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

In the Matter of	)	
	)	
Ryder Communications, Inc.,	)	
	)	File No. EB-02-MD-038
Complainant,	)	
	)	
v.	)	
	)	
AT&T Corp.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 3, 2003 **Released: July 7, 2003**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a formal complaint[1] that Ryder Communications, Inc. ("Ryder") filed against AT&T Corp. ("AT&T") pursuant to section 208 of the Communications Act of 1934, as amended ("Communications Act" or "Act").[2] In particular, Ryder has failed to prove that AT&T's enforcement of the early service termination provision contained in the parties' contract tariff for 900 transport service was unjust and unreasonable under section 201(b) of the Act.[3] This conclusion rests on the principle that where two parties, through valid contracts, have clearly allocated the risk of certain events, it is not unjust and unreasonable under section 201(b) for one party to hold the other party to this contractual allocation.

II. BACKGROUND

A. The Parties

2. During its existence as a going concern, Ryder was a "service bureau" and a 900 pay-per-call provider of information services to marketers and media companies.[4] AT&T is a

[1] Formal Complaint of Ryder Communications, Inc., File No. EB-02-MD-038 (filed Dec. 13, 2002) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. § 201(b).

[4] Second Revised Joint Statement, File No. EB-02-MD-038 (filed Mar. 14, 2003) ("Joint Statement") at 2, ¶ 3; Complaint at 2, ¶ 2. According to AT&T, a service bureau acts as an intermediary between 900 pay-per-call information providers and long distance telephone companies, such as AT&T, and provides the physical facilities

(continued....)

national and international provider of telecommunications services, as well as a provider of transport services for 900 number calls.[5] During the period covered by the Complaint, AT&T also provided, in addition to tariffed telecommunications services, certain non-tariffed services, including billing and collection services.[6]

B. The Parties' Business Relationship

3. In 1992, AT&T began providing 900 transport service to Ryder for Ryder's 900 pay-per-call operations.[7] From 1992 until 1997, AT&T provided this 900 transport service to Ryder pursuant to AT&T Tariff F.C.C. No. 1 ("Tariff No. 1").[8]

4. In January 1997, AT&T and Ryder entered into a contract, also referred to as a Custom Offer Agreement, under which AT&T agreed to provide 900 transport service to Ryder for a period of three years at discounted usage rates based on Ryder's volume of 900 calls.[9] In exchange for these volume discounts, Ryder agreed to meet certain prescribed "Minimum Annual Revenue Commitments ("MARC")," regardless of whether it actually incurred sufficient volume to generate such revenue in usage charges.[10] Specifically, Ryder agreed to a minimum commitment to AT&T of $600,000 in 900 transport service usage charges per year for three years;[11] Ryder also agreed with AT&T that, in the event Ryder discontinued service prior to the expiration of the three year term, AT&T could charge Ryder an early service termination fee in "an amount equal to 100% of the unsatisfied MARC for each year remaining in the Custom Offer Agreement term."[12] Ryder further agreed with AT&T that the early service termination provision in the parties' contract would supercede the early service termination provision in Tariff No. 1.[13] In addition, the parties agreed to incorporate the limitation of liability provisions

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through which an information provider operates its programs and connects to a long distance carrier. *See* Answer of AT&T Corp., File No. EB-02-MD-038 (filed Feb. 3, 2003) ("Answer") at 29, n.5.

[5] Joint Statement at 2, ¶ 6.

[6] Joint Statement at 2-3, ¶ 8; Complaint at 5-6, ¶ 11; Answer at 28-29, ¶¶ 52-53; Reply of Ryder Communications, Inc., File No. EB-02-MD-038 (filed Feb. 10, 2003) ("Reply") at 10-11, ¶ 14.

[7] Joint Statement at 3, ¶ 12. AT&T marketed the 900 transport service under the name "AT&T MultiQuest" service. *Id*. at 3, ¶ 13.

[8] Joint Statement at 3, ¶ 13; Answer, Ex. 28 (AT&T Tariff F.C.C. No. 1).

[9] Joint Statement at 4, ¶¶ 15-16, 20; Answer at 31, ¶ 59, and at Ex. 30 (Custom Offer Agreement (COA) No. CX003), Section 2, "COA Term; Renewal Options", Section 5, "Discounts" (indicating that specified monthly discounts ranged from at least 12.50% to 18.25% based on usage, and that additional discounts also applied)).

[10] Joint Statement at 4, ¶ 16, 20; Complaint at 5, ¶ 10; Answer at 31, ¶¶ 59-60, and at Ex. 30 (COA No. CX003), Section 3, "Minimum Commitments/Charges;" Complaint, Ex. E-6 (CT 6831) at Section 3, "Minimum Commitments/Charges."

[11] Complaint, Ex. E-6 (CT 6831) at Section 3, "Minimum Commitments/Charges;" Answer at Ex. 30 (COA No. CX003) at Section 3, "Minimum Commitments/Charges."

[12] Answer at Ex. 30 (COA No. CX003) at 6(D), "Discontinuance"; Complaint, Ex. E-6 (CT 6831) at Section 6(D), "Discontinuance" ("early service termination provision"); Joint Statement at 4-5, ¶ 21.

[13] Answer at Ex. 30 (COA No. CX003) at 6(D), "Discontinuance"; Complaint, Ex. E-6 (CT 6831) at Section 6(D), "Discontinuance;" Joint Statement at 5, ¶ 22.

in Tariff No. 1,[14] under which AT&T remained liable for damages caused by any willful misconduct in its provision of tariffed services.[15]

5. AT&T filed the parties' contract with the Commission as Contract Tariff No. 6831 ("CT 6831").[16] CT 6831 became effective on April 15, 1997.[17]

6. In addition to 900 transport service, AT&T also provided billing and collection services to Ryder pursuant to a billing services agreement executed by both parties, effective as of January 1995 ("Billing Agreement").[18] Under the Billing Agreement, AT&T agreed to obtain usage records for calls placed to the 900 numbers served by Ryder, to bill the calling party for such calls at the charges established by Ryder, to collect payment from the callers, and to remit to Ryder the net amount of such collections after deducting AT&T's rates for 900 transport service, any charges disputed by callers, federal, state, and local taxes, and AT&T's billing service fee.[19] The parties did not file this Billing Agreement with the Commission as a contract tariff, because the Commission had mandatorily detariffed billing and collection services.[20]

7. The Billing Agreement stated explicitly that "charges for tariffed services will not be

[14] Answer, Ex. 30 (COA No. CX003), Section 1, "Services Provided;" Complaint, Ex. E-6 (CT 6831), Section 1, "Services Provided." Section 1 of CT 6831 and COA No. CX003 state that Tariff No. 1 is "incorporated herein by reference." *Id.*

[15] Section 2.3.1.A of Tariff No. 1 states: "The Company's liability, if any, for its willful misconduct is not limited by this tariff." Answer, Ex. 28 (Tariff No. 1), Section 2.3.1.A.

[16] Pursuant to Commission rules in effect during the relevant period, AT&T was required to file a tariff summarizing the terms of the parties' contract. *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5902-03, ¶ 121 (1991) (subsequent history omitted) ("*Interexchange Competition Order*"); 47 C.F.R. § 61.55 (1991). The Commission later mandatorily detariffed interstate, domestic, interexchange services, including 900 transport service, provided by AT&T and other nondominant interexchange carriers. *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, Second Report and Order, 11 FCC Rcd 20730 (1996), *recon*., 12 FCC Rcd 15014 (1997), *stay granted*, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997); Order on Reconsideration, 12 FCC Rcd 15,014 (1997) ("*Domestic Detariffing Order on Reconsideration*"); Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999) ("*Domestic Detariffing Second Order on Reconsideration*"); *stay lifted and aff'd*, *MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. April 28, 2000), Memorandum Report and Order, 15 FCC Rcd 22321 (Com. Car. Bur. 2000) ("*Domestic Transition Order*"); *Common Carrier Bureau Extends Transition Period for Detariffing Consumer Domestic Long Distance Services*, Public Notice, 16 FCC Rcd 2906 (Com. Car. Bur. 2001); Joint Statement at 4, ¶ 18; Complaint, Ex. E-6 (CT 6831).

[17] Joint Statement at 4, ¶ 18; Complaint, Ex. E-6 (CT 6831). CT 6831 and COA No. CX003 contain identical terms, with the only difference being that AT&T filed CT 6831 in standard tariff format in accordance with the Commission's requirements. *See* 47 C.F.R. §§ 61.54, 61.55 (1991). Although CT 6831 was available to any other customer "similarly situated" to Ryder (Complaint, Ex E-6 (CT 6831) at original page 4, "Availability"), no other party ordered service from AT&T under CT 6831. Supplement to Answer of AT&T Corp, File No. EB-02-MD-038 (filed Feb. 6, 2003) ("Supplemental Answer") at 24, ¶ 58.

[18] Joint Statement at 5, ¶ 24; Answer, Ex. 32 (Billing Services Agreement). AT&T refers to these billing services as "MultiQuest" premium billing services. *See* Answer at 11-12, ¶ 7.

[19] Joint Statement at 5, ¶ 27; Complaint at 5-6, ¶ 11; Answer at 31-32, ¶ 61, and at Ex. 32 (Billing Services Agreement) at ¶¶ 1-3, "Billing Services," "Caller Inquiry and Adjustments," "Charges/Remittance."

[20] *See Detariffing of Billing and Collection Services*, Report and Order, 102 F.C.C.2d 1150 (1986) (*"Billing Detariffing Order*"); *AT&T 900 Dial-It Services and Third Party Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd 3429 (1989) (*"900 Dial-It Order*").

abated or refunded in the event of delay or failure of performance of this Agreement."[21] In addition, regarding any harm to Ryder that might result from AT&T's inadequate performance of billing and collection services, the Billing Agreement expressly limited AT&T's potential liability to Ryder to "direct damages," excluding, *inter alia*, "incidental, indirect, special, or consequential damages…."[22] Lastly, the Billing Agreement provided that it was governed by the laws of the State of New Jersey.[23]

8. Although the record in this proceeding does not indicate that Ryder experienced any problems with the 900 transport service it received from AT&T pursuant to CT 6831,[24] Ryder did experience some problems (of disputed nature and magnitude) with the billing and collection services AT&T provided.[25] After experiencing these billing and collection problems, Ryder terminated all of its employees and closed its 900 pay-per-call business on June 25, 1997.[26] On July 24, 1997, approximately three months after CT 6831 became effective, Ryder formally notified AT&T that it was canceling all telecommunications services under CT 6831 and directed AT&T to disconnect all 900 telephone numbers assigned to it.[27]

9. As a result of Ryder's decision to cease purchasing telecommunications services from AT&T and close its business, Ryder failed to meet its MARC under CT 6831.[28] Consequently, pursuant to the terms of the early service termination provision in CT 6831, AT&T notified Ryder, by letter dated November 3, 1997, of Ryder's liability to AT&T in the amount of approximately $1.6 million in early service termination charges.[29]

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[21] Answer, Ex. 32 (Billing Services Agreement) at ¶ 12, "Tariffed Services."

[22] Answer, Ex. 32 (Billing Services Agreement) at ¶ 14, "Limitations of Liability." The Billing Agreement states, in pertinent part, that "AT&T's entire liability [to Ryder] for any damages caused by AT&T's performance of billing services under this agreement regardless of the form of action, whether in contract, tort including negligence, or otherwise. . . shall be limited to direct damages which are proven in an amount not to exceed $100,000. . . . AT&T shall not be liable for incidental, indirect, special, or consequential damages or for lost profits, savings or revenues of any kind, whether or not AT&T has been advised of the possibility of such damages." *Id.* Consequential damages are damages, loss, or injury that do not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act. *See, e.g.*, Black's Law Dictionary (Pocket ed. 1996).

[23] Joint Statement at 5, ¶ 29; Answer Ex. 32 (Billing Services Agreement) at ¶ 18G, "General."

[24] *See, e.g.*, Complaint, Exhibit E-2 (Post-Trial Order, Case No. 99-6688-CIV-HIGHSMITH, Jan. 31, 2001, U.S.D.C., Southern District of Florida) ("Post-Trial Order") at 8 (stating that "there was simply no evidence that there were any irregularities or problems with the phone services provided by AT&T to Ryder Communications, Inc.").

[25] *See, e.g.*, Complaint at 4, 6-7, 13, ¶¶ 8, 12, 24; Answer at 12-13, 16, 23-24, ¶¶ 8, 12, 24; Complaint, Ex. E-2 (Post-Trial Order) at 4-5 (finding that AT&T breached the Billing Agreement).

[26] Joint Statement at 6, ¶ 35.

[27] Joint Statement at 7, ¶ 37.

[28] Joint Statement at 7, ¶ 38.

[29] Joint Statement at 7, ¶ 40; Answer, Ex. 36 (Letter from Robert S. Iacuone, AT&T, to David Ryder, Nov. 3, 1997). According to AT&T, AT&T also sent a final bill to Ryder in June 1998 showing that, after netting the termination charges against the amounts due Ryder from AT&T under the Billing Agreement, Ryder owed AT&T over $1.4 million. Answer at 35, ¶ 72.

C. The Federal District Court Proceeding

10. On May 12, 1999, Ryder filed a complaint against AT&T in state court in Florida alleging that AT&T had breached its obligations under the Billing Agreement.[30] Ryder alleged that AT&T had failed to timely and accurately account for and remit to Ryder proceeds that AT&T had collected from Ryder's customers on Ryder's behalf under the Billing Agreement.[31] Claiming that AT&T's breach of the Billing Agreement had depleted Ryder's revenue stream to the point that it was forced out of business, Ryder sought damages for its lost revenues, its company's value as a going concern, and other costs.[32] Ryder's Court Complaint did not allege that AT&T had violated CT 6831 or that any provision of CT 6831, including the early service termination provision, violated the Communications Act.[33]

11. After removing Ryder's complaint to the United States District Court for the Southern District of Florida ("District Court" or "Court"), AT&T filed an answer and counterclaims against Ryder.[34] AT&T's counterclaims alleged, *inter alia*, that Ryder breached CT 6831 by terminating service before the end of the three-year term, failing to meet its MARC, and then refusing to pay early service termination charges; thus, AT&T further alleged that, pursuant to the early service termination provision in CT 6831, Ryder owed AT&T approximately $1.6 million for unpaid tariff charges.[35] In response, Ryder asserted that its obligations under CT 6831's early service termination provision should be excused, because it was AT&T's "negligence, gross negligence, and willful breach" of the Billing Agreement that caused Ryder to incur those obligations, and AT&T should not be permitted to benefit from its own wrongful action.[36] Again, Ryder did not allege, either by way of counterclaim or affirmative defense, that AT&T had violated CT 6831 or that any provision of CT 6831, including the early service termination provision, violated the Communications Act.[37]

12. From the early stages of the District Court proceeding, Ryder took the position that it could recover consequential damages, including recoupment/cancellation of the early service termination charges due under CT 6831, as part of its damages for AT&T's alleged breach of the Billing Agreement.[38] Ryder took this position despite the Billing Agreement's express exclusion

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[30] Joint Statement at 7, ¶ 41; Answer, Ex. 1 (Complaint, Ryder Communications, Inc. v. AT&T Corp., filed May 17, 1999, Broward County, Florida) ("Court Complaint") at 2-3, ¶¶ 11-16.

[31] Answer, Ex. 1 (Court Complaint) at 3, ¶¶ 12-16.

[32] Answer, Ex. 1 (Court Complaint) at 3, ¶¶ 12-16.

[33] Joint Statement at 8, ¶ 46.

[34] Joint Statement at 7, ¶ 43; Answer, Ex. 2 (Answer and Counterclaims of AT&T Corp., Ryder Communications, Inc. v. AT&T Corp., Case No. 99-6688-CIV-HIGHSMITH, filed June 14, 1999, U.S.D.C., Southern District of Florida) ("AT&T Court Answer and Counterclaims").

[35] Joint Statement at 8, ¶ 44; Answer, Ex. 2 (AT&T Court Answer and Counterclaims), at 9-10, ¶¶ 49-54.

[36] Joint Statement at 8, ¶ 46; Answer, Ex. 3 (Ryder Communications, Inc.'s Answer and Affirmative Defenses to AT&T's Counterclaim, Case No. 99-6688-CIV-HIGHSMITH, filed June 14, 1999, U.S.D.C., Southern District of Florida) ("Ryder Court Answer") at 2, ¶ 7.

[37] Joint Statement at 8, ¶ 46.

[38] *See, e.g.*, Answer, Ex. 4 (Memorandum In Response to AT&T Memorandum Concerning Filed Tariff Doctrine, Case No. 99-6688-CIV-HIGHSMITH, filed Sept. 3, 1999, U.S.D.C., Southern District of Florida) at 7 (stating that any termination charge owed by Ryder "would simply be further damage suffered by [Ryder]. [Ryder] was (continued....)

of liability for consequential damages, and despite the Billing Agreement's clear statement that charges for tariffed services would not be abated or refunded in the event of a billing "delay or failure of performance."[39]

13. In at least two separate rulings, the District Court squarely rejected Ryder's position, holding that Ryder could not include as consequential damages arising from any breach by AT&T of the Billing Agreement the early service termination charges owed by Ryder under CT 6831.[40] The District Court held, in other words, that AT&T could collect and retain early service termination charges from Ryder, notwithstanding a breach by AT&T of the Billing Agreement. In so ruling, the Court upheld the validity of the Billing Agreement's liability limitation provision under New Jersey law, because Ryder had failed to show that AT&T's breach of the Billing Agreement was willful and wanton.[41] As a result, the District Court limited Ryder's potential recovery to "direct damages," meaning any funds that AT&T might have wrongfully

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prevented from using the minimum service by AT&T's breach of its billing contract with [Ryder]. Thus, whatever amount [Ryder] is deemed to owe AT&T for minimum services under the tariff, that amount is another element of the damages suffered by [Ryder] as a result of AT&T's breach of the billing and collection contract."); Answer, Ex. 7 (Plaintiffs' Memorandum In Response to AT&T's Motion For Partial Summary Judgment, Case No. 99-6688-CIV-HIGHSMITH, filed Oct. 10, 2000, U.S.D.C., Southern District of Florida) ("Ryder Opposition to AT&T Partial Summary Judgment Motion") at 16 ("AT&T should . . . indemnify [Ryder] for all contract tariff penalties caused by [Ryder's] inability to continue as a business ($1,800,000.00)"); Answer, Ex. 19 (Plaintiffs' Notice of Filing of Proposed Jury Instructions, Case No. 99-6688-CIV-HIGHSMITH, filed Nov. 14, 2000, U.S.D.C., Southern District of Florida), Plaintiffs' Proposed Jury Instruction No. 2 (stating that "direct special damages" to Ryder should include any contract penalties incurred by Ryder); *Id.*, Ex. 17 (Trial Transcript, Case No. 99-6688-CIV-HIGHSMITH, Dec. 21, 2000, U.S.D.C., Southern District of Florida) ("Trial Transcript") at 178-180 (Court denying Ryder's request to instruct the jury that Ryder was entitled to recover early service termination charges as part of its damages).

[39] Answer, Ex. 32 (Billing Services Agreement) at ¶¶ 12, 14.

[40] In so ruling, the Court also held that, had Ryder shown that AT&T's breach of the Billing Agreement did, in fact, constitute willful and wanton misconduct, Ryder could have recouped or cancelled its early service termination charges as consequential damages arising from AT&T's breach. Answer, Ex. 5 (Order Determining Applicability of Filed Tariff Doctrine, Case No. 99-6688-CIV-HIGHSMITH, Sept. 27, 1999, U.S.D.C., Southern District of Florida) at 5; Ex. 8 (Order Granting Defendant's Motion for Partial Summary Judgment, Case No. 99-6688-CIV-HIGHSMITH, Dec. 8, 2000, U.S.D.C., Southern District of Florida) ("Partial Summary Judgment Order") at 4-5; Ex. 17 (Trial Transcript) at 178-180.

[41] Joint Statement at 9, ¶¶ 51-53; Answer at 37-40, 92-95, ¶¶ 76-81, 181-87, and at Ex. 8 (Partial Summary Judgment Order) ("Partial Summary Judgment Order") at 4-5. The Court found that, although AT&T's billing errors may have amounted to negligent or grossly negligent performance of its duties under the Billing Agreement, they did not rise to the level of specific intent required by the "willful and wanton" standard to set aside the limitation of liability provision under New Jersey law. The Court stated that "it is uncontested that Defendant took prompt remedial action when Ryder brought the accounting errors to the attention [of AT&T]." Answer, Ex. 8 (Partial Summary Judgment Order) at 4. *See* Answer at 46-47, 96-97, ¶¶ 95-97, 190-91 (*citing* Answer, Ex. 17 (Trial Transcript) at 180. *See also* Answer at 53-54, 111, ¶¶ 110, 218, and at corrected Ex. 27 (Order, Case No. 99-6688-CIV-HIGHSMITH, Mar. 27, 2001, U.S.D.C., Southern District of Florida) (denying Ryder's request for prejudgment interest on its damage award, because AT&T, "in good faith, continued to withhold the monies owed to Plaintiff Ryder Communications, Inc. once it became evident that they were owed due to (a) Plaintiff Ryder's breach of the parties' tariff agreement and (b) the tariff agreement's liquidated damages provision.").

withheld from Ryder.[42]

14. After a week long trial, the jury returned a verdict in favor of Ryder on its claim against AT&T alleging a breach of the Billing Agreement, and awarded Ryder $984,795.38 in "direct damages," the amount that AT&T had wrongfully withheld.[43] The jury also returned a verdict against AT&T on its counterclaim against Ryder for early service termination charges, finding that Ryder's failure to meet its MARC under CT 6831 should be excused because of AT&T's grossly negligent provision of 900 transport services under CT 6831.[44]

15. In a Post-Trial Order issued on January 31, 2001, the District Court upheld the jury's verdict in favor of Ryder on its claim against AT&T for breach of the Billing Agreement.[45] The District Court overruled the jury's verdict denying AT&T's counterclaim, however, because "there was simply no evidence that there were any irregularities or problems with the 900 transport services provided by AT&T to Ryder" under CT 6831.[46] The Court therefore granted as a matter of law AT&T's counterclaim for early service termination charges, finding that "it is uncontested that Ryder breached the Contract Tariff Agreement" by failing to meet its MARC.[47]

D. The Federal District Court's Referral

16. In its January 31, 2001 Post-Trial Order, upon finding in favor of AT&T on its counterclaim for early service termination charges, the Court did not simply award those charges to AT&T. Instead, the Court observed a significant difference between the charges that Ryder owed under CT 6831's early service termination provision and the charges that Ryder would have owed under Tariff No. 1's early service termination provision.[48] This led the Court to ask

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[42] Answer, Ex. 8 (Partial Summary Judgment Order) at 5 (stating that "the limitation of liability provision contained in the Billing Agreement] must be given effect."); *Id.*, Ex. 20 (Court's Instructions to the Jury, Case No. 99-6688-CIV-HIGHSMITH, Jan. 31, 2001, U.S.D.C., Southern District of Florida) at 12; Joint Statement at 10, ¶ 60.

[43] Answer, Ex. 23 (Final Judgment, Case No. 99-6688-CIV-HIGHSMITH, Jan. 31, 2001, U.S.D.C., Southern District of Florida) at 1; Complaint, Ex. E-2 (Post-Trial Order) at 5; Answer at 45, 48, ¶¶ 93, 99. The jury was not asked to make any finding, and did not make any finding, as to whether any breach of the Billing Agreement by AT&T was the proximate cause of Ryder's decision to close its business. *See* Joint Statement at 11, ¶ 63; Answer at 18, 48-49, ¶¶ 14, 99.

[44] Complaint, Ex. E-2 (Post-Trial Order) at 7-8. As far as we can tell from the record, Ryder did not assert this alleged excuse until shortly before trial. *See* Answer, Ex. 9 (Order, Case No. 99-6688-CIV-HIGHSMITH, Dec. 18, 2000, U.S.D.C., Southern District of Florida) at 2 (stating that gross negligence in the provision of transport service could be an affirmative defense to AT&T's counterclaim); Joint Statement at 9, ¶ 54.

[45] Complaint, Ex. E-2 (Post-Trial Order) at 4-5.

[46] Complaint, Ex. E-2 (Post-Trial Order) at 8. *See* Joint Statement at 11, ¶ 68; Complaint, Ex. E-2 (Post-Trial Order) at 7-8.

[47] Complaint, Ex. E-2 (Post-Trial Order) at 8.

[48] Complaint, Ex. E-2 (Post-Trial Order) at 8-10. According to the Court, under CT 6831, AT&T sought damages equivalent to Ryder's MARC for the three year life of the contract tariff while under the early service termination provision in Tariff No. 1, Ryder would be responsible for one month's charges from the date that AT&T received Ryder's letter of July 24, 1997 terminating service. *Id*. at 9. The parties dispute whether the Court correctly assessed the difference between the amounts due under the early service termination provisions in CT 6831 and in Tariff No. 1. *See* Answer at 51, n.62; Reply Brief of Ryder Communications Regarding the Application of Res (continued....)

"whether it is permissible to abrogate the Tariff No. 1's discontinuance clause in such a manner."[49] The Court then stated that, "in the present case, it is conceivable that a nearly $1,600,000.00 termination penalty, which is what application of the Tariff Agreement's [CT 6831's] discontinuance provision amounts to, may be considered an unreasonable and unenforceable tariff practice."[50] Without further explanation, the Court concluded that, pursuant to the primary jurisdiction doctrine, it should refer to the Commission "the issue of the appropriate measure of damages for Ryder Communications, Inc.'s breach" of CT 6831.[51]

E. Ryder's Commission Complaint

17. On December 13, 2002, almost two years after the District Court's referral order, Ryder filed the instant Complaint against AT&T.[52] The Complaint claims that AT&T's enforcement of CT 6831's early service termination provision violates the reasonableness standard of section 201(b) of the Act, because it was AT&T's own breaches of the Billing Agreement that caused Ryder to go out of business, which, in turn, caused Ryder to miss its MARC and incur early service termination charges under CT 6831.[53] The Complaint also claims that, on its face, CT 6831's early service termination provision violates the reasonableness standard of section 201(b) of the Act, because the provision applies even when AT&T's own misconduct causes a customer to terminate service early and incur charges thereunder.[54] For the reasons described below, we deny both claims.[55]

III. DISCUSSION

A. CT 6831 Lawfully Superceded Tariff No. 1.

18. The District Court clearly directed the parties to present to the Commission the

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Judicata, Inc., File No. EB-02-MD-038 (filed Mar. 26, 2003) at 13-16. For purposes of this proceeding, we will assume that the Court's calculation of the early service termination charges is correct.

[49] Complaint, Ex. E-2 (Post-Trial Order) at 10.

[50] Complaint, Ex. E-2 (Post-Trial Order) at 10.

[51] Complaint, Ex. E-2 (Post-Trial Order) at 11. *See id*. ("…AT&T is granted judgment as a matter of law with respect to liability on its counterclaim against Ryder Communications, Inc. This case, however, is referred to the F.C.C. for determination of the appropriate measure of damages on AT&T's counterclaim."); Answer, Ex. 24 (Partial Judgment, Case No. 99-6688-CIV-HIGHSMITH, Jan. 31, 2001, U.S.D.C., Southern District of Florida) ("Partial Judgment Order") at 1("Pursuant to the doctrine of primary jurisdiction and this Court's post-trial order, damages for Ryder Communication, Inc.'s breach shall be determined by the Federal Communications Commission").

[52] The parties first discussed the District Court's referral order with Commission staff in late 2001, but those discussions ended, and neither party contacted Commission staff again until a procedurally insufficient version of the Complaint was filed on November 26, 2002.

[53] Complaint at 17, ¶¶ 36-39 (Count II), and at Ex. D (Legal Analysis) at 10, ¶¶ 26-27. *See* Reply at 32-37, ¶¶ 64-75.

[54] Complaint at 17, ¶ 33-35 (Count I), and at Ex. D (Legal Analysis) at 2-5, ¶¶ 5-12. *See* Reply at 37-42, ¶¶ 76-86.

[55] Ryder's Complaint contained a third claim alleging that enforcement of the early service termination penalty was an unlawful tariff practice under section 201(b) of the Act. Complaint at 18, ¶¶ 40-43. The parties later stipulated that the third claim is withdrawn. Joint Statement at 27, ¶154.

following issue: whether the parties lawfully could, by agreement, agree to be bound by the early service termination provision in CT 6831 rather than the early service termination provision in Tariff No. 1, given that the former triggers a significantly higher charge than the latter.[56] The resolution of that issue is equally clear. As the parties correctly stipulate, it is a settled point of law that a contract tariff may lawfully take precedence over the provisions of a generally filed tariff.[57] It is well established that, under the Communications Act, carriers are not limited to offering service subject to generic tariffs, but may also operate pursuant to individually negotiated contract tariffs that supercede the generic tariff on file for the same service.[58] Since 1991, the Commission has specifically allowed AT&T to offer service pursuant to contract tariffs, like CT 6831, that contain minimum volume commitments by the customer for each service.[59] Consequently, we conclude that the early service termination provision in CT 6831 lawfully superceded the early service termination provision of Tariff No. 1, even though the former triggers a higher charge than the latter. We note that the higher charge triggered by CT 6831's early service termination provision should not be viewed in isolation, but rather as a *quid pro quo* for CT 6831's lower usage charges (as compared to Tariff No. 1). [60]

B. CT 6831's Early Service Termination Provision Complies with the Reasonableness Standard of Section 201(b), Both As Applied and On Its Face.

19. The District Court did not state clearly what additional issues, if any, it expected the parties to present to the Commission, other than the issue addressed in Part III(A) above. As a result, Commission staff spent considerable time with the parties, both before and after the instant Complaint was filed, discussing how properly to frame the issues presented, with all sides expressing varying viewpoints.[61] We are not completely confident (nor is AT&T) that Ryder's Complaint comports with the intent of the District Court's referral order.[62] Nevertheless, because the ultimate responsibility for presenting referred issues to the Commission lies with the

[56] Complaint, Ex. E-2 (Post-Trial Order) at 9-10.

[57] Joint Statement at 27, ¶ 152.

[58] *See, e.g.*, *Interexchange Competition Order*, 6 FCC Rcd at 5897, 5899, 5902-03, ¶¶ 91, 103-04, 121, 126 (*citing MCI Telecom. Corp. v. FCC*, 917 F.2d 30, 37-38 (D.C. Cir. 1990) (*MCI v. FCC*)(holding that contract tariffs do not violate the Communications Act).

[59] *Interexchange Competition Order*, 6 FCC Rcd at 5902, ¶ 121.

[60] *See* Answer at 72-74, ¶ 142-43, 146.

[61] To avoid this kind of inefficiency in the future, we strongly recommend that parties in a court proceeding who receive a primary jurisdiction referral order that does not clearly define the matter(s) to be brought to the Commission seek clarification from the court before initiating Commission processes.

[62] Our skepticism stems, in part, from the fact that, were we to grant one or both of Ryder's claims, as presently framed, AT&T's damages would likely diminish to zero, which would seem to contradict the Court's own rulings that Ryder could not recoup its early service termination payments as consequential damages for AT&T's breach of the Billing Agreement. Thus, we suspect that, if the Court expected the parties to present any question other than the one addressed in Part III(A) above (and that is a big "if"), the Court may have meant the question of whether a $1.6 million charge is unreasonable in amount, either in absolute terms or in relation to the discounts afforded to Ryder or the timing of Ryder's discontinuance within the three-year service period. *See* Answer at 2. Ryder declined to present that question in its Complaint, however.

parties (as the District Court recognized),[63] and because we want to assist the District Court as much and as quickly as possible, we proceed below to consider the issues as framed by Ryder's Complaint.[64]

1. Enforcement of the Early Service Termination Provision in CT 6831 Is Not Unjust and Unreasonable in the Present Case.

20. Ryder argues that AT&T's breach of the Billing Agreement caused Ryder to go out of business, which, in turn, caused Ryder to miss its MARC and incur early service termination charges under CT 6831.[65] Ryder contends, therefore, that permitting AT&T to enforce CT 6831's early service termination provision would unreasonably allow AT&T to profit from its own misconduct.[66] Ryder maintains, in other words, that we should preclude AT&T from collecting any damages (in the form of early service termination charges) for Ryder's admitted breach of CT 6831.[67] For the following reasons, we disagree.[68]

21. As Ryder itself repeatedly observes, the parties deliberately designed CT 6831 and the Billing Agreement to operate symbiotically and to define the parameters of the parties' business relationship.[69] As part of that conscious design, the parties expressly allocated the risk that AT&T might breach the Billing Agreement and thereby harm Ryder: AT&T would have to pay Ryder "direct damages" arising from the breach, but Ryder would still have to pay AT&T any charges incurred under CT 6831, subject to Ryder's recoupment of those charges as consequential damages if AT&T's breach of the Billing Agreement constituted willful and wanton misconduct. Put differently, AT&T assumed the risk of paying direct damages, whereas Ryder assumed the risk of incurring consequential damages, unless AT&T's breach was willful

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[63] Complaint, Ex. E-2 (Post-Trial Order) at 11, n.9.

[64] We note that this is not a situation where a party makes certain representations to the court, and then, upon referral, makes contrary representations to the Commission. *Compare Haxtun Telephone Company v. AT&T Corp*., Memorandum Opinion and Order, 15 FCC Rcd 14895, 14898-902, ¶¶ 11-20 (Enf. Bur. 2000), *aff'd*, Order on Review, 15 FCC Rcd 25260 (2000).

[65] Complaint at 6-7, 9-13, 17, ¶¶ 12-13, 16-24, 36-39, and at Ex. D (Legal Analysis) at 1-2, 5-6, 9-10, ¶¶ 12-13, 23-24, 26-27; Reply at 10-15, ¶¶ 14-22.

[66] Complaint at 11-12, 14-16, ¶¶ 20, 27, 31, and at Ex. D (Legal Analysis) at 1, 3, 5-6, 9 ¶¶ 1, 8, 11-13, 24, 26-27; Reply at 27, 32-37, ¶¶ 53, 64-75.

[67] Complaint at 11-12, 16-17, ¶ 20-22, 31, 36-39; Ex. D (Legal Analysis) at 2-5, ¶¶ 5-12; Reply at 32-37, ¶¶ 64-75.

[68] We note at the outset that, because Ryder did not assert a claim for relief alleging the unlawfulness of CT 6831's early service termination provision (either facially or as applied) in its Court Complaint, AT&T raises here compelling affirmative defenses of statute of limitations and claim preclusion (*i.e.*, *res judicata*). Answer at 27, 54-67, ¶¶ 49, 112-32; AT&T Res Judicata Brief at 1-12. Moreover, neither the jury nor the Court found that AT&T's breach of the Billing Agreement proximately caused Ryder to go out of business, Joint Statement at 11, ¶ 63, Answer at 107-08, 115, ¶¶ 211, 225, and Ryder presents little probative evidence of such causation here. Complaint at 7, 11, ¶¶ 13, 20, and at Ex. H (Ryder Affidavit) at 4-7, ¶¶ 25-34; Reply at 14-15, ¶ 22; *contra* Answer at 21, 107-08, ¶¶ 20, 211. Because our conclusions against Ryder rest on other grounds, however, we need not and do not reach these issues.

[69] Complaint at 3-5, 9, ¶¶ 7, 9, 16; Reply at 9, ¶ 11 ("The issues raised in this proceeding involve two specific interrelated and interdependent agreements, which were presented to Ryder as a package deal. . . . These agreements were symbiotic and worked in concert to support the single business relationship between the parties…."); Reply at 11-12, ¶ 16 (noting "the interrelatedness of the parties' agreements"); Joint Statement at 13-14, 15 ¶¶ 83-84, 91 (Complainant's separate statement of disputed facts).

and wanton.[70]

22. In particular, the Billing Agreement plainly states that "charges for tariffed services will not be abated or refunded in the event of delay or failure of performance of this Agreement."[71] Thus, according to the Billing Agreement, charges incurred by Ryder under CT 6831 remain due, even if AT&T breaches the Billing Agreement. The Billing Agreement also provides that, if AT&T breaches the Billing Agreement, AT&T will be liable to Ryder only for "direct damages," and not "consequential damages," arising from the breach; however, the Billing Agreement specifies New Jersey law as governing, and New Jersey law (according to the District Court in this matter) precludes limitations on liability for willful and wanton misconduct.[72] Consequently, in sum, the deal that the parties reached under the Billing Agreement is as follows: if AT&T breaches the Billing Agreement, Ryder still has to pay AT&T all charges incurred under CT 6831, but AT&T has to pay Ryder direct damages arising from the breach, and also has to pay any consequential damages arising from the breach, potentially including return of early service termination charges, if AT&T's breach was willful and wanton.

23. Ryder tried and failed to show in the court proceeding that AT&T's breach of the Billing Agreement constituted willful and wanton misconduct.[73] Moreover, Ryder does not dispute here the interpretation of the Billing Agreement described above.[74] In addition, the District Court found, and Ryder does not contest here, that Ryder breached CT 6831 by terminating service before the end of the three-year term, failing to meet its MARC, and then refusing to pay early service termination charges. Furthermore, a filed federal tariff is presumed lawful, and the filing carrier must enforce the tariff's terms.[75] Given all of these circumstances, it is perfectly reasonable under section 201(b) for AT&T to seek the benefit of its bargain -- payment by Ryder of the early service termination charges incurred under CT 6831.

24. Indeed, Ryder essentially concedes that CT 6831 and the Billing Agreement, as written, preclude its claims. Ryder argues, therefore, that we should effectively rewrite CT 6831

[70] Answer at 7, 76-77, 101, ¶¶ 151, 199.

[71] Answer, Ex. 32 (Billing Services Agreement) at ¶ 12, "Tariffed Services."

[72] Answer, Ex. 32 (Billing Services Agreement) at ¶ 18(G), "General;" Answer, Ex. 8 (Partial Summary Judgment Order) at 3-5.

[73] Answer, Ex. 8 (Partial Summary Judgment Order) at 4-5.

[74] Indeed, at one point in its pleadings, Ryder appears to concede that it cannot use AT&T's breach of the Billing Agreement to avoid liability for the early service termination charge. Reply Brief of Ryder Communications, Inc. Regarding the Application of Res Judicata, File No. EB-02-MD-038 (filed Mar. 26, 2003) ("Res Judicata Reply Brief"), at 2 ("Ryder does not contend that 'it should be allowed to use AT&T's breach of the BSA (billing service agreement) to avoid liability for the termination charges due under the discontinuance provision of CT 6831.' Rather, Ryder asserts …that AT&T's actions – as a whole – were so harmful and derelict that to permit a carrier to recover a termination penalty under these circumstances would be unjust and unreasonable, in contravention to the Act and Commission orders…"). We fail to see, on this record, how Ryder's referral to AT&T's actions "as a whole" could refer to anything other than AT&T's breach of the Billing Agreement. In fact, Ryder summarizes its entire case by requesting that the Commission find that "AT&T, through its failure to fulfill its obligations and sustained erroneous billing, acted unreasonably in its creation of the very situation from which it now hopes to profit." Complaint at 12, ¶ 20.

[75] *See, e.*g., *American Telephone and Telegraph v. Central Office Telephone*, 524 U.S. at 221-27.

so Ryder can avoid the allegedly harsh results of the parties' deal.[76] In making that argument, Ryder relies, in part, on the "Sierra-Mobile doctrine."[77] Ryder's reliance is misplaced. Under the principles of the Sierra-Mobile doctrine, the Commission may effectively alter the terms of a contract tariff at the behest of one of the original negotiating parties, but only if there exists a compelling public interest in doing so, or convincing evidence of unfairness in the contract formation process.[78] Moreover, "[t]he threshold for demonstrating sufficient harm to the public interest to warrant contract reformation under the Sierra-Mobile doctrine is much higher than the threshold for demonstrating unreasonable conduct under Sections 201(b) and 202(a) of the Act."[79] This preserves the integrity of contracts, which is vital to the proper functioning of any commercial enterprise, including the communications market. In fact, the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of contracts.[80] Here, as explained below, Ryder shows neither a compelling public interest nor unfairness in the formation of CT 6831.

25. Ryder makes some general assertions that it lacked bargaining power in its negotiations with AT&T and thus had no choice but to accept the "boilerplate" aspects of CT 6831, including the early service termination provision.[81] AT&T effectively rebuts these assertions with evidence that its negotiations with Ryder were "extensive, and included a healthy

[76] *See, e.g*., Reply at 32, ¶ 65 ("The Commission should reject the argument AT&T has offered; that simply because the law recognizes the existence of a discontinuance provision, that it should be free to impose it without condition or consideration of its own actions."). *See also* Reply at 4, 36-37, ¶¶ 74-75; Ryder Res Judicata Brief at 2 (both stating generally that the Commission need not disturb the findings of the Court, but must still find that the harm inflicted by AT&T makes enforcement of the early service termination provision unreasonable).

[77] Reply at 25-32, ¶¶ 46-63 (*citing Federal Power Commission v. Sierra Pacific Power Co*., 350 U.S. 348 (1956); *United Gas Pipeline Co. v. Mobile Gas Service Corp*., 350 U.S. 332 (1956); *IDB Mobile Communications, Inc. v. COMSAT Corp*., Memorandum Opinion and Order, 16 FCC Rcd 11,474 (2001) ("*IDB v. COMSAT*")).

[78] *See, e.g.*, *IDB v. COMSAT*, 16 FCC Rcd at 11480-81, ¶¶ 14-15 (and cases cited therein). We reference the principles of the Sierra-Mobile doctrine because the Commission has never squarely held that the doctrine applies to contract tariffs between a carrier and a non-carrier, as opposed to a contract or contract tariff between a carrier and another carrier. Nevertheless, as the parties each assert (Answer at 102-07, ¶¶ 201-10; Reply at 25-32, ¶¶ 46-63), we see no reason why the principles underlying the doctrine should not have similar, if not equal, applicability in both contexts. *See Global Access Limited v. AT&T Corp.*, 978 F. Supp. 1068 (S.D. Fla. 1997) (holding that the Sierra-Mobile doctrine applies to contract tariffs between carriers and non-carriers). Thus, without actually holding that the Sierra-Mobile doctrine governs, we examine the facts here in light of Sierra-Mobile principles, as both parties urge us to do. Answer at 103-07, ¶¶ 203-210; Reply at 26-29, ¶¶ 50-56. *Cf. Echostar Communications Corporation v. Fox/Liberty Networks LLC*, Memorandum Opinion and Order, 13 FCC Rcd 21841, 21849, ¶ 20 (Cab. Serv. Bur. 1998) (finding, independent of the Sierra-Mobile doctrine, that public policy requires minimal regulatory interference with private contracts entered into by consenting parties); *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and For Expedited Arbitration, et al.,* Memorandum Opinion and Order**,** 17 FCC Rcd 27039, 27206, ¶ 348 (Com. Car. Bur. 2002) (declining to invalidate the early service termination provisions contained in Verizon's special access tariffs, and noting that AT&T had voluntarily purchased special access services pursuant to Verizon's filed tariff and took advantage of discount pricing plans that offered lowered rates in return for a longer commitment).

[79] *IDB v. COMSAT*, 16 FCC Rcd at 11480, ¶ 15 (and cases cited therein).

[80] *See, e.g.*, *IDB v. COMSAT*, 16 FCC Rcd at 11480-81, ¶ 16 (and cases cited therein).

[81] Complaint at Ex. H (Affidavit of David Ryder) ("Ryder Affidavit") at 3, ¶¶ 19-20; Reply at 12, 28, ¶¶ 17, 54, Joint Statement at 15, ¶¶ 92, 95 (Complainant's Disputed Facts).

'give and take' with respect to the terms and conditions of the agreements."[82] AT&T also states convincingly that the early service termination provision was a *quid pro quo* for the reduced rates that Ryder had achieved through hard bargaining.[83] Therefore, Ryder falls far short of demonstrating the kind of unfairness that might warrant reformation of CT 6831.[84]

26. Ryder maintains that reforming CT 6831's early service termination provision so as to vitiate Ryder's liability thereunder would serve a compelling public interest by preventing carriers from using boilerplate contract provisions to insulate themselves from the consequences of their own misconduct.[85] Ryder overlooks several key facts: the Commission detariffed the services at issue here, and as far as the record shows, no other party opted into CT 6831 or has agreed in negotiations to a contract provision that would harm them in the manner claimed by Ryder here.[86] Thus, Ryder's assertion that we need to protect others from suffering the same fate as Ryder rests on sheer speculation.

27. Moreover, and perhaps most importantly, Ryder's own description of the parties' business relationship reveals that Ryder could have foreseen, and thus sought to address differently in the agreements, the very circumstances that allegedly occurred here. In particular, Ryder emphasizes repeatedly the interrelationship between the parties' two agreements, and highlights the fact that its ability to meet its MARC under CT 6831 depended on the cash flow that it received from AT&T under the Billing Agreement.[87] Thus, Ryder knew or should have known that a breach by AT&T of the Billing Agreement might cause a breach by Ryder of CT 6831. Yet the record contains no evidence that Ryder sought to allocate the risk of that occurrence in any manner other than what presently appears in the agreements: Ryder would remain liable for early service termination charges, while AT&T would be liable for direct damages if its breach was not willful and wanton, or direct and consequential damages (including return/cancellation of any early service termination charges) if its breach was willful and wanton (and the Court has ruled that AT&T's breach was not willful and wanton).[88]

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[82] Answer at 105-06, ¶ 206, and at Ex. 40 (Decl. of Laurie B. Brown, File No. EB-02- MD-038, filed Feb. 3, 2003) ("AT&T Brown Decl.") at 1-2.

[83] Answer at 72-74, 105-07, ¶¶ 142-43, 146, 206, 209, and at Ex. 40 (AT&T Brown Decl.) at 1-2. *See also* Joint Statement at 4, ¶ 20 ("CT 6831 provided that in exchange for receiving volume discounts from AT&T, Ryder committed to take MultiQuest 900 service from AT&T for a period of three years, and to pay AT&T at least a Minimum Annual Revenue Commitment of $600,000 for each year of the term.") (emphasis added).

[84] In fact, at least two federal courts of appeals have expressed skepticism about the relevance of uneven bargaining power in Sierra-Mobile analysis. *IDB v. COMSAT*, 16 FCC Rcd at 11486, n.70 (and cases cited therein).

[85] Reply at 27-29, 31-32, ¶¶ 53-56, 62-63.

[86] Answer at 99-100, ¶¶ 195-96; Supplemental Answer at 24, ¶ 58.

[87] Complaint at 3-5, 9 ¶¶ 7, 9, 16; Reply at 9, ¶ 11 ("The issues raised in this proceeding involve two specific interrelated and interdependent agreements, which were presented to Ryder as a package deal. . . . These agreements were symbiotic and worked in concert to support the single business relationship between the parties…"); Reply at 11-12, ¶ 16 ("As evidenced by the interrelatedness of the parties' agreements, Ryder Communications was dependent on AT&T's performance of its contractual obligations in order to conduct its business. Ryder's ability to offer 900 number service to customers, pay for the communications transport, and receive monies for those services, was dependent upon AT&T fulfilling all of its contractual obligations."); Joint Statement at 13-14, 15 ¶¶ 83-84, 91 (Complainant's separate statement of disputed facts).

[88] Although the parties usually refer to a single billing agreement, they both acknowledge (as did the Court) that they actually entered into a series of agreements pertaining to billing matters. Reply at 9, 12, n.42-43; Answer at (continued....)

28. Given these circumstances, revising CT 6831 so as to eliminate Ryder's responsibility to pay early service termination charges would serve only Ryder's private economic interest, not a public interest. In fact, revising CT 6831 in that manner would contravene the strong public interest in preserving the sanctity of contracts, especially because the MARC and its attendant termination charges were principal components of the exchange for reduced rates. As AT&T states aptly: "There is simply no justification for allowing a customer to negotiate for concessions on price, to sign a contract containing customized provisions that are the product of voluntary agreement, and then to run to the Commission to have the Commission reform a provision of the contract that was an integral part of the quid pro quo bargain but which subsequently produces hardship to the customer."[89]

29. Buttressing our conclusion is Ryder's insistence that we need not, and probably should not, disturb any of the District Court's rulings.[90] We agree with Ryder, but accepting the District Court's rulings as given almost compels denial of Ryder's claim, as Ryder has chosen to present it. Here again are the relevant Court rulings: (1) Ryder breached CT 6831 by terminating service before the three-year term had ended, missing its revenue commitments, and then refusing to pay early service termination charges; (2) AT&T provided transport service to Ryder in accordance with the requirements of CT 6831; and (3) although AT&T breached the Billing Agreement by wrongfully withholding certain funds, Ryder's damages are limited by the Agreement and New Jersey law to receipt of those funds, because AT&T's breach of the Agreement was not willful and wanton. Taken together, these rulings leave little room for Ryder to escape liability for the early service termination charges.

30. At bottom, all that Ryder actually proffers to support its claim is a simplistic notion of fairness: AT&T harmed Ryder first, so AT&T should not be allowed to recover anything from Ryder. What Ryder ignores is that Ryder expressly *agreed*, in exchange for reduced per-minute rates, to allow AT&T to recover early service termination charges in the very circumstances that allegedly occurred here. Thus, what would really be unfair would be to permit Ryder to shirk its contractual commitments and to deprive AT&T of the benefit of its bargain.

31. In sum, for the reasons stated above, AT&T's enforcement of CT 6831's early service termination provision comports with the reasonableness requirement of section 201(b) of the Act. Consequently, we deny Count Two of Ryder's Complaint.

2. The Early Service Termination Provision in CT 6831 Is Not Unjust and Unreasonable On Its Face.

32. Ryder asserts that the early service termination provision in CT 6831, on its face,

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(...continued from previous page)
107, n.127; Joint Statement at 6, ¶¶ 31-32; Complaint, Ex. E-2 (Post-Trial Order) at 2, n.1. Thus, Ryder had numerous opportunities over the years to seek a different allocation of the risk of a breach by AT&T.

[89] Answer at 106, ¶ 208.

[90] Reply at 4 ("…neither the Court nor Ryder have asked the Commission to engage in any review, or to make any determinations with regard to issues that have already been decided by the Court, or that are subject to appeal, such as the jury instructions or application of New Jersey's 'willful and wanton' standard."). *See* Reply at 36-37, ¶¶ 74-75.

violates the reasonableness requirement of section 201(b) of the Act, because the provision contains no express abrogation of its effect in the event that AT&T's misconduct causes the customer to terminate service early.[91] For the following reasons, we disagree.

33. The Commission has consistently allowed carriers to include provisions in their tariffs that impose early termination charges on customers who discontinue service before the expiration of a long-term discount rate plan containing minimum volume commitments.[92] Many of these provisions required individual customers, like Ryder, to pay charges similar, if not equivalent to, the charges that the customers would have paid had they continued service and fulfilled their minimum volume commitments.[93] In approving these provisions, the Commission recognized implicitly that they were a valid *quid pro quo* for the rate reductions included in long-term plans.[94] The Commission has acknowledged that, because carriers must make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs.[95] In other words, the Commission has allowed carriers to use early service termination provisions to allocate the risk of investments associated with long term service arrangements with their customers. Given this history of Commission approval of early service termination provisions similar to the one at issue here, and the reasonable goals that they generally serve, Ryder must provide convincing reasons why we should hold that CT 6831 is unlawful on its face.

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[91] Complaint at 17, ¶¶33-35, and at Ex. D (Legal Analysis) at 3-5, ¶¶ 8-12; Reply at 37-42, ¶¶ 76-86.

[92] *See, e.g.*, *Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Tr. No. 1921*, Order, 5 FCC Rcd 2523 (Com. Car. Bur. 1990) ("*SWB Tr. No. 1921 Order*"); *Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Tr. No. 1963*, Order, 5 FCC Rcd 3790 (Com. Car. Bur. 1990) ("*SWB Tr. No. 1963 Order*") (both allowing five year service contract containing early service termination provision that required the customer to pay charges as if minimum volume commitment would be met, minus Southwestern Bell's interstate special access authorized rate of return at the time of the termination); *AT&T Communications Revisions to Tariff F.C.C. No. 1*, *Tr. No. 2422*, Order, 5 FCC Rcd 5988 (Com. Car. Bur. 1990) ("*AT&T Tr. No. 2422 Order*") (allowing long term service plans that required customers who discontinued service prior to the end of the plan to pay shortfall charges for the remainder of the term, and also required repayment of the discounted amounts customers paid for years in which they actually purchased service); *AT&T Communications Tariff F.C.C. Nos. 2 and 14, Tr. Nos. 4974, 5149, and 5383*, Order, 8 FCC Rcd 4543 (Com Car. Bur. 1993 ("*AT&T Tr. No. 4974 Order"*) (allowing 800 service term plans containing early service termination provisions that required customers who discontinued service prior to the end of the plan to pay charges based on a percentage of the remaining, unfulfilled commitments). *See also Telecom International America, Ltd. v. AT&T Corp.*, 67 F. Supp.2d 189, 219-221 (S.D.N.Y. 1999), *aff'd in part, rev'd in part on other grounds*, 280 F.3d 175, 189-90, 193 (2nd Cir. 2001) (upholding the validity of a shortfall provision that obligated the customer to pay termination charges if it failed to purchase a minimum amount of communications services during the three year term of the contract tariff).

[93] *See, e.g.*, *SWB Tr. No. 1921 Order*, 5 FCC Rcd at 2523, ¶ 1; *SWB Tr. No. 1963 Order*, 5 FCC Rcd at 3790, ¶ 1; *AT&T Tr. No. 2422 Order,* 5 FCC Rcd at 5988, ¶ 2 ; *AT&T Tr. No. 4974 Order*, 8 FCC Rcd at 4543, n.4-5. *See also Telecom International v. AT&T Corp.*, 67 F. Supp.2d at 219-221. Ryder has emphasized that its complaint does not dispute the actual amount of the termination charges required under the early service termination provision in CT 6831. Reply at 33, ¶ 67.

[94] *See, e.g.*, *Interexchange Competition Order*, 6 FCC Rcd at 5902, ¶ 121; *SWB Tr. No. 1921 Order*, 5 FCC Rcd at 2523, ¶ 1; *SWB Tr. No. 1963 Order*, 5 FCC Rcd at 3790, ¶ 1; *AT&T Tr. No. 2422 Order,* 5 FCC Rcd at 5988, ¶ 2 ; *AT&T Tr. No. 4974 Order*, 8 FCC Rcd at 4543, n. 4-5. *See also Telecom International v. AT&T Corp.*, 67 F. Supp.2d at 219-221.

[95] *See generally 800 Presubscription Rules for 800 Providers and Responsible Organizations*, Order, 8 FCC Rcd 7315, 7317, ¶ 18 (Com. Car. Bur. 1993).

34. As stated above, Ryder claims that CT 6831's early service termination provision is facially unlawful because it does not include a way for a customer to avoid the payment of termination charges if AT&T somehow causes the customer to terminate service before the expiration of the contract period. Although Ryder accurately describes the provision, Ryder overlooks another part of CT 6831 that ameliorates Ryder's concern. In particular, CT 6831 incorporates by reference certain aspects of Tariff No. 1, including a section stating that AT&T's "liability, if any, for its willful misconduct is not limited by this tariff."[96] Consequently, under CT 6831, if AT&T were to engage in willful misconduct in its provision of transport service and thereby cause a customer to terminate service early and incur termination charges, the customer could seek to recover those charges as damages for AT&T's misconduct. Indeed, that is precisely what Ryder tried and failed to do in the court proceeding, and Ryder failed only because it provided no evidence of any misconduct by AT&T in the provision of transport service. Thus, contrary to Ryder's assertion, CT 6831 does, in fact, provide a means for a customer ultimately to avoid paying early service termination charges if AT&T's misconduct causes the early termination.

35. Ryder complains that Tariff No. 1's liability limitation provision does not save CT 6831's early service termination provision, because it only gives a customer a potential cause of action for recovery of charges rather than an immediate immunity from paying the charges in the first place. What Ryder seems to be saying is that, in order to pass muster, CT 6831 must excuse payment of early service termination charges immediately upon a customer's mere assertions that AT&T has engaged in willful misconduct and that the misconduct has caused the customer to terminate service, before AT&T has the opportunity to dispute either assertion.[97] We disagree. Given the investments that AT&T must make to accommodate a substantial long-term contract, we do not believe that the Act's reasonableness standard requires AT&T to allow the customer to make those unilateral determinations in the first instance. The reality is that, if the parties intractably disagree about whether AT&T engaged in willful misconduct and/or whether such misconduct caused the customer to terminate service early, litigation will ensue. Whether CT 6831 requires the customer to pay termination charges pending the outcome of such litigation is not a matter on which section 201(b) dictates an outcome either way.

36. Ryder further complains that Tariff No. 1's liability limitation provision does not save CT 6831's early service termination provision, because it fails to address a situation where AT&T's misconduct concerns something other than AT&T's provision of transport service, but still causes the customer to terminate service early.[98] Tariffs filed with the Commission ordinarily do not address matters other than the provision of communications services offered therein.[99] Consequently, CT 6831's failure to do so is certainly not facially unreasonable. In particular, CT 6831's failure to anticipate every conceivable situation where AT&T's conduct might cause Ryder harm is not unreasonable. This is especially true because, as described above, Ryder knew of the foreseeable risks and voluntarily agreed to allocate them as set forth in the parties' contracts. Moreover, we cannot prejudge that Ryder's remedies outside CT 6831 would

[96] Complaint, Ex. E-6 (CT 6831) at Section 1, "Services Provided;" Answer, Ex. 28 (Tariff No. 1) at Section 2.3.1**,** "Liability." Ryder does not dispute that CT 6831 incorporates this section of Tariff No. 1.

[97] *See* Complaint, Ex. D (Legal Analysis) at 5, ¶ 12; Reply at 40, ¶ 83.

[98] Complaint at 14-16; ¶¶ 25-30, and at Ex. D (Legal Analysis) at 7-10, ¶¶ 19-27; Reply at 37-42, ¶¶ 77-86.

[99] *See generally* 47 U.S.C. § 203.

be inadequate.

37. Ryder also contends that, for the same reason that the Commission prohibits carriers from using tariff provisions to insulate themselves from liability for willful misconduct,[100] the Commission here should prohibit AT&T from using CT 6831 to profit from its willful misconduct.[101] Ryder's analogy is flawed. As explained above, CT 6831 does, in fact, preclude AT&T from profiting from its willful misconduct with respect to the relevant service. If AT&T harms a customer via willful misconduct in the provision of transport services, CT 6831 allows the customer to seek the recovery of damages, including recoupment/cancellation of early service termination charges.

38. In sum, CT 6831's early service termination provision, read in context, comports with the reasonableness requirement of section 201(b). Consequently, we deny Count One of Ryder's Complaint.

IV. ORDERING CLAUSES

39. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, that the Complaint of Ryder Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[100] Complaint, Ex. D (Legal Analysis) at 4-5, ¶¶ 9-10 (*citing Local Exchange Carrier Line Information Database*, CC Docket No. 92-24, Order, 8 FCC Rcd 7130, 7134-35, ¶¶ 27 (1993) (allowing local exchange carriers to maintain general limitation of liability provisions that do not shield them from liability for willful misconduct or gross negligence for incorrect calling card validations); *Annual 1985 Access Tariff Filings*, Memorandum Opinion and Order, 2 FCC Rcd 1416, 1423-24, ¶¶ 66-72 (1987) (requiring local exchange carriers to apply their general liability provisions holding them responsible for willful misconduct or gross negligence for presubscription errors, and declining to require them to modify their general liability provisions to ensure that they do not disclaim liability for ordinary negligence for assigning an end user to the wrong interexchange carrier); *UNIMAT, Inc. v. MCI Telecom. Corp.*, Order, 14 FCC Rcd 7829, 7835, ¶ 14 (Com. Car. Bur. 1999) (noting that an otherwise reasonable limitation of liability clause that addresses the carrier's liability for mis-dialed toll-free calls will not shield the carrier from liability under the reasonableness standard of the Act in the case of willful misconduct or gross negligence by its employees or agents)). *See* Reply at 39-40, ¶ 82.

[101] Complaint, Ex. D (Legal Analysis) at 4-5, ¶¶ 9-11; Reply at 39-40, ¶ 82.