UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| LINE SYSTEMS, INC.<br>1645 WEST CHESTER PIKE<br>WEST CHESTER, PA 19382<br><br>Plaintiff,<br><br>v.<br><br>SPRINT NEXTEL CORPORATION on behalf of itself and its commercial mobile radio service provider affiliates, subsidiary corporations, partnerships, and limited liability companies including those listed in Appendix A hereto, individually and collectively<br>6200 SPRINT PKWY.<br>OVERLAND PARK, KS 66251,<br><br>Defendants. | Case No. 2:11-cv-06527-TON<br><br>Judge Thomas N. O'Neill, Jr. |

**Memorandum of Law in Support of Defendants' Motion to Dismiss**


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Dated: January 26, 2012

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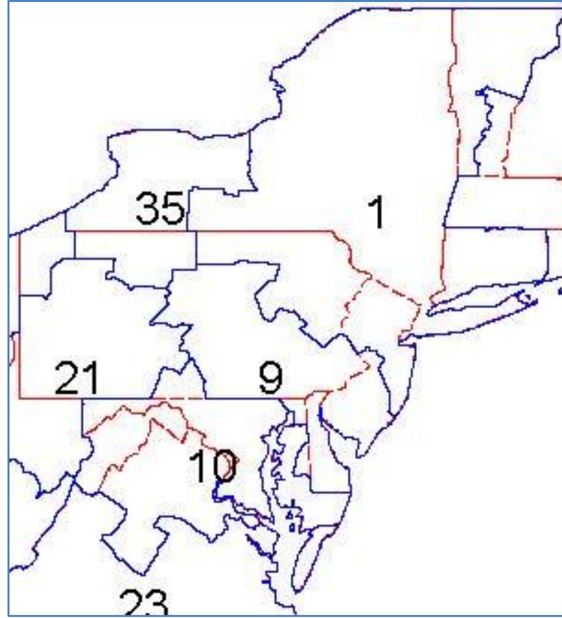
## I. Background

The plaintiff in this case, Line Systems Inc. ("LSI"), is a local exchange carrier that provides landline telephone service for customers in several mid-Atlantic states. The defendants, Sprint Spectrum, L.P., Nextel Partners Operating Corporation, and Nextel Communications of the Mid-Atlantic, Inc. (collectively, "Sprint") provide cellular telephone service throughout the United States.[1]

In this lawsuit, LSI seeks to collect "access charges" from Sprint for completing (or "terminating") calls from Sprint cell phones to LSI landline customers. When a Sprint cell customer calls an LSI landline, LSI charges Sprint a fee for every minute of that call. LSI has attempted to assess these charges not pursuant to any contract, but based on payment schedules, or "tariffs," that LSI has filed unilaterally with regulatory agencies.

LSI maintains that its tariffs apply to telephone calls that cross the borders of federally-established regulatory zones called "Major Trading Areas." A map of the Major Trading Areas (or "MTAs") in the mid-Atlantic region appears below, with state lines drawn in red and MTA lines drawn in blue:

[1] The plaintiff has named Sprint Nextel Corporation as the defendant in this case. The defendants assert that this was in error, and that the plaintiff intended to name Sprint Spectrum, L.P., Nextel Partners Operating Corporation, and Nextel Communications of the Mid-Atlantic, Inc. as defendants. Sprint Nextel Corporation is a publicly-traded holding company that does not operate any wireless facilities, whereas the above named entities are subsidiaries of Sprint Nextel Corporation that own and operate cellphone services under the trademark "Sprint Nextel." There is no basis in this case for personal jurisdiction over Sprint Nextel Corporation, as it is organized in Kansas and conducts no business in Pennsylvania. See, e.g., Kehm Oil Co. v. Texaco, Inc., 537 F.3d 290 (3d Cir. 2008) (describing basic contours of personal jurisdiction in Pennsylvania). Further, as Sprint Nextel Corporation is not liable for the acts of its corporate subsidiaries, the plaintiff has not alleged a valid claim against it based on its subsidiaries' alleged failure to pay. See, e.g., In re Teleglobe Comm'ns Corp., 493 F.3d 345, 371 (3d Cir. 2007) ("It is a bedrock principle of corporate law in Delaware and elsewhere that courts must respect entity separateness unless doing so would work inordinate inequity."); Louisburg Bldg. & Development Co., L.L.C. v. Albright, 45 Kan.App.2d 618, 635, 252 P.3d 597 (Kan. App. 2011) (describing the standard for piercing the corporate veil under Kansas law). To the extent that the plaintiff declines to substitute Sprint Spectrum, L.P., Nextel Partners Operating Corporation, and Nextel Communications of the Mid-Atlantic, Inc. as defendants, Sprint Nextel Corporation moves to dismiss all of the plaintiff's claims against it for lack of personal jurisdiction and failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6).




A call that stays within MTA lines is called an "int*ra*-MTA call." LSI does not seek recovery here for intra-MTA calls. A call that crosses MTA lines—that is, the type of call for which LSI presently does seek compensation—is referred to as an "int*er*-MTA call."

However, under the Telecommunications Act of 1996, LSI cannot charge Sprint pursuant to the tariffs it has filed. Rather, that law requires LSI to negotiate with Sprint to mutually agree on compensation *between* the two providers. Since Sprint must also complete calls that LSI customers make—and could charge for this—such an agreement may well provide that neither LSI nor Sprint need pay the other for completing calls. This type of arrangement is called "bill and keep," and the FCC recently endorsed it as the eventual compensation regime for *all* carriers—reflecting the fact that "the incremental cost of call termination is very nearly zero." Connect America Fund, et. al., Report and Order and Further Notice of Proposed Rulemaking, 2011 WL 5844975, *190 (Nov. 18, 2011). By contrast, LSI is attempting to enforce a system of one-sided pricing that Congress abolished sixteen years ago. The Court should not permit this, and should dismiss LSI's causes of action for failure to state a claim.

## II. The Court Should Dismiss the Plaintiff's Complaint for Failure to State a Claim.

The plaintiff asserts claims for (1) breach of federal tariff; (2) violation of Section 201 of the [Communications] Act, 47 U.S.C. § 201; (3) violation of Section 203 of the [Communications] Act, 47 U.S.C. § 203; (4) breach of state tariffs; (5) unjust enrichment, quantum meruit, and/or implied contract; and (6) account stated. The first four of these claims, which are predicated on the application of publicly filed tariffs, should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because, under the Telecommunications Act of 1996, tariffs do not apply to Sprint in this context. The latter two claims, which seek recovery based on theories of quasi-contract, should be dismissed under Rule 12(b)(6) as pre-empted by federal law and as improperly pleaded.

### A. Standard on a Rule 12(b)(6) Motion to Dismiss

Fed. R. Civ. P. 12(b)(6) provides that a court may dismiss a cause of action for "failure to state a claim upon which relief can be granted." Under this rule, a "plaintiff's obligation to state the grounds of entitlement to relief 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" Lott v. Children's Hosp. of Phila., No. 10-cv-4088, 2010 WL 5186167, *1 (E.D.Pa. Dec. 22, 2010) (O'Neill, J.) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Further, "a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (citing Phillips v. County of Allegheny, 515 F.3d 224, 234–35 (3d Cir. 2008)); see also Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.") (internal

quotations and alterations omitted). A complaint that fails to meet these requirements must be dismissed. Lott, 2010 WL 5186167 at *1.

**B. The Plaintiff's Breach of Tariff Claims are Invalid.**

When Congress passed the Telecommunications Act of 1996, it required all local telephone companies (referred to in the statute as "local exchange carriers" or "LECs") to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). This requirement contrasted with the prior-existing compensation regime, whereby telecommunications providers would file public tariffs that listed the charges other carriers would have to pay to send or receive phone calls through the LECs' networks. The access charges that LSI seeks to collect here under its unilaterally filed tariffs assume the application of that pre-1996 Act compensation scheme. Under the current regime, however, LECs are generally obligated to *negotiate* with other telecommunications carriers to contract for the exchange of calls, and cannot simply rely on unilaterally filing tariffs to charge for completing others' calls.

Congress carved out a significant exception from the new negotiation requirement, however, and Sprint and LSI disagree as to whether that exception applies here. The exception, found in 47 U.S.C. § 251(g), provides:

> On and after February 8, 1996, each local exchange carrier . . . shall provide exchange access . . . to interexchange carriers . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. . . .

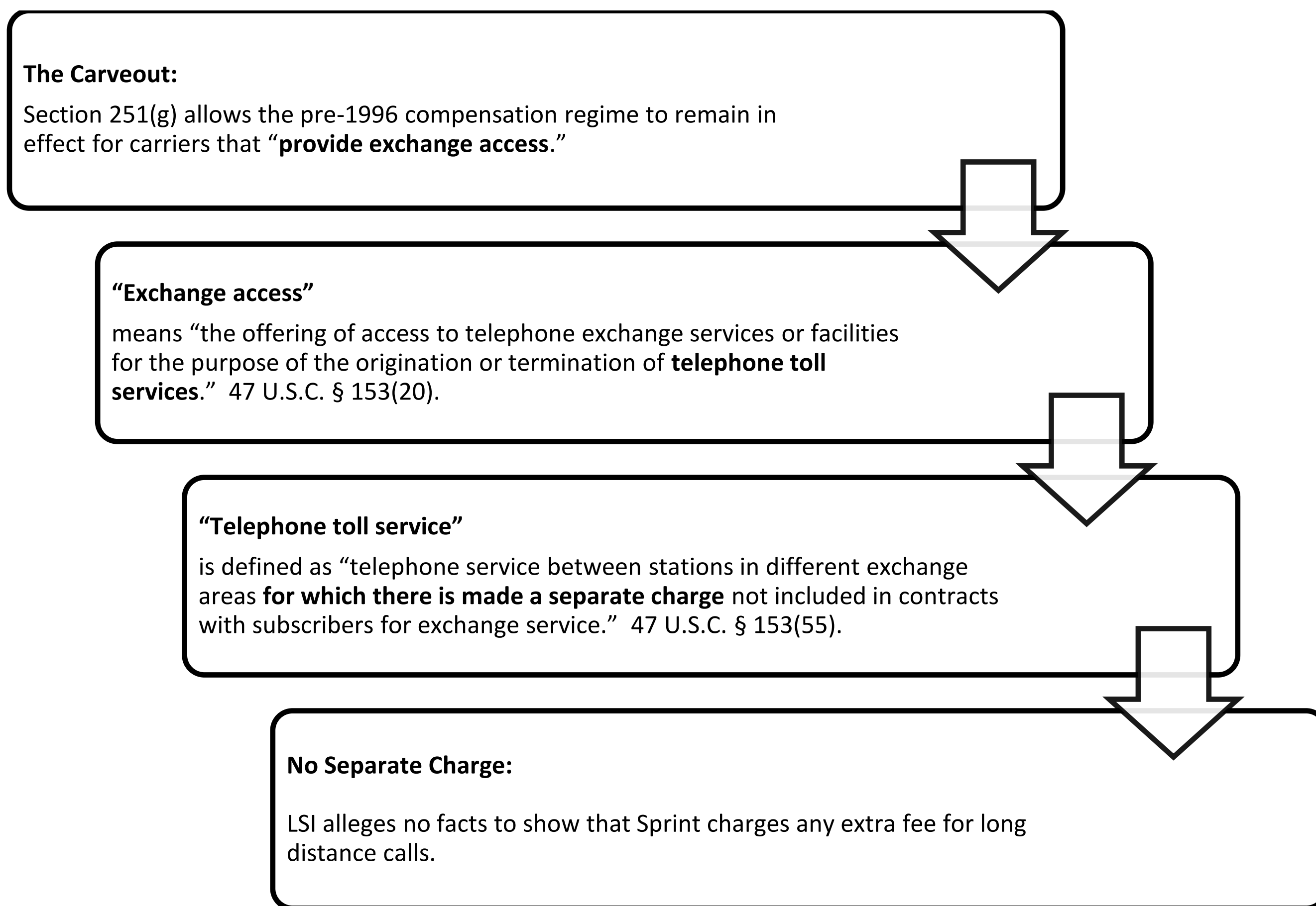
LSI implicitly suggests that the carve-out in Section 251(g) applies to the calls at issue in this case, but a careful reading of the statute demonstrates that this is not correct.

The critical phrase in the Section 251(g) carve-out is that LECs "shall" continue to "provide *exchange access* . . . to interexchange carriers" under the tariff-based rules in place before 1996. Id. (emphasis added).[2] "Exchange access" is defined in the Communications Act as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of *telephone toll services*." 47 U.S.C. § 153(20) (emphasis added). "Telephone toll service" in turn is defined as "telephone service between stations in different exchange areas *for which there is made a separate charge* not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(55) (emphasis added).

"Telephone toll service" is, in colloquial terms, long distance calling service. But under the Communications Act, it is only long distance service *for which the provider charges extra*. Id. LSI alleges no facts to show that Sprint charges any extra fee for long distance calls. And in fact, Sprint does not charge an extra fee to the vast majority of its customers—its customers generally pay a flat rate for all domestic calls regardless of the distance. See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 24 FCC Rcd. 6185, 6244 ¶ 112 (noting that all major cell phone companies now offer toll-free long distance service to subscribers). LSI fails to allege facts showing that Sprint provides "telephone toll service" to its customers, because LSI does not allege that Sprint charges any additional fee for calling a long distance number. This by definition means LSI does not provide "exchange access" to Sprint because "exchange access" is defined by originating or terminating "telephone toll service."

[2] See also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C. Rcd. 15499, 15682 ¶ 362 (1996) ("the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent").

In short, under these definitions, the cell phone traffic for which LSI alleges it should be paid is *not* within Section 251(g)'s carve-out from Section 251(b)(5), because Section 251(g) permitted tariffing to continue *only* for "exchange access."[3] As a result, Section 251(b)(5) applies to these phone calls, and Section 251(b)(5) requires parties such as LSI to "establish reciprocal compensation arrangements" rather than to file tariffs for the purpose of charging for completing others' calls.[4] Thus, even accepting the facts alleged in the complaint as true, the plaintiff's claims for breach of tariff are legally barred by Section 251(b)(5). For ease of reference, a diagram reflecting this analysis appears below:




[3] Section 251(g) also made exceptions for "exchange services" and "information services," but neither of these terms is relevant to the present discussion.

[4] Reciprocal compensation rates are generally substantially lower than access charge rates because carriers such as Sprint will not agree to accept rates, such as those at issue here, that are substantially higher than the rates customarily paid by telecommunications companies.

To be sure, the FCC has at times suggested that Section 251(g) applies to cell phone traffic, thereby carving such traffic out of Section 251(b)(5). See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. at 16014 ¶ 1036. But most of these interpretations are merely vestiges of a time when cell phone companies generally *did* charge separate long distance rates. Of course, even today, Section 251(g) allows LECs like LSI to impose access charges in situations where cell phone companies like Sprint do charge a separate fee for long distance calls. Significantly, though, while some cell phone companies still offer such calling plans to new customers, Sprint does not. It is true that Sprint has a very small number of customers who still pay an additional fee for long distance calling.[5] But these customers are very few, and more importantly for this motion to dismiss, LSI has *not alleged facts showing* that Sprint charges an additional fee to any of its customers.

Moreover, to the extent that the FCC has suggested that Section 251(g) would apply in the present situation, the important point for this Court is that such an interpretation of the law is impermissible because the statute unambiguously precludes it. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The Supreme Court provided in Chevron that, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id.; see also Pennsylvania, Dept. of Pub. Welfare v. U.S. Dept. of Health and Human Serv'cs., 647 F.3d 506, 511 (3d Cir. 2011) ("Under Chevron, we follow a two-step analysis. First, we determine whether Congress has directly spoken to the precise question at issue. If it has, we must effectuate the intent of Congress.") (internal quotations and

[5] And the majority of such additional fees would be associated with international calling, and such calls are not at issue in this case.

citations omitted); Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3d Cir. 2001) (noting that, in the context of a Chevron analysis, "[w]here the statutory language is plain and unambiguous, further inquiry is not required.").

As set forth above, the statutory definitions that underlie the relevant portions of the Section 251(g) carve-out are plain and unambiguous. The Section 251(g) carve out applies only to "exchange access," which in turn is defined by completing "telephone toll service" calls. "Telephone toll service" in turn depends on the levying of a "separate charge" beyond the charge for local service. The plaintiff does not allege that Sprint collects any such "separate charge," and thus regardless of the FCC's interpretation of the Telecommunications Act, Section 251(g) cannot apply to the calls that Sprint customers make to LSI customers. Not only is this the plain meaning of the statutory language, but it also adheres to the cannon of statutory construction that "courts should endeavor to give meaning to every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous." Id. (citing U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997)). Congress required a "separate charge" for exchange access to apply, and there is no "separate charge" here.

Further, this plain language is consistent with the fact that Section 251(g) only applies to "exchange access" that is provided to "interexchange carriers."[6] See Section 251(g) ("On and after February 8, 1996, each local exchange carrier . . . shall provide exchange access . . . *to interexchange carriers* . . . ." (emphasis added)). Although "interexchange carrier" is an undefined term in the Communications Act, it is in practice the commonly used name for a traditional long distance company, not a cell phone service provider. See, e.g., Nat'l Cable & Telecomms. Ass'n v. F.C.C., 555 F.3d 996, 998 (D.C. Cir. 2009) (noting the "distinction

[6] The statute also references providing exchange access to information service providers, but this is not relevant to this case.

between three traditional categories of telecommunications services: local telephone service, interexchange (primarily long distance calling service), and commercial mobile radio services (primarily mobile or cellular phone service)"); Connect America Fund, Notice of Inquiry and Notice of Proposed Rulemaking, 25 FCC Rcd. 6657, 6861 (2010) (defining "Interexchange Carrier (IXC)" as "[a] telecommunications service provider authorized by the FCC to provide interstate, long distance communications services and authorized by the state to provide long distance intrastate communications services"); Sprint Corp. v. DeAngelo, 12 F. Supp. 2d 1188, 1191 (D. Kan. 1998) ("IXC [i.e., interexchange carrier] is a diversified carrier in the traditional long distance telephone business."). Sprint is *not* an "interexchange carrier,"[7] and it is therefore consistent that Section 251(g) does not apply to Sprint's customers' telephone calls.

Assuming, then, that Section 251(g) does not apply to Sprint's customers' calls, the Court should enforce what *is* a permissible rule adopted by the FCC—47 C.F.R. § 20.11(d), which provides that Section 251(b)(5) cell phone traffic may not be tariffed. Section 20.11(d), which was adopted in part to interpret Section 251(b)(5), provides that "[l]ocal exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers [i.e., cell phone providers, see 47 U.S.C. § 153(33)] pursuant to tariffs." In simplified terms, this means that local exchange carriers like LSI may *only* use tariffs to charge cell phone providers for completing calls that are subject to "access charges." As described above, *none* of the Sprint customer calls to LSI require "exchange access" or are subject to ensuing "access charges," because there is no "separate charge" for long distance calls. (And, for purposes of this motion, LSI does not allege facts that show that Sprint collects a

[7] For the sake of clarity, certain affiliates of Sprint do provide traditional long distance service. However, none of those entities are parties to this lawsuit, and LSI has not alleged that any of Sprint's long distance affiliates delivered any of the traffic at issue to LSI.

separate charge for long distance calls.) Section 20.11 thus bars the application of tariffs to any of Sprint's customers' calls to LSI's network.

Without doubt, the FCC has previously indicated that Section 20.11 only applies to intra-MTA traffic. See, e.g., Developing a Unified Intercarrier Compensation Regime, Declaratory Ruling and Report and Order, 20 FCC Rcd. 4685 (2005). However, this merely derives from the same impermissible interpretation of Section 251(g) discussed above. The plain language of the statute contradicts this, and Section 20.11 should bar tariffing for *all* Sprint customer calls to LSI customers.

The plaintiff's tariffs are therefore precluded by statute and regulation. The Court should thus dismiss the plaintiff's claims for breach of tariff for failure to state a claim.

### C. The Plaintiff's Claims Under Sections 201 and 203 of the Communications Act are Invalid.

The plaintiff's claims under 47 U.S.C. §§ 201 and 203 fail for closely related reasons. Both of these claims are expressly predicated on the application of the plaintiff's federal tariff. (See Marx Decl., Ex. A at ¶¶ 32–33, 40–41.) As this tariff cannot apply under Section 251(b)(5) and Section 20.11, the basis for these claims is not valid. They should be dismissed.

Further, even if LSI's tariff did apply these claims could not stand. The FCC has consistently held that the Communications Act does not provide causes of action for enforcement of filed tariffs. See, e.g., All American Telephone Co. v. AT&T, Memorandum of Opinion and Order, 26 FCC Rcd. 723, 727, ¶ 10 (2011) ("During the past twenty years, the [FCC] has repeatedly held that an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including sections 201(b) and 203(c) -- even if the carrier's customer is another carrier."). For this reason, also, these claims should be dismissed.

**D. The Plaintiff's Claims for Unjust Enrichment, Quantum Meruit, Implied Contract, and Account Stated Should be Dismissed.**

All of the plaintiff's remaining claims are state law quasi-contract claims. See, e.g., Mitchell v. Moore, 729 A.2d 1200, 1202 n. 2 (Pa. Super. Ct. 1999) (describing unjust enrichment and quantum meruit as quasi-contract claims); Richburg v. Palisades Collection LLC, 247 F.R.D. 457, 465 (E.D. Pa. 2008) ("The 'account stated' is 'a debt as a matter of contract implied by law. . . .'") (citing 29 Williston on Contracts § 73:58 (2007)). These claims are universally pre-empted by comprehensive federal regulation in this area of law. See, e.g., Rural Telephone Serv. Co., Inc. v. Alltel Comm'ns, Inc., No. 08-cv-2052, 2008 WL 2169444, *7 n.2 (D. Kan. May 23, 2008) ("federal law requires parties to set rates through interconnection agreements and therefore allowing the plaintiff to recover damages under a theory of unjust enrichment or quantum meruit would frustrate the federal regulatory scheme") (citing Union Tele. Co. v. Qwest Corp., 495 F.3d 1187, 1197 (10th Cir. 2007)). The Court should therefore dismiss the plaintiff's fifth and sixth claims, as well.

Finally, a claim for account stated in Pennsylvania "is based on an 'account in writing, examined and accepted by the both parties.'" EBC, Inc. v. Clark Bldg. Systems, No. 05-cv-01549, 2007 WL 4563518, *9 (W.D.Pa. Dec. 21, 2007) (quoting Ryon v. Andershonis, 42 Pa. D. & C.2d 86, 88 (Pa. Comm. Pl. March 13, 1967) (citing Leinbach v. Wolle, 211 Pa. 629, 61 A. 248 (Pa. 1905))). That is, a claim for account stated is predicated on "a promise by a debtor to pay a stated sum of money which the parties have agreed upon as the amount due." Id. (citing Restatement (Second) of Contracts § 282(1)). The plaintiff has not alleged facts showing that Sprint agreed to or accepted LSI's assertions that amounts were due to LSI. For this separate reason also, the plaintiff's claim for account stated should be dismissed.

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