defendants via electronic means pursuant to Local Rule 5(b)(D).

s/ Demetrios G. Metropoulos

Demetrios G. Metropoulos

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

SOUTHWESTERN BELL TELEPHONE) COMPANY, BELLSOUTH) TELECOMMUNICATIONS, INC.,) ILLINOIS BELL TELEPHONE COMPANY,) INDIANA BELL TELEPHONE COMPANY) INC., MICHIGAN BELL TELEPHONE) COMPANY, NEVADA BELL TELEPHONE) COMPANY, PACIFIC BELL TELEPHONE) COMPANY, THE OHIO BELL TELEPHONE) COMPANY, THE SOUTHERN NEW) ENGLAND TELEPHONE COMPANY and) WISCONSIN BELL, INC.,)) Plaintiffs,)) v.)) IDT TELECOM, INC., ENTRIX TELECOM) INC., and JOHN DOES 1-10,)) Defendants.)	Civil Action No. 3-09-cv-01268-P
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**APPENDIX TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION
TO STAY BASED ON THE DOCTRINE OF PRIMARY JURISDICTION
OR, IN THE ALTERNATIVE, TO DISMISS THE COMPLAINT
PURSUANT TO FED R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM**

Exhibit	Description	Appendix Pages
1	Statement of FCC Chairman Kevin J. Martin on Intercarrier Compensation and Universal Service Reform (Nov. 3, 2008) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-286537A1.pdf)	00001

2	<i>Broadband Plan May Provide “Window” for USF, Intercarrier Compensation Overhauls</i> , Communications Daily (Oct. 23, 2009)	00002-00003
3	<i>Staton Holdings, Inc. v. First Data Corp.</i> , No. Civ. A 304CV2321P, 2005 WL 2219249 (N.D. Tex. Sept. 9, 2005)	00004-00006
4	<i>Southern New England Tel. Co. v. Global NAPs, Inc.</i> , 2005 WL 2789323 (D. Conn. 2005)	00007-00014

Dated: November 19, 2009

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CERTIFICATE OF SERVICE

The undersigned hereby certifies, on this 19th day of November, a true and correct copy of the foregoing was served upon lead counsel for Defendants via electronic means pursuant to Local Rule 5(b)(D).

s/ Demetrios G. Metropoulos
Demetrios G. Metropoulos

*STATEMENT OF FCC CHAIRMAN KEVIN J. MARTIN ON INTERCARRIER
COMPENSATION AND UNIVERSAL SERVICE REFORM*

November 3, 2008

The issues of Intercarrier Compensation and Universal Service reform have been in front of the Commission for years. Last summer I publicly indicated my intention to put forward concrete and comprehensive proposals to reform the inefficient and outmoded Intercarrier compensation and Universal Service programs. Those proposals have been with my colleagues for several weeks now. I am disappointed that we will miss the opportunity for comprehensive reform. Instead my colleagues have requested that we once again seek public comment on several proposals. As a result such a notice would make little progress and ask for comment again on the most basic and broad questions about reforming the two programs. For example, the Commission would again ask should broadband be supported by the Universal Service Fund and should we move to one uniform rate for all traffic or should that rate vary by the type of company?

I would like to be encouraged by my colleagues' commitment that they will truly be ready to complete this much needed reform on December 18. The nature of the questions they would like to include makes me doubt they will have found their answers with an additional seven weeks. I believe the far more likely outcome is that, in December, the other Commissioners will merely want another Further Notice and another round of comment on the most difficult questions. I do not believe they will be prepared to address the most challenging issues and that the Commission will be negotiating over what further questions to ask in December.

Additionally, I have instructed the Bureau to draft a narrow order to address the Court's remand. However, I remain skeptical that such an order which retains artificial and unsupported distinctions between types of Internet traffic will be seen any more favorably by the Court than the Commission's two previous attempts.

I recognize that few other issues before the Commission are as technically complex and involved, with as many competing interests, as are reforming the Intercarrier Compensation and Universal Service programs. But neither of those two realities are an excuse for inaction. They will be true in one month, in one year or as we have now seen at the Commission, in ten years. I too remain committed to tackling the most difficult issues, providing answers to the toughest questions, fixing broken and outdated government programs and providing broadband to all Americans including those living in rural areas. I look forward to completing these long overdue and much needed reforms as soon as possible.



FOCUS - 1 of 209 DOCUMENTS

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SECTION: TODAY'S NEWS

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HEADLINE: Broadband Plan May Provide 'Window' for USF, Intercarrier Compensation Overhauls

BODY:

CHICAGO -- The FCC's National Broadband Plan presents an opportunity to take on long-awaited revamps for the Universal Service Fund and intercarrier compensation, said industry executives on a panel Thursday at Supercomm. But analysts said they were skeptical. "The realist in me doesn't think it's going to happen," said Moody's analyst Gerald Granovsky.

For people following telephone regulation, the overhauls have been the "gift that keeps on giving," said moderator Kathleen Abernathy of Wilkinson Barker Knauer. From the perspective of a former FCC commissioner, by the time one realizes there's no "good answer" and that the "bad" answer must be taken, "your time is up" at the commission, she said.

There's now "general consensus" that USF and intercarrier compensation are broken, said Qwest Vice President Melissa Newman. "That's half the battle," considering people didn't even agree on that a few years ago, she said. The other "good news" is that the FCC broadband team has said USF and compensation likely will need to be addressed as part of the national broadband plan, she said.

If the FCC is going to set broadband goals, it must reform USF and the intercarrier compensation regime, said Windstream Senior Vice President Mike Rhoda. Money from both makes up a significant portion of rural carriers' income, he said. The funding makes up 11 percent of Windstream's revenue and 50 percent of its free cash flow, he said. If the FCC requires broadband deployment but doesn't redirect USF to broadband, the FCC will leave a lot of rural consumers "in the lurch" and rural providers in a "world of hurt," he said.

The pending revamps have been brewing so long, investors "have become very cynical about the process," said Regulatory Source Associates President Anna Kovacs. Many believe the overhaul will never happen because there's too much political back and forth, she said. Even if the national plan opens a window, switching USF funding to broadband from voice isn't going to be an easy process, she said.

Debt investors are "keenly interested" in what happens with USF and intercarrier compensation, Granovsky said. Technology continues to move ahead of existing rules, and Verizon has said all its traffic will be IP in five to ten years, he said. "Regulations have to catch up to that."

Broadband Plan May Provide 'Window' for USF, Intercarrier Compensation Overhauls COMMUNICATIONS DAILY
October 23, 2009 Friday

In a "perfect world," there would be a legislative fix, Kovacs said. The FCC may not be able to do a "perfect fix" otherwise, she said. Piecemeal revamps would be "the worst thing you could do," she said. Access charges can't be reduced without having a replacement mechanism ready, she said. And policymakers can't declare USF a broadband fund without widening the base of contributors to all providers, she said. The issues are "too interrelated" to handle separately, agreed Rhoda.

Newman said regulators could tackle some specific, "more egregious" aspects of intercarrier compensation ahead of a comprehensive revamp. However, "whatever starts the process, I'm all for [it]." -- Adam Bender

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United States District Court,
N.D. Texas, Dallas Division.
STATON HOLDINGS, INC. d/b/a Staton Wholesale
and All Eights, L.L.C d/b/a Infoeights, Plaintiffs,
v.
FIRST DATA CORPORATION, Defendant.
No. Civ.A. 304CV2321P.

Sept. 9, 2005.

Christopher M. McCaffrey, Law Offices of Christo-
pher McCaffrey, Dallas, TX, for Plaintiffs.

Aaron D. Davidson, Baker Botts, Dallas, TX, for
Defendant.

MEMORANDUM OPINION AND ORDER

SOLIS, J.

*I Now before the Court is Defendant First Data Corporation's ("First Data") Motion to Stay Proceedings, filed July 15, 2005. After careful consideration of the Parties' briefing and the applicable law, the Court hereby DENIES First Data's motion.

BACKGROUND

Plaintiff Staton Holdings, Inc. d/b/a Staton Wholesale ("Staton") is a business based in Dallas, Texas. According to Staton's Complaint, in 1998 MCI Worldcom Communications, Inc. ("MCI") assigned the phone number (888) 888-8888 to Staton.

In April 2000, Staton incorporated a company called All Eights, L.L.C. d/b/a InfoEights ("InfoEights"), a company through which it intended to earn revenue using the (888) 888-8888 number as the focal point of its marketing campaign. As part of its business, Staton intended to assign to InfoEights the rights to use the (888) 888-8888 number. To facilitate this assignment, Staton had to first cease daily use of the (888) 888-8888 number as a toll-free fax number. Staton

began using a new fax number beginning with its 2001 catalog.

In 2001, MCI negligently disconnected Plaintiff's phone number. Thereafter, First Data requested that MCI assign the number to it, which MCI did. First Data then changed its telephone service provider from MCI to Sprint.

Because Staton had not been actively using the (888) 888-8888 number itself at the time it was disconnected, Staton did not become aware of the disconnection and transfer of the number until June 14, 2001. When contacted, First Data refused to return the rights to the number to Staton.

On December 17, 2002, Staton filed a formal complaint with the FCC against MCI and Sprint (common carriers) concerning the improper disconnection and transfer of the telephone number. (Def.'s App. at 92.)

On May 12, 2004, the FCC issued an order holding that MCI had negligently disconnected the (888) 888-8888 number, but that there was no evidence of willful misconduct by MCI. (Def.'s App. at 86, ¶¶ 15-16.) The FCC ordered MCI to pay Staton \$1,000.00 The FCC further noted that there was no evidence in the record to suggest that First Data was "anything other than a completely innocent third party." (Def.'s App. at 89, ¶ 26.) The FCC concluded that Staton had failed to prove that Sprint engaged in any misconduct. (Def.'s App. at 86, ¶¶ 22-23.)

Staton filed a motion for reconsideration, arguing that the FCC failed to conduct a full investigation into the facts of the case, as required by statute. Staton alleges that the FCC issued its ruling based solely on limited discovery and a status conference. (Def.'s App. at 92.) Staton alleges it was not allowed to cross-examine MCI's witnesses. (Def.'s App. at 92-93.) The FCC has not yet ruled on the motion for reconsideration.

In October 2004, Staton filed this lawsuit against First Data. Staton contends in this lawsuit that First Data engaged in a scheme to unlawfully obtain rights to the phone number. Staton alleges that First Data inten-

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tionally misrepresented to MCI that the number was no longer active in order to have the number transferred to First Data. Staton contends that First Data then changed its telephone service provider to Sprint, thereby making it impossible for MCI to return the number to Staton.

DISCUSSION

*2 In its motion to stay, First Data contends that the Court should invoke the doctrine of primary jurisdiction and find that Staton should not be permitted to proceed with a simultaneous administration action and a federal court lawsuit. (Def.'s Mot. at 4.) The doctrine of primary jurisdiction is a judicially-created doctrine whereby a court of competent jurisdiction may stay an action pending resolution of some portion of the action by an administrative agency. See Penny v. Southwestern Bell Telephone Co., 906 F.2d 183, 187 (5th Cir.1990); Wagner & Brown v. ANR Pipeline Co., 837 F.2d 199, 201 (5th Cir.1988). The doctrine is invoked when a claim requires the resolution of issues that are within the special competence of an administrative body. See Wagner, 837 F.2d at 201. In such a case, the judicial process may be suspended pending resolution of such issues by the administrative body. See *id.* Application of the doctrine is especially appropriate where uniformity of certain types of administrative decisions is desirable or where there is a need for the specialized knowledge or expertise of the agency. See *id.* The doctrine is intended to ensure that the administrative agency is not bypassed in a matter that the legislature has specially committed to it. See Penny, 906 F.2d at 187.

There is no fixed formula for applying the doctrine of primary jurisdiction and each case must be examined individually to determine whether it would be aided by the doctrine's application. See *id.* However, a court considering deferring to an agency's jurisdiction must weigh the benefits of obtaining the agency's aid against the need to resolve the litigation expeditiously and may defer only if the benefits of agency review exceed the costs imposed on the parties. See *id.*

The Fifth Circuit has established a three-part test for determining whether application of the primary jurisdiction doctrine is appropriate in a particular case. In Northwinds Abatement, Inc. v. Employers Ins. of Wausau, 69 F.3d 1304, 1311 (5th Cir.1995), the court

held that the doctrine applies where: "(1) the court has original jurisdiction over the claim before it; (2) the adjudication of that claim requires the resolution of predicate issues or the making of preliminary findings; and (3) the legislature has established a regulatory scheme whereby it has committed the resolution of those issues or the making of those findings to an administrative body."

Staton does not dispute that the Court has diversity jurisdiction over Staton's state law claims. Thus, the Court must consider whether the adjudication of Staton's claims against First Data requires the resolution of some predicate issue or the making of some preliminary finding by the FCC.

First Data argues that Staton's claims in this proceeding depend on the outcome of the FCC proceeding because Staton's damage claim in this case assumes that the FCC ruling will not be disturbed. First Data contends that if the FCC does grant the relief requested, then any federal court award would result in "an impermissible, multi-million dollar, windfall for Staton." (Def.'s Mot. at 6-7.) Thus, First Data argues, Staton cannot be allowed to use the FCC proceeding to procure the return of the number while simultaneously asking this Court to award damages based on their inability to use the number to start their new business. Thus, the FCC determination on the motion to reconsider is a necessary prerequisite to any award to Staton by this Court.

*3 First, this fraud case is not predicated on the FCC's ruling on Staton's motion for reconsideration. Staton's motion for reconsideration involves statutory interpretation and the issue of whether a full opportunity was given to Staton to develop its case before the FCC regarding Sprint and MCI's liability. Resolution of that issue will not affect the fraud and conversion issues raised against First Data in this proceeding.

Furthermore, the relief requested in the administrative ruling—the return of the number to Staton—would not affect this Court's ability to assess damages, if any, caused by First Data's alleged fraud/conversion. Regardless of whether the number is returned, Staton is required to demonstrate to this Court that it lost business opportunities.

However, even if the federal case was predicated on

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issues raised in the reconsideration motion filed in the FCC case, the doctrine of primary jurisdiction does not contemplate courts staying their proceedings after the rulings on the predicate issues have been made. The FCC has issued its preliminary ruling. Post-judgment motions and appeals could linger for years. It is reasonable for Staton and the Court to continue to operate under the assumption that the FCC's ruling is final and will not be disturbed. Should the FCC grant Staton's motion for reconsideration, and should the FCC then reverse its underlying ruling in light of evidence newly presented, the Court will address the Parties' concerns and the FCC ruling's effects on this case at that time.

Additionally, if the FCC does grant the motion for reconsideration, the Parties will likely have to conduct discovery and participate in another hearing, the resolution of which could be years away. Staying this case pending resolution of the issues in the administrative hearing would not promote the efficient resolution of disputes.

Finally, the Court notes that the FCC has already resolved the purported predicate issues and issued its preliminary findings. The FCC ruled on May 12, 2004 that the telephone number should remain with First Data and would not be returned to Staton. (Def.'s App. at 81-90.) The FCC has applied its expertise to this matter and issued a ten-page order that provides the Court with guidance as to its reasoning.

First Data argues that because the FCC has special expertise in determining rights to specific toll-free numbers, the Court should stay this case pending the outcome of the reconsideration motion before the FCC. (Def.'s Mot. at 8-9.) This argument is unpersuasive for several reasons. First, invocation of the primary jurisdiction doctrine may be appropriate where there is a *need* for the specialized knowledge or expertise of an agency. However, in this case the Court does not need the FCC to make determinations in its proceedings before the Court can resolve the tort issues before it. The FCC's special expertise in resolving disputes against common carriers and in determining rights to use toll-free numbers will not assist this Court in determining whether First Data, who is not a common carrier, committed fraud against Staton, thereby causing Staton damages.

*4 First Data also argues that (1) Staton has taken inconsistent positions in its pleadings before the FCC and this Court, and (2) the FCC has made findings of fact that are inconsistent with Staton's positions in this Court proceeding, and that somehow this warrants invocation of the primary jurisdiction doctrine. (Def.'s Mot. at 7-8.) However, First Data has not offered any authority to demonstrate that this issue is relevant to the analysis of primary jurisdiction. As Staton points out, any inconsistent position(s) taken by Staton in its pleadings before the FCC and this Court would be addressed more appropriately under some other legal theory at the summary judgment stage. Likewise, any factual findings made by the FCC concerning First Data's participation in this dispute would be addressed more appropriately under some other legal theory at the summary judgment stage. (Pl.'s Resp. at 11-12.)

FN1

FN1. First Data's entire reply brief is replete with new issues and argument. The Court will not address these issues because "[t]he scope of the reply brief must be limited to addressing the arguments raised by the [response]. The reply brief is not the appropriate vehicle for presenting new arguments or legal theories to the court." See *United States v. Feinberg*, 89 F.3d 333, 340-741 (7th Cir.1996). However, it bears mentioning that the Court has reviewed and considered these arguments and finds them to be both irrelevant to the primary jurisdiction analysis and without legal merit.

For these reasons, the Court hereby DENIES First Data's Motion to Stay Proceedings.

It is SO ORDERED.

N.D.Tex.,2005.

Staton Holdings, Inc. v. First Data Corp.
Not Reported in F.Supp.2d, 2005 WL 2219249
(N.D.Tex.)

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United States District Court,
D. Connecticut.
THE SOUTHERN NEW ENGLAND TELEPHONE
COMPANY, Plaintiff,
v.
GLOBAL NAPS, INC., Defendant.
No. Civ.A. 304CV2075JCH.

Oct. 26, 2005.

George M. Moreira, Southern New England Telephone Co., Timothy P. Jensen, Tyler, Cooper & Alcorn, New Haven, CT, for Plaintiff.

Mark S. Gregory, Kelley Drye & Warren, Stamford, CT, for Defendant.

RULING ON DEFENDANTS' MOTION TO DISMISS [DKT. NO. 11]

HALL, J.

*1 The plaintiff, the Southern New England Telephone Company ("SNET"), brings this action against the defendant, Global Naps, Inc. ("Global NAPS"), for damages and injunctive relief arising out of the alleged use of SNET's telephonic networking facilities by Global NAPS. SNET asserts claims for the breach of applicable federal and state tariffs and for breach of an interconnection agreement between the two parties. SNET also asserts claims for the violation of the Connecticut Unfair Trade Practices Act ("CUTPA") against Global NAPS. Global NAPS moves to dismiss SNET's claims pursuant to Fed.R.Civ.P. 12(b)(6), arguing, *inter alia*, that SNET's suit is barred by the doctrine of primary jurisdiction and that the plaintiff has failed to sufficiently state claims for relief.

I. FACTUAL BACKGROUND

Both parties, in their pleadings, provide substantial explanation of the telecommunications world and the technologies implicated by the dispute in this case. While this information has been helpful to the court, it

is not necessary to recount all of it for purposes of ruling on the pending motion. This factual summary will focus on the specific allegations that SNET makes in its complaint. As with all Rule 12(b)(6) motions to dismiss, the court takes the facts alleged in SNET's complaint as true, and draws all inferences in SNET's favor. See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds by* Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

SNET is a Connecticut corporation with its principal place of business in New Haven, Connecticut. Global NAPS is a Delaware corporation with its principal place of business in Quincy, Massachusetts. Global NAPS has been a licensed telecommunications carrier in Connecticut since 1999. SNET's claims are predicated on two separate allegations of wrongdoing by Global NAPS: SNET claims that Global NAPS: 1) ordered from SNET, and did not pay for, twenty-six special access circuits, which SNET provided pursuant to a federal tariff; and that 2) Global NAPS "misrouted" long distance network traffic over certain types of connections (i.e., "meet point trunks") in violation of the parties' interconnection agreement.

In support of its set of claims, SNET alleges that between 2002 and 2004, Global NAPS ordered twenty-six special access circuits pursuant to the terms and conditions for special access services that are set forth in SNET Tariff F.C.C. No. 39.^{FN1} SNET further alleges that it provided the special access circuits, billed Global NAPS for the circuits pursuant to the federal tariff, and that Global NAPS has not made a single payment to SNET, despite SNET's repeated attempts to collect.

^{FN1}. While SNET references SNET Tariff F.C.C. No. 39 and its interconnection agreement with Global NAPS in its complaint, it did not attach these documents to its complaint or explicitly incorporate them by reference. While, as Global NAPS points out, the court may examine documents that it deems "integral" to a complaint, see Chambers v. Time Warner, 282 F.3d 147, the court does not find it appropriate to do so at this

Not Reported in F.Supp.2d, 2005 WL 2789323 (D.Conn.)
(Cite as: 2005 WL 2789323 (D.Conn.))

time and accordingly declines to do so here in determining the sufficiency of SNET's claims at this stage of the litigation in connection with a Rule 12(b)(6) motion.

The second set of claims requires more by way of background explanation. In Connecticut, SNET acts as a "incumbent local exchange carrier" ("ILEC"), which is responsible for carrying calls to and from end users (i.e., telephone customers) both within a local exchange and in connection with long distance carriers outside of the local exchange.^{FN2} ILECs such as SNET connect with long distance carriers through "points of presence" ("POPs"). Federal and state tariffs determine the access charges that apply to intra-exchange calls, i.e., calls that travel from an ILEC through a POP destined for another local exchange carrier. Under these tariffs, ILECs such as SNET do not charge their end user customers for receiving long distance calls; instead, long distance carriers are required to route long distance calls through certain facilities (i.e., "Feature Group D trunks," according to SNET's arrangement) so that the ILEC receives the information necessary to bill the long distance carrier for the cost of providing terminating access for the calls.

^{FN2}. In its pleadings, Global NAPS describes itself as a "competitive local exchange carrier" ("CLEC"). Def's Memo. of Law in Support of Its Mot. to Dismiss, p. 1 [Dkt 12] ("Def's Memo"). However, SNET's complaint does not make any specific allegations about the general nature of Global NAPS's business.

*2 SNET alleges that Global NAPS has participated in a scheme to avoid using the Group D trunks when it has transmitted interexchange (i.e., long distance) traffic to SNET's end users, thus depriving SNET of the ability to gather the information necessary to bill the long distance carriers responsible for the call. SNET claims that instead of using the Group D trunks to deliver long distance calls to SNET's end users, Global NAPS has used "meet point trunks" which, under the interconnection agreement between SNET and Global NAPS, are reserved only for the delivery of interexchange traffic to Global NAPS's own end-users (and which, according to SNET, there are none of in Connecticut), and are not to be used for the

delivery of interexchange traffic to SNET end users. By delivering interexchange traffic to SNET's network through meet point trunks instead of Group D trunks, SNET is unable to properly account for the long distance traffic carried on its network and is thus unable to bill the appropriate long distance carriers.

In its complaint, SNET notes that Global NAPS and the long distance carriers whose traffic it delivers to the SNET network "may or may not" convert the calls to Internet Protocol ("IP") format in transmitting the traffic across networks. Complaint, ¶ 22 [Dkt. No. 1]. SNET also alleges that the "calls that Global NAPS is delivering to SNET for completion to SNET's end-user customers are generally voice calls that both originate and terminate on the public switched telephone network ("PSTN"), but at least in some cases, use Internet Protocol-based transmission in the middle of the call." *Id.* at ¶ 5.

On the basis of the first set of allegations concerning the special access circuits, SNET asserts claims for the breach of a federal tariff (Count I) and a CUTPA violation (Count V). SNET seeks money damages for these claims. On the basis of the second set of allegations concerning the misrouting of long distance traffic, SNET asserts claims for the breach of a federal tariff (Count II), breach of a state tariff (Count III), breach of the interconnection agreement (Count IV), and a CUTPA violation (Count VI). SNET only seeks injunctive and declaratory relief against Global NAPS for this second set of claims.

Global NAPS moves to dismiss all of the plaintiff's claims under the doctrine of primary jurisdiction, arguing that resolution of the dispute between the parties involves several complex policy judgments that are appropriately the domain of the Federal Communications Commission ("FCC"). In support of its argument, Global NAPS asserts that the traffic in question is all "IP-enhanced" traffic for which the FCC has not yet determined the applicability of existing tariffs and interconnection agreements. Global NAPS also argues that SNET's special access circuit claims are barred by the mandatory arbitration provision of the interconnection agreement, and that SNET's tariff-based causes of action fail to state claims upon which relief can be granted.

II. STANDARD OF REVIEW

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(Cite as: 2005 WL 2789323 (D.Conn.))

*3 A motion to dismiss filed pursuant to Rule 12(b)(6) can be granted only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). See also Reed v. Town of Branford, 949 F.Supp. 87, 89 (D.Conn.1996). “In considering a motion to dismiss ... a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference ... [and review all allegations] in the light most favorable to the non-moving party.” Newman & Schwartz v. Asplundh Tree Expert Co., Inc., 102 F.3d 660, 662 (2d Cir.1996). The undertaking is “not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient.” Velez v. Levy, 401 F.3d 75, 80 (2d Cir.2005). Rule 8 of the Federal Rules of Civil Procedure provides that a complaint “shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); see also Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

III. Discussion

A. Primary Jurisdiction Doctrine

Global NAPS argues that the court should dismiss each of the plaintiff's causes of action under the doctrine of primary jurisdiction. The doctrine of primary jurisdiction “comes into play whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” Johnson v. Nyack Hospital, 964 F.2d 116, 122 (2d Cir.1992) (quoting United States v. Western Pac. R.R., 352 U.S. 59, 64, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956)). “[T]he reasons for [the doctrine's] existence and the purposes it serves are twofold: the desire for uniformity and the reliance on administrative expertise.” Tassy v. Brunswick Hospital Center, Inc., 296 F.3d 65, 68 (2d Cir.2002). “Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.” Rieter v. Cooper, 507 U.S. 258, 268-69, 113 S.Ct. 1213, 122

L.Ed.2d 604 (1993).

In determining whether to apply the doctrine, courts generally look to four factors. These are: (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. See Nat'l Commc'ns Ass'n. v. American Tel. and Tel. Co., 46 F.3d 220, 222-23 (2d Cir.1995). In addition, courts must “balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings.” Id. at 223.

*4 Global NAPS argues that SNET's claims are barred by the doctrine of primary jurisdiction. The thrust of Global NAPS argument is that the traffic at issue in SNET's complaint is “Voice over Internet Protocol” (“VOIP”) traffic, or IP-enhanced traffic, whose treatment under existing federal tariffs and payment arrangements is currently being considered by the FCC and thus should not appropriately be the subject of litigation before this court. Global NAPS's argument concerning VOIP traffic and primary jurisdiction generally fails to bar SNET's claims in their entirety because it relies on facts that cannot be adduced from the face of SNET's complaint. Despite Global NAPS's assertions, SNET does not concede in its complaint that the traffic at issue in its complaint is all VOIP or Internet Protocol (IP) enhanced traffic. Instead, SNET alleges that the calls being delivered to SNET by Global NAPS are “generally voice calls” that may, in some cases, “use Internet-Protocol-based transmission in the middle of the call.” Complaint, ¶ 5. The court cannot conclude, on the basis of the well-plead facts in SNET's complaint, that all of the calls at issue in the complaint are VOIP or IP-enhanced calls. Consequently, to the extent that Global NAPS's primary jurisdiction arguments relies on this factual assertion, they are unpersuasive, and Global NAPS' motion on the basis of primary jurisdiction is denied.^{FN3}

^{FN3} Global NAPS argues that both the special access circuit claims and the misrouting claims should be dismissed under the doctrine of primary jurisdiction. Global does not

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(Cite as: 2005 WL 2789323 (D.Conn.))

address the primary jurisdiction doctrine in relation to the misrouting claims apart from its assertions about the IP-enhanced nature of the traffic at issue, and thus this holding applies primarily to the application of the primary jurisdiction doctrine to SNET's misrouting claims. Global NAPS does offer several other arguments in relation to the special access circuit claims that are not related to IP-enhanced traffic, which are considered separately in this decision.

However, as the parties have briefed the issue of the application of primary jurisdiction to the claims in this case that may related to IP-enhanced traffic, and as the complaint acknowledges that "at least some" of the traffic at issue in the misrouting claims involves IP at some point in its transmission, the court will consider the application of primary jurisdiction to whatever class of IP-enhanced traffic that discovery reveals to be at issue in this dispute. Global NAPS argues that SNET's claims involve a complex, unsettled area of telecommunications law that has yet to be addressed by the FCC, i.e., the treatment of interexchange traffic that involves IP at some point in its transmission, and that SNET's claims cannot be resolved without the court making policy-oriented conclusions about the applicability of existing tariffs to this different kind of traffic. In support of this position, Global NAPS points to a recent notice of a proposed rulemaking issued by the FCC which indicates the FCC's intention to consider issues relating to VOIP and "IP-enhanced" communications. See *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 2004 WL 439260, 19 F.C.C.R. 4863 (F.C.C. March 10, 2004). In its notice, the FCC seeks comment on the extent to which access charges should apply to VOIP and "IP-enabled" services. *Id.* at ¶¶ 61-62. Global NAPS argues that a determination that it is liable to SNET under existing tariffs and agreements for IP-related traffic would necessarily entail reaching a conclusion about the exact issue that is currently being considered by the FCC.

*5 In response, SNET argues that Global NAPS is trying to recast as a complex policy matter what is really a simple matter of contractual breach. SNET argues that its interconnection agreement and tariffs require that Global NAPS use SNET's meet point trunks for only one purpose, and that have used the

trunks for a very different purpose, i.e., the transmission of interexchange, "interLATA" traffic. Pl's Brief in Opposition, p. 17 [Dkt. No. 16] ("Pl's Opposition"). As such, according to SNET, their claims do not entail the consideration of complex policy issues, and, furthermore, SNET argues, the consideration by the FCC of how to treat IP-related traffic in the future should not impact their rights to enforce their existing agreement and tariffs.

In further support of its position, SNET points to a recent decision by the FCC concerning traffic that involved, at some point, IP transmission, in which it concluded that interstate access charges could be assessed against the originating carrier. *In the Matter of Petition for Declaratory Ruling that AT & T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges*, FCC-04-97, 19 F.C.C.R. 7457, 2004 WL 856557 (April 21, 2004) ("AT & T Decision"). In the AT & T Decision, the FCC found that:

AT & T's specific service, which an end-user customer originates by placing a call using a traditional touch-tone telephone with 1 + dialing, utilizes AT & T's Internet backbone for IP transport, and is converted back from IP format before being terminated at a LEC switch, is a "telecommunications service" to which access charges apply.

Id., ¶ 24. SNET argues that the AT & T Decision settled the question of whether access charges apply to whatever IP-enhanced interexchange traffic may exist in the present dispute. Global NAPS, however, notes that the AT & T Decision explicitly limited its holding to the type of service at issue in the decision, which was interexchange service that (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.

Id., ¶ 1. Global NAPS argues that its service is "structurally" different than the service that was the subject of the AT & T Decision, and argues, essentially, that the determination of whether the service and traffic produced by Global NAPS that is at issue in this case is covered by the AT & T Decision requires

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(Cite as: 2005 WL 2789323 (D.Conn.))

the FCC's specialized expertise and is beyond the competency of this court.

In determining the application of the primary jurisdiction doctrine under the *Nat'l Commc'ns Ass'n.* criteria, the court is guided by two recent opinions in similar cases in which the district courts held that the primary jurisdiction doctrine was applicable to the plaintiffs' claims. In *Southwestern Bell, L.P. v. Vartec Telecom, Inc.*, No. 4:04-CV-1303, 2005 WL 2033416 (E.D.Mo. August 23, 2005), the plaintiffs, ten local exchange carrier, sought to recover access charges from several entities that were involved in the transmission of interexchange traffic through the use of IP-related transmission. While one defendant was clearly alleged to be an interexchange carrier ("IXC") like AT & T in the AT & T decision, the other defendants, like Global NAPS in the instant case, were not alleged to be IXCs. *Id.* at *3. The plaintiffs contended that the AT & T Decision imposed liability on all entities involved in providing interexchange service, regardless of whether the entities were themselves IXCs. *Id.* The district court found that the plaintiffs' theory of liability required that it determine whether the defendants in question were in fact IXCs, or whether access charges could be assessed against non-IXCs, and that these questions required technical and policy determinations which were beyond the court's expertise and which were currently before the FCC in the proposed rulemaking discussed above. *Id.* at *4. Accordingly, the district court found that application of the primary jurisdiction argument was appropriate and stayed the plaintiffs' actions.^{FN4FN5}

^{FN4} Shortly after issuing its August 23, 2003 ruling, the district court in *Southwestern Bell* issued an order amending its previous judgment dismissing the plaintiffs' complaint, deciding to stay the matter instead. Pl's Response to Def's Submission of Supp. Auth., Ex. I. [Dkt. 34].

^{FN5} SNET argues that the *Southwestern Bell* decision is distinguishable from the claims in the instant case because the *Southwestern Bell* plaintiffs sought payment of access charges, and SNET only seeks equitable remedies from Global NAPS and does not contend that Global NAPS is liable for the payment of terminating access

charges. This appears to the court to be a distinction without a difference, as SNET's claims are premised on tariffs that, presumably, are similar to the tariffs that served as the basis of the actions in the AT & T decision and in *Southwestern Bell*. The choice of the remedies sought by SNET does not change the fact that this court would have to make similar decisions about the applicability of provisions of the tariffs as were at issue in *Southwestern Bell* and the AT & T decision.

If anything, SNET's argument would apply with equal force to distinguish the instant case from the AT & T decision, and it would undercut its assertion that the AT & T decision resolves the IP-related issues involved in its asserted claims.

*6 In *Frontier Tel. of Rochester, Inc. v. USA Datanet Corp.*, No. 05-CV-6056(CJS), 2005 WL 2240356 (W.D.N.Y. August 2, 2005), the plaintiff was an incumbent local exchange carrier who brought a claim against a provider of VOIP services for origination access charges. The district court in *Frontier* also confronted the applicability of the AT & T decision to the matter before it and found that it did not have the requisite expertise to make the determination of whether the services offered by the defendant were sufficiently similar to the services offered by AT & T so as to render the AT & T decision controlling. *Id.* Accordingly, the district court found that the primary jurisdiction doctrine applied and stayed the action.

It strikes the court that the issues confronted by the district courts in *Southwestern Bell* and *Frontier* are substantially similar to the issues presented by the facts in the present case, if the assertion that some of the calls involve IP is credited. To determine that SNET's tariffs and interconnection agreement bind Global NAPS in the ways that SNET alleges that they do, i.e., in the use of the Group D and meet point trunks, the court will have to determine whether there is in fact no difference between the traffic described in the tariffs and the agreement and the traffic at issue. Such a determination will require considering whether Global NAPS' IP-related services are enhanced and whether that has any impact on the applicability of the tariffs and the agreements (as in *Frontier*), as well as a

Not Reported in F.Supp.2d, 2005 WL 2789323 (D.Conn.)
(Cite as: 2005 WL 2789323 (D.Conn.))

determination that Global NAPS as an entity is bound by the tariffs in its transmission of IP-related traffic (as in *Southwestern Bell*). SNET's characterization of these issues as simply involving the application of the interconnection agreement and the tariffs is question-begging as it assumes that the IP-related traffic can be treated exactly the same as non-IP-related traffic. Despite SNET's assertion in its complaint that the "FCC has for decades ruled that temporary protocol conversions such as this have no effect on the regulatory classification of a call or, by extension, the applicability of access charges," the AT & T Decision and Notice of Proposed Rulemaking demonstrate that these issues are very much in flux and currently being considered by the FCC. The court cannot proceed on SNET's theory regarding whatever set of IP-related calls are at issue in this case without making the determinations described in *Frontier* and *Southwestern Bell*.^{FN6}

^{FN6} The court also takes note of a recent petition for a declaratory ruling filed by SBC Communication, Inc., on behalf of its affiliated ILECs, including SNET, subsequent to the *Southwestern Bell* decision, requesting that the FCC clarify the applicability of the AT & T decision to the "IP-in-the-middle" calls that were at issue in *Southwestern Bell* and may be at issue in this instant case. Def's Submission of Supp. Auth, Ex. B ("SBC Petition for Declaratory Ruling") [Dkt. No. 32]. The FCC has also indicated, in a public notice, its intention to consider the issues raised in SBC's petition. *Id.* at Ex. C.

Accordingly, this court stays, under the doctrine of primary jurisdiction, SNET's misrouting claims to the extent that they assert causes of action regarding traffic that involves IP at some point in its transmission. For the reasons described above, the court does not stay SNET's misrouting claims to the extent that they only involve "traditional" voice calls that do not involve IP.

In addition to the VOIP-related arguments that primarily apply to SNET's misrouting claims, Global NAPS makes separate arguments as to why the primary jurisdiction doctrine should be applied to SNET's special access circuit claims (Counts I and V). Global NAPS argues that SNET's special access cir-

cuit claims involve the interpretation of SNET's federal tariff to determine which party should properly bear the costs of building a specific set of "intraLATA" interconnection trunks, and thus such interpretation is properly within the jurisdiction of the FCC. Def's Reply Brief, p. 3 [Dkt. No. 23]. SNET contends instead that the special access circuit claims are "collection action claims" to which the primary jurisdiction doctrine does not apply. Given the allegations contained in SNET's complaint-that Global NAPS actually and specifically ordered twenty six circuits pursuant to the plaintiff's federal tariff-it is unclear to the court at this juncture why SNET's special access claims would require the type of policy-minded interpretative analysis that the defendant urges. *See* Complaint, ¶ 11. SNET's claims, at least at this stage of the litigation, appear to involve factual questions concerning whether Global NAPS actually purchased the circuits that SNET says that it has, and whether it actually failed to compensate SNET for them.

*7 Furthermore, the Second Circuit has made clear that, under the four criteria described above, "primary jurisdiction does not apply to cases involving the enforcement of a tariff, as opposed to a challenge to the reasonableness of a tariff." *National Commc'ns Ass'n*, 46 F.3d 220, 223 (2d. Cir.1994)(citing cases). As in *National Communication Ass'n*, determination of the issues presented by SNET's special access circuit claims, as alleged in its complaint, involves factual questions that do not require the FCC's policy expertise or specialized knowledge for resolution.^{FN7} *See id.* Thus, the court concludes that the primary jurisdiction argument does not bar SNET's claims regarding the special access circuits (Counts I and V).

^{FN7} Global NAPS directs the court to a D.C. Circuit case, *Allnet Commc'ns Serv., Inc. v. NECA*, 965 F.2d 1118 (D.C.Cir.1992), for the opposition conclusion, i.e., that tariff enforcement claims are regularly within the primary jurisdiction of administrative agencies. However, *Allnet Communications* is inapposite to the instant case as it involved the interpretive construction of a tariff's terms based on policy considerations and not the type of factual issues presented by the allegations of the complaint in this case.

B. Failure to State a Claim for Relief for Special

Not Reported in F.Supp.2d, 2005 WL 2789323 (D.Conn.)
(Cite as: 2005 WL 2789323 (D.Conn.))

Access Circuit Claims

Global NAPS also argues that SNET's special access circuit claims fail as a matter of law because SNET's special access circuit claims do not actually involve, as a factual matter, special access circuits ordered under the SNET federal tariff, but rather services purchased, or allegedly constructively purchased, under the parties' interconnection agreement. See Def's Memo, p. 26 and 28. As with its assertions concerning VOIP traffic, Global NAPS's arguments involve factual assertions that cannot be adduced from SNET's complaint. As discussed above, SNET's complaint clearly alleges that Global NAPS *ordered* special access circuits pursuant to SNET's federal tariff and failed to compensate SNET for them, not simply that Global NAPS was required to do so. Thus, the court denies Global NAPS' motion for failure to sufficiently state a claim for relief.

C. Failure to State a Claim for Relief for Misrouting Claims

Global NAPS also asserts that SNET's claims for the breach of its federal and state tariffs (Counts II and III), which allege that Global NAPS violated the terms of its federal and state tariffs by routing interexchange traffic over meet-point trunks rather than Group D trunks, fail to state claims for relief. Global NAPS argues that these tariffs only apply to parties who voluntarily purchase services under them, as in a contractual relationship, and that they do not apply to parties who do not avail themselves of them, as if they had the force of law. It further argues that SNET's claims essentially allege that Global NAPS *should* have ordered service from SNET but did not. As such, it concludes, SNET has failed to state claims for breach of its tariffs. See Def's Memo, p. 37-38.

Global NAPS has mischaracterized the nature of the tariffs and has misread SNET's complaint. Tariffs "are the law, not mere contracts," and they "conclusively and exclusively enumerate the rights and liabilities of the contracting parties." *Marcus v. AT & T Corp.*, 138 F.3d 46, 56 (2d Cir.1998)(emphasis omitted); see also *Fax Telecommunicaciones Inc. v. AT & T*, 138 F.3d 479, 488 (2d Cir.1998). Thus, Global NAPS' contention that SNET's tariffs do not apply to them unless they are specifically invoked in their purchase of services from SNET or in their use of SNET facilities is

inaccurate. Furthermore, SNET does not simply allege that Global NAPS should have ordered service under its tariffs; it alleges that Global NAPS did make use of SNET's facilities in such a way that its tariffs applied to Global NAPS and that Global NAPS failed to perform under the terms of the tariffs. Complaint, ¶¶ 35-44. Thus, SNET has sufficiently asserted claims for the breach of its tariffs.

D. Applicability of the Mandatory Arbitration Clause to Special Access Circuit Claims

*8 Global NAPS also contends that SNET is barred from asserting its special access circuit claims as it is bound by a mandatory arbitration clause in its interconnection agreement, and thus "may not pursue" these claims "in this forum." Def's Memo, p. 35. Global NAPS inclusion of its mandatory arbitration claim within its Rule 12(b)(6) motion is inappropriate as it necessarily involves the consideration of facts that are not before the court. The Federal Arbitration Act gives parties the ability to move to compel arbitration pursuant to an arbitration agreement between the parties. 9 U.S.C. § 4. In a Rule 12(b)(6) motion to dismiss, the court treats the facts as alleged in the plaintiff's complaint as true and simply tests the sufficiency of the plaintiff's allegations. See *Velez v. Levy*, 401 F.3d 75, 80 (2d Cir.2005). In a motion to compel arbitration brought under 9 U.S.C. § 4, "the court applies a standard similar to that applicable for a motion for summary judgment." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir.2003).

The determination that there is a binding arbitration clause between the parties that prevents SNET from bringing the specific claims that it asserts in its complaint requires an examination of facts that are not alleged in SNET's complaint. Moreover, the existence of a binding arbitration clause does not bear on the sufficiency of the SNET's claims, and thus does not support Global NAPS's Rule 12(b)(6) motion to dismiss. Accordingly, Global NAPS's motion to dismiss on this basis is denied. Global NAPS remains free to bring a motion to compel arbitration pursuant to 9 U.S.C. § 4.

IV. CONCLUSION

For the forgoing reasons, Global NAPS's motion to dismiss [Dkt. No. 11] is DENIED. SNET's claims that

Not Reported in F.Supp.2d, 2005 WL 2789323 (D.Conn.)
(Cite as: 2005 WL 2789323 (D.Conn.))

involve IP-related transmissions are STAYED pending determination by the Federal Communications Commission of the issues raised in the plaintiff's complaint.

SO ORDERED.

Dated at Bridgeport, Connecticut this 25th day of October, 2005.

D.Conn.,2005.
Southern New England Telephone Co. v. Global Naps, Inc.
Not Reported in F.Supp.2d, 2005 WL 2789323 (D.Conn.)

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