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Defendant Comtel Telcom Assets LP, d/b/a Excel Telecommunications (“Excel”), hereby moves this Court to refer the claims in Excel’s Third Counterclaims that the charges and practices of Plaintiffs Hypercube, LLC and Hypercube Telecom, LLC’s (collectively, “Hypercube”) are unjust and unreasonable in violation of 47 U.S.C. § 201(b) to the Federal Communications Commission (“FCC”) on the basis of primary jurisdiction, and states as follows:

I.
INTRODUCTION

In January, 2009, in opposing Hypercube’s motion to dismiss the federal-law components of Excel’s Third Counterclaim, Excel requested that the Court refer its Third Counterclaim to the FCC under the doctrine of primary jurisdiction.¹ The Court has not yet ruled on Excel’s request. Hypercube has asserted that Excel’s request for a referral should have been made as an “affirmative motion” rather than as part of Excel’s response in opposition to Hypercube’s motion.² In order to eliminate the argument over whether a formal paper entitled “motion” is required, Excel hereby formally moves for a referral order.

II.
BACKGROUND

The § 201(b) claims that Excel requests be referred to the FCC are the “federal-law components” of Excel’s Third Counterclaim. The remaining portions of the Third Counterclaim raise state law issues regarding intrastate calls that neither party has addressed in any motion pending before the Court.

¹ See Excel’s Opposition to Hypercube’s Motion to Dismiss at 22-25 (ECF Doc. 31).

² Hypercube’s Response to Notice of Related Case at 3, n. 1 (ECF Doc. 94)

Hypercube must prove that it “adds value” to the communication network and that its rates do not exceed safe-harbor (ILEC) rates³ in order to force Excel to accept Hypercube’s services offered under the KMC Telecom Operating Companies tariff (“Tariff”).⁴ Even if Hypercube meets that burden, however, the Tariff and Hypercube’s practices⁵ are “unjust and unreasonable” and therefore “unlawful” in violation of § 201(b), and so are unenforceable.

Because deciding whether particular practices and charges are “reasonable” often calls for exercising regulatory judgment and discretion, U.S. District Courts commonly refer § 201(b) reasonableness claims to the FCC under the doctrine of primary jurisdiction. To the extent the §201(b) reasonableness issues need to be decided, Excel respectfully request that the Court exercise its discretion and refer the such issues to the FCC.

III. **ARGUMENTS AND AUTHORITIES**

A. Excel’s Third Counterclaim.

Excel’s Third Counterclaim seeks a declaration that the following specific rates/practices of Hypercube are unjust and unreasonable in violation of 47 U.S.C. § 201(b):

- (a) Hypercube’s practice of demanding that IXCs block calls;
- (b) Hypercube’s payment of commissions to wireless carriers;
- (c) Hypercube’s scheme of inserting itself unnecessarily in the calling path of wireless-originated 1-8XX calls; and

³ Excel has now completed and served upon Hypercube traffic studies for seven months of traffic comparing Hypercube rates to ILEC rates. Excel believes Hypercube will be unable to show that its rates are equal to or lower than ILEC rates. Excel further believes that Hypercube will be unable to show that its “service” adds value to the telecommunications network.

⁴ September 25, 2009 Memorandum Order and Opinion at 14 (ECF Doc. 96).

⁵ See, e.g., KMC Telecom Operating Companies Tariff, Tariff Sheet Nos. 16 and 25 (tariff blocking provisions) (attached to Hypercube’s Motion to Dismiss counterclaims, ECF Doc. 21).

(d) the rates Hypercube charges on interstate calls.⁶

B. The Concurrent Jurisdiction of the U.S. District Courts and the FCC.

Under 47 U.S.C. §§ 206, 207 and 208, the U.S. District Courts and the FCC have concurrent jurisdiction over claims that a common carrier, such as Hypercube, violated “any” provision of the Communications Act, including § 201(b)’s prohibition against unjust and unreasonable practices:

In case any common carrier shall do, or cause or permit to be done, *any act, matter, or thing in this chapter prohibited or declared to be unlawful*, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206 (emphasis added).

Any 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 [in Section 208 of the Act], 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. § 207.⁷ This concurrent jurisdiction is sweeping. The FCC has held that courts as well as the FCC may set aside tariff provisions they find to be unreasonable, and so in violation of § 201(b):

Under the well-established “filed-rate” doctrine ... effective tariff provisions are binding both upon the carrier and the customer until the Commission *or a court of competent jurisdiction* finds them to be unlawful. While the filed rate doctrine sets the tariffed rate as the “legal” rate; that rate is not necessarily the “lawful” rate; an actual finding by the agency *or a court of competent jurisdiction that the rate is*

⁶ See Excel’s Amended Answer & Counterclaims, ¶ 104.

⁷ The case law, both at the FCC and in the federal courts, unanimously holds that election-of-remedies restriction contained in § 207 (quoted above) does not prevent the FCC from accepting and processing a primary jurisdiction referral from a U.S. District Court. *Allnet Communication Service, Inc. v. National Exchange Carrier Assoc., Inc.*, 965 F.2d 1118, 1122 (D.C. Cir. 1992); *AT&T v. Beehive Tel. Co., Inc.*, 17 FCC.Rcd. 11641, ¶ 24 (2002). This rule avoids gutting the primary jurisdiction doctrine by preventing courts from using it to take advantage of the FCC’s expertise.

unreasonable “disentitle[s] the carrier to the collection of that rate.”

Communique Telecommunications, Inc., d/b/a Logically, Application for Review of Declaratory Ruling, 14 FCC. Rcd, 13635, ¶ 28 (1999) (emphasis added). A defendant sued on a telecommunications tariff in U.S. District Court may challenge the reasonableness of tariffed rates and practices. “A challenge to the unreasonableness of rates is a claim in its own right and, if asserted in response to a collection action in district court, should be raised by counterclaim.” *Cincinnati Bell Tel. Co. v. Allnet Communications Services, Inc.*, 17 F.3d 921, 923 (6th Cir. 1994).⁸

C. The Doctrine of Primary Jurisdiction.

Although a court must consider a counterclaim challenging the reasonableness of tariffed rates and practices, the common course of action is for the court to refer the reasonableness issue to the expert agency for actual decision. *Matter of Steve D. Thompson Trucking, Inc.*, 989 F.2d 1424, 1433-34 (5th Cir. 1993); *Advantel*, 105 F.Supp.2d, 476, 480-81 (E.D. Va. 2000) (referring to FCC a defendant’s counterclaim alleging that tariffed rates were unreasonable); *AT&T Corp. v. Business Telecom, Inc.*, 16 FCC.Rcd. 12312, ¶¶ 1, 6-9, 58 (2001)(deciding the issues referred in *Advantel* litigation, finding that the plaintiffs’ tariffed rates were indeed unjust and unreasonable, and establishing a lower just and reasonable rate to apply retrospectively).

The doctrine of primary jurisdiction “seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within the regulatory regime.” *Pharm. Research & Mfrs. v. Walsh*, 538 U.S. 644, 673 (2003). In *Access Telecommunications v. Southwestern Bell Telephone Co.*, 137 F.3d 605, 608 (8th Cir. 1998), the Eighth Circuit discussed the general principles of the doctrine of primary jurisdiction:

Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making. See *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988). The doctrine allows a district court to refer a matter to the appropriate administrative agency for a ruling in the first instance, even when the matter is initially cognizable by the district court. See *Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R. Co.*, 685 F. 2d 255, 259 (8th Cir. 1982). There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction. See *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956). Rather, in each case we consider whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created. See *United States v. McDonnell Douglas Corp.*, 751 F. 2d 220, 224 (8th Cir. 1984). We are always reluctant, however, to invoke the doctrine because added expenses and undue delay may result. See *id.*

One reason courts apply the doctrine of primary jurisdiction is to obtain the benefit of an agency's expertise and experience. The principle is firmly established that “in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.” *Far East Conference v. United States*, 342 U.S. 570, 574, 96 L. Ed. 576, 72 S. Ct. 492 (1952); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988). Another is to promote uniformity and consistency within the particular field of regulation. See *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976).

A number of courts consolidate these concepts into a four-factor primary jurisdiction test:

- (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
- (2) whether the question at issue is particularly within the agency's discretion;
- (3) whether there exists a substantial danger of inconsistent rulings; and
- (4) whether a prior application to the agency has been made. (citation omitted). A court is also required to “balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings.

