

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Total Telecommunications Services, Inc.,
and
Atlas Telephone Company, Inc.,
Complainants,
v.
AT&T Corporation,
Defendant.
File No. E-97-003

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2001

Released: March 13, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we deny a complaint filed by Total Telecommunications Services, Inc. ("Total") and Atlas Telephone Company, Inc. ("Atlas") (collectively, "Complainants") against AT&T Corporation ("AT&T") pursuant to section 208 of the Communications Act of 1934, as amended ("Act" or "Communications Act").

1 47 U.S.C. § 208.

Total and Atlas violated section 201(b) of the Act² by engaging in an unreasonable scheme to inflate the access fees charged to AT&T, and deny the remainder of AT&T's claims as either moot or meritless.

II. BACKGROUND

A. The Parties

2. Atlas is an incumbent local exchange carrier ("LEC") located in Big Cabin, Oklahoma that serves approximately 1500 end users. Atlas provides local exchange service to end user customers, and originating and terminating exchange access services to AT&T and other interexchange carriers ("IXCs").³ Atlas charges IXCs access rates specified by the National Exchange Carrier Association ("NECA").⁴

3. Total was formed on May 26, 1995, and identifies itself as a competitive access provider ("CAP") in Oklahoma.⁵ Although Total purports to be an independent entity that competes with Atlas in the access market, Total and Atlas actually have a "highly intertwined" and "symbiotic" relationship.⁶ For example, the same person is both the President of Atlas and the Chairman of Total; Atlas and Total operate in the same geographic area; Total's sole end office is collocated in an Atlas end office building; all of Total's transmission facilities are leased from Atlas; and Total received a \$20,000 startup loan from the Atlas pension fund.⁷

² 47 U.S.C. § 201(b).

³ *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Answer and Cross Complaint of AT&T Corp., File No. E-97-03 (filed Dec. 24, 1996) at 30, ¶ 5 (Answer); *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Answer to Cross Complaint, File No. E-97-03 (filed Jan. 17, 1997) at 2, ¶ 5 (Answer to Cross Complaint); *Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. American Telephone and Telegraph Company, Inc.*, 919 F. Supp. 472, 475-6 (D.D.C. 1996) (*Total and Atlas v. AT&T*), *aff'd mem.*, No. 96-7043 (D.C. Cir. 1996). See also *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Brief of AT&T Corp., File No. E-97-03 (filed July 7, 1997) at 1 (AT&T Brief).

⁴ *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Complaint, File No. E-97-03 (filed Oct. 18, 1996) at 12, ¶ 64 (Complaint); Answer at 10, ¶ 64. FN12. Pursuant to the Commission's rules, NECA prepares and files access charge tariffs on behalf of "all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements." 47 C.F.R. § 69.601(a). Each participating company charges the rates appearing in those tariffs, pools its revenues with other participants, and receives an amount equal to its costs and its *pro rata* share of all earnings.

⁵ Complaint at 2, 5-6, ¶¶ 4, 7, 23-24.

⁶ *Total and Atlas v. AT&T*, 919 F. Supp. at 476, 482.

⁷ AT&T Brief at 11; Answer at 30, ¶ 6; Answer to Cross Complaint at 2, ¶ 6; *Total*

4. Total's Tariff F.C.C. No. 1, filed on July 31, 1995, specifies the rates, terms, and conditions under which it offers access services.⁸ Because Total is a "non-dominant" carrier, its tariff took effect on one day's notice.⁹ The terminating access charges of Total exceed those of Atlas by 27 percent.¹⁰

5. During the relevant period, Total provided no local exchange service. Moreover, there was only one end-user customer to which Total terminated traffic: Audiobridge of Oklahoma, Inc. ("Audiobridge").¹¹ Audiobridge provides its customers a kind of multiple voice bridging service ("MVBS") commonly known as "chat-line" service.¹² This service connects incoming calls so that two or more callers can talk with each other simultaneously.¹³ This differs from traditional conference call service in that callers to the chat line are randomly paired with other callers. In addition, unlike many chat-line operators, Audiobridge does not impose any

Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp., Total Telecommunications, Inc. Response To Interrogatories, File No. E-97-03, Response to Interrogatory No. 4 (Total's Response To Interrogatories) (describing the loan to Total from Atlas' pension fund); *Total and Atlas v. AT&T*, 919 F. Supp. at 475-6, 482.

⁸ Complaint at 2, ¶ 6; Answer at 2, ¶ 6.

⁹ Answer at 32-33, 34, ¶¶ 13, 16; AT&T Brief at 11. A carrier that has been found by the Commission to have market power (*i.e.*, the power to control prices) is considered "dominant." 47 C.F.R. § 61.3(o). All others are classified "non-dominant." Pursuant to section 61.23(c) of the Commission's rules then in effect, "[a]ll tariff filings of domestic and international non-dominant carriers must be made on at least one day's notice." 47 C.F.R. § 61.23(c) (1995). Tariffs for dominant carriers, however, were not effective until 30 days after filing. 47 C.F.R. § 61.59(a) (1995).

¹⁰ AT&T Brief at 6. *See also Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Reply Brief of TTS/Atlas, File No. E-97-03 (filed July 28, 1997) at 9 (Complainants' Reply) (citing AT&T's assertion that Total's terminating access rates are 27% higher than those of Atlas, and, while not confirming this figure, admitting that Total's rates are "justifiably higher" than Atlas'). In early pleadings, AT&T alleged that Total's rates were ten times higher than those of Atlas, but it subsequently modified that claim. *See, e.g., Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Motion of AT&T Corp. To Dismiss or For Judgment on the Pleadings, File No. E-97-03 (filed Dec. 24, 1996) at 3 (AT&T's Motion to Dismiss).

¹¹ *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Brief of Total Telecommunications, Inc. and Atlas Telephone Company, Inc., File No. E-97-03 (filed July 7, 1997) at 3 (Complainants' Brief); AT&T Brief at 2; *Total and Atlas v. AT&T*, 919 F. Supp. at 475. *See also* Transcript of Oral Argument, May 6, 1999, at 6-7 (Tr.).

¹² Complaint at 6, ¶ 29; Complainants' Brief at 3; AT&T Brief at 2,5.

¹³ Complaint at 6, ¶ 29; Complainants' Brief at 3; Tr. at 11. *See also Total and Atlas v. AT&T*, 919 F. Supp. at 475 n.4.

charges on callers. Instead, Audiobridge obtains all of its revenues from Total, as described below.¹⁴ Thus, callers to Audiobridge pay only their IXC for the calls, and pay only the IXC's tariffed, long-distance toll charges.¹⁵

6. During the period at issue here, when an AT&T subscriber placed a long distance call to Audiobridge in Big Cabin, Oklahoma, the call was initially handled by the subscriber's local telephone company. In this context, the local telephone company is known as the "originating access provider." The local telephone company transported the call to AT&T, which transported the call across AT&T's long distance network to an AT&T point of presence ("POP") located in an area of Oklahoma near Big Cabin served by Southwestern Bell Telephone Company ("Southwestern Bell"). From the AT&T POP, the call was transmitted through Southwestern Bell's facilities to a "meet point" with Atlas. Atlas carried the call over its facilities, switched the call through its access tandem switching equipment, and ultimately transported the call to a meet point with Total (the "terminating access provider"). Atlas charged AT&T a relatively modest fee for this tandem switching service pursuant to the NECA tariff. As the "terminating access provider," Total routed the call to its sole end user customer, Audiobridge. Total then separately billed AT&T for terminating access services.¹⁶

B. The Agreement Between Total and Audiobridge

7. On July 6, 1995, about three weeks before Total filed its first federal tariff, Total entered an agreement with Audiobridge whereby Total would pay Audiobridge commission payments of 50 to 60 percent of Total's terminating access revenues from calls completed to Audiobridge. In return, Audiobridge would market and otherwise aid the chat-line operations.¹⁷ As mentioned above, the commission payments that Total pays to Audiobridge out of terminating access revenues constitute Audiobridge's only source of revenue.¹⁸

¹⁴ See AT&T Brief at 6.

¹⁵ See, e.g., *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Opposition To Motion of AT&T To Dismiss or For Judgment On The Pleadings, File No. E-97-03 (filed Jan. 14, 1997) at 14; Complainants' Reply at 2.

¹⁶ Complaint at 8, ¶ 40; Answer at 5, ¶ 40; Total's Response To Interrogatories, Response to Interrogatory No. 11.

¹⁷ Total's Response To Interrogatories, Response to Interrogatory No. 1.

¹⁸ AT&T Brief at 2, 6.

C. AT&T's Dealings With Atlas and Total in Late 1995

8. From July 1995 through October 1995, representatives of Total and AT&T negotiated over the installation of facilities necessary to handle the anticipated traffic between them. In order to transport and terminate such traffic, AT&T ultimately ordered from Atlas a total of 336 trunks to carry calls from AT&T customers to Total's end office, via Atlas' tandem.¹⁹ Atlas itself also purchased additional facilities to support its part in the arrangement.²⁰

9. On approximately August 1, 1995, Total began completing calls from AT&T customers to Audiobridge.²¹ From August 1, 1995, to November 22, 1995, Total terminated approximately 10 million minutes of use for calls from AT&T customers to Audiobridge.²²

10. Sometime in early September, 1995, AT&T contacted Total and questioned why AT&T should pay Total for access service, because AT&T had ordered trunk lines from Atlas, not from Total.²³ After a fruitless period of negotiation over Total's rates, AT&T notified Total by letter in early November, 1995 that it planned to terminate service between its customers and the end user served by Total (*i.e.*, Audiobridge) on the grounds that AT&T did not order such service, and had not been aware of Total's relationship with Atlas until AT&T received Total's bills.²⁴

11. On November 22, 1995, after various warnings to Total, AT&T began blocking all calls from AT&T's customers to Audiobridge and declining to purchase access services from Total.²⁵ In other words, AT&T ceased connecting calls placed over its network intended for

¹⁹ Complaint at 8-11, ¶¶ 41-52; Answer at 5-8, ¶¶ 41-52. AT&T apparently ordered additional trunks from Atlas, instead of from Total, because AT&T was not directly interconnected with Total. Once AT&T delivered this traffic to Atlas' facilities, Atlas was obliged to transfer it to Total's end office. AT&T denies, however, that it intended to use these additional trunks exclusively to carry calls to Total. Answer at 7, ¶ 49.

²⁰ Complaint at 11, ¶ 52; Complainants' Brief at 17. AT&T responds that it is "without knowledge" on this issue, but does not dispute this allegation. Answer at 8, ¶ 52.

²¹ Complaint at 11, ¶ 56; Answer at 8, ¶ 56.

²² Complaint at 12, ¶ 63; Answer at 9, ¶ 63.

²³ Complaint at 14, ¶ 70; Answer at 11, ¶ 70.

²⁴ Complaint at 14-15, ¶¶ 72-74; Answer at 11, ¶¶ 72-74. *See* Answer at Attachment 8 (Nov. 7, 1995 Letter from Debbie H. Joyce, AT&T Corporation, to Dick Segress, President, Total Telecommunications Inc.).

²⁵ Complaint at 15-16, ¶¶ 74-81; Answer at 11-13, ¶¶ 74-81. *See also* Complainants' Brief at 4. Audiobridge thereafter began utilizing other telephone numbers through Total, which were not blocked by AT&T.

Audiobridge. In addition, AT&T refused to pay Total's bills for access charges for the period August through November 1995.²⁶ AT&T did pay, however, the corresponding tandem switching transport charges to Atlas.²⁷

D. The Parties' Legal Claims

12. On October 18, 1996, Atlas and Total filed the instant complaint before the Commission.²⁸ Atlas and Total contend that AT&T's blockage of calls destined for Audiobridge via Total violates sections 201(a), 202(a), 214(a), and 251(a) of the Act.²⁹ Total seeks a Commission order permanently restraining and prohibiting AT&T from preventing its subscribers from completing telephone calls to Total's end-user customer. In addition, Total and Atlas seek the recovery of damages arising from AT&T's blocking of traffic, and reserve the right to file a supplemental complaint for damages pursuant to section 1.722 of the Commission's rules.³⁰

It is unclear from the record whether, or how much, AT&T paid for the associated access charges for calls to these new numbers. See Transcript of Oral Argument, May 6, 1999, at 9-10 (Tr.). AT&T states that it was unaware of these calls going to Total and Audiobridge until Total disclosed that fact in the instant formal complaint. AT&T thereupon requested Total to cease using that exchange number and any future new exchange numbers for Audiobridge's services, and stated that it would not pay associated access charges for such service. *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Reply Brief of AT&T Corp., File No. E-97-03 (filed July 28, 1997) at 7 n.5, Attachment B (AT&T Reply).

²⁶ Complaint at 16, ¶ 85. See also *Total and Atlas v. AT&T*, 919 F.Supp. at 476; Complainants' Brief at 17.

²⁷ Answer at 42-44, ¶¶ 53-65; *Total and Atlas v. AT&T*, 919 F.Supp. at 776. See also Tr. at 34.

²⁸ Complainants initially pursued relief in federal courts. First, Total brought suit against AT&T on November 24, 1995 in the United States District Court for the Northern District of Oklahoma. Complaint at 23-24, ¶ 128; Answer at 18, ¶ 128. This suit alleged violations of the Communications Act and sought preliminary injunctive relief and damages. After denying a preliminary injunction, the court referred the case to this Commission on November 30, 1995 pursuant to the primary jurisdiction doctrine. *Total and Atlas v. AT&T*, 919 F.Supp. at 477. Instead of pursuing the referral, Complainants "voluntarily dismissed" the action. Complaint at 24, ¶ 131; Answer at 18-19, ¶ 131. On December 13, 1995, immediately after entry of the dismissal order, Complainants filed a similar complaint before the United States District Court for the District of Columbia. On February 29, 1996, that court denied Complainants' requests for both a temporary restraining order and a preliminary injunction and referred the matter to this Commission under the doctrine of primary jurisdiction. *Total and Atlas v. AT&T*, 919 F.Supp. at 483-4. Furthermore, the court dismissed, rather than stayed, the action before it. *Id.* Complainants appealed the referral order to the United States Court of Appeals for the District of Columbia Circuit, which affirmed the district court's opinion in an unpublished memorandum order issued on October 4, 1996. *Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. American Telephone and Telegraph Company, Inc.*, *aff'd mem.*, No. 96-7043 (D.C. Cir. Oct. 4, 1996). Ten days later, Complainants filed the instant complaint pursuant to the D.C. District Court's referral order.

²⁹ 47 U.S.C. §§ 201(a), 202(a), 214(a), 251(a).

³⁰ 47 C.F.R. § 1.722 (1997).

13. In response to Total's complaint, AT&T answered, *inter alia*, that the Act does not require AT&T to purchase unwanted access services from Atlas and Total. In addition, AT&T filed a cross-complaint³¹ alleging that (1) Atlas and Total are violating section 201(b) of the Act by engaging in a scheme to circumvent the Commission's rules regarding dominant carriers³² and pay-per-call services³³; (2) Total is violating section 201(b) of the Act by charging unreasonably high access fees; (3) Atlas and Total are violating section 228 of the Act³⁴ by operating a pay-per-call service without employing a 900 number; (4) Total is violating section 203 of the Act³⁵ by seeking to preclude AT&T from exercising its right under Total's tariff to cancel service; (5) Atlas and Total are violating section 201(b) of the Act by charging AT&T for services that are not properly described in their respective tariffs; and (6) Total is violating section 203 of the Act by refusing to pay AT&T for the legal fees and costs that it incurred in the court actions described above, as required by Total's tariff. As relief, AT&T requests, *inter alia*, "an order requiring Atlas to pay as damages the approximately \$150,000 that AT&T has been improperly charged, plus interest,"³⁶ plus other "damages in an amount to be determined," and injunctive relief.³⁷

III. DISCUSSION

A. Introduction

14. As explained below, we conclude that Atlas created Total as a sham entity designed to impose increased access charges on calls made to Audiobridge. Because this conclusion about the relationship between Atlas and Total informs our decisions on Complainants' claims, we begin the discussion by examining AT&T's counterclaim that focuses on that relationship.

³¹ Although nominally captioned as a cross-complaint, we note that AT&T's pleading is essentially a counterclaim, and will be referred to as such throughout the remainder of this order.

³² 47 C.F.R. Part 61.

³³ 47 C.F.R. §§ 64.1501-64.1515.

³⁴ 47 U.S.C. § 228.

³⁵ 47 U.S.C. § 203.

³⁶ Answer at 44-45, 46, 47, ¶¶ 66, 73, 78.

³⁷ Answer at 51.

B. Total and Atlas Violated Section 201(b) of the Act by Engaging in an Unreasonable Scheme to Inflate the Access Charges Assessed Against AT&T.

15. In Count II of its Counterclaim, AT&T argues that Atlas and Total violated section 201(b) of the Act by engaging in a scheme to inflate unreasonably the access charges assessed against AT&T.³⁸ In particular, AT&T claims that Total is not a legitimate CAP, but rather is a mere shell created by Atlas to extract an inflated “access charge” payment from AT&T.³⁹ AT&T asserts that Total and Atlas were able to charge rates for access services that were greater than those that would have been imposed by Atlas alone pursuant to its tariff. AT&T further argues that, although the Commission has permitted incumbent LECs to have separate affiliates that engage in competitive enterprises, it has never permitted this when the new affiliate provides the same service in the same geographic region as the incumbent LEC.⁴⁰

16. We agree with AT&T that Atlas created Total as a sham entity designed solely to extract inflated access charges from IXC, and that this artifice constitutes an unreasonable practice in connection with the provision of access service, in violation of section 201(b) of the Act. Our conclusion rests on the relationship between Atlas and Total; the evidence compels the conclusion that the two entities are not independent or competitive. As previously stated, the Complainants share a high ranking official: the same person is both President of Atlas *and* Chairman of Total. Moreover, Total received a \$20,000 startup loan from Atlas’ pension fund; Total’s sole end office is collocated in an Atlas end office building; and all of Total’s transmission facilities are leased from Atlas.⁴¹ This record shows that Total’s sole business activity was to provide IXCs with terminating access to a single party, Audiobridge, at rates significantly higher than those charged by Atlas for terminating access to every other customer in the area. Finally, the fact that 50 to 60 percent of Total’s access revenues are used to finance the Audiobridge chat line lends support to our conclusion that Atlas created Total to increase access charges for calls to Audiobridge.

17. Complainants have not adequately rebutted the assertion that Total is not a legitimate independent entity. Complainants merely assert that Total intended to compete with Atlas, but was forced to withdraw its application to provide local exchange service in Oklahoma

³⁸ Answer at 39-40, ¶¶ 35-40.

³⁹ Answer at 39-40, ¶ 37; AT&T’s Motion to Dismiss at 21-22; AT&T Brief at 11.

⁴⁰ AT&T Brief at 12 (citing *Policies and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorized Therefor*, Fourth Report and Order, 95 F.C.C.2d 554, 575-79 (1983)).

⁴¹ AT&T Brief at 3-4, 11; Answer at 30, ¶ 6; Answer to Cross Complaint at 2, ¶ 6; Total’s Response To Interrogatories, Response to Interrogatory No. 4 (describing the loan to Total from Atlas’ pension fund); *Total and Atlas v. AT&T*, 919 F. Supp. at 475-6, 482.

due to AT&T's opposition thereto.⁴² Furthermore, Complainants argue that Total's "business relationship with Atlas does not violate the Commission's dominant carrier regulations,"⁴³ because "local telephone companies are perfectly free to have subsidiaries enter into competitive telecommunications markets and those subsidiaries have been treated by the Commission as non-dominant."⁴⁴ These arguments, however, avoid the heart of the matter. The fundamental issue is not whether Complainants have violated the Commission's dominant carrier regulations, or whether Total "intended" to compete with Atlas, but whether Total is truly an independent entity. On this point, Complainants have not provided any evidence (or argument) that AT&T's depiction of Total's relationship with Atlas is erroneous. Complainants have thus failed to convince us that Total and Atlas are independent entities.

18. In sum, the arrangement between Total and Atlas serves only to create a superficial distinction intended to enable Atlas to increase its fees for interexchange access for calls to the Audiobridge chat line. We find that this corporate structure was a sham, and we will not permit Atlas to charge indirectly, through a sham arrangement, rates that it could not charge directly through its existing tariff. Accordingly, we find in favor of AT&T on Count II of its Counterclaim.

C. Sections 201(a), 251(a), 214(a) and 202(a) of the Act Do Not Prohibit AT&T From Declining to Purchase Total's Terminating Access Services and Blocking Calls to Audiobridge.

1. Section 201(a) Does Not Require AT&T To Complete Calls To Audiobridge.

19. Complainants argue that section 201(a) of the Act requires AT&T to purchase Total's terminating access services and complete calls to Audiobridge.⁴⁵ The first clause of section 201(a) states: "It shall be the duty of every common carrier engaged in interstate or

⁴² Complaint at 19, ¶ 103; Complainants' Reply at 3-4. Specifically, Complainants assert that AT&T "appeared before the Oklahoma Corporation Commission on [Total]'s application for local exchange service to raise questions regarding [Total]'s financial qualifications that ultimately forced [Total] to withdraw its application for the time being." Complaint at 19, ¶ 103. AT&T admits that it appeared before the Oklahoma Corporation Commission and opposed Total's application, but denies Total's characterization of the ultimate effect of this presentation. Answer at 16, ¶ 103.

⁴³ Complainants' Reply at 3.

⁴⁴ *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Opposition To Motion of AT&T To Dismiss or For Judgment On The Pleadings, File No. E-97-03 (filed Jan. 14, 1997) at 9-10.

⁴⁵ Complaint at 20-21, ¶¶ 105-112. *See also* Complaint at 27-38, ¶¶ 143-173; Complainants' Brief at 5-7; Complainants' Reply at 6-7.

foreign communication by wire or radio to *furnish* such communication service upon *reasonable* request therefor.”⁴⁶ The second clause of section 201(a) requires an interstate common carrier “to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes,” but only if “the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest.”⁴⁷

20. Complainants assert that section 201(a) requires AT&T to maintain its interconnection with Total, continue to purchase Total’s terminating access services, and refrain from blocking traffic to Audiobridge. Complainants argue that the first clause of section 201(a) requires AT&T to “furnish . . . communication service” to Total and Audiobridge, even though the Commission has not made any of the public interest findings required under the second clause of section 201(a).⁴⁸ In bringing this claim, Complainants purport to step into the shoes of AT&T’s customers who are trying to call Audiobridge. Specifically, Complainants assert that a “reasonable request” for AT&T to “furnish” a communications service is made each time a caller — *i.e.*, an AT&T customer — dials the particular number of a party that the caller desires to reach.⁴⁹ Hence, because AT&T’s customers attempting to reach Audiobridge have dialed Audiobridge’s number, they allegedly have made a “reasonable request” for service, which AT&T must honor under the first clause of section 201(a).

21. Even assuming, *arguendo*, that we must address a claim brought by Atlas and Total on behalf of someone other than themselves, *i.e.*, AT&T’s customers, we conclude that Complainants’ claim lacks merit. As stated above, section 201(a) obligates AT&T to furnish service only upon “reasonable” request. If an AT&T customer asks AT&T to provide a service that would require AT&T to transport traffic to a carrier that charges an unlawful rate to terminate the traffic, the customer’s request is not “reasonable” under section 201(a). Here, we have previously concluded that Total’s access rate was unlawful because it represented an attempt by Atlas to charge, through a sham arrangement, access rates it was not otherwise permitted to charge under its existing tariff. Requests by AT&T’s customers to send traffic to Audiobridge via Total do not constitute “reasonable requests” for service for purposes of section 201(a), because they would require AT&T to purchase access service that we have previously determined is unreasonably priced and the product of a sham arrangement. Thus, we conclude that section 201(a) does not require AT&T to purchase Total’s terminating access services or to refrain from

⁴⁶ 47 U.S.C. § 201(a) (emphasis added).

⁴⁷ *Id.*

⁴⁸ 47 U.S.C. § 201(a). *See* Complaint at 28-32, ¶¶ 143-157; Complainants’ Brief at 6-7.

⁴⁹ Complaint at 28, ¶ 146.

blocking calls to Audiobridge.⁵⁰ Accordingly, we deny Count One of the Complaint.

2. Section 251(a) Does Not Require AT&T To Complete Calls To Audiobridge.

22. Complainants argue that section 251(a)(1) of the Act requires AT&T to purchase Total's terminating access services and refrain from blocking calls to Audiobridge.⁵¹ Section 251(a) states, in pertinent part, that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."⁵² Complainants argue that Atlas, Total, and AT&T are all telecommunications carriers within the meaning of section 251(a), and that, therefore, AT&T must interconnect with Total.⁵³ Furthermore, Complainants argue that a carrier's duty to "interconnect" under section 251(a) encompasses a duty to transport and terminate all traffic bound for any other carrier with which it is physically linked.⁵⁴ According to Complainants, in order to meet this obligation, AT&T has the legal duty under section 251(a) to purchase Total's access services at Total's tariffed rates for those services, and deliver to Total all calls made by AT&T's customers to Audiobridge.⁵⁵

23. Complainants base their argument on an erroneous interpretation of the term "interconnect" in section 251(a)(1). We have previously held that the term "interconnection" refers solely to the physical linking of two networks, and *not* to the exchange of traffic between networks. In the *Local Competition Order*, we specifically drew a distinction between "interconnection" and "transport and termination," and concluded that the term "interconnection," as used in section 251(c)(2),⁵⁶ does not include the duty to transport and terminate traffic.⁵⁷

⁵⁰ Our ruling should not be construed to address the broader question of what other circumstances might permit an IXC to refuse to purchase, or discontinue purchasing, access service from a competitive LEC. That is an issue about which the Commission has previously sought comment, and it is currently under consideration. See *Access Charge Reform*, Fifth Report & Order & Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14342, ¶ 242 (1999).

⁵¹ Complaint at 21, 39, ¶¶ 113-115, 176.

⁵² 47 U.S.C. § 251(a).

⁵³ Complainants' Brief at 8; Complainants' Reply at 8.

⁵⁴ See, e.g., Complainants' Brief at 10 (stating that "AT&T must cease blocking calls to [Total] under section 251(a) — it must interconnect.").

⁵⁵ Complaint at 38-41, ¶¶ 174-180; Complainants' Brief at 7-10; Complainants' Reply at 7-9.

⁵⁶ 47 U.S.C. § 251(c)(2) (requiring incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point and on rates, terms, and conditions that are just, reasonable, and nondiscriminatory).

⁵⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*,

Accordingly, section 51.5 of our rules specifically defines “interconnection” as “the linking of two networks for the mutual exchange of traffic,” and states that this term “does not include the transport and termination of traffic.”⁵⁸

24. Complainants argue that the term “interconnection” has a different meaning in section 251(a) than in section 251(c).⁵⁹ According to Complainants, section 251(a) blends the concepts of “interconnection” and “transport and termination,” and “the only way for AT&T and [Total] to interconnect under Section 251(a)(1) is for AT&T to purchase [Total]’s services at its tariffed rate.”⁶⁰

25. We find nothing in the statutory scheme to suggest that the term “interconnection” has one meaning in section 251(a) and a different meaning in section 251(c)(2). The structure of section 251 supports this conclusion. Section 251(a) imposes relatively limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more stringent obligations on incumbent LECs. Thus, section 251 of the Act “create[s] a three-tiered hierarchy of escalating obligations based on the type of carrier involved.”⁶¹ As explained above, section 251(c) does not require incumbent LECs to transport and terminate traffic as part of their obligation to interconnect. Accordingly, it would not be logical to confer a broader meaning to this term as it appears in the less-burdensome section 251(a).

26. Furthermore, among the subparts of this provision, section 251(b)(5) establishes a duty for all local exchange carriers to “establish reciprocal compensation arrangements for the transport and termination of telecommunications.”⁶² Local exchange carriers, then, are subject to

First Report and Order, 11 FCC Rcd 15499, 15590, ¶ 176 (1996) (*Local Competition Order*), *aff’d in relevant part, Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997)(*CompTel v. FCC*); *aff’d in part, vacated in part, Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *cert. granted, AT&T Corp. v. Iowa Utilities Bd.*, 522 U.S. 1089 (1998); *aff’d in part, reversed in part, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), *opinion after remand, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order, 14 FCC Rcd 5263 (1999) (subsequent history omitted).

⁵⁸ 47 C.F.R. § 51.5.

⁵⁹ Complainants’ Reply at 8.

⁶⁰ *Id.* at 8-9.

⁶¹ *Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925, 6937-38 ¶ 19 (1997).

⁶² 47 U.S.C. § 251(b)(5).

section 251(a)'s duty to interconnect *and* section 251(b)(5)'s duty to establish arrangements for the transport and termination of traffic. Thus, the term interconnection, as used in section 251(a), cannot reasonably be interpreted to encompass a general requirement to transport and terminate traffic. Otherwise, section 251(b)(5) would cease to have independent meaning, violating a well-established principle of statutory construction requiring that effect be given to every portion of a statute so that no portion becomes inoperative or meaningless.⁶³ Moreover, section 252 of the Act indicates that "interconnection" and "transport and termination" are separate and distinct duties.⁶⁴ Section 252 establishes a process for the negotiation and arbitration of intercarrier agreements, and this process involves separate pricing standards for interconnection on the one hand, and for transport and termination of traffic on the other.⁶⁵ It would be difficult to reconcile these separate pricing standards if the requirement to interconnect incorporated a requirement to transport and terminate traffic.

27. In sum, we conclude that section 251(a) does not require AT&T to purchase Total's terminating access services and refrain from blocking calls to Audiobridge. Section 251(a) only requires AT&T to provide direct or indirect physical links between itself and Complainants. Accordingly, we deny Count Two of the Complaint.

3. Section 214(a) Does Not Require AT&T To Complete Calls To Audiobridge.

28. In Count Three of their Complaint, Complainants argue that AT&T violated section 214(a) by discontinuing service to Audiobridge without the prior consent of the Commission.⁶⁶ Section 214(a) provides, in pertinent part: "No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected."⁶⁷ Complainants assert that the "discontinuance of service" provision of section 214(a) applies to intercarrier connections, and not just to connections between carriers and their end users.⁶⁸ Moreover, Complainants argue

⁶³ See, e.g., *Cablevision Systems Development Company v. Motion Picture Association Of America, Inc.*, 836 F.2d 599, 610 (D.C. Cir. 1988); *Norfolk & W. Ry. v. United States*, 768 F.2d 373, 379 (D.C.Cir.1985), *cert. denied*, 479 U.S. 882 (1986).

⁶⁴ 47 U.S.C. § 252.

⁶⁵ Compare 47 U.S.C. § 252(d)(1) with 47 U.S.C. § 252(d)(2).

⁶⁶ Complaint at 21-22, ¶¶ 116-120; Complainants' Brief at 11-14.

⁶⁷ 47 U.S.C. § 214(a).

⁶⁸ Complaint at 43-44, ¶¶ 186-87; Complainants' Brief at 11-12.

that the section 214(a) certification requirement applies to non-dominant carriers like AT&T, and even when other competing carriers are providing the same or similar service through the use of access codes.⁶⁹

29. We conclude that AT&T was not required to obtain section 214(a) authorization before discontinuing its service of terminating calls to Total. Although Complainants are correct that a non-dominant carrier must receive a section 214 certification prior to terminating an inter-carrier connection that will result in discontinuing, reducing, or impairing service to a community or part of a community, we find that “service to a community or part of a community” has not been discontinued, reduced, or impaired in this instance. We accept AT&T’s uncontroverted assertions that it continues to complete calls to all residents and businesses in Big Cabin, Oklahoma *other than* Audiobridge. In other words, AT&T completes all calls that are placed pursuant to lawful access charge arrangements.

30. There is no evidence that AT&T has discontinued service to a “community, or part of a community” as is necessary to trigger section 214 authorization. AT&T’s decision to discontinue service to Total has affected only one end user, Audiobridge; AT&T continues to originate and terminate traffic to all other residents and businesses in Big Cabin, Oklahoma. Complainants have failed to demonstrate that Audiobridge constitutes a “community or part of a community” for purposes of section 214. Based on the record before us, such a population of one end user does not comprise a community, or even a part of a community, as those terms are commonly understood.⁷⁰ Concluding otherwise would not only contradict the plain language of the statute, but also cause absurdly burdensome results. For example, a carrier would require a section 214 certification prior to terminating service to a single customer due to the not-uncommon occurrence of nonpayment of bills. This would unduly undermine a carrier’s ability to take appropriate action in response to a customer’s unwarranted failure to pay for service.⁷¹ Section 214 requires the Commission to consider the impact that discontinuation of a service will have on a community, or a portion of a community, not the impact such discontinuation will have on an individual subscriber.

31. AT&T’s conduct surely has had a significant financial impact on Total, but such an

⁶⁹ Complainants’ Brief at 12-13.

⁷⁰ Cf. *Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2597 ¶ 38 & n.94 (1993) (noting that “community” can also “include an economic community of users, such as international record carriers or domestic satellite carriers”). See also *Inquiry Into Problems of Public Coast Radiotelegraph Stations*, Memorandum Opinion and Order, 67 FCC 2d 790, 794 ¶ 9 & n.15 (1978) (same).

⁷¹ We need not — and do not — decide here whether AT&T would need section 214 authorization under similar circumstances before discontinuing service to more than one customer.

impact on Total is irrelevant under section 214. Rather, the relevant focus is the impact on the community of end-users. As the Commission has previously indicated:

In determining the need for prior authority to discontinue, reduce or impair service under Section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, *i.e.*, the using public. Thus, in situations where one carrier attempts to invoke Section 214(a) against another carrier, concern should be had for the ultimate impact on the community served rather than on any technical or financial impact on the carrier itself.⁷²

Here, the ultimate impact on the community served is minimal because, as stated above, AT&T continues to complete calls to all residents and businesses in Big Cabin, Oklahoma *other than* Audiobridge. To the extent that Audiobridge has legitimate communications needs, there is no reason it cannot make alternative lawful arrangements that would enable it to use AT&T or any other IXC. Accordingly, we deny Count Three of the Complaint.

4. Section 202(a) Does Not Require AT&T To Complete Calls to Audiobridge.

32. In Count Four of their Complaint, Complainants argue that AT&T is violating section 202(a) of the Act by blocking calls to Audiobridge.⁷³ Section 202(a) of the Act makes it unlawful “for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services, . . . or to make or give any undue or unreasonable preference or advantage to any particular person.”⁷⁴ Complainants argue that, when an AT&T customer places a long distance call, AT&T has the legal duty to ensure that the call is carried to completion.⁷⁵ Complainants contend that AT&T is unlawfully discriminating against Total and Atlas by refusing to terminate calls to Audiobridge, while continuing to deliver access traffic to other local exchange carriers. According to Complainants, AT&T has no discretion to refuse calls to specific numbers in areas it has chosen to serve.⁷⁶ Finally, Complainants assert that AT&T participates in chat-line arrangements similar to the one at issue here, so AT&T cannot lawfully choose to serve some chat lines and not others.⁷⁷

⁷² *Western Union Tel. Co.*, Memorandum Opinion and Order, 74 FCC 2d 293, 296 (1979).

⁷³ Complaint at 22-23, ¶¶ 121-127; Complainants’ Brief at 18-20.

⁷⁴ 47 U.S.C. § 202(a).

⁷⁵ Complaint at 47, ¶ 195; Complainants’ Brief at 20.

⁷⁶ *Id.*

⁷⁷ Complainant’s Brief at 20-23; Complainants’ Reply at 3.

33. There is a well-established, three-pronged test for determining whether a carrier's conduct violates the anti-discrimination provision of section 202(a): (1) whether the services at issue are "like"; (2) if the services are "like," whether the carrier treats them differently; and (3) if the carrier treats the services differently, whether the difference is reasonable.⁷⁸ If the complainant in a section 208 proceeding meets its burden of proving like service and disparate treatment, the burden of proof shifts to the defendant to prove that the disparate treatment is reasonable.⁷⁹

34. Even assuming, *arguendo*, that Complainants have satisfied their burden of proving the first two prongs of the anti-discrimination test, Complainants' claim under section 202(a) fails, because AT&T has satisfied its burden of proving the reasonableness of the disparate treatment. That is, AT&T has shown that, under the particular circumstances of this case, AT&T's allegedly discriminatory conduct was not unreasonable. We find that AT&T's conduct was perfectly reasonable in view of the fact that Total and Atlas engaged in an unlawful scheme to inflate unjustly the access fees charged to AT&T.

35. We have decided that, under the unique circumstances of this case, AT&T's decisions to discontinue purchasing terminating access services from Total and to block traffic to Audiobridge did not violate sections 201, 202, 214, or 251 of the Act. Our decision does not mean, however, that an IXC has *carte blanche* to discontinue purchasing a CLEC's access services at any time or in any manner it chooses. In pending proceedings, the Commission will determine (i) what circumstances, if any, other than the unique ones present here permit an IXC to discontinue purchasing a CLEC's access services, and (ii) the procedures an IXC must follow to execute such a discontinuance, if permitted.⁸⁰ In the meantime, IXCs should not view this order as authorizing them unilaterally to block access traffic whenever they believe that a CLEC's rates are too high. In addition, we note that AT&T's decision to discontinue purchasing Total's terminating access services, and our decision to find AT&T's conduct lawful on the unique record

⁷⁸ See, e.g., *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *Allnet Communications Serv., Inc. v. US West, Inc.*, 8 FCC Rcd 3017, 3025, ¶ 38 n.87 (1993).

⁷⁹ See, e.g., *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5903, ¶ 131-32 (1991); *PanAmSat Corp. v. Comsat Corp.*, 12 FCC Rcd 6952, 6965, ¶ 34 n.90 (1997); *C.F. Communications Corp. v. Michigan Bell Tel. Co.*, 12 FCC Rcd 2134, 2141-42, ¶ 15 n.47 (1997); *The People's Network Inc. v. American Tel. & Tel.*, 12 FCC Rcd 21081, 21093, ¶ 25 n.72 (Com. Car. Bur. 1997).

⁸⁰ *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999). See also *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services*, Public Notice, 15 FCC Rcd 10181 (Com. Car. Bur. 2000); *Common Carrier Bureau Seeks Comment on the Request for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision*, Public Notice, 2000 WL 217601 (Com. Car. Bur. rel. May 15, 2000).

of this case, do not render Audiobridge inaccessible to future customers. AT&T is a non-dominant IXC and any party wishing to reach Audiobridge may “dial around” to the network of another IXC to complete the call. Accordingly, Count Four of the Complaint is denied.⁸¹

D. The Unlawful Nature of the Complainants’ Relationship, Standing Alone, Does Not Make it Unreasonable for Complainants to Charge a “Reasonable Amount” For Complainants’ Access Services Provided Prior to the Blocking of Calls to Audiobridge.

36. In its request for relief, AT&T essentially seeks, *inter alia*, an order prohibiting Complainants from charging any access fees from AT&T. For the reasons described below, we grant that request in part, and deny it in part.

37. We reject AT&T’s argument that the unlawful relationship between Atlas and Total, in and of itself, makes it unreasonable for Total to charge anything for the access services provided to AT&T. Complainants did provide a service to AT&T, *i.e.*, completing calls from AT&T’s customers to Audiobridge. Moreover, AT&T recovered revenue through ordinary long-distance rates from its own customers for calls completed to Audiobridge. Finally, Complainants may not be able to recover their legitimate costs, if any, through other means, that they are entitled to recover. Therefore, Total’s unlawful relationship with Atlas, standing alone, does not preclude Complainants from charging “reasonable” access charges from AT&T.⁸²

38. Given the particular circumstances of this case, we conclude that a reasonable access charge is the fee that Atlas would have charged AT&T for terminating traffic directly to Audiobridge, had Total never existed.⁸³ We so conclude because (1) Total and Atlas were effectively the same entity, (2) Total serves the same territory as Atlas, simply providing service

⁸¹ Complainants also allege, and AT&T admits, that callers who dial Audiobridge receive AT&T’s standard error message: “Your call cannot be completed as dialed. Please check the number and dial again.” Complainants’ Brief at 23; Answer at 15-16, ¶ 99. AT&T also admits that its operators state that calls to Audiobridge “are being restricted from receiving calls from AT&T due to a service problem.” Answer at 15-16, ¶ 99; AT&T Reply at 9. Complainants do not state a claim for relief arising from this conduct. Nevertheless, we note that AT&T’s conduct is potentially problematic to the extent that the messages misstate (or omit) the reason that such calls cannot be completed.

⁸² We note that, although Complainants’ complaint refers to AT&T’s failure to pay certain access charges incurred before AT&T began blocking calls to Audiobridge, Complaint at 16, ¶ 85, the complaint does *not* state a claim for relief based on that conduct. Instead, all of Complainants’ claims for relief only concern AT&T’s blockage of calls to Audiobridge. Thus, we have no basis on which to award pre-blocking damages to Complainants, either in this order or in response to a supplemental complaint for damages.

⁸³ According to Complainants, Atlas’ per-minute terminating access fee was \$0.0663. *See* Tr. at 81.

to a single customer in that territory, and (3) the record contains no evidence that Atlas' rate (which was a NECA rate), had it been charged, would have been unreasonably high or low. Consequently, we grant AT&T's request for relief as against Complainants such that Total may not charge AT&T access fees in any amount exceeding the amount that Atlas would have charged AT&T for the same services.

39. We reject, however, AT&T's request for an order precluding Total from attempting to charge anything more than a fraction of a penny per minute for its terminating access services.⁸⁴ AT&T argues that Total is actually a dominant carrier and, as a result, should have based its rates on its actual costs and traffic volume, in accordance with the Commission's dominant carrier rate-of-return regulations.⁸⁵ AT&T calculates that compliance with these regulations would have reduced Total's access rates to approximately one-tenth of one penny per minute.⁸⁶ We have already held that Total is an alter-ego of Atlas, rather than a separate entity, for the purpose of determining a reasonable access rate. Accordingly, it is not appropriate to calculate a reasonable fee based on Total's costs and revenues; instead, it is Atlas' experience, had Total not existed, that is relevant. Here, however, Atlas subscribed to the NECA tariff, which pools the experience of a large number of carriers nationwide to determine the appropriate rates for those carriers. One important feature of the NECA tariffing process is that, due to the large number of participating carriers, a sudden increase or decrease in costs or traffic by one carrier will have a marginal, if any, impact on the rates filed by NECA. There is no evidence in the record that, absent the existence of Total, Atlas would have filed its own tariff instead of subscribing to the NECA tariff. Moreover, there is no evidence in the record that, had the additional traffic generated by Audiobridge been attributed to Atlas rather than Total, the NECA rate to which Atlas subscribed would have decreased.⁸⁷

40. Finally, AT&T also seeks damages from Atlas equaling the charges that AT&T paid to Atlas for "tandem switched transport."⁸⁸ But for its unlawful relationship with Total, Atlas would not have charged AT&T anything at all for tandem switched transport to Total;

⁸⁴ *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, AT&T Notice of Supplemental Authorities, File No. E-97-03 (filed May 26, 1999) at 8-10.

⁸⁵ 47 C.F.R. §§ 61.31-61.59.

⁸⁶ *Id.* at 10.

⁸⁷ Because we grant AT&T's claim in Count II that Total's relationship with Atlas violates section 201(b) of the Act, we need not and do not reach the issue raised in Count I of whether Total's relationship with Atlas also violates the Commission's dominant carrier regulations (47 C.F.R. Part 61) and section 212 of the Act, 47 U.S.C. § 212. See Answer at 37-38, ¶¶ 28-30; AT&T Brief at 11-14.

⁸⁸ Answer at 42-45, ¶¶ 53-66; AT&T's Motion to Dismiss at 26.

instead, Atlas would have charged AT&T only for terminating access directly to Audiobridge. Thus, we grant AT&T's request for damages as against Atlas in the amount that AT&T paid to Atlas for tandem switched transport, plus interest.⁸⁹

E. AT&T's Remaining Counterclaims Are Rejected.

1. AT&T's Claims That the Relationship Between Total and Audiobridge Violates Sections 228 and Section 201(b) of the Act Are Dismissed as Moot.

41. In Counts I and III of its Counterclaim, AT&T argues that the revenue-sharing arrangement between Total and Audiobridge violates sections 228 and 201(b) of the Act.⁹⁰ We dismiss these claims as moot, without prejudice. Even assuming, *arguendo*, that we were to find that Complainants violated either section 228 or 201(b) of the Act, AT&T would still not be entitled to any relief that has not already been awarded. This is because Complainants' alleged violation of section 201(b) or section 228 of the Act, standing alone, would not vitiate AT&T's obligation to pay a reasonable access charge for services already provided. Accordingly, Counts I and III of AT&T's Counterclaim are dismissed as moot, without prejudice.

2. AT&T's Claim That Total's Tariff Precludes Total from Attempting to Prevent AT&T's Blocking Is Dismissed as Moot.

42. In Count IV of its Counterclaim, AT&T asserts that Total's attempts to prevent AT&T from refusing to purchase Total's access service violate Total's tariff, because Total's tariff permits AT&T to cancel service with thirty day's notice.⁹¹ Given that we have already denied Total's attempt to prevent AT&T from refusing to purchase Total's access service, we dismiss as moot Count IV of AT&T's Counterclaim, without prejudice.

⁸⁹ The parties must compute interest on the total amount of tandem switched transport charges paid by AT&T to Atlas for calls routed to Total, and covering the time period beginning November 22, 1995 (the date that AT&T began blocking calls to Total) and concluding on the date Atlas provides full payment to AT&T. To calculate the amount of accrued interest, the parties shall use the appropriate I.R.S. rate for corporate overpayments. See, e.g., *Rainbow Programming Holdings, Inc. v. Bell Atlantic-New Jersey, Inc. and Bell Atlantic Network Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11754, 11763, ¶ 26 (2000); *MCI Telecom. Corp. v. Pacific Northwest Tel. Co.*, Memorandum Opinion and Order, 8 FCC Rcd 1517, 1529-30, ¶¶ 46-48 (1993).

⁹⁰ Answer at 37-38, 40-41, ¶¶ 27-34, 41-48; AT&T Brief at 23; AT&T's Motion to Dismiss at 20-24.

⁹¹ Answer at 41-42, ¶¶ 49-52.

3. AT&T's Claims that the Applicable Tariffs Erroneously Describe the Services at Issue are Dismissed as Moot.

43. In Counts V through IX of its Counterclaim, AT&T alleges that Atlas and Total violated sections 201(b) and 203 of the Act by assessing charges for services not accurately described in their tariffs.⁹² It is well established that a purchaser of telecommunications services is not absolved from paying for the rendered services solely because the services furnished were not properly encompassed by the carrier's tariff (where, as here, the provider has no other means of attempting to obtain compensation).⁹³ Thus, even assuming, *arguendo*, that Atlas' and Total's tariffs do not accurately describe the services provided by them to AT&T, AT&T's claims in Counts V – IX are moot, because in response to Count II we have awarded AT&T all of the relief to which it would be entitled under Counts V - IX: an order (1) precluding Total from attempting to collect any amount greater than the amount that Atlas would have charged for the same service under its tariff, and (2) requiring Atlas to pay damages to AT&T in the amount that AT&T paid Atlas for tandem switching services, plus interest. Thus, we dismiss as moot Counts V through IX of AT&T's Counterclaim, without prejudice.

4. Total's Refusal to Pay AT&T's Attorney's Fees and Costs In the Court Actions Does Not Violate Total's Tariff.

44. In Count X of its Counterclaim, AT&T alleges that Total has unlawfully refused AT&T's request for legal costs and fees incurred by AT&T while defending the underlying federal court actions.⁹⁴ AT&T points out that, under Total's tariff, in any action to enforce the tariff, "the prevailing party shall be entitled to recover its legal fees and court costs from the non-prevailing party."⁹⁵ According to AT&T, it was the "prevailing party" in the court actions described above, because the courts denied Total's requests for preliminary injunctive relief and granted AT&T's requests for referral to the Commission under the primary jurisdiction doctrine.⁹⁶

⁹² Answer at 42-48, ¶¶ 53-89; AT&T Brief at 24-25; AT&T Reply at 8.

⁹³ See *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5132-33, ¶ 10 (2000), *affirming New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com.Car.Bur. 1993).

⁹⁴ Answer at 48-50, ¶¶ 90-99.

⁹⁵ *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Opposition of AT&T Corp. to Motion to Dismiss, File No. E-97-03, at 15 (filed Feb. 5, 1997).

⁹⁶ *Id.* at 16-17.

45. We disagree with AT&T. Even assuming that we have authority to enforce a tariff provision regarding the payment of legal fees and costs, we are not convinced that the tariff provision was triggered. In the absence of any evidence in the record regarding the meaning of the term “prevailing party” in Total’s tariff, we construe the term to mean a party that obtains in its favor a final, unappealable order resolving the dispute at issue. AT&T did not previously obtain such an order regarding the dispute at issue here. The court decisions merely denied Total’s requests for preliminary relief and referred the dispute to the Commission for further adjudication. Because the court decisions do not make AT&T a “prevailing party” within the meaning of Total’s tariff, we deny Count X of AT&T’s Counterclaim.

IV. MISCELLANEOUS MATTERS

46. Total’s Petition for Immediate Restoration of Connection, filed November 1, 1996, is denied for the reasons discussed above. AT&T’s Motion to Dismiss or for Judgment on the Pleadings, filed December 24, 1996, and Total’s Motion to Dismiss Cross Claim, filed January 25, 1997, are denied as moot. Total’s Motion to Accept Supplement to Record, filed April 11, 1997, concerning evidence that AT&T itself has provided teleconferencing services of the kind it opposes in this proceeding, is granted. Total’s Motion to Accept Supplement to Record, filed December 3, 1997, concerning AT&T’s alleged inconsistent representations to the California Public Utilities Commission on the issues of blocking and interconnection, is granted.

V. ORDERING CLAUSES

47. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 202, 206, 207, 208, 214, and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 202, 206, 207, 208, 214, 251, that the above-captioned complaint filed by Total IS DENIED IN ITS ENTIRETY.

48. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, 206, 207, 208, 212, 214, and 228 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 207, 208, 212, 214, 228, that the cross complaint filed by AT&T IS GRANTED IN PART, DISMISSED IN PART WITHOUT PREJUDICE, AND DENIED IN PART to the extent specified herein.

49. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201(b), 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 206, 207, 208, and 209, that Atlas shall pay AT&T damages in the amount that AT&T paid to Atlas for tandem switched transport for calls ultimately routed to Total, plus prejudgment interest computed from November 22, 1995 to the date of release of this Order at the appropriate

I.R.S. rate for corporate overpayments. Atlas shall pay this amount to AT&T within 90 days of the date of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary