

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

SOUTHWESTERN BELL TELEPHONE	§	
COMPANY, BELLSOUTH	§	
TELECOMMUNICATIONS, INC.,	§	
ILLINOIS BELL TELEPHONE	§	
COMPANY, INC., MICHIGAN BELL	§	
TELEPHONE COMPANY, NEVADA	§	
BELL TELEPHONE COMPANY,	§	
PACIFIC BELL TELEPHONE	§	
COMPANY, OHIO BELL	§	
TELEPHONE COMPANY,	§	
SOUTHERN NEW ENGLAND BELL	§	
TELEPHONE COMPANY, and	§	
WISCONSIN BELL, INC.,	§	
	§	
Plaintiffs,	§	
v.	§	3:09-CV-01268-P
	§	
IDT TELECOM, INC., ENTRIX	§	
TELECOM, INC., and JOHN DOES 1-10,	§	
	§	
Defendants.	§	

**ORDER**

Now before the Court is Defendants’ Motion to Stay based on the Doctrine of Primary Jurisdiction or, in the alternative, Motion to Dismiss pursuant to Rule 12(b)(6), filed on October 9, 2009. Plaintiffs filed a Response on November 19, 2009. Defendants filed a Reply on December 29, 2009.<sup>1</sup> After reviewing the parties' briefing, the evidence, and the applicable law, the Court DENIES Defendants’ Motion to Stay and Motion to Dismiss.

---

<sup>1</sup> Defendants requested Motion to Supplement on March 22, 2010. Plaintiffs filed a brief in opposition to Motion to Supplement on April 12, 2010. Defendants filed a Reply to Plaintiffs’ brief on April 24, 2010. The Court GRANTS Defendants’ Motion to Supplement, considers Defendants’ supplemental brief, and still DENIES Defendants’ Motion to Stay and Motion to Dismiss.

## **I. Background**

Plaintiffs are ten corporations that provide local exchange telecommunications services and exchange access services for various states. (Compl. ¶¶ 3-12.) Defendants include two corporations as well as John Does that allegedly provide telecommunications services and products, including prepaid and rechargeable calling cards. (*Id.* at ¶¶ 13-15.) Plaintiffs operate local exchange networks in designated service areas which originate, transport, and terminate local telecommunications traffic. (*Id.* at ¶ 19.) Defendants provide long-distance phone services through prepaid calling cards, allowing customers to pay in advance for long-distance calls. (*Id.* at 25.) In exchange for long-distance access to local networks, Plaintiffs claim that they are entitled to access charges by law, through federal and state tariffs. (*Id.* at ¶ 19.) Unlike typical “1-800” or long distance calls that allow Plaintiffs to apply access charges up front, Defendants allegedly receive payment before local exchange carriers grant access. (*Id.* at ¶ 28.) Plaintiffs seek relief because they contend federal and state tariff charges are required by law and each Plaintiff network incurs costs every time it provides access to long-distance providers. (*Id.*)

## **II. Violation of Federal and State Tariffs**

Defendants move to stay Plaintiffs’ action for violation of tariffs until the regulatory issues raised by the complaint are resolved by the Federal Communications Commission (FCC). (Defs.’ Mot. Dismiss 1.) In the alternative, Defendants move to dismiss Plaintiffs’ action. (*Id.*)

### **a. Telecommunications Act, FCC Orders, Federal and State Tariffs**

Under the Communications Act of 1934, later amended by the Telecommunications Act of 1996, every common carrier must file with the FCC “schedules” (“tariffs”) “showing all charges” and “showing the classifications, practices, and regulations affecting such charges.” 47 U.S.C. § 203(a); *see also Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000). Further, a

carrier may not lawfully "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c)(3); *see also Evanns*, 229 F.3d at 840. Tariffs define the legal relationship between a common carrier and its customers and consist of the terms and conditions on file with the FCC. *Am. Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996). Moreover, "federal tariffs are the law, not mere contracts." *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); *see also Am. Tel. & Tel. Co. v. City of New York*, 83 F.3d at 552 (filed tariffs "have the force of law and are not simply contractual."); *Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966) ("[A] tariff, required by law to be filed, is not a mere contract. It is the law.").

Once a carrier's tariff is approved by the FCC, the terms of the federal tariff are considered to "conclusively and exclusively enumerate the rights and liabilities" as between the carrier and the customer." *Am. Tel. & Tel. Co. v. New York City Human Res. Admin.*, 833 F. Supp. 962, 970 (S.D.N.Y. 1993); *see also Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998). Most pertinent to the instant case, customers are charged with notice of the terms and rates on file with the FCC and "may not bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff." *Evanns*, 229 F.3d at 840. Furthermore, tariffs properly filed with the FCC are public records and may be considered with a Rule 12(b)(6) motion to dismiss. *Katz v. MCI Telcomm. Corp.*, 14 F. Supp. 2d 271, 274 (E.D.N.Y. 1998). AT&T's tariffs are public record. *Marcus v. AT&T Corp.*, 138 F.3d 46, 64 (2d Cir. N.Y. 1998)

Telecommunications services providers are regulated as common carriers, whereas providers of information services are not. 47 U.S.C. § 153(20), (44), (47); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976-77 (2005) (providing a

historical basis for the distinction); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 534 (D.C. Cir. 2007). Access charges shall be computed and assessed upon all common carriers that use local exchange carriers for telecommunications services. 47 C.F.R. § 69.5(a)-(b); *see also In re Transcom Enhanced Servs., LLC*, 2005 Bankr. LEXIS 1244, at \*15-16 (Bankr. N.D. Tex. Apr. 28, 2005) (interpreting 47 C.F.R. § 69.5). AT&T local exchange carriers are classified as a telecommunications service. *In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, 20 FCC Rcd 4826, ¶ 21 (rel. Feb. 23, 2005).

In 2006, the FCC included both IP transport and menu-driven calling cards as “subject to all of the applicable requirements of the Communications Act and the Commission's rules, including requirements to contribute to the federal USF and to pay access charges.” *In re Regulation of Prepaid Calling Card Servs.*, 21 FCC Rcd. 7290, ¶ 21 (rel. June 30, 2006) (referred to in this Order as the “2006 FCC Order”). The FCC based its decision on the determination that these two calling cards offer “telecommunications services.” *Id.* FCC does not classify all calling cards as telecommunications services, as evident by the following provision in the 2006 FCC Order, “[W]e will treat certain prepaid calling card service providers as telecommunications service providers. As such, these providers must pay intrastate access charges for interexchange calls.” *Id.* at ¶ 1.

Accordingly, the critical inquiry is not whether a party offers a calling card service, but rather if the party provides a telecommunications service. Reviewing the 2006 FCC Order, “the Commission previously has found that these same access charge obligations apply to basic prepaid calling cards and prepaid calling cards with unsolicited advertising.” *Id.* at ¶ 27. Thus, the FCC also includes basic prepaid calling cards as telecommunications providers.

Plaintiffs request the Court: (i) declare that Defendants violated the FCC's orders regarding access charges and interstate/intrastate tariffs; (ii) enjoin Defendants from further violations; (iii) order Defendants to provide an accounting of the access charges; and (iv) order Defendants to compensate Plaintiffs for damages. (Compl. ¶ 2.) Defendants now move to stay under the Doctrine of Primary Jurisdiction, or in the alternative, move to dismiss Plaintiffs' complaint. (Defs.' Mot. Dismiss 1.) Accordingly, the Court addresses each of these motions.

**b. Motion to Stay**

Defendants assert the Court should grant motion to stay under the doctrine of primary jurisdiction because the issues raised in the complaint are pending FCC review with no present resolution and such issues should be resolved on an industry-wide level. (Defs.' Mot. Dismiss 7-15.)

**i. Primary Jurisdiction Legal Standard**

Generally, courts apply the doctrine of primary jurisdiction "when a suit is brought in federal court and that court is of the opinion that the suit ought to have been prosecuted exclusively or initially before an administrative body." *Litton Sys. v. Sw. Bell Tel. Co.*, 539 F.2d 418, 420 (5th Cir. 1976). "The doctrine acts as a means of reconciling the functions of administrative agencies with the judicial function of the courts." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 417 (5th Cir. 1976). Primary jurisdiction is appropriate when, "the need arises to integrate the regulatory agency into the judicial decision making process." *Id.*

No fixed formula exists for applying the doctrine. *Miss. Power & Light Co.*, 532 F.2d at 419. The courts are reluctant to invoke the doctrine of primary jurisdiction when the result increases expense or delays litigation. *Id.* Likewise, when the agency's position is sufficiently

clear or nontechnical, courts are reluctant to refer to agencies. *Miss. Power & Light Co.*, 532 F.2d at 419 (citing *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285 (1922)); *see also Shew v. Southland Co.*, 370 F.2d 376 (5th Cir. 1966); *Strickland Transp. Co. v. United States*, 334 F.2d 172 (5th Cir. 1964). Moreover, a court must balance the benefits of seeking the agency's aid with the need to resolve disputes fairly, yet as expeditiously as possible. *Miss. Power & Light Co.*, 532 F.2d at 419.

A court need not defer review in every cause of action involving regulatory rules. *The Business Edge Group, Inc. v. Champion Mortgage Co.*, 519 F.3d 150, 154 (3d Cir. 2007). Such cases may be handled by a district court if the issues before it can be resolved "using the plain language of the [regulations] and ordinary rules of construction." *Id.* (quoting *Advance United Expressways, Inc. v. Eastman Kodak Co.*, 965 F.2d 1347, 1353 (5th Cir. 1992)); *see also MCI Telcoms. Corp. v. John Mezzalingua Assocs.*, 921 F. Supp. 936, 941 (N.D.N.Y. 1996) (holding no issues of interpretation or application exist regarding MCI's tariff that would require the FCC's technical or policy expertise). Notwithstanding the inherent flexibility of courts, various methods are employed to ascertain the appropriate ruling. The Fifth Circuit applied a three-part test in *Northwinds Abatement*:

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.

*Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, 69 F.3d 1304, 1311 (5th Cir. 1995) (citing *Penny v. Sw. Bell Tel. Co.*, 906 F.2d 187 (5th Cir. 1990)). The court in *Global Naps* adopted four factors to guide analysis:

(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.

*Global Naps, Inc. v. Bell Atlantic-New Jersey, Inc.*, 287 F. Supp. 2d 532, 549 (D.N.J. 2003) (citing *Oh v. AT&T Corp.*, 76 F. Supp. 2d 551, 557, (D.N.J. 1999)); see also *Torres-Hernandez v. CVT Prepaid Solutions, Inc.*, No. 3:08-CV-1057-FLW, 2008 U.S. Dist. LEXIS 105413, at \*11-12 (D.N.J. Dec. 9, 2008) (ruling primary jurisdiction did not apply in a settled FCC regulatory issue).

## ii. Application of Legal Standard

The Court applies the *Northwinds Abatement* and *Global Naps* factors and determines Plaintiffs' complaint is properly before the Court. Notwithstanding pending administrative developments, the FCC released its 2006 Order "to protect the federal universal service program and promote stability in the market for prepaid calling cards." *In re Regulation of Prepaid Calling Card Servs.*, 21 FCC Rcd. 7290, ¶ 1 (rel. June 30, 2006). Further, the FCC stated in the 2006 Order, "We conclude that immediate action in this proceeding is necessary to preserve universal service and provide regulatory certainty while the Commission considers systemic reform in the *Contribution Methodology* and *Intercarrier Compensation* proceedings." *Id.* at ¶ 8. Moreover, the FCC aimed to eliminate "incentives to reduce exposure to charges [telecommunications services providers] may owe" and to provide "a level regulatory playing field for calling card providers." *Id.* at ¶ 1, ¶ 8.

Both the federal regulations and FCC orders provide a clear path to determine if a calling card provider should be accountable for access charges: are they common carriers that offer a

product that is considered telecommunications services? The FCC and federal regulations provide guidance to enable judicial determinations of this sort. Though Defendants claim that the proper compensation, if any, for Plaintiffs is reciprocal compensation and not access charges, disputed compensation schemes have been properly brought before courts and this Court sees no reason to invoke primary jurisdiction to determine whether Plaintiffs are entitled to reciprocal compensation or access charges. 47 U.S.C. § 251(b)(5), (g); *see also Alma Commc'ns. Co. v. Mo. PSC*, 490 F.3d 619, 625 (8th Cir. 2007) (citing cases); (Defs.' Mot. Dismiss 11.)

Though the Court recognizes Defendants' concerns that this matter should be addressed at an industry-wide level to avoid inconsistent rulings, the FCC, through regulations and released orders, provides the necessary tools for adjudication without administrative referral. Quoting the 2006 FCC Order, "interim requirements are necessary to provide regulatory certainty and ensure compliance with our existing access charge and USF contribution requirements while we consider broader reform of those rules." *In re Regulation of Prepaid Calling Card Servs.*, 21 FCC Rcd. 7290, ¶ 21 (rel. June 30, 2006). Thus, the 2006 FCC Order makes clear that the FCC desired judicial remedies to sustain the system until industry reform is in place. Moreover, to invoke primary jurisdiction in this instance would only protract litigation and increase financial burdens. Accordingly, Plaintiffs properly bring suit to the Court.

**c. Motion to Dismiss**

Defendants assert Plaintiffs failed to state a claim for violation of federal and state tariffs. (Defs.' Mot. Dismiss 15-17.)

**i. 12(b)(6) Legal Standard**

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint when a defendant shows that the plaintiff failed to state a claim for which relief can be granted. "To

survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal v. Ashcroft*, - - - U.S. - - - 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual matter contained in the complaint must allege actual facts, not legal conclusions masquerading as facts. *Id.* at 1949-50 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Twombly*, 550 U.S. at 555).

Additionally, the factual allegations of the complaint must state a plausible claim for relief. *Id.* A complaint states a "plausible claim for relief" when the factual allegations contained therein infer actual misconduct on the part of the Defendants, not a "mere possibility of misconduct." *Id.*; see also *Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986). Moreover, when determining whether dismissal should be granted, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiffs. See *Capital Parks, Inc. v. Southeastern Adver. and Sales Sys., Inc.*, 30 F.3d 627, 629 (5th Cir. 1994); *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994).

## **ii. Application of Legal Standard**

Defendants contend no claim exists for breach of tariff because: 1) Plaintiffs fail to identify the federal and state tariffs allegedly violated; 2) no contract existed between the parties; and 3) no Federal Communications Commission (FCC) regulation or order legally binds Defendants to the tariffs. (Defs.' Mot. Dismiss 16-21.) The Court addresses each assertion.

### **1. Tariffs and Contracts**

Defendants claim the complaint does not identify applicable federal and state tariffs, thereby failing to provide grounds for relief. (Defs.' Mot. Dismiss 17-19.) Though Plaintiff

does not expressly state the provisions of each federal and state tariff, the complaint references filed documents with FCC. (Compl. ¶¶ 22-24, 38, 47.) As alleged customers of common carriers for telecommunications services, Defendants are charged with notice of any tariffs properly filed with the FCC that impact business operations. *See Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000); *Am. Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996); *Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966). Further, it is reasonable to assume that a business continuously operating under the regulatory purview of the FCC has the means to obtain these terms and conditions as a matter of public record. Accordingly, the Court finds Plaintiffs properly put Defendants on notice of their legal obligations under the tariffs filed with the FCC.

Similarly, Defendants contend that no contract existed between the parties. (Defs.' Mot. Dismiss 19.) This contention is unavailing to Defendants. As previously mentioned, a tariff properly filed with the FCC is law with residual legal ramifications for common carriers and customers. *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); *Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966).

Defendants claim no contract existed and they did not order Plaintiffs' services. (Defs.' Mot. Dismiss 19-20; Defs.' Reply 7-8; Defs.' Mot. Supp. 2-4.) A telecommunications provider may constructively order services when it does not follow the ordering provisions contained within the relevant tariff, but instead "(1) is interconnected in such a manner that it can expect to receive access services, (2) fails to take reasonable steps to prevent the receipt of services, and (3) does in fact receive such services." *Alliance Commc'ns Coop., Inc. v. Global Crossing Telecomms., Inc.*, No. 06-4221-KES, 2010 U.S. Dist. LEXIS 12281, at \*23-24 (D.S.D. Feb. 11, 2010) (citing *Advantel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000)); *see*

*also Am. Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 553 (2d Cir. 1996). Though *Alliance Commc'ns* held that a court must compare the specific access charges sought with the respective tariffs, that court order was during a motion for summary judgment. *Alliance Commc'ns Coop., Inc.*, No. 06-4221-KES, 2010 U.S. Dist. LEXIS 12281, at \*31. Moreover, Plaintiffs adequately explain how access charges are applied to their tariffs in the complaint. (Compl. ¶¶ 21-24, 38, 47).

Viewing the pleadings in the light most favorable to Plaintiffs, Defendants provide calling cards that allegedly offer telecommunications services over Plaintiffs' networks. (*Id.* at ¶ 33.) It is reasonable to infer that Defendants expected to provide calling cards that would afford customers access to Plaintiffs' networks and knew that such services would be provided by Plaintiffs to Defendants' customers. Therefore, the Court finds that Plaintiffs have pled facts to preclude a motion to dismiss regarding the legal obligations that arise from Plaintiffs' tariffs.

## 2. FCC Regulations or Orders

Defendants also claim that no FCC regulation or order binds them to liability associated with the tariffs filed with the FCC. (Defs.' Mot. Dismiss 20-21.) Defendants further assert that Plaintiffs' reliance on the 2006 FCC Order is misplaced and the most appropriate judicial posture is to submit the complaint to the FCC for administrative determinations. (Defs.' Mot. Dismiss 20-21.)

Though the Court agrees with Defendants that Plaintiffs' complaint, at times, extends the language of the 2006 FCC Order to encompass "all" calling cards, the Order does reaffirm that certain calling cards must "comply with applicable requirements of the Communications Act and the Commission's rules, including requirements to contribute to the federal USF and to pay access charges." *In re Regulation of Prepaid Calling Card Servs.*, 21 FCC Rcd. 7290, ¶ 21 (rel.

June 30, 2006). Among other related items directed toward stabilizing the industry, the Order added two calling card types to this list. *Id.* Though Plaintiffs do not claim that Defendants provide either calling card, Plaintiffs do contend that Defendants offer telecommunications services through calling cards. *Id.* at ¶ 29; 33. Therefore, viewing the facts in the complaint as true, Defendants are responsible for federal and state tariffs because they provide telecommunications services over Plaintiffs' networks and carriers. For the foregoing reasons viewed in the light most favorable to Plaintiffs' pleadings, the Court finds that the FCC Orders and federal regulations are applicable to Defendants and preclude a motion to dismiss.

### **III. Unjust Enrichment**

Similarly, Defendants claim that unjust enrichment is an inappropriate remedy because such relief would require the Court to determine the parties' rights under the tariffs. (Defs.' Mot. Dismiss 21-25.) Defendants move to stay, or in the alternative, to dismiss the action. (*Id.* at 1.)

#### **a. Legal Standard**

Though state law may vary the specific elements for a cause of action under unjust enrichment, "[a]n essential element" of unjust enrichment "is a benefit conferred upon the defendant by the plaintiff." *Earley v. Wachovia Bank, N.A.*, Nos. 09-1714,1757, 2010 U.S. App. LEXIS 943, 3-4 (8th Cir. Mo. Jan. 15, 2010) (citing *ACLU/E. Mo. Fund v. Miller*, 803 S.W.2d 592, 595 (Mo. 1991)). The measure of damages on an unjust enrichment claims is the reasonable value of benefit conferred on Defendants by the performance of Plaintiffs' telecommunications services. *See Manhattan Telcoms. Corp. v. Global Naps, Inc.*, No. 08 Civ. 3829 (JSR), 2010 U.S. Dist. LEXIS 32315, at \*11 (S.D.N.Y. Mar. 31, 2010); *Giordano v. Thomson*, 564 F.3d 163, 170 (2d Cir. 2009); *see also Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005) (holding restitution is measured by a defendant's ' unjust gain).

**b. Application of Legal Standard**


Although Defendants direct the Court's attention to *PAETEC* as a case that rejects unjust enrichment theories for carrier compensation, even more recent cases suggest that unjust enrichment may be a viable claim. *See Manhattan Telcoms. Corp. v. Global Naps, Inc.*, No. 08 Civ. 3829 (JSR), 2010 U.S. Dist. LEXIS 32315, at \*10-11 (S.D.N.Y. Mar. 31, 2010); *but see PAETEC Commc'ns, Inc. v. CommPartners, LCC*, No. 08-0397, slip op. at \*11 (D.D.C. Feb. 18, 2010) (holding that "the access charge regime is inapplicable to VoIP-originated traffic"); (Defs.' Mot. Supp. 4-5.) Reviewing the recent precedent, the Court cannot hold that Plaintiffs improperly pled a claim for unjust enrichment.

**IV. Conclusion**

For the foregoing reasons, the Court DENIES Defendants' Motion to Stay and Motion to Dismiss.

**IT IS SO ORDERED.**

Signed this 3<sup>rd</sup> day of June 2010.

  
\_\_\_\_\_  
JORGE A. SOLIS  
UNITED STATES DISTRICT JUDGE