Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Services, Inc. and AT&T Corp.,	)	Proceeding Number 19-222
Complainants.	)	Bureau ID Number EB-19-MD-007
	)	
v.	)	
	)	
123.Net, Inc. (d/b/a Local Exchange Carriers of Michigan and/or Prime Circuits)	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 2020 **Released: June 24, 2020**

By the Chief, Enforcement Bureau:

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I. INTRODUCTION

1. This order concludes a long-running dispute among AT&T, 123.Net, Inc. d/b/a Local Exchange Carriers of Michigan (LEC-MI), and others regarding improper end office charges on aggregated toll free long distance traffic that originated from wireless customers (traffic in dispute).[1] In this proceeding, AT&T alleges that LEC-MI violated the Communications Act (Act) by billing and collecting end office charges, through its agent, with respect to toll free wireless calls that were placed to AT&T's toll free customers. LEC-MI concedes that the charges were improper, but counters that it should not be held responsible for the bills its agent sent on its behalf. Although the facts of this case are

[1] Formal Complaint of AT&T Services, Inc., Proceeding Number 19-222, Bureau ID Number EB-19-MD-007 (filed Aug. 5, 2019) (Complaint or Formal Complaint).

complex, the underlying misconduct is simple—LEC-MI charged for services that it did not provide. We therefore find that LEC-MI unlawfully billed and collected these charges and grant AT&T a refund in the amount of $972,394, plus interest, for charges it paid from February 2012 through April 2014.

II. BACKGROUND

A. Legal Framework

2. The Act defines the obligations of carriers to behave in a just and reasonable manner, their tariffing duties, and their responsibility for those acting on their behalf. Under section 201(b) of the Act, "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."[2] A carrier violates section 201(b) when it bills for services it does not provide.[3] In addition, section 203(c) prohibits a carrier from collecting charges for services that are not described in its tariff. Specifically, section 203(c) provides: "[N]o carrier shall [] charge, demand, collect or receive a greater . . . compensation" than the "charges specified" in the carrier's tariff. [4]

3. Section 217 provides that "the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person."[5] The Commission has observed that "Congress's clear intent in enacting section 217 was to ensure that common carriers not flout their statutory duties by delegating them to third parties."[6] A carrier's liability for the conduct of agents or contractors extends to actions within the scope of their employment that are contrary to the carrier's policies, for "[t]o hold that [s]ection 217 does not extend to

[2] 47 U.S.C. § 201(b).

[3] *See, e.g., In the Matter of AT&T Corp. v. All American Telephone Co., et al*., 28 FCC Rcd. 3477, 3492–93 at paras. 34-36 (2013).

[4] 47 U.S.C. § 203(c). *See YMax Commc'ns Corp*., 26 FCC Rcd at 5748, para. 12; *Firstcom, Inc. v. Qwest Corp*., 555 F.3d 669, 680-81 (8th Cir. 2009); *MCI WorldCom Network Servs. v. PaeTac Commc'ns, Inc.*, 204 Fed. Appx. 271, 272 n.2 (4th Cir. 2006) ("[U]nder the filed rate doctrine, a carrier is expressly prohibited from collecting charges for services that are not described in its tariff."); *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 482 (2d Cir. 1997).

[5] 47 U.S.C. § 217. *See Sprint Corp.*, Notice of Apparent Liability for Forfeiture, 35 FCC Rcd 1655, 1673, para. 52 (2020) ("[T]he Commission has consistently held that carriers are responsible for the conduct of third parties acting on the carrier's behalf."); *AT&T, Inc.*, Notice of Apparent Liability for Forfeiture, 35 FCC Rcd 1743, 1760, para. 48 (2020). Courts have sometimes referred to section 217 as a codification of vicarious liability principles. *See, e.g., Chavrat v. EchoStar Satellite*, LLC, 630 F.3d 459, 465 (6th Cir. 2010) (stating that section 217 establishes "a form of vicarious liability applicable only to 'common carrier[s] or user[s]'"). In resolving this dispute, we need not determine whether section 217 imposes direct or vicarious liability on common carriers.

[6] *Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3300, para. 9 (2000). *See AT&T, Inc.*, 35 FCC Rcd at 1760, para. 47 ("[A] carrier cannot avoid its statutory obligations by assigning them to a third party."). *See also Eure Family Ltd. Partnership*, Memorandum Opinion and Order, 17 FCC Rcd 21861, 21863-4, para. 7 (2002) ("[T]he Commission has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors, and has 'consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors have resulted in violations.'") (citing *American Paging, Inc. of Virginia*, 12 FCC Rcd 10417, 10420, para. 11 (Wireless Bur., Enf. and Cons. Inf. Div., 1997)); *In re Silv Comm'ns Inc.*, Notice of Apparent Liability, 25 FCC Rcd 5178, 5180, para. 5 n.18 (2010).

independent contractors acting inconsistently with the carrier's policy would create a loophole in the requirements of the Act and frustrate clear legislative intent."[7]

B. Factual Background

4. *Parties and Relevant Non-Parties.* Complainant AT&T Corp., for purposes of this case, provides end users the ability to make long distance calls[8] and offers and provides toll free long distance service to end-user customers around the country.[9] Callers initiate toll free calls by dialing 800 or another three digit prefix beginning with the number 8 in lieu of an area code. The customer receiving the call (rather than the customer making the call) pays its toll free provider for the call.[10] Thus, the calls are "toll free" for the calling party but not the called party. AT&T's customers here are the businesses that receive the toll free calls.[11] AT&T Corp. is the AT&T entity involved in routing the traffic in dispute.[12]

5. Complainant AT&T Services, Inc. performs centralized administrative support services including information technology and billing support services.[13] AT&T Services, Inc. is not a carrier and was not involved in routing any of the traffic in dispute.[14] In this order, we refer to AT&T Corp. and AT&T Services, Inc. collectively as AT&T.

6. Defendant LEC-MI is a common carrier and competitive local exchange carrier that operates an end office switch in Southfield, Michigan, among other communications services.[15] LEC-MI's telephone numbering resources are limited to certain NPA-NXXs associated with its switch in Southfield.[16]

7. From October 21, 2003 until approximately September 19, 2014, LEC-MI's end office switch in Southfield was connected to a tandem switch owned by Great Lakes Comnet (Great Lakes).[17] During that time, Great Lakes was registered with the Michigan Public Service Commission as a facilities-based competitive access provider.[18] Great Lakes provided interstate switched and special

[7] *Long Distance Consolidated Billing Co.*, Forfeiture Order, 34 FCC Rcd 1871, 1874-75, para. 10 (2019) (holding that a carrier was "not relieved of liability [for slamming] simply because it provided its telemarketers with a policy manual and sales script and directed its telemarketers to market its service 'through lawful means"'). *See Vista Servs. Corp.*, 15 FCC Rcd 20646, 20649-50, para. 9 (2000) (observing that to hold that section 258 of the Act and the Commission's slamming rules do not reach the conduct of contractors hired by a carrier would "frustrate legislative intent" and violate "long-established principles of common law holding statutory duties to be nondelegable").

[8] Joint Statement of Stipulated Facts, Disputed Facts, Key Legal Issues, and Discovery and Scheduling, Proceeding Number 19-222, Bureau ID Number EB-19-MD-007 (filed Oct. 30, 2019) (Jt. Statement) at 2, para. 2.

[9] Jt. Statement at 2, para. 3.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *Id.* at 2, para. 1. AT&T Services, Inc. also performs real estate support services, procurement support services, human resources support services, training services, and finance support services. *Id*.

[14] *Id*.

[15] *Id*. at 3, para. 4.

[16] *Id*.

[17] *Id*. Great Lakes is not a party to this proceeding but was a defendant in a separate formal complaint proceeding brought by AT&T which resulted in a Commission order. *AT&T Servs. Inc. et al.* v. *Great Lakes Comnet, Inc. et al.*, 30 FCC Rcd 2586 (2015) (*Great Lakes Order*).

[18] *Great Lakes Order* at 2587-88, para. 7.

access services, including tandem switched transport, tandem switched facility, tandem switched termination, and tandem switching via a tandem switch located in Westphalia, Michigan.[19]

8. Westphalia Telephone Company (Westphalia) is an incumbent local exchange carrier and affiliate of Great Lakes that provides telephone exchange services to business and residential customers and switched access services to long distance carriers in Michigan.[20]

9. *Traffic and Billing Responsibilities.* Great Lakes filed an interstate access service tariff with the Commission (Great Lakes Tariff or Tariff) that governs the rates and terms of its interstate switched and special access services.[21] Until 2014, LEC-MI participated as an issuing carrier in the Great Lakes Tariff.[22] The Great Lakes Tariff provided that the local switching (or end office) rate includes "information surcharge, common trunk port, and tandem switched termination charges for the portion of those services directly provided by LEC[-MI]."[23]

10. The Tariff also reflected an arrangement between LEC-MI and Great Lakes under which Great Lakes had billing responsibility for LEC-MI's interexchange traffic.[24] Specifically, Great Lakes and LEC-MI had entered into a network operating agreement in 2003 under which Great Lakes was responsible for, *inter alia*, billing local switching and other switched access services to long distance carriers for the jointly provided access services on toll and toll free calls for which LEC-MI was a participating carrier in the call flow.[25] Later, Great Lakes assigned its responsibility to bill switched access services for such calls to Westphalia.[26] As a result of this assignment, Westphalia assumed responsibility for billing AT&T and other long distance carriers for LEC-MI's switched access services during the time period from January 1, 2012 through September 19, 2014.[27]

11. *The Disputed Traffic and Billing.* AT&T received monthly bills in electronic format from Westphalia for services that LEC-MI, Great Lakes, and Westphalia purportedly provided to AT&T.[28] The bills identified by operating company number (OCN) the carrier associated with the

[19] *Id*.

[20] Jt. Statement at 3, para. 6. Westphalia is not a party to this proceeding but was a defendant in the separate proceeding that resulted in the *Great Lakes Order*.

[21] Jt. Statement at 3-4, para. 8. *See* Complaint Exh. 7, GLC Tariff Revisions (ATT-0000101-106) (Great Lakes Tariff Revisions); *id*. Exh. 15, GLC Tariff Excerpts (ATT-0000209-315) (Great Lakes Tariff Excerpts). The Tariff was designated as Great Lakes Comnet, Inc. Tariff F.C.C. No. 20. Jt. Statement at 3-4, para. 8. The original version of the Tariff became effective April 2, 2002. *Id*. *See also, e.g.*, Great Lakes Tariff Excerpts at ATT-0000219-86. Great Lakes revised the Tariff on various occasions. Jt. Statement at 3-4, para. 8. *See also, e.g.*, Great Lakes Tariff Revisions at ATT-0000102-06; Great Lakes Tariff Excerpts at ATT-0000212-18.

[22] Jt. Statement at 8, para. 37. *Cf*. Complaint Exh. 8, Current LEC-MI Tariff Excerpts (ATT-0000107-128) (Current LEC-MI Tariff Excerpts) (identifying the original effective date of LEC-MI's tariff as April 12, 2014).

[23] Jt. Statement at 8, para. 39; Great Lakes Tariff Revisions at ATT-0000106.

[24] Jt. Statement at 4, para. 12; Complaint Exh. 5, Letter of J. Bowser, Counsel to LEC-MI, to A.J. DeLaurentis, FCC (May 12, 2014), Bureau ID Number EB-14-MDIC-0003 (Informal Complaint Response or LEC-MI Inf. Compl. Resp.) at 2 (ATT-0000069). Great Lakes's billing responsibility for LEC-MI's interexchange traffic was reflected in the parties' Tariff starting in 2003. *Id.*

[25] Jt. Statement at 3-4, paras. 5, 12.

[26] *Id*. at 3-4, 8, paras. 6, 13, 42; LEC-MI Inf. Compl. Resp. at 2 (ATT-0000069).

[27] Jt. Statement at 3, 8-9, paras. 7, 40, 50.

[28] *Great Lakes Order*, 30 FCC Rcd at 2591, para. 17; Jt. Statement at 7-8, paras. 34, 41, 43; 123.Net's (d/b/a LEC-MI) Amended Answer to the Formal Complaint of AT&T Services, Inc. and AT&T Corp., Proceeding Number 19-222, Bureau ID Number EB-19-MD-007 (filed Oct. 3, 2019) (Answer) Exh. 4, Declaration of Michael Starkey (continued….)

specific rate elements that were billed.[29] These bills to AT&T included charges for end office switching and related access charges billed under LEC-MI's OCN for aggregated toll free traffic that originated from wireless customers throughout the country,[30] even though LEC-MI did not provide end office switching services on that traffic.[31] Westphalia, directly or through its vendor, accepted AT&T's payments on access bills for traffic associated with LEC-MI during the time period February 2012 through July 2013.[32] LEC-MI was aware that Westphalia was billing access charges on LEC-MI's behalf for traffic that was transported from LEC-MI to Great Lakes,[33] and LEC-MI received at least some of the access charges Westphalia collected.[34]

12. Starting in or around 2010, the total amount of billings to AT&T for access services jointly provided by LEC-MI, Great Lakes, and Westphalia began to increase steadily, largely due to the aggregation of toll free traffic that originated from wireless customers throughout the country.[35] Prior to November 2009, the volume of traffic to and from AT&T through LEC-MI's switch in Southfield was about one million minutes per month, but by May 2013 the monthly volume had reached a peak of about 25 million minutes.[36] Concerned about improper billing for the traffic in dispute, AT&T began withholding from its payments a portion of the end office and related charges billed under LEC-MI's OCN, starting with the July 2013 invoice it received from Westphalia.[37]

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(Starkey Decl.) at 4, para. 10 (LEC-MI_00097). *See also* LEC-MI Inf. Compl. Resp. at 3 (ATT-0000070).

[29] Jt. Statement at 8, para. 44. LEC-MI's OCN is 2550. *See id*. at 3, para. 4.

[30] *Id*. at 7, 8, paras. 31, 34, 40; Answer at 11-12, para. 34.

[31] *See* MPSC Transcript at 545. *Great Lakes Order* at 2590, para. 14. *See also* Jt. Statement at 7-9, paras. 31, 45, 46; Answer at 12, para. 35; Complaint Exh. 1, Joint Declaration of Geri Lancaster & Kurt Giedinghagen (Joint Declaration or Joint Decl.) at 5-6, para. 16 (ATT-000006-7). After traffic aggregators handled the traffic bound for AT&T's toll free customers, it was then handed off to intermediate service providers and delivered to LEC-MI's end office switch in Southfield, Michigan. Jt. Statement at 7, para. 33. LEC-MI established an IP point of interconnection for this traffic, and carried the traffic to Flint, Michigan. *Id*. at 7, para. 35; MPSC Transcript at 567-68. Great Lakes and Westphalia then carried the traffic, and ultimately handed it off to AT&T, which routed the calls to its toll free customers. Jt. Statement at 7, para. 36. *See also* MPSC Transcript at 567-68.

[32] Jt. Statement at 9, para. 50.

[33] MPSC Transcript at 558-59. In response to a billing dispute letter that AT&T sent to LEC-MI, Westphalia, and Great Lakes on June 6, 2013, an employee of Westphalia sent a letter to AT&T on July 8, 2013, which purported to address the billing issues on behalf of all three entities, and showed a copy going to LEC-MI's representatives. *See* Letter from J. Bowser to M. Dortch re State of Discovery, Proceeding Number 19-222, Bureau ID Number EB-19-MD-007 (filed Dec. 2, 2019) (December 2, 2019 Letter) Exh. 1 at 123.Net_000007-9 (AT&T June 6, 2013 Letter); *id*. at 123.Net_000005-6 (Westphalia July 8, 2013 Letter).

[34] *See* MPSC Transcript at 545, 574-75, 578-80; Jt. Statement at 4, para. 14; LEC-MI Inf. Compl. Resp. at 3 (ATT-0000070).

[35] *Great Lakes Order*, 30 FCC Rcd at 2590, para. 14; Jt. Statement at 7-9, paras. 31, 45, 46; Answer at 12, para. 35. *See also* Joint Decl. at 5-6, para. 16 (ATT-000006-7).

[36] Jt. Statement at 9, para. 46.

[37] Jt. Statement at 9, para. 49. AT&T asserts that it first learned of the traffic in dispute from a review of certain call detail records (CDRs), which AT&T received in July 2013. Complaint at 13, para. 40; Joint Decl. at 4-5, paras. 12-14 (ATT-0000005-ATT-0000006); Complaint Exh. 16, AT&T's Reply to the Answer, Response to Affirmative Defenses, and Information Designation, Bureau ID Number EB-14-MD-013 (filed Nov. 19, 2014) (AT&T Reply in Great Lakes Case) at 11-12, para. 40 (ATT-0000327-8). *See also* Complaint at 12, para. 36. Although AT&T initially sent a billing dispute letter to Westphalia and LEC-MI on March 20, 2013 and another dispute letter to Westphalia, LEC-MI, and Great Lakes on June 6, 2013, these letters did not dispute charges for the aggregated traffic at issue here. *See* AT&T June 6, 2013 Letter; December 2, 2019 Letter Exh. 1 at 123.Net_000010-12 (AT&T
(continued….)

13. *Procedural History and Related Proceedings.* AT&T Services, Inc. (on behalf of itself and its operating affiliates) filed an informal complaint against Great Lakes, Westphalia, and LEC-MI on April 4, 2014 that included claims concerning the same toll free traffic at issue in this case, among other claims.[38] As to LEC-MI, the Informal Complaint alleged that LEC-MI's billing of end office charges for toll free calls originated by customers of wireless carriers was "unlawful, because it has been established since 2004 that LECs cannot bill such charges for traffic that does not originate or terminate with their own end users." The Informal Complaint also alleged that LEC-MI's end office charges "plainly violate LEC-MI's tariff."[39]

14. On May 12, 2014, LEC-MI filed a response to AT&T's Informal Complaint.[40] LEC-MI acknowledged that the toll free wireless aggregation traffic did not originate from LEC-MI's end users and that end office charges should not have been assessed on the traffic.[41] LEC-MI also stated that it intended to "satisfy AT&T's remaining concerns about end office switching charges that were erroneously billed" within the statute of limitations[42] and that it had "direct[ed] Respondents [Great Lakes] and [Westphalia] to credit AT&T's account for any outstanding end office switching charges related to the disputed toll free traffic that have not yet been paid by AT&T."[43] LEC-MI maintained that the "actions that led to these charges being assessed on AT&T were taken by [Westphalia] and/or [Great Lakes]."[44] LEC-MI has not directly issued any credits or refunds to AT&T.[45]

15. The initial six-month deadline to convert AT&T's Informal Complaint against LEC-MI into a formal complaint under section 1.718 of the Commission's rules[46] was extended several times at the request of the parties, and during these extensions, the parties engaged in settlement discussions and staff-supervised mediation.[47] When these settlement efforts proved unsuccessful, AT&T filed the instant Complaint on August 5, 2019, alleging that LEC-MI violated sections 201 and 203 of the Act.[48]

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March 20, 2013 Letter). *See also* Complaint at 13, para. 38; AT&T Reply in Great Lakes Case at 11-12, para. 40 (ATT-0000327-8); Joint Decl. at 5, paras. 13-14 (ATT-0000006); Jt. Statement at 9, para. 48.

[38] Jt. Statement at 4, para. 9. *See* Complaint Exh. 3, Letter from Michael J. Hunseder, Counsel to AT&T Services Inc., to Rosemary McEnery, Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC, Bureau ID Number EB-14-MDIC-0003 (e-mailed Apr. 4, 2014) (Informal Complaint) (ATT-0000027 to ATT-0000048); Answer at 10, para. 25.

[39] Informal Complaint at 2 (ATT-0000029); *see id.* at 12-13 (ATT-0000039-40).

[40] Jt. Statement at 4, para. 10; LEC-MI Inf. Compl. Resp. (ATT-0000067-76).

[41] Jt. Statement at 5, para. 15; LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072).

[42] Jt. Statement at 4, para. 11. *See* LEC-MI Inf. Compl. Resp. at 1 (ATT-0000068).

[43] Jt. Statement at 5, para. 20; LEC-MI Inf. Compl. Resp. at 1 (ATT-0000068); *see id.* at 5 (ATT-0000072).

[44] Jt. Statement at 5, para. 21; LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072). LEC-MI never asserted, in a civil action or Great Lakes's bankruptcy proceeding, any contribution or indemnity claims against Great Lakes or Westphalia with respect to LEC-MI's potential liability to AT&T. Jt. Statement at 6, paras. 23. *Cf. id*. at 6, para. 22; LEC-MI Inf. Compl. Resp. at 6 (ATT-0000073).

[45] Answer at 4, para. 4; Joint Decl. at 9, para. 26 (ATT-0000010).

[46] *See* 47 CFR § 1.718.

[47] Jt. Statement at 6, para. 26 ("The initial deadline to convert AT&T's Informal Complaint into a formal complaint and have the formal complaint 'relate back' to the Informal Complaint was November 12, 2014, but that deadline was extended by a number of Commission-granted consent motions.") The last staff-granted extension, dated January 29, 2018, extended the conversion deadline to the "date that is 60 days after the conclusion of the planned Mediation Session" in which the parties engaged with Commission Staff. Jt. Statement at 6, para. 27; AT&T's Consent Motion for Waiver and to Extend the Time in Which to Convert Its Informal Complaint as to
(continued….)

16. AT&T's decision to extend the six-month conversion deadline did not apply to AT&T's claims against Great Lakes and Westphalia. Instead, AT&T filed a formal complaint against Great Lakes and Westphalia in October 2014.[49] In March 2015, the Commission released an order granting in part AT&T's complaint against Great Lakes and Westphalia.[50]

17. Great Lakes subsequently declared bankruptcy.[51] AT&T, Great Lakes, and Westphalia entered into a settlement agreement in connection with the bankruptcy proceeding, which the Bankruptcy Court approved.[52] The Settlement Agreement states that AT&T released Great Lakes and Westphalia "from any and all manner of claims."[53] The Settlement Agreement further states that "[n]othing herein releases . . . (c) any claims by AT&T against parties other than the Debtor Release Parties, including, without limitation, 123.Net, Inc. d/b/a Local Exchange Carriers of Michigan, notwithstanding [Great Lakes], [Westphalia] . . . or any other party billing AT&T on behalf of or as agent for such parties."[54]

III. DISCUSSION

A. LEC-MI Violated Sections 201(b) and 203(c) by Imposing Access Charges for Traffic Not Originated by LEC-MI End Users.

18. AT&T alleges that LEC-MI violated sections 201(b) and 203(c) of the Act[55] by billing AT&T for end office access charges on toll free traffic in violation of the Commission's rules and the terms of the Tariff.[56] AT&T further alleges that under section 217 of the Act, LEC-MI is responsible for

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LEC-MI, Bureau ID Number EB-14-MDIC-0003, at 5 (Grant Stamped Jan. 30, 2018). On June 6, 2019, counsel for AT&T sent a letter to counsel for LEC-MI and MDRD Staff stating that further mediation discussions would not be productive. Jt. Statement at 7, para. 29; Complaint Exh. 12, Letter from Brian A. McAleenan, Counsel to AT&T Services Inc., to Lisa Saks and Adam Suppes, Market Disputes Resolution Division, Enforcement Bureau, FCC, Bureau ID Number EB-14-MDIC-0003 (June 6, 2019) (ATT-00000144 to ATT-0000145) (Mediation Termination Letter). This set the deadline for AT&T to convert its Informal Complaint to a formal complaint at August 5, 2019. *See id*.

[48] Jt. Statement at 7, para. 30.

[49] Jt. Statement at 6, para. 24. *Great Lakes Order*, 30 FCC Rcd at 2586 n.1.

[50] Jt. Statement at 6, para. 25; *Great Lakes Order*.

[51] *See* Jt. Statement at 12, para. 67. *See generally id*. at 12, paras. 70-71.

[52] Jt. Statement at 12, paras. 67, 70-71; Complaint Exh. 6, Settlement Agreement, dated January 4, 2017, among AT&T, GLC and Westphalia (Settlement Agreement) (ATT-0000077-100); Answer Exh. 1, United States Bankruptcy Court Order Approving Terms of Compromise Among Debtors, Everstream GLC Holding Company, LLC and AT&T Corp. (LEC-MI_00001-00004). After approving the settlement, the Bankruptcy Court entered an order confirming the Debtor's Chapter 11 Plan, and AT&T voted to accept the plan. Jt. Statement at 12, para. 71; Answer Exh. 2, United States Bankruptcy Court Order Confirming Chapter 11 Plan (LEC-MI_00005-00032); Answer Exh. 3, Tabulation of Votes on the Joint Chapter 11 Plan (LEC-MI_00033-00090).

[53] Jt. Statement at 12, para. 67; Settlement Agreement at 4, para. 7 (ATT-0000081).

[54] Jt. Statement at 12, para. 68. Settlement Agreement at 5, para. 7 (ATT-0000082). The Settlement Agreement contains a choice-of-law provision which states that the agreement "shall be construed in accordance with and be governed by the law of the State of New York not including its choice of law principles." Jt. Statement at 12, para. 69; Settlement Agreement at 7, para. 19 (ATT-0000084).

[55] 47 U.S.C. §§ 201(b), 203(c).

[56] Complaint at 32, para. 101.

the improper billing practices of Westphalia, which was acting as LEC-MI's billing agent.[57] AT&T seeks a refund in the amount of $1,054,897, plus interest under section 206 of the Act.[58]

19. LEC-MI does not dispute that sections 201(b) and 203(c) of the Act prohibited LEC-MI from charging AT&T for end office access services for the traffic in dispute,[59] or that AT&T was improperly billed for access charges under LEC-MI's OCN.[60] Instead, LEC-MI contends that it is not liable for the charges Westphalia billed and collected from AT&T for such traffic because Westphalia was not acting as LEC-MI's agent when it engaged in this conduct.[61] LEC-MI also asserts several unrelated defenses, none of which has merit.[62] As explained below, we find that LEC-MI violated sections 201(b) and 203(c) of the Act by billing AT&T for access services on toll free traffic through its agent, Westphalia.

20. We agree with AT&T that LEC-MI engaged in an unjust and unreasonable practice in violation of section 201(b) of the Act by improperly billing AT&T for end office access charges on aggregated toll free traffic.[63] A carrier violates section 201(b) when it bills for services it does not provide.[64] LEC-MI concedes that it did not provide end office switching services to AT&T on the traffic at issue.[65] LEC-MI's collection of payment for these services is therefore unjust and unreasonable in violation of section 201(b).

21. We further agree that section 203(c) barred LEC-MI from billing end office access charges on the aggregation traffic at issue.[66] AT&T was billed under LEC-MI's OCN for a service different from that described in the Tariff of which LEC-MI was an issuing carrier during the relevant timeframe.[67] End office switching of toll free traffic from wireless customers does not fall within the Tariff's definition of switched access service,[68] for at least two reasons. First, section 6.1 of the Tariff states that switched access service provides the ability to originate calls from, and terminate calls to, end users of LECs (such as LEC-MI) whose end office switches subtend the Great Lakes switch.[69] The traffic

[57] Complaint at 27, paras. 91-92. *See* 47 U.S.C. § 217.

[58] Complaint at 20, 22, paras. 65, 73.

[59] *See* LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072). *See generally* Answer.

[60] Jt. Statement at 4, 5, 7, 8, paras. 11, 15-18 34, 40.

[61] Answer at 9, 11, 27, paras. 19, 34, 91.

[62] Answer at 30.

[63] Complaint at 20, paras. 63-64.

[64] *See* 47 U.S.C. § 201(b); *AT&T Corp. v. All American Telephone*, 28 FCC Rcd. 3477, 3492–93 at paras. 34-36.

[65] Jt. Statement at 4-5, paras. 11, 15; LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072); MPSC Transcript at 545. LEC-MI acknowledges that "end office charges should not have been assessed" on that traffic. *See* Jt. Statement at 5, para. 15; LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072).

[66] Complaint at 21, paras. 68-72.

[67] *Cf.* 47 U.S.C. § 203(c); Jt. Statement at 8, para. 37 ("LEC-MI's tariffed rate for local switching (or end office) access service as of January, 2012, was $0.012 per minute."); *id*. at 7, para. 34. *See generally AT&T Corp. v. Central Office Tel*., 524 U.S. 214, 223 (1998) ("Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached.").

[68] *See* Jt. Statement at 10, para. 52; Great Lakes Tariff Excerpts at ATT-0000247.

[69] Great Lakes Tariff Excerpts at ATT-0000247-8 ("Switched Access Service provides for the ability to originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end user's premises of LEC[s] whose end office(s) subtend the Company's tandem."). *See* Jt. Statement at 5, para. 15; LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072); MPSC Transcript at 545. *Cf.* Jt.

(continued….)

in dispute does not fall within that provision because the end users originating the aggregated toll free calls were not end-user customers of LEC-MI.[70] Second, wireless-originated toll free traffic lacks the "premises" required for the switched access services described in the Tariff.[71] Section 6.1 of the Tariff states that "switched access services" can be used for connecting the "premises" of long distance carriers to an "end user premises,"[72] and section 2.6 defines "premises" as a "building or buildings on contiguous property."[73] It is undisputed that the wireless phones used for the toll free aggregated traffic at issue, are not "premises" under the Tariff.[74]

22. We also agree with AT&T that LEC-MI is liable for violations of section 201(b) and 203(c) that resulted from the actions of Westphalia—the entity that billed and collected the access charges at issue here.[75] We find that under section 217, LEC-MI is liable for the unlawful access charges Westphalia billed and collected from AT&T under LEC-MI's OCN because Westphalia was acting as LEC-MI's agent or was otherwise "acting for" LEC-MI when it engaged in that conduct. The record establishes that Westphalia acted as LEC-MI's agent to issue and collect bills on LEC-MI's behalf.[76] LEC-MI admits it had an agreement with Great Lakes that it would bill certain access charges on LEC-MI's behalf,[77] admits that Great Lakes delegated that responsibility to Westphalia, and does not dispute that Great Lakes's assignment of billing responsibilities to Westphalia was valid.[78] Billing AT&T and other carriers for LEC-MI's switched access services was within the scope of Westphalia's duties under that agreement. Further, LEC-MI knew that Westphalia was billing access charges on LEC-MI's behalf,[79] and LEC-MI received at least some of the access charges collected.[80] At the time AT&T was paying the disputed charges, LEC-MI did not complain that AT&T was improperly paying Westphalia instead of LEC-MI, or that Westphalia otherwise lacked authority to bill and collect on its behalf.[81] These undisputed facts establish that Westphalia was an "agent" or "other person acting for" LEC-MI, within the scope of its employment, when it billed and collected access charges from AT&T on aggregated toll

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Statement at 10, para. 52. LEC-MI concurred in section 6.1 during the relevant time-period. Jt. Statement at 8, para. 37.

[70] *See* Jt. Statement at 5, para. 15; LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072); MPSC Transcript at 545. *Cf.* Jt. Statement at 10, para. 52; Great Lakes Tariff Excerpts at ATT-0000247-8.

[71] *See* Great Lakes Tariff Excerpts at ATT-0000247, ATT-0000253-266; Jt. Statement at 10, para. 53.

[72] Great Lakes Tariff Excerpts at ATT-0000248; Jt. Statement at 10, para. 53.

[73] Great Lakes Tariff Excerpts at ATT-0000240; Jt. Statement at 10, paras. 54.

[74] Jt. Statement at 10, para. 54 (confirming that wireless phones are not "premises" as described in the Tariff).

[75] Complaint at 27-29, paras. 91, 93-95; Reply Legal Analysis of AT&T Services, Inc., Proceeding Number 19-222, Bureau ID Number EB-19-MD-007 (filed Oct. 18, 2019) (Reply Legal Analysis) at 7.

[76] *See* Jt. Statement at 9, para. 50 ("At all relevant times, Westphalia issued invoices for access charges that were billed under LEC-MI's OCN, and, through the vendor, sent, and accepted payment on, access bills to AT&T for traffic associated with LEC-MI.").

[77] Jt. Statement at 3-4, paras. 5, 12, 14; LEC-MI Inf. Compl. Resp. at 2 (ATT-0000069); MPSC Transcript at 526-27, 574.

[78] Jt. Statement at 3-4, 8-9, paras. 6, 7, 13, 40, 42, 50; LEC-MI Inf. Compl. Resp. at 2 (ATT-0000069).

[79] MPSC Transcript at 558-59, 578-79 (LEC-MI's CEO indicating knowledge that Westphalia billed on LEC-MI's behalf); Westphalia July 18, 2013 Letter.

[80] *See supra* note 34.

[81] Joint Decl. at 9-10, paras. 25-26 (ATT-0000010-11). *See* MPSC Transcript at 558-59; Westphalia July 8, 2013 Letter; AT&T June 6, 2013 Letter. There is no record evidence that LEC-MI, which was copied on the July 2013 letter, ever advised AT&T that it disputed Westphalia's statement that it was billing AT&T on LEC-MI's behalf.

free traffic. Under section 217, this billing conduct is "deemed to be the act, omission, or failure of" LEC-MI.[82]

23. Although LEC-MI's Answer to the Complaint repeatedly asserts that Westphalia's improper billing for toll free calls occurred "without LEC-MI's knowledge or consent,"[83] the Answer fails to cite any evidence supporting this claim, as required by our rules.[84] In any event, the record shows that LEC-MI was aware that Westphalia had assumed billing responsibility for LEC-MI's switched access services,[85] and LEC-MI is therefore liable for Westphalia's improper billing of toll free traffic under section 217, regardless of whether LEC-MI specifically approved the billing. Having opted to use a third party to do its billing, section 217 imposed an obligation on LEC-MI to ensure that its billing agent acted in accordance with sections 201(b) and 203(c) of the Act.[86] To hold otherwise would allow LEC-MI to "flout [its] statutory duties by delegating them to third parties."[87]

24. AT&T argues that agency law principles also support a finding of liability here because Westphalia acted with apparent authority from LEC-MI when it billed and collected unlawful charges.[88] We agree. Under tenets of agency law, apparent authority arises when a third party reasonably believes, based on the principal's conduct, that the agent is acting with authority from the principal.[89] Here, AT&T's willingness to pay Westphalia for access charges billed under LEC-MI's OCN on the toll free

[82] 47 U.S.C. § 217.

[83] Answer at 3-5, 7, 11, 15-17, 19-23, paras. 2, 3, 5, 12, 29, 42, 46-50, 55-57, 59, 63-64, 70, 72. *See* LEC-MI Inf. Compl. Resp. at 5 (ATT-0000072).

[84] *See* 47 CFR § 1.726(b); 1.721(d) ("Averred facts, claims, or defenses . . . must be supported by relevant evidence."). Notably, LEC-MI's Answer provides no testimony from a LEC-MI employee, or any contemporaneous business records, describing LEC-MI's billing arrangement with Westphalia even though LEC-MI has admitted that it received at least some of the access charges that Westphalia billed and collected under LEC-MI's OCN. *See supra* note 34.

[85] *See supra* note 79.

[86] *Long Distance Consolidated Billing Co.*, 34 FCC Rcd 1871, 1874-75, para. 10; *Vista Services Corp.*, 15 FCC Rcd 20646, 20649-50, para. 9. Although LEC-MI's CEO, Dan Irvin, testified in another proceeding that LEC-MI didn't know what type of traffic or what elements Westphalia was billing AT&T, MPSC Transcript at 546, 558, section 217 places responsibility on LEC-MI to monitor the types of charges a third party was billing under LEC-MI's OCN.

[87] *Long Distance Direct, Inc.*, 15 FCC Rcd 3297, 3300, para. 9. *See AT&T, Inc.*, 35 FCC Rcd at 1760, para. 48.

[88] Complaint at 28-29, paras. 93-95; Reply Legal Analysis at 14-19. In evaluating a regulatee's liability for a rule or statutory violation caused by the actions of employees or others acting on its behalf, the Commission may look to basic tenets of agency law. *See, e.g., In re Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois. N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules*, 28 FCC Rcd 6574, 6586-87, paras. 33-34 (2013); *In Re Implementation of Telecommunications Act of 1996*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14881, para. 46 (2002); *American Paging, Inc. of Virginia*, 12 FCC Rcd 10417, 10420, para. 11 (Wireless Bur., Enf. and Cons. Inf. Div. 1997); *Dial-A-Page, Inc*., Notice of Apparent Liability for Forfeiture, 8 FCC Rcd 2767, 2768, para. 9 (1993).

[89] *See* Restatement (Third) of Agency § 2.03 (2006) ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."). *See also id.* at § 7.08 (a principal is subject to vicarious liability for its agent's tortious acts, when the agent's actions were taken with apparent authority). A third-party's belief in alleged apparent authority must be objectively reasonable under the circumstances. *See Meretta v. Peach*, 491 N.W.2d 278, 280 (Mich. Ct. App. 1992) ("In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances."); *Atl. Die Casting Co. v. Whiting Tubular Prods., Inc*., 60 N.W.2d 174, 178 (Mich. 1953).

traffic at issue, and its history of corresponding with Westphalia about those charges,[90] indicates that AT&T believed Westphalia had authority to bill for those charges.[91] Further, AT&T's belief was reasonable, for the same reasons that support our finding above that Westphalia was acting as LEC-MI's agent. In particular, the Tariff indicated that LEC-MI had an arrangement with Great Lakes to bill access charges on LEC-MI's behalf; and although LEC-MI knew that AT&T was making payments to Westphalia for charges under LEC-MI's OCN, and corresponding with Westphalia about such billing, LEC-MI did not dispute that Westphalia was authorized to act as its agent.[92]

25. LEC-MI raises a variety of arguments to avoid liability under agency law. None are persuasive. LEC-MI contends that apparent authority was absent here because the dramatic increase in end office charges under LEC-MI's OCN starting in February 2012 made it objectively unreasonable for AT&T to believe that Westphalia was acting as LEC-MI's agent for the billing at issue.[93] Similarly, LEC-MI points to evidence that in December 2011, AT&T suspected that Westphalia was billing for toll free traffic that did not originate with LEC-MI's end-users, and that AT&T raised a question about such billing with Westphalia.[94] LEC-MI asserts that this shows that AT&T then "had every reason to doubt that Westphalia was truly acting in *LEC-MI's interest* because it is simply implausible for Westphalia to be acting in LEC-MI's interest by adding charges on Westphalia's bills that AT&T knew were improper."[95] We disagree. Even if AT&T knew, or had reason to believe, that its bills contained some unlawful charges, that would not have given AT&T reason to doubt Westphalia's apparent authority to act as LEC-MI's billing agent.[96]

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[90] *See* Jt. Statement at 4, 9, paras. 14, 50; Joint Decl. at 9-10, paras. 25-26 (ATT-0000010-11); Westphalia July 8, 2013 Letter; AT&T June 6, 2013 Letter; AT&T March 20, 2013 Letter.

[91] Jt. Statement at 9, paras. 50-51; Joint Decl. at 3-4, paras. 6-9 (ATT-0000004-5); Answer at 4, 24, paras. 4 n.1, 75. *See* Informal Complaint at 13 (ATT-0000040).

[92] *See supra* notes 76-81. *See DBI Architects v. Am. Express Travel-Related Servs. Co.*, 388 F.3d 886, 888-89, 893-94 (D.C. Cir. 2004) (holding that corporation "clothe[d] its accounting manager with apparent authority by repeatedly paying after notice all charges made by the accounting manager on its corporate AMEX account, thereby misleading AMEX reasonably to believe that the accounting manager had authority to use the account").

[93] *See, e.g.*, Amended Legal Analysis in Opposition to Formal Complaint, Proceeding Number 19-222, Bureau ID Number EB-19-MD-007 (filed Oct. 3, 2019) (Answer Legal Analysis) at 6-8.

[94] 123.Net's Reply Brief, Proceeding Number 19-222, Bureau ID Number EB-19-MD-007 (filed Feb. 10, 2020) (LEC-MI Post-Discovery Opposition Brief) at 2, 8-9.

[95] *Id*. at 2 (emphasis in original).

[96] In support of its arguments, LEC-MI cites cases where courts found apparent authority doubtful or lacking, but the facts of these cases differ starkly from this case. *See* Answer Legal Analysis at 8-9. For example, in *Permobil, Inc. v. Am. Express Travel Related Servs. Co.*, 571 F. Supp.2d 825 (M.D. Tenn. 2008) an employer sought to recover from a credit card company payments the employer made on its agent's fraudulent corporate-card expenses, where the agent had paid those charges with company funds and then destroyed the monthly statements, compromising the employer's ability to police its agent's actions. 571 F. Supp.2d at 829, 836. The court found there to be a fact question as to whether the credit card company reasonably relied on the agent's authority and when, if ever, the agent had apparent authority. *Id*. at 835. The court's decision focused on the "highly suspicious" nature of the agent's charges (e.g., thousands of dollars spent on personal items not associated with employer's business, and signatures on the charges not matching the signature on file for the card), which may have reasonably required further investigation on the part of the third-party credit card company. *Id.* at *834.* Here, by contrast, the only alleged irregularities in the invoices was a sharp increase in the billed volumes and the possible presence of improper toll free charges, and these charges were billed under LEC-MI's OCN. This alone did not provide AT&T with a basis to suspect that *Westphalia* was billing these charges for its own benefit and without LEC-MI's knowledge or consent.

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26. LEC-MI's further argument that it should escape liability because it allegedly did not authorize Westphalia's improper acts or benefit from them is contrary to established law.[97] First, the evidence tends to contradict LEC-MI's claim that it received no benefit from Westphalia's wrongful conduct.[98] Second, LEC-MI's claim that it did not know about or authorize Westphalia's improper conduct is unavailing because "a principal is charged with notice of facts that an agent knows or has reason to know" when the fact is material to the agent's duties.[99] Billing AT&T and other carriers for LEC-MI's switched access services was within the scope of Westphalia's duties under the 2003 network operating agreement between Great Lakes and LEC-MI; thus Westphalia's knowledge of the improper billing is imputed to LEC-MI, whether LEC-MI specifically authorized these charges or not.[100] It is well established that where an agent has apparent authority to engage in the subject transactions, the risk of loss from the agent's unauthorized acts falls on the principal that selected the agent, regardless of whether the principal benefited.[101] We also reject LEC-MI's argument that it is exonerated under the adverse-

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Similarly, in *Gen. Overseas Films v. Robin Int'l*, 542 F. Supp. 684 (S.D.N.Y. 1982) the issue concerned the apparent authority of the vice-president and treasurer of a company (Anaconda) to issue a guarantee to an unrelated third party. 542 F. Supp. at 687-89. While acknowledging Anaconda had held its treasurer out as having a broad range of authority regarding the financial affairs of the company, the court found three critical facts undercut the treasurer's apparent authority for the guarantee at issue: (i) the third party had no prior relationship with Anaconda, and was not a bank or other type of entity with which Anaconda regularly conducted business; (ii) the treasurer's authority described in the bylaws and other documents was restricted to transactions in which Anaconda had a direct interest; and (iii) a guarantee issued to a third party was beyond the authority given to the treasurer. *Id*. at 690-91. The present case, however, involves invoices for access charges billed by Westphalia under LEC-MI's OCN. Although they contained improper charges, these invoices were precisely the type of invoices that LEC-MI engaged Great Lakes (and Westphalia) to produce. AT&T therefore had no reason to suspect that Westphalia issued those invoices without authority to act as LEC-MI's agent.

[97] *See supra* note 83. LEC-MI Post-Discovery Opposition Brief at 1-2, 8-9; Answer at 3-4, para. 2.

[98] For example, LEC-MI received at least some of the access charges Westphalia collected, and Westphalia purported to address billing issues on behalf of LEC-MI. *See* Jt. Statement at 4, para. 14; LEC-MI Inf. Compl. Resp. at 3 (ATT-0000070); Westphalia July 8, 2013 Letter; *supra* note 34.

[99] *See* Restatement (Third) of Agency § 5.03 cmt. a (2006). Imputing the agent's knowledge to the principal "creates incentives for a principal to choose agents carefully and to use care in delegating functions to them" and "discourage[s] practices that isolate the principal . . . from facts known to an agent." *Id.* at cmt. b.

[100] *See* Jt. Statement at 3-4, 8-9, paras. 5-7, 12, 13, 40, 42, 50; LEC-MI Inf. Compl. Resp. at 2 (ATT-0000069); *Alberici Constructors, Inc. v. Oliver*, No. 4:11-CV-744 CEJ, 2012 WL 6738491, at *2 (E.D. Mo. Dec. 31, 2012) ("A corporation is liable for a fraud perpetrated on a third person by its agent within the apparent scope of his authority . . . even where the wrongful acts are ultra vires . . . and despite the fact the corporation did not authorize, concur in, or know of the fraud.") (*quoting State of Inf. Taylor v. Am. Ins. Co.*, 355 Mo. 1053, 1114, 200 S.W.2d 1 (1946) (en banc)). *See also Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 567, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982) ("It is . . . for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal.") (internal quotation omitted).

[101] *See, e.g., Ripon Knitting Works v. Ry. Express Agency, Inc.*, 240 N.W. 840, 842 (Wis. 1932) (when agent overcharged customer and collected payments, agent "did [so] within the scope of his authority as a delivery and collection agent of defendant," rendering defendant liable, even though "defendant never expressly authorized" the misrepresentations and defendant "did not profit thereby"). See Restatement (Third) of Agency § 7.08 cmt. b (2006) (principal's liability under this rule does not depend on whether the principal benefits from the agent's tortious conduct.). *See also Alberici Constructors*, 2012 WL 6738491, at *2 (principal liable to third parties for acts of agent with apparent authority "even when the principal is innocent and deprived of any benefit") (internal citation omitted); *Heritage Christian Sch., Inc. v. ING N. Am. Ins. Corp.*, 851 F.Supp.2d 1154, 1159 (E.D.Wis.2012) (noting that apparent authority makes a principal liable for its agent's actions, even though the principal did not benefit, since the fraud was only possible through use of the apparent authority in which the principal had cloaked the

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interest exception, which holds that an agent's actions or knowledge will not be imputed to the principal if the actions were adverse to the principal's interests and were done solely for the agent's own benefit."[102] This exception does not apply in cases like this one, where the agent acts against a third party (here, AT&T) who dealt with the principal in good faith, rather than against the principal itself.[103] LEC-MI is therefore liable for the improper billing conduct of its agent, Westphalia.

B. LEC-MI's Defenses Are Unavailing.

27. We reject LEC-MI's assertion that AT&T released it from liability based on the bankruptcy Settlement Agreement that AT&T executed with Great Lakes and Westphalia.[104] This defense lacks merit for at least two reasons. First, AT&T counters that the Settlement Agreement resolved only tandem and transport charges, and not end office charges billed by LEC-MI,[105] and LEC-MI does not specifically refute that assertion.[106] Second, although the Settlement Agreement granted Great Lakes and Westphalia a general release,[107] it expressly excluded LEC-MI, stating: "[n]othing herein releases . . . (c) any claims by AT&T against parties other than the Debtor Release Parties, including, without limitation, 123.Net, Inc. d/b/a Local Exchange Carriers of Michigan."[108]

28. LEC-MI argues that it is nevertheless entitled to rely on the release based on a line of cases under Michigan law holding that release of an agent discharges the principal from vicarious

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agent); *Aetna Life Ins. v. Carr*, 2010 WL 5476783, *2 (N.D. Ill. 2010) ("If the agent is authorized to submit a valid bill on behalf of the principal, but instead submits a false bill, 'the principal is liable even if the agent is acting solely to feather his own nest.'") (quoting *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 471 (7th Cir. 1999)). *See supra* note 33.

[102] Answer Legal Analysis at 11-13. *See* Restatement (Third) of Agency § 5.04 (2006). *See also MCA Fin. Corp. v. Grant Thornton*, 687 N.W.2d 850, 857 (2004); *In re ChinaCast Educ. Corp. Sec. Lit.*, 809 F.3d 471, 476 (9th Cir. 2015) ("Under that exception, a rogue agent's actions or knowledge are 'not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person.'") (quoting Restatement (Third) of Agency § 5.04 (2006)); *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 952 (N.Y. 2010) ("A fraud that by its nature will benefit the corporation is not 'adverse' to the corporation's interests, even if it was actually motivated by the agent's desire for personal gain.").

[103] *See* Restatement (Third) of Agency § 5.04 cmt. b (2006) (Under the adverse interest exception, notice of a fact known to the agent is not imputed to the principal if the agent acts adversely to the principal, except (a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or (b) when the principal has ratified or knowingly retained a benefit from the agent's action); *In re ChinaCast Educ. Corp.*, 809 F.3d at 476 (holding that "the adverse interest rule doesn't apply" when the agent violated "the rights of a third party who dealt with the principal in good faith") (internal citation omitted); *Kirschner*, 938 N.E.2d at 952-953 ("The crucial distinction is between conduct that defrauds the corporation and conduct that defrauds others for the corporation's benefit. . . . So long as the corporate wrongdoer's fraudulent conduct enables the business to survive . . . this test is not met."). Sound policy underlies this rule, as it "encourages principals to exercise caution to avoid hiring agents who may defraud third parties; there is no need to further encourage a principal to hire an agent who will not defraud *the principal itself* . . ." *Alberici Constructors*, 2012 WL 6738491 at *3 (emphasis in original).

[104] Answer at 30; Answer Legal Analysis at 2-6.

[105] *See* Joint Decl. at 9-10, para. 26 (ATT-0000010-11); Complaint at 3 n.5; Reply at 2-3, para. 4.

[106] LEC-MI offers only a general denial of this construction of the Settlement Agreement, without explaining the basis for the denial. *See* Answer at 5, para. 4.

[107] *See supra* note 53. A bankruptcy court's confirmation of a chapter 11 plan has the effect of a judgment for res judicata purposes. *See Browning v. Levy*, 283 F.3d 761, 772 (6th Cir. 2002).

[108] Jt. Statement at 12, para. 68. Settlement Agreement at 5, para. 7 (ATT-0000082).

liability.[109] This argument is unavailing. First, as explained above there is no convincing basis to assume that LEC-MI was released. But even assuming *arguendo* that LEC-MI was subject to a release, federal law governs questions about the validity of purported releases of federal statutory causes of action,[110] and under the federal rule, "a party releases only those other parties whom he intends to release."[111] Even if we were to apply state law, we would apply New York law in accordance with the Settlement Agreement's choice-of-law provision.[112] Under New York law, consistent with federal law, the express terms of the parties' agreement determine the scope of release.[113] Because the parties here plainly expressed their intent to exclude LEC-MI from the release, LEC-MI's defense must fail.[114]

29. LEC-MI's Answer asserted a variety of other defenses, including the equitable defenses of waiver, estoppel, laches, ratification, and failure to mitigate damages, and the voluntary payment doctrine.[115] We reject these defenses because LEC-MI failed adequately to explain in its Answer the factual or legal basis for these defenses and their applicability to this dispute, as the Commission's rules require.[116] Among these defenses, only estoppel is even mentioned in LEC-MI's Answer beyond a single, naked recitation,[117] and none appear in the legal analysis supporting the Answer. Further, LEC-MI has cited no authority establishing that a party may assert equitable defenses in a formal complaint proceeding before the Commission.[118]

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[109] *See id*.; Answer at 27, para. 91; Answer Legal Analysis at 2-3 (citing *Theophelis v. Lansing Gen. Hosp*., 424 N.W.2d 478 (Mich. 1988)).

[110] *See LocaFrance U.S. Corp. v. Intermodal Systems Leasing, Inc.*, 558 F.2d 1113, 1115 (2d. Cir. 1977) ("It is well established that federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action.").

[111] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 343-45, 347 (1971) (expressly repudiating rule that release of one joint tortfeasor released all other parties jointly liable). *See also Ruskay v. Waddell*, 552 F.2d 392, 395 (2d Cir. 1977) ("In construing the scope of [a settlement] release, we are to give effect to the intent of the parties.") (citing *Zenith Radio*); Restatement (Third) of Agency § 7.04 reporter's notes c (2006) ("Releasing an agent from liability may not always release the principal as well.").

[112] Jt. Statement at 12, para. 69; Settlement Agreement at 7, para. 19 (ATT-0000084).

[113] *See* N.Y. Gen. Oblig. Law § 15-108 (McKinney 1989); *Skylon Corp v. Guilford Mills, Inc.*, 901 F. Supp. 711, 713 (S.D.N.Y. 1995).

[114] We also reject LEC-MI's unsupported assertion that because AT&T "receive[d] compensation via settlement with [Great Lakes] and Westphalia . . . [AT&T] is not entitled to any recovery from LEC-MI." Answer at 24, para. 75. LEC-MI provides no evidence that any settlement amounts AT&T has received concern the end office charge violations alleged in this Complaint. Rather, the record evidence indicates that those amounts concern tandem and transport charges billed by Great Lakes and Westphalia, not end office charges. Joint Decl. at 9-10, para. 26 (ATT-0000010-11); Complaint at 3, para. 5 n.5.

[115] Answer at 30.

[116] *See* 47 CFR §§ 1.721(b), (d), (e) and 1.726(b), (c). As noted *infra* at note 162, the record indicates that LEC-MI possessed the documents on which it bases its mitigation of damages and voluntary payment defenses (belatedly cited in LEC-MI's brief) at the time it filed its Answer yet did not cite them. *See* LEC-MI Post-Discovery Opposition Brief at 6-9.

[117] *See* Answer at 30; *see also id*. at 17-18, 27, paras. 50-52, 89.

[118] *See AT&T Corp. v. All American Tel. Co*., 30 FCC Rcd 8959, 8962-63, para. 13 (2015), *aff'd in part*, 867 F.3d 81 (D.C. Cir. 2017) (noting that the Commission's explanation that the defendants "had failed to show 'that they may plead equitable defenses in a [s]ection 208 proceeding,'" was "[f]air enough"); *Air Touch Cellular v. Pacific Bell*, Memorandum Opinion and Order, 16 FCC Rcd 13502, 13508 (2001) (finding that defendant failed to provide specific authority for the availability of equitable defenses in a section 208 complaint proceeding). Although the Answer included no legal authorities in support of LEC-MI's equitable defenses, LEC-MI's brief, filed much later,

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30. In addition, we reject LEC-MI's assertion that the voluntary payment doctrine bars AT&T's claim as contrary to the Commission's holding in the *Great Lakes Order.* There, the Commission found that the voluntary payment doctrine cannot be harmonized with the Commission's obligations under the Act and the terms of the Tariff.[119] Here, as in *Great Lakes,* AT&T cannot be deprived of its right to damages under section 208, and to a refund under an express provision of the Tariff, merely because it paid bills it questioned and disputed.[120] For similar reasons, we find that a failure to mitigate damages defense is unavailable here. LEC-MI's failure to mitigate defense conflicts with AT&T's statutory right to collect damages for violations of the Act, for at least two years.[121] It also conflicts with the terms of LEC-MI's Tariff, which expressly allows claims for refunds to be brought within two years of making payment, and imposes no mitigation obligation.[122] Finally, recognizing a failure to mitigate defense in cases such as this would incentivize carriers to withhold payment at the first hint of possible impropriety lest they lose their right to a refund, potentially disrupting legitimate billing operations.[123]

C. LEC-MI Owes AT&T Damages, Plus Interest, for Charges Improperly Billed.

31. AT&T seeks to recover damages totaling $1,054,897, plus interest under section 206 of the Act.[124] This amount includes a refund of overpayments starting in February 2012, along with interest

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cited a Commission decision in support of LEC-MI's mitigation of damages defense. *See* LEC-MI Post-Discovery Opposition Brief at 9 (citing *MCI Telecom. Corp. v. AT&T Co.*, 94 F.C.C.2d 332, 358 (May 12, 1983)). The cited decision assumed, without deciding, that a mitigation defense was available in a complaint proceeding and did not address whether a mitigation defense could reduce the amount due under a tariff provision expressly allowing refunds.

[119] *See Great Lakes Order*, 30 FCC Rcd at 2598, paras. 36 (explaining that the defense of voluntary payment "cannot be harmonized with the Commission's obligations under [s]ections 205-209 of the Act, which permit . . . claims against carriers for damages relating to violations of the Act, nor with Defendants' tariffs, which permit refunds within two years of issuing bills"). *See also Lipton v. MCI Worldcom, Inc*., 135 F. Supp. 2d 182, 191 (D.D.C. 2001) ("Insofar as the tariff is law, it is the law, applied to the facts of this case, that will dictate the outcome.").

[120] *See supra* note 119. *See also* Jt. Statement at 8-9, paras. 48, 50; Complaint at 13, para. 38; Complaint Exh. 13, Refiled Declaration of John W. Habiak at 12, para. 32 (ATT-0000158); Joint Decl. at 5-6, paras. 16-17 (ATT-0000006-ATT-0000007).

[121] *See* 47 U.S.C. §§ 201-208, 415. *See also, e.g., Great Lakes Order*, 30 FCC Rcd at 2597-98, paras. 36-37 ("That AT&T ordered and paid for Defendants' services for a period of time, therefore, is of no consequence"; the defense "cannot be harmonized with the Commission's obligations under [s]ections 205-209 of the Act, which permit investigations into the reasonableness of charges and claims against carriers for damages relating to violations of the Act."); *AT&T Corp.* v. *Bell Atl.-Pa.*, 14 FCC Rcd. 556, at paras. 12-16 (1998) (holding that even where long distance carriers could have discovered misbilling earlier, they were entitled to damages within the two-year limitations period); *AT&T Corp.* v. *Business Telecom., Inc.*, EB-01-MD-001, paras. 11-12 (May 30, 2001) (confirming Commission's section 208 authority to award damages for access charges deemed unlawful under section 201(b)).

[122] *See* AT&T Post-Discovery Reply Brief Exh. 2, Tariff F.C.C. No. 20 at section 2.4.1(E). The Tariff also explicitly contemplates that a customer can pay a charge it believes is improper, and still obtain a refund if the charge is ultimately found unlawful. *See id.* In fact, the Tariff supplies incentives not to withhold amounts in dispute, by offering "penalty interest" when the customer "pays the total billed amount and disputes all or part of the amount." *See id*.

[123] We also find LEC-MI's failure-to-state-a-claim defense to be without substantive merit in view of the findings in this Order.

[124] Complaint at 20, 22, 25, 27, paras. 65, 73, 85, 90. *See* 47 U.S.C. § 206.

calculated from February 2012 until May 2015, when AT&T requested a stay of its formal complaint against LEC-MI,[125] and from June 2019, when the mediation ended, until the resolution of this matter.[126]

32. A party claiming damages must prove the damages it alleges with a reasonable degree of certainty.[127] This requires proof "by the best means possible under the circumstances," although "damages need not be established with precise mathematical accuracy."[128] AT&T asserts that its damages estimate is reasonable,[129] and we find that it is.

33. In order to estimate overpayments, AT&T analyzed the average LEC-MI interstate originating minutes billed during the six months prior to February 2012, which was a month when AT&T saw a marked increase in LEC-MI charges for toll free aggregation traffic.[130] AT&T used the average originating minutes billed during that period (from August 2011 through January 2012) as a proxy for the amount of monthly interstate traffic LEC-MI's end users originated, with all minutes exceeding that average assumed to be unlawful toll free aggregation traffic.[131] AT&T then applied the rates for each billed service for each month to the calculated aggregation minutes to determine the amount that AT&T was overcharged for that month.[132] The total amount that AT&T calculated it was overcharged for interstate, originating, end office access charges billed under LEC-MI's OCN from February 2012 through July 2013 was $1,054,897.[133] AT&T argues that basing its estimate of LEC-MI's legitimate originating traffic on the period August 2011 through January 2012 results in a conservative damages calculation because the evidence indicates that improper billings for aggregated traffic began as early as

[125] *See* Jt. Statement at 11-12, para. 66. *See also* Complaint at 19 n.37 ("AT&T has chosen to forego interest for a period of time (sic) May 2015 because, at that point, AT&T decided to move forward with a formal complaint against Great Lakes [] and Westphalia, and requested that its complaint against LEC-MI be stayed pending the outcome of the proceedings against the other parties.").

[126] *See* Complaint at 19 n.37; *id.* at 18-19, para. 57. *See also* Jt. Statement at 7, paras. 28-29.

[127] *See Palmer v. Conn. Ry. & Lighting Co*., 311 U.S. 544, 558 (1941) (noting the requirement that the evidence "showed the damage to reasonable certainty"). *See also United States v. Penn Foundry & Mfg. Co.*, 337 U.S. 198, 208 (1949); *Ryco Inc. v. Ag-Bag Corp.*, 857 F.2d 1418, 1428 (Fed. Cir. 1988); *Klayman v. Judicial Watch, Inc.*, 255 F. Supp. 3d 161, 167 (D.D.C. 2017); *Roth v. Islamic Republic of Iran*, 78 F.Supp.3d 379, 402 (D.D.C. 2015); *Levermore v. Smith*, 1988 WL 110607, at *5 (D.D.C. Oct. 12, 1988).

[128] *In re Commc'ns Satellite Corp.*, 97 F.C.C.2d 82, 91, para. 26 (Feb. 2, 1984). *See Palmer*, 311 U.S. at 561 (declaring that contract damages need only provide a "basis for a reasoned conclusion"). *See also Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 at para. 186 (1997) (a complainant must "prove injury and quantify its monetary damages with reasonable certainty to prevail on its claim for damages"); Order on Reconsideration, 16 FCC Rcd 5681 (2001).

[129] *See* Complaint at 17, para. 53.

[130] Jt. Statement at 11, paras. 60, 63. *See* Joint Decl. at 5-8 (ATT-0000006-9). The average volume of originating interstate minutes billed on the LEC-MI invoices during that six-month span was 1,874,862 minutes per month. Jt. Statement at 11, para. 61. *See* Joint Decl. at 5-6, para. 16 (ATT-0000006-7). AT&T used this same baseline when it began withholding partial payment of the charges invoiced under LEC-MI's OCN after July 2013. Jt. Statement at 11, paras. 63.

[131] Jt. Statement at 11, para. 62. *See* Joint Decl. at 5-6, para. 16 (ATT-0000006-7).

[132] Jt. Statement at 11, para. 64.

[133] Jt. Statement at 11, para. 65; Joint Decl. Exh. A at ATT-0000013. Applying this method to the period from April 2012 through July 2013 yields a total overcharge amount of $972,394 for interstate, originating, end office access charges billed under LEC-MI's OCN. *See* Joint Decl. Exh. A at ATT-0000013. *See also infra* paras. 36-38.

2010.[134] Thus, the period August 2011 through January 2012 period likely included unlawful billings for toll free aggregation traffic.[135]

34. We find that the methodology AT&T has chosen allows for the calculation of damages with a reasonable degree of certainty. AT&T claims that it lacks the records necessary to calculate the precise amount of improper charges it paid for toll free aggregated traffic billed under LEC-MI's OCN,[136] and LEC-MI has not refuted that assertion.[137] Moreover, we agree that AT&T's damages estimate is conservative because AT&T's chosen baseline of "legitimate" LEC-MI interstate originating traffic from August 2011 through January 2012 almost certainly includes some improper aggregation traffic.[138] Indeed, according to LEC-MI, by as early as mid-2010, the bills AT&T received included improper local switching charges on toll free traffic originating from LEC-MI's switch.[139]

35. LEC-MI generally denies that AT&T's damages analysis is "conservative, credible, or reasonably certain," but does little to substantively critique it.[140] The only aspect of AT&T's methodology that LEC-MI specifically criticizes is AT&T's alleged failure to isolate VoIP-originated traffic.[141] Specifically, LEC-MI asserts that AT&T has admitted that some of the traffic in question originated from VoIP providers rather than wireless providers, and that AT&T's failure to separate out this type of traffic renders AT&T's damages claim insufficiently certain.[142] While AT&T acknowledged in its complaint that some of the traffic included in its damages calculation "potentially" could have

[134] Complaint at 17-18, para. 54.

[135] *Id.*

[136] *See* Joint Decl. at 5-6, para. 16 (ATT-0000006-7) ("AT&T had no means to determine precisely how many of the billed minutes were toll free aggregation traffic, as opposed to traffic that was in fact associated with LEC-MI's end users and thus was properly billed."); *id.* at 7, para. 21 (ATT-0000008); Complaint at 17, para. 53.

[137] LEC-MI argues that AT&T possessed records, including its own Call Detail Records (CDRs) and the access bills AT&T received from Westphalia, that would have allowed AT&T to determine, by at least May 2010, that it was being improperly billed for toll free traffic originating from LEC-MI's switch. *See, e.g.*, Answer at 12, para. 36; Starkey Decl. at 3, para. 8 (LEC-MI_00096). LEC-MI does not, however, argue that AT&T should have used these records to develop a damages calculation that would have been more precise—or more favorable to LEC-MI—than the estimate AT&T developed. *See* Answer Legal Analysis at 13-14. *See also* Starkey Decl. at 16, para. 30 & n.38 (LEC-MI_00109); *id*. at 17, para. 31 (LEC-MI_00110) (data from Westphalia's invoices to AT&T "can be examined to: (i) determine whether information identifying toll free traffic specifically attributable to LEC-MI's OCN and end office switch in Southfield, Michigan is evident, and (ii) examine trends in the invoice detail that *may be relevant* to AT&T's damages claims.") (emphasis added). Notably, LEC-MI's final brief in this case—written after AT&T produced additional records—did not contain any additional substantive critique of AT&T's damages calculation or methodology. *See* LEC-MI Post-Discovery Opposition Brief.

[138] *See* Joint Decl. at 5-6, para. 16 (ATT-000006-7); *Great Lakes Order*, 30 FCC Rcd at 2590, para. 14; Jt. Statement at 7-9, paras. 31, 45, 46; Answer at 12, para. 35. LEC-MI admits this point and even filed the report of an expert who asserts that AT&T should have recognized long before February 2012 that it was being "improperly billed" for "8YY calls specific to LEC-MI's OCN." Starkey Decl. at 3, 15-29, paras. 8, 28-30, 32-36, 38-50 (LEC-MI_00096, LEC-MI_00108-122). *See* Answer at 12, para. 36.

[139] *See, e.g.*, Answer at 12, paras. 35-36; Starkey Decl. at 3, 24, paras. 8, 44 (LEC-MI_00096, LEC-MI_00117). *See also* Answer at 12, para. 35 (admitting that in early 2010 the volume of toll free traffic that LEC- MI, Great Lakes, and Westphalia carried to AT&T began to increase and that, starting in about February 2012, the traffic increased substantially over the course of a few months, resulting in a 25-fold increase by May 2013).

[140] *See* Answer at 18, para. 53.

[141] Answer Legal Analysis at 13-14.

[142] *See* Answer at 3; Answer Legal Analysis at 13-14.

originated from VoIP providers, neither party provided evidence that it did.[143] To the contrary, LEC-MI admitted that the traffic here is the same as was at issue in the *Great Lakes Order*, and that traffic was wireless.[144] Because there is no evidence that the disputed traffic in fact included VoIP-PSTN traffic, we find that we need not address the impact this traffic might have had on the calculation of AT&T's damages. We therefore reject LEC-MI's argument and award damages based on AT&T's methodology.[145]

36. We agree with LEC-MI, however, that a small part of AT&T's claim for damages is barred by the applicable statute of limitations. As explained below, we find that under the two year limitations period in section 415(c) of the Act,[146] AT&T is entitled to recover only the improper charges it paid for the two-year period before it filed the Informal Complaint in April 2014.[147] We start with section 1.718 of our rules, which provides that a formal complaint will be deemed to relate back to the filing date of an informal complaint if it is filed within six months from the date of the response to the informal complaint and is based on the same cause of action as the informal complaint.[148] AT&T's Formal Complaint was filed within the six-month relation back period, as extended by agreement of the parties,[149] and relates to the same facts as the Informal Complaint.[150] The Formal Complaint therefore relates back to the filing date of the Informal Complaint. Under section 415(c) of the Act, claims for refunds of overcharges are subject to a two-year limitations period which begins to run when "the cause of action accrues."[151] Causes of action for overbilling generally arise each month a bill contains disputed charges.[152] Since AT&T filed its Informal Complaint in April 2014,[153] it is entitled to a refund of billed overcharges for two years, dating back to April 2012.

37. We reject AT&T's contention that it is entitled to a refund of overcharges for an additional two months, dating back to February 2012.[154] AT&T invokes the discovery rule, which holds that where the injury is not readily discoverable, a claim accrues, and the limitations period begins to run,

[143] *See* Complaint at 10, 16, 25, paras. 26, 27, 50, 87. AT&T clarified in its Reply that it was merely noting the possibility that the disputed charges included VoIP-PTSN traffic and denied there was any evidence such traffic was in fact included. Reply at 10, para. 42. LEC-MI cites no evidence that the disputed traffic included any VoIP-originated calls.

[144] Answer at 10, para. 25. See *Great Lakes Order* at 2590, para. 14.

[145] Finally, LEC-MI asserts that its "analysis shows that AT&T was *underbilled* for the switched access services LEC-MI did in fact provide to AT&T," but it cites no record evidence supporting this claim. *See* Answer at 19-20, para. 56.

[146] 47 U.S.C. § 415(c).

[147] *See* Informal Complaint.

[148] 47 CFR § 1.718.

[149] *See supra* note 47.

[150] *Compare* Informal Complaint *with* Complaint. *Compare, e.g.*, Informal Complaint at 2 (ATT-0000029) *with* Complaint at 32, para. 101. AT&T's Complaint also refers to the date of the Informal Complaint, as required by the relation back provision in section 1.1718, 47 CFR § 1.718. *See* Complaint at 2, para. 2.

[151] 47 U.S.C. § 415(c).

[152] *See In the Matter of Tele-Valuation, Inc.*, 73 F.C.C.2d 450, 452 at para. 4 (1979). *See also Operator Communications, Inc. v. Comtel of the South, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 19783, 19787 at para. 11 (2005); *Qwest Commc'ns Co. v. Budget Prepay, Inc. d/b/a Budget Phone, and Budget Phone, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 5170, 5173 at para. 9 (EB 2013).

[153] *See* Informal Complaint.

[154] *See* Complaint at 18-20, paras. 56-59.

when the complainant discovers, or with due diligence should discover, the injury giving rise to the action.[155] AT&T asserts that LEC-MI and Westphalia never disclosed the toll free aggregation activities to AT&T,[156] and AT&T did not discover, and with diligence could not have discovered, the improper charges until July 2013.[157] Thus, AT&T contends, its claim did not accrue until that date.[158]

38. AT&T has failed to meet its burden to support this argument with evidence. First, while AT&T alleges that it discovered the unlawful charges after examining call records in July 2013, it does not explain why this review of records could not have taken place much earlier, particularly in light of the steady increase in LEC-MI access billings that began in 2010.[159] More importantly, the evidence shows that AT&T actually raised questions about possible improper charges as early as December 2011. Internal AT&T e-mails from December 2011 show that AT&T personnel responsible for monitoring carrier bills observed that the LEC-MI traffic "is almost exclusively tollfree dialed" by callers who "are not [LEC-MI] end-users but rather other carrier subscribers."[160] These e-mails show that AT&T knew, or at least had reason to suspect, there was a problem with these billings in December 2011, and could have confirmed that fact by exercising due diligence.[161] Indeed, AT&T acknowledged that these December 2011 e-mails "might be evidence that AT&T's cause of action began to accrue in late 2011, which would place the amounts AT&T paid in February and March 2012 outside the statute of limitations."[162] We

[155] Complaint at 19-20, para. 59 (citing *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1416 (D.C. Cir. 1995)). *See generally*, *Qwest Commc'ns v. Budget*, 28 FCC Rcd at 5173-74, para. 10; *American Cellular Corporation and Dobson Cellular Systems, Inc., v. Bellsouth Telecommunications, Inc*., Memorandum Opinion and Order, 22 FCC Rcd 1083, 1090, para. 15 (EB 2007).

[156] Complaint at 13, paras. 39-40; Joint Decl. at 4-5, paras. 12-14 (ATT-0000005-ATT-0000006); AT&T Reply in Great Lakes Case at 11-12, para. 40 (ATT-0000327-8) (laying out AT&T's alleged timeline for what it learned in 2013). *See also* Complaint at 12, para. 36.

[157] Complaint at 19-20, para. 59 (citing *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1416 (D.C. Cir. 1995)).

[158] *See* Complaint at 12, 19, paras. 36, 59.

[159] *See* Complaint at 13, paras. 38-40; Joint Decl. at 4-5, paras. 13, 14 (ATT-0000006) (asserting that AT&T learned about LEC-MI's improper aggregation traffic charges in July 2013 after AT&T requested and received call detail records). AT&T does not explain why it could not have taken steps much earlier to examine the call detail records that allegedly led to its discovery of the improper billings. Nor does AT&T explain why it did not conduct this review shortly after LEC-MI's toll free aggregation activities admittedly "began in earnest" in February 2012. Complaint at 18, para. 55; Joint Decl. at 5-6, para. 16 (ATT-0000006-7). *See also* Answer at 12, paras. 35-36; Starkey Decl. at 3, 24, paras. 8, 44 (LEC-MI_00096, LEC-MI_00117).

[160] *See* December 2, 2019 Letter Exh. 2 at 123.Net_000024-5; LEC-MI Post-Discovery Opposition Brief Exh. 1 at 123.Net_000002; *id.*, Exh. 2 at 123.Net_000004.

[161] See *Qwest Commc'ns v. Budget*, 28 FCC Rcd at 5174, para. 10 ("Under the discovery rule, '[a]ccrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim . . . Once the prospective plaintiff is on notice that it might have a claim, it is required to make a diligent inquiry into the facts and circumstances that would support the claim.'" (quoting *Sprint Communications Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996)).

[162] AT&T Post-Discovery Reply Brief at 6. AT&T made this concession in response to LEC-MI's argument that the December 2011 e-mails—which are not mentioned in the Complaint—demonstrate that AT&T made false statements when it asserted in the Complaint and the attached Joint Declaration that AT&T did not learn about the toll free aggregation issue until 2013. *See* LEC-MI Post-Discovery Opposition Brief at 1-5. LEC-MI requested that the Commission "dismiss AT&T's Formal Complaint as a sanction for" these allegedly false statements. *Id.* at 8. We deny LEC-MI's dismissal request as untimely because LEC-M's Answer failed to raise the alleged contradiction between the December 2011 emails and statements in the Complaint and the Joint Declaration, even though LEC-MI possessed the same e-mails, or substantively identical ones, before it filed its Answer. *Compare* December 2, 2019 Letter Exh. 2 at 123.Net_000024-5 (labeled as ATTProd_0000626 and ATTProd_0001952, which LEC-MI acknowledged having obtained before AT&T filed the Complaint, *see* December 2, 2019 Letter at 4 n.2) *with* LEC-
(continued….)

agree with this assessment, and reject AT&T's effort to recover a refund extending back to February 2012 based on the argument that its claim did not accrue until July 2013.

39. Accordingly, we find that the refund period runs from April 2012 through April 2014. The total amount to be refunded over this period, excluding interest, is $972,394 for interstate, originating, end office access charges billed under LEC-MI's OCN.[163] The Tariff provides for the payment of interest, at the rate of 0.05% per day, compounded daily, on overcharges that are refunded.[164] AT&T is entitled to interest at this rate from April 2012 through the date it sought a stay of its complaint against LEC-MI in May 2015, along with interest at this rate from the date AT&T ended the mediation in June 2019 through the date of this order.[165]

IV. ORDERING CLAUSES

40. Accordingly, **IT IS ORDERED** that, pursuant to sections 4(i), 4(j), 201, 203, 206, 208, 217, and 415 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 208, 217, and 415, and sections 0.111, 0.311, and 1.720-1.740, of the of the Commission's rules, 47 CFR §§ 0.111, 0.311, and 1.720-1.740, Complainant's Complaint is **GRANTED IN PART** and **DENIED IN PART**.

41. **IT IS FURTHER ORDERED** that within 30 days of this order, LEC-MI shall refund to AT&T $972,394, excluding interest.

(Continued from previous page)
MI Post-Discovery Opposition Brief Exh. 1 at 123.Net_000002, Exh. 2 at 123.Net_000004 (labeled as ATTProd_0002048 and ATTProd_0002049, which AT&T produced on Jan. 15, 2020, *see* Letter from B. McAleenan to M. Dortch re Discovery Responses, Proceeding Number 19-222, Bureau ID Number EB-19-MD-007 (filed Jan. 15, 2020)); December 2, 2019 Letter Exh. 2 at 123.Net_000019-20 *with* LEC-MI Post-Discovery Opposition Brief Exh. 3 at 123.Net_000006-7.

[163] *See* Joint Decl. Exh. A at ATT-0000013.

[164] *See* Jt. Statement at 11-12, para. 66; Complaint Exh. 8, Current LEC-MI Tariff Excerpts at 50 (ATT-0000118).

[165] *See* Jt. Statement at 11-12, para. 66. *See also* Complaint at 19 n.37 ("AT&T has chosen to forego interest for a period of time (sic) May 2015 because, at that point, AT&T decided to move forward with a formal complaint against Great Lakes [] and Westphalia, and requested that its complaint against LEC-MI be stayed pending the outcome of the proceedings against the other parties."). AT&T claims it is entitled to interest from February 2012 until May 2015, which amounts to $628,467. Jt. Statement at 11-12, para. 66; Joint Decl. Exh. A at ATT-0000014-15. *See* Current LEC-MI Tariff Excerpts at 50 (ATT-0000118). Calculating the interest on overcharges from April 2012 through May 2015 results in a somewhat lower number. Joint Decl. Exh. A at ATT-0000014-15. AT&T also claims it is entitled to interest, at 0.05%, compounded daily, from June 2019 until the resolution of this matter. Jt. Statement at 11-12, para. 66. *See* Complaint at 18-19, para. 57.

42. **IT IS FURTHER ORDERED** that, within 10 days of this order, AT&T shall present to LEC-MI a calculation of the interest owed on the refund amount from April 2012 until AT&T sought a stay of its complaint against LEC-MI in May 2015, combined with interest owed on the refund amount from the date AT&T ended the mediation with LEC-MI in June 2019 until the date of this order. Within 10 days of receiving AT&T's interest calculation, LEC-MI shall pay the interest amount calculated by AT&T or shall present an alternative interest calculation and pay that. In the event LEC-MI's interest calculation differs from AT&T's, AT&T shall be entitled to bring a supplemental complaint for damages amounting to the difference in the parties' interest calculations.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau