



finding, we grant Counts III and IV of the Complaint.<sup>6</sup> Because our grant of these Counts will afford AT&T all the relief to which it is entitled, we find it unnecessary to address the remaining unsevered Counts in the Complaint and dismiss them without prejudice.<sup>7</sup>

## II. BACKGROUND

2. For purposes relevant to this proceeding, AT&T is a nationwide provider of interexchange (*i.e.*, long distance) services, also called an interexchange carrier (“IXC”).<sup>8</sup> YMax is certificated as a competitive local exchange carrier (“CLEC”) throughout the United States.<sup>9</sup>

3. Although YMax is widely certificated as a CLEC, it lacks many typical local exchange carrier (“LEC”) characteristics. YMax does not provide any physical transmission facilities connecting

(Continued from previous page) \_\_\_\_\_

Analysis”); Answer of YMax Communications Corp. (filed Nov. 29, 2010) (“Answer”); Legal Analysis in Opposition to Formal Complaint (“Answer Legal Analysis”); Supplement to Answer of YMax Communications Corp. (filed Dec. 2, 2010) (“Supp. Answer”); AT&T’s Reply to Numbered Paragraphs in YMax’s Answer (Erratum) (original filed Dec. 6, 2010, correction filed Dec. 22, 2010) (“Reply”); AT&T’s Reply Legal Analysis in Support of its Formal Complaint (“Reply Legal Analysis”); Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues (filed Dec. 16, 2010) (“Joint Statement”); Erratum & Supplemental Answer to YMax Communications Corp. Answers to Interrogatories (original filed Dec. 30, 2010, correction filed Jan. 10, 2011) (“YMax Answers to Interrogatories”); AT&T’s Initial Brief in Support of its Formal Complaint (filed Jan. 20, 2011) (“AT&T Initial Brief”); Initial Brief of YMax Communications Corp. (filed Jan. 20, 2011) (“YMax Initial Brief”); AT&T’s Reply Brief in Support of its Formal Complaint (filed Jan. 27, 2011) (“AT&T Reply Brief”); Reply Brief of YMax Communications Corp. (filed Jan. 27, 2011) (“YMax Reply Brief”); Affidavit of Jeffrey D. Owens, attached as Ex. A to Complaint (“Owens Aff.”); Joint Declaration of Ardell Burgess and Pam Britt, attached as Ex. C to Complaint (“Burgess & Britt Decl.”); Declaration of Mark Pavol, attached as Ex. 1 to Answer (“Pavol Decl.”); Declaration of Paul J. Calabro, attached as Ex. 2 to Answer (“Calabro Decl.”); Declaration of Jon Jones, attached as Ex. 3 to Answer (“Jones Decl.”); Declaration of Daniel Borislow, attached to Supp. Answer (“Borislow Decl.”); Reply Affidavit of Jeffrey D. Owens, attached as Ex. D to Reply (“Owens Reply Aff.”); Joint Reply Declaration of Ardell Burgess and Pam Britt, attached as Ex. E to Reply (“Burgess & Britt Reply Decl.”); Deposition of Daniel Mark Borislow, attached as Ex. 22 to AT&T Initial Brief (“Borislow Dep.”); Deposition of Mark Pavol, attached as Ex. 23 to AT&T Initial Brief (“Pavol Dep.”); Deposition of Paul Calabro, attached as Ex. 24 to AT&T Initial Brief (“Calabro Dep.”); Deposition of Jeffrey D. Owens, attached as Ex. 25 to AT&T Initial Brief (“Owens Dep.”); Facts to Which YMax Refused to Stipulate in the Joint Statement But Which Mr. Pavol Verified as True in His Deposition, attached as Appendix B to AT&T Initial Brief (“Appendix B”).

<sup>6</sup> AT&T elected to bifurcate its claims for damages pursuant to section 1.722(d) of the Commission’s rules. 47 C.F.R. § 1.722(d). Therefore, this Order addresses AT&T’s liability claims only. Complaint at 8, ¶ 13. At an appropriate time, AT&T may file a supplemental complaint for damages. 47 C.F.R. § 1.722(e).

<sup>7</sup> See Reply Legal Analysis at 9; AT&T Initial Brief at 4-5 & App. A; AT&T Reply Brief at 12. We therefore dismiss without prejudice Counts I, II, V, VI, XI, XII, and XIII. We note that, in these Counts, AT&T raises credible allegations that, *inter alia*, YMax’s switched interstate access charges violate the “functional equivalent” standard and the rate-mirroring standard of section 61.26 of the Commission’s rules. We also note that we need not, and do not, address issues regarding the intercarrier compensation obligations, if any, associated with Voice over Internet Protocol (“VoIP”) traffic in this Order. “The Commission has never addressed whether interconnected VoIP is subject to intercarrier compensation rules and, if so, the applicable rate for such traffic,” and is “seek[ing] comment on the appropriate intercarrier compensation framework for [VoIP] traffic” in a pending proceeding. *Connect America Fund et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, ¶ 608 (rel. Feb. 9, 2011). Moreover, we emphasize that this Order addresses only the particular language in YMax’s Tariff and the specific configuration of YMax’s network architecture, as described in the record.

<sup>8</sup> See, e.g., Joint Statement at 2, ¶ 1.

<sup>9</sup> See, e.g., Joint Statement at 2, ¶ 3.

YMax to the premises of any non-carrier/non-ISP persons or entities.<sup>10</sup> YMax has no customers who purchase local exchange service from YMax's state tariffs.<sup>11</sup> [Redacted confidential information regarding YMax's business operations and network configuration.]<sup>12</sup> YMax does not assess or collect fees or charges associated with the Universal Service Fund ("USF").<sup>13</sup> YMax does not assess or collect any End User Common Line ("EUCL") charges.<sup>14</sup> YMax does not have any present capability to effectuate the selection of a preferred interexchange carrier ("PIC") and thus does not assess or collect any PIC charges.<sup>15</sup>

4. YMax is able to participate in the transmission of the telephone calls at issue here only through its working relationship with its close affiliate, MagicJack, L.P.<sup>16</sup> MagicJack, L.P. markets and sells for \$39.95 a device called the magicJack®,<sup>17</sup> which provides the ability to use the Internet to make and receive calls throughout most of North America.<sup>18</sup> The magicJack device itself consists of a USB "dongle" on one end that plugs into a computer's USB port, and an RJ-11 telephone jack on the other end into which an ordinary landline telephone can be plugged.<sup>19</sup> MagicJack, L.P. relies on YMax to obtain telephone numbers and interconnection to the public switched telephone network ("PSTN") for magicJack purchasers.<sup>20</sup> The record indicates that virtually all of the calls at issue involved the use of a magicJack device.<sup>21</sup>

---

<sup>10</sup> See, e.g., Pavol Dep. at 113; YMax Initial Brief at 11-12; YMax Answers to Interrogatories at 5 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories at 17 (Response to AT&T Second Set of Interrogatories No. 3); Borislow Decl. at 4; Appendix B at 2. "ISP" means Internet Service Provider.

<sup>11</sup> See, e.g., Supp. Answer at 2; Joint Statement at 4, ¶ 24; Borislow Dep. at 143-55; YMax Initial Brief at 8-9; YMax Answers to Interrogatories at 17 (Response to AT&T Second Set of Interrogatories No. 3); Pavol Dep. at 101.

<sup>12</sup> See, e.g., YMax Answer to Interrogatories at 17 (Response to AT&T Second Set of Interrogatories No. 3); Borislow Dep. at 153-55; Appendix B at 2.

<sup>13</sup> See, e.g., YMax Answers to Interrogatories at 14 (Response to AT&T First Set of Interrogatories No. 7); YMax Initial Brief at 8-9; Pavol Dep. at 118; Appendix B at 3.

<sup>14</sup> See, e.g., Joint Statement at 5, ¶ 32, 6, ¶ 43; YMax Answers to Interrogatories at 14 (Response to AT&T First Set of Interrogatories No. 7); YMax Initial Brief at 8-9; Pavol Dep. at 118, 127-30, 150; Appendix B at 3.

<sup>15</sup> See, e.g., YMax Answers to Interrogatories at 15 (Response to AT&T First Set of Interrogatories No. 7); Pavol Dep. at 117; Borislow Dep. at 185-90; YMax Initial Brief at 8-9.

<sup>16</sup> See notes 17, 25 *infra*; Joint Statement at 3, ¶ 13. The sole member of MagicJack, L.P. is YMax Corporation, which is the sole stockholder of YMax Communications Corp., the defendant here. See Pavol Decl. at 8 n.2. The same person serves as the chief executive officer ("CEO") of both MagicJack, L.P. and YMax Communications Corp. See, e.g., Borislow Dep. at 7, 11.

<sup>17</sup> Joint Statement at 3, ¶ 14, 4, ¶ 16. For purposes of this Order, we use the terms "magicJack" or "magicJack device" to refer to the magicJack® device, and we use the term "MagicJack, L.P." to refer to the entity that markets and sells the magicJack device.

<sup>18</sup> Joint Statement at 4, ¶ 16; MagicJack L.P. FAQs, attached as Ex. 15 to Complaint ("MagicJack FAQs"). To continue using the magicJack device after the first year of use, an annual renewal fee of \$19.95 is required. MagicJack FAQs. As previously noted, YMax assesses no tariffed fees or charges on any magicJack purchaser for any of the calls enabled by the magicJack device. Although the purchaser of a magicJack device has the *option* to buy prepaid minutes for certain international outbound calling, the magicJack purchaser is not required to do so, and no aspect of this optional prepaid plan is at issue in this proceeding. See, e.g., Joint Statement at 28, ¶ 50.

<sup>19</sup> Joint Statement at 3, ¶ 15.

<sup>20</sup> See, e.g., Joint Statement at 3, ¶ 10; Borislow Dep. at 77, 150, 177.

<sup>21</sup> Although YMax declined to stipulate that virtually all of the calls at issue involved the use of a magicJack device, YMax failed to heed Staff's directive to "explain, in detail" the basis for declining to so stipulate. See Letter from Alexander P. Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, to David Lawson, counsel for (continued...)

5. Before using the magicJack device, purchasers must register it online by clicking on a box indicating their agreement with a terms of service agreement (“TOS Agreement”) that appears on the MagicJack, L.P. website.<sup>22</sup> Among other things, the TOS Agreement requires that magicJack purchasers separately procure high speed Internet access service from a third-party ISP in order to use the magicJack device to place or receive calls.<sup>23</sup> The TOS Agreement further states that it constitutes “the entire agreement between you and magicJack and YMAX ... and governs your use of the magicJack device ... and Software and items and/or services which may be provided by YMAX, [and] it trumps any prior agreements between you and magicJack ... and/or YMAX.”<sup>24</sup>

6. The parties’ dispute centers on interstate switched access charges that YMax billed AT&T for two types of calls: 1) calls from an AT&T long-distance customer to a “Called Party” (*i.e.*, “1+” calls); and 2) calls from a “Calling Party” to an AT&T toll-free long-distance service customer (*i.e.*, “8YY” calls).<sup>25</sup> As used in this Order, “Called Party” means the person or entity that received an interexchange (1+) call from an AT&T long-distance service customer for which YMax has billed *terminating* switched access charges to AT&T,<sup>26</sup> and “Calling Party” means the person or entity that placed an interexchange call to an AT&T toll-free (8YY) customer for which YMax has billed *originating* switched access charges to AT&T.<sup>27</sup>

7. The record reflects that 1+ calls from an AT&T long-distance customer to a Called Party are routed as follows. First, the entity serving the AT&T long-distance customer (typically a LEC) delivers the long-distance call to AT&T’s point of presence (“POP”) in the local access and transport area (“LATA”) where the customer that initiated the call is located.<sup>28</sup> AT&T then transports the call and hands it off to the access tandem provider (typically an incumbent local exchange carrier (“ILEC”)) that serves the specific NPA-NXX code of the Called Party.<sup>29</sup> The access tandem provider to which AT&T has

(Continued from previous page) —————

AT&T, and Russell M. Blau and Antoinette C. Bush, counsel for YMax, File No. EB-10-MD-005 (rel. Jan. 24, 2011) at 4. [Redacted confidential information regarding YMax’s business operations]. YMax Reply Brief at 1 n.1. Given the evidence supplied by AT&T, *see, e.g.*, AT&T Initial Brief at 7 n.7 (citing Borislow Dep. at 182-83 (stating that 7 million magicJack devices have been sold, versus “less than a couple thousand” people that use a separate software product to make and receive calls)), YMax’s own implicit acknowledgement of the central role played by the magicJack device, *see, e.g.*, YMax Initial Brief at 1, 8 n.35, 22 n.104; YMax Reply Brief at 17; Borislow Dep. at 181-83 (stating that “the great majority” of YMax’s customers use the magicJack device), and YMax’s failure to comply with Staff’s order to provide a detailed explanation, we find ample support in the record to conclude that virtually all of the calls at issue involved the use of a magicJack device. In any event, neither party contends that, for purposes of resolving this case, there is any material difference between those MagicJack, L.P. customers who use a magicJack device and those who use a separate software product to make and receive calls.

<sup>22</sup> *See, e.g.*, Terms of Service and Software License Agreement for magicJack, L.P. and YMax Communications Corporation and VocalTec Communications Corp., attached as Ex. A to the Borislow Decl. (attached to Supp. Answer); Joint Statement at 4, ¶ 19. The current TOS Agreement is available at <http://www.magicjack.com/tos/>. Joint Statement at 4, ¶ 17.

<sup>23</sup> TOS Agreement at 2, § 1; Joint Statement at 4-5, ¶ 25.

<sup>24</sup> TOS Agreement at 11, ¶ 21.

<sup>25</sup> Joint Statement at 2, 5, ¶ 34, 7, ¶ 47. For purposes of this Order, we use the term “calls at issue” to refer to these two types of calls.

<sup>26</sup> Joint Statement at 2.

<sup>27</sup> *Id.* at 2. Accordingly, “Called/Calling Party” may refer to either of these where the direction of the call is not relevant to the particular statement. *Id.*

<sup>28</sup> *See, e.g.*, Calabro Decl. at 8-9, ¶ 18; Pavol Decl. at 5, 7; Borislow Dep. at 62, 66-67.

<sup>29</sup> *See, e.g.*, Calabro Decl. at 8; ¶ 18; Pavol Decl. at 5-6, 7; Pavol Dep. at 102; Borislow Dep. at 59-67; Owens Aff. at 8; Appendix B at 1-2. “NPA-NXX” refers to the first six digits of a ten-digit telephone number in the form NPA- (continued...)

terminated the call then delivers it to one of YMax's 141 points of interconnection ("POIs").<sup>30</sup> As far as any physical presence of YMax is concerned, 110 of YMax's 141 POIs exist only on paper (presumably for the purpose of permitting YMax to obtain telephone numbers in those LATAs); that is, YMax has no equipment of its own and leases no space at these locations, [redacted confidential information regarding YMax's network configuration].<sup>31</sup> As it turns out, all of "the equipment, facilities, configurations and interconnections" in these 110 locations are actually "provided exclusively [to YMax] by AT&T."<sup>32</sup> Thus, a call sent to any of these 110 POIs ("Empty POIs") is picked up by a private DS-1 line that AT&T provides to YMax and then is transported to [redacted confidential information regarding YMax's network configuration] YMax equipment collocated in an AT&T facility in Dallas, Texas.<sup>33</sup> YMax's equipment, which consists of an access gateway, servers, and a Cisco router, converts the call from TDM to IP format<sup>34</sup> and then, pursuant to a managed Internet service contract with AT&T, sends the call back to AT&T in the same Dallas facility over a single high-capacity line.<sup>35</sup> AT&T then sends the call over the Internet to one or more ISPs, the last of which delivers it to the Called Party's magicJack.<sup>36</sup>

8. For calls delivered by the access tandem provider to one of the other 31 YMax POIs, the routing is essentially the same. [Redacted confidential information regarding YMax's network configuration].<sup>37</sup>

9. The record is less clear about the routing of an 8YY call from a Calling Party to an AT&T toll-free long-distance service customer.<sup>38</sup> [Redacted confidential information regarding YMax's

(Continued from previous page) \_\_\_\_\_

NXX-XXXX, where N represents any one of the numbers 2 through 9 and X represents one of the numbers 0 through 9. *See, e.g., Numbering Resource Optimization*, Fourth Report and Order, 18 FCC Rcd 12472, 12474, ¶ 5 (2003). An access tandem switch provides the connection between an end office and an IXC's POP. *See, e.g., Owens Aff. at 9; Complaint, Ex. JDO-4.*

<sup>30</sup> *See, e.g., YMax Answers to Interrogatories at 2-3 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories, Exs. 1-2, 1-3; Pavol Decl. at 6, 7; Borislow Dep. at 51-54.*

<sup>31</sup> *See, e.g., YMax Answer to Interrogatories at 2-3 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories at 9 (Response to AT&T First Set of Interrogatories No. 3); YMax Answers to Interrogatories, Exs. 1-1, 1-2; Borislow Dep. at 56-57.*

<sup>32</sup> *YMax Answers to Interrogatories at 9 (Response to AT&T First Set of Interrogatories No. 3). See, e.g., YMax Answer to Interrogatories at 2-3 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories at 12-13 (Response to AT&T First Set of Interrogatories No. 6); YMax Answers to Interrogatories, Exs. 1-1, 1-2.*

<sup>33</sup> *See, e.g., YMax Answers to Interrogatories at 2-3 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories, Ex. 1-2; Borislow Dep. at 54-57; Pavol Dep. at 72.*

<sup>34</sup> *Joint Statement at 6, ¶ 41; YMax Answer to Interrogatories at 2-3 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories at 8-9 (Response to AT&T First Set of Interrogatories No. 3); Pavol Dep. at 72, 81-82. "TDM" stands for time-division multiplexing, and "IP" stands for Internet Protocol.*

<sup>35</sup> *See, e.g., YMax Answer to Interrogatories at 2-3 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories at 12-13 (Response to AT&T First Set of Interrogatories No. 6); YMax Answers to Interrogatories, Ex. 1-2; Pavol Dep. at 107-08; Appendix B at 2; Borislow Dep. at 66. [Redacted confidential information regarding YMax's network configuration]. YMax Answers to Interrogatories at 4 (Response to AT&T First Set of Interrogatories No. 1).*

<sup>36</sup> *See, e.g., YMax Answers to Interrogatories at 5-6 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories, Ex. 1-2; Appendix B at 1-2.*

<sup>37</sup> *See, e.g., Pavol Dep. at 74-75, 85-86, 109-112; YMax Answers to Interrogatories at 3, 5-6 (Response to AT&T First Set of Interrogatories No. 1); YMax Answers to Interrogatories at 13 (Response to AT&T First Set of Interrogatories No. 6); YMax Answers to Interrogatories, Ex. 1-3; Appendix B at 1-2; Borislow Dep. at 122-29.*

<sup>38</sup> This lack of clarity stems largely from YMax's provision, under oath, of incorrect routing information, and from (continued...)

network configuration.]<sup>39</sup> [Redacted confidential information regarding YMax’s network configuration.]<sup>40</sup>

10. Purportedly pursuant to its Tariff, YMax billed AT&T terminating switched access charges for calls to a Called Party and originating switched access charges for calls from a Calling Party. AT&T disputed these charges, to no avail. Hence, this formal complaint proceeding commenced.

11. The non-severed Counts in AT&T’s Complaint are Counts I through VI, and Counts XI through XIII.<sup>41</sup> Counts I and II allege that YMax does not provide the “functional equivalent” of any competing ILEC’s switched access services, as set forth in the Commission’s access charge rules and orders, and, therefore, YMax has violated sections 201(b) and 203(c), respectively, by billing AT&T for switched access services that YMax has not provided.<sup>42</sup> Counts III and IV allege that YMax does not provide switched access services as defined in its Tariff, and, therefore, YMax has violated sections 203(c) and 201(b), respectively, by billing for services that it did not provide pursuant to the terms of its Tariff.<sup>43</sup> Counts V and VI allege that YMax has violated sections 203(c) and 201(b), respectively, by billing for “information services” that are not authorized by its Tariff and that Commission rules prohibit to be tariffed.<sup>44</sup> Counts XI and XII allege that YMax has violated sections 201(b) and 203(c), respectively, by billing rates that exceed the rates that the “competing ILEC” charges for functionally equivalent service.<sup>45</sup> Count XIII alleges that, if the Commission construes the Tariff to permit billing switched access charges for the services actually provided by YMax, then the Tariff is unjust and unreasonable under section 201(b).<sup>46</sup>

(Continued from previous page) \_\_\_\_\_

YMax’s failure to expressly acknowledge such falsity until AT&T deposed YMax’s witnesses. *Compare* Answer Legal Analysis at 1 n.1 (“the services provided by YMAX on these calls are precisely the same as those provided for terminating calls, except that the call flow is in the opposite direction”); Pavol Decl. at 5, ¶ 17 (“The path followed by an originating call is exactly the same, but in the opposite direction”); Calabro Decl. at 10, ¶ 21 (“The switched access services that YMax provides for the delivery of a toll-free call are the same, albeit in the opposite direction, as those provided when it terminates a 1+ call.”); Answer, Ex. 5, *with* Borislow Dep. at 218 ([Redacted confidential information regarding YMax’s network configuration]); Pavol Dep. at 29-37; 51; Supp. Answer, Ex. B.

<sup>39</sup> [Redacted confidential information regarding YMax’s network configuration]. *See, e.g.*, YMax Answers to Interrogatories at 7 (Response to AT&T First Set of Interrogatories No. 2); Pavol Dep. at 36-37; Borislow Dep. at 15-17. In fact, based on a potentially specious distinction between YMax and its close affiliate MagicJack, L.P., YMax averred to the Public Service Commission of West Virginia that it does not provide magicJack purchasers with any ability to originate any calls. *See* AT&T Initial Brief, Ex. 30, *Emergency Operations of Kanawha County v. YMax Communications Corp. and MagicJack, L.P.*, Case No. 10-0383-T-C (complaint filed March 22, 2010) at 6 (direct testimony of Mark Pavol before Public Service Commission of West Virginia relating to non-payment by YMax of E911 fees).

<sup>40</sup> *See, e.g.*, YMax Answers to Interrogatories at 7 (Response to AT&T First Set of Interrogatories No. 2); YMax Reply Brief at 3-4, 6 n.16; Borislow Dep. at 218; Pavol Dep. at 29-31. [Redacted confidential information regarding YMax’s network configuration]. *See, e.g.*, AT&T Initial Brief at 2. [Redacted confidential information regarding YMax’s network configuration]. AT&T Initial Brief at 2, 18.

<sup>41</sup> As previously noted, Counts VII-X and Count XIV were severed by agreement of the parties. *See* note 4 *supra*.

<sup>42</sup> Complaint at 26-30, ¶¶ 63-74.

<sup>43</sup> *Id.* at 30-36, ¶¶ 75-94.

<sup>44</sup> *Id.* at 36-39, ¶¶ 95-110.

<sup>45</sup> *Id.* at 45-48, ¶¶ 139-52.

<sup>46</sup> *Id.* at 48-49, ¶¶ 153-55.

### III. DISCUSSION

#### A. YMax Has Violated Sections 203(c) and 201(b) Of The Act By Assessing Switched Access Charges That Are Not Authorized By Its Tariff.

12. YMax filed its Tariff with the Commission<sup>47</sup> pursuant to section 203(a) of the Act, which requires common carriers to submit schedules showing “all charges” and “the classifications, practices, and regulations affecting such charges.”<sup>48</sup> Section 203(c) of the Act bars a carrier from “enforc[ing] any classifications, regulations, or practices affecting” its tariffed charges, “except as specified” in the tariff.<sup>49</sup> Consistent with these statutory provisions, a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff.<sup>50</sup>

13. AT&T alleges in Counts III and IV of the Complaint that YMax has violated sections 203(c) and 201(b) of the Act by assessing AT&T switched access charges for services that are not authorized by YMax’s Tariff. To support that allegation, AT&T argues that none of YMax’s services qualifies as “Switched Access Service” under the Tariff because the Called/Calling Parties who placed and received the calls at issue are not “End Users” within the meaning of the Tariff.<sup>51</sup> Further, AT&T asserts additional, independent grounds for arguing that none of YMax’s services qualifies as the “End Office Switching” and the “Switched Transport” rate elements of YMax’s switched access charges.<sup>52</sup> According to AT&T, YMax does not provide End Office Switching within the meaning of its Tariff because, *inter alia*, YMax does not have an “End Office Switch” as defined by the Tariff.<sup>53</sup> Similarly, AT&T contends that YMax does not provide certain Switched Transport services because the Tariff describes such services as routing traffic “to and from an End Office” “via the Access Tandem,” and YMax does not have any End Offices within the meaning of the Tariff.<sup>54</sup>

14. As explained below, we find each of AT&T’s arguments in Counts III and IV to be meritorious. The fundamental problem appears to be that YMax chose to model its Tariff on common language in LEC access tariffs, even though the functions YMax performs are very different from the access services typically provided by LECs. As a result, YMax’s Tariff fails to unambiguously describe

---

<sup>47</sup> See, e.g., Joint Statement at 3, ¶ 9; Answer Legal Analysis at 40-41.

<sup>48</sup> 47 U.S.C. § 203(a).

<sup>49</sup> 47 U.S.C. § 203(c).

<sup>50</sup> See, e.g., *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2<sup>d</sup> Cir. 1998); *Alliance Commc’ns Cooperative, Inc. v. Global Crossing Telecommunications, Inc.*, 663 F.Supp.2d 807, 827 (D. S.D. 2009) (“[T]he fact that [the customer] benefitted from services provided by [the carriers] does not mean that [the customer] actually received the access services offered in [the carriers] tariffs.”); *MCI Worldcom Network Services, Inc. v. Paetec Commc’ns Inc.*, 2005 WL 2145499, at \*3 (E.D. Va. 2005) (citing *Bryan v. Bellsouth Commc’ns., Inc.*, 377 F.3d 424, 429 (4<sup>th</sup> Cir. 2004) (holding access charges unlawful when service was provided outside the scope of the tariff); *Qwest Commc’ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 24 FCC Rcd 14801, 14810-13, ¶¶ 21-26 (2009) (“*Farmers III*”), *recon. denied*, 25 FCC Rcd 3422 (2010), *pet. for review pending*, *Farmers & Merchants Mut. Tel. Co. v. FCC*, No. 10-1093 (D.C. Cir. filed May 7, 2010).

<sup>51</sup> See, e.g., Complaint at 33-34, ¶¶ 82-85; Complaint Legal Analysis at 24-26; Reply Legal Analysis at 9-19.

<sup>52</sup> See, e.g., Complaint at 33-34, ¶¶ 82-85; Complaint Legal Analysis at 24-27; Reply Legal Analysis at 19-28.

<sup>53</sup> See, e.g., Complaint at 30-33, ¶¶ 77-81; Complaint Legal Analysis at 19-21; Reply Legal Analysis at 19-20.

<sup>54</sup> Reply Legal Analysis at 27-29. See Complaint at 32, ¶ 80; Complaint Legal Analysis at 28. AT&T also presents a credible argument that YMax has violated its Tariff “on many calls” because the services YMax provides cross LATA boundaries. See, e.g., Reply Legal Analysis at 27-29. Because we grant AT&T’s claims in Counts III and IV based on other terms of the Tariff, we need not address that argument here.

the kinds of services and functions that YMax performs with regard to the traffic at issue.<sup>55</sup>

**1. Because The Called/Calling Parties Are Not “End Users,” YMax Has Not Provided “Switched Access Services” Within The Meaning Of Its Tariff.**

15. As required by section 203(c) of the Act, we begin by examining the relevant terms in YMax’s Tariff. Section 3 of the Tariff describes Switched Access Services.<sup>56</sup> A review of section 3 reveals that, in determining whether YMax properly billed AT&T for Switched Access Services under its Tariff, a central issue is whether the Called/Calling Parties are “End Users” within the meaning of the Tariff. According to section 3, Switched Access Service “is available to Customers [usually interexchange carriers]<sup>57</sup> for their use in furnishing their services to *End Users*,” and it provides a “a two-point communications path between a Customer’s Premises and an *End User’s* Premises” and thus “the ability to originate calls from an *End User’s* Premises to a Customer’s Premises and to terminate calls from a Customer’s Premises to an *End User’s* Premises ....”<sup>58</sup> The Tariff defines an “End User’s Premises” as “[t]he premises specified by the Customer or *End User* for termination of access services at the *End User’s* physical location.”<sup>59</sup> It further states that, when provisioning Switched Access Service, “Originating traffic type represents access capacity ... for carrying traffic from the *End User* to the Customer; and Terminating traffic type represents access capacity ... for carrying traffic from the Customer to the *End User*.”<sup>60</sup>

16. Thus, the term, “End User” is integral to the meaning of “Switched Access Service.” YMax provides Switched Access Service under its Tariff if — and only if — a call involves an “End User” as defined in the Tariff.

17. The definition of “End User” in YMax’s Tariff is similar to that commonly found in many LEC tariffs.<sup>61</sup> An “End User” is defined as a person or entity “that *uses* the service of the Company [YMax] *under the terms and conditions of this Tariff*.”<sup>62</sup> As explained below, we find that the

<sup>55</sup> We express no view about whether or to what extent YMax’s functions, if accurately described in a tariff, would provide a lawful basis for any charges.

<sup>56</sup> See Tariff §§ 3.1-3.8, Original Pages No. 45-54.

<sup>57</sup> The Tariff defines “Customer” as “Any person, firm, partnership, corporation or other entity that uses service under the terms and conditions of this tariff and is responsible for the payment of charges. In most contexts, the Customer is an interexchange carrier utilizing the Company’s Switched Access services described in this tariff to reach its End User customer(s).” Tariff § 1, Original Page No. 9.

<sup>58</sup> Tariff § 3.1.1, Original Page No. 45 (emphases added). Section 3.1.1 states in full: “Switched Access Service, which is available to Customers for their use in furnishing their services to End Users, provides a two-point communications path between a Customer’s Premises and an End User’s Premises. It provides for the use of common terminating, switching and trunking facilities, and for the use of common subscriber plant of the Company. Switched Access Service provides for the ability to originate calls from an End User’s Premises to a Customer’s Premises and to terminate calls from a Customer’s Premises to an End User’s Premises in the LATA where it is provided.”

<sup>59</sup> Tariff § 1, Original Page No. 10 (emphases added).

<sup>60</sup> Tariff § 3.2.3, Original Page No. 46 (emphases added).

<sup>61</sup> See, e.g., YMax Initial Brief at 3 n.9; AT&T Reply Brief at 6.

<sup>62</sup> Tariff § 1, Original Page No. 10 (emphasis added). The Tariff defines “Company” as “YMax.” Tariff § 1, Original Page No. 8. The Tariff defines “End User” as: “Any person, firm, partnership, corporation or other entity that uses the service of the Company under the terms and conditions of this tariff. In most contexts, the End User is the customer of an interexchange carrier who in turn utilizes the Company’s Switched or Dedicated Access services described in this tariff to provide the End User with access to the IC’s communication and switching system.” Tariff (continued...)

Called/Calling Parties do not qualify as End Users within the meaning of the Tariff because they do not “use” any YMax service “under the terms and conditions of [the] tariff.” YMax therefore did not provide tariffed Switched Access Service to AT&T and was not authorized by the Tariff to assess Switched Access charges for any traffic involving the Called/Calling Parties.

18. As with other LEC federal access tariffs, the only service that YMax’s Tariff offers for “use” by “End Users” is “End User Access” service.<sup>63</sup> This service, described in section 5 of the Tariff, provides End Users with “the use of an End User Common Line (‘local loop’) to originate or terminate interstate long distance calls.”<sup>64</sup> End Users must pay “[a] monthly recurring charge” for this service, ranging from \$6.50 to \$7.00 per line,<sup>65</sup> and a Federal Universal Service Fee.<sup>66</sup> Moreover, under the Tariff, YMax must provide End Users with the ability to select or “presubscribe” to the long distance carrier that will handle their interstate calls.<sup>67</sup> The Tariff specifies that End Users who fail to make such a designation must “dial an access code (i.e., 101XXXX) for interstate calls,”<sup>68</sup> and those who change an IXC designation must pay a non-recurring charge.<sup>69</sup>

19. YMax concedes that it has never provided End User Access service for any End User’s “use” within the meaning of section 5 of its Tariff.<sup>70</sup> YMax also admits that it provides no “local loops” or any other facilities that physically connect to the premises of a Called/Calling Party,<sup>71</sup> and that it [Redacted confidential information regarding YMax’s network configuration].<sup>72</sup> Instead, the

(Continued from previous page) \_\_\_\_\_

§ 1, Original Page No. 10.

<sup>63</sup> See, e.g., AT&T Initial Brief at Ex. 36, NECA Tariff F.C.C. No. 5, § 2.6, 1st Rev. Page 2-68.

<sup>64</sup> Tariff § 5.1.1, Original Page No. 81. Under the general heading, End User Access, § 5.1.1 of the Tariff states, in pertinent part: “This service provides for the use of an End User Common Line (‘local loop’) to originate or terminate interstate long distance calls. A monthly recurring charge applies to each local access line for this service.”

<sup>65</sup> *Id.*

<sup>66</sup> Tariff § 5.2, Original Page No. 83. Tariff § 5.2 provides, in pertinent part: “In connection with the FCC’s Universal Service Orders, the Company [YMax] will pay a percentage of its retail revenues to support the Universal Service Fund (USF). The Company [YMax] will pass-through the USF assessment to its customers by assessing a charge applicable against all retail interstate and international charges, including usage and non-usage charges.” Although the Tariff defines “Customer” as meaning, “in most contexts,” “an interexchange carrier utilizing the Company’s Switched Access services described in this tariff to reach its End User customer(s),” Tariff § 1, Original Page No. 9, the uncapitalized term “customers,” as used in the context of § 5.2, clearly refers to End Users. See, e.g., Complaint at 33-34, ¶ 84; Answer at 26, ¶ 84; YMax Answers to Interrogatories at 14 (Response to AT&T First Set of Interrogatories No. 7).

<sup>67</sup> Tariff § 5.1.2, Original Page No. 81 (“End Users may select and designate to [YMax] an interexchange carrier (“IXC”) to access, without an access code, for interstate calls”). See *id.* at Original Page No. 13 (defining “Presubscription” as “[a]n arrangement whereby a Customer selects and designate [sic] to [YMax] or other LEC a carrier he or she wishes to access, without an access code, for completing interLATA and/or intraLATA toll calls.”).

<sup>68</sup> Tariff § 5.1.2, Original Page No. 81.

<sup>69</sup> Tariff § 5.1.2, Original Page No. 81 (“After the End User’s initial selection of a predesignated IXC or the designation that they do not want to presubscribe to any IXC, a non-recurring charge, as set forth below, will apply for any change in selection.”); see *id.* at § 5.5, Original Page No. 87.

<sup>70</sup> See, e.g., Answer at 26, ¶ 84; Supp. Answer at 2; Joint Statement at 5, ¶ 32; YMax Initial Brief at 8 (citing Borislow Dep. at 153-54; 186-88; 193-94 and Pavol Dep. at 117).

<sup>71</sup> See, e.g., Pavol Dep. at 112-13; YMax Initial Brief at 11-12; TOS Agreement at 2, § 1; YMax Answers to Interrogatories at 17 (Response to AT&T Second Set of Interrogatories No. 3); Borislow Decl. at 4; Appendix B at 2.

<sup>72</sup> YMax Answer to Interrogatories at 17 (Response to AT&T Second Set of Interrogatories No. 3); Borislow Dep. at (continued...)

Called/Calling Parties must separately obtain service and facilities from a third-party ISP in order to place or receive calls.<sup>73</sup> YMax acknowledges that it has “never billed any Called/Calling Party the End User Common Line charge or Federal Universal Service surcharge described in the Tariff, and that no Called/Calling Party has ever paid YMax the tariffed charges associated with the End User Common Line.”<sup>74</sup> Likewise, YMax admits that it has not provided, and presently has no facilities to provide, Called/Calling Parties the ability to presubscribe to an IXC, and does not require End Users to dial a 101XXXX code to select an IXC for individual long distance calls.<sup>75</sup>

20. Thus, the undisputed record makes clear that no Called/Calling Party has ever used YMax’s End User Access service. This means that no Called/Calling Party has ever been an “End User” as defined in YMax’s Tariff. Accordingly, YMax has never provided a key component of Switched Access Service as defined in the Tariff — basically, originating and terminating traffic from and to an “End User.”

21. Buttrressing this conclusion is the fact that Called/Calling Parties establish a business relationship with YMax, not by ordering service under “the terms and conditions of [YMax’s] tariff,”<sup>76</sup> but instead by agreeing to the separate online TOS Agreement.<sup>77</sup> This agreement appears on the magicJack website and, according to YMax, is accepted by “all consumers or businesses who have subscribed to YMax’s services.”<sup>78</sup>

22. The TOS Agreement purports to establish an agreement between the Called/Calling Party and YMax and its affiliates, MagicJack, L.P. and VocalTec Communications, LTD. (“VocalTec”),<sup>79</sup> and states that it is the “entire agreement between you [the Called/Calling Party] and magicJack and YMax and VocalTec” and it “trumps any prior agreement.”<sup>80</sup> Unlike the Tariff, the TOS Agreement does not require YMax to provide a common line or “local loop” to any user.<sup>81</sup> Instead, it states that the Called/Calling Party must obtain local connections at their own cost from a third-party.<sup>82</sup> Rather than requiring payment of a monthly End User Common Line Charge or Federal Universal Service surcharges, as specified in the Tariff, the TOS Agreement promises users “free” calling. Further, the TOS Agreement, unlike the Tariff, does not allow users to pre-subscribe to an IXC or require them to pay a

(Continued from previous page) \_\_\_\_\_  
153-55; Appendix B at 2.

<sup>73</sup> See, e.g., Pavol Dep. at 113; YMax Answers to Interrogatories at 5 (Response to AT&T First Set of Interrogatories No. 1); Calabro Decl. at 18; Borislow Decl. at 4; TOS Agreement at 2, § 1; Joint Statement at 4-5, ¶ 25.

<sup>74</sup> See, e.g., Joint Statement at 5, ¶ 32; 6, ¶ 43; Answer at 26, ¶ 84; Supp. Answer at 2; Answer Legal Analysis at 49; YMax Answers to Interrogatories at 14 (Response to AT&T First Set of Interrogatories No. 7); YMax Initial Brief at 8-9; Pavol Decl. at 13-14, ¶ 43; Pavol Dep. at 118, 127-30, 150; Appendix B at 3.

<sup>75</sup> See, e.g., YMax Answers to Interrogatories at 15 (Response to AT&T First Set of Interrogatories No. 7); YMax Initial Brief at 8-9; Borislow Dep. at 185-90; Pavol Dep. at 117.

<sup>76</sup> Tariff § 1, Original Page No. 10 (emphasis added). See YMax Reply Brief at 7.

<sup>77</sup> See TOS Agreement; Joint Statement at 4, ¶ 19.

<sup>78</sup> YMax’s Answers to Interrogatories at 14 (Response to AT&T First Set of Interrogatories No. 7). See Supp. Answer at 1-2.

<sup>79</sup> TOS Agreement at 1. YMax and MagicJack, L.P. are owned by YMax Corporation, which is owned by VocalTec Communications Ltd. See Borislow Dep. at 9-10; VocalTec Communications Ltd. SEC Form 6-K (July 2010), at Complaint, Ex. 10.

<sup>80</sup> TOS Agreement at 11, § 21.

<sup>81</sup> Cf. Tariff § 5.1.1, Original Page No. 81.

<sup>82</sup> See TOS Agreement at 2, § 1. See also Pavol Decl. at 8, ¶ 28.

non-recurring charge to change a presubscription.

23. These undisputed facts about the TOS Agreement further establish that the Called/Calling Parties are not End Users under the Tariff: they do not “use” any service “under the terms and conditions of this tariff,” but rather use a completely different service under an entirely separate TOS Agreement.<sup>83</sup> Given that Switched Access Service, as described in the Tariff, must involve traffic to and from End Users, and YMax has no End Users as defined in the Tariff, YMax has not provided AT&T with such Switched Access Services and cannot lawfully bill AT&T for those services.<sup>84</sup>

24. Additional support for this conclusion is found in Commission precedent, including the recent *Farmers* decision,<sup>85</sup> which construed similar tariff language. In *Farmers*, the Commission barred a LEC from assessing switched access charges for calls to conference calling companies who were not “end users” under the LEC’s tariff. The Commission held that the conference calling companies did not qualify as “end users” because they did not take service pursuant to the terms and conditions of the tariff, but rather under separate agreements with the LEC.<sup>86</sup> Here, as in *Farmers*, the Called/Calling Parties take service under a separate agreement — the TOS Agreement — and not “under the terms and conditions of [the] tariff.” Accordingly, YMax, like the LEC in *Farmers*, may not assess Switched Access charges under its Tariff for calls to or from Called/Calling Parties.<sup>87</sup>

25. YMax makes two principal arguments, raised late in this proceeding, in an attempt to show that it has End Users under the Tariff. For the following reasons, both lack merit.

26. First, conceding that there are no persons or entities that use End User Access services under section 5 of YMax’s Tariff,<sup>88</sup> YMax instead focuses on the Switched Access Services provided in section 3.<sup>89</sup> YMax maintains that the Called/Calling Parties are all “End Users,” because they “use” Switched Access Service under section 3 of the Tariff whenever AT&T also uses such Service to transmit a call to or from a Called/Calling Party.<sup>90</sup> The fact that only AT&T is responsible for paying for the

<sup>83</sup> Tariff § 1, Original Page No. 10 (emphasis added).

<sup>84</sup> See note 50 *supra*.

<sup>85</sup> See *id.*

<sup>86</sup> *Farmers III*, 24 FCC Rcd at 14812-13, ¶¶ 24-26; *Id.* at 14812, ¶ 25 (finding “the evidence of the parties’ actual course of dealing demonstrates that there was no purchase of tariffed services”).

<sup>87</sup> YMax’s attempt to distinguish the *Farmers* holding based on differences between YMax’s Tariff language and that at issue in *Farmers* is unavailing. See Answer Legal Analysis at 49. YMax points out that the tariff in *Farmers* defined “end user” as a “customer” that “*subscribe[s]* to the services offered under [the] tariff,” whereas YMax’s Tariff defines “End User” as an entity that “*uses* the service of [YMax] under the terms and conditions of this tariff.” YMax Reply Brief at 8-9 (internal quotations omitted). YMax argues that the Called/Calling Parties qualify as End Users under its Tariff because they “were in fact *using* the service of YMax” when they received calls from AT&T customers. Answer Legal Analysis at 49. We disagree. The YMax Tariff does not define an “End User” as anyone who merely “uses” *any* YMax service. Rather, the Tariff language limits “End Users” to those entities that use YMax’s service “under the terms and conditions of this tariff.” As shown above, the Calling/Calling Parties take service under the separate TOS Agreement — not under the terms and conditions of the Tariff. Nor are we persuaded by YMax’s attempt to distinguish *Farmers* on several other grounds, none of which undermines the well-established rule, affirmed in *Farmers*, that a common carrier may only assess charges for services specifically described in its tariff. See Answer Legal Analysis at 47-49.

<sup>88</sup> See, e.g., Pavol Dep. at 118; Borislow Dep. at 205-08; YMax Initial Brief at 8-9.

<sup>89</sup> See, e.g., YMax Initial Brief at 2, 7-8; YMax Reply Brief at 9, 12, 19-20.

<sup>90</sup> See, e.g., YMax Initial Brief at 2-4; YMax Reply Brief at 7 (“Thus, End Users includes both YMax users and AT&T users because each use the switched access services that YMax provides under the Tariff in order to have (continued...)”).

Switched Access Service under the Tariff, YMax urges, has no bearing on whether the Called/Calling Parties (and AT&T customers) “use” the Service.<sup>91</sup>

27. The Tariff does not define “use.” Consequently, we must construe the term “use” in accordance with its common meaning in the industry.<sup>92</sup> Applying such a common meaning, we find that no person or entity other than an IXC can “use” YMax’s Switched Access Service, as described in Tariff section 3. It is widely understood that switched access is a wholesale service provided to IXCs, paid for by them, and used by them as an input to the end-to-end long distance service they provide to their 1+ and 8YY customers. Thus, only IXCs – not Called/Calling Parties – “use” “Switched Access Service.”

28. Several provisions of the Tariff confirm, and even compel, this conclusion. The definition of “Switched Access Service” states that the Service is “available to Customers [*i.e.*, IXCs] for their use in furnishing their services to End Users.”<sup>93</sup> This language establishes that IXCs, not the Called/Calling Parties, are the “users” of Switched Access Services under the Tariff. Moreover, the Tariff also states that Switched Access “provides line-side or trunk-side access to End Office switches for the Customer’s [*i.e.*, IXC’s] use in originating and terminating communications.”<sup>94</sup> Indeed, even the language of the End User definition underscores that it is the “interexchange carrier who ... utilizes the ... Switched ... Access services described in this tariff” — not the Called/Calling Parties.<sup>95</sup> And even if Called/Calling Parties could be said, in some generic sense, to “use” switched access service when calls are placed by or to them, they do not do so under the “terms and conditions of the tariff,” because there are no tariff provisions applicable to an End User’s “use” of carrier access services.

29. YMax’s argument that the Called/Calling Parties “use” switched access services under the terms and conditions of section 3 of the Tariff is also contradicted by other statements YMax has made in the record. YMax’s expert, for example, testified that switched access is a service that “allows IXCs to use YMax’s common terminating, switching and trunking facilities.”<sup>96</sup> Similarly, YMax has asserted that, when it originates 8YY toll-free calling, “this is a service to interexchange carriers, not as a service provided to its end users.”<sup>97</sup>

30. YMax’s second belated argument fares no better. Relying on the second sentence of the End User definition in the Tariff, YMax argues that, in addition to the Called/Calling Parties, the term “End Users” includes the AT&T long distance customers that make calls to Called Parties, or receive

(Continued from previous page) \_\_\_\_\_  
telephone calls between two people.”).

<sup>91</sup> See, e.g., YMax Initial Brief at 3-4; YMax Reply Brief at 8-9. YMax did not make this argument in its Answer.

<sup>92</sup> See, e.g., *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 181 Ct. Cl. 315, 322 (Ct. Cl. 1967); *BellSouth Telecomms., Inc. v. Kerrigan*, 55 F. Supp.2d 1314, 1324 (N.D. Fla. 1999); *Quaker State Oil Refining Corp. v. United States*, 465 F. Supp. 75, 79 (W.D. Pa. 1979); *United Artists Payphone Corp. v. New York Tel. Co., and AT&T, Co.*, 8 FCC Rcd 5563, 5565, ¶ 9 (1993). Courts have recognized that the Commission has special expertise in reviewing and interpreting tariffs. See, e.g., *Allnet Commc’ns Serv. Inc. v. National Exchange Carrier Assoc.*, 965 F.2d 1118, 1120 (D.C. Cir. 1992); *Halprin, Temple, Goodman & Sugrue v. MCI*, Order on Reconsideration, 14 FCC Rcd 21092, 21100, ¶ 19 (1999).

<sup>93</sup> Tariff § 3.1.1, Original Page No. 45 (emphases added).

<sup>94</sup> Tariff § 3.2.4, Original Page No. 46 (emphasis added).

<sup>95</sup> Tariff § 1, Original Page No. 10 (emphasis added).

<sup>96</sup> Calabro Decl. at 4-5, ¶ 10 (emphasis added). Mr. Calabro further testified that “[w]hen AT&T delivered calls to YMax for completion to YMax’s end users, AT&T indeed made use of YMax’s common terminating, switching and trunking facilities and it was for use of these facilities that AT&T was assessed switched access charges by YMax.” *Id.* (emphasis added).

<sup>97</sup> Supp. Answer at 3.

8YY calls from Calling Parties.<sup>98</sup> This argument fails for at least two reasons.

31. First, it is inconsistent with the Tariff language. The second sentence of the End User definition states that “[i]n most contexts, the End User is the customer of an interexchange carrier who in turn utilizes [YMax’s] Switched or Dedicated Access services described in this tariff to provide the End User with access to the [IXC’s] communication and switching systems.”<sup>99</sup> This sentence describes the typical situation where a LEC’s local customer connects to an IXC’s network via presubscription, or by dialing an access code, and thereby obtains the originating access necessary to make a long distance call. AT&T’s long distance customers do not satisfy the second sentence of the End User definition because, although each is the “customer of an interexchange carrier” — *i.e.*, AT&T — AT&T does not “utilize” YMax’s access services to provide these customers with access to AT&T’s network.<sup>100</sup> Instead, such access is provided by the AT&T customer’s local service provider, which, as discussed above, is never YMax.<sup>101</sup>

32. Second, even if YMax could show that AT&T long distance customers satisfy the second sentence of the End User definition, this would not advance YMax’s position because it cannot show that such AT&T customers satisfy the first sentence of the End User definition.<sup>102</sup> That is, YMax cannot show that AT&T long distance customers “use” any YMax service “under the terms and conditions” of the Tariff. As shown above, they do not use End User Access services under section 5 because YMax provides these services to no one, and they do not use the Switched Access Services under section 3 because these wholesale services are used only by IXCs.<sup>103</sup>

33. Finally, even if YMax’s arguments regarding the construction of “End User” in the Tariff were plausible — and they are not — YMax’s arguments would, at best, show only that the meaning of

<sup>98</sup> See, e.g., YMax Initial Brief at 2-4; YMax Reply Brief at 7. YMax did not make this argument in its Answer. YMax Initial Brief at ii, 3-4. In its Answer and supporting materials, YMax characterized only Called/Calling Parties as “end users,” and did not refer to AT&T customers that way. See, e.g., Answer at 26, ¶ 85 (“YMax end users obtain access to the public switched telephone network from YMax pursuant to the terms of the Tariff”); Calabro Decl. at 4, ¶ 9 (“At issue in this complaint proceeding are two specific types of calls: the first being 1+ long distance calls placed by an AT&T long distance customer to a YMax end user; and the second being 1+8YY toll free calls placed by YMax end users to AT&T served toll free customers.”); *Id.* at 4-5, ¶ 10 (“Switched access allows the IXC to receive interexchange calls that are originated by YMax’s end users and allows the IXC to terminate calls to YMax’s end users.”).

<sup>99</sup> Tariff § 1, Original Page No. 10.

<sup>100</sup> See, e.g., Borislow Dep. at 62 ([Redacted confidential information regarding YMax’s network configuration]). Likewise, on 8YY calls, the AT&T toll-free customer does not obtain its connection to AT&T’s network from YMax.

<sup>101</sup> See note 11 *supra*. Notably, the Called/Calling Parties cannot satisfy the second sentence of the End User definition, either. Because they do not obtain End User Access under the Tariff, Called/Calling Parties cannot become “customers of an IXC,” either by presubscription, or by dialing an access code, as described in section 5.1.2 of YMax’s Tariff.

<sup>102</sup> Tariff § 1, Original Page No. 10 (defining “End User,” in relevant part, as “[a]ny person, firm, partnership, corporation or other entity that uses the service of the Company under the terms and conditions of this tariff”).

<sup>103</sup> We note that, under YMax’s interpretation, it would always have an End User (and thus an “End User Premises”) on both ends of any long-distance call, and thus the Tariff would entitle it to charge *both* originating and terminating access simultaneously on every call. Nor would YMax’s interpretation be limited to the endpoints of a call: every entity in the chain of a call, including the originating access provider, the tandem providers, and the ISPs directly connected to the final destination of the call, would also be “End Users,” because all of those entities “use” YMax’s service in conjunction with their own services to complete a call. This provides further confirmation that YMax’s proffered interpretation of its Tariff makes no sense.

the term, “End User” is ambiguous. It is well-established, however, that any ambiguity in a tariff is construed against the party who filed the tariff, in this case YMax.<sup>104</sup>

34. To summarize, YMax may assess Switched Access Service charges on AT&T pursuant to its Tariff only if YMax provided Switched Access Services to AT&T as described in the Tariff. YMax’s Tariff describes Switched Access Service as a service involving originating and terminating calls to an “End User.” An “End User,” in turn, is defined as a person or entity who “uses” a YMax service “under the terms and conditions of [its] tariff.” No such End User exists here because: (i) no Called/Calling Party uses YMax’s End User Access service under section 5 of the Tariff; and (ii) no Called/Calling Party uses Switched Access Service under section 3 of the Tariff, because under the terms of the Tariff, Switched Access Service is available only to IXC’s, not to any Called/Calling Party. Thus, YMax did not provide Switched Access Service to AT&T within the meaning of the Tariff because YMax did not originate calls from, or terminate calls to, an End User. YMax’s charges to AT&T for such Service therefore violate sections 203(c) and 201(b) of the Act.<sup>105</sup> Accordingly, we grant Counts III and IV of AT&T’s Complaint.<sup>106</sup>

## **2. YMax Does Not Provide “End Office Switching” Or “Transport” Services Within The Meaning Of Its Tariff.**

35. AT&T raises additional, independent grounds for challenging YMax’s Switched Access charges, apart from the absence of “End Users” under the Tariff. Specifically, AT&T argues that YMax’s charges for the End Office Switching rate element and certain Switched Transport rate elements are not authorized by YMax’s Tariff. We agree, for the reasons set forth below.

### **a. End Office Switching**

36. In determining whether YMax has lawfully billed AT&T for End Office Switching under its Tariff, we begin, as before, with an examination of the Tariff language. As discussed below, we find that YMax does not provide End Office Switching under the Tariff because it does not operate any “End Office Switches” where “station loops” that connect to End User premises are “terminated.”

37. The Tariff describes the “End Office Switching” rate category as “establish[ing] the charges related to,” among other things, “the terminations in the end office of end user lines.”<sup>107</sup> The

---

<sup>104</sup> See, e.g., *Associated Press v. FCC*, 452 F.2d 1290, 1299 (D.C. Cir. 1971); *Farmers III*, 24 FCC Rcd at 14810, n.83; *American Satellite Corp. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 57 FCC2d 1165, 1167, ¶ 6 (1976). Certain representations made by YMax to the Public Service Commission of West Virginia further undermine YMax’s defense of its originating switched access charges. In a proceeding to address YMax’s non-payment of E911 fees, YMax averred that it does not provide any service enabling magicJack purchasers to originate calls, and that MagicJack, L.P. does not provide any service enabling magicJack purchasers to terminate calls. See, e.g., AT&T Initial Brief, Ex. 30 at 6 (transcript of testimony of Mark Pavol before the Public Service Commission of West Virginia asserting that “[n]either magicJack nor YMax offers a single service that permits users generally to receive calls that originate on the PSTN and to terminate calls to the PSTN”). We find it difficult, if not impossible, to square YMax’s representation to the Public Service Commission of West Virginia that it provides no ability to originate calls with YMax’s assertion here that it provides originating access service.

<sup>105</sup> Specifically, we find that YMax’s violation of section 203(c) of the Act constitutes an unreasonable practice that violates section 201(b) of the Act. 47 U.S.C. §§ 203(c), 201(b).

<sup>106</sup> We note that neither party has mentioned the definition of “end user” in section 69.2(m) of the Commission’s rules. 47 C.F.R. § 69.2(m). Thus, this Order need not, and does not, address the question of whether section 69.2(m) has any bearing on the claims and defenses presented.

<sup>107</sup> Tariff § 3.3.2, Original Page No. 47. Section 3.3.2 provides in full: “The End Office Switching rate category (continued...)”

Tariff defines an “End Office Switch” as a place “where Customer or End User station loops are terminated for purposes of interconnection to other station loops, trunks, or access facilities.”<sup>108</sup> An “End Office” is defined as “[t]he Central Office from which the End User’s Premises would normally obtain local exchange service.”<sup>109</sup> A “Central Office,” in turn, is defined as a premises where “End User station loops are terminated for purposes of interconnection to other station loops, trunks or access facilities.”<sup>110</sup>

38. Under these Tariff provisions, construed together, a facility is not an End Office Switch unless “End User station loops are terminated” at that facility,<sup>111</sup> and End Office Switching does not occur without “terminations in the end office of end user lines.”<sup>112</sup> The Tariff does not define “termination” of “station loops” and “end user lines,” however. Thus, as previously stated, we must construe these terms according to their common meaning in the industry.<sup>113</sup>

39. The terms “termination” of “End User station loops” and “end user lines” have well established meanings within the telecommunications industry, in Commission orders, and in court decisions. The terms generally refer to a physical transmission facility that provides a point-to-point connection between an individual home or business and a telephone company office.<sup>114</sup> For example, in

(Continued from previous page) \_\_\_\_\_

establishes the charges related to the use of end office switching equipment, the terminations in the end office of end user lines, the terminations of calls at Company Intercept Operators or recordings, the Signaling Transfer Point (STP) costs, and the SS7 signaling function has between the end office and the STP.” *Id.*

<sup>108</sup> The full definition of “End Office Switch” is: “A Company switching system where Customer or End User station loops are terminated for purposes of interconnection to other station loops, trunks or access facilities. In most contexts, the End User is connected via station loops or trunks to an End Office Switch.” Tariff § 1, Original Page No. 10. This definition appears to be based on traditional ILEC tariffs describing traditional networks. It is, for example, very similar to the definition of “End Office” in the National Exchange Carrier Association (“NECA”) tariff. *See* AT&T Initial Brief at Ex. 36, NECA Tariff F.C.C. No. 5, § 2.6, 1st Rev. Page 2-68 (defining “End Office” in part as “a local Telephone Company switching system where Telephone Exchange Service customer station loops are terminated for purposes of interconnection to each other.”); *see also* AT&T Reply Brief at 13.

<sup>109</sup> Tariff § 1, Original Page No. 10. The full definition of “End Office” is: “The Central Office from which the End User’s Premises would normally obtain local exchange service and dial tone from the Company or other local exchange carrier.” *Id.*

<sup>110</sup> Tariff § 1, Original Page No. 8. The full definition of “Central Office” is: “The premises of the Company or another local exchange carrier containing one or more switches where Customer or End User station loops are terminated for purposes of interconnection to other station loops, trunks or access facilities.” *Id.*

<sup>111</sup> *See* Tariff § 1, Original Page No. 10.

<sup>112</sup> *See* Tariff § 3.3.2, Original Page No. 47.

<sup>113</sup> *See* authorities cited at note 92 *supra*.

<sup>114</sup> *See, e.g., Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 489-90 (2002) (stating that the “local loop,” which runs from “local switches” and terminates at “terminal points in individual houses and businesses” is “traditionally ... made of copper wire, though fiber-optic cable is also used”); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17111-12, ¶¶ 214-16 (2003) (subsequent history omitted) (describing a “local loop” as “copper cable pairs” or “fiber-optic cable” that “connect[s] customers directly to a central office” and establish “one direct connection or transmission path to each customer premises”); *see also id.* at 17102, ¶ 197 n.620 (stating “the local loop network element is a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises”); *AT&T Corp., MCI Telecommunications Corp., Bell Atlantic Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 559, ¶ 4 (1998), *recon. denied*, 15 FCC Rcd 7467 (2000) (“A common line, sometimes called a ‘local loop,’ connects an end user’s home or business to a LEC central office. A characteristic feature of a common line is that it enables the end user to complete local as (continued...)”)

the 1996 *Local Competition Order*, the Commission defined a local loop as “a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises.”<sup>115</sup> Moreover, the Commission and others in the industry commonly refer to loops as “last mile facilities.”<sup>116</sup>

40. The purpose and relative amount of end office switching charges further confirm that “termination” of “End User station loops” and “end user lines” refers to a physical transmission facility that provides a point-to-point connection between a customer premises and a telephone company office. End office switching charges were and are authorized by law to allow local exchange carriers to recover the substantial investment required to construct the tangible connections between themselves and their customers throughout their service territory.<sup>117</sup> As a result, end office switching rates are among the highest recurring intercarrier compensation charges. In fact, as is typically true of LECs, YMax’s own End Office Switching rates greatly exceed all other recurring rates in its Tariff.<sup>118</sup>

41. Applying those meanings here, the record plainly shows that YMax provides no “termination” of “End User station loops” and “end user lines” under its Tariff. In particular, as YMax acknowledges, YMax does not provide any physical transmission facilities that establish point-to-point connections between the premises of Called/Calling Parties and YMax equipment.<sup>119</sup> Instead, multiple parties other than YMax — starting with the Called/Calling Parties’ ISPs and ending with [Redacted confidential information regarding YMax’s network configuration] or AT&T, with a number of unknown ISPs in between — must provide physical transmission facilities to complete a link between the premises of Called/Calling Parties and YMax. Consequently, the Tariff does not authorize YMax to assess End Office Switching charges on AT&T.<sup>120</sup>

(Continued from previous page) \_\_\_\_\_

well as interstate and foreign calls.”) (footnotes omitted); Newton’s *Telecom Dictionary* (16th ed.) at 507 (defining “loop” as “the pair of wires that winds its way from the central office to the telephone set or system at the customer’s office, home or factory, *i.e.*, ‘premises’ in telephones”).

<sup>115</sup> See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 15691, ¶ 380 (1996) (also noting that a “local loop” “includes, for example, two-wire and four-wire analog voice-grade loops and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals”) (subsequent history omitted); *Ameritech Operating Companies*, 11 FCC Rcd 14028, 14031-32, ¶ 6 (1996) (“‘Common line’ is the term in the Part 69 Rules that refers to the *facilities* that connect subscriber premises and LEC end office switches, also known as ‘local loops’ or ‘subscriber lines.’”) (emphasis added).

<sup>116</sup> See, e.g., *Verizon Commc’ns, Inc.*, 535 U.S. at 490 (characterizing a “local loop” as the “‘last mile’ of feeder wire”); *Covad Commc’ns v. FCC*, 450 F.3d 528, 532 (D.C. Cir. 2006) (describing a “local loop” as “wires that run from switches over the ‘last mile’ to consumers’ telephones”); *AT&T, Inc. & BellSouth Corp.*, 22 FCC Rcd 5662, 5677, ¶ 28 (2007) (stating that a “local loop” is a “‘last mile’ connection” that “runs from the transport facility to the end-user customer”).

<sup>117</sup> See, e.g., *Owens Aff.* at 10 (“Switched access charges were established for the purpose of ensuring that interexchange carriers contribute to the recovery of the costs of local exchange carrier facilities used in the origination and termination of interexchange calls from and to end users.”).

<sup>118</sup> See Tariff § 4.

<sup>119</sup> See, e.g., Pavol Dep. at 113; YMax Initial Brief at 11-12. [Redacted confidential information regarding YMax’s network configuration]. See YMax Initial Brief at 8. See also Borislow Dep. at 91-93.

<sup>120</sup> According to YMax, the fact that Called/Calling Parties procure their own physical, last mile connection from a third-party ISP is irrelevant because YMax has not sought to charge AT&T a carrier common line (“CCL”) charge for that last mile connection. See, e.g., Answer Legal Analysis at 38. We disagree. Whether YMax has assessed a CCL charge on AT&T has no bearing on the meaning of End Office Switching under the Tariff.

42. Recognizing that the terms of its Tariff, if construed according to their standard meaning, would not authorize End Office Switching charges, YMax urges us to apply novel definitions. YMax argues that “virtual” facilities, as well as physical facilities, can qualify as “terminations” of “End User station loops” and “end user lines” under the Tariff. Specifically, YMax asserts that Called/Calling Parties establish a “virtual connection” to the equipment that YMax has collocated at AT&T and [Redacted confidential information regarding YMax’s network configuration] offices through the “virtual channel” that is created “by the exchange of streams of IP packets transmitted over the Internet.”<sup>121</sup> According to YMax, this “virtual channel” or “virtual loop” serves the same function as a legacy fixed loop, in that it provides a direct connection between a Called/Calling Party’s premises and the Public Switched Telephone Network (“PSTN”).<sup>122</sup>

43. We reject YMax’s argument that its purported “virtual channels” qualify as “terminations” of “station loops” and “end user lines” under the Tariff. First, nothing in the language of the Tariff authorizes charges for “virtual” services or facilities.<sup>123</sup> The commonly understood meanings of the terms “termination,” “station loop” and “end user line” do not include the type of non-physical, “virtual connection”<sup>124</sup> described by YMax. Indeed, YMax’s own CEO testified that he did not know what a “virtual connection” is, even though YMax’s expert used that term in describing YMax’s relationship with Calling Parties.<sup>125</sup>

44. In essence, YMax contends that the entire worldwide Internet – from a Called/Calling Party’s premises through the network of the Called/Calling Party’s ISP, through the networks of other ISPs, up to and including the connection YMax purchases from its own ISPs (*i.e.*, AT&T or [Redacted confidential information regarding YMax’s network configuration]), comprises a “virtual” loop that terminates at the equipment it collocates at AT&T or [Redacted confidential information regarding YMax’s network configuration] offices.<sup>126</sup> Under this interpretation, the “virtual loops” YMax claims to provide would be of indeterminate length and configuration. They could extend thousands of miles via numerous intermediaries throughout the country (or even the world), or only a few miles via a couple of intermediaries in contiguous states.<sup>127</sup> This cannot be what the Tariff means by “termination” of “End

<sup>121</sup> Answer Legal Analysis at 42; *see also* Answer at 21-22, ¶ 66; YMax Initial Brief at 13; YMax Reply Brief at 12-14; 25. [Redacted confidential information regarding YMax’s network configuration]. *See, e.g.*, YMax Initial Brief at 20 n.95. AT&T has presented substantial evidence that, although YMax’s equipment may have traditional switching capabilities, these capabilities are not actually used with respect to the traffic at issue. *See, e.g.*, Reply Legal Analysis at 39. We need not (and do not) decide here whether any of YMax’s collocated equipment qualifies as a switch under the Tariff.

<sup>122</sup> *See, e.g.*, Pavol Decl. at 11, ¶ 36. *See also id.* at 10, ¶ 32; Answer Legal Analysis at 42; YMax Initial Brief at 13; YMax Reply Brief at 11-12, 14, 21.

<sup>123</sup> YMax undermines its position by citing to a provision in another carrier’s Statement of Generally Available Terms and Conditions of Interconnection (“SGAT”) that explicitly refers to “Virtual Transport” and “virtual Loop transport.” *See* YMax Reply Brief at 12 n.37 and Ex. 26. The cited provision illustrates that when a carrier intends to describe a “virtual” service or facility, it does so in express terms.

<sup>124</sup> *See* Pavol Decl. at 7, ¶ 26; 10, ¶ 32.

<sup>125</sup> Borislow Dep. at 172-74. *See* Pavol Decl. at 7, ¶ 26.

<sup>126</sup> *See, e.g.*, Pavol Dep. at 72-73 ([Redacted confidential information regarding YMax’s network configuration]).

<sup>127</sup> *See, e.g.*, Borislow Dep. at 88 (“A. ... personally I could be in France and be on AOL, and it would go through a proxy in – in – in the United States ... Q. But if someone wanted to, they could go to Best Buy or Radio Shack, buy a MagicJack, and then take it to France and use it, couldn’t they? A. Yes. Q. Okay. And they could use a U.S. NPA-NXX when they made calls from France, couldn’t they? A. That’s correct.”); *Id.* at 90-91 ([Redacted confidential information regarding YMax’s network configuration]); *see also* Calabro Dep. at 56 (“Q. . . .the called party could be located in, say, Australia? A. Why not? ... I don’t know that they could get it on the moon, but if they were, we (continued...)”).

User station loops” and “end user lines.” If this exchange of packets over the Internet is a “virtual loop,” then so too is the entire public switched telephone network – and the term “loop” has lost all meaning.

45. For all of these reasons, we find that YMax’s construction of the terms “termination” of “station loops” and “end user lines” is contrary to the common meaning of these terms in the telecommunications industry. Further, even if YMax’s construction of these terms were plausible — and it is not — it would, at best, merely show that their meaning is ambiguous and, as noted above, we would be bound to resolve the ambiguities against YMax, the drafter.<sup>128</sup> Accordingly, we conclude that the Tariff does not authorize YMax to assess End Office Switching charges for the calls at issue.

#### **b. Switched Transport**

46. For similar reasons, we find that YMax’s Switched Transport charges to AT&T also violate the Tariff. The Tariff provides that these charges apply when an IXC’s traffic “to and from an End Office” is routed “via an Access Tandem.”<sup>129</sup> Thus, YMax does not provide Switched Transport unless it operates an End Office.

47. As described above, the Tariff defines an “End Office” as the “Central Office from which the End User’s Premises would normally obtain local exchange service,”<sup>130</sup> and a “Central Office” as the premises of a local exchange carrier “where Customer or End User station loops are terminated.”<sup>131</sup> As shown above, YMax does not operate any End Offices under the Tariff because YMax operates no premises where “End User station loops” are terminated.<sup>132</sup> YMax’s Switched Transport charges therefore are not authorized by the Tariff.

#### **B. YMax’s Affirmative Defenses Lack Merit**

48. YMax asserts that we should dismiss the Complaint without prejudice to sanction AT&T for allegedly violating section 207 of the Act.<sup>133</sup> In YMax’s view, AT&T violated section 207 by first filing its claims here and then later filing substantially similar counterclaims in federal court in response to YMax’s action to collect unpaid charges.<sup>134</sup> YMax argues that, although the claims were filed here first

(Continued from previous page) —————  
could probably do that, too.”).

<sup>128</sup> See note 104 *supra*.

<sup>129</sup> Tariff § 3.2.5(A), Original Page No. 46; *id.* at § 3.3.1, Original Page No. 47; Answer Legal Analysis at 43.

<sup>130</sup> Tariff § 1, Original Page No. 10.

<sup>131</sup> Tariff § 1, Original Page No. 8.

<sup>132</sup> See *Part III.A.2.a supra*.

<sup>133</sup> 47 U.S.C § 207 (“Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission ... or may bring suit ... in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.”). See Answer at 41; Answer Legal Analysis at 7-9.

<sup>134</sup> See *YMAX Communications Corp. v. AT&T Corp., and BellSouth Long Distance, Inc.*, Complaint, Case No. 4:10-cv-04115-DMR (N.D. Cal. filed Sep. 14, 2010); *YMAX Communications Corp. v. AT&T Corp., and BellSouth Long Distance, Inc.*, Answer and Counterclaims of AT&T Corp. and BellSouth Long Distance, Inc., Case No. 4:10-cv-04115-DMR (N.D. Cal. filed Oct. 26, 2010). YMax also asserts that the Complaint should be dismissed because AT&T has not paid YMax’s bills. Answer at 41; Answer Legal Analysis at 4-7. Even assuming, *arguendo*, that such an “unclean hands” defense could apply in this context, YMax’s assertion lacks merit. YMax’s Tariff expressly contemplates that a customer may withhold payment of disputed charges while YMax pursues resolution, which, as discussed above, YMax has done by filing a collection action in federal court. See Tariff § 2.10.4, Second Revised Page No. 32. Thus, YMax has not experienced any inequitable conduct warranting dismissal of the (continued...)

and thus are properly within our jurisdiction, we should nevertheless bar AT&T from proceeding here until AT&T withdraws its counterclaims in federal court. We disagree with YMax. First, from the start, AT&T openly characterized the filing of its court counterclaims as a cautious, defensive measure designed simply to protect itself in the event that its Complaint here did not proceed, and it asserted that the Commission was the proper forum in which to resolve the issues raised in the counterclaims.<sup>135</sup> Moreover, at AT&T's request, the federal court stayed AT&T's counterclaims pending the resolution of AT&T's Complaint here.<sup>136</sup> As a result, even assuming, *arguendo*, that AT&T's filing of court counterclaims violated section 207 (about which we express no view), AT&T's filing provides no equitable basis for dismissal of the Complaint, over which YMax concedes we have jurisdiction.<sup>137</sup>

49. YMax also argues that we should dismiss the Complaint because it violates section 1.721(a)(5) of the Commission's rules,<sup>138</sup> by allegedly "fail[ing] to state, separately and plainly, the material facts that AT&T alleges constitute violations of the Communications Act."<sup>139</sup> We disagree. We found the Complaint's factual allegations to be quite clear, and the vigor and comprehensiveness of YMax's Answer show that YMax was able to fully identify and comprehend them.

50. YMax further asserts that we should dismiss the Complaint, because AT&T waived its right to dispute YMax's allegedly tariffed charges by purportedly failing "to submit all documentation reasonably requested by YMax to document its claims and disputes under the Tariff."<sup>140</sup> YMax bears the burden of proof regarding its affirmative defenses.<sup>141</sup> YMax's evidence is scant and cursory,<sup>142</sup> and is outweighed by AT&T's evidence that AT&T did adequately dispute the charges at issue.<sup>143</sup> Moreover, as AT&T argues, most of any relevant information that AT&T did not provide (such as YMax's network configurations) was within the sole possession of YMax.<sup>144</sup> Thus, we find that YMax has failed to satisfy its burden of demonstrating that AT&T waived its right to dispute the charges assessed by YMax.

51. With regard to YMax's remaining affirmative defenses, they relate either to severed counts<sup>145</sup> or to damages.<sup>146</sup> Thus, we need not, and do not, address them in this Order.

(Continued from previous page) \_\_\_\_\_  
Complaint.

<sup>135</sup> See, e.g., Reply at 8 n.5; Motion to Lodge Court Order and Hearing Transcript, File No. EB-10-MD-005, Ex. B (filed Feb. 3, 2011) ("Motion to Lodge Court Order and Hearing Transcript") (attaching a transcript of a court hearing regarding, *inter alia*, AT&T's counterclaims). AT&T's unopposed Motion to Lodge Court Order and Hearing Transcript is granted. See generally, Fed. R. Civ. P. 13(a) (describing compulsory counterclaims).

<sup>136</sup> Motion to Lodge Court Order and Hearing Transcript, Ex. A (attaching *YMAX Communications Corp. v. AT&T Corp., and BellSouth Long Distance, Inc.*, Case No. 4:10-cv-04115-DMR, Order Denying Without Prejudice YMax Communication Corp.'s Motions to Dismiss AT&T's Counterclaims, to Strike AT&T's Affirmative Defenses, and for Partial Summary Judgment and Granting AT&T's Motion to Stay (N.D. Cal. dated Jan. 14, 2011) (granting AT&T's motion to stay the court case pending the Commission's resolution of AT&T's formal complaint).

<sup>137</sup> Answer Legal Analysis at 9.

<sup>138</sup> 47 C.F.R. § 1.721(a)(5).

<sup>139</sup> Answer at 41.

<sup>140</sup> Answer at 42.

<sup>141</sup> See, e.g., *APCC Services, Inc. v. NetworkIP, LLC*, Memorandum Opinion and Order, 22 FCC Rcd 4286, 4311, ¶ 60 (2007) (subsequent history omitted).

<sup>142</sup> See, e.g., Answer at 42 n.100.

<sup>143</sup> Burgess & Britt Decl. at 3-4, ¶¶ 6-10; Burgess & Britt Reply Decl. at 7-9, ¶¶ 17-22.

<sup>144</sup> See, e.g., Reply Legal Analysis at 59, 71 n.231.

<sup>145</sup> See Answer at 42 (YMax Affirmative Defense ¶ 4).

#### IV. CONCLUSION

52. For the reasons described above, we hold that YMax has violated sections 203(c) and 201(b) regarding all of the switched access charges in dispute. In particular, YMax's Tariff does not authorize any of the switched access charges in dispute, because the Called/Calling Parties are not "End Users" as defined by the Tariff. In addition, the Tariff does not authorize either of the two categories of switched access charges in dispute — End Office Switching and Switched Transport — because YMax provides no "termination" of "End User station loops" and "end user lines," as its Tariff requires. Accordingly, we grant Counts III and IV of AT&T's Complaint.

53. Finally, our finding that YMax's charges to AT&T are unlawful under sections 203 and 201(b) of the Act will afford AT&T all the relief to which it is entitled. We therefore need not, and do not, reach the claims stated in the remaining counts of the Complaint.<sup>147</sup> Accordingly, we dismiss these counts without prejudice.

#### V. ORDERING CLAUSES

54. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, and 208, and sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, that Counts III and IV of the Complaint are hereby GRANTED as to liability; and

55. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, that Counts I, II, V, VI, XI, XII, and XIII of the Complaint are hereby DISMISSED, without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

(Continued from previous page) \_\_\_\_\_

<sup>146</sup> See Answer at 42 (YMax Affirmative Defense ¶ 5).

<sup>147</sup> AT&T stated that a decision that YMax has violated the terms of its Tariff would obviate the need to decide AT&T's other claims against YMax. See, e.g., Reply Legal Analysis at 9 (asserting that "the Complaint can be decided on the ground that YMAX has violated its tariffs (and hence sections 203 and 201(b) of the Communications Act) by assessing charges that are not authorized by its tariff" and that the "issues under the Commission's CLEC access charge orders and rules, the Commission's Computer Inquiry rules, and section 201(b) of the Communications Act are relevant only *if* YMax's tariffs actually authorized the access charges that YMax has assessed") (emphasis in original).