

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

In the Matter of
U.S. TELEPACIFIC CORP.,
d/b/a/ TELEPACIFIC COMMUNICATIONS,
Complainant,
v.
TEL-AMERICA OF SALT LAKE CITY, INC., a
wholly-owned subsidiary of
TRANSTEL COMMUNICATIONS, INC.,
Defendant.
File No. EB-04-MD-005

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 2004

Released: December 14, 2004

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, based on multiple Commission precedents directly on point, we dismiss without prejudice a formal complaint that U.S. TelePacific Corporation, d/b/a/ TelePacific Communications ("TelePacific") filed against Tel-America of Salt Lake City, Inc. ("Tel-America") pursuant to section 208 of the Communications Act of 1934, as amended ("Act"). TelePacific alleges that Tel-America's failure to pay tariffed access charges for which TelePacific has billed Tel-America since 1999 constitutes an unjust practice under section 201(b) of the Act. As discussed below, although TelePacific's Complaint is styled as an action under section 201(b) of the Act, it is, in reality, a collection action to recover monies allegedly owed under a federal tariff. Because, as the Commission recently reiterated, "the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges," we dismiss the Complaint without prejudice. TelePacific is, of course, free to pursue its collection action in court.

1 Amended Formal Complaint, File No. EB-04-MD-005 (filed May 20, 2004) ("Complaint"). TelePacific's original complaint was filed on May 5, 2004.

247 U.S.C. § 208.

347 U.S.C. § 201(b).

4See, e.g., In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Order, 19 FCC Rcd 7457, 7472 n. 93 (2004) ("IP Telephony Order").

II. BACKGROUND

A. The Parties

2. The complainant, TelePacific, is a competitive local exchange carrier (“CLEC”) that provides access services through its six switches located in California and Nevada.⁵ Defendant, Tel-America, is a long distance carrier, or interexchange carrier (“IXC”).⁶

B. Procedural History

3. On November 15, 2002, TelePacific filed an informal complaint⁷ with the Market Disputes Resolution Division of the Commission’s Enforcement Bureau (“the Division”) pursuant to section 208 of the Act and section 1.711 of the Commission’s rules.⁸ TelePacific alleged in the Informal Complaint that Tel-America’s failure to pay access charges to TelePacific for services rendered violated sections 201(a) and 201(b) of the Act.⁹ On January 17, 2003, Tel-America filed a response to the Informal Complaint that denied TelePacific’s claims on a variety of grounds.¹⁰ On February 26, 2003, the Division issued a letter order informing the parties that TelePacific had exhausted all remedies under the informal complaint process and that the Division would therefore close the file for the Informal Complaint.¹¹

4. On December 10, 2003, TelePacific filed a complaint against Tel-America in the United States District Court for the Central District of California (“District Court”), alleging that Tel-America’s failure to pay access charges to TelePacific constituted a violation of TelePacific’s federally filed tariffs and a violation of sections 201(a) and 201(b) of the Act.¹² The District Court Complaint sought damages and a judicial determination that Tel-America’s failure to pay the access charges constituted a violation of

⁵Complaint at 3-4, ¶ 5.

⁶Complaint at 4, ¶ 6; Answer of Tel-America of Salt Lake City, Inc., File No. EB-04-MD-005 (filed May 25, 2004) (“Answer”) at 6-7, ¶ 6; Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-04-MD-005 (filed June 15, 2004) (“Joint Statement”) at 2, ¶ 2. The Complaint uses the term, “Tel-America” to refer to either or both Tel-America or Tel-America’s parent company, TransTel Communications, Inc. Complaint at 1-2, n.1.

⁷Informal Complaint, File No. EB-02-MDIC-0093 (filed Nov. 15, 2002) (“Informal Complaint”), attached to the Complaint as Exhibit 5.

⁸47 U.S.C. § 208; 47 C.F.R. § 1.711. *See also* 47 C.F.R. §§ 1.716-1.719.

⁹Informal Complaint at 9; Joint Statement at 2, ¶ 3.

¹⁰Response to Notice of Informal Complaint, File No. EB-02-MDIC-0093 (filed Jan. 17, 2003), attached to the Complaint as Exhibit 6, at 9; Joint Statement at 2, ¶ 3.

¹¹Letter from Alexander P. Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, to Karen Brinkmann, counsel for TelePacific, EB-02-MDIC-0093 (rel. February 26, 2003), attached to the Complaint as Exhibit 7, at 1; Joint Statement at 2, ¶ 4. *See also* Letter from Christopher N. Olsen, Assistant Chief, Market Disputes Resolution Division, Enforcement Bureau, to counsel for TelePacific and Tel-America, EB-02-MDIC-0093 (rel. July 23, 2003), attached to the Complaint as Exhibit 10, at 1-2 (denying request for Accelerated Docket treatment); Joint Statement at 3, ¶ 8.

¹²*U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, Complaint, Case No. CV 03-8972GAF (C.D. Cal. Dec. 10, 2003) (“District Court Complaint”), attached to the Complaint as Exhibit 11, at 3-5. TransTel Communications, Inc. (“TransTel”) was also joined as a defendant in the District Court Complaint. *Id.* at 2.

sections 201(a) and 201(b) of the Act.¹³

5. On March 19, 2004, the District Court, on Tel-America's motion, issued an order dismissing TelePacific's action against Tel-America without prejudice on two grounds. First, the District Court concluded that, when TelePacific filed its earlier Informal Complaint with the Commission, it had elected that forum under section 207 of the Act,¹⁴ and thereby divested the District Court of subject matter jurisdiction over the action.¹⁵ The District Court held that only if the Commission finds that it lacks jurisdiction over some of TelePacific's claims, and dismisses those claims without prejudice, would TelePacific be permitted to re-file its action in the District Court.¹⁶

6. Second, the District Court held that TelePacific's complaint against Tel-America should be dismissed on primary jurisdiction grounds.¹⁷ The District Court noted that the Commission was then engaged in on-going rule-making proceedings that addressed the right of CLECs to recover access charges from IXCs under circumstances that were virtually identical to those at issue in TelePacific's action against Tel-America.¹⁸ Based on the pendency of those rulemaking proceedings, and what the District Court described as the "highly technical nature of the dispute," the District Court concluded that "the FCC enjoys primary jurisdiction over this dispute."¹⁹

7. TelePacific filed the instant Complaint with the Commission on May 20, 2004. TelePacific alleges that Tel-America's refusal to pay TelePacific's tariffed access charges is a violation of section 201(b) of the Act and seeks to recover the unpaid charges as damages.²⁰ TelePacific further alleges that the majority of the traffic at issue in this case, and for which TelePacific seeks to recover access charges, consists of toll-free interstate calls originated by unaffiliated cellular carriers, universities, hotels, hospitals, and similar businesses.²¹ TelePacific contends that Tel-America has unlawfully refused to pay these access charges, based on the erroneous assertions that the cellular traffic at issue is not subject to access charges, and that TelePacific's practice of provisioning access jointly with cellular providers is a "sham arrangement."²² Tel-America answered the Complaint, denying the violations alleged by TelePacific, and advancing various affirmative defenses.²³ Two days before TelePacific filed the

¹³Complaint, Exhibit 11, at 5-8.

¹⁴Section 207 of the Act provides that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies." 47 U.S.C. § 207.

¹⁵*U.S. TelePacific v. Tel-America of Salt Lake City*, Order, Case No. CV 03-8972GAF (C.D. Cal. March 19, 2004) ("District Court Order"), attached to the Complaint as Exhibit 13, at 6-9.

¹⁶District Court Order at 10. See Joint Statement at 3, ¶ 10.

¹⁷District Court Order at 10-11.

¹⁸District Court Order at 4-5.

¹⁹District Court Order at 11.

²⁰Complaint at 11-17, ¶¶ 25-36; 19, ¶¶ 45-46.

²¹Complaint at 12, ¶ 27.

²²Complaint at 13-14, ¶ 30.

²³See Answer.

Complaint, the Commission issued its *Fifth Order On Reconsideration*²⁴ which, *inter alia*, sets forth rules regarding CLEC access charges, including the types of charges allegedly at issue in this case.

C. DISCUSSION

8. Although TelePacific's Complaint before the Commission purports to allege a violation of section 201(b) of the Act, the Complaint states an action for recovery of unpaid access charges that are allegedly due under the terms of a federal tariff.²⁵ The proper forum for such a dispute is the federal district court. As noted by the D.C. Circuit,²⁶ long-standing Commission precedent holds that "under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges, and that such claims should be filed in the appropriate state or federal courts."²⁷

²⁴*In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108 (2004) ("*Fifth Order On Reconsideration*"). See Answer at 20, ¶ 21 and n.92 (citing *Fifth Order On Reconsideration* and noting that Tel-America's request for a primary jurisdiction referral in the District Court was "due to the related issues pending in the Commission's rulemaking proceeding in CC Docket 96-262, which now have been decided").

²⁵TelePacific's damages claim in this proceeding apparently also includes some intrastate charges that TelePacific cannot, in any event, recover in a complaint proceeding before the Commission. See TelePacific's Reply to Defendant's Answer, File No. EB-04-MD-005 (filed June 2, 2004) at 25, ¶ 58 and n.40.

²⁶*In MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995), cert. denied, 517 U.S. 1129 (1996), the court vacated Commission orders that calculated the amount of damages owed by rate-of-return LECs to IXCs by offsetting against the amount that an IXC had "overpaid" the LEC (*i.e.*, paid a rate that yielded a return more than the allowed maximum) for one type of access service the amount that the same IXC had "underpaid" the LEC (*i.e.*, paid a rate that yielded a return less than the allowed maximum) for any other type of access service. The court did so because, *inter alia*, under FCC and Interstate Commerce Commission precedent, "this would involve a determination of the carrier's rights against a subscriber [*i.e.*, the IXC], over which this Commission has no jurisdiction." 59 F.3d at 1418 (quoting *Thornell Barnes Co. v. Illinois Bell Telephone Co.*, 1 F.C.C.2d 1247, 1275 (1965)). See *AT&T Corp. v. BellAtlantic-Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 598-600 & n.240 (1998) (acknowledging that "the Commission has no authority" to conduct "adjudications of carrier's rights against their customers").

²⁷*IP Telephony Order*, 19 FCC Rcd at 7472 n. 93. See *Beehive Tele., Inc. v. Bell Operating Cos.*, Memorandum Opinion and Order, 10 FCC Rcd 10562 at 10569, ¶ 37 and n.90 (1995) ("This Commission is not a collection agent for carriers with respect to unpaid tariffed charges;" thus, "[t]he BOCs' cross-claim does not allege a violation of the Act over which we have jurisdiction")(interior quotation marks omitted); *Illinois Bell Tel. Co. v. AT&T*, Order, 4 FCC Rcd 5268 at 5270, ¶ 18 ("The complaints do not allege that AT&T, in its role as a carrier, acted or failed to act in contravention of the Communications Act . . . Rather, they allege conditionally that AT&T may have failed to pay the lawful charge for service. Such allegations do not state a cause of action under the complaint procedures and are properly dismissed."), recon. denied, 4 FCC Rcd 7759 at 7760, ¶ 4 (1989) ("BOCs may not bring a complaint against AT & T in its capacity as a customer."); *Tel-Central v. United Tel. Co.*, Memorandum Opinion and Order, 4 FCC Rcd 8338 at 8340-41, ¶ 16 (1989)("th[e] statutory scheme does not constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action in contract to compel payment . . ."). *Accord American Sharecom, Inc. v. Mountain States Tele. & Telegraph Co.*, Memorandum Opinion and Order, 8 FCC Rcd 6727 (Com. Car. Bur. 1993); *C.F. Communs. Corp. v. Century Tele. of Wisconsin*, Memorandum Opinion and Order, 8 FCC Rcd 7334 (Com. Car. Bur. 1993) (subsequent history omitted); *Long Distance/USA, Inc. v. Bell Tel. Co. of Pa.*, Memorandum Opinion and Order, 7 FCC Rcd 408 (Com. Car. Bur. 1992); see also *American Telephone & Telegraph Co. v. The People's Network, Inc.*, 1993 WL 248165 (D.N.J. 1993) ("AT & T's only recourse against [its customer] TPN is in an action in contract to compel payment of the unpaid charges in this court. Complete relief cannot be afforded before the FCC, which simply lacks the collection remedies for AT & T which this court provides.") (interior quotation marks omitted); but see *MGC Comm., Inc., v. AT&T*, Memorandum Opinion and Order, 15 FCC Rcd 308 (1999) (deciding claim for recovery of

(continued...)

Accordingly, we dismiss this action without prejudice so that TelePacific can pursue its claims in federal court,²⁸ if it so chooses.²⁹

9. We note that the Commission's recent issuance of the *Fifth Order On Reconsideration* should provide the District Court with the guidance it sought regarding the lawfulness of the access charges at issue here.³⁰ We therefore believe that the issuance of the *Fifth Order On Reconsideration* satisfies the District Court's primary jurisdiction referral.³¹

10. Moreover, now that we have held that this collection action was not properly brought before the Commission in the first instance, neither TelePacific's filing of the instant Complaint, nor the filing of the earlier Informal Complaint, constitutes an election of forum under section 207 of the Act that would deprive the District Court of jurisdiction over this action. The dismissal of the instant Complaint without prejudice should thus clarify that section 207 poses no bar to TelePacific proceeding in the

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tariffed charges without discussing the issue of whether the Commission hears such claims, which neither party raised).

²⁸We note that the Commission does entertain claims to recover unpaid payphone compensation pursuant to section 276 of the Act, 47 U.S.C. § 276, and sections 64.1300 through 64.1320 of the Commission's rules, C.F.R. §§ 64.1300-64.1320. See, e.g. *APCC Services, Inc., et al., v. TS Interactive*, Order, 17 FCC Rcd 25523 (2002) Unlike the statutory provisions and Commission rules regarding access charges -- which speak only to the duties of the charging carrier and not to the duties of the customer-- section 276 of the Act and section 64.1300 of the Commission's rules specifically impose an obligation on the "customer" to pay payphone compensation charges. Therefore, a failure to pay payphone compensation charges constitutes a violation of the Act itself, which is actionable under section 208.

²⁹In the *CLEC Access Reform Order*, on which TelePacific relies in its Complaint to establish that its access charges are lawful, the Commission expressly contemplated that actions to collect unpaid access charges due under a federal tariff would be brought in federal district court. *In the Matter of Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 at 9948, ¶ 60 (2001) ("*CLEC Access Reform Order*") (stating that "an IXC that refused payment of tariffed rates within the safe harbor [established in the *CLEC Access Reform Order*] would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate."). See Complaint at 13, ¶ 29 (citing *CLEC Access Reform Order*).

³⁰For example, the Commission established a new rule in the *Fifth Order on Reconsideration* that provided, on a prospective basis, that "the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions." *Id.* at ¶ 17. The Commission further stated that, with respect to access charges imposed on interstate traffic prior to the date of that *Order*, such as the charges allegedly at issue here, "it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff." *Id.* at ¶ 18. *Cf., AT & T Communications of Virginia v. Bell Atlantic-Virginia, Inc.*, 35 F.Supp.2d 493, 498 (E.D.Va.1999) (stating that, where a case involves an issue that would otherwise be appropriate for a primary jurisdiction referral, there is no need to refer that issue to the agency if the agency has already ruled on it).

³¹To the extent that adjudication of TelePacific's claims requires interpretation of its federal tariffs, we note that such issues of tariff interpretation are well within the expertise of the District Court. See, e.g., *Advantel, LLC v. AT & T Corp.*, 105 F.Supp.2d 507 (E.D. Va. 2000) (holding that an action to enforce a tariff to collect amounts due under the tariff is "well within the ordinary competence of courts"). See also *ITC DeltaCom Communications, Inc. v. US LEC Corp.*, No. 3:02-CV-116-JTC (N.D. Ga. March 15, 2004) (interpreting a CLEC's tariff in determining whether an IXC had a duty to pay access charges arguably similar to those at issue in TelePacific's Complaint).

District Court.³²

III. ORDERING CLAUSE

11. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and section 1.728 of the Commission's rules, 47 C.F.R. § 1.728, that the Complaint that TelePacific filed against Tel-America is hereby DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³²See District Court Order at 9 (observing that “[a] dismissal without prejudice renders the previous action as though it had not been filed,” and concluding that because TelePacific “has not obtained such a dismissal without prejudice from the FCC . . . this Court cannot entertain [TelePacific’s] suit as it lacks subject matter jurisdiction over the action”) (citation omitted).