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

In the Matter of	)	**FCC 95-358**
	)	
BEEHIVE TELEPHONE, INC., and	)	
BEEHIVE TELEPHONE NEVADA, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	File No. E-94-57
	)	
THE BELL OPERATING COMPANIES	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 1995; Released: August 16, 1995

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a complaint filed by Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc. (collectively Beehive) against the Bell Operating Companies (BOCs).[1] In its complaint, Beehive challenges the lawfulness of the 800 Service Management System Functions Tariff (SMS Tariff)[2] that was filed by the BOCs to comply with the Commission's instructions in a declaratory ruling it issued,[3] and alleges

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1 The BOCs include the Ameritech Operating Companies; the Bell Atlantic Telephone Companies; BellSouth Telecommunications, Inc.; Southwestern Bell Telephone Company; the NYNEX Telephone Companies; Pacific Bell and Nevada Bell; and U S West Communications, Inc.

2 Bell Operating Companies' Tariff F.C.C. No. 1.

3 Provision of Access for 800 Service, Order, 8 FCC Rcd 1423 (1993) (CompTel Declaratory Ruling) (finding, among other things, that access to the 800 Service Management System by Responsible Organizations (RespOrgs) is a Title II common

violations of the Communications Act of 1934, as amended.[4] For the reasons discussed below, we deny Beehive's complaint.

II. BACKGROUND

2. The 800 Service Management System (SMS) is the computer-based system that allows 800 numbers to be portable among service providers. Because of the SMS, an 800 customer may change carriers without changing 800 numbers. To accomplish this, the SMS uses a database that contains service information associated with each 800 number, including the identity of the carrier selected by the 800 customer for each number.[5]

3. Physically, the SMS consists of a main database and twelve regional databases called service control points (SCPs). All subscriber information for 800 customers is maintained in the main database and downloaded to the SCPs. When a caller places an 800 call, the local exchange company's (LEC) switch queries an SCP for routing information. The SCP directs the switch to route the call to the carrier chosen by the 800 customer. That carrier then delivers the call to the 800 customer.[6]

4. Database Service Management, Inc. (DSMI), a wholly-owned subsidiary of Central Services Organization, Inc. (Bellcore), which is itself jointly owned by the BOCs, manages the SMS. Southwestern Bell Telephone Company (SWBT), using software developed by Bellcore,[7] actually administers the SMS and provides the necessary computer hardware and network and operational support under contract with DSMI. Also under contract with DSMI, Lockheed Information Management Services Company (Lockheed) manages the Number Administration and Service Center (NASC), which provides administrative and support services to SMS users.[8]

5. Entities known as Responsible Organizations (RespOrgs) are responsible for entering information into and maintaining the accuracy of the information contained in the main database. Any entity that meets certain financial, technical, and service-related eligibility criteria set forth in the SMS Tariff may be a RespOrg, including an interexchange carrier (IXC), a local

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carrier service and shall be provided pursuant to tariff).

4 47 U.S.C. § 151, et seq. (the "Act").

5 CompTel Declaratory Ruling, 8 FCC Rcd at 1423.

6 Beehive Brief at 5; BOC Brief at 3.

7 BOC Brief at 3.

8 Beehive Brief at 7-10.

exchange carrier (LEC), the customer, or others.[9] RespOrgs are permitted access to the SMS under the terms and at the rates contained in the SMS Tariff. This tariffed service permits RespOrgs to reserve 800 numbers, create and modify customer records in the main database, and obtain various reports. For this tariffed service, RespOrgs pay a non-recurring charge to establish service and a flat monthly fee per 800 number associated with the RespOrg. RespOrgs may also pay a per-request tariffed fee for certain services.[10]

6. SCP owners contract with DSMI to receive updated information from the main database.[11] The BOCs deem this service to be unlike that provided to RespOrgs and do not offer it under tariff.[12] However, the services offered respectively to SCP owners and RespOrgs have two rate elements in common -- service establishment and main database access. SCP owners and RespOrgs are charged the same rates for these common rate elements.[13]

7. Beehive, which is a RespOrg, but not an SCP owner, has in the past taken the service offered by the BOCs under tariff. Beehive filed this complaint to challenge the lawfulness of the tariffed rates it has been charged for SMS service. At the time Beehive filed its complaint, it had paid a total of $42,768.90 and was threatened with service termination unless it paid additional charges of $7,909.50 that it had incurred, but refused to pay.[14] Beehive paid these additional charges,[15] but its service was subsequently disconnected for non-payment of other tariffed charges.[16]

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9 CompTel Declaratory Ruling, 8 FCC Rcd at 1426; Bell Operating Companies' Revisions to Tariff F.C.C. No. 1, 9 FCC Rcd 3037 n.1 (Com. Car. Bur. 1994); see Beehive Brief at n.3; see also BOC Brief at 3-4.

10 Beehive Brief at 11-13.

11 BOC Reply Brief at 9. Currently, SCPs are owned by the seven RBOCs, Southern New England Telephone Company, United Telephone Company, Bell of Canada, the GTE System Telephone Companies, and the GTE Operating Companies. These LECs have installed the necessary computer equipment to operate regional databases and contracted with DSMI to receive downloaded information from the SMS.

12 Id.

13 See Beehive Brief at 11.

14 Beehive Complaint at 18-19.

15 Amendment and Supplement to Complaint at 1-2.

16 Amendment and Supplement to Complaint at 1.

III. DISCUSSION

A. SUBSTANTIVE ISSUES

1. Contentions

8. Beehive objects to the rates it has been charged for SMS service,[17] and raises a number of arguments attacking the lawfulness of both the rates themselves and the tariff that sets them forth. Beehive's primary argument is that the SMS access service provided to RespOrgs is not a common carrier service, and, therefore, is not subject to the tariff or other provisions of Title II of the Act. According to Beehive, the test to be used here to determine whether SMS access service is a common carrier service is whether the SMS is used by RespOrgs to "transmit intelligence of their own design and choosing." Because the RespOrgs do not use the SMS for that purpose, argues Beehive, access to SMS cannot be a common carrier service.[18] Beehive claims that at most the SMS provides an administrative function that enables the accurate routing of 800 calls and is thus "incidental" to the provision of a communications service.[19] Beehive argues that this is insufficient to make SMS access a common carrier service subject to Title II.[20]

9. In the alternative, Beehive alleges a variety of Title II violations if the Commission finds the SMS access provided to RespOrgs to be a common carrier service. Beehive first claims that the tariffed rates it paid for SMS access are unjust and unreasonable under Section 201(b) of the Act[21] because they represent DSMI's revenue requirements rather than cost-based rates.[22] Beehive next claims that the BOCs unreasonably discriminate in violation of Section 202(a)[23] by

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17 See, e.g., Complaint at 7, 16; letter to DSMI from Art Brothers, CEO of Beehive (June 29, 1993).

18 Id. at 24-25 (citing National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (NARUC II)).

19 We will use the term "incidental service" to refer to a service that is incidental to transmission within the meaning of Section 3(a).

20 Beehive Brief at 26-27.

21 47 U.S.C. § 201(b). This section provides in pertinent part that "[a]ll charges, practices, classifications, and regulations for and in connection with such communications service shall be just and reasonable."

22 Beehive Brief at 31-32.

23 47 U.S.C. § 202(a). This section provides in pertinent part that it is 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

offering SMS access to RespOrgs only under tariff, while offering the same service to SCP owners under negotiated contracts.[24] Beehive also claims that the BOCs should not be permitted to file the SMS tariff under Section 203(a)[25] because they are not the "carrier" with respect to the SMS.[26] Finally, Beehive argues that the BOCs did not get the proper authorization from the Commission pursuant to Section 214[27] before constructing the SMS in violation of Section 214(a).[28]

10. Beehive seeks both damages and injunctive relief for these alleged unlawful acts by the BOCs. Beehive seeks damages in the amount of the sum of the SMS charges it has paid plus interest at the IRS rate for tax refunds. Beehive also requests the return to its control of all 800 telephone numbers that it had reserved in the main database prior to the time its service was terminated.[29]

11. As a threshold matter, the BOCs, while agreeing with Beehive that, contrary to the Commission's finding, SMS service to RespOrgs is not a communications common carrier service and should not be tariffed under Section 203, argue that Beehive's allegations amount to an impermissible collateral attack on the CompTel Declaratory Ruling.[30] In the CompTel proceeding, the Commission required the tariffing of SMS service despite the BOCs' argument that the SMS administrator performs "administrative functions," not common carrier functions. According to the BOCs, Beehive should have challenged that ruling by filing a petition for reconsideration or an appeal. Because it failed to do so, the BOCs contend that Beehive cannot now properly challenge the Commission's determination that SMS is a common carrier service

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communications services."

24 Beehive Brief at 32.

25 47 U.S.C. § 203(a). This section provides in pertinent part that "[e]very carrier ... shall ... file with the Commission ... schedules showing all charges for ... communication between points on its own system ...."

26 Beehive Brief at 28-31.

27 47 U.S.C. § 214.

28 47 U.S.C. § 214(a). This section provides in pertinent part that "[n]o carrier shall undertake the construction of a new line ... unless and until there shall first have been obtained from the Commission a certificate ...."

29 Beehive Reply Brief at 10.

30 BOC Brief at 7; BOC Reply Brief at 2.

in this formal complaint proceeding.[31] The BOCs also argue that the reasonableness of the tariffed access rates are the subject of a Section 204 tariff investigation proceeding, and review of those rates in this Section 208 proceeding is inappropriate.[32] Finally, the BOCs deny that they unreasonably discriminate between RespOrgs and SCP owners because the services provided to each are not like because they are functionally different.[33] The BOCs did not specifically respond to Beehive's Section 214 claim and presented no substantive arguments to support the Commission's finding in the CompTel Declaratory Ruling that SMS access is a common carrier service.

12. Beehive responds to the BOCs' procedural challenges by arguing that a jurisdictional issue in a Commission ruling may be raised at any time.[34] Beehive further responds that the Commission has a duty to rule on questions properly raised in a formal complaint proceeding, and that it has properly raised issues about the lawfulness of the CompTel Declaratory Ruling.[35] Moreover, Beehive claims, the holding in the CompTel Declaratory Ruling that SMS service should be treated as a common carrier service was merely an initial determination that is subject to further consideration by the Commission. According to Beehive, the Commission has authority to detariff SMS and depart from the holding of the CompTel Declaratory Ruling if further examination or subsequent events show that SMS service is not a common carrier service.[36]

2. Discussion

a. BOCs' Collateral Estoppel Claim

13. We do not agree that Beehive is collaterally estopped from raising its jurisdictional claims in this proceeding. The doctrine of collateral estoppel precludes relitigation of facts issues only if 1) there is an identity of parties; 2) there is an identity of issues; 3) the parties had adequate opportunity to litigate the issues in the prior proceeding; 4) the issues were actually litigated and determined in the prior proceeding; and 5) the findings in the prior proceeding were

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31 BOC Brief at 6; BOC Reply Brief at 4.

32 BOC Reply Brief at 7-9.

33 Id. at 9.

34 Beehive Brief at 23 (citations omitted).

35 Id. (citing American Telephone and Telegraph Company v. FCC, 978 F.2d 727 (D.C. Cir. 1992) (AT&T v. FCC); other citations omitted).

36 Beehive Brief at 23-24.

necessary to the proceeding.[37] The first two elements are missing here. First, Beehive was not a party to the CompTel proceeding; thus, there is no identity of parties. Second, there is no identity of issues. This is true despite the fact that, as the BOCs claim, the Commission squarely addressed the question of whether SMS access is a communications common carrier service in the CompTel Declaratory Ruling. The issue as presented there and here is different in light of the changed circumstances alleged by Beehive.[38] Beehive alleges that the record in this proceeding contains information about the creation of DSMI and its operation of the SMS that Beehive claims was not available at the time of the CompTel Declaratory Ruling. Specifically, Beehive points to DSMI's handling of the day-to-day operation of the SMS as evidence that the BOCs no longer have general control over SMS access and alleges that DSMI, unlike the BOCs, is not a communications common carrier but for its operation of the SMS. From these changed circumstances, Beehive concludes, respectively, that the Commission's finding in the CompTel Declaratory Ruling that the BOCs should file the SMS Tariff is no longer valid and the Commission's additional finding that SMS access is a common carrier service is questionable. Given these allegations, we find that the issue presented in this proceeding lacks identity with the issue decided in the CompTel Declaratory Ruling. Because there is neither identity of parties nor issues between that proceeding and this one, we find that collateral estoppel does not bar Beehive from raising its claims in this proceeding.

14. Further, where there is an allegation that subsequent events have rendered a ruling unlawful, the Commission is obliged to consider that allegation.[39] We note that the CompTel Declaratory Ruling was based on the BOCs plans for SMS access service, which was not yet offered at that time. Beehive alleges that the way in which SMS access is actually provided does not fully comport with the plans the Commission considered in the CompTel Declaratory Ruling.

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37 Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir. 1985); see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) (Court held that a party may not be collaterally estopped if it did not have a full and fair opportunity to litigate an issue in the earlier proceeding and explained in dicta that a litigant who did not appear in the prior proceeding may not be collaterally estopped from litigating the issue).

38 See Aronson v. U.S. Dep't. of Housing and Urban Development, 869 F.2d 646 (1st Cir. 1989) (Aronson) (Due to its adoption of new eligibility notification procedures following judicial reversal, Department of Housing and Urban Development was not collaterally estopped from relitigating in later suit issue of whether entrepreneur was entitled, under the Freedom of Information Act, to lists of mortgagors due refunds under federal mortgage insurance program.); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4417 at 162-163.

39 AT&T v. FCC, 978 F.2d at 733.

We must consider these allegations.[40] The Commission emphasized in the CompTel Declaratory Ruling that its findings were based on the record available at that time. Implicit in that order was a recognition that subsequent events may require that those findings be revisited.[41] We, therefore, take this opportunity to discuss those findings further and to address Beehive's claims that the creation of DSMI has rendered them invalid. Beehive also has raised issues not present in the Section 204 proceeding and alleged violations of the Communications Act. Beehive is entitled to have these claims adjudicated here.[42]

b. Common Carriage

15. Beehive argues that SMS access service is not a common carrier service. The determination of the jurisdictional status of SMS access hinges upon two questions: (1) is SMS access an interstate or foreign communications service under Section 3(a) of the Communications Act, which defines communications services to include not only the transmission of signals by wire or radio, but also all services incidental to such transmission; and (2) if so, is it a common carrier service, under Section 3(h) of the Act. The first question was answered in the affirmative in the CompTel Declaratory Ruling. There, the Commission found SMS service to be incidental to 800 service, which is a common carrier transmission service, because 800 service does not function properly without the SMS.[43] That finding is not in dispute here. Even Beehive agrees that it is reasonable to view SMS service as incidental to 800 service.[44] The answer to the second question is also affirmative. The precedents are clear that the key feature of common carriage is that the service provider undertakes to provide service indifferently to all potential customers.[45]

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40 See National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 644 (D.C. Cir. 1976) (NARUC I).

41 CompTel Declaratory Ruling, 8 FCC Rcd at 1426. Further, in Aronson, the court found that changed circumstances precluded application of collateral estoppel, relying in part on the suggestion in its initial decision that adequate departmental procedures could have altered the result. 869 F.2d at 648.

42 See AT&T v. FCC, 978 F.2d at 732.

43 CompTel Declaratory Ruling, 8 FCC Rcd at 1426. Although the Commission has found SMS service to be necessary to 800 service, even services that are not technically necessary to a transmission service may be considered incidental thereto because the language of Section 3(a) is quite broad. Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 7 FCC Rcd 3528, 3531 (1992) (Validation Order).

44 Beehive Brief at 26.

45 See, e.g., Frontier, 24 FCC at 254; NARUC II, 533 F.2d at 608.

SMS access is offered indifferently to all entities that meet the criteria for being a RespOrg,[46] and many entities take service as RespOrgs under the BOCs' tariff. Indeed the Commission's regulatory scheme requires it to be so offered.[47] In the CompTel Declaratory Ruling, the Commission found that, because SMS access is necessary to the provision of 800 services, it is important to ensure that SMS access is provided at reasonable rates and on nondiscriminatory terms.[48] The Commission concluded there that requiring that SMS access be tariffed was necessary to reach the goals of reasonable rates and nondiscriminatory terms.[49]

16. The crux of Beehive's jurisdictional claim is that the test applied by the court in NARUC II also applies to the BOCs' provision of SMS access to RespOrgs and precludes a finding that the service is a common carrier service. NARUC II established that a transmission service is a common carrier service if in addition to the service provider undertaking to carry for all customers indifferently, the service enables the customer to "transmit intelligence of his own design and choosing."[50] Beehive argues that because SMS access service does not enable customers to transmit anything, it does not satisfy the NARUC II test. Beehive further contends that even if transmissions are deemed a component of SMS access service, that which is transmitted is not of the customer's own design and choosing. As discussed in more detail below, Beehive's reliance on NARUC II is misplaced. Nothing in that case suggests that a service, such as SMS access, which is incidental to a service that provides transmission of intelligence of the customer's own design and choosing fails to meet the test of common carriage applied there. Application of that test so as to exclude a service that is incidental to transmission from the definition of common carriage would produce a result at odds with the plain meaning of Sections 3(a) and 3(h), which respectively define "wire communication"[51] and "common carrier".[52]

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46 See supra note 9.

47 CompTel Declaratory Ruling, 8 FCC Rcd at 1426. This alone is sufficient evidence of offering indifferently to all potential customers. NARUC II, 533 F.2d at 609. See Validation Order, 7 FCC Rcd at 3532; infra note 60.

48 CompTel Declaratory Ruling, 8 FCC Rcd at 1426-7.

49 Id.

50 NARUC II, 533 F.2d at 608-09. The requirement to "transmit intelligence of [the customer's] own design and choosing" is unique to telecommunications and distinguishes common carriage in the telecommunications context from common carriage generally. Id. at 609.

51 "Wire communication" means:

> the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all

Moreover, as outlined below in paragraph 19, the Commission previously has rejected the theory advanced by Beehive that only the transmission portion of a communications service may be considered common carriage by holding that a service that is incidental to a common carrier transmission service is also common carriage.[53]

17. The "transmits intelligence of their design and choosing" test was first enunciated by the Commission in 1958 in determining whether a community antenna television (CATV) operator was a communications common carrier.[54] To develop this test, the Commission examined the interplay between Sections 3(a) and 3(h) of the Act.[55] The Commission noted that Section 3(h) does not specifically define "common carrier" and relied on the legislative history to determine that Congress intended the term to have its ordinary meaning of holding out to provide service indifferently to all potential customers.[56] Integrating the Act's definition of "wire communication," the Commission determined that a communications common carrier service is a service offered on a common carrier basis whereby customers could "transmit intelligence of their own design and choosing" over wire transmission facilities.[57]

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instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

47 U.S.C. § 153(a).

52 "Common carrier" means "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy...." 47 U.S.C. § 153(h).

53 Validation Order, 7 FCC Rcd at 3532.

54 See Frontier Broadcasting Co. v. J. E. Collier, 24 FCC 251 (1958) (Frontier). CATV provided access to broadcast television signals to persons living in areas of poor reception. This was accomplished by placing an antenna in an area where reception of broadcast signals was good (often a hilltop) and transmitting selected signals over wires to the subscribers' premises. Because the quality of the reception varied among different broadcast stations and the technical limitations of CATV technology, the CATV operator selected a limited number of broadcast stations to carry from among the broadcast stations signals that it could receive at the antenna site. Id. at 252.

55 See 47 U.S.C §§ 153(a) and (h).

56 Frontier, 24 FCC at 254. This view has been endorsed by the courts. See NARUC I, 525 F.2d at 642; NARUC II, 533 F.2d at 608.

57 Frontier, 24 FCC at 254. "Intelligence" is a shortened reference to the "writing, signs, signals, pictures, and sounds of all kinds" language of Section 3(a).

18. The Commission's decision in that proceeding turned on the question of whether the transmission of broadcast television signals over the CATV system's wires was the kind of transmission that would be considered "wire communications" under Section 3(a). In answering this question, the Commission focused on the ability of the customers to choose the intelligence to be transmitted, not merely on the fact of transmission itself. Ultimately, the Commission found the CATV operator not to be a communications common carrier because the customers (subscribers) were merely passive recipients of whatever signals the CATV operator chose to send over the system.[58] In contrast, the NARUC II court found a cable television operator that leased access channels for two-way, point-to-point, non-video communications to be a communications common carrier because its system permitted subscribers to engage in two-way communication. Importantly, these subscribers, unlike the CATV customers in Frontier, exercised discretion to use the cable system to transmit messages and thus to "transmit intelligence of their own design and choosing."[59] These cases deal exclusively with the question of when transmission services are common carrier services. Here the issue is whether a service that is incidental to transmission is a common carrier service. In neither Frontier nor NARUC II was there any analysis of this issue.

19. The Commission has, however, addressed the question of when services that are incidental to transmission fall within the Commission's Title II jurisdiction.[60] Importantly, the Commission has specifically rejected the theory advanced by Beehive that only transmission services are subject to the Commission's Title II jurisdiction by finding a service that is incidental to a common carrier transmission service to be common carriage.[61] In the Validation Order, the Commission found that services, such as validation and screening of calling cards, that are incidental to the transmission of telephone messages fall within the meaning of wire communications as defined in Section 3(a) and stated, "[w]e reject the contention ... that [incidental services] are not communications services because they do not employ wire or radio facilities to transmit intelligence designed by the [customer]."[62] The Commission went on to find

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58 Id. at 204-05. See supra note 54.

59 NARUC II, 533 F.2d at 609-10.

60 In addition to the case discussed in the text, the Commission addressed this issue in the context of billing and collection services. See Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (1986). There, the Commission found billing and collection services provided by non-carrier third parties not to be communications common carrier services because (1) the services, being neither transmission nor incidental to transmission, were not wire communications within the meaning of Section 3(a) and (2) the service providers, often credit card companies, were not common carriers within the meaning of Section 3(h). Id. at 1168-69.

61 See Validation Order, 7 FCC Rcd at 3532.

62 Id. at 3531.

these incidental services to be common carrier services because the Commission's regulatory scheme required them to be offered on a common carrier basis.[63]

20. In this proceeding, as in the above-mentioned precedents, we are guided by Sections 3(a) and 3(h) in determining whether the particular service at issue is a common carrier service. Section 3(h) plainly states that any wire communications service, as defined in Section 3(a), offered on a common carrier basis for hire is a common carrier service. Under these circumstances, we find that the SMS service offered to RespOrgs is a communications common carrier service and reject Beehive's claims as contrary to the plain meaning of Sections 3(a) and 3(h).

21. We note that this finding is consistent with the Commission's analysis of the distinction between enhanced and common carrier services.[64] In the NATA/Centrex Order, the Commission held that "adjunct" services that could be considered enhanced services and are not themselves basic transmission services will be treated and regulated as basic transmission services if their purpose is to "facilitate the use of the basic network without changing the nature of basic telephone service."[65] In both the NATA/Centrex Order and the Validation Order, a key to delineating the boundaries of common carriage has been the functional relationship between the service in question and the associated transmission service. Those services that are incidental or adjunct to the common carrier transmission service are to be regulated in the same way as the common carrier service.

22. Having found SMS access to be a communications common carrier service, we turn to Beehive's allegations of violations of Sections 201, 202, 203, and 214 of the Act. We address each of the alleged Title II violations below.

c. Title II Claims

Section 201

23. Beehive claims that the tariffed rates it has been charged for SMS access are unjust and unreasonable because they represent DSMI's revenue requirements rather than cost-based rates, and also that the BOCs bear the burden of proof in this Section 208 proceeding to show that their tariffed rates are cost-based. We reject Beehive's burden-of-proof claim. Although

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63 Id. at 3532. The Commission required validation and screening services to be offered on a common carrier basis because the service providers exercised monopoly control over the services. Id.

64 See North American Telecommunications Association, 101 FCC 2d 349 (1985) (NATA/Centrex Order), aff'd on recon., 3 FCC Rcd 4385 (1988).

65 Id. at 361.

carriers who file new or revised rates bear the burden of proof in Section 204 proceedings,[66] it is well settled that complainants in Section 208 formal complaint proceedings bear the burden of proof.[67] Beehive, as the complainant in this proceeding, has the burden of proving that the disputed rates are unjust and unreasonable.

24. Beehive has not met its burden under Section 208. Beehive presents scant evidence to support its claim that the tariffed rates for SMS access are not cost-based and are therefore unjust and unreasonable under Section 201(b). Beehive offers criticisms of the BOCs' ratemaking methodology, but does not demonstrate what the costs of service are and what the tariffed rates should be. Beehive also offers evidence that DSMI handles the daily operations of the SMS, which it alleges demonstrates that the tariffed rates are not cost-based because they reflect DSMI's revenue requirements rather than costs incurred by the BOCs. Although Beehive offers this evidence is support of its Section 201 claim, it seems more probative of Beehive's Section 203 claim that the BOCs are the wrong party to file the tariff. It does not tend to prove that the tariffed rates are not based on the costs of providing the tariffed service. We therefore find that Beehive has failed to meet its burden of proof to show that the rates contained in the SMS Tariff are not cost-based and are therefore unjust and unreasonable in violation of Section 201(b).

Section 202

25. Section 202(a) of the Act prohibits unjust or unreasonable discrimination in connection with like communications services. The crux of Beehive's discrimination claim is that the practice of providing tariffed SMS access to RespOrgs to create records, and non-tariffed SMS access to SCP owners to receive records is inherently preferential to SCP owners. Beehive alleges that as a result of the BOCs' practice, it has been required to pay tariffed rates while it litigated the issue of whether the tariff is lawful. On the other hand, Beehive alleges, SCP owners have presumably had the opportunity to negotiate the rates they are willing to pay for access to the SMS.

26. The defendants counter that Beehive's allegations fail to state a claim under Section 202(a) because the SMS service offered to RespOrgs is not "like" the service offered to SCP owners within the meaning of Section 202(a). According to defendants, the services provided to RespOrgs and SCP owners are fundamentally distinct because RespOrgs make "real

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66 47 U.S.C. § 204(a)(1). We note that in the Section 204 investigation of the SMS Tariff, we are reviewing the information submitted by the BOCs to support the SMS Tariff rates. The BOCs have the burden of proof in that proceeding. See Order Designating Issues for Investigation, 8 FCC Rcd 5132, 5137 (Com. Car. Bur. 1993).

67 See, e.g., Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795 (D.C. Cir 1982) (Ad Hoc v. FCC).

time" entries into the main database and are charged for making such entries, while SCP owners simply receive updated information from the main database.

27. Applicable judicial precedents establish a three-prong test for determining whether a defendant has unreasonably discriminated in violation of Section 202(a). The first prong requires the Commission to determine whether the services at issue are like one another. If so, the Commission must, under the second prong, determine whether there is disparate pricing or treatment between the like services. Third, if disparate pricing or treatment is found to exist, the Commission must decide whether the disparity is justified and, therefore, not unreasonable.[68] In the context of a Section 208 complaint proceeding, the complainant has the evidentiary burden of establishing that the services are like and that discriminatory pricing or treatment exists.[69] Once a prima facie showing of like services and discrimination has been made, the defendant has the burden of establishing that the discrimination is justified and, therefore, not unreasonable.[70]

28. The first question, whether the services are like, depends largely upon what has come to be known as the "functional equivalency" test.[71] This test looks to whether there are any material functional differences between the services. An important aspect of the test, as it has evolved, involves reliance upon customer perception to help determine whether the services being compared provide the same or equivalent functions. The test asks whether the services at issue are "different in any material functional respect"[72] and requires the Commission to examine both the nature of the services and the customer perception of the functional equivalency of the services.[73] The test presumes that not all differences between services make them a priori unlike. Rather, the differences must be functionally material or, put another way, of practical significance to customers.

29. In the instant case, Beehive does not contend that the SMS access services provided to RespOrgs and SCP owners are like. It argues instead that the Commission need not consider their likeness because Section 202(a) prohibits unreasonable discrimination "'in

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68 MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990); Competitive Telecommunications Association. v. FCC, 998 F.2d 1058 (D.C. Cir. 1993) (CompTel v. FCC).

69 Ad Hoc v. FCC, 680 F.2d at 795.

70 Id.

71 See Ad Hoc v. FCC, 680 F.2d at 790; American Broadcasting Corp. v. FCC, 663 F.2d 133 (D.C. Cir. 1980).

72 Ad Hoc v. FCC, 680 F.2d at 795.

73 Id. at 796.

connection with'" like communications services.[74] Beehive contends that because the BOCs discriminate between RespOrgs and SCP owners in offering access to the main database, which in each instance functions in connection with the same 800 access service, the BOCs' actions are unlawful within the meaning of Section 202(a).

30. We find that Beehive has failed to state a prima facie case of unlawful discrimination within the meaning of Section 202(a). Beehive's contention that we need not consider whether the SMS access services provided to RespOrgs and SCP owners are like misses the point of the analysis required under Section 202(a). Commission and court precedent firmly establish that under the first prong of the discrimination analysis the Commission must view the services at issue in light of their material relevance or practical significance to the class of customers or potential customers for such services. We conclude, therefore, that Beehive has failed to provide any persuasive argument or evidence to counter the BOCs' claim that the services are not like.

31. The rate elements of the service the BOCs offer to SCP owners are: (1) central data base access, (2) service establishment, (3) translations and validations, and (4) data base administration and support. The rate elements of the service the BOCs offer to RespOrgs are: (1) central data base access, (2) service establishment, (3) customer records administration, and (4) mechanized generic interface. It is true, as Beehive points out, that the services offered under contract to SCP owners and under tariff to the RespOrgs do include two common rate elements, central data base access and service establishment.[75] These common elements, however, when considered in the context of the services as a whole and the respective functions of affected customers do not, however, make the services functionally equivalent within the meaning of Section 202(a). The separate services offered to RespOrgs and SCP owners are specifically tailored to enable them to perform their separate and distinct functions. It is undisputed that the primary function of SCP owners is to disseminate broadly to carriers routing information that is periodically downloaded to the SCPs from the central database. The function of RespOrgs, on the other hand, is to enter data into the central database and to ensure that the information is accurate and current. We note, for example, that the mechanized generic interface element, which was created specifically for RespOrgs to enable them to enter efficiently large amounts of data into the main database, appears to be neither useful to nor desired by SCP owners.[76] At the same time, there is no indication in the record before us that RespOrgs would be indifferent to the loss of the mechanized generic interface element as a key component of the BOC's SMS service. In the absence of any persuasive showing by Beehive to the contrary, we conclude that the two

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74 Beehive Brief at 33.

75 See, e.g., Beehive Brief at 11.

76 See Bell Operating Companies Tariff F.C.C. No. 1, Transmittal No. 3 (Apr. 23, 1993), Description and Justification at 10.

services are functionally and materially different and, therefore, are not like services within the meaning of Section 202(a). [77]

Section 203

32. Beehive claims that DSMI is the SMS "carrier" and, as such, it, not the BOCs, should file the SMS Tariff. This claim is also unavailing. The Commission has stated, and the courts have affirmed, that Section 203 authorizes an agent to file tariffs on behalf of the operating companies that actually provide telecommunications services.[78] Thus, even if Beehive were correct that DSMI, rather than the BOCs, is the SMS carrier, the BOCs still could properly file the tariff. We do not agree, however, that DSMI is the carrier. We reaffirm the Commission's conclusion in the CompTel Declaratory Ruling that the BOCs are the real parties in interest with respect to the SMS. The creation of DSMI, a wholly-owned subsidiary of Bellcore, does not change the fact that the BOCs control all fundamental aspects of SMS access through Bellcore.[79] Further, the Commission was aware of and considered in the CompTel Declaratory Ruling the BOCs' intention to divorce responsibility for daily operation of the SMS from themselves and Bellcore, and to transfer responsibility for NASC duties to a third-party.[80] The record indicates that the BOCs have accomplished this by creating DSMI as a separate subsidiary of Bellcore to handle the day-to-day operation of the SMS and having DSMI contract out NASC duties to Lockheed. The fact that the BOCs have done as they intended does no harm to the CompTel Declaratory Ruling.

Section 214

33. Beehive claims that the BOCs did not have the necessary prior Section 214(a) authorization to construct the SMS. This claim is unfounded. In response to a request by Bell Atlantic that the Commission determine the obligations of local exchange carriers to provide 800 access to interexchange carriers, the Commission initiated the Docket 86-10 rulemaking that ultimately resulted in the creation of the SMS.[81] At the start of that rulemaking, the Commission

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77 See CompTel v. FCC for a similar analysis.

78 See Communique Telecommunications Inc., DA 95-1149, released May 25, 1995, ¶¶ 19-20 (Communique) (citing Allnet Communications Services, Inc. v. National Exchange Carrier Association, Inc., 965 F.2d 1118, 1120 (D.C. Cir. 1992)).

79 See CompTel Declaratory Ruling, 8 FCC Rcd at 1427.

80 Id.

81 See Provision of Access for 800 Service, CC Docket No. 86-10, Notice of Proposed Rule Making, 102 FCC 2d. 1387 (1986); Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 721 (1988); Report and Order, 4 FCC Rcd 2824 (1989) (First Report and Order); Memorandum Opinion and Order on Reconsideration and Second Supplemental

found that the BOCs did not need prior Section 214(a) authorization to develop and offer SMS access service because it was a new service offering, as opposed to an expansion of capacity (i.e., construction of a new or extended line) for an existing service.[82] The courts have held that because the policy underlying Section 214(a) is the avoidance of overcapacity and the consequent higher charges to customers, it does not apply to new service offerings.[83]

B. RELIEF REQUESTED

1. Contentions

34. Beehive originally sought a variety of remedies, including relief for the alleged Title II violations, and requested the opportunity to file a supplemental complaint for damages.[84] However, it stated in its reply brief that it could be made whole by being awarded damages equal the total of its payments for SMS access service plus interest at the IRS rate for tax refunds and by having returned to it all 800-629-XXXX numbers it had reserved in the database, but lost when its SMS service was disconnected for nonpayment.[85]

Notice of Proposed Rule Making, 6 FCC Rcd 5421 (1991) (Second Supplemental Notice); Order, 7 FCC Rcd 8616 (1992); Second Report and Order, 8 FCC Rcd 907 (1993); Memorandum Opinion and Order on Further Reconsideration, 8 FCC Rcd 1038 (1993); Order, 8 FCC Rcd 1423 (1993); Order, 8 FCC Rcd 1844 (1993).

82 First Report and Order, 4 FCC Rcd at 2839 n.9.

83 MCI Telecommunications Corp. v. FCC, 561 F.2d 365, 375-76 (D.C. Cir. 1977) cert. denied, 434 U.S. 1040 (1978).

84 See Beehive Complaint at 52-53. The relief requested included: an investigation of the SMS Tariff; a hearing to examine the lawfulness of the SMS Tariff under Section 204(a)(1); joinder of Southwestern Bell Telephone Company, Bellcore, and DSMI as defendants; an order enjoining enforcement of the SMS Tariff; dismissal of the SMS Tariff for lack of jurisdiction; an order requiring the BOCs to refund, with interest, all monies paid by Beehive for SMS service; a finding that the BOCs had violated Sections 201(b), 202(a), 203(c), and 214(a); a cease and desist order requiring the BOCs to tariff the service provided to SCP owners; divestiture of the SMS; compensatory damages; an opportunity to file a supplemental complaint for damages; an order requiring the parties to negotiate an amount of damages; and other appropriate relief. Id.

85 Beehive Reply Brief at 10.

35. The BOCs argue that the damages sought by Beehive amount to a refund and the Commission is precluded from ordering refunds in a Section 208 complaint proceeding.[86] Further, the BOCs argue, refunds that benefit all RespOrgs will be properly ordered, if at all, in the Section 204 proceeding if the Commission finds the tariffed rates unreasonable.[87] The BOCs also argue that it would be inappropriate to order the return of the reassigned 800-629-XXXX numbers because they have since been assigned to other RespOrgs, and through them, to end users who are not parties to this proceeding.[88]

2. Discussion

36. We have found no violation of the Act for which damages would lie. Accordingly, we find that Beehive has failed to establish a prima facie case for damages. Nor has Beehive provided a basis for a grant of the injunctive relief it seeks. Beehive's SMS access service was discontinued after it failed to pay in a timely manner for that access.[89]

C. OTHER MATTERS

1. Cross-Complaint

37. The BOCs cross-complained for amounts billed to Beehive, which Beehive has not paid. The BOCs' cross-claim does not allege a violation of the Act over which we have jurisdiction.[90] The cross-complaint is dismissed.

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86 BOC Reply Brief at 7-8 (citing Illinois Bell Telephone Company v. FCC, 966 F.2d 1478 (D.C. Cir. 1992)).

87 BOC Reply Brief at 8-9.

88 Letter to William F. Caton, Acting Secretary, FCC, from Paul Walters, Counsel for Southwestern Bell (Apr. 20, 1995).

89 See Complaint at 19; Amendment and Supplement to Complaint at 1-2; Motion to Dismiss Cross-Complaint at 1; and Answer to Amended and Supplemental Complaint at 1.

90 This Commission is not "a collection agent for carriers with respect to unpaid tariffed charges." Long Distance/USA, Inc. v. The Bell Telephone Co. of Pennsylvania, 7 FCC Rcd 408, 410 (Com. Car. Bur. 1992).

2. Request to Reopen Record

38. Beehive requests that we reopen the record in this proceeding to permit the parties to develop a record on the matter of the proposed sale of Bellcore by the BOCs.[91] We decline to reopen the record on this matter, which is not material to any issue in this proceeding.

3. Administrative Procedure Act

39. Beehive argued in its complaint that the CompTel Declaratory Ruling was invalid and should be disregarded for purposes of deciding whether SMS access is a communications common carrier service because of alleged violations of the Administrative Procedure Act (APA).[92] Because Beehive did not raise this issue in its briefs, it is not clear that it intended to pursue this argument further. In any event, we are not persuaded that an APA violation occurred. Moreover, even if we were to do as Beehive requests and disregard the CompTel Declaratory Ruling in deciding whether SMS access is a communications common carrier service, our conclusion would not change. The analysis contained herein independently demonstrates that SMS access is a communications common carrier service.

IV. CONCLUSION AND ORDERING CLAUSES

40. We conclude that Beehive's argument that SMS access is not a communications common carrier service does not amount to an impermissible collateral attack on the CompTel Declaratory Ruling. Despite Beehive's arguments, however, we continue to believe that the SMS access provided to RespOrgs is a communications common carrier service subject to Title II and should be tariffed. We also conclude that Beehive has failed to prove the Title II violations it has alleged.

41. Accordingly, IT IS ORDERED pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208 that the above-captioned complaint filed by Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc. IS DENIED.

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91 Letter to William F. Caton, Acting Secretary, FCC, from Russell D. Lukas, Counsel for Beehive (May 4, 1995).

92 Beehive Complaint at 19. Beehive alleged that inadequate notice was given that the Commission was considering asserting Title II jurisdiction over the SMS and that the Commission could not properly issue a declaratory ruling on a matter that was the subject of a rulemaking proceeding.

42. IT IS FURTHER ORDERED that the cross-complaint filed by the Bell Operating Companies IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary