

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**
Southern Division

BROADVOX-CLEC, LLC,

*

Plaintiff/Counter-Defendant,

*

v.

*

Case No.: PWG-13-1130

AT&T CORPORATION,

*

Defendant/Counter-Plaintiff.

*

* * * * *

MEMORANDUM OPINION

Plaintiff/Counter-Defendant Broadvox-CLEC, LLC (“Broadvox”) is a competitive local exchange carrier (“LEC”); Defendant/Counter-Plaintiff AT&T Corporation (“AT&T”) is an interexchange (long-distance) carrier. Jt. Stmt. ¶¶ 1–2, Jt. Ex. 1, ECF No. 102-1. Broadvox partners with tandem access providers to provide long-distance telephone access services to AT&T and charges AT&T tandem and end office (local) switching charges for traffic it receives in Internet Protocol (“IP”) format, as well as for prepaid calling card (“PPCC”) traffic, ostensibly pursuant to its federal and state tariffs. *Id.* ¶¶ 5–9, 11–13. The end office switching charges “are among the highest recurring intercarrier compensation charges.” *AT&T Corp. v. YMax Commc’ns Corp.*, 26 FCC Rcd. 5742, ¶ 40 (2011). The parties dispute whether AT&T must pay end office switching charges on calls it sends to a Voice over Internet Protocol (“VoIP”) provider or to a PPCC platform provider, as well as whether it must pay tandem switching charges on its PPCC traffic.

Broadvox sued AT&T to obtain payment for those services, alleging that AT&T violated Broadvox’s federal tariff (Count I) and state tariffs (Count IV). Broadvox also claims that

AT&T violated the Communications Act, 47 U.S.C. §§ 201(b) and 202 (Counts II and III), because it was not “just and reasonable” for AT&T to withhold these payments, and AT&T’s payment of “the access charges of some carriers while withholding payments to Broadvox” was an “unjust or unreasonable discrimination in . . . practices.” Alternatively, Broadvox seeks recovery in *quantum meruit* (Count V). Am. Compl., ECF No. 3.

AT&T counterclaims to recover any potential overpayment, alleging violations of Broadvox’s tariffs and the Communications Act, 47 U.S.C. §§ 203(a) and (c) and 201(b), based on AT&T’s view that Broadview did not terminate the PPCC calls (Count I), and did not provide end office switching for the over-the-top (“OTT”) VoIP traffic (Count II).¹ AT&T also seeks a declaratory judgment confirming AT&T’s view of the services Broadvox provides. Countercl. ¶¶ 61, 74, 92–95, ECF No. 20.

Following an orgy of briefing (often in violation of page limits established in the Court’s Local Rules), the parties’ cross-motions for summary judgment on liability are fully briefed and ready for a ruling. ECF Nos. 81, 81-1, 87, 87-1, 95, 101.² A hearing is not necessary. *See* Loc.

¹ AT&T also claimed fraudulent and negligent misrepresentation (Count III), on the theory that Broadvox’s bills misrepresented the disputed charges, but I previously dismissed that count. July 2, 2014 Order, ECF No. 40.

² Broadvox also filed a Consent Motion to File a Portion of Joint Record Under Seal, requesting leave to file certain exhibits under seal “because they contain trade secrets and other commercial confidential information.” ECF No. 104. Given that AT&T consented to the motion to seal; the exhibits contain trade secrets and confidential business information; and “[a]lternatives to sealing would not provide sufficient protection because the Attorney’s Eyes Only material cannot be released to the public without harm to both Broadvox and AT&T,” the motion to seal IS GRANTED.

The parties filed their summary judgment motions and briefing under seal, accompanied by unsealed, redacted versions, ECF Nos. 80, 80-1, 86, 86-1, 94, but neither party moved to seal the unredacted motions and briefing. The sealed motions and briefing will be unsealed on April 15, 2016, unless the parties submit motions to seal pursuant to Loc. R. 105.11.

R. 105.6. Because the unambiguous language of Broadvox's tariffs obligates AT&T to pay end office switching charges on OTT VoIP traffic, I will grant Broadvox's motion as it pertains to this VoIP traffic and deny AT&T's motion as it pertains to it. But, because Broadvox cannot charge access charges on PPCC traffic, I therefore will deny Broadvox's motion as it pertains to PPCC traffic and grant AT&T's motion as it pertains to this traffic. Further, Broadvox fails to state a claim under the Communications Act, and therefore I will enter judgment in AT&T's favor on Counts II and III of the Amended Complaint. Finally, because the filed rate doctrine proscribes Broadvox's claim in *quantum meruit*, I will grant summary judgment in AT&T's favor on Count V of the Amended Complaint. This order moots AT&T's request for a declaratory judgment.

Factual Background³

Traditionally, telephone carriers employed "TDM" or "Time Division Multiplexing" format, which is "a method of transmitting and receiving signals over the Public Switched Telephone Network (PSTN)." FCC Tariff § 1, Jt. Ex. 16; *see* Broadvox's Mem. 6; AT&T's Mem. 7 & App'x A, at 4. A TDM network involves "physical connections," including an end office, or "local switch connecting the trunk to the termination line/end-point phone device" to

Given that this Memorandum Opinion cites to confidential material in the record, the parties will have fourteen days to move to seal it. Their motion must be accompanied by a proposed redacted version of the Memorandum Opinion. This Memorandum Opinion will remain under seal in the interim.

³ As the parties have submitted cross-motions for summary judgment, I must consider "each motion . . . individually" and view "the facts relevant to each . . . in the light most favorable to the non-movant." *Mellen v. Bunting*, 327 F.3d 355, 363 (4th Cir. 2003); *see C B Structures, Inc. v. Potomac Elec. Power Co.*, 122 F. Supp. 3d 247, 250 (D. Md. Aug. 13, 2015) (same). The factual background consists of the undisputed facts, drawn in part from the April 10, 2015 Memorandum Opinion in this case, ECF No. 67 (*Broadvox-CLEC, LLC v. AT&T Corp.*, 98 F. Supp. 3d 839 (D. Md. 2015)).

“ensure[] a connection from the transport (across the network) to the termination point (phone device).” *In re Connect Am. Fund*, 30 FCC Rcd. 1587, ¶¶ 27–28 (Feb. 11, 2015) (“2015 Declaratory Ruling” or “*In re Connect Am. Fund*”).

But, technology has moved beyond exclusive employment of TDM format, to embrace newer methods of communication, such as Voice over Internet Protocol, or “VoIP.” For over-the-top VoIP service, carriers transmit communications “by aid of wire, cable, radio, or other like connection using [VoIP] that is originated or terminated in Internet Protocol (IP) format.” FCC Tariff § 1, Jt. Ex. 16. The use of IP format eliminates the need for a carrier to have physical transmission facilities, which is what drives up the cost of end office switching services. *See CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 374–75 (4th Cir. 2014) (noting that the high price of end office switching charges “is ordinarily justified by the need ‘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’” (quoting *YMax*, 26 FCC Rec. 5742, ¶ 40)). VoIP-PSTN traffic is traffic that “starts as PSTN traffic and is terminated as VoIP traffic.” Broadvox’s Mem. 6, ¶ 12; AT&T’s Mem. App’x A, at 4 ¶ 12; *see* FCC Tariff § 1.

The parties agree that 47 C.F.R. § 51.913(b), the “VoIP Symmetry Rule” (“VSR”) that the Federal Communications Commission (“FCC” or “Commission”) implemented on December 29, 2011, following *In re Connect America Fund*, Report & Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, 26 FCC Rcd. 17663 (rel. Nov. 18, 2011) (“*Connect America Fund Order*” or “2011 CAF Order”), and clarified in the 2015 Declaratory Ruling, permits Broadvox to charge for access services it provides in conjunction with calls

passed to over-the-top VoIP providers, as long as its tariffs incorporate the VSR. Broadvox's Mem. 8-9, ¶¶ 17-18; AT&T's Mem. App'x A, at 5-6, ¶¶ 17-18. Section 51.913(b) provides:

Notwithstanding any other provision of the Commission's rules, a local exchange carrier shall be entitled to assess and collect the full Access Reciprocal Compensation charges prescribed by this subpart *that are set forth in a local exchange carrier's interstate or intrastate tariff* for the access services defined in § 51.903 regardless of whether the local exchange carrier itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect Access Reciprocal Compensation charges prescribed by this subpart for that traffic. This rule does not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service. For purposes of this provision, functions provided by a LEC as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of the incumbent local exchange carrier access service.

47 C.F.R. § 51.913(b) (emphasis added). Section 51.903 defines, *inter alia*, "End Office Access Service," which is "[t]he switching of access traffic at the carrier's end office switch and the delivery to or from of such traffic to the called party's premises"; "[t]he routing of interexchange telecommunications traffic to or from the called party's premises, either directly or via contractual or other arrangements with an affiliated or unaffiliated entity, regardless of the specific functions provided or facilities used"; or "[a]ny functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier." 47 C.F.R. § 51.903(d). It also defines "Tandem-Switched Transport Access Service," which is "[t]andem switching and common transport between the tandem switch and end office," or "[a]ny functional equivalent of the incumbent local exchange carrier access service provided by a non-incumbent local exchange carrier via other facilities." 47 C.F.R. § 51.903(i). While AT&T acknowledges that Broadvox theoretically could charge for these services and that

Broadvox's tariffs incorporate the VoIP Symmetry Rule from § 51.913(b), it refuses to pay the charges because, according to AT&T, Broadvox's tariffs do not authorize them, as they do not incorporate the language from § 51.903(d), pertaining to end office access service. AT&T's Mem. 17–18.

Broadvox's federal tariff, filed with the FCC, and its state tariffs govern the charges and other fees it can assess on long-distance carriers like AT&T. Under its federal tariff, Broadvox may charge for "Access Service," which "includes services and facilities provided for the origination or termination of any interstate Telecommunication regardless of the technology used in transmission. This includes, but is not limited to, voice and data communications services that may use either TDM or . . . IP[] or other technology." FCC Tariff § 1, Jt. Ex. 11. Tandem switching and end office switching are access services. *Id.*

As noted, Broadvox's tariffs incorporate the VoIP Symmetry Rule:

3.8.4 Application of Access Charges to VoIP-PSTN Access Traffic

- A. All VoIP-PSTN Access traffic will be assessed switched access charges at the rates set forth in this tariff.
- B. The Company shall assess and collect switched access rate elements under this tariff for *access services*, regardless of whether the Company itself delivers such traffic to the called party's premises or delivers the call to the called party's premises via contractual or other arrangements with an affiliated or unaffiliated provider of VoIP service that does not itself seek to collect switched access charges for the same traffic. The Company will not charge for functions not performed by the Company, its affiliated or unaffiliated provider of VoIP service. For purposes of this provision, functions provided by the Company as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is comparable to a service offered by a local exchange carrier constitutes the functional equivalent of carrier access service.

FCC Tariff, Jt. Ex. 63 (emphasis added); *see, e.g.*, Conn. Tariff Jt. Ex. 315 (same), Fl. Tariff 381 (same); *see* Broadvox's Mem. 9, ¶ 18 (stating that the VoIP Symmetry Rule "is incorporated into

every Broadvox federal and state tariff under which Broadvox has issued invoices to AT&T for OTT traffic”); AT&T’s Mem. App’x A, at 6, ¶ 18 (agreeing that “Broadvox appears to have included certain language from 47 C.F.R. § 51.903(b) in its tariffs”).⁴

Also relevant to this dispute is Section 3.3, which identifies six rate categories, or elements,⁵ that “apply to Switched Access Service.” FCC Tariff, Jt. Ex. 53.

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 [Local Access and Transport Area] where it is provided.

§ 3.1.1; *see* § 1 (Definitions and Abbreviations, defining “Access Service”). The elements include “Switched Transport” and “End Office Switching.” The tariff then describes each rate category. As for end office switching:

3.3.3 End Office Switching

The End Office Switching component is 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 between the end office and the STP.

⁴ The parties generally refer to the provisions in the federal (FCC) tariff and do not differentiate the state tariffs. Therefore, I, like the parties, will refer primarily to the federal tariff and treat the state tariffs the same as the federal tariff.

⁵ Switched access services typically consist of various components or “rate elements”. Each element that makes up switched access service is ordinarily priced separately and billed pursuant to FCC rules and the rates and requirements contained in the applicable tariff or contract. Whether and how particular rate elements for switched access services can properly be billed varies depending upon multiple factors, including the specific call routing path, and the types of facilities used to route the call.

AT&T’s Mem. 6.

FCC Tariff § 3.3.3, Jt. Ex. 53; *see, e.g., id.* at 304 (Connecticut tariff), 308 (Florida tariff). As for switched transport, it states: “The Switched Transport component is related to the transmission and *tandem switching* facilities between the customer designated premises and the end office switch(es) where the customer’s traffic is switched to originate or terminate the customer’s communications. . . .” FCC Tariff § 3.3.2, Jt. Ex. 53 (emphasis added).

Relying on these tariffs, Broadvox bills AT&T for end office switching on over-the-top VoIP calls. But these end office switching charges do not apply to “the terminations in the end office of end user lines,” *see* FCC Tariff § 3.3.3. Rather, they arise under the following circumstance:

Broadvox receives calls in IP format from AT&T, via a [VoIP] provider that Broadvox selects [that converted the traffic from TDM format], and then “hand[s] off the call to an over-the-top VoIP provider” that “dump[s] the IP packets for the call . . . into the public Internet.” An unaffiliated internet service provider then transfers the call “to the neighborhood IP broadband facilities used by the called party’s broadband service provider,” and that provider delivers the call to its recipient.

Broadvox-CLEC, LLC v. AT&T Corp., 98 F. Supp. 3d 839, 847 (D. Md. 2015). For this OTT VoIP traffic, “Broadvox is not ‘involved in the “last-mile” delivery of the call.’” *Id.* On that basis, “Broadvox argues that AT&T has failed to pay its bills, and AT&T argues that it has been charged improperly because Broadvox charges for terminating calls when it is not, according to AT&T, actually terminating the calls.” *Id.*

Broadvox also relies on its tariffs to bill AT&T for tandem switching and end office switching charges when AT&T customers place PPCC calls. *Id.* at 2. For these calls, the AT&T customers “dial[] telephone numbers that Broadvox provides, which AT&T then transmits to a Broadvox facility.” *Id.* “Broadvox and its PPCC provider partner [then] ‘route[] them to a calling “platform,””” which they reach in IP format. *Id.* at 2–3. These calls are known as “two-

stage calls,” because “[a]t that point, the customer dials a second number and an unknown third-party network delivers the call its recipient.” *Id.* at 3. AT&T contends that Broadvox cannot assess tandem switching and end office charges because “Broadvox and its PPCC provider partner deliver the call to the platform at the end of the first stage but not to its ultimate recipient.” *Id.*

Standard of Review

Summary judgment is proper when the moving party demonstrates, through “particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials,” that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a), (c)(1)(A); *see Baldwin v. City of Greensboro*, 714 F.3d 828, 833 (4th Cir. 2013). If the party seeking summary judgment demonstrates that there is no evidence to support the nonmoving party’s case, the burden shifts to the nonmoving party to identify evidence that shows that a genuine dispute exists as to material facts. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 & n.10 (1986). The existence of only a “scintilla of evidence” is not enough to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). Instead, the evidentiary materials submitted must show facts from which the finder of fact reasonably could find for the party opposing summary judgment. *Id.*

Issues of contract and tariff interpretation are matters of law germane to resolution at the summary judgment stage.

If a court properly determines that the contract is unambiguous on the dispositive issue, it may then properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue. Even where a court, however, determines as a matter of law that the contract is

ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if the evidence is, as a matter of law, dispositive of the interpretative issue, grant summary judgment on that basis.

Verizon Va., LLC v. XO Commc'ns, LLC, No. 15-CV-171, 2015 WL 6759473, at *4 (E.D. Va. Nov. 5, 2015) (quoting *Goodman v. Resolution Trust Corp.*, 7 F.3d 1123, 1126 (4th Cir. 1993)).

Tariff Interpretation

“Tariffs . . . are interpreted according to federal common law,” and their “interpretation largely follows the rules of contract construction.” *XO Commc'ns*, 2015 WL 6759473, at *5 (citing *Great N. Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 291 (1922)). “When a tariff is clear and unambiguous on its face, no construction by the court is necessary, and the parties are bound by its terms.” *D.S. Swain Gas Co. v. Dixie Pipeline Co.*, 911 F.2d 721, 1990 WL 112071, at *2 (4th Cir. 1990) (unpublished). Indeed, “[a]n unambiguous and duly published tariff is ‘binding on the parties and has the force of law . . . regardless of the intentions of the parties or the equities existing between carrier and shipper.’” *XO Commc'ns*, 2015 WL 6759473, at *5 (quoting *In re Carolina Motor Exp., Inc.*, 949 F.2d 107, 111 n.3 (4th Cir. 1991), *rev'd on other grounds sub nom. Reiter v. Cooper*, 507 U.S. 258 (1993)).

Thus, the court may interpret a tariff by reference to sources other than the language in the tariff itself only when it “‘is ambiguous, so that a literal reading is impossible.’” *D.S. Swain*, 1990 WL 112071, at *2 (quoting *W. Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982)). Then, “the court must construe the tariff by examining the intent of the parties and ‘[t]he practical application of [the tariff] by interested persons.’” *Id.* (quoting *Nat'l Van Lines, Inc. v. United States*, 355 F.2d 326, 333 (7th Cir. 1966)). Typically, the court should construe any ambiguity against the drafter. *XO Commc'ns*, 2015 WL 6759473, at *5. But, “[a]n ambiguity should not be construed against the drafter ‘when such construction ignores a permissible,

reasonable construction which conforms to the intention of the framers of the tariff, avoids possible violations of the law, and accords with the practical application given by shippers and carriers alike,” because “a tariff should be interpreted to avoid unjust, absurd, or improbable results.” *D.S. Swain*, 1990 WL 112071, at *2 (quoting *Nat’l Van Lines*, 355 F.2d at 332–33).

Discussion

A. End Office Switching Charges on Over-the-Top VoIP-PSTN Traffic

1. Parties’ Arguments

Broadvox argues that summary judgment in its favor regarding the claims based on end office switching charges on OTT VoIP-PSTN traffic is appropriate because, in its view, the FCC’s 2011 *CAF* Order gave AT&T “explicit direction . . . that it must pay carriers like Broadvox for access charges on this OTT traffic” and, “in a February 2015 *Declaratory Ruling*, the FCC reiterated that such OTT access payments must be paid to carriers with tariffs like Broadvox’s” that incorporate the VoIP Symmetry Rule. Broadvox’s Mem. 1–2. Broadvox insists that, where its incorporation of the VoIP Symmetry Rule refers to “switched access charges” for “access services,” those services “includes ‘end office switching.’” *Id.* at 28.

Certainly, in the 2011 *CAF* Order, the Commission “adopt[ed] rules that permit a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture.” 26 FCC Rcd. 17663, ¶ 970. And, in its 2015 *Declaratory Ruling*, the FCC stated that the VoIP Symmetry Rule “does not require, and has never required, an entity to use a specific technology or its own facilities in order for the service it provides to be considered the functional equivalent of end office switching.” 30 FCC Rcd. 1587, ¶ 3. Rather, “a competitive LEC or its VoIP provider partner” can “provide the

functional equivalent of end office switching, and . . . be eligible to assess access charges for this service,” even if it does not “provide the physical last-mile facility to the VoIP provider’s end user customers.” *Id.* ¶ 19. Thus, the FCC held that the call control functions that competitive LECs and their over-the-top VoIP partners jointly provide “are the functional equivalent of end-office switching.” *Id.* ¶ 29; *see id.* ¶ 31 (concluding that, “under section 51.903 of [the FCC] rules, a competitive LEC in conjunction with its over-the-top VoIP provider partner provides the functional equivalent of end office switching”). Further, it held that carriers could assess access charges for the functional equivalent of end office switching, provided that they “accurately describe [such] services offered in their tariffs.” *See id.* ¶ 35.

Nonetheless, AT&T insists that, as a matter of law, Broadvox cannot impose end office switching charges on AT&T’s VoIP-PSTN traffic because “Broadvox’s tariffs do not permit the charges,” as they only “include some language that incorporates portions of the general rules that the FCC recently ‘reinterpreted’ to allow end office charges *when properly tariffed*,” but do not “incorporate the portion of the FCC’s rules that define end office switching service more broadly.” AT&T’s Mem. 1–2 (citing *AT&T Corp. v. YMax*, 26 FCC Rcd. 5742 (2011); *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 374–75 (4th Cir. 2014)) (emphasis added). As AT&T sees it,

[Broadvox’s] tariffs’ provision on VoIP “symmetry” (§ 3.8.4) generally allows Broadvox to charge for certain VoIP-based services and for functions provided by Broadvox’s VoIP partners, [but] the more specific tariff provision on “End Office Switching” (§ 3.3.3) is more narrow than the FCC’s rules (47 C.F.R. 51.903(d)) and precludes Broadvox from billing charges for that service unless Broadvox or its VoIP partner operate a switch that terminates “end user lines” in an office.

AT&T’s Mem. 2. Indeed, I noted in the April 10, 2015 Memorandum Opinion that Broadvox’s “tariff includes both specific language about end office switching that does not refer to over-the-top VoIP traffic, and general language incorporating the VoIP Symmetry Rule with regard to

‘switched access charges.’” *Broadvox-CLEC, LLC v. AT&T Corp.*, 98 F. Supp. 3d 839, 847 (D. Md. 2015). Based on this dichotomy, AT&T asserts that, “under decisions of the FCC and Fourth Circuit, Broadvox’s tariffs bar end office switching charges, even though the FCC’s rules permit them.” AT&T’s Mem. 2. In essence, AT&T argues that Broadvox’s efforts to incorporate the VoIP Symmetry Rule into its tariff as it pertains to charging end office switching charges for AT&T’s VoIP-PSTN traffic failed for want of careful drafting.

Broadvox disagrees, responding that the 2011 *CAF* Order invalidated the *YMax* and *CoreTel* holdings on which AT&T relies, and that the 2015 Declaratory Ruling stated that these holdings had been “explicitly superseded.” Broadvox’s Opp’n & Reply 1. Not so, AT&T argues; to “the contrary, the *Declaratory Ruling* expressly acknowledged the *continued viability* of [*YMax* and *CoreTel*] as tariff interpretations; and because those two decisions interpreted precisely the same language that appears in Section 3.3.3 of Broadvox’s tariff, they have direct application here.” AT&T’s Reply 7–8 (citing 2015 Declaratory Ruling, 30 FCC Rcd. 1587, ¶ 40) (emphasis in Reply). AT&T also contends that “because the *Declaratory Ruling* did not address the precise issue here – *i.e.*, a tariff with both the VoIP-PSTN rule language [§ 3.8.4] and the ‘terminations in the end office of end user lines’ language [§ 3.3.3] – this dispute cannot be resolved as Broadvox wishes, *i.e.*, solely by reference to the *Declaratory Ruling*.” *Id.* at 8 n.10.

2. *Interplay Between Case Law and Later FCC Decisions*

AT&T relies quite heavily on *YMax*, 26 FCC Rcd. 5742, which the Commission decided months before implementing the VoIP Symmetry Rule. There, “YMax d[id] not provide any physical transmission facilities connecting YMax to the premises of any non-carrier/non-ISP persons or entities,” *id.* ¶ 3, such that it was “able to participate in the transmission of the telephone calls at issue . . . only through its working relationship with its close affiliate,” *id.* ¶ 4.

AT&T contended that YMax had “assess[ed] AT&T interstate switched access charges that [were] not authorized by YMax’s federal tariff,” and the Commission agreed. *Id.* ¶ 1. Specifically, AT&T argued that “none of YMax’s services qualifies as the ‘End Office Switching’ and the ‘Switched Transport’ rate elements of YMax’s switched access charges” because “YMax d[id] not have an ‘End Office Switch’ as defined by [its] Tariff” or “any End Offices within the meaning of the Tariff.” *Id.* ¶ 13.

The Commission observed that YMax’s tariff “describe[d] the ‘End Office Switching’ rate category as ‘establish[ing] the charges related to,’ among other things, ‘the termination in the end office of end user lines.’” *Id.* ¶ 37. Construing this provision along with the tariff definitions of the terms within it, the Commission held that, under the language of the YMax tariff, “End Office Switching does not occur without ‘terminations in the end office of end user lines,” *id.* ¶ 38, which “refers to a physical transmission facility that provides a point-to-point connection between a customer premises and a telephone company office,” *id.* ¶ 40. Thus, it concluded that YMax did not provide, and therefore could not charge for, end office switching. *Id.* ¶ 41. In doing so, the Commission rejected YMax’s “novel definitions” of “‘virtual’ facilities” that could “qualify as ‘terminations’ of ‘End User station loops’ and ‘end user lines’ under the Tariff.” *Id.* ¶¶ 42–43.

As discussed previously, the 2011 *CAF* Order, the VoIP Symmetry Rule, and the 2015 Declaratory Ruling later embraced the concept of allowing virtual facilities and affiliates to provide the functional equivalent of end office switching and other switched access services. But they did not supersede the *YMax* holding in its entirety. Rather, they provided that, when a tariff incorporates the VoIP Symmetry Rule and specifically describes charges for the functional equivalent of traditional access services, and the carrier provides the functionally-equivalent

services using VoIP partners, then the carrier can assess those charges. *See* 2015 Declaratory Ruling, 30 FCC Rcd. 1587, ¶¶ 35, 40 (“While the Commission rule still exists that carriers must accurately describe services offered in their tariffs, carriers are now allowed to charge for services that either they or their retail VoIP partners provide, as long as one of them provides the service and no double billing occurs. . . . Because tariff language may now include compensation for functional equivalent services provided by a competitive LEC or its VoIP provider partner under the VoIP symmetry rule, the CoreTel case does not necessarily preclude the application of end office switching charges in every case.”); 2011 CAF Order, 26 FCC Rcd. 17663, ¶ 970. But, a tariff that failed to incorporate the VoIP Symmetry Rule to extend the concept of access services to include their VoIP functional equivalents still would be limited by the *YMax* holding.

For example, in *CoreTel*, the VoIP Symmetry Rule was not incorporated into CoreTel’s tariff, and the two telecommunications carriers disputed, *inter alia*, whether CoreTel could bill Verizon for end office switching. 752 F.3d at 374. Verizon argued that such charges were improper, the district court granted summary judgment in Verizon’s favor on this issue, and the Fourth Circuit affirmed. *Id.* at 366, 374. Relevantly, “CoreTel’s state and federal tariffs provide[d] that CoreTel’s end-office switching service [would] include ‘terminations in the end office of end user lines.’” *Id.* at 374 (quoting CoreTel federal and state tariffs). The Fourth Circuit noted that “[t]he FCC has held that this tariff language carries a specific and established meaning: ‘a physical transmission facility that provides a point-to-point connection between a customer premises and a telephone company office,’” and that “[to] provide ‘terminations in the end office of end user lines,’ a carrier must ‘provide . . . physical transmission facilities that establish point-to-point connections between the premises of Called/Calling Parties and [the carrier’s] equipment.’” *Id.* (quoting *YMax*, 26 FCC Rcd. 5742, ¶¶ 37, 40, 41). It observed that

“CoreTel d[id] not provide the physical infrastructure over which calls are delivered from CoreTel’s premises to its customers,” but rather, “as in *YMax*, CoreTel convert[ed] incoming calls into a data stream once they reach[ed] its office and then deliver[ed] these calls to its customers over the public internet.” *Id.* (quoting *YMax*, 26 FCC Rcd. 5742, ¶ 41). CoreTel’s tariff, similar to Broadvox’s, and “unlike those in *YMax*, explicitly permit[ted] it to charge for ‘switched-access service’ provided using IP technology.” *Id.* at 375. Yet, this definition of switches access services was insufficient to permit CoreTel to bill Verizon for end office switching because “this language only appears in CoreTel’s general definition of switched-access service,” and the “more specific definition” of end office switched access, which limited the service to that involving a physical transmission facility, governed. *Id.* Consequently, the court concluded that, because “CoreTel ha[d] not deployed its own physical facilities to connect it to its customers,” it “d[id] not provide ‘terminations in the end office of end user lines’ as required by its tariffs” to charge for end office switching. *Id.* at 374. Thus, the Fourth Circuit held: “The language of CoreTel’s end-office switching service d[id] not permit that specific tariff rate to be applied when CoreTel deliver[ed] calls to customers over the public Internet rather than using a physical facility owed by CoreTel.”⁶ *Id.* at 375.

Broadvox’s tariffs employ almost identical language to YMax’s and CoreTel’s tariffs with regard to end office switching. *Compare* Broadvox FCC Tariff § 3.3.3 (“The End Office

⁶ The care with which the Fourth Circuit addressed this issue was not accidental. As noted, “[e]nd-office switching charges are among the highest recurring charges in any carrier’s tariff, a price that is ordinarily justified by the need ‘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.’” *CoreTel*, 752 F.3d at 374–75 (quoting *YMax*, 26 FCC Rec. 5742, ¶ 40). Obviously, when VoIP technology provides the functional equivalent of physical transmission that terminates in the end office of the user lines, this allows the LEC the benefit of the higher charges without the need to pay the “substantial investment” to construct the tangible connections to their customers.

Switching component is 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 between the end office and the STP.”), *with* YMax FCC Tariff § 3.3.2, Jt. Ex. 2700 (“The End Office Switching rate category 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 between the end office and the STP.” (emphasis added)), CoreTel FCC Tariff (effective Mar. 27, 2012) § 3.3.2, Jt. Ex. 2967 (same), *and* CoreTel FCC Tariff (effective Jan.1, 2011) § 3.3.2, Jt. Ex. 3120 (same). And, the Broadvox and CoreTel tariffs define “access service” similarly to include services provided using IP technology. *Compare* Broadvox FCC Tariff § 1, Jt. Ex. 11 (“Access or Access Service includes services and facilities provided for the origination or termination of any interstate Telecommunication regardless of the technology used in transmission. This includes, but is not limited to, voice and data communications services that may use either TDM or Internet Protocol (‘IP’) or other technology. Access Service includes the functional equivalent of the incumbent local exchange carrier interstate exchange access services typically associated with . . . local end office switching . . . and tandem switching.”), *with* CoreTel Tariff § 1 (eff. Mar. 27, 2012), Jt. Ex. 2926 (“Switched Access Service includes services and facilities provided for the origination or termination of any interstate or foreign communication, regardless of the technology used in transmission, including, but not limited to, local exchange, long distance, and data communications services that may use either TDM or Internet Protocol (‘IP’) or other technology. Switched Access Service includes, but is not limited to, the functional equivalent of the incumbent local exchange carrier interstate exchange access services typically associated with following rate elements: . . .

local end office switching; . . . tandem switching”); CoreTel Tariff § 1 (eff. Jan. 1, 2011), Jt. Ex. 3090 (same).

But, in contrast to the CoreTel tariff, Broadvox’s definition of access service is not the only place in the tariff where language about functional equivalence appears. Rather, it also appears in Broadvox’s provision incorporating the VoIP Symmetry Rule. Section 3.8.4 of Broadvox’s tariff specifically applies access charges (which include end office switching charges, Broadvox Tariff § 3.3 (Rate Categories)), to VoIP-PSTN access traffic. It states: “All VoIP-PSTN Access traffic will be assessed switched access charges at the rates set forth in this tariff.” Broadvox FCC Tariff § 3.8.4(A). Further, and importantly, Broadvox’s tariff goes much farther. It states:

The Company shall assess and collect switched access rate elements under this tariff for access services, regardless of whether the Company itself delivers such traffic to the called party’s premises or delivers the call to the called party’s premises via contractual or other arrangements with an affiliated or unaffiliated provider of VoIP service that does not itself seek to collect switched access charges for the same traffic. . . . For purposes of this provision, functions provided by the Company as part of transmitting telecommunications between designated points using, in whole or in part, technology other than TDM transmission in a manner that is *comparable to* a service offered by a local exchange carrier constitutes the *functional equivalent of carrier access service*.

Id. § 3.8.4(B) (emphasis added). In short, the Broadvox tariff makes it clear that (1) access service includes communications services in either TDM or IP format, and is associated with rate elements that include end office switching, *id.* § 1; (2) there are six rate categories that apply to switched access service, one of which is end office switching, *id.* § 3.3; (3) all VoIP-PSTN access traffic will be assessed switched access charges at rates specified in the tariff, *id.* § 3.8.4(A); and (4) switched access rate elements (which include end office switching rates) will be assessed and collected if Broadvox delivers a call to the call party by partnering with a VoIP service provider that does not itself collect switched access charges for the same traffic, so long

as the non-TDM technology used (i.e., VoIP) is comparable to a service offered by a local exchange carrier and constitutes the functional equivalent of carrier access service, *id.* § 3.8.4(B). This is a far cry from the limited “general definition” language used by CoreTel that the Fourth Circuit found insufficient to incorporate the VoIP Symmetry Rule in *CoreTel*, 752 F.3d at 375.

Neither Ymax’s nor CoreTel’s tariff incorporated the VoIP Symmetry Rule; indeed, YMax’s tariff preceded the rule. This point of differentiation is significant, as contracts “are construed as a whole,” and therefore their interpretation should “give effect to every provision . . . , avoiding any interpretation that renders a particular provision superfluous or meaningless.” *Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 820 (4th Cir. 2013). This rule applies to tariffs as well. *See S. Natural Gas Co. v. F.E.R.C.*, 780 F.2d 1552, 1558 (11th Cir. 1986) (“In construing a tariff, it is appropriate to look at the four corners of the tariff and consider the instrument as a whole.” (citing *United States v. Missouri-Kansas-Texas R.R.*, 194 F.2d 777, 778 (5th Cir. 1952)); *Cortes v. Honeywell Bldg. Sols. SES Corp.*, 37 F. Supp. 3d 1260, 1266 (S.D. Fla. 2014) (“Where words in a tariff are used in their ordinary meaning, courts apply a set of construction maxims derived from contract and statutory interpretation,” including “considering the tariff as a whole”). Given that Broadvox’s tariff uses the same language to describe end office switching as the YMax and CoreTel tariffs but buttresses it significantly by explicitly incorporating the VoIP Symmetry Rule as it applies to assessing switched access charges to end office switching, the *YMax* and *CoreTel* holdings only would apply as AT&T argues they should if I were to ignore the language in Broadvox’s tariff.

3. *Broadvox’s Tariff*

In this regard, despite the parties’ submission of more than 200 pages of briefing and well over 3,000 pages of exhibits, largely focused on the scope of the VoIP Symmetry Rule provision

in Broadvox's tariff, what is before me is a straightforward matter of tariff interpretation. Broadvox's tariff is clear and unambiguous, making a literal reading possible. *See D.S. Swain*, 1990 WL 112071, at *2; *XO Commc'ns*, 2015 WL 6759473, at *5. This leaves me with no ambiguities to construe but only terms to enforce. *See D.S. Swain*, 1990 WL 112071, at *2.

As already noted, Section 3 of the federal tariff, Switched Access Charges, states that "Switched Access Service . . . is available to Customers for their use in furnishing their services to End Users" and that it "provides a two-point communications path between a Customer's Premises and an End User's Premises." FCC Tariff § 3.1.1, Jt. Ex. 51. It then sets out the various categories, or rate elements, of switched access for which Broadvox can assess charges. FCC Tariff § 3.3, Jt. Ex. 53. One category of switched access charges is end office switching; customers are subject to charges for end office switching "related to . . . the terminations in the end office of end user lines." *Id.* § 3.3.3, Jr. Ex. 53. As noted, "[t]he FCC has held that this tariff language carries a specific and established meaning: 'a physical transmission facility that provides a point-to-point connection between a customer premises and a telephone company office.'" *CoreTel*, 752 F.3d at 374 (quoting *YMax*, 26 FCC Rcd. 5742, ¶ 40). Thus, consistent with *YMax* and *CoreTel*, this section read in isolation does not allow Broadvox to charge end office switching charges for over-the-top VoIP traffic, because it does not provide "termination in the end office of end user lines" or provide the path to the End User's Premises. *See id.*; *YMax*, 26 FCC Rcd. 5742, ¶ 40.

But Broadvox's tariff then distinguishes itself from the *YMax* and *CoreTel* tariffs by incorporating the VoIP Symmetry Rule. FCC Tariff § 3.8.4, Jt. Ex. 63. As already discussed, under this rule, the call control functions that competitive LECs, such as Broadvox, and their over-the-top VoIP partners jointly provide "are the functional equivalent of end-office

switching,” and therefore, the competitive LECs are “eligible to assess access charges for this service,” even though they do not “provide the physical last-mile facility to the VoIP provider’s end user customers.” *In re Connect Am. Fund*, 30 FCC Rcd. 1587, ¶¶ 19, 29; *see* AT&T’s Mem. 17 (quoting this holding). Consistent with the VSR, Broadvox’s tariff provides that “All VoIP-PSTN Access traffic will be assessed switched access charges at the rates set forth in this tariff,” and that Broadvox may assess “switched access rate elements,” which, as noted, include end office switching, “for access services,” even if it is not Broadvox that provides the service that ultimately delivers the call. FCC Tariff § 3.8.4. The tariff defines “access services” to “include[] services and facilities provided for the origination or termination of any interstate Telecommunication regardless of the technology used in transmission,” which may be “either TDM or Internet Protocol (‘IP’) or other technology,” and specifically to “include[] the functional equivalent of the incumbent local exchange carrier interstate exchange access services typically associated with . . . local end office switching . . . and tandem switching.” FCC Tariff § 1. It further provides that when Broadvox transmits calls using non-TDM transmission “in a manner that is comparable to a service offered by a local exchange carrier,” that transmission “constitutes the functional equivalent of carrier access service.” FCC Tariff § 3.8.4. This language clearly allows Broadvox to charge for the functional equivalent of end office switching; Broadvox need not also “incorporate the portion of the FCC’s rules that define end office switching service more broadly.” *See* AT&T’s Mem. 1–2. Simply put, Section 3.8.4 permits Broadvox to charge end office switching charges for VoIP-PSTN traffic, just as it would for TDM traffic under Section 3.3.3. It does not contradict Section 3.3.3, but rather expands upon it by providing for charges on another access service, that is, the over-the-top VoIP call service that is functional equivalent of the service typically associated with end office switching.

AT&T argues that the tariff cannot be construed such that “Section 3.8.4 applies to VoIP calls, and Section 3.3.3 applies to traditional TDM calls,” as Broadvox proposes, Broadvox’s Mem. 30, because “nothing in the language of Section 3.3.3 or Section 3.8.4 – or indeed anywhere in the tariff – suggests that Section 3.3.3 applies only to TDM calls while Section 3.8.4 applies only to VoIP.” AT&T’s Mem. 24. It seems disingenuous for AT&T to argue here that Section 3.3.3 does not apply only to TDM calls, when it argues elsewhere that end office switching charges, the subject of Section 3.3.3, do apply only to TDM calls, based on the limiting language of Section 3.3.3. *See* AT&T’s Mem. 2. Moreover, it is true that, as Broadvox counters, “the title of Section 3.8.4 (Application of Access Charges to VoIP-PSTN Access Traffic) and Section 3.8.4(a) make it clear that it only applies to VoIP traffic.” Broadvox’s Opp’n & Reply 12 n.12. Additionally, Section 3.3.3 states that “End Office Switching component is related to . . . the terminations in the end office of end user lines,” a feature of TDM traffic but not VoIP traffic. Further, reading the tariff as a whole, it also is clear that, as Broadvox suggests, *id.*, if Section 3.8.4 specifically applies to VoIP traffic, then the preceding sections describing switched access charges, including Section 3.3.3, apply to non-VoIP traffic, that is, TDM traffic.

According to AT&T, Broadvox’s reading renders Section 3.3.3 superfluous because “all of [Broadvox’s] access traffic is VoIP because that is how it receives the traffic from the tandem provider.” AT&T’s Mem. 24. Yet, according to Broadvox, “Section 3.3.3 is necessary for the operation of the VSR and Section 3.8.4 implementing that Rule,” because Section 3.8.4 first cross-references the rate elements that Section 3.3.3 describes and then provides for collection of any rate elements for which Broadvox performs the “functional equivalent.” Broadvox’s Opp’n & Reply 11. Broadvox insists that, “to determine whether Broadvox is performing the functional equivalent, the Broadvox Tariff must contain a description of the functions performed by those

rate elements” to permit the comparison necessary to determine if services are equivalent. *Id.* This accords with my reading of the tariff’s unambiguous language, above. Further, Broadvox need not receive TDM traffic to include a traditional description of end office switching charges. Given that the industry traditionally serviced TDM traffic, it makes sense to describe the services in familiar terms, well understood within the industry, as in Section 3.3.3, and then to expand that service (through Section 3.8.4) to include when the carrier employs newer technology.⁷

AT&T dedicates numerous pages to its argument that “the ‘specific governs the general’ when interpreting tariff provisions.” See AT&T’s Reply 3 (quoting *CoreTel*, 752 F.3d at 374). This cannon of construction, while accurate, see *CoreTel*, 752 F.3d at 374, only applies when the court must construe the provisions. “When a tariff is clear and unambiguous on its face,” as Broadvox’s tariff is, “no construction by the court is necessary, and the parties are bound by its terms.” *D.S. Swain*, 1990 WL 112071, at *2. Moreover, insofar as AT&T posits that “customers looking to see if they will be charged end office switching . . . will examine that specific tariff language in Section 3.3.3,” AT&T’s Reply 4, is disingenuous, because customers with VoIP-PSTN traffic would look at the section on VoIP-PSTN traffic, not traditional end office switching, a service they are not receiving.

In sum, Broadvox properly charged AT&T for end office switching charges on its over-the-top VoIP traffic, and AT&T is liable for any end office switching charges it has refused to pay. Broadvox’s motion for summary judgment as to liability on Counts I and IV of Broadvox’s

⁷ According to Broadvox, it included the TDM-specific provisions because it “knew carriers like AT&T would attempt to deny compensation for traffic as VoIP-PSTN traffic and drafted its tariff to collect for TDM traffic.” Broadvox’s Opp’n & Reply 12. Broadvox does not provide any evidentiary support for this argument. Even if it had, I could not consider it because “[a]n unambiguous and duly published tariff,” such as Broadvox’s, is “binding on the parties and has the force of law . . . regardless of the intentions of the parties” *XO Commc’ns*, 2015 WL 6759473, at *5 (quoting *In re Carolina Motor Exp., Inc.*, 949 F.2d 107, 111 n.3 (4th Cir. 1991)).

Amended Complaint (state and federal tariff violations) is granted with regard to the end office switching charges only. AT&T's motion for summary judgment on liability as to end office switching charges claims in these counts, as well as Count II of AT&T's Counterclaim (Billing For Functions Not Provided On VoIP-PSTN Traffic), is denied. Broadvox's claims for end office switching charges⁸ on over-the-top VoIP traffic will proceed to trial on damages.

B. End Office Switching Charges and Tandem Switching Charges on PPCC Traffic

1. Parties' Arguments

Broadvox's claim to switching charges on PPCC traffic stands or falls depending on the accuracy of its assertion that a PPCC "call" involves two separate calls, one from the calling party (AT&T's long-distance customer) to the PPCC platform and a second one from the platform to the called party. Broadvox argues that it "terminate[s]" the first call and therefore is entitled to recover end office and tandem switching charges for its services on that call. Broadvox's Mem. 37. In Broadvox's view, this PPCC traffic is "a form of 'over the top' traffic," as Broadvox's VoIP provider partner terminates the calls to the PPCC platform in IP format, and therefore Broadvox is entitled to assess switching charges under the VoIP Symmetry Rule, which "places no restriction on the types of VoIP providers with which competitive LECs may form partnerships." *Id.* at 37, 46 (quoting 2015 Declaratory Ruling, 30 FCC Rcd. 1587, ¶ 21).

As AT&T sees it, Broadvox is not entitled to these charges because Broadvox does not terminate the calls to the PPCC platform. AT&T's Mem. 26. AT&T contends that a PPCC call is one two-phased call that continues through the PPCC platform to its ultimate recipient, the

⁸ Trial also will address damages for tandem switching charges on over-the-top VoIP calls. Although AT&T does not contest its liability for tandem switching charges on over-the-top VoIP calls, the parties dispute AT&T's payment of these charges. *See* Broadvox's Mem. 19 n.9.

called party, where it terminates. *Id.* at 3. AT&T also argues that the VoIP Symmetry Rule does not apply because Broadvox, in providing “intermediate routing . . . to a calling card platform,” does not “provide ‘comparable’ service to traditional access services charged by local exchange carriers,” and “Broadvox has cited no evidence that the prepaid calling card services at issue were placed or received exclusively, or even primarily, over computers or internet phones.” *Id.* at 36–38. Underlying this argument is AT&T’s primary contention: that PPCC calls do not terminate at the PPCC platform. *See id.*

2. *One Call or Two?*

To determine whether Broadvox may impose access charges on PPCC calls, I must resolve whether PPCC calls involve two separate calls with the first one terminating at the PPCC platform, as Broadvox posits, or, in AT&T’s view, one two-phased call. The Commission addressed the nature of these calls in *In re AT & T Corp. Pet. for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, 20 FCC Rcd. 4826 (2005) (“2005 PPCC Order”), and *In re Regulation of Prepaid Calling Card Servs.*, 21 FCC Rcd. 7290, ¶ 6 (2006) (“2006 PPCC Order”), *vacated in part on other grounds*, 509 F.3d 531 (D.C. Cir. 2007).

In the *2005 PPCC Order*, AT&T sought a declaratory ruling that the service it provided in transmitting a PPCC call “made using its so-called ‘enhanced’ prepaid calling cards,” that is, a call that communicated an advertising message to the caller at the PPCC platform, was an “information service,” not a “telecommunications service.” If that were the case, then there would be “a call endpoint at the switching platform, thereby dividing a calling card communication into two calls.” *Id.* ¶¶ 1, 6, 14, 15, 23. Essentially, in stark contrast to its current position, AT&T asked the Commission to declare that the PPCC calls terminated at the platform so that, when the platform was out of state but the called party was in-state, the call would be

“considered jurisdictionally interstate because it consists of two calls (one between the caller and the platform and one between the platform and the called party).” *Id.* ¶¶ 5, 7. By making this argument, AT&T hoped to avoid paying the intrastate access charges that otherwise would be due under the end-to-end-analysis that the Commission applied to determine jurisdiction. *Id.* ¶ 7; *see id.* ¶ 5 (“For purposes of determining the jurisdiction of calling card calls, the Commission has applied an ‘end-to-end’ analysis, classifying long-distance calls as jurisdictionally interstate or intrastate based on the endpoints, not the actual path, of each complete communication.”).

The Commission found that “the mere insertion of the advertising message in calls made with AT&T’s prepaid calling cards does not alter the fundamental character of the calling card service” and therefore “AT&T’s service is properly classified as a telecommunications service.” *Id.* ¶ 21. It then addressed the jurisdiction of these calls, concluding that the end-to-end analysis still applied and an out-of-state PPCC platform did not eliminate intrastate access charges when the called party was in-state. *Id.* ¶¶ 22–29. The FCC reasoned that “it cannot be the case that communication of the advertising message creates an endpoint because *all* calling card platforms engage in some form of communication with the calling party, and the Commission never has found this communication to be relevant for jurisdictional purposes.” *Id.* ¶ 23.

Notably, the Commission explicitly “limit[ed] [its] decision” to this form of PPCC calls that included messages at the PPCC platform, *id.* ¶ 1, and only discussed the relevance of the PPCC platform “for jurisdictional purposes,” *id.* ¶ 23. And, while AT&T also argued that two other forms of PPCC calls terminated at the PPCC platform for jurisdictional purposes, the Commission did not address those calls in its Order, instead issuing a Notice of Proposed Rulemaking. *See id.* ¶¶ 11–13 (noting issues and seeking comments regarding classification of (1) calls transmitted in part or whole in IP format that communicated an advertising message at

the PPCC platform, and (2) calls in which the caller heard a menu of options at the PPCC platform (“e.g., ‘press 1 to learn more about specials at ABC stores . . .’”).

Thereafter, AT&T filed an emergency petition, asking the FCC to adopt interim rules “imposing federal universal service funding obligations on all prepaid calling card services [including the services for which the Commission sought comments regarding their classification] regardless of whether the Commission ultimately decides they are telecommunications services or information services.”⁹ *2006 PPCC Order*, 21 FCC Rcd. 7290, ¶ 6. AT&T also asked the Commission to “subject[] all prepaid calling card service providers to the same type of access charges.” *Id.* The Commission agreed that it needed to take immediate action “to preserve universal service and provide regulatory certainty while the Commission considers systemic reform” *Id.* ¶ 8. Although AT&T asked the Commission not to reach the issue of PPCC call classification, the Commission decided that it needed to take immediate action “to resolve the classification issues . . . so that there [would] be no doubt as to the requirements that apply to prepaid calling card providers.” *Id.* ¶ 9.

The Commission found that “(1) menu-driven prepaid calling cards[] and (2) prepaid calling cards that utilize IP transport to deliver all or a portion of the call . . . are telecommunications services and that their providers are subject to regulation as telecommunications carriers.” *Id.* ¶ 10. Thus, “providers [of these calling cards] are now subject to all of the applicable requirements of the Communications Act and the Commission’s rules, including requirements . . . to pay access charges,” based on the location of the called party on the far side of the platform, not the location of the PPCC platform. *Id.* ¶ 21; *see 2005 PPCC*

⁹ Telecommunications service providers “must contribute to the federal Universal Service Fund (USF) based on their interstate revenues” *2006 PPCC Order*, 21 FCC Rcd. 7290, ¶ 1.

Order ¶¶ 22–29. To ensure accurate billing “at least on the terminating end” (the second stage of a PPCC call), the FCC ordered that “carriers must pass the [number] of the calling party . . . and not replace that number with the number associated with the platform,” so that carriers can determine jurisdiction based on the calling and called parties’ numbers, not the PPCC platform’s number. *2006 PPCC Order* ¶¶ 33–34. The FCC noted one exception to this approach, holding that “the platform number should be considered the called party number *if* the caller does not attempt to make a call to a third party. *In this scenario*, the caller is completing a call to the platform” *Id.* ¶ 37. This is not, as Broadvox suggests, Broadvox’s Mem. 44, a broad recognition that PPCC traffic involves two separate calls. Rather, it is only recognition that, for jurisdictional purposes, when the call does not extend beyond the platform, the platform is the terminus for the call.¹⁰

Following the *2005 PPCC Order* and the *2006 PPCC Order*, the Commission observed that, for “calling card platform cases,” it had “applied an end-to-end analysis and found that calls dialed in to a calling card platform and then routed to another party terminated with the ultimate called party, not at the platform,” such that “there was one call (from A to B via the calling card platform), not two (A to the platform plus platform to B).” *Quest Commc’ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, 22 FCC Rcd. 17973, ¶ 34 & n.114 (2007) (“*Farmers*”) (citing *2005 PPCC Order*, 20 FCC Rcd. 4826; *2006 PPCC Order*, 21 FCC Rcd. 7290). Yet, *2005 PPCC*

¹⁰ Even for these calls, Broadvox cannot charge because the PPCC platform provider is not the end user or the called party. See FCC Tariff §§ 1, 3.1.1, 3.2.1; *High-Cost Universal Service Support*, Order on Remand & Report & Order & Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475, ¶ 13 (2008) (“*2008 ISP Remand Order*”), *aff’d sub nom. Core Commc’ns, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010); Jt. Stmt. ¶¶ 11–13.

Order and the 2006 PPCC *Order* addressed jurisdictionalizing,¹¹ and, according to Broadvox, the end-to-end analysis is only appropriate for jurisdictionalizing. AT&T counters that, in *Farmers*, the Commission also observed that it “has generally used an ‘end-to-end’ analysis in determining where a call terminates” and “consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.” *Id.* ¶ 31 (quoting *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000)); see AT&T’s Mem. 27. Broadvox insists that *Farmers* misapplied the holding from *Bell Atlantic*. Broadvox’s Opp’n & Reply 24–25.

In *Bell Atlantic*, the D.C. Circuit reviewed an FCC decision in which the Commission had applied an end-to-end analysis to determine “whether calls to internet service providers (‘ISPs’) within the caller’s local calling area are themselves ‘local,’” such that reciprocal compensation¹² would be due on such calls. 206 F.3d at 2. The Commission had found that the calls were not local because “the communication characteristically [would] ultimately (if indirectly) extend beyond the ISP to websites out-of-state and around the world.” *Id.* The D.C. Circuit vacated and remanded, reasoning that the Commission failed to employ “reasoned decisionmaking” when it applied the end-to-end analysis “that is has traditionally used to determine whether a call is within its interstate *jurisdiction* . . . for quite a different purpose without explaining why such an extension made sense in terms of the statute or the Commission’s own regulations.” *Id.* at 3; see *id.* at 4 (reiterating that “the ‘end-to-end’ analysis

¹¹ “Jurisdictionalizing” is the term used to describe the determination of “where a call originated and where it terminated” for purposes of “assessing the appropriate compensation for a local, long distance intrastate, and long distance interstate call.” *Cent. Tel. Co. of Va. v. Sprint Commc’ns Co. of Va.*, 715 F.3d 501, 507 (4th Cir. 2013).

¹² Local exchange carriers pay each other “reciprocal compensation,” which is similar to the switching charges that long-distance carriers pay LECs. See *Bell Atl.*, 206 F.3d at 4.

[is one] that [the Commission] has traditionally used *for jurisdictional purposes* to determine whether particular traffic is interstate” (emphasis added)). Thus, Broadvox is correct that *Bell Atlantic* does not stand for the proposition that the end-to-end analysis generally applies outside the jurisdictional context. *See id.*

But, significantly, *Bell Atlantic* also does not hold that the end-to-end analysis cannot apply outside the jurisdictional context. Instead, the D.C. Circuit simply differentiated the cases that the Commission relied on for using the end-to-end approach, *Teleconnect Co. v. Bell Tel. Co. of Penn.*, 10 FCC Rcd. 1626 (1995), and *In re Petition for Emergency Relief & Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd. 1619 (1992). *Bell Atl.*, 206 F.3d at 6. The court observed that *Petition for Emergency Relief* involved a voice mail service and *Teleconnect* involved 800 services, such that “[b]oth involved a single continuous communication, originated by an end-user, switched by a long-distance communications carrier, and eventually delivered to its destination.” *Id.* For the ISP traffic before it, in contrast, the end-to-end approach was not so readily applicable because “the subsequent communication [was] not really a continuation, in the conventional sense, of the initial call to the ISP”; “an end user [could] communicate with multiple destination points, either sequentially or simultaneously”; and the ISPs were not “telecommunications providers (as are long-distance carriers),” but rather “information service providers.”¹³ *Id.* at 5–7.

Teleconnect, 10 FCC Rcd. 1626, and *In re Long Distance/usa, Inc.*, 10 FCC Rcd. 1634, ¶ 13 (1995), are informative with regard to when calls terminate for non-jurisdictional purposes. In both, the Commission addressed how LECs should assess carrier common line (“CCL”)

¹³ Here, it is undisputed that the AT&T PPCC calls at issue are part of its telecommunications service. *Jt. Stmt.* ¶ 2.

charges for certain 800 services. At the time, “a bifurcated CCL rate system” governed CCL charges: a higher CCL charge applied at the terminating end, which was an “open” end, than at the originating end, which was a “closed” end.¹⁴ *Teleconnect*, 10 FCC Rcd. 1626, ¶ 2. Calls through 800 services were not open at the terminating end, and therefore the Commission ordered that the higher charge be paid on the originating end, which was open. *Id.* ¶ 2 & n.11. The 800 services at issue were different, however, in that they had two open ends; as a result the originating LECs charged the higher CCL charge at the originating end and the terminating LECs charged the higher rate at the terminating end, giving rise to the lawsuit. *Id.* ¶¶ 2–4; *Long Distance/usa*, 10 FCC Rcd. 1634, ¶¶ 2–4.

The LECs justified the imposition of two CCL charges on one call by arguing that the “service configuration . . . actually comprised two calls.” *Teleconnect*, 10 FCC Rcd. 1626, ¶ 9. As they saw it, “the first call originates with the calling party and terminates at Teleconnect’s intermediate switch,” and “the calling party then initiates a second call, which originates at the Teleconnect switch and terminates at the called party’s line.” *Id.* The Commission rejected their position, finding that “only a single higher CCL charge should have been assessed on the calls,” because a caller using the 800 service at issue was “making a single call.” *Id.* ¶¶ 1, 12. It reasoned:

[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications [when considering the scope of the Commission’s jurisdiction]. According to these precedents, [the FCC] regulate[s] an interstate wire communication under the Communications Act from its inception to its completion. Such an interstate communication does not end at an intermediate switch. [T]his view of [FCC] jurisdiction under the Act gives rise to an

¹⁴ An open end is “an end using exchange carrier common line plant to originate or terminate the call,” whereas “[a] ‘closed’ end does not use common line plant.” *Teleconnect*, 10 FCC Rcd. 1626 ¶ 3 n.11.

assumption that the interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities.

Id. ¶ 12 (footnotes omitted) (emphasis added); *see Long Distance/usa*, 10 FCC Rcd. 1634, ¶ 13 (same).

In *Teleconnect*, the Commission applied this end-to-end approach and “conclude[d] that a call placed using the [800 service] configuration is a single interstate communication.” 10 FCC Rcd. 1626, ¶ 12. In *Long Distance/usa, Inc.*, the Commission again applied this approach and “conclude[d] that the configuration [was] a single interstate communications that does not become two communications because it passes through intermediate switching facilities.” 10 FCC Rcd. 1634, ¶ 13. Both times, the Commission rejected defendants’ “attempt to distinguish the so-called ‘jurisdictional’ nature of a call from its status for ‘billing’ purposes” because “they present[ed] no persuasive argument nor any authority to support their contention that this distinction has legal significance.” *Teleconnect*, 10 FCC Rcd. 1626, ¶ 12; *see Long Distance/usa*, 10 FCC Rcd. 1634, ¶ 13 (same). Consequently, the Commission has made it clear that the end-to-end analysis applies for purposes of determining access charges, as well as for jurisdictionalizing. Under this approach, the Commission has determined that PPCC calls consist of one call that does not terminate until it reaches the called party on the far side of the PPCC platform. *See 2005 PPCC Order*, 20 FCC Rcd. 4826; *2006 PPCC Order*, 21 FCC Rcd. 7290.

3. *When Calls Terminate*

Alternatively, if I were to disregard the end to end analysis and consider instead the meaning of “terminate” to determine whether the transmission of a call to a PPCC platform is

one call that terminates at the platform, the result would be the same.¹⁵ Because Broadvox's tariff does not define "terminate," I must give it its "ordinary commercial meaning as ordinarily understood in the particular trade or industry." See *Atchison, Topeka & Santa Fe Ry. v. United States*, 181 Ct. Cl. 315, 322 (1967); see *YMax*, 26 FCC Rcd. 5742, ¶ 38. Broadvox argues that, as the Commission, the Fourth Circuit, and AT&T itself understand the term "terminate," it describes what happens at the PPCC platform. To the contrary, as "terminate" has been defined, it does not apply to the switching of a call at a PPCC platform.

Broadvox insists that "AT&T acknowledge[d] that there is a call terminating to the PPCC platform and that AT&T treats that call as having terminated to the platform," because "Mr. [Ardell] Burgess, a director in AT&T's Access Management Department, testifie[d] [that, for AT&T's] own PPCC services 'a prepaid calling card is debited once the call reaches an AT&T calling card platform, and such charges can be assessed even if the calling party does not complete a call with a called party using a second phone number.'" AT&T's Mem. 43 (quoting Burgess Dep., Jt. Ex. 2204). And, Broadvox contends that AT&T "has often treated the platform as the terminating location for the purpose of jurisdictionalizing and payment of originating access charges." Broadvox's Mem. 44. But, as noted, the Court adopts the "ordinary commercial meaning as ordinarily understood in the particular trade or industry," not one party's understanding or usage. See *Atchison*, 181 Ct. Cl. at 322. This is especially true given that the Commission disagreed with AT&T's treatment of the platform as the terminus, as discussed previously. See *2005 PPCC Order*, 20 FCC Rcd. 4826; *2006 PPCC Order*, 21 FCC Rcd. 7290.

¹⁵ Insofar as Broadvox insists that "access charges are . . . paid for intermediary [switching] functions," such that these charges are appropriate even if the calls do not terminate at the platform, Broadvox's Mem. 54, I note that "only a carrier whose facilities are used to originate or terminate a call may impose access charges." *Farmers*, 22 FCC Rcd. 17973, ¶ 31.

Nor has Broadvox cited any authority to support its approach of relying on AT&T's actions in unrelated activities to classify a call.

The Commission has “define[d] ‘termination,’ for purposes of section 251(b)(5),^[16] as ‘the switching of traffic that is subject to section 251(b)(5) at the terminating carrier’s end office switch ... and delivery of that traffic from that switch *to the called party’s premises.*’” *2008 ISP Remand Order*, 24 FCC Rcd. 6475, ¶ 13 (quoting *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 1040 (1996) (“*Local Competition Order*”), *vacated on other grounds by Iowa Util. Bd. v. FCC*, 219 F.3d 744 (8th Cir. July 18, 2000) (emphasis added)). In the *2008 ISP Remand Order*, 24 FCC Rcd. 6475, ¶ 13, the Commission agreed with the D.C. Circuit in *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 6 (D.C. Cir. 2000), that an ISP to which an LEC delivers a call is “clearly the ‘called party’” under this definition. According to Broadvox, the Commission found, on this basis, that “in order to be entitled to compensation on Section 251(b)(5) calls, a carrier like Broadvox need only establish that it has switched the call and delivered the call to *its customer’s* premises (here Broadvox’s PPCC customer).” Broadvox’s Mem. 53 (citing *2008 ISP Remand Order*, 24 FCC Rcd. 6475, ¶ 13) (emphasis in brief).

Notably, however, the *2008 ISP Remand Order* referred to delivery to “the called party,” not the customer. Certainly, Broadvox argues that “the PPCC platform provider [is] the called party.” Broadvox’s Mem. 11, ¶ 24; Broadvox’s Opp’n & Reply 23. But, in the Joint Statement of Undisputed Facts, Broadvox agrees that,

¹⁶ 47 U.S.C. § 251(b)(5), which “imposes on all LECs the ‘duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications,” is “not limited to local traffic,” but rather “defines the scope of traffic that is subject to reciprocal compensation” and can be applied to “traffic exchanged between a LEC and another carrier.” *2008 ISP Remand Order*, 24 FCC Rcd. 6475, ¶¶ 7–8, 10, 12.

With respect to PPCC calls, an AT&T long distance customer dials the long distance number assigned to a PPCC platform provider that is served by Broadvox Broadvox receives the call . . . and delivers the call to the PPCC provider platform. . . . *Once the call reaches the platform, if the AT&T long distance customer wishes to continue the process of reaching **the called party**, he or she then dials a second phone number. The call is then routed from the PPCC platform over the facilities of one or more carriers to a **called party**, via arrangements and payments made by the PPCC provider.*

Jt. Stmt. ¶¶ 11–13, Jt. Ex. 3 (emphasis added). Thus, Broadvox itself recognizes that the PPCC platform provider is not the called party. *See id.* Therefore, pursuant to the Commission’s definition of termination, calls terminate to “the called party’s premises,” not to the PPCC platform. *See 2008 ISP Remand Order*, 24 FCC Rcd. 6475, ¶ 13.

Broadvox also argues that, under Fourth Circuit precedent, “[a] carrier “terminates” a call by routing it from another carrier to a *customer* in its own network.” Broadvox’s Mem. 53 (quoting *Cent. Tel. Co. of Va. v. Sprint Commc’ns Co. of Va.*, 715 F.3d 501, 507 (4th Cir. 2013)) (emphasis added). In Broadvox’s view, “[t]here is no question that Broadvox’s customer is the PPCC platform provider and that Broadvox ‘terminates’ calls by routing them from ‘another carrier’, AT&T, to ‘a customer in its own network,’ the PPCC provider.” *Id.* But, significantly, “to charge for services under a tariff, a carrier must provide its services in exactly the way the carrier describes them in that tariff.” *CoreTel*, 752 F.3d at 374. Broadvox’s tariff does not provide that Broadvox can assess access service charges for terminating a call *to* a “customer.” Rather, it provides that “Switched Access Service provides for the ability . . . to terminate calls *from* a Customer’s Premises *to an End User’s Premises*,” FCC Tariff § 3.1.1, Jt. Ex. 51 (emphasis added), and, “Switched Access Service is furnished for originating and terminating calls *by* the Customer *to its End User*,” *id.* § 3.2.1, Jt. Ex. 52 (emphasis added). This means that Broadvox only provides switched access services when it terminates a call to an end user, not a customer. *See id.* §§ 3.1.1, 3.2.1.

An “End User” is

Any individual, association, corporation, governmental agency or any other entity subscribing to intrastate service provided by an Exchange Carrier where such individual association, corporation, governmental agency or other entity is not an Interexchange Carrier, Local Exchange Carrier, CLEC, Wireless Carrier or other entity otherwise utilizing the Company’s service to provide a telecommunications service (as defined by applicable law) to its own customers.

Id. § 1, Jt. Ex. 13. As Broadvox describes the PPCC platform provider, it is not an “end user,” given that it “bills entirely separate charges for the calls from the platform to the end user.” Broadvox’s Mem. 12. In contrast, a “Customer” is “[a]ny person, firm, partnership, corporation or other entity which uses service under the terms and conditions of this tariff and is responsible for the payment of charges. Customers typically include interexchange carriers, wireless providers, CLECs, and VoIP providers.” FCC Tariff § 1, Jt. Ex. 12. Thus, under the tariff, a call terminates, at least for purposes of assessing switched access charges, not to a customer such as the PPCC platform provider, but to an end user, which is the person or entity with which the calling party ultimately seeks to communicate. *See id.*

In sum, while the PPCC platform provider may be Broadvox’s customer, Broadvox’s tariff provides that a call terminates, at least for purposes of assessing switched access charges, not to a customer but to an end user, which is the person or entity with which the calling party ultimately seeks to communicate. *See* FCC Tariff §§ 1, 3.1.1, 3.2.1. This is consistent with the Commission’s definition of termination, under which calls terminate to “the called party’s premises.” *See 2008 ISP Remand Order*, 24 FCC Rcd. 6475, ¶ 13. Broadvox agrees that the PPCC platform provider is not the called party. *See* Jt. Stmt. ¶¶ 11–13. This also is consistent with the result under the end-to-end approach that the Commission applied in *Teleconnect*, 10 FCC Rcd. 1626 ¶ 13, and *Long Distance/usa, Inc.*, 10 FCC Rcd. 1634, ¶ 13, to determine appropriate charges on 800 call that passed through an intermediate switch. Accordingly, PPCC

calls do not terminate to the PPCC platform and therefore Broadvox is not entitled to switched access charges on these calls. AT&T's motion for summary judgment as to liability on Counts I and II of Broadvox's Amended complaint, as they pertain to PPCC traffic, as well as Count I of its Counterclaim, is granted. Broadvox's motion for summary judgment on Counts I and II of Broadvox's Amended complaint, as they pertain to PPCC traffic, is denied. AT&T's Counterclaim for overpayments on PPCC calls will proceed to trial on damages.

C. Communications Act, § 201(b) (Count II)

Section 201(b) of the Communications Act, which Broadvox claims AT&T violated, provides:

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful

47 U.S.C. § 201(b). As noted in the letter order denying AT&T's motion to dismiss,

“[A]n allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violations of any provision of the [Communications] Act, including sections 201(b) and 203(c)—even if the carrier's customer is another carrier. These holdings stem from the fact that the Act generally governs a carrier's obligation to its customers, and not vice versa. Thus, although a customer-carrier's failure to pay another carrier's tariffed charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a claim . . . in court under section 206[] for breach of the Act itself.”

Ltr. Order 3 (quoting *In re All Am. Tel. Co.*, 26 FCC Rcd. 723, ¶ 10 (2011)), ECF No. 16. Broadvox insisted at the dismissal stage that its statutory claims are not based on AT&T's failure to pay charges but rather its “course of conduct [that] demonstrates a series of unjust/unreasonable and discriminatory practices distinct from its failure to pay Broadvox's invoices for its tariffed services.” *Id.* Now, Broadvox asserts that AT&T's statutory violations

include not only “selectively paying only certain CLECS” but also “self-help nonpayment.” Broadvox’s Mem. 55.

Yet, Broadvox also concedes that the “long line of Commission and federal court precedent” it cites as “finding that self-help nonpayment constitutes a violation of Section 201(b),” *id.* at 58, actually “show[s] that self-help alone does not violate the Communications Act,” *see* Broadvox’s Opp’n & Reply 40 n.35. Broadvox maintains that “self-help is the first act in AT&T’s three-part drama violating the Act,” which also includes “a pattern and practice of nonpayment litigation” and “pick[ing] disparate and discriminatory rates from small companies such as Broadvox.” Broadvox’s Opp’n & Reply 39, 40 n.35. Thus, these allegations shall be considered as to Broadvox’s § 202 claim, and judgment will be entered in AT&T’s favor on Broadvox’s claim for violation of § 201, as it cannot be based on self-help non-payment alone. *See All Am. Tel. Co.*, 26 FCC Rcd. 723, ¶ 10; Fed. R. Civ. P. 12(c).

D. Communications Act, § 202 (Count III)

Broadvox also claims that AT&T violated § 202 of the Communications Act by refusing to pay tariffed rates, “forcing its smaller competitors to litigate,” and then reaching settlements “at different rates and at different times with each carrier.” Broadvox’s Mem. 59. Section 202 provides:

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services ... include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

47 U.S.C. § 202(a)–(b).

In Broadvox’s view, “AT&T is obligated pursuant to Section 202 to treat all carriers in a nondiscriminatory manner.” *Id.* Broadvox asserts that the language of § 202(b) “has been construed broadly by the courts to include application to a purchaser of services, as AT&T here. Broadvox’s Mem. 60 (citing *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 55 (2007)). AT&T counters that “the FCC has squarely held that where, as here, an allegedly ‘discriminatory’ practice consists of a customer’s ‘refusal to pay a comparable rate’ for communication services, Section 202 is inapplicable.” AT&T’s Mem. 41 (quoting *N. Cnty. Commc’ns Corp. v. MetroPCS Cal., LLC*, 24 FCC Rcd. 3807, ¶ 22 (2009)). Thus, the issue is whether § 202 applies to actions by a carrier–customer, as opposed to a carrier–service provider.

Certainly, in *Global Crossing*, the Supreme Court held:

[I]n ordinary English, one can call a refusal to pay Commission-ordered compensation despite having received a benefit from the payphone operator a “practic[e] ... in connection with [furnishing a] communication service ... that is ... unreasonable” [pursuant to § 201(b)]. The service that the payphone operator provides constitutes an integral part of the total long-distance service the payphone operator and the long-distance carrier together provide to the caller, with respect to the carriage of his or her particular call. The carrier’s refusal to divide the revenues it receives from the caller with its collaborator, the payphone operator, despite the FCC’s regulation requiring it to do so, can reasonably be called a “practice” “in connection with” the provision of that service that is “unreasonable.”

550 U.S. at 55. But, *Global Crossing* presented an inapposite set of facts. There, the carrier–customer’s refusal to compensate the payphone operator was not a tariff violation implicating the Commission’s rules with regard to access charges, as Broadvox presents here; it was “a refusal to

pay Commission-ordered compensation” to a “payphone operator.” *Id.* As the Commission later observed:

The [Communications] Act requires the Commission to adopt rules ensuring that payphone service providers receive compensation for every completed call originated from their payphones. To implement that statutory directive, the Commission adopted rules requiring certain carriers to pay to originating payphone service providers a fixed amount for each completed payphone call handled by those carriers. In subsequent decisions, the Commission held that *a carrier’s failure to pay the amount required to be paid by the Commission’s payphone compensation rules constitutes a violation of our payment rules and a violation of section 201(b) of the Act.*

In re All Am. Tel. Co., 26 FCC Rcd. 723, ¶ 17 (2011) (footnotes omitted) (emphasis added).

Significantly, the Commission explained that these facts were in “stark contrast” to “the provisions of the Act and [FCC] rules regarding access charges,” which “apply only to the provider of the service, not to the customer; and they govern only what the provider may charge, not what the customer must pay.” *Id.* ¶ 18. On this basis, the commission concluded that “failure to pay [access charges] does not breach any provisions of the Act or Commission rules.”

Id.

Likewise, in *North County Communications Corp.*, the Commission concluded that the carrier–service provider, North County “failed to state a claim under section 202(a) of the Act” by alleging that its carrier–customer’s “‘refusal to enter into an interconnection agreement that provide[d] a comparable rate for like termination services constitute[d] unjust and unreasonable discrimination’ under section 202(a) of the Act.” 24 FCC Rcd. 3807, ¶¶ 21–23 (footnotes omitted). There, North County claimed that its carrier–customer “negotiated and paid reasonable termination rates for intrastate traffic with other carriers, but refuses to do so with respect to North County.” *Id.* ¶ 21 (footnote omitted). The Commission held:

Section 202(a) is inapplicable where, as here, the challenged conduct - refusing to pay “a comparable rate for [allegedly] like termination services” - is that of the

carrier receiving the communication service rather than the carrier providing the service. Notably, North County does not base its section 202(a) claim on services provided by MetroPCS at all, but on alleged similarities between North County's own termination services and the termination services of other carriers. As the Commission has explained, however, "[s]ection 202(a) is not concerned with whether the services of two *separate* carriers are 'like'; it is concerned with whether two services offered by the *same* carrier are like." There is no dispute that North County, not MetroPCS, is the carrier providing the communication service in question here. Thus, MetroPCS' willingness or obligation to pay other carriers a different rate for terminating intrastate traffic than what it is willing to pay North County for terminating services does not fall within the scope of section 202(a) of the Act.

Id. ¶ 22 (footnotes omitted); *see also XChange Telecom Corp. v. Sprint Spectrum L.P.*, 2014 WL 4637042, at *4 (N.D.N.Y. Sept. 16, 2014) ("Generally speaking, the Act is intended to regulate the conduct of carriers in providing services to customers, and prohibit them from discriminating in the rates that they charge; it does not, however, govern a customer's obligations to a carrier.").

Broadvox has not identified any case law to the contrary. It cites *National Communications Association v. AT&T*, No. 93 CIV. 3707 (LAP), 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001), but there the court did not address whether a *carrier-service provider* has a cause of action under § 202. Rather, it noted that, in *In re MCI Telecommunications Corp.*, 62 F.C.C. 2d 703, ¶¶ 6–7 (1976), the Commission "refus[ed] to condone [the] customer's refusal to pay [the] tariffed rate for voluntarily ordered services, finding that self-help is not acceptable remedy, and noting that if [the] *customer* thought that carrier acted unlawfully, [the] *customer* had recourse to Sections 206-209 of the Communications Act." *Id.* at *5 (emphasis added). Broadvox also relies on *Competitive Telecommunications Association v. FCC*, 998 F.2d 1058, 1063–64 (D.C. Cir. 1993), and *Western Union International, Inc. v. FCC*, 568 F.2d 1012, 1014 (2d Cir. 1977), but these cases, also, addressed a customer's rights against a carrier under § 202, not vice versa. Consequently, Broadvox, as the service provider, cannot state a claim against

AT&T, its customer, under § 202, and judgment will be entered in AT&T's favor. *See* Fed. R. Civ. P. 12(c).

E. *Quantum Meruit* Claim

Broadvox finally seeks to recover in *quantum meruit* if it does not prevail on its tariff claims. Thus, Broadvox's *quantum meruit* claim is moot to the extent that it has prevailed on its tariff claims for end office switching charges on over-the-top VoIP traffic. Broadvox also cannot succeed on its *quantum meruit* claim insofar as the tariffs cover the PPCC services in question. This is because *quantum meruit* is a "quasi-contract remed[y] . . . that permits recovery, 'where, in fact there is no contract, but where circumstances are such that justice warrants a recovery as though there had been a promise.'" *Swedish Civil Aviation Admin. v. Project Mgmt. Enters., Inc.*, 190 F. Supp. 2d 785, 790 (D. Md. 2002) (quotations omitted). A plaintiff cannot recover under *quantum meruit* when a contract exists, as "[t]he general rule is that no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests." *Cnty. Comm'r of Caroline Cnty. v. J. Ronald Dashiell & Sons, Inc.*, 747 A.2d 600, 605 (Md. 2000) (citations and quotations omitted). Here, it is undisputed that the tariffs are contracts between the parties, and therefore Broadvox cannot recover under *quantum meruit* with regard to services covered by the tariffs. *See id.*

Thus, the issue are whether the PPCC services in question are covered by the tariffs or outside their scope and, if they are outside the scope of the tariffs, whether the filed rate doctrine bars this claim. Resolution of the first issue is simple. As Broadvox explains, the PPCC services in question necessarily are not covered by the tariffs: that is why Broadvox did not prevail on its tariff violation claims with regard to these services. *See* Broadvox's Opp'n & Reply 47–48.

The “filed rate doctrine” is a “century-old . . . doctrine[] associated with the ICA [Interstate Commerce Act] tariff provisions,” which the Supreme Court applied to the Communications Act in *American Telephone and Telephone Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 222 (1998). Under the filed rate doctrine, “the rate of the carrier duly filed is the only lawful charge,” and “[d]eviation from it is not permitted upon any pretext.” *Id.* (quoting *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94, 97 (1915)). Stated differently, it “expressly prohibit[s] [a carrier] from collecting charges for services that are not described in its tariff.” *MCI Worldcom Network Servs., Inc. v. Paetec Commc’ns, Inc.*, 204 F. App’x 271, 272 n.2 (4th Cir. 2006).

The doctrine “prevent[s] discrimination among consumers and . . . preserve[s] the rate-making authority of federal agencies.” *Bryan v. BellSouth Commc’ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004). The Supreme Court observed that “[t]his rule is undeniably strict” and “may seem harsh in some circumstances, its strict application is necessary to “prevent carriers from intentionally ‘misquoting’ rates to [customers] as a means of offering them rebates or discounts,” the very evil the filing requirement seeks to prevent.” *Am. Tel. & Tel. Co.*, 524 U.S. at 222–23 (quoting *Louisville & Nashville Ry.*, 237 U.S. at 97). The filed rate doctrine applies to “the provisioning of services and billing,” as well as rates and rate setting, because rates “do not exist in isolation.” *Am. Tel. & Tel. Co.*, 524 U.S. at 223 (citation omitted). Thus, under the doctrine, courts lack the authority to “award damages that would effectively impose a rate different from that dictated by the tariff,” as that “would usurp the FCC’s authority to determine what rate is reasonable.” *Bryan*, 377 F.3d at 430.

Here, Broadvox seeks to recover for services it provided that its tariffs do not cover. This Court cannot determine the rates associated with such services. *See Am. Tel. & Tel. Co.*, 524

U.S. at 222–23; *Bryan*, 377 F.3d at 430. Certainly, in *Quest v. Farmers & Merch. Mut. Tel. Co.*, 24 FCC Rcd. 14801, ¶ 24, n.96 (2009) (“*Farmers II*”), the Commission acknowledged that Farmers might not have been “precluded from receiving any compensation at all for the services it has provided to Qwest,” even though it was “bound by the terms of its tariff,” which did not permit it to assess switched access charges on them because they did “not constitute ‘end users’ within the meaning of the tariff provisions at issue.” *Id.* ¶¶ 24–25 & n.96. But, it later clarified that *Farmers II* “does not hold that a carrier is *always* entitled to some compensation for a service rendered, even if the service is not specified in its tariff.” *All. Am. Tel. Co.*, 26 FCC Rcd. 723, ¶ 19 (emphasis in *All Am. Tel. Co.*). Rather, it “merely holds that a carrier *may* be entitled to some compensation for providing a non-tariffed service, depending on the totality of the circumstances.” *Id.* (emphasis in *All Am. Tel. Co.*). Moreover, this observation in a footnote is not tantamount to a holding that carriers can recover in *court*, as opposed to before the Commission, for services they neglect to address in their tariffs or contracts with customers. In light of the necessary “strict application” of the filed rate doctrine, I conclude that Broadvox cannot recover on its *quantum meruit* claim in this Court. *See Am. Tel. & Tel. Co.*, 524 U.S. at 222–23; *Bryan*, 377 F.3d at 430. Summary judgment is granted in AT&T’s favor on this claim.

Conclusion

Broadvox’s motion for summary judgment on liability, ECF No. 81, is granted in part on Counts I and IV of the Amended Complaint, as to its claims under its federal and state tariffs to recover end office switching charges on over-the-top VoIP traffic. Judgment as to liability will be entered in Broadvox’s favor on these claims. Broadvox’s motion is otherwise denied.

AT&T’s motion for summary judgment on liability, ECF No. 87, with regard to Count II of its Counterclaim, which pertains to end office switching charges for the over-the-top VoIP