⁸The “filed-tariff doctrine does not bar suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement” *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1085 (9th Cir. 2006).

Telstar Resource Group, Inc. v. MCI, Inc., 476 F.Supp.2d 261, 271-272 (S.D.N.Y. 2007).

Claims that a common carrier has engaged in unjust and unreasonable conduct in violation of § 201(b) are particularly strong candidates for primary jurisdiction referral because the “reasonableness” standard is inherently flexible and therefore Factor Two (agency discretion) and Factor Three (danger of inconsistent rulings) favor referral.

The district court was clearly correct in concluding that the claims based on section 201(b) of the Communications Act are within the primary jurisdiction of the FCC. Section 201(b) speaks in terms of reasonableness, and the very charge of Count I is that the defendants engaged in unreasonable practices. This is a determination that Congress has placed squarely in the hands of the FCC.

In re Long Distance Telecommunications Litigation, 831 F.2d 627, 631 (6th Cir. 1987) (internal quotations omitted); *accord*, *In re Access Telecommunications*, 137 F.3d at 608-09 (referring to the FCC a § 201(b) claim that a carrier unreasonably utilized more expensive equipment whenever circuits were more than 6000 feet in length); *Telstar Resource Group*, 476 F.Supp.2d at 272 (“Courts have commonly found that claims alleging ‘unreasonable’ practices in violation of Section 201(b) of the FCA are within the primary jurisdiction of the FCC.”); *Advantel*, 105 F.Supp.2d at 480-81 (unreasonable tariffed rates).

Important telecommunications policy issues also involve discretionary determinations in which it is important to avoid inconsistent results, and so are good candidates for referrals. *Sprint Spectrum L.P. v. AT&T Corp.*, 168 F. Supp. 2d 1095 (W.D. Mo. 2001) (referring the issue of whether wireless carriers may impose access charges on IXC’s); *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC. Rcd. 13192, ¶¶ 8-9, 12 (2002) (deciding the issue referred in *Sprint Spectrum* and ruling against the wireless carriers).

D. Application of the Primary Jurisdiction Doctrine to Excel's Third Counterclaim.

The Third Counterclaim describes four unjust and unreasonable actions by Hypercube violating § 201(b). The four factor analysis favors a primary jurisdiction referral as to each of those four claims:

- 1. Hypercube's practice of requiring a customer to block calls in order to cease being a customer is unjust and unreasonable in violation of Section 201(b), and the tariff provisions which purport to support this practice should therefore be set aside.⁹**

Excel notified Hypercube in September and/or early October of 2007 that it declined to order service, immediately after learning that Hypercube was engaged in a CLEC-insertion scheme on wireless-originated 1-8XX calls. Excel subsequently directed Hypercube in writing not to send calls to Excel and explained to Hypercube that it was not possible, as an engineering matter, for an IXC to block calls that Hypercube routed to it through ILECs. Despite these unambiguous steps demonstrating that Excel is not a Hypercube customer subject to the Tariff, Hypercube asserts that Excel is a Hypercube customer subject to the Tariff

If Hypercube proves that that it is entitled to enforce the Tariff against Excel after March 31, 2009, then Excel will show that the Tariff's restrictions that purport to require a customer to block calls in order to cease being a customer are unjust and unreasonable practices violating § 201(b). Accordingly, because the FCC has already ruled that it is unjust and unreasonable to block calls as a

⁹See Proposed 2nd Amended Answer and Counterclaims, ¶ 106(a) (stating the block issue specifically); Amended Answer and Counterclaim, ¶ 104A (stating this issue in broader more general terms by alleging that Hypercube is attempting unreasonably to use tariffs to force persons to be its customers). The blocking provisions are the only tariff provisions known to Excel at this point that fall within the broader category of trying to use a tariff to force someone to be (or remain) a customer. The September 28, 2009 opinion at page 10 states that an IXC is not obligated to purchase tariffed access service unless the FCC has ordered the IXC to purchase the service. (ECF Doc. 98). This may well moot the blocking issue. Excel cannot be sure as the opinion does not specifically the call blocking tariff provisions.

means to solve a dispute between a LEC and an IXC,¹⁰ and the Court can hear witnesses to confirm that it is not technically possible for the IXC to block calls routed to it by a CLEC through an ILEC, this may well be a case where the Court is in the position to determine whether the Tariff provision (the blocking provision) is unjust and unreasonable. *Communique Telecommunications, Inc.*, 14 FCC. Rcd, 13635, ¶ 28 (stating that the court as well as the FCC can set aside unreasonable tariff provisions).

Excel recognizes that the standard practice is to refer to the FCC claims that particular tariff provisions are unjust and unreasonable, so that the expert agency can use its expertise and apply its discretion in evaluating reasonableness. See cases cited in Point C of this Motion above. Thus Referral Factors One (agency expertise) and Two (agency discretion) would support referral. Referral Factor Four (prior application to the agency) also favors referral as the issue is presented in Excel's September 4, 2009 Informal Complaint, on which the FCC has issued a scheduling order requiring briefing by Hypercube and Excel in October and November, 2009.

2. By billing access charges on wireless-originated calls and then sharing revenues with wireless carriers, Hypercube is using a tariff to circumvent and/or violate the FCC order prohibiting wireless carriers from imposing access charges without an IXC's consent.¹¹

This claim presents a follow-up policy issue arising from the FCC's answer to the question referred to it by the Western District of Missouri in *Sprint Spectrum, supra* – whether wireless carriers may impose access charges on IXCs without a contract. The FCC answered the question in

¹⁰Compare KMC Telecom Operating Companies Tariff, Tariff Sheet Nos. 16 and 25 (tariff blocking provisions) (attached to Hypercube's Motion to Dismiss counterclaims, ECF Doc.21) with *Declaratory Ruling and Order, Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, 22 FCC.Rcd. 11629, ¶ 5 and n.20 (FCC Wireline Comp. Bur. 2007) (forbidding blocking of calls).

¹¹Amended Answer & Counterclaims, ¶ 104B.

the negative.¹² However, the FCC has never resolved whether the prohibition on wireless access charges can be circumvented by the wireless carrier directing calls to a wireline carrier who then bills access charges to the IXC and splits revenue with the wireless carrier.

This is a “yes/or no” policy question that calls for an exercise of agency discretion on an issue that will affect the industry generally and not just Hypercube and Excel. Thus, Referral Factor No. 2 (agency discretion) and Referral Factor 3 (danger of inconsistent results) are particularly applicable.

3. **Hypercube’s attempt to insert itself into a pre-existing calling path in order to impose an extra layer of charges above and beyond the ILEC’s charges and/or charges higher than the ILECs impose is unjust and unreasonable in violation of § 201(b);¹³ and**
4. **The rates and charges billed by Hypercube are well in excess of ILEC rates and charges and unjust and unreasonable in violation of § 201(b).¹⁴**

In light of the Court’s Memorandum Opinion and Order, the threshold issues are (1) whether Hypercube’s service “adds value” to the telecommunications network and (2) whether Hypercube rates exceed ILEC rates (the safe harbor).¹⁵ Even if Hypercube proves that it is adding value to the telecommunications network, which Excel strongly believes is not the case, the FCC has ruled that CLEC tariffed rates exceeding ILEC rates are “conclusively” presumed to be unreasonable, and so capped CLEC rates at ILEC rates.¹⁶ Accordingly, there is no need to refer the question of whether

¹²*Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC. Rcd. 13192, ¶¶ 8-9, 12 (2002)

¹³Amended Answer & Counterclaims, ¶ 104C.

¹⁴Amended Answer & Counterclaims, ¶ 104D.

¹⁵Memorandum Opinion and Order at 14 (ECF Doc. 98).

¹⁶*Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC.Rcd. 9923, ¶¶ 52, 57 (2001) (“Seventh Report and Order”).

Hypercube rates exceeding ILEC rates are just and unreasonable. The FCC has answered that question with a “yes.”¹⁷

However, while the FCC, at least with respect to CLECs who directly serve the called party, has ruled that CLEC rates not exceeding ILEC rates are reasonable, it has not ruled that an unnecessary insertion into the calling path is itself just and reasonable.¹⁸ The FCC might well rule that a CLEC that inserts itself in the calling path and provides minimal value yet demands the full capped rate has acted unreasonably, especially where the CLEC routes calls through ILECs who are also billing. This type of weighing of value versus cost will hopefully not be necessary given the threshold issues, but this issue implicates agency technical expertise (Referral Factor One) and discretion (Referral Factor Two). Referral Factor Four (application to the agency) also applies as the issue is presented in Excel’s Informal Complaint.

E. The Court Should Stay Rather than Dismiss the Section 201(b) Claims in the Third Counterclaim Pending Their Resolution by the FCC

When a court refers a claim under the doctrine of primary jurisdiction, “[t]he court may stay the case and retain jurisdiction or, “if the parties would not be unfairly disadvantaged, ... dismiss the [claim] without prejudice.” *Davel Communications, Inc.*, 460 F.3d at 1091 (citing *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993)). “The factor most often considered in determining whether a party will be disadvantaged by dismissal without prejudice is whether there is a risk that the statute of limitations may run on the claims pending agency resolution” of the [referred] issues. *Id.* at 1091.

The statute-of-limitations factor is applicable here as there are Hypercube invoices at issue that are more than two years old at issue. The statute-of-limitations for administrative complaints is

¹⁷Memorandum Order and Opinion at 14 (ECF Doc. 96).

¹⁸ *Seventh Report and Order*, 16 FCC.Rcd. 9923, ¶ 94

two years. 47 U.S.C. § 415. Excel has acted to prevent a statute-of-limitation problem by filing the Informal Complaint at the FCC, but Hypercube contends that step was an ineffective “nullity” due to election-of-remedies under 47 U.S.C. § 207.¹⁹ Excel also believes the statute-of-limitations is not applicable under FCC precedent to Excel’s request to the FCC for equitable relief,²⁰ but Hypercube may disagree with that analysis, or may characterize Excel’s Informal Complaint as a claim for damages. How the FCC will resolve the disputed § 207 election-of-remedies issue is not known. Accordingly, a dismissal without prejudice of the Third Counterclaim could result in statute-of-limitations problem, so a stay rather than dismissal without prejudice is proper. *See Davel Communications, Inc.*, 460 F.3d at 1091.

Additionally, where the referral is of less than all the issues pending in the case, a stay is more appropriate than a dismissal, so that the court can more easily incorporate the agency’s decision into its own decision. *See Carter v. AT&T*, 365 F.2d 486, 499-500 (5th Cir. 1966); *In re Long Distance Telecommunications Litigation*, 831 F.2d at 632. This is the situation here. The Court’s September 28, 2009 opinion outlines the additional work that needs to be performed in this case. No party has asked that any issues other than the § 201(b) reasonableness issues be referred to the FCC. Excel believes that a stay of the proceedings would allow the Court to take into account rulings by the FCC and coordinate them with its own rulings on non-referred issues.

¹⁹Hypercube Response to Notice of Related Case at 1 (ECF Doc. 94).

²⁰“Section 415(b), both by its terms and as it has been construed in past proceedings, applies exclusively as a bar to the recovery of damages; it does not operate as a bar to other forms of relief . . .” *Bunker Ramo Corp. v. Western Union Telegraph Co.*, 31 FCC.2d 449, ¶ 11 (1971).

**IV.
CONCLUSION**

WHEREFORE Defendant Comtel Telcom Assets LP, d/b/a Excel Telecommunications requests that this Court refer the § 201(b) claims raised by Excel's Third Counterclaim to the FCC under the doctrine of primary jurisdiction, stay consideration of the § 201(b) claims pending the FCC's ruling on them, and grant such other relief, in law and in equity, to which this Court finds Excel is justly entitled.

Dated: October 14, 2009

Respectfully submitted,

By: /s/ J. Robert Arnett II

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CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that I conferred with Steven Thomas, counsel for Hypercube LLC and Hypercube Telecom, LLC, on October 14, 2009 concerning the relief requested in this motion in a good faith effort to resolve it. Plaintiffs have stated they do not agree to the requested relief. Accordingly, this Motion is being presented for the Court's determination.

/s/ Ryan M.T. Allen

Ryan M.T. Allen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing instrument has been served on all attorneys of record via CM/ECF, in accordance with the Federal Rules of Civil Procedure, on this 14th day of October, 2009.

/s/ J. Robert Arnett II

Ryan M.T. Allen